

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson, Jr., Circuit Court Judge
Case No.: 2009-CP-10-6873

RECEIVED

DEC 10 2012

S.C. Supreme Court

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A., ... Respondents,

v.

Amy Meyer, ... Petitioner.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance, ... Third Party Defendants.

**APPENDIX
VOLUME III of III**

Nancy Bloodgood, Esquire
Lucy C. Sanders, Esquire
FOSTER LAW FIRM, L.L.C.
895 Island Park Drive, Suite 202
Charleston, SC 29492
Telephone: (843) 972-0313
Facsimile: (888) 519-0934
Email: nbloodgood@fosterfoster.com
Attorneys for the Petitioner

Cherie Blackburn, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, SC 29401
Telephone: (843) 577-9440
Facsimile: (843) 720-1777
Email: cblackburn@nexsenpruet.com
Attorneys for Respondent

INDEX TO APPENDIX

VOLUME I

Record on Appeal	1
------------------------	---

VOLUME II

Record on Appeal (continued)	301
------------------------------------	-----

VOLUME III

Record on Appeal (continued)	601
Final Brief of Appellants	676
Final Brief of Respondent	726
Final Reply Brief of Appellants	774
Initial Decision of the Court of Appeals, filed March 28, 2012	801
Petition for Rehearing	820
Return to Petition for Rehearing	849
Reply to Return to Petition for Rehearing	866
Final Decision of the Court of Appeals, filed October 24, 2012	879

11/2/2006

Amy K. Meyer

**31.95

Thirty-One and 95/100*****

Amy K. Meyer

Harper expenses

Amy K. Meyer

Harper
Harper

11/2/2006

Gas--Oakes depo.
Lunch--Oakes depo.

23.85
8.10

Regions Client Act

Harper expenses

31.95

Amy K. Meyer

Harper
Harper

11/2/2006

Gas--Oakes depo.
Lunch--Oakes depo.

23.85
8.10

Regions Client Act

Harper expenses

31.95

593

October 23, 2006

Gary K. Oakes, M.D.
12 Shellworth Crossing
Savannah, Georgia 31411

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Dr. Oakes:

Enclosed for your review, please find copies of Trident Medical Center's Supplemental Responses to Plaintiffs' First Interrogatories and Supplemental Responses to Plaintiffs' Second Supplemental Requests for Documents.

According to these discovery responses, neither Nurse Midwife Krauss nor Ana Verdeja had active hospital privileges at the time of Nicholas Harper's birth on April 1, 1999.

I will call you later on this week to discuss these new developments in the case. Thank you for your assistance. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Amy K. Meyer

Enclosures

594

October 20, 2006

P. Gunnar Nistad, Esquire
Barnwell Whaley Patterson & Helms, LLC
885 Island Park Drive
Charleston, SC 29402

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-43

Dear Gunnar,

Enclosed please find Dr. Oakes' bill for his deposition testimony in the above-referenced matter. There is a balance due of \$675.00. We ask that you send a check directly to Dr. Oakes with a copy to us.

Thank you for your attention to this matter. Please call should you have any questions.

Cordially yours,

Amy K. Meyer

AM/mp
Encl.

cc: David H. Batten, Esquire

595

00001:01 STATE OF SOUTH CAROLINA
02 COUNTY OF CHARLESTON

03
04 Jacqueline Harper, in behalf of)
and as guardian ad litem for)
05 Nicholas Harper, a minor child,)
and as Trustee of the Nicholas)
06 Harper Trust,)
Plaintiffs,)

07 vs.) Civil Action No.
05-CP-10-43

08 Trident Medical Center, LLC d/b/a)
Trident Medical Center, Low)
09 Country Women's Specialists, Inc.,)
Christopher R. Accetta, MD, and)
10 Martha Kraus,)
Defendants.)

11)
12
13 DEPOSITION OF ARTHUR SHORR
14 Friday, October 20, 2006
15 Woodland Hills, California
16
17
18
19
20
21
22

23 Reported by:
24 Debby Green, RMR
25 CSR No. 2791

00002:01 Deposition of ARTHUR SHORR, taken on behalf
02 of the Defendant Trident Medical Center at 6279 Variel
03 Avenue, Suite C, Woodland Hills, California, Friday,
04 October 20, 2006 before Debby Green, RMR, CSR No. 2791,
05 Certified Shorthand Reporter for the State of
06 California.

07 APPEARANCES OF COUNSEL:

08 FOR PLAINTIFFS:

09 JUSTIN O'TOOLE LUCEY, PA
BY: AMY MEYER, Attorney at Law
10 (Present via speakerphone)
415 Mill Street
11 Mt. Pleasant, South Carolina 29465
(843) 849-8400 (843) 849-8406 (fax)

12

FOR DEFENDANT TRIDENT MEDICAL CENTER:

13

CRANFILL, SUMNER & HARTZOG, L.L.P.

14

BY: DAVID H. BATTEN, Attorney at Law

Post Office Box 27808

15

Raleigh, North Carolina 27611-7808

(919) 828-5100

16

- and -

SOWELL GRAY STEPP & LAFFITTE, LLC

17

(Not present at deposition)

1310 Gadsden Street

18

Columbia, South Carolina 29211

(803) 929-1400

19

FOR DEFENDANTS ACCETTA, KRAUSS AND LOWCOUNTRY

20

WOMEN'S SPECIALISTS:

21

BARNWELL, WHALEY, PATTERSON & HELMS, LLC

BY: JAY A. JONES, Attorney at Law

22

(Present via speakerphone)

885 Island Park Drive

23

Charleston, South Carolina 29402

(843) 577-7700 (843) 577-7708 (fax)

24

25

ALSO PRESENT VIA PHONE: RANDY SIMONSON

597

October 17, 2006

Via FedEx
Mr. Arthur S. Shorr, FACHE
Arthur S. Shorr & Associates, Inc.
4710 Deseret Drive
Woodland Hills, CA 91364-3720

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Mr. Shorr:

Please find enclosed for your review a copy of the deposition of Dr. Gary Oakes in the above-referenced matter. Also enclosed is a copy of Exhibit 25 from Nurse Carolann Mitchell Lemcke's deposition.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Amy K. Meyer

Enclosure

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
 2 COUNTY OF CHARLESTON) CASE NO. #2005-CP-10-0043
 3 JACQUELINE HARPER, in behalf)
 and as Guardian Ad Litem for)
 4 Nicholas Harper, a minor)
 child, and as Trustee of the)
 5 Nicholas Harper Trust,)
)
 6 Plaintiff,)
)
 7 vs.)
)
 8 TRIDENT MEDICAL CENTER, LLC,)
 d/b/a TRIDENT MEDICAL CENTER,)
 9 LOWCOUNTRY WOMEN'S)
 SPECIALISTS, INC.,)
 10 CHRISTOPHER R. ACCETTA, M.D.,)
 and MARTHA KRAUS,)
 11)
 Defendants.)

Deposition of GARY K. OAKES, M.D., taken by
counsel for the Defendant, reported by Annette
Pacheco, CSR, RPR, RMR, B-2153, at the offices of
McCorkle, Pedigo & Johnson, 319 Tattnall Street,
Savannah, Georgia, on Monday, October 16, 2006,
commencing at 2:14 p.m.

23 McKEE COURT REPORTING, INC.
24 P. O. Box 9092
25 Savannah, Georgia 31401
 (912) 232-8322

1 APPEARANCES OF COUNSEL
2 FOR THE PLAINTIFF:
3 AMY K. MEYER, ESQ.
4 LAW OFFICES: JUSTIN O'TOOLE LUCEY,
PA
415 Mill Street

599

5 P. O. Box 806
Mt. Pleasant, South Carolina 29465
6 843-849-8400
ameyer@lucey-law.com

7
8 FOR THE DEFENDANT TRIDENT MEDICAL CENTER, LLC, d/b/a
TRIDENT MEDICAL CENTER:

9 DAVID BATTEN, ESQ.
CRANFILL, SUMNER & HARTZOG, LLP
10 225 Hillsborough Street
Suite 300
11 Raleigh, North Carolina 27603
919-863-8720
12 davidbatten@yahoo.com

13
14 FOR THE DEFENDANTS LOWCOUNTRY WOMEN'S SPECIALISTS,
INC., CHRISTOPHER R. ACCETTA, M.D., and MARTHA KRAUS:

15 P. GUNNAR NISTAD, ESQ.
BARNWELL, WHALEY, PATTERSON & HELMS
16 885 Island Park Drive
Charleston, South Carolina 29492
17 843-577-7700
gnistad@barnwell-whaley.com

18
19
20
21
22
23
24
25

600

October 4, 2006

Gary K. Oakes, M.D.
12 Shellworth Crossing
Savannah, Georgia 31411

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Dr. Oakes:

Please find enclosed for your review copies of the depositions of Dr. Christine Hunter, Dr. Ana Verdeja, Jackie Harper, and Lloyd Harper in the above-referenced matter.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Jennifer A. Clough
Paralegal

Enclosures

601

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2005-CP-10-0043

Jacqueline HARPER in behalf of and as
guardian ad litem for Nicholas HARPER,
a minor child, and as Trustee of the
NICHOLAS HARPER TRUST,

Plaintiffs,

vs.

NOTICE OF DEPOSITION
(DUCES TECUM)

TRIDENT MEDICAL CENTER, LLC,
d/b/a TRIDENT MEDICAL CENTER,
LOWCOUNTRY WOMEN'S
SPECIALISTS, INC., CHRISTOPHER R.
ACCETTA, M.D., and MARTHA KRAUSS,

Defendants.

YOU WILL PLEASE TAKE NOTICE that pursuant to the South Carolina Rules of Civil Procedure and for the purposes therein authorized, the Plaintiffs will take the deposition of Ana Verdeja, M.D. on Wednesday, August 30, 2006, at 1:00 p.m. at the law offices of Justin O'Toole Lucey, P.A., 415 Mill Street, Mt. Pleasant, SC 29464, by video deposition, before a Notary Public or some other officer authorized by law to administer oaths.

The deponent is hereby notified in accordance with Rule 30.04 that she may be questioned about any and all of the documents received through discovery to date. The witness is instructed to bring her entire file and any and all materials in her possession or control listed in Exhibit A.

JUSTIN O'TOOLE LUCEY, P.A.

BY:

Justin Lucey, Esquire
Amy K. Meyer, Esquire
415 Mill Street
Post Office Box 806
Mount Pleasant, S.C. 29464
Phone: (843) 849-8400
Attorneys for the Plaintiffs

Charleston, South Carolina
August 18, 2006

602

June 7, 2006

Gary K. Oakes, M.D.
12 Shellworth Crossing
Savannah, Georgia 31411

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Dr. Oakes:

Please find enclosed for your review a copy of the errata sheet for corrections to the deposition of Martha Krauss in the above-referenced matter.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Amy K. Meyer

Enclosure

603

June 5, 2006

Mr. Arthur S. Shorr, FACHB
Arthur S. Shorr & Associates, Inc.
4710 Deseret Drive
Woodland Hills, CA 91364-3720

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Mr. Shorr:

Please find enclosed for your review a copy of the transcript of Dr. Christopher Accetta's deposition in the above-referenced matter.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Amy K. Meyer

Enclosure

604

June 5, 2006

Gary K. Oakes, M.D.
12 Shellworth Crossing
Savannah, Georgia 31411

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Dr. Oakes:

Please find enclosed for your review a copy of the transcript of Dr. Christopher Accetta's deposition in the above-referenced matter.

Also enclosed is disk with a copy of films for Nicholas Harper taken when he was approximately 1 years old while being seen at the Medical University of South Carolina Neurology Clinic.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Amy K. Meyer

Enclosures

605

April 10, 2006

Mr. Arthur S. Shorr, FACHE
Arthur S. Shorr & Associates, Inc.
4710 Deseret Drive
Woodland Hills, CA 91364-3720

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Mr. Shorr:

Enclosed please find a transcript of Martha Krauss' deposition for your review in the above referenced matter.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact our office.

Cordially yours,

Jennifer A. Clough
Paralegal

/jac
Enclosures

March 24, 2006

Via FedEx
Mr. Arthur S. Shorr, FACHE
Arthur S. Shorr & Associates, Inc.
4710 Deseret Drive
Woodland Hills, CA 91364-3720

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Mr. Shorr:

Enclosed for your review, please find the following:

- 1) the Consent Protective Order entered in this matter;
- 2) an Acknowledgment relating to the same; and
- 3) Trident Medical Center's policies and procedures.

After your review of the Consent Protective Order, please execute the Acknowledgment and forward it back to this office at your earliest convenience.

I look forward to working with you and thank you for your assistance in this case.

Cordially yours,

Amy K. Meyer

AKM/jac
Enclosures

607

March 8, 2006

Gary K. Oakes, M.D.
12 Shellworth Crossing
Savannah, Georgia 31411

Re: *Harper v. Trident Medical Center, LLC, et al.*
Case No. 2005-CP-10-0043

Dear Dr. Oakes:

This letter is a follow up to our conversation yesterday. Justin and I look forward to speaking with you on Thursday, March 23, 2006 at 9:00 a.m. in reference to this matter.

Please find enclosed medical records for Jacqueline Harper. I have also enclosed copies of the fetal monitoring strips, the labor and delivery register, and the written discovery responses from the defendants.

I look forward to working with you and thank you for your assistance in this case.

Cordially yours,

Amy K. Meyer

Enclosures

LOB

March 3, 2006

Mr. Arthur S. Shorr, PACHE
Arthur S. Shorr & Associates, Inc.
4710 Desoret Drive
Woodland Hills, CA 91364-3720

Re: *Harper v. Trident Medical Center, LLC, et al.*

Dear Mr. Shorr:

Please find enclosed the following documents:

1. A copy of Defendants Lowcountry Women's Specialists, Inc., Christopher R. Accetta, MD, and Martha Krauss, CNMS's Responses to Plaintiff's First Set of Interrogatories and Requests for Production;
2. A copy of Defendant Trident Medical Center, LLC d/b/a Trident Medical Center's Responses to Plaintiff's First Set of Interrogatories and Requests for Production; and
3. Copies of the Delivery Room Register for March 30, 1999 through April 3, 1999.

Please give me a call once you have had a chance to review the enclosed materials. I look forward to working with you.

Cordially yours,

Amy K. Meyer

Enclosures

609

February 27, 2006

Mr. Arthur S. Shorr, FACHE
Arthur S. Shorr & Associates, Inc.
4710 Deserot Drive
Woodland Hills, CA 91364-3720

Re: *Harper v. Trident Medical Center, LLC, et al.*

Dear Mr. Shorr:

As we discussed, I represent Nicholas Harper, a child who suffered a catastrophic birth injury. Nicholas suffers from Erb's Palsy, a condition which arises from damaging the spinal root nerves at birth and affects muscles around the shoulder and elbow. His birth was complicated by shoulder dystocia.

We would like to retain you for assistance in assessing any claims we may have against the hospital. Enclosed is a retainer check in the amount of \$5,000.00 for your services. Also enclosed for your review are the medical records we have obtained through the discovery process.

Please give me a call once you have had a chance to review the enclosed materials. I look forward to working with you.

Cordially yours,

Justin Lucey

Enclosures

610

COPY

HARTFORD LIFE INSURANCE COMPANY
200 HOPMEADOW STREET
SIMSBURY, CT 06089
1-800-678-2282
(A stock insurance company)

Will make Income Payments according to the frequency shown on Page 3. Payments will begin on the Date of First Payment. Payments will be made to the Annuitant until the Owner directs otherwise.

Will, upon receipt at our office in Simsbury, Connecticut of due proof of the Annuitant's death before the end of the Certain Period, continue Income Payments to the Beneficiary for the balance of the Certain Period.

This Policy has no Cash Surrender Value.

Signed for the Company



Richard G. Costello, Secretary



Thomas M. Marra, President

TEN DAY RIGHT TO EXAMINE CONTRACT

We want you to be satisfied with the contract you have purchased. We urge you to examine it closely. If, for any reason, you are not satisfied, you may return the contract to us or to the agent from whom it was purchased within ten days after you receive it. It will be cancelled and any premium paid will be refunded in full.

Single Premium Annuity Certain
Income Payments for a Certain Period
With Death Benefit
Non-Participating
Single Premium shown on Page 3



611

112201 1000CCX022052200032*

COPY

CONTRACT SPECIFICATIONS

AGE AND SEX OF FIRST ANNUITANT	8 Male	FIRST ANNUITANT	Nicholas J. Harper
AGE AND SEX OF SECOND ANNUITANT	N/A	SECOND ANNUITANT	N/A
DATE OF FIRST PAYMENT	07/01/2007	INCOME PAYMENT	\$300.00
DATE OF ISSUE	11/19/2007	INCOME PAYMENT FREQUENCY	Monthly
OWNER	Hartford CEBSCO	ANNUITY NUMBER	CCX0220522

SCHEDULE OF BENEFITS AND PREMIUMS

FORM NUMBERS HL-	DESCRIPTION OF BENEFIT	SINGLE PREMIUM
16948, 9352, 15692 15693	Single Premium Annuity Certain Certain Period - 117 Months Income Payments Of \$300.00 Monthly Beginning 07/01/2007 - Last Payment 03/01/2017 Guaranteed Lump Sum Payments \$15,000.00 On 04/01/2017 \$30,000.00 On 04/01/2020 \$40,000.00 On 04/01/2024 \$55,575.00 On 04/01/2029	Paid In Full

A0011000CCX02205220003

612

Wild Dunes Ocean Club Horizontal Property Regime

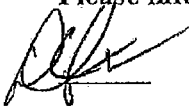
v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1508
Name: DONALD C. & DONNA W. TIGHE
Address: 1959 W. PEACHTREE RD #336
Street
WINSTON-SALEM, N.C. 27106
City, State, and Zip
Phone Number (Day) 843-886-9141 (Evening) 312-860-5490

Please initial each of the following assignments and acknowledgments:



I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

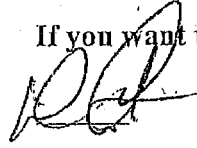


I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.



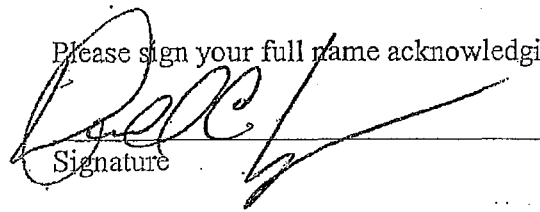
I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:



I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:


Signature

10-9-2006
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

613

Wild Dunes Ocean Club Horizontal Property Regime
v.
McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1506, 4402, 4508, 4201
Name: Hennon + Brown Properties, LLC
Address: P.O. Box 1412
Dalton, GA 30722
City, State, and Zip

Phone Number (Day) 706-277-3132 (Evening) 706-217-8476

Please initial each of the following assignments and acknowledgments:

KB

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

KB

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

KB

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

Justin Lucey 3/13/07
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1505

Name: CHARMENZ F. GUAGENTI (TRUST)

Address: 216 W. WATER ST
Street
NEWBURGH, NY. 47630
City, State, and Zip

Phone Number ^{EVENING} (Day) 812-853-7126 ^{DAY} (Evening) 812-474-6256

Please initial each of the following assignments and acknowledgments:

CA I hereby assign my claim to the Regime, which has hired Justin Lucey to sue
CA McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I
understand that the board has retained Justin Lucey on a contingency fee basis and
that the level of contingency starts at one-third and decreases at various levels with
the fee being based upon the total recovery.

CA I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit
against McCrory Construction Co., Inc.

CA I hereby waive any conflict that should arise by virtue of Justin Lucey representing
both the Regime and me, and I acknowledge that the Regime's claims supersede my
individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

(Maybe)
I would like to be added as a Plaintiff on behalf of myself and as a representative of
other homeowners.

Charmenz Guagenti 9-18-06
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number:

1502

Name:

ROBERT T. BAYER

Address:

6 FRITH DRIVE

Street

ASHEVILLE, NC 28803

City, State, and Zip

Phone Number (Day)

828/277-3500

(Evening)

SAME

Please initial each of the following assignments and acknowledgments:

RTB I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

RTB I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

RTB I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

RTB I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Signature

Date

9/18/06

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

616

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1412

Name: ALBERT SCHNEIDER

Address: 324 EARLWOOD RD
Street
STATESVILLE NC 28677
City, State, and Zip

Phone Number (Day) 828-632-8181 (Evening) 704-873-4057

Please initial each of the following assignments and acknowledgments:

AS I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

@ I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

AS I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

AS I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

Albert Schneider 2/20/07
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

617

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1409

Name: EDWARD J. BRENT GENPTR

Address: 3598 N 162ND LANE
Street
GOODYEAR AZ 85338
City, State, and Zip

Phone Number (Day) 623-536-6079 (Evening) _____

Please initial each of the following assignments and acknowledgments:

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery. *EJB*

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc. *EJB*

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict. *EJB*

If you want to be added as a Plaintiff please indicate below:

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

EJB
Signature _____ Date 9/28/06

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

618

RECEIVED
OCT 04 2006

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1406 Ocean Club

Name: Steve Edwards

Address: 2625 Wingbow Dr.
Street
Raleigh, N.C. 27615
City, State, and Zip

Phone Number (Day) _____ (Evening) 919-852-0694

Please initial each of the following assignments and acknowledgments:

SE

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

SE

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

SE

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

SE

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Steve Edwards
Signature

10/23/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

619

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1405
Name: GOLFPAO LLC / James Tarull
Address: 1224 FIRETHORNE CLUB 7
Street
WAYHAW NC 28173
City, State, and Zip
704-
Phone Number (Day) 6615940 (Evening) 704-8430321

Please initial each of the following assignments and acknowledgments:

JA

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JA

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

JA

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

James Tarull
Signature

2-7-07
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: MARC H. SILVERMAN

Name: 1404

Address: 6707-C FAIRVIEW Rd
Street
Charlotte, N.C. 28210
City, State, and Zip

Phone Number (Day) 704-362-0400 (Evening) _____

Please initial each of the following assignments and acknowledgments:

MAS

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

MAS

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

MAS

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

MAS

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Marc H. Silverman

Signature

10/7/06

Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

621

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 140.3
Name: Rick Appel & Darlene Jones
Address: 7715 Waltham Ct.
Street
Charlotte N.C. 28210
City, State, and Zip
Phone Number (Day) (704) 552-8228 (Evening) (704) 333-3111
(Fve)

Please initial each of the following assignments and acknowledgments:

LOJ

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

LOJ

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

LOJ

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

LOJ

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Darlene A. Jones
Signature

10/14/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

622

C. R. Bard, Inc.
730 Central Avenue
Murray Hill, NJ 07974
Tel: (908) 277-8000
Fax: (908) 277-8025
www.crbard.com

BARD

Office of
General Counsel

Writer's Direct Dial Number

October 4, 2006

Justin O'Toole Lucey, PA
Attorney At Law
P.O. Box 806
Mt. Pleasant, SC 29465

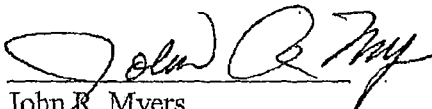
RE: Wild Dunes Ocean Club Horizontal Property Regime v. McCrory Construction Co., Inc.

Dear Mr. Lucey:

Further to your September 12, 2006 letter to the Wild Dunes Ocean Club owners, enclosed herewith please find a Litigation Authorization Form signed on behalf of C.R. Bard, Inc., the owner of Unit #1312. C.R. Bard has not elected to be added as a named plaintiff.

Very truly yours,

C.R. Bard, Inc.


John R. Myers
Associate General Counsel

JRM:br
Encl.

cc: Joe Cherry - w/encl.
Steve Long
Barbara Vincelli - w/encl.

P.S. - I am just in receipt of your September 28, 2006 letter and the attached Owners' Questionnaire. I will forward the Questionnaire to you in the near future.

623

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1312

Name: C.R. Bard, Inc.

Address: 730 Central Avenue
Street

Murray Hill, New Jersey 07974
City, State, and Zip

Phone Number (Day) (908) 277-8183 (Evening) _____

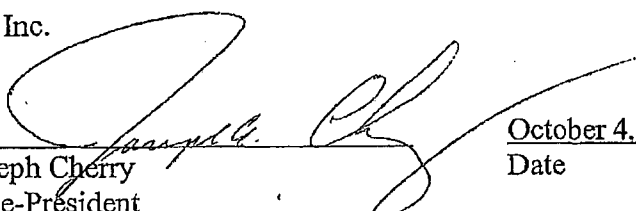
Please initial each of the following assignments and acknowledgments:

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

C.R. Bard, Inc.

By:  October 4, 2006
Joseph Cherry Date
Vice-President

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

624

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1309 / 1310 OCEAN CLUBName: Mike Kerner Managing PartnerAddress: 1015 WALTERS DR
Street
MORRISTOWN TN 37814
City, State, and ZipPhone Number (Day) 423 231 2062 (Evening) same

Please initial each of the following assignments and acknowledgments:

JK I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JK I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JK I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

JK I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

Mike Kerner
Signature2/28/07
DatePlease mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

625

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1307

Name: BARBARA K BEONSTEIN

Address: 3723 Foxcroft Road 482 Fenton Place
Street
Charlotte NC 28214 28207
City, State, and Zip

Phone Number (Day) 704-364-8880 (Evening) 704-364-8880
332 332

Please initial each of the following assignments and acknowledgments:

BKB

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

BKB

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

BKB

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Barbara K. Beonstein

Signature

10/04/06

Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

626

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1304 Ocean Club

Name: Bernice Lerner

Address: 945 Confederate Ave
Street
Salisbury NC 28144
City, State, and Zip

Phone Number (Day) ~~704~~ 704-636-5237 (Evening) _____

Please initial each of the following assignments and acknowledgments:

BLL

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

BLL

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

BLL

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Bernice L. Lerner
Signature

2/12/07
Date

Please mail or fax this form to: Justin Lucey; P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

627

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: Unit 1303 Ocean Club

Name: J. Toliver Davis and wife, Jackie J. Davis

Address: 187 Old Caroleen Road
Street
Forest City, N. C. 28043
City, State, and Zip

Phone Number (Day) 828 245 4886 (Evening) 828 245 4886

Please initial each of the following assignments and acknowledgments:

J. J. D.
JJD

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

J. J. D.
JJD

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

J. J. D.
JJD

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

J. Toliver Davis - Jackie J. Davis
Signature

October 5, 2006
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806; Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

628

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1211

Name: Eastern Distributing Co, INC

Address: P.O. Box 25307

Street

Richmond, VA 23260

City, State, and Zip

Phone Number (Day) _____ (Evening) _____

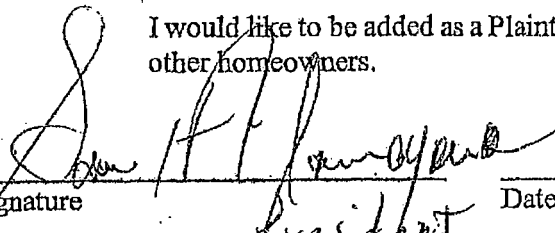
Please initial each of the following assignments and acknowledgments:

 I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

 I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

 I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Signature

Date 10/6/06

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

OCT. -06' 06 (FRI) 12:47

JUSTIN LUCEY LAW FIRM

TEL: 843 8498406

P. 001/001

Fax back to: 843-849-8406

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1204
Name: LEONARD HERKING
Address: 310 COFFEY ST
Street
No. WILKESBORO, N.C.
City, State, and Zip 28659
Phone Number (Day) 336-838-7181 (Evening) 336-667-6090

Please initial each of the following assignments and acknowledgments:

LgH

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

LgH

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

LgH

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Leonard Herking
Signature10-6-06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucy-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1203

Name: E.G. Meybohm

Address: 315 Millidge Rd

Street
Augusta GA 30904
City, State, and Zip

Phone Number (Day) (706) 736-3375 (Evening) (706) 481-0880

Please initial each of the following assignments and acknowledgments:

EM

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

EM

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

EM

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Edward G. Meybohm
Signature

10-4-06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

631

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1102

Name: RICHARD J. Cooper / Bruce D. Fox

Address: 6708 Sherwood Dr

Street Knoxville TN 37919

City, State, and Zip

Phone Number (Day) 865-585470 (Evening) Anytime

Please initial each of the following assignments and acknowledgments:

☒ I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

☒ I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

☒ I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

☐ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

R. Cooper
Signature

2/22/07
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1105

Name: DALE HAASE

Address: 425 HUEHL Rd. Bldg #10
Street
NORTH BROOK ILL. 60062
City, State, and Zip

Phone Number (Day) 630-399-3193 (Evening) SAME

Please initial each of the following assignments and acknowledgments:

DHA

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

DHA

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

DHA

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Dale R Haase
(Signature)

10/23/05
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

633

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1106 OCEAN CLUB

Name: DAVID & EMILY RIVERS

Address: 315 N. MAIN ST.
Street
GREENEVILLE, TN. 37745
City, State, and Zip

Phone Number (Day) 602-708-1511 (Evening) 423-636-1148

Please initial each of the following assignments and acknowledgments:

DR

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

DR

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

DR

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

DR

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

David Rivers Emily Rivers 10/4/06
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

634

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1107

Name: Lawrence Matteson

Address: 5 Hogan Court
Street
Pittsford, NY 14534
City, State, and Zip

Phone Number (Day) 585 586 8063 (Evening) _____

Please initial each of the following assignments and acknowledgments:

JLM

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JLM

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JLM

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Lawrence Matteson
Signature

10/27/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

635

Please send all notices / correspondence to Mary Spahia-Canducci
Salt Preston Ct
Powell, OH 43065

Wild Dunes Ocean Club Horizontal Property Regime

McCrorry Construction Co., Inc.

Litigation Authorization Form

43065
Charged mailing label

Unit Number: 1109 Ocean Club

Name: Ernie Canducci, Mary Spahia-Canducci, Patrick Joyce Elizabeth Joyce

Address: Canducci - Salt Preston Ct. Powell OH 43065
Joyce
Street

City, State, and Zip

Phone Number (Day) 414-580-3674 (Evening) 614-761-3545

Please initial each of the following assignments and acknowledgments:

ESC
MEQ
PJ

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrorry Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

ESC
MEQ
PJ

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrorry Construction Co., Inc.

ESC
MEQ
PJ

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

ESC
MEQ
PJ

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Ernie Canducci Patrick Joyce
Mary Spahia-Canducci Elizabeth Joyce
Signature Date 11-27-2006

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com.

636

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1110

Name: TERRA FULLER

Address: 9315 WHISPERING WIND DR.
Street
CHARLOTTE, NC 28277
City, State, and Zip

Phone Number (Day) 704 544-7624 (Evening) _____

Please initial each of the following assignments and acknowledgments:

T.F.

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

T.F.

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

T.F.

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Terra P. Fuller
Signature

7/26/07
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

843 849

637

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1112Name: WILLIAM D. DUDNEYAddress: 4500 Hickory Hill RD
Street
KINGSPORT, TN. 37664
City, State, and ZipPhone Number (Day) 423-230-4302 (Evening) 423-288-8327

Please initial each of the following assignments and acknowledgments:

WD

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

WD

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

WD

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

William D. Dudney
Signature10/12/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

638

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4101

Name: ELIZABETH L FRYE

Address: 1427 F ROXBURY RD
Street
COLUMBUS OH 43212
City, State, and Zip

Phone Number (Day) 614-466-7561 (Evening) _____

Please initial each of the following assignments and acknowledgments:

ELF I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

ELF I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

ELF I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Elizabeth Lou Frye Oct. 3rd, 06
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

639

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4103

Name: JAMES J. DOREAU OLSON

Address: 18802 HALYARD POINTE LANE
Street
CORNELIUS NC 28031
City, State, and Zip

Phone Number (Day) 704-987-3715 (Evening) _____

Please initial each of the following assignments and acknowledgments:

JO

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JO

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JO

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

James J. Doreau Olson
Signature

10-3-06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

640

**Wild Dunes Ocean Club Horizontal Property Regime
v.****McCrory Construction Co., Inc.****Litigation Authorization Form**

Unit Number: 4105 OCEAN CLUB
Name: LINDA RUHRMAN
Address: 10 BENNINGTON PL
Street
LA FAYETTE IN 47905
City, State, and Zip

Phone Number (Day) 765/449-8884 (Evening) Same

Please initial each of the following assignments and acknowledgments:

LR

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

LR

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

LR

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

LR

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Linda R. Ruhrman
Signature

2/6/07
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

641

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4108
Name: CLYBURN L. ELYNN HALL
Address: 2325 Edgemere Lake Circle
Street
MARIETTA GA 30062
City, State, and Zip
Phone Number (Day) 770-926-4655 (Evening) 770-552-0949

Please initial each of the following assignments and acknowledgments:

CEH

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

CEH

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

CEH

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

CEH

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Justin Lucey
Signature

10/2/2006
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

642

MAR. -13' 07(TUE) 13:50

JUSTIN LUCEY LAW FIRM

TEL: 843 8498406

PAGE 21

P. 003/003

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1506, 4402, 4508, 4201
Name: Hennon + Brown Properties, LLC
Address: P.O. Box 1412
Daston, GA 30122
City, State, and Zip
Phone Number (Day) 706-217-3332 (Evening) 706-217-8476

Please initial each of the following assignments and acknowledgments:

KB

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

KB

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

KB

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

Justin Lucey 3/13/07
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

643

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4203 Ocean ClubName: Fly Lo PropertiesAddress: 4020 Yancey RD

Street

Charlotte NC 28217

City, State, and Zip

Phone Number (Day) 704-525-7630 (Evening) 704-542-7087

Please initial each of the following assignments and acknowledgments:

OK

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

OK

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

OK

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

OK

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Signature

Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax).
Or please e-mail the form and information to: office@lucey-law.com

644

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4204

Name: William & Brian Kittredge

Address: 63 Grand Ave

Street

River Edge, NJ 07661

City, State, and Zip

Phone Number (Day) 201-342-8300 (Evening) 201-934-1347

Please initial each of the following assignments and acknowledgments:

WK

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

WK

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

WK

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

WK

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

William & Brian Kittredge
Signature

10/4/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

645

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4206

Name: Mr. and Mrs. Marion (Gail S.) Glover

Address: 3410 Habersham Road, NW
Street
Atlanta, GA 30305
City, State, and Zip

Phone Number (Day) 404-523-2921 (Evening) 404-266-2047

Please initial each of the following assignments and acknowledgments:

JSJ

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JSJ

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JSJ

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Gail S. Glover
Signature

October 3, 2006
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

646

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.**Litigation Authorization Form**Unit Number: 4209 OCEAN CLUBName: TOM and CAMILLE POTTERAddress: 5160 BRIDLE PATH RD.
Street
FAJETTEVILLE, NEW YORK 13066
City, State, and ZipPhone Number (Day) (315) 446-3354 (Evening) SAME

Please initial each of the following assignments and acknowledgments:

Xc/p

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

ce/tp

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

ce/tp

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Camille Potter
Signature2-8-07
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4301 Ocean Club
Name: Shirley Sumner Armstrong
Address: 1331 Stone Crossing St N.E.
Street
Canton Ohio 44701
City, State, and Zip
Phone Number (Day) (330) 4992832 (Evening) —

Please initial each of the following assignments and acknowledgments:

SSA

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

SSA

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

SSA

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please indicate below:

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Shirley Sumner Armstrong 9-28-06
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

648

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4303

Name: D. SCOTT WELTON

Address: P.O. Box 36218
Street
CHARLOTTE NC 28236
City, State, and Zip

Phone Number (Day) (704) 334-7877 (Evening) (704) 364-1122
X101

Please initial each of the following assignments and acknowledgments:

DSW

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

DSW

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc. *on the same basis as*

DSW

above.

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

D. Scott Welton
Signature

OCT 1, 2006
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

649

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4304

Name: Charles and Sheila Lord

Address: 101 DELVIEW LANE
Street
DELANCO, NJ 08075
City, State, and Zip

Phone Number (Day) 856-764-9287 (Evening) Same

Please initial each of the following assignments and acknowledgments:

CL

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

CL

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

CL

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

CL ✓

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Charles H. Lord
Signature

3/1/2007
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

650

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4305
Name: NORMAN LEVIN
Address: 2343 ROWELL AVE 1-B
Street
CHARLOTTE N.C. 28207
City, State, and Zip

Phone Number (Day) 704-358-9001 (Evening) 704-358-9002

Please initial each of the following assignments and acknowledgments:



I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.



I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.



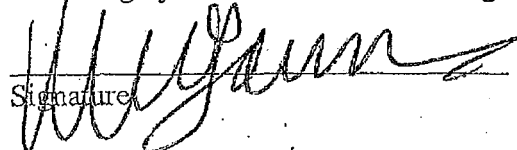
I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:



I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:


Signature

10/2/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

651

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4306
Name: James S + Mary W. Bush
Address: 1130 Atlantic Ave
Street Knoxville, TN. 37917
City, State, and Zip

Phone Number (Day) 865-686-3777 (Evening) 865-909-0991

Please initial each of the following assignments and acknowledgments:

JSB

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JSB

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JSB

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

James S Bush
Signature

10/9/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4308

Name: M/M H.E. DERRICK, JR

Address: 206 PAXTON ST
Street
LEVINGTON, VA 24450
City, State, and Zip

Phone Number (Day) 540-463-7700 (Evening) 540-463-3202

Please initial each of the following assignments and acknowledgments:

JED I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JED I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JED I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

JED I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Thomas Edwin Derrick Jr Oct. 4, 2006
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

653

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4401 OCEAN CLUB
Name: Stephen G. & Carol M. Cobb
Address: 14617 FAUCET LN.
Street
FORTVILLE IN. 46040
City, State, and Zip
317
Phone Number (Day) 842-4290 (Evening) 317 482-0055

Please initial each of the following assignments and acknowledgments:

X

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

X

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

X

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Carol M. Cobb 10-4-06
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1506 (4402, 4508, 4201)

Name: Hennon & Brown Properties, LLC

Address: P.O. Box 1412
Street
Dalton, GA 30722
City, State, and Zip

Phone Number (Day) 706-277-3132 (Evening) 706-277-8476

Please initial each of the following assignments and acknowledgments:

K.B. I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

K.B. I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

K.B. I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

 I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

Justin L. Lucey 3/13/07
 Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29463; (843) 849-8406 (Fax)
 Or please e-mail the form and information to: office@lucey-law.com

655

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4406
Name: Bill Gorelic
Address: 4064 Colony Rd. Suite 240
Street Charlotte, N.C. 28211
City, State, and Zip
Phone Number (Day) 704-442-1093 (Evening) EXT. 11

Please initial each of the following assignments and acknowledgments:

WG

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

WG

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

WG

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

WG

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Bill Gorelic
Signature

10/13/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

656

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4503 OCEAN CLUB

Name: GRAEME M. Keith

Address: 2301 RICHARDSON DRIVE
Street
Charlotte, NC 28211
City, State, and Zip

Phone Number (Day) 704-365-6000 (Evening) 704-365-2404

Please initial each of the following assignments and acknowledgments:

☒ I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

☒ I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

☒ I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

☐ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Signature GM Keith Date 10/16/06

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com.

657

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4505

Name: KAY L. STRICKLAND

Address: 10733 CROSS SCHOOL RD
Street
RESTON, VA 20191-5105
City, State, and Zip

Phone Number (Day) 703-391-9321 (Evening) SAME

Please initial each of the following assignments and acknowledgments:

KLS

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

KLS

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

KLS

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

KLS

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Kay L. Strickland
Signature

10/3/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4506Name: VAN DEN BERGH HUGOAddress: A. VAN DEN SANDELAAN 45
Street
B2970 SCHILDE, BELGIUM
City, State, and ZipRepresented by:
c/o VAUGHAN LAW FIRM, PA
102 WAPPON CREEK DRIVE
SUITE 2A
CHARLESTON, SC 29412
USA

Phone Number (Day) _____ (Evening) _____

Please initial each of the following assignments and acknowledgments:

/

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

/

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

/

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

/

I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

Signature

Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

659

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 4507

Name: JAMES L & JUDITH C. WARDEN

Address: PO Box 52652

Street

ATLANTA, GA 30355

City, State, and Zip

Phone Number (Day) 404-219-1144 (Evening) 404-216-8619

Please initial each of the following assignments and acknowledgments:

JW

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

JW

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

JW

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

James L. Warden
Signature

10/2/06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

660

MAR -13' 07 (TUE) 13:50

JUSTIN LUCEY LAW FIRM

TEL: 843 8498406

PAGE 21

P. 003/003

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrory Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1506, 4402, 4508, 4201
Name: Hennon + Brown Properties, LLC
Address: P.O. Box 1412
Street
Dalton, GA 30722
City, State, and Zip

Phone Number (Day) 706-217-3132 (Evening) 706-217-8476

Please initial each of the following assignments and acknowledgments:

KB

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrory Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

KB

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrory Construction Co., Inc.

KB

I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff please initial below:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign and date:

Keith S. Brown 3/13/07
Signature Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

661

Wild Dunes Ocean Club Horizontal Property Regime

v.

McCrary Construction Co., Inc.

Litigation Authorization Form

Unit Number: 1509 OCEAN CLUB

Name: S. M. (Bobby) MARILYN B. BROWN

Address: 8 Club Knoll

Street
Asheville, NC 28804
City, State, and Zip

Phone Number (Day) 843 882 6669 (Evening) 828-252-5546

Please initial each of the following assignments and acknowledgments:

P.M. ✓

I hereby assign my claim to the Regime, which has hired Justin Lucey to sue McCrary Construction Co., Inc. for the construction deficiencies at the Ocean Club. I understand that the board has retained Justin Lucey on a contingency fee basis and that the level of contingency starts at one-third and decreases at various levels with the fee being based upon the total recovery.

J.P. ✓

I hereby appoint Justin Lucey to represent me in any matters relating to the lawsuit against McCrary Construction Co., Inc.

_____ I hereby waive any conflict that should arise by virtue of Justin Lucey representing both the Regime and me, and I acknowledge that the Regime's claims supersede my individual claim in the event of a conflict.

If you want to be added as a Plaintiff, please indicate by initialing here:

_____ I would like to be added as a Plaintiff on behalf of myself and as a representative of other homeowners.

Please sign your full name acknowledging your completion of this form:

P. M.
Signature

10-13-06
Date

Please mail or fax this form to: Justin Lucey, P.O. Box 806, Mt. Pleasant, SC 29465; (843) 849-8406 (Fax)
Or please e-mail the form and information to: office@lucey-law.com

662

NEXSEN|PRUET

March 17, 2010

Cherle W. Blackburn
Member
Admitted in SC

VIA ELECTRONIC MAIL

JNicholsonJ@sccourts.org

The Honorable J.C. Nicholson, Jr.
Charleston County, Tenth Circuit Court Judge
100 Broad Street, Suite 106
Charleston, SC 29401

*Re: Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. vs. Amy Meyer
vs. Lorcan Lucey, GMAC Mortgage Corporation, Citi Mortgage, Inc.,
and John Doe Finance
Civil Action No.: 2009-CP-10-6873
Our File No.: 45631-1*

Charleston

Charlotte

Columbia

Greensboro

Greenville

Hilton Head

Myrtle Beach

Raleigh

Dear Judge Nicholson:

We received a copy of the Affidavit of the Defendant, Amy K. Meyer, which was filed March 12, 2010, at your invitation for the Defendant to file any factual information with the Court relevant to your reconsideration of the Plaintiffs' Motion to Compel Arbitration. I am writing to briefly address certain points raised by the Defendant in her Affidavit.

1. As to the issue of whether the arbitration provision is unconscionable, the Defendant focuses on the entire document, stating "I believed that if I did not sign the *document* as presented to me, that I would jeopardize my trial bonuses..." and "I believe that I had no choice but to sign the *June 2006 contract* or jeopardize my job or bonuses..." See Affidavit, ¶¶ 13 and 16 (emphasis added). As Judge Duffy pointed out in Brown v. Green Tree Services, 358 F. Supp. 2d 770, 777 (2008), "when claims allege unconscionability of the contract generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the *entire contract*, rather than the arbitration agreement. (emphasis added) (citations omitted) (finding that Brown's illiteracy related to the entire contract and did not prevent

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Attorneys and Counselors at Law

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663

him from *only* reading the arbitration clause and, therefore, the arbitration provision was not unconscionable.)

2. In paragraph 24 of her affidavit, the Defendant questions the terms "expedited and abbreviated procedures" contained in the arbitration clause. Arbitration, by its very nature, is expedited and abbreviated. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) (explaining that although procedures in arbitration may not as extensive as federal court's, agreeing to arbitrate trades such procedures for simplicity, informality, and expedition of arbitration). In this case, the Employment Rules and Procedures of National Arbitration and Mediation ("NAM") will be the procedures followed. The NAM Employment Rules and Procedures were provided to the Court with the Documents Filed Under Seal by Plaintiffs, tab 14, on January 28, 2010.
3. In paragraph 25, the Defendant states that Plaintiffs misrepresented to the Court that there is an arbitration pending before NAM. This is not a misrepresentation. Plaintiffs submitted to the Court the Demand for Arbitration filed with NAM. See Documents Filed Under Seal, tab 16. Although Defendant has refused to arbitrate and has requested that the file be closed, there is no evidence before this Court that the file has been closed. The arbitration proceeding remains open and will remain open pending the decision of the Court on Plaintiffs' Motion to Compel Arbitration.
4. Defendant states in paragraph 28: "Contrary to the statements made by Plaintiffs' counsel at the hearing in this matter, the attached Exhibit B indicates Plaintiffs intended, and still intend, to limit witnesses at any arbitration." I did not represent at either hearing that Plaintiffs were in agreement with Defendant's position that the limitation of witnesses testifying at the arbitration was unconscionable. To the contrary, Plaintiffs' position is that this part of the arbitration provision is *not* unconscionable, since it does not prohibit either party from submitting testimony via deposition transcripts and affidavits. What I stated at the hearing was that the law clearly allows the Court to sever any portion of the arbitration provision that the Court deems to be unconscionable. Therefore, should your Honor decide that the limitation as to witnesses at the hearing is unconscionable, the Court can simply sever that portion of the arbitration provision. See Discussion in Plaintiffs' Memorandum in Support of Motion for Reconsideration, pages 37-39.
5. In paragraph 30, Defendant attempts to explain that her counsel's representation that she was out-of-state only six deposition days, did not include travel days and was somehow not a misrepresentation. The fact remains that she was out-of-state for depositions and meetings for the Ocean Club case on more than six days. Moreover, and more importantly, Defendant's *in-state* activities, including

The Honorable J.C. Nicholson, Jr.
March 17, 2010
Page 3

phone calls to clients and witnesses out-of-state, video depositions of out-of-state parties and witnesses, and use of interstate wires and foreign vendors, including Westlaw research, all constitute interstate commerce. See Towles v. United Health Care Corporation, 524 S.E. 2d 839, 843 Ct. App. (1999) (finding that Towles' responsibilities, many of which were conducted in-state, such as participating in telephone conversations across state lines, reviewing claims from out-of-state providers, working with officials from national companies and reviewing proposals for services from out-of-state service providers were sufficient evidence of interstate commerce to invoke the Federal Arbitration Act.) Defendant has not disputed this fact. In addition, she has not disputed the fact that other cases, such as Harper, which she handled on behalf of the Firm and which are referenced in her June 2006 contract, involved numerous activities on her part in interstate commerce.

Once again, I appreciate your reconsideration of our Motion to Compel Arbitration.

Very truly yours,



Cherie W. Blackburn

CWB/mtk

cc: Nancy Bloodgood, Esquire (via e-mail and U.S. Mail)

665

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey and Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

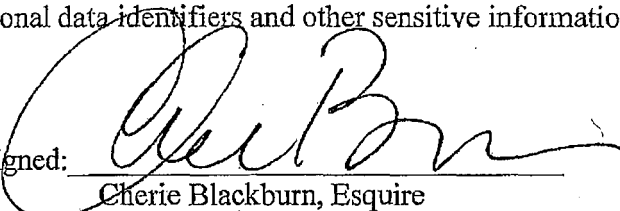
And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

**RULE 210(g), SCACR, CERTIFICATE OF COUNSEL AND
CERTIFICATION OF COMPLIANCE WITH ORDER ON
REDACTION OF PERSONAL DATA IDENTIFIERS**

I, Cherie Blackburn, Esquire, hereby certify, pursuant to Rule 210(g), SCACR, that this Record on Appeal (Volumes I, and II) contains all of the material and documentation proposed to be included by any of the parties and not any other material.

In addition, I further certify that this Record on Appeal (Volumes I, and II) complies with the South Carolina Supreme Court's Order dated August 13, 2007, addressing the redaction of personal data identifiers and other sensitive information.

Signed: 

Cherie Blackburn, Esquire

Charleston, South Carolina

December 16, 2010

667

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

FINAL BRIEF OF THE APPELLANTS

Cherie Blackburn, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, South Carolina 29401
Telephone: 843.577.9440
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Attorney for the Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. STATEMENT OF ISSUES ON APPEAL	1
II. STATEMENT OF THE CASE	2
III. STATEMENT OF THE FACTS	6
A. The Employment Agreement and Arbitration Clause	6
B. The Ocean Club Case	11
IV. ARGUMENT AND CITATION OF AUTHORITY	13
A. BECAUSE THE RELATIONSHIP BETWEEN APPELLANT LAW FIRM AND RESPONDENT INVOLVED INTERSTATE COMMERCE, THE FEDERAL ARBITRATION ACT APPLIES AND THE TRIAL COURT ERRED IN NOT COMPELLING ARBITRATION	13
1. Interstate Commerce is Broadly Construed for Purposes of the FAA	14
2. The Employment Agreement and the Surrounding Facts and Circumstances Involve or Affect Interstate Commerce.....	17
3. The Arbitration Agreement is a Binding and Enforceable Agreement Freely Entered Into By the Parties	24
B. BECAUSE THE ARBITRATION CLAUSE IS NOT PROCEDURALLY OR SUBSTANTIVELY UNCONSCIONABLE, THE TRIAL COURT ERRED IN REFUSING TO ENFORCE IT AND COMPEL ARBITRATION.....	26
1. The Arbitration Agreement is Not Procedurally Unconscionable ..	27
(a) Meaningful Choice	28
(b) The parties' Relative Sophistication.....	30
(c) The Element of Surprise	33
(d) The Parties' Bargaining Power	33
2. The Arbitration Agreement is Not Substantively Unconscionable.	35

C.	EVEN IF THE PROVISION LIMITING LIVE WITNESSES IS SUBSTANTIVELY UNCONSCIONABLE, THE TRIAL COURT SHOULD HAVE SEVERED THAT PORTION OF THE ARBITRATION CLAUSE AND COMPELLED ARBITRATION.....	37
D.	THE SOUTH CAROLINA ARBITRATION ACT IS NOT APPLICABLE TO THE CONTRACT BETWEEN THE PARTIES, AND THE TRIAL COURT ERRED IN SO APPLYING IT	39
	1. The Federal Arbitration Act Preempts State Law	39
	2. The SCUAA Does Not Apply to an Agreement Between an Employer and an Employee Unless the Agreement Provides That it Shall Apply	41
V.	CONCLUSION	42

TABLE OF AUTHORITIES

CASE DECISIONS

<u>Allied-Bruce Terminix Co. v. Dobson,</u> 513 U.S. 265, 115 S.Ct. 834 (1995).....	14, 18, 24
<u>Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham,</u> 953 So.2d 574 (Fla. Dist. Ct. App. 2007)	38
<u>Aronson v. Dean Witter Reynolds, Inc.,</u> 675 F. Supp. 1324 (S.D. Fla. 1987)	14
<u>Bank of Indiana, Nat'l Ass'n v. Holyfield,</u> 476 F. Supp. 104 (S.D. Miss. 1979).....	33, 34
<u>Barron v. Labor Finders of S.C.,</u> 384 S.C. 21, 682 S.E.2d 271 (Ct. App. 2009)	28
<u>Blanton v. Stathos,</u> 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002)	15
<u>Caley v. Gulfstream Aerospace Corp.,</u> 428 F.3d 1359 (11th Cir. 2005).....	36
<u>Citizens Bank v. Alafabco, Inc.,</u> 539 U.S. 52 (2003).....	16
<u>Cleveland v. Mann,</u> 942 So.2d 108 (Miss. 2006).....	34
<u>Crawford v. West Jersey Health Sys. (Voorhees Div.),</u> 847 F. Supp. 1232 (D.N.J. 1994)	16, 18
<u>Doctor's Assocs., Inc. v. Casarotto,</u> 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902.....	24, 40
<u>Dotson v. Amgen, Inc.,</u> No. B212965, 2010 WL 189653 (Cal. Ct. App. Jan. 21, 2010)	38,40
<u>Episcopal Hous. Corp. v. Federal Ins. Co.,</u> 269 S.C. 631, 239 S.E.2d 647 (1977).....	39
<u>Equal Employment Opportunity Commission v. Rinella and Rinella,</u> 401 F. Supp. 175 (N.D. Ill. 1975)	20, 21
<u>Evans and Kunz, Ltd.,</u> 194 NLRB 1216 (1972)	20
<u>Fernandez v. Clear Channel Broad., Inc.,</u> 268 F. Supp. 2d 1365 (S.D. Fla. 2003) (.....	37
<u>Gilmer v. Interstate/Johnson Lane Corp.,</u> 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)	30, 36, 35
<u>Hood v. Life & Cas. Ins. Co. of Tenn.,</u> 173 S.C. 139, 175 S.E. 76 (1934).....	24
<u>In re Cotton Yarn Antitrust Litig.,</u> 505 F.3d 274 (4th Cir. 2007).....	36

<u>In re FirstMerit Bank, N.A.,</u> 52 S.W.3d 749 (Tex. 2001)	31
<u>In re Fleetwood Homes of Tex., L.P.,</u> 257 S.W.3d 692 (Tex. 2008)	37
<u>In re Sacred Heart Hosp. of Norristown,</u> 200 B.R. 826 (Bankr. E.D. Pa. 1996)	16
<u>Katzenbach v. McClung,</u> 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964)	20
<u>Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.,</u> 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)	24
<u>Munoz v. Green Tree Fin. Corp.,</u> 343 S.C. 531, 542 S.E.2d 360 (2001)	14, 17, 18, 19, 24, 28, 40
<u>Nabors Drilling USA, LP v. Carpenter,</u> 198 S.W.3d 240 (Tex. App. 2006)	16
<u>New England Retail Properties, Inc. v. Maturo,</u> 925 A.2d 1151 (Conn. App. 2007)	32
<u>New Hope Missionary Baptist Church v. Paragon Builders,</u> 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008)	13, 17, 19, 20
<u>Nuckols v. Athey,</u> 138 S.E.2d 344 (W.Va. 1964)	15
<u>Osborne v. Marina Inn at Grande Dunes, LLC,</u> 2009 WL 3152044 (D.S.C. 2009)	27
<u>Ramirez-Baker v. Beazer Homes, Inc.,</u> 636 F. Supp. 2d 1008 (E.D. Cal. 2008)	26
<u>Sec. Serv. Fed. Credit Union v. Sanders,</u> 264 S.W.3d 292 (Tex. App. 2008)	14
<u>Simpson v. MSA of Myrtle Beach, Inc.,</u> 373 S.C. 14, 644 S.E.2d 663 (2007)	24, 26, 27, 30, 38
<u>Soil Remediation Co. v. Nu-Way Env'tl., Inc.,</u> 323 S.C. 454, 476 S.E.2d 149 (1996)	14, 39, 40
<u>Southwind Group, Inc. v. Landwehr,</u> 188 S.W.3d 730 (Tex. App. 2006)	16
<u>Strand v. U.S. Bank Nat'l Ass'n ND,</u> 693 N.W.2d 918 (N.D. 2005)	26, 27, 30
<u>Sutton v. Hollywood Entm't Corp.,</u> 181 F. Supp. 2d 504 n.2 (D. Md. 2002)	14
<u>Thornton v. Trident Med. Ctr., L.L.C.,</u> 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003)	18, 19
<u>Tillman v. Commercial Credit Loans, Inc.,</u> 655 S.E.2d 362 (N.C. 2008)	26
<u>Towles v. United Healthcare Corporation,</u> 338 SC 29, 524 S.E.2d 839 (Ct. App. 1999)	18, 19
<u>Volt Info Scis, Inc. v. Board of Trs.,</u> 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)	24, 40

<u>Wilks v. Pep Boys,</u>	
241 F. Supp. 2d 860 (M.D. Tenn. 2003) (.....)	37
<u>Woods v. QC Fin. Servs., Inc.,</u>	
280 S.W.3d 90 (Mo. App. 2008)	35
<u>Young v. Prudential Ins. Co. of America, Inc.,</u>	
688 A.2d 1069 (N.J. Super. Ct. App. Div. 1997)	30
<u>Zabinski v. Bright Acres Assocs.,</u>	
346 S.C. 580, 553 S.E.2d 110 (2001)	13, 15, 18, 19, 40

STATUTES, REGULATIONS, AND COURT RULES

29 U.S.C. § 151 et seq.	20
S.C. Code Ann. § 15-48-10(b)(2)	41
S.C. Code Ann. § 41-10-10 et seq.	3
South Carolina Code Ann. § 15-48-10(a)	5, 39, 40, 41

OTHER AUTHORITIES

15A AM. JUR. 2D Commerce § 4 (May 2009)	15
17A AM. JUR. 2D <u>Contracts</u> § 278 (May 2009)	38
RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981)	35, 38

I. STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ITS DETERMINATION THAT THE EMPLOYMENT CONTRACT BETWEEN THE PARTIES DID NOT INVOLVE COMMERCE WITHIN THE MEANING OF THE FEDERAL ARBITRATION ACT SUCH THAT THE FEDERAL ARBITRATION ACT DOES NOT APPLY?
2. DID THE TRIAL COURT ERR IN ITS DETERMINATION THAT THE ARBITRATION CLAUSE AT ISSUE IS NOT VALID AND ENFORCEABLE DUE TO IT BEING UNCONSCIONABLE?
3. ASSUMING *ARGUENDO* THAT THE LIMITATION OF LIVE WITNESSES IS SUBSTANTIVELY UNCONSCIONABLE, DID THE TRIAL COURT ERR IN ITS FAILURE TO SEVER THAT PORTION OF THE ARBITRATION CLAUSE AND ENFORCE THE REMAINDER?
4. DID THE TRIAL COURT ERR IN ITS DETERMINATION THAT THE SOUTH CAROLINA ARBITRATION ACT APPLIES TO THE EMPLOYMENT AGREEMENT BETWEEN THE PARTIES AND THAT THE EMPLOYMENT AGREEMENT IS NOT IN COMPLIANCE WITH SUCH ACT?

II. STATEMENT OF THE CASE

Beginning in August of 2009, Respondent Amy Meyer, through her attorney, Nancy Bloodgood, made demands for compensation Respondent claims is due under the Employment Agreement between Respondent and Appellant Justin O'Toole Lucey, P.A. ("Appellant Firm"). In response to Respondent's demands under the Employment Agreement, on October 27, 2009, Appellant Firm filed a Demand for Arbitration with National Arbitration and Mediation, Inc. ("NAM") in which Appellant Firm seeks a declaratory judgment that it has paid all compensation and wages due to Respondent and is not in violation of the Employment Agreement. (R.pp.531-542).

The Demand for Arbitration was filed under the NAM Employment Rules and Procedures. (R.pp.513-530). Under the NAM Employment Rules and Procedures the "Employer shall pay NAM's Administrative fees and NAM's hourly fees for the total time spent by the Arbitrator/Mediator and shall advance all other costs due NAM related to the costs of the Arbitration/Mediation. The Employee shall pay the NAM Filing Fee." (R.pp.513-527). The NAM Filing Fee, which is the only fee that the Employee pays to NAM, is sixty dollars (\$60.00). (R.pp.528-530).

On October 30, 2009, Respondent's attorney, Nancy Bloodgood, through her assistant, sent to Cherie Blackburn, Appellants' counsel, by electronic mail, a draft Complaint which Respondent planned to file the following week. (R.p.294). The draft Complaint contained allegations and causes of action against Appellants based upon the June 2006 Employment Agreement and May 2007 Amendment between Appellant Firm and

Respondent (as further defined in the Statement of Facts and referred to collectively as the Employment Agreement"). On October 31, 2009, Ms. Bloodgood sent an e-mail to Ms. Blackburn stating that she would be filing, on behalf of Respondent, the Draft Complaint, as well as a Lis Pendens on all property owned by Appellants on Monday, November 2, 2009. (R.p.295).

On November 2, 2009, Appellants instituted the underlying lawsuit by filing a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration in order to prevent the filing of the draft Complaint. (R.pp.19-29; R.pp.30-36).

On November 30, 2009, Appellant filed an Answer, Counterclaims and Third Party Complaint that contained, among other allegations, the claims set forth in the draft Complaint in the form of counterclaims. (R.pp.49-84). The counterclaims set forth eight causes of action, all arising out of the terms of the Employment Agreement. The crux of the counterclaims is Respondent's allegation that Appellant Firm breached the Employment Agreement by not paying Respondent bonuses she claims were due under the Employment Agreement. Her counterclaims consist of the following: (1) declaratory judgment as to Appellant Justin O'Toole Lucey ("Appellant Lucey") that he is not a party to the Employment Agreement and cannot compel arbitration; (2) breach of the Employment Agreement as to Appellant Firm, (3) breach of the Employment Agreement accompanied by fraudulent act as to Appellant Firm, (4) failure to pay wages under the Employment Agreement in violation of the Payment of Wages Act (S.C. Code Ann. § 41-10-10 *et seq.*) against Appellants, (5) promissory estoppel with regard to promises made in the

Employment Agreement against Appellant Firm, (6) intentional misrepresentation/fraud/constructive trust based on alleged representations regarding Respondent's entitlement to the bonuses referenced in the Employment Agreement against Appellants, (7) unjust enrichment as a result of Appellant Firm's retention of compensation due under the Employment Agreement against Appellants; and (8) constructive trust on properties owned by the Appellants due to the withholding of compensation due under the Employment Agreement, against the Appellants and the Third Party Defendants. (R.pp.49-84).

On December 9, 2009, Appellants filed a Memorandum in Support of their Motion to Compel Arbitration. (R.pp.85-96). A hearing was held on December 10, 2009. (R.pp.190-214). Respondent did not file a brief in opposition to Plaintiffs' Motion prior to the hearing, but handed to the Trial Court and Appellants' counsel her Brief in Opposition to Appellants' Motion to Compel Arbitration at the hearing. (R.pp.97-121). During the hearing, the Trial Court invited counsel to provide to it any supporting case law, including cases addressing the applicability of the Federal Arbitration Act ("FAA") to the case. (R.p.211). Appellants' counsel hand-delivered a cover letter with nineteen supporting cases on December 11, 2009. (R.pp.296-300).

At the time of the hearing, a Motion to Seal the pleadings, filed by Appellants, was pending before the Court. The Trial Court granted the Motion and issued an Order to Seal Pleadings that was filed on December 11, 2009. (R.pp.1-3).

On December 16, 2009, the Trial Court sent an e-mail to Nancy

Bloodgood, Respondent's counsel, with a copy to Cherie Blackburn, Appellants' counsel, stating "the court finds there is no reason for the FAA to apply in this case please send a proposed order regarding this and any other issues you feel appropriate." (R.p.301). Appellants filed their response to Respondent's counterclaims in the form of a Motion to Dismiss Strike and Make More Definite and Certain on December 30, 2009.

The Order Denying Appellants' Motion to Compel Arbitration was filed by the Trial Court on January 25, 2010. (R.pp.4-13). The Trial Court's Order includes not only a discussion and conclusion that the FAA does not apply to the facts and circumstances surrounding the execution of the Employment Agreement at issue, but also a discussion and holding that the arbitration clause does not meet the requirements of South Carolina Code Ann. § 15-48-10(a) and a discussion and holding that the arbitration clause at issue is further void on equitable grounds. (R.pp.9-12). Although the Trial Court did not make such a ruling from the bench or in the e-mail to Nancy Bloodgood of December 16, 2009, Ms. Bloodgood included these findings based upon the Trial Court's instructions that she send a proposed order regarding the FAA "and any other issues you feel appropriate." (R.p.301).

The Order Denying Plaintiffs' Motion to Compel Arbitration granted leave to Appellants to file under seal documentation regarding the Ocean Club case in support of their Motion to Compel Arbitration. (R.p13). These documents had not been filed prior to the hearing because they contain confidential and attorney-client privileged communications and work product, and Appellants' Motion to Seal the pleadings had not yet been heard by the

Court. On January 28, 2010, in accordance with the Order, Appellants filed Documents Filed Under Seal in Support of Plaintiffs' Motion to Compel Arbitration, which contained sixteen documents. (R.pp.315-542).

On February 2, 2010, Appellants filed a Motion for Reconsideration of the Trial Court's Order. (R.pp.136-139). On March 1, 2010, Appellants filed a supporting memorandum. (R.pp.140-183). A hearing was held on Appellants' Motion for Reconsideration on March 2, 2010. At the hearing, Appellants presented to the Trial Court certain documents from Ocean Club and other cases, supporting their position that interstate commerce was involved and the Federal Arbitration Act ("FAA") should apply. (R.pp.544-662). The Trial Court heard arguments on whether arbitration should be compelled. (R.pp.215-261).

On March 7, 2010, following the hearing and at the Trial Court's invitation, Appellants sent a letter to the Trial Court addressing various statements made by Respondent in an Affidavit she filed and other issues relative to the Trial Court's decision. (R.pp.663-665). On May 4, 2010, the Trial Court issued a summary Order denying the Motion for Reconsideration. (R.p.14). Appellants received the Order on May 14, 2010, and served their Notice of Appeal on June 11, 2010. On July 1, 2010, the Trial Court issued an Amended Consent Order to Seal Filings with the Clerk of Court. (R.pp.15-18).

III. STATEMENT OF THE FACTS

A. The Employment Agreement And Arbitration Clause.

Appellant Firm maintains a law practice located at 415 Mill Street, Mount Pleasant, South Carolina. In or about January 2006, Appellant Firm hired Respondent as an associate attorney. Prior to being hired by Appellant

Firm, Respondent was an Assistant Solicitor for the Ninth Circuit, specializing in white color crime. (R.p.55, para. 44). Respondent had been practicing law since 2002. She was also a certified public accountant and had practiced public accounting for six years before going to work with the Solicitor's Office. (R.p.55, para. 44). Respondent was hired as an at-will employee and worked the first six months with Appellant Firm without a written employment contract. (R.p.55, para. 45).

In June of 2006, Appellant Firm and Respondent executed an agreement setting forth the terms of her employment (referred to herein as the "2006 Agreement"). (R.pp.262-264). The 2006 Agreement was amended with regard to the payment of bonuses by letter agreement in May of 2007 (referred to herein as the "2007 Amendment"). (R.pp.265-266). (The 2006 Agreement and 2007 Amendment, being referred to collectively herein as the "Employment Agreement" (R.pp.262-266).

The purpose of the Employment Agreement was to put into writing terms that Respondent and Appellant Lucey, the Firm's owner and principal attorney, had discussed when Respondent came to work for the Firm several months earlier, as well as additional benefits that Appellant Firm was offering to Respondent. The beginning paragraph explains the reason for the Employment Agreement and states as follows:

"As I have several times told you I would, am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalese, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate."

(R.pp.262-264). The 2006 Agreement goes on to describe benefits that Respondent will receive in her employment, including a monthly salary, an additional bonus paid on fees earned on contingency cases spearheaded by her, payment for legal CLE's, payment for health insurance, malpractice insurance, employer payroll taxes and deposition school, vacation, sick days and paid holidays, and use of a laptop computer. (R.pp.262-264). It also addresses the hours Respondent will work, confidentiality of Appellant Firm's clients and information, and the termination of the Employment Agreement by either party. (R.pp.262-264). Under "Subsequent Modifications" it lists additional benefits to Respondent, above and beyond what was agreed upon when she was hired. These benefits include an increased bonus of fifteen percent on the Harper case and a graduated trial bonus on cases on which Respondent shared the load with Appellant Lucey in getting ready for trial. (R.pp.262-264).

The 2006 Agreement contemplated that Respondent would work as an associate at the direction of Appellant Lucey on legal cases handled by Appellant Firm that were assigned to her by Appellant Lucey. Appellant Firm was engaged in interstate commerce. It represented parties from other states, had cases with witnesses from other states, used experts from other states, took depositions in other states, dealt with court reporting firms in other states, and regularly communicated and corresponded with individuals in other states.

The 2006 Agreement also contains a binding arbitration provision, as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

(R.pp.262-264). The 2006 Agreement encourages Respondent to spend time reviewing it prior to signing it. It states, directly above her signature:

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

(R.pp.262-264). Respondent did not voice any objection to the arbitration provision in the 2006 Agreement. (R.p.103) ("Perhaps Ms. Meyer could have objected to the arbitration clause, but she was certainly in a poor position to do so...").

From the day Respondent was hired, she worked directly on cases that involved and affected interstate commerce. The Employment Agreement specifically references some of these cases, including "Cusack," "Harper," "Shoshan," "Hanson" and "Turner" and provides Appellant a bonus opportunity on the fees received by the Firm in these cases. Each of these cases affected interstate commerce. Shoshan was an employment lawsuit against a non South Carolina resident car parts manufacturing subsidiary of a German company which had a North Charleston factory. (R.p.143). Turner was a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank. (R.p.143). Harper involved a treating doctor who resided in and was deposed in Florida, Appellant Firm's

primary liability expert resided in and was deposed in Georgia, another of Appellant Firm's experts resided in and was deposed in California and Appellant Firm procured neurological analysis from physicians in Florida and North Carolina. (R.p.143). The majority of the out of state work was handled by Respondent. (R.pp.567-612).

Another such case that Respondent worked on was a construction case in which Appellant Firm represented the Ocean Club Horizontal Property Regime (the "Ocean Club case"). According to Respondent, she spent the vast majority of her time between May of 2007 and July of 2009 working on this complex state court construction case. (R.p.98).

The 2006 Agreement was amended in May of 2007 to allow Respondent to receive a bonus on the Ocean Club case even though she was not spearheading the case. (R.pp.265-266). The primary purpose of creating this addition to the 2006 Agreement was to address Respondent's work on the Ocean Club case and give her the ability to obtain a bonus on fees Appellant Firm received in the case. Respondent was provided a draft of the 2007 Amendment on or about May 1, 2007 for her review. (R.p.60, para. 80). Respondent reviewed the 2007 Amendment overnight, crossed out and initialed certain language to which she objected and signed the 2006 Agreement the following day. (R.p.60, para. 81).

Respondent continued to work for Appellant Firm until July 22, 2009, when her employment terminated. During the time period between the execution of the 2007 Amendment and the end of her employment, she claims she worked in excess of 3,400 hours on the Ocean Club case. (R.p.63, para.

103).

B. The Ocean Club Case.

Appellant Firm's primary client in the Ocean Club case was the Ocean Club Horizontal Property Regime, which was made up of homeowners located in various states. The firm executed retainer agreements with each of the homeowners which show the addresses of the numerous homeowners. (R.pp. 613-662). An e-mail to the homeowners dated September 18, 2008, lists the numerous homeowners who were the Firm's clients. (R.pp.328-330). The Ocean Club case involved not only regular communication with the clients located in other states, but also travel to other states. On February 2, 2009, Respondent prepared, on behalf of Appellant Firm, a summary of the travel expenses incurred in connection with the case. Her summary states as follows: "...the below is general summary of some of the travel that my office has done during this case to date:

During 2007, my office incurred travel expenses to Charlotte, NC for the Bonsal Corporate deposition; to Columbia for three McCrory depositions (Tharp, Royster, Marshall Clark Architect); to Atlanta for several Kawneer depositions; and, to Sarasota, FL to take the depositions of Valcourt and Spectech employees. During 2008, my office incurred travel expenses to travel to Columbia for roofer and McCrory depositions. Additionally, as you are aware, the Court ordered the owner depositions to be taken in Fall 2008; my office incurred travel expenses to meet with the homeowners and attend their depositions in Columbia, Greenville, Asheville, Atlanta, New Jersey, Washington, D.C., Knoxville and Kingsport. We also had travel to Charlotte for roofer depositions. Finally, in Fall 2008, I incurred travel expenses to meet with our national concrete expert, Peter Emmons, in Baltimore.

We also had various document inspections in Columbia and Charlotte that have necessitated travel.

(R.pp.326-327). As further described below, much of this travel was performed

by Respondent.

The case also involved numerous insurance companies located throughout the country. (R.pp.343-347; R.pp.348-355; R.pp.506-512). Appellant Firm maintained an Ocean Club Emergency Contact List, which provided the names of the client homeowners, their contact numbers, their billing addresses and their e-mail addresses. The billing addresses evidence that these homeowners were located in numerous different states, including South Carolina, Tennessee, North Carolina, Georgia, Illinois, New York, Michigan, Florida, Ohio, Virginia, California, Indiana, and New Jersey. (R.pp.356-370).

The court in the Ocean Club case ordered all of the homeowners to give their depositions. (R.pp.328-330). Depositions were taken in Georgia, Florida, North Carolina, and Minnesota. (R.pp.371-473). In addition, several out-of-state depositions were taken via video. (R.pp.474-505).

Respondent's timesheets, which she maintained for her Ocean Club time, reveals travel to Atlanta on September 24, 2007, attendance at various depositions in Atlanta on September 25 and 26, 2007, travel to Sarasota, Florida on November 12, 2007, attendance at depositions in Florida on November 13 and 14, 2007, travel to Charlotte, North Carolina on October 7, 2008, for a meeting and deposition, meetings and depositions in North Carolina on October 8, 2008, travel to Kingsport, Tennessee for a meeting and depositions on October 9, 2008, attendance at a deposition in Tennessee on October 10, 2008, travel to Statesboro, North Carolina on January 26, 2009, for depositions in North Carolina, and attendance at depositions on January

27, 2009, and January 28, 2009. (R.pp.317-325).

Respondent claims that she expended "more than 5,100 hours of legal work on the Ocean Club case" and "worked 56% of the attorney hours for the attorneys in the Lucey Firm assigned to the Ocean Club case." (R.p.78, para. 220). All of her claims in this lawsuit arise out of her allegation that she is entitled to bonus money on the Ocean Club case and one other case on which she worked, the Bees Ferry case. The crux of her case involves her claim for the Ocean Club bonus under the Employment Agreement over and above the \$370,000 she has already received as a bonus on that case and the \$60,000 annual salary the Firm paid her.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. BECAUSE THE RELATIONSHIP BETWEEN APPELLANT LAW FIRM AND RESPONDENT INVOLVED INTERSTATE COMMERCE, THE FEDERAL ARBITRATION ACT APPLIES AND THE TRIAL COURT ERRED IN NOT COMPELLING ARBITRATION.

It is well settled that "the policies of the United States and this State *favor arbitration of disputes.*" New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (emphasis added). The South Carolina Supreme Court explained the broad reach of the Federal Arbitration Act ("FAA") in Zabinski v. Bright Acres Associates:

Beginning in the mid 1980s, the United States Supreme Court, interpreting the FAA, essentially "federalized" the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. *The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements.*

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 590–91, 553 S.E.2d 110, 115 (2001) (emphasis added) (footnotes omitted) (citing Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 115 S.Ct. 834 (1995)).

The party opposing arbitration bears the burden of proving why arbitration should not be ordered. See Aronson v. Dean Witter Reynolds, Inc., 675 F. Supp. 1324, 1325 (S.D. Fla. 1987).

Once a valid arbitration agreement has been established, **a presumption attaches favoring arbitration.** [citation omitted]. The burden then shifts to the opposing party to establish that the agreement was procured in an unconscionable manner or induced or procured by fraud or duress; that the other party has waived its right to compel arbitration under the agreement; or that the dispute falls outside the scope of the agreement.

Sec. Serv. Fed. Credit Union v. Sanders, 264 S.W.3d 292, 297 (Tex. App. 2008) (emphasis added).

Under South Carolina law, “unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, *regardless of whether or not* the parties contemplated an interstate transaction.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363 (2001) (emphasis added) (citing Allied-Bruce, 115 S.Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996)).

1. Interstate Commerce Is Broadly Construed For Purposes of the FAA.

The United States Supreme Court has given broad interpretation to the definition of ‘interstate commerce,’ as used in section 2 of the FAA.” Sutton v. Hollywood Entm’t Corp., 181 F. Supp. 2d 504, 509 n.2 (D. Md. 2002).

An illustrate explanation of how far-reaching interstate commerce can be is as follows:

Generally, the distinguishing feature and indispensable element of interstate commerce is importation into one state from another. However, interstate commerce **is not necessarily confined to transportation among the states**; rather, the term may include any commercial intercourse between states and their component parts. **It may embrace purely social intercourse between citizens of different states, such as telephone conversations or travel from one state to another.** Even local matters may amount to interstate commerce if they commence a chain of movement which culminates across state lines. . . . Since the Commerce Clause contemplates transactions between citizens of different sovereign states, it does not apply to the transportation of goods from a point within a state to property of the United States within that state.

15A AM. JUR. 2D Commerce § 4 (May 2009) (emphasis added) (internal footnotes omitted). Further:

The terms 'commerce' 'interstate commerce' and 'commerce among the states' or 'commerce among the several states' embrace business or commercial intercourse **in any and all of its forms and branches and in all its component parts between citizens of different states**, and may embrace purely social intercourse between citizens of different states, **as over the telephone, telegraph, or radio**, or the mere passage of persons from one state to another for social intercourse or pleasure. Indeed, commerce is said to include not only the fact of intercourse and traffic but also the subject matter thereof, which may be either things, goods, chattels, merchandise, or persons.

Nuckols v. Athey, 138 S.E.2d 344, 348 (W.Va. 1964) (emphasis added).

The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002); Zabinski, 346 S.C. at 591, 553 S.E.2d at 115. As the United States Supreme Court has explained:

We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. . . . Because the statute provides for 'the enforcement of arbitration agreements within the full reach of the Commerce Clause,' . . . it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'-that is, 'within the flow of interstate commerce,' . . ."

Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003). The variety of manners in which one can demonstrate interstate commerce for purposes of whether the FAA is applicable has been discussed as follows:

The FAA applies when a contract relates to interstate commerce. [citation omitted]. The FAA *does not require* a substantial effect on interstate commerce, and interstate commerce *can be demonstrated in a variety of ways*, including headquarters located in another state, transportation of material across state lines, or *interstate mail or telephone calls*. [citation omitted]. The relationship between an employer who is regularly engaged in activities involving interstate commerce and its employee relates to interstate commerce.

Nabors Drilling USA, LP v. Carpenter, 198 S.W.3d 240, 245 (Tex. App. 2006) (emphasis added). See e.g., In re Sacred Heart Hosp. of Norristown, 200 B.R. 826, 831 (Bankr. E.D. Pa. 1996) ("The FAA would apply if the subject matter of the dispute were found by the arbitrators to have had ***even the slightest, tangential nexus with interstate commerce.***") (emphasis added); Southwind Group, Inc. v. Landwehr, 188 S.W.3d 730, 734-35 (Tex. App. 2006) ("The FAA extends to any contract affecting interstate commerce as far as the Commerce Clause of the United States Constitution [footnote omitted] will reach. [citation omitted]. ***The FAA does not require a substantial effect on interstate commerce; it requires only that commerce be involved or affected.*** [citation omitted] (emphasis added); Crawford v. West Jersey Health Sys. (Voorhees Div.), 847 F. Supp. 1232, 1240 (D.N.J. 1994) ("For the FAA to apply, the district court must find

that the contract containing the arbitration provision 'evidenc[es] a transaction involving commerce.' . . . ***This is not a rigorous inquiry***; in fact, the contract 'need have ***only the slightest nexus with interstate commerce.***'")

The Crawford case essentially dealt with a physician and her former employer and explained:

[T]he Supreme Court has indicated that Section 3's requirements are met where contractual activity facilitates or affects commerce, even tangentially. . . Defendants . . . treat patients who live and work in Pennsylvania. . . Medical costs for many of these patients are paid through out-of-state or multi-state insurance carriers. . . Defendants advertise regularly in out-of-state newspapers. . . [and] receive goods and services from numerous out-of-state vendors, including Hartford Life and Accident (Boston, Mass.), Ohio Psychology Publishing, and Weyman Advertising (New York). . . ***Because [Plaintiff's] employment facilitated defendants' interstate business activities, the court finds that her employment agreement 'evidences a transaction involving commerce.'***

Id. at 1240 (emphasis added).

2. The Employment Agreement and the Surrounding Facts and Circumstances Involve or Affect Interstate Commerce.

The issue in determining if the FAA applies is whether the Employment Agreement and the surrounding facts and circumstances pertain to a transaction involving or affecting interstate commerce. See New Hope Missionary, 379 S.C. at 626–27, 667 S.E.2d at 4 ("As a preliminary note, we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . ."); see also Munoz, 343 S.C. at 538, 542 S.E.2d at 363. To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and

the surrounding facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117; Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) ("In all cases, determination of whether a transaction involves interstate commerce depends on the *facts of the case*.") (emphasis added).

It is immaterial whether the parties contemplated interstate commerce when the Employment Agreement was entered. In formulating the question to be asked by courts when considering the application of the FAA, the United States Supreme Court rejected the "contemplation of the parties" test (i.e., whether the parties contemplated interstate commerce) applied by the Supreme Court of Alabama, reasoning that Congress would not have intended a "test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid[.]" Allied-Bruce, 513 U.S. at 278, 115 S.Ct. at 841, 130 L.Ed.2d 753 (internal citations omitted). Thus, the Court is to review the contract and the transaction of the parties without consideration of whether the parties ever "contemplated" an interstate transaction upon entering the contract. See Munoz, 343 S.C. at 538, 542 S.E.2d at 363 (citing Allied-Bruce, 513 U.S. 265).

This Court addressed the issue of whether the FAA applied in the case of Towles v. United Healthcare Corporation, and held that, because interstate commerce was involved, the FAA did apply and displaced South Carolina's Uniform Arbitration Act. Towles, 338 SC 29, 524 S.E.2d 839 (Ct. App. 1999). Towles worked as a medical director for United Healthcare and had signed an employee handbook acknowledgement that contained an arbitration clause. Towles responsibilities included the following:

helping to establish medical policy, overseeing utilization review and quality management for plan participants, attending out of state conferences, participating in telephone conferences with United's corporate medical affairs staff in Minnesota, and reviewing claims from out of state providers and specialty providers located in North Carolina and Georgia. Towles participated in sales presentations in South Carolina and Georgia and worked with officials from national companies in resolving questions of utilization review and medical necessity for PHP participants. Towles also reviewed proposals from out-of-state medical and ancillary service providers.

Id. at 36; 524 S.E.2d at 843. This Court found that these activities provided sufficient evidence of interstate commerce. Id.

In Zabinski, the South Carolina Supreme Court examined whether a South Carolina partnership, created for the purpose of renovating and selling thirty apartments and twenty-six acres on Hilton Head Island was involved in interstate commerce such that the FAA would apply to the arbitration provision in the partnership agreement. The court found that the partnership was in fact involved in interstate commerce:

The heart of the transaction in this case is the sale and development of real property on Hilton Head Island. Bright Acres is a South Carolina partnership with its principal place of business on Hilton Head Island. The only property owned by the partnership is located on Hilton Head Island. The development of land within South Carolina's borders is the quintessential example of a purely intrastate activity. However, the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors and investors.

Zabinski, 346 S.C. at 595, 553 S.E. 2d at 117-18.

In Thornton v. Trident Medical Center, this Court held that the recruiting agreement between the physician and the medical center, which contained an arbitration clause, involved interstate commerce and, thus, was subject to the FAA. Thornton, 357 S.C. at 95-96, 592 S.E.2d at 52. In New Hope Missionary

Baptist Church v. Paragon Builders, this Court held that the FAA applied to the arbitration agreement between the builder and the church. New Hope Missionary, 379 S.C. at 630, 667 S.E.2d at 6.

Illustrative of one federal district court that has explored whether a law firm is engaged in business that affects interstate commerce is Equal Employment Opportunity Commission v. Rinella and Rinella, 401 F. Supp. 175, 181-82 (N.D. Ill. 1975):

The defendants contend that they are not engaged in an industry affecting interstate commerce due to the local nature of their business which involves predominately divorce litigation. [footnote omitted] ***Few cases have dealt with whether the practice of law affects commerce.*** Of particular note is the National Labor Relations Board's decision in *Evans and Kunz, Ltd.*, 194 NLRB 1216 (1972), involving unfair labor charges levied against a small Phoenix law firm which confines most, if not all, of its activities to the practice of law solely within the state of Arizona. In that case, the Board upheld the Trial Examiner's decision that the firm was engaged in operations affecting commerce within the meaning of the National Labor Relations Act, 29 U.S.C. § 151 et seq. wherein 'affecting commerce' is similarly defined.

* * * * *

A similar result may be inferred from the case of *Kohn v. Royall, Koegel & Wells*,...where the court, sub silentio, assumed jurisdiction over charges of sex discrimination brought under Title VII against a New York law firm. Consistent with these holdings, and in keeping with the general principle that remedial legislation such as Title VII should be liberally construed for jurisdictional purposes, we find that the dynamics inherent in a general law practice necessarily affects interstate commerce. This is especially so in light of the cases interpreting the interstate commerce requirements of the Civil Rights Act of 1964, most notably, *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964), which held that Ollie's Barbeque, a family owned restaurant catering only to local trade, was within the definition of commerce contained in Title II of the Civil Rights Act of 1964.

The incidents of interstate commerce are far more apparent in the instant case than they were in *Katzenbach v. McClung* and many of its progeny. Notwithstanding the defendants' divorce orientation, they admit that their practice encompasses other types of business, i.e., corporate, probate and real estate. ***They further admit that various attorneys travel out of state on firm business.*** Samuel Rinella, for instance, travelled to London,

England and to Arizona, and Richard Rinella travelled to Washington, D.C. ***The firm's long distance phone bill in calendar year 1974 was \$1,277.01; its out-of-state travel expenses amounted to approximately \$2,000 for the same year. The firm also purchased both office intercommunication equipment from an out-of-state company for \$8,400, and law and reference books from out-of-state publishers billed at approximately \$2,500. These various factors establish that Rinella & Rinella indeed affects interstate commerce and, accordingly, is subject to the proscriptions of Title VII.***

Id. at 181-82 (emphasis added).

In the case at hand there are clearly sufficient facts demonstrating that the relationship between Respondent and Appellant Firm involves/affects interstate commerce. In connection with her work on various cases, including those specifically identified in the Employment Agreement, such as Harper, Turner, and Shoshan, Respondent engaged in telephone conversations that crossed state lines, sent e-mails and faxes that crossed state lines and performed Westlaw research across state lines (R.pp.558-566).

In her counterclaims, Respondent alleges that she is due additional bonus compensation under the Employment Agreement pertaining to her work on the Ocean Club case, a large case involving a suit filed by the Firm on behalf of homeowners from several different states against defendants from various states, represented by insurance companies from dozens of states. (R.pp.49-84).

The Firm's clients in the Ocean Club case included homeowners located in various states, including South Carolina, Tennessee, North Carolina, Georgia, Illinois, New York, Michigan, Florida, Ohio, Virginia, California, Indiana, and New Jersey. (R.pp.328-330; R.pp.356-370). The Ocean Club case involved regular communication with the clients located in other states, as well as travel to other states. Respondent's summary of the travel in the Ocean Club case, which she

prepared for Lucey on February 2, 2009, states as follows: "...the below is general summary of some of the travel that my office has done during this case to date:

During 2007, my office incurred travel expenses to Charlotte, NC for the Bonsal Corporate deposition; to Columbia for three McCrory depositions (Tharp, Royster, Marshall Clark Architect); to Atlanta for several Kawneer depositions; and, to Sarasota, FL to take the depositions of Valcourt and Spectech employees. During 2008, my office incurred travel expenses to travel to Columbia for roofer and McCrory depositions. Additionally, as you are aware, the Court ordered the owner depositions to be taken in Fall 2008; my office incurred travel expenses to meet with the homeowners and attend their depositions in Columbia, Greenville, Asheville, Atlanta, New Jersey, Washington, D.C., Knoxville and Kingsport. We also had travel to Charlotte for roofer depositions. Finally, in Fall 2008, I incurred travel expenses to meet with our national concrete expert, Peter Emmons, in Baltimore.

We also had various documents inspections in Columbia and Charlotte that have necessitated travel.

(R.pp.326-327). Much of this travel was performed by Respondent.

The case also involved numerous insurance companies located throughout the country. (R.pp.343-347; R.pp.345-355; R.pp.506-512). The court in the Ocean Club case ordered all of the homeowners to give their depositions. (R.pp.328-330). Homeowner depositions were taken in Georgia, Florida, North Carolina, and Minnesota. (R.pp.371-473). In addition, several out-of-state depositions were taken via video. (R.pp.474-505).

Respondent's timesheets, which she maintained for the Ocean Club case, reveals travel to Atlanta on September 24, 2007, attendance at various depositions in Atlanta on September 25 and 26, 2007, travel to Sarasota, Florida on November 12, 2007, attendance at depositions in Florida on November 13 and 14, 2007, travel to Charlotte, North Carolina on October 7, 2008, for a meeting and deposition, meetings and depositions in North Carolina on October 8, 2008,

travel to Kingsport, Tennessee for a meeting and depositions on October 9, 2008, attendance at a deposition in Tennessee on October 10, 2008, travel to Statesboro, North Carolina on January 26, 2009, for depositions in North Carolina, and attendance at depositions on January 27, 2009, and January 28, 2009. (R.pp.317-325).

The time she spent traveling out-of-state on the Ocean Club case was at least 12 days and does not include the numerous conversations she had with out-of-state witnesses, attorneys and, most importantly, meetings with homeowner clients in preparation for these depositions and in connection with various other aspects of the case, including a trip by Respondent to Tennessee for a homeowner deposition preparation conference.

By its nature, the Ocean Club case clearly involved interstate commerce, as did the work Respondent was performing for other clients. As a result, Respondent's claims under the Employment Agreement, that she was entitled to bonuses for the Ocean Club case and other cases, necessarily implicate interstate commerce.

Respondent argued before the Trial Court that most of *her* activities occurred within the state of South Carolina and only minimal activities were outside the state. (*Def.'s Brief.*, p. 4). She claims that she spent only six days in out-of-state depositions, with minimal travel costs and that *if* video depositions¹ had been taken or *if* Lucey had compelled witnesses to appear in state, this travel would not have been necessary. (*Def.'s Brief.*, p. 6-7). Although it is clear from the

¹ Her reliance on this argument is misplaced. The video depositions taken of out of state witnesses used interstate phone lines and out of state video rooms and constitute interstate commerce.

timesheets she created and submitted that she spent many more than six days in out-of-state depositions, the issue before the court is not how many days Respondent spent physically outside of the state, nor does it matter that things *might have or could have* been handled without her having to go out of state. (R.pp.317-325).

The Trial Court's decision that the FAA does not apply is misplaced and simply does not apply the legal reasoning of our appellate courts in the cases in which the courts address the issue of interstate commerce and the application of the FAA.

3. The Arbitration Agreement is a Binding and Enforceable Agreement Freely Entered Into By the Parties.

In evaluating the enforceability of an arbitration provision, the court is to apply "general contract principles of state law." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007); Munoz, 343 S.C. at 539, 542 S.E.2d at 364 (citing Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902; Allied-Bruce, 513 U.S. at 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). One such contract principle is that "a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (citing Hood v. Life & Cas. Ins. Co. of Tenn., 173 S.C. 139, 175 S.E. 76 (1934)). Like other contracts, arbitration agreements are enforceable in accordance with their terms. See id. at 539, 542 S.E.2d at 364 (citing Volt Info. Scis., Inc. v. Board of Trs., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)).

Having before it evidence of an agreement, freely entered by the parties, and a relationship that affected interstate commerce, the Trial Court should have compelled arbitration in accordance with the terms of the Employment Agreement.

The arbitration clause in the Employment Agreement provides as follows:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

(R.pp.262-266) (emphasis added). Respondent read and signed the Employment Agreement. She is intimately familiar with the terms of the Employment Agreement, as it forms the basis for her counterclaims. Respondent admits that the Employment Agreement is a binding agreement between the parties upon which she bases her claims. (R.p.50, para. 6). ("Defendant admits so much of Paragraph 6 as alleges Amy Meyer and Justin O'Toole Lucey, P.A. . . . entered into a written contract of employment in June of 2006."); (R.p.56, para. 47) ("Ms. Meyer and Lucey Law Firm entered into a written contract of employment in June of 2006 drafted by Justin Lucey"); (R.p.60, para. 81) ("On May 2, 2007, Ms. Respondent and the Lucey Firm entered into a written agreement"); (R.p.68, para. 140) ("The document executed by Ms. Meyer in June 2006 was a contract between Plaintiff Lucey Firm and Ms. Meyer."); (R.p.68, para. 142) ("The June 2006 Contract was supported by valuable consideration."); (R.p.68, para. 143) ("The May 2007 Ocean Club Agreement was an amendment to the contract between Plaintiff Lucey Firm and Ms. Meyer.").

B. BECAUSE THE ARBITRATION CLAUSE IS NOT PROCEDURALLY OR SUBSTANTIVELY UNCONSCIONABLE, THE TRIAL COURT ERRED IN REFUSING TO ENFORCE IT AND COMPEL ARBITRATION.

The majority of jurisdictions hold that both procedural and substantive unconscionability must be demonstrated in order to negate an arbitration agreement. See, e.g., Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 924 (N.D. 2005) ("We agree with *the majority of courts* which have addressed the issue and hold that a party alleging unconscionability must demonstrate *some quantum of both procedural and substantive unconscionability*, and courts are to balance the various factors, viewed in totality, to determine whether the particular contractual provision is 'so one-sided as to be unconscionable.'") (emphasis added); see also Ramirez-Baker v. Beazer Homes, Inc., 636 F. Supp. 2d 1008, 1024 (E.D. Cal. 2008) ("Both procedural and substantive unconscionability must be present for a court to refuse to enforce an arbitration agreement under the doctrine of unconscionability."); Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362, 369–70 (N.C. 2008) ("... unconscionability is an affirmative defense, and the party asserting it has the burden of proof. . . . A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability.")

This approach appears to be consistent with the definition of unconscionability under South Carolina law. Under South Carolina law, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, *together with* terms that are so *oppressive that no reasonable person would make them and no fair and honest person would accept them.* Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668

(emphasis added). It also appears to be consistent with the factors that are taken into consideration in South Carolina for determining whether an arbitration agreement is unconscionable:

Courts should look at several factors to determine whether there was an absence of meaningful choice, including the nature of the injuries suffered by the plaintiff; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the contract provision; and the conspicuousness of the clause.

Osborne v. Marina Inn at Grande Dunes, LLC, 2009 WL 3152044, at *7 (D.S.C. 2009) (citing Simpson, 373 S.C. at 25, 644 S.E.2d at 669) (unpublished opinion).

The Employment Agreement in the case at hand was freely negotiated, there is insufficient evidence demonstrating any procedural or substantive unconscionability, and the courts should not rewrite binding contracts merely because one party regrets provisions of a contract.

1. The Arbitration Clause is Not Procedurally Unconscionable.

Procedural unconscionability focuses upon formation of the contract and fairness of the bargaining process, including factors such as inequality of bargaining power, oppression, and unfair surprise." Strand, 693 N.W.2d at 924. The Trial Court found that the arbitration clause was unconscionable because the parties were in "vastly unequal bargaining positions." (R.p.11, para 2). The Trial Court stated that Appellant Firm, as employer, "was in a significantly more powerful position as [Respondent] was an associate who had already been working for several months when the employment contract with the arbitration clause was presented to her." (R.p.11, para 2). To the contrary, Respondent failed to demonstrate any procedural unconscionability in the formation of the

arbitration agreement to require the arbitration agreement to be voided and negate the favored policy of enforcing arbitration agreements.

(a) Meaningful Choice

The Trial Court apparently based its decision on Respondent's position that she had been working for the Firm for six months before getting the employment contract and she essentially had to agree to it or else "jeopardize her existing job." (*Def.'s Br.*, p. 7). Respondent suggested that this left her with no meaningful choice because changing "employment at law firms is a more difficult [task] than changing other types of jobs." See *id.* However, Respondent was an at-will employee and could have been terminated at any time. See, e.g., Barron v. Labor Finders of S.C., 384 S.C. 21, 682 S.E.2d 271, 273 (Ct. App. 2009) ("An employee without a contract for a stated period of time is presumptively considered an employee at-will, and employers may terminate such employees at anytime."). If the parties had not reached an agreement as to the terms of her employment, Appellant Firm could have terminated her, just as she could have left Appellant Firm.

Further, even if an arbitration clause is presented in a take-it or leave-it manner (which it was not) that is not sufficient to demonstrate procedural unconscionability. This issue was addressed by the South Carolina Supreme Court in Munoz, where the debtors contended the arbitration clause was unconscionable because it was part of an adhesion contract and they were not advised it was included in the contract. See Munoz, 343 S.C. at 541, 542 S.E.2d at 365. The court addressed the enforcement of an arbitration clause in an adhesion contract stating:

Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Under state law, an adhesion contract is not per se unconscionable. Further, a person who can read is bound to read an agreement before signing it. We find the arbitration clause is not unconscionable as an adhesion contract.

Id. (internal citations omitted). In footnote, the court noted that:

Similarly, federal substantive law under the FAA holds an arbitration clause is not invalid simply because it part of an adhesion contract. And that the rule that a person who can read is bound to read an agreement before signing it is consistent with federal cases holding that arbitration agreements governed by the FAA will not be set aside on the grounds that the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it.

Id. (citations omitted). Therefore, even if the Employment Agreement were an adhesion contract, presented in a take it or leave it fashion, that fact would not make the arbitration provision unenforceable.

However, the Employment Agreement was in no way an adhesion contract. Respondent and Appellant Lucey openly discussed the employment provisions of the Employment Agreement, most of which were in place for her benefit. Never once during these discussions or before signing the Employment Agreement did Respondent request that the arbitration provision be removed or otherwise object to its inclusion.

The 2006 Agreement provided benefits to Respondent *above and beyond* what she was offered when she came to work for Appellant Firm. Specifically, the Agreement increased Respondent's bonus on the Harper case to fifteen percent and, under certain circumstances, to twenty percent. (R.pp.262-264). It added a five percent bonus to the collection matters Respondent was handling "to give [her] some extra bonus money while [she was] building [her] pipeline," and it included a graduated increase in bonus monies for cases in which she shared the

load with Appellant Lucey in preparing for trial. (R.pp.262-264).

Further, the amendment entered into in 2007 Amendment was prepared for the purpose of providing bonus opportunities to Respondent in cases she was not spearheading, namely the Ocean Club case. (R.pp.265-266). The provisions *benefited* Respondent. She negotiated its terms, striking through certain language. (R.p.60, paras. 80-81).

At best, Respondent is declaring that the normal pressures faced by persons seeking employment compelled her to agree to the arbitration clause, which is insufficient for a finding of procedural unconscionability. The United States Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., in which Gilmer was required to sign the registration application as a condition of his employment, reveals that the Supreme Court "obviously contemplated avoidance of the arbitration clause *only upon circumstances substantially more egregious than the ordinary economic pressure faced by every employee who needs the job.*" Young v. Prudential Ins. Co. of America, Inc., 688 A.2d 1069, 1078 (N.J. Super. Ct. App. Div. 1997), citing Gilmer, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

(b) The Parties' Relative Sophistication.

Courts are to take into account the parties' relative sophistication in making a determination as to whether a contract was tainted by an absence of meaningful choice. Simpson, 373 S.C. at 25, 644 S.E.2d at 669.² In this case, it clearly was

² Although the contract between Plaintiff and Defendant is not a traditional "commercial" contract, given the sophistication of the parties involved (as further discussed below), the standard that should be employed in determining whether there was any procedural unconscionability should be the heightened one dealing with commercial entities and not those dealing with consumers. See generally Strand, 693 N.W.2d at 924 ("Courts are

not.

First, Respondent had been licensed as an attorney since November 2002. Second, she was a licensed certified public accountant and practiced public accounting for six years before taking employment as a solicitor with the Solicitor's Office in this circuit. (R.p.55, para. 44). Third, by her own admission, Respondent "specialized" in white collar crime, a complex area of law. (R.p.55, para. 44).

Fourth, Respondent demonstrated her ability to make a risk-based analysis with the terms of the Employment Agreement as a result of some of the negotiated modifications to the Employment Agreement by considering "the opportunity" she was given "to accept a higher fixed income and lower variable income by diversifying her case load in lieu of the Ocean Club case bonus" and then "reject[ing] that option by crossing out the language" in the Employment Agreement. Id.

And, fifth, to the extent that Respondent tries to imply that she was not experienced enough in legal matters to understand, or be able to research any lack of understanding, this is negated by the fact that Respondent appears to declare that her efforts in the another case were critical in its successful outcome. (R.p.57, paras. 54-57). Respondent claims that she "researched and found a key case that supported the position that a property interest exists for the holder of an issued permit, thus triggering the unconstitutional taking for the inverse condemnation claim," that she "argued the case law for the encroachment permit

more likely to find unconscionability in consumer transactions than in contracts arising in purely commercial settings involving experienced parties."); see also In re FirstMerit Bank, N.A., 52 S.W.3d 749, 757 (Tex. 2001) ("In any event, the basic test for unconscionability is whether, given the parties' *general commercial background* and the *commercial needs of the particular trade or case*, the clause involved is so one-sided that it is unconscionable under

property interest issue and other jury charges in front of the court," that the "permit property interest case law that Respondent found through her research and efforts and argued before the court was found as the law of the case for the jury instructions," and that the Bees Ferry case "ended in verdicts in favor of the clients." Id.³

Respondent points out the complexity and novelty of the issues addressed in the case. (R.p.58, para. 61). It is disingenuous for Respondent to emphasize her legal capabilities in connection with complex legal issues and yet to claim that she did not have an understanding of the legal effect of a clearly written arbitration provision.

In addition, in September, October, and December of 2006, months before entering the 2007 Amendment, Respondent performed legal work for Appellant Firm dealing with an arbitration provision, including "arbitration research." (R.pp.544-557).

Based on these facts, it is inconceivable how a seasoned attorney who previously worked in the Solicitor's Office of this circuit, worked on a complex multi-state litigation for Appellant Firm and specifically researched and dealt with an arbitration provision, can state that she had no idea as to the significance of agreeing to the terms of the arbitration agreement. Rather, the only thing that the evidence shows is that Respondent entered into a binding contract and now regrets certain terms to which she reviewed and consented. See, e.g., New England Retail Properties, Inc. v. Maturo, 925 A.2d 1151, 1161 (Conn. App. 2007)

the circumstances existing when the parties made the contract.").

³ Respondent's allegations regarding the work she performed in connection with the Bees Ferry case provide additional proof of interstate commerce in that the research was

("The fact that a party to a contract comes to regret one of its provisions does not render the contract unconscionable.").

(c) The Element of Surprise.

There was no evidence before the Trial Court that Respondent was surprised by the terms of the Employment Agreement compelling arbitration. She was provided the Employment Agreement to review, given an opportunity to inquire into the terms of the Employment Agreement, and then "signed off" on the Employment Agreement. See, e.g., Bank of Indiana, Nat'l Ass'n v. Holyfield, 476 F. Supp. 104, 109 (S.D. Miss. 1979) ("[t]he doctrine of unconscionability was intended to prevent oppression and unfair surprise, and not to relieve a party from the effect of a bad bargain."). In fact, Respondent had not one, but two, opportunities to object to the arbitration clause and did not do so on either occasion. She had no objection at the time she entered into the 2006 Agreement, nor did she have any objection when she executed, after revising, the 2007 Amendment.

(d) The Parties' Bargaining Power.

In support of its finding that the parties were in "vastly unequal bargaining positions," the Trial Court stated that Appellant Firm was in a significantly more powerful position than Respondent and that Respondent was an associate and had been working for several months when the employment agreement was presented to her. (R.p.11, para. 2). While Appellant Firm was the employer and Respondent was the employee, this fact alone does not make an arbitration clause unconscionable, nor does the fact that Appellant had been working for

performed on Westlaw. See argument at Section I., *supra*.

several months when the 2006 Agreement was signed.

Respondent clearly had time to review the Employment Agreement for a day. (R.p.60, paras. 80-81) ("On May 2, 2007, Ms. Meyer and Justin Lucey met as a follow up to the April 27, 2007 meeting. At this meeting, Justin Lucey provided Ms. Meyer with a written agreement that he had drafted for her to review and discuss with him on the following day. On May 2, 2007, Ms. Meyer and the Lucey Firm entered into a written agreement...").

Further, Respondent clearly had an opportunity to, and did, negotiate the terms in the Employment Agreement. (R.p.60, para. 81) ("Ms. Meyer was given the opportunity by Justin Lucey and the Lucey firm to accept a higher fixed income and lower variable income by diversifying her caseload in lieu of an Ocean Club bonus, but Ms. Meyer *rejected that option by crossing out that language* on the May 2007 Ocean Club Agreement. Ms. Meyer also initialed this rejection of that option of changing the ten percent bonus she would receive on the Ocean Club Case on the face of the Ocean Club Agreement.") (emphasis added).

At no point did Respondent argue that there was a *gross inequality* of bargaining power between Plaintiff and herself. See, e.g., Bank of Indiana, 476 F. Supp. at 110 ("[T]he meaningfulness of the choice is negated by a *gross inequality* of bargaining power.") (emphasis added); Cleveland v. Mann, 942 So.2d 108, 115-16 (Miss. 2006) ("Further, [defendant] signed the first page of the agreement and initialed beside each term on the second page, denoting his understanding of the terms. [Defendant's] initials on the second page of the agreement also indicate he was provided an opportunity to inquire about the agreement's terms. Plaintiffs may not escape the agreement by simply stating Mann did not read the

agreement or have it read to him or understand its terms."); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) ("A bargain is not unconscionable *merely because the parties to it are unequal in bargaining position*, nor even because the inequality results in an allocation of risks to the weaker party. But *gross inequality of bargaining power*, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.") (emphasis added).

The Employment Agreement consisted of terms that were primarily for Respondent's benefit. The entire purpose of the 2007 Amendment, which forms the basis of Respondent's counter-claims, was to describe in writing the manner in which Respondent could obtain a bonus on cases she was not spearheading. This amendment was created for the purpose of giving her something that she was not already entitled to. It was both parties' intention that she would (and in fact she did) benefit from the provisions in both the 2006 Agreement and the 2007 Amendment.

2. The Arbitration Agreement is Not Substantively Unconscionable.

Substantive unconscionability refers to the undue harshness in the contract terms themselves. See Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 95 (Mo. App. 2008). In Gilmer v. Interstate/Johnson Lane Corp., the United States Supreme Court explained that although procedures in arbitration may not be as extensive as federal courts, agreeing to arbitrate trades such procedures for

simplicity, informality, and expedition of arbitration. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991); see also Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (“[T]he Supreme Court has explained, the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration’s ability to offer simplicity, informality, and expedition,” . . .”).

The Trial Court held that the arbitration clause is void as against public policy because it “required the preclusion of calling any witnesses” in violation of “Rule 43, which states the oral testimony of witnesses ‘shall be taken orally in open court’ in order to determine the competency of witnesses”). (Order, p. 8). However, this holding is in error because the limitation on both parties’ ability to call witnesses does not make the arbitration clause unconscionable.

Arbitration agreements that have limited the litigation procedures normally available in court have been upheld and enforced by the courts. See generally In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 286 (4th Cir. 2007) (Traxler, J.) (“While discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the ‘procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration’ that is inherent in every agreement to arbitrate. [citation omitted]. Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement.”); Gilmer, 500 U.S. at 31 (explaining that although procedures in arbitration may not be as extensive as federal courts, agreeing to arbitrate trades such procedures for simplicity, informality, and expedition of arbitration);

Fernandez v. Clear Channel Broad., Inc., 268 F. Supp. 2d 1365, 1368 (S.D. Fla. 2003) (enforcing arbitration agreement limiting depositions to three per side and permitting additional depositions upon showing of "good cause").

The limitations in the Employment Agreement, which apply to both Appellant Firm and Respondent, do not even go this far. Instead, both Appellant Firm and Respondent have an equal opportunity to develop their respective positions, obtain depositions for publication with relevant testimony, obtain documents needed for the arbitration hearing, and have the opportunity (via depositions) to impeach witnesses as needed. See generally In re Fleetwood Homes of Tex., L.P., 257 S.W.3d 692, 695 (Tex. 2008) ("We hold that arbitration's limits on discovery for *both* parties does not make it unconscionable."); Wilks v. Pep Boys, 241 F. Supp. 2d 860, 864–65 (M.D. Tenn. 2003) (enforcing arbitration agreement limiting depositions to one per side and allowing for additional discovery as ordered by arbitrator). The only apparent limitation being made by the arbitration provision in the Employment Agreement is in the manner of presentment of one's case, not in the evidence and testimony to provide. This limitation does not result in the arbitration provision being substantively unconscionable.

C. EVEN IF THE PROVISION LIMITING LIVE WITNESSES IS SUBSTANTIVELY UNCONSCIONABLE, THE TRIAL COURT SHOULD HAVE SEVERED THAT PORTION OF THE ARBITRATION CLAUSE AND COMPELLED ARBITRATION.

Assuming *arguendo* that the arbitration provision's limitations on trial witnesses is substantively unconscionable, this does not make the entire arbitration provision so permeated with unconscionability to justify not severing

this provision. Under South Carolina law, “[i]f a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result.” Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668.

In determining whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.” 17A AM. JUR. 2D Contracts § 278 (May 2009). “If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.” RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). “The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.” RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981). “Where a term rather than the entire contract is unconscionable, the appropriate remedy is ordinarily to deny effect to the unconscionable term.” RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. g (1981).

In Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham, the court affirmed the severance of the limitation of liability provision in the arbitration clause so as to enforce the *remainder* of the arbitration provision. Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham, 953 So.2d 574, 579 (Fla. Dist. Ct. App. 2007). See, e.g., Dotson v. Amgen, Inc., No. B212965, 2010 WL 189653, at *6

(Cal. Ct. App. Jan. 21, 2010) ("Even if we assume the discovery provision to be unconscionable, which we do not, the trial court abused its discretion by refusing to sever it. Where, as here, only one provision of the agreement is found to be unconscionable and that provision can easily be severed without affecting the remainder of the agreement, the proper course is to do so.").

The limitation on witnesses is the only basis for the Trial Court's conclusion that the actual wording of the arbitration provision is void.⁴ If this Court deems that this aspect of the arbitration provision makes it unconscionable, which Appellants do not believe is the case, this Court should still enforce the arbitration provision by merely severing this one part of the arbitration provision and keeping the remaining portions.

D. THE SOUTH CAROLINA ARBITRATION ACT IS NOT APPLICABLE TO THE CONTRACT BETWEEN THE PARTIES, AND THE TRIAL COURT ERRED IN SO APPLYING IT.

1. The Federal Arbitration Act Preempts State Law.

The Trial Court held that the arbitration clause does not meet the requirements of the South Carolina Uniform Arbitration Act ("SCUAA"), specifically, S.C. Code §15-48-10(a) which requires that a specific notice appear on the first page of the agreement. However, because the FAA applies, it preempts the SCUAA, and the Employment Agreement need not meet the requirements of the state statute. Where a transaction involves interstate commerce, "the FAA trumps state common-law." Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 636, 239 S.E.2d 647, 649 (1977). In Soil Remediation Co.

⁴ It is worth noting that Appellants filed the pending arbitration proceeding under the NAM Employment Rules and Procedures, which do not have any limitation on the number of live witnesses who can testify at the arbitration hearing. (R.pp.513-527; R.pp.528-530).

v. Nu-Way Environmental, Inc., the South Carolina Supreme Court, relying on a United States Supreme Court decision, held that because section 15-48-10(a) singles out arbitration agreements, it directly conflicts with Section 2 of the FAA. Soil Remediation, 323 S.C. at 459, 476 S.E.2d at 151 (citing Doctor's Assocs., 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed. 2d 902). The Court held that the FAA preempted section 15-48-10(a). See id. at 152; see also Munoz, 343 S.C. at 539, 542 S.E. 2d at 363 n.2.

The South Carolina Supreme Court further discussed this issue in Zabinski, stating that "while the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." Zabinski, 346 S.C. at 591-92, 553 S.E.2d at 116 (citing Volt Info. Scis., 489 U.S. 468, 109 S.Ct. 1248). Even generic choice of law provisions cannot be used to incorporate into an arbitration agreement a state law which would be preempted by the FAA. See id. While courts can invalidate arbitration provisions on general contract defenses, they may not invalidate arbitration agreements under state laws applicable *only* to arbitration provisions. See id. (citing Doctor's Assocs., 517 U.S. 681, 116 S.Ct. 1652).

Therefore, based on the clear precedent of the United States Supreme Court, as outlined in several South Carolina appellate court cases, the requirements of the SCUAA, including the requirement that a notice clause must appear on the first page of the contract, do not apply. See S.C. Code Ann. § 15-48-10(a).

2. The SCUAA Does Not Apply to an Agreement Between an Employer and an Employee Unless the Agreement Provides That it Shall Apply.

In addition to the FAA's preemption of the SCUAA, the statute itself provides that it does not apply to arbitration agreements between employers and employees unless the agreement states that the SCUAA shall apply:

- (b) This chapter however shall not apply to: . . .
- (2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply

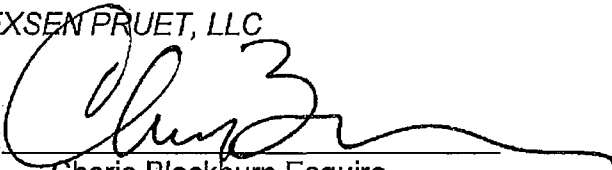
S.C. Code Ann. § 15-48-10(b)(2). Therefore, the Trial Court erred in holding that the Employment Agreement was subject to the provisions in the SCUAA and that it was unenforceable due to its failure to contain the notice provision required by §15-48-10(a).

V. CONCLUSION

The Trial Court erred in its decision not to compel arbitration. The FAA applies to the Employment Agreement because the Agreement and relationship between the parties involved interstate commerce. There is no evidence that the arbitration clause in the Employment Agreement is procedurally or substantively unconscionable and, therefore, the Trial Court should have enforced the binding agreement freely negotiated and entered into between the parties and compelled arbitration of all of Respondent's claims. Even if the limitation of live witnesses in the arbitration provision made it unconscionable, the Trial Court should have severed that portion of the provision and enforced the remainder of the arbitration clause. Further, the Trial Court's application of the SCUAA to the Employment Agreement and its finding that the Agreement did not comply with the notice provisions of the SCUAA is in error because the SCUAA does not apply to employment agreements between employer and employees unless the agreement so states and the FAA preempts the SCUAA in this case.

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January 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

RULE 211 (B), SCACR,
CERTIFICATE OF COUNSEL

I, Cherie Blackburn, Esquire, hereby certify that the **FINAL BRIEF**
submitted by the Appellants, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A.,
complies with Rule 211(b), SCACR.

Signed:



Cherie Blackburn, Esquire

Charleston, South Carolina

January 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
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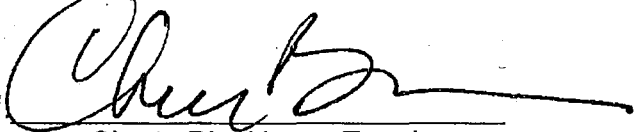
And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

CERTIFICATE OF COUNSEL
COMPLIANCE WITH AUGUST 13, 2007
SUPREME COURT ORDER

I, Cherie Blackburn, Esquire, hereby certify that this the **FINAL BRIEF** submitted by the Appellants, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A., complies with the Supreme Court's Order dated August 13, 2007, concerning the redaction of personal identifiers and other sensitive information.

Signed



Cherie Blackburn, Esquire

Charleston, South Carolina

January 4, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A., ... Appellants,

v.

Amy Meyer, ... Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance, ... Third Party Defendants.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities	ii
I. Statement of Issues on Appeal	1
II. Statement of the Case	1
III. Facts	4
IV. Arguments	7
A. Appellants' Notice of Appeal was untimely so this Court has no jurisdiction of this matter	7
B. Even if this Court finds that a Rule 59(a) Motion is a proper method for a Circuit Court to analyze its decision to deny a Motion to Compel Arbitration, the Circuit Court's denial of Appellants' Motion should be affirmed because Appellants failed to meet their burden under Rule 59(a) and, in the alternative, failed to file a Rule 59(e) Motion.....	12
C. Regardless of the type of Rule 59 Motion this Court finds Appellants filed, Appellants can only raise issues on appeal that were ruled on in the January 2010 Arbitration Order or raised in Appellants' February Motion because no other issues were properly preserved for this Court's review.....	18
1. Severance of the "no live witnesses" portion of the arbitration clause was never raised in Appellants' written Motion to Compel or at the December 10, 2009 Hearing and is, therefore, not preserved for review and barred	22
2. Substantive and procedural unconscionability were never raised in Appellants' written Motion to Compel or at the December 10, 2009 Hearing, were not preserved for review, and are, therefore, barred on appeal.....	24
D. Notwithstanding the Rule 59 issues, the Circuit Court's holding that the arbitration clause is void on equitable grounds should be affirmed because the clause is unconscionable as it contains oppressive terms, violates public policy, and there was a lack of a meaningful choice when it was presented.....	26
1. The factual findings in the Circuit Court's Arbitration Order are supported by evidence, and the Order contains no errors of law	27
2. The arbitration clause is unconscionable because it contains oppressive terms	28
3. The arbitration clause is unconscionable because it violates public policy..	29
4. The arbitration clause is unconscionable because Respondent lacked a meaningful choice in entering into the arbitration agreement.....	32
E. The Circuit Court's holding that the Federal Arbitration Act is inapplicable should be affirmed because the Circuit Court found the arbitration clause is void on	

equitable grounds or, in the alternative, because interstate commerce was not involved in the transaction between the parties	35
F. This Court should affirm the Circuit Court's holding that the South Carolina Uniform Arbitration Agreement does not apply to the agreement at issue	42

V. Conclusion	44
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TABLE OF AUTHORITIES

CASES

<u>Armstrong v. Manzo</u> , 380 U.S. 545 (1965)	30
<u>Arnold v. State</u> , 309 S.C. 157, 420 S.E.2d 834 (1992)	21
<u>Blejski v. Blejski</u> , 325 S.C. 491, 480 S.E.2d 462 (Ct. App. 1997)	10, 13, 14, 16
<u>Brown v. Singletary</u> , 226 S.C. 482, 85 S.E.2d 738 (1955)	22
<u>Budinich v. Becton Dickinson and Co.</u> , 486 U.S. 196 (1988)	21
<u>Carlson v. Gen. Motors Corp.</u> , 883 F.2d 287 (4th Cir. 1989)	32
<u>Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.</u> , 361 S.C. 544, 606 S.E.2d 752 (2004)	30
<u>Chastain v. Hiltabidle</u> , 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009)	17
<u>Clear Channel Outdoor v. City of Myrtle Beach</u> , 372 S.C. 230, 642 S.E.2d 565 (2007)	30
<u>Crawford v. West Jersey Health Sys.</u> , 847 F.Supp. 1232 (D.N.J. 1994)	36, 38
<u>Dismuke v. S.C. Dept. of Motor Vehicles</u> , 371 S.C. 418, 639 S.E.2d 151 (Ct. App. 2006)	20
<u>Dixon v. Dixon</u> , 362 S.C. 388, 608 S.E.2d 849, (2005)	21
<u>Eaddy v. Oliver</u> , 345 S.C. 39, 545 S.E.2d 830 (Ct. App. 2001)	21
<u>EEOC v. Rinella and Rinella</u> , 401 F.Supp. 175 (N.D. Ill. 1975)	37
<u>Elam v. South Carolina Dep't of Transp.</u> , 361 S.C. 9, 24 S.E.2d 772 (2004)	10 21, 25
<u>Fields v. Reg. Med. Ctr.</u> , 363 S.C. 19, 609 S.E.2d 506 (2005)	9

<u>Fitz v. NCR Corp.</u> , 118 Cal.App. 702 (2004).....	32
<u>Floyd v. Floyd</u> , 365 S.C. 56, 615 S.E.2d 465 (Ct. App. 2005).....	19
<u>Fuentes v. Shevin</u> , 407 U.S. 67 (1972).....	30
<u>Green Tree Fin. Corp. v. Randolph</u> , 531 U.S. 79 (2000).....	31
<u>Harlan v. Satterfield Constr. Co.</u> , 257 S.C. 69, 184 S.E.2d 339 (1971)	12
<u>Herron v. Century BMW</u> , 387 S.C. 525, 693 S.E.2d 394 (2010).....	29, 30, 34
<u>Holler v. Holler</u> , 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005).....	27, 28
<u>Holroyd v. Requa</u> , 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004).....	18
<u>Hooters of Am., Inc. v. Phillips</u> , 173 F.3d 933 (4th Cir. 1990).....	28
<u>In re Sacred Heart Hosp. of Norristown</u> , 200 B.R. 826 (Bankr. E.D. Pa. 1996).....	36
<u>I'on, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	21, 22
<u>Jones v. State Farm Mut. Auto. Ins. Co.</u> , 364 S.C. 222, 612 S.E.2d 719 (Ct. App. 2005)	19
<u>Lackey v. Green Tree Fin. Corp.</u> , 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998)	27 28
<u>Lane v. Gilbert Constr. Co.</u> , 383 S.C. 590, 681 S.E.2d 879 (2009)	13
<u>Mail Source, LLC v. M.A. Bailey & Assoc., Inc.</u> , 356 S.C. 370, 588 S.E.2d 639 (2003)	11
<u>Mathews v. Flour Corp.</u> , 312 S.C. 404, 440 S.E.2d 880 (1994).....	35, 36, 38, 39, 41
<u>Maxwell v. Genez</u> , 356 S.C. 617, 591 S.E.2d 26 (2003).....	8, 9, 19
<u>Mazur v. Ebay, Inc.</u> , No. C 07-03967 MHP, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. March 4, 2008).....	31
<u>Munoz v. Green Tree Fin. Corp.</u> , 343 S.C. 531, 542 S.E.2d 360 (2001)	30, 36, 39
<u>Nabors Drilling USA LP v. Carpenter</u> , 198 S.W.3d 240 (Tex. App. 2006).....	36
<u>Noisette v. Ismail</u> , 304 S.C. 56, 403 S.E.2d 122 (1991).....	19

I. STATEMENT OF ISSUES ON APPEAL

- A. This Appeal Should be Dismissed as Untimely because of Appellants' Failure to File a Proper Motion to Toll the Time for Appeal.
- B. Even if this Appeal is Timely, the Circuit Court's Denial of the Appellant's Motion Should be Affirmed because Appellants Failed to Meet their Burden Under Rule 59(a) and Failed to File a Rule 59(e) Motion.
- C. Even if this Appeal is Timely, Appellants are Barred from Raising Issues on Appeal that were not Ruled on in the Arbitration Order or Raised in Appellants' Motion.
- D. Even if this Appeal is Timely, the Circuit Court's Denial of the Motion to Compel Arbitration Should be Affirmed because the Arbitration Clause is Void on Equitable Grounds.
- E. In the Alternative, Even if this Appeal is Timely and Even if this Court Finds the Court Erred in Finding the Arbitration Clause to be Void on Equitable Grounds, the Circuit Court's Denial of the Motion to Compel Arbitration Should be Affirmed because the Federal Arbitration Act Does Not Apply to the Transaction Between the Parties because the Transaction Did Not Involve Interstate Commerce.
- F. Even if this Appeal is Timely, the Circuit Court's Denial of the Motion to Compel Arbitration Should be Affirmed because the South Carolina Uniform Arbitration Agreement Does Not Apply to the Transaction Between the Parties.

II. STATEMENT OF THE CASE

On November 2, 2009, Appellants instituted the underlying lawsuit by filing a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction and to Compel Arbitration.¹ (R. pp. 19-36.) Of the 29 paragraphs in the Motion to Compel, only three addressed the legal arguments and bases for requesting that arbitration be compelled: 1) S.C. Ann. Code § 15-48-20 required the Court to order arbitration, 2) arbitration is favored to resolve disputes in South Carolina, and 3) as Respondent was going to bring suit against Appellants, and because Appellants had a written provision for

¹ Appellants' Motion to Compel was part of a 7-page document that also requested a Temporary Restraining Order to prevent Respondent from filing suit against Appellants.

arbitration, Appellants were entitled to arbitration. (R. pp. 35-36.) Appellants never amended their Motion to Compel.

On November 30, 2009, Respondent timely filed an Answer to Appellants' Complaint which included Counterclaims and a Third Party Complaint based on her employment with Appellant Law Firm alleging contract, tort, statutory, and equitable causes of action.² (R. pp. 49-84.) At Appellants' request, an expedited hearing was held on Appellants' Motion to Compel Arbitration on December 10, 2009. (R. pp. 45-48.) At the time of the Hearing, a Motion to Seal the pleadings, filed by Respondent, was pending.³

On December 9, 2009, Appellants filed a Memorandum in Support of their Motion to Compel Arbitration. (R. pp. 85-96.) In response thereto, at the hearing on December 10, 2009, Respondent handed to the Circuit Court Judge, Judge Nicholson, and Appellants' counsel a Brief in Opposition to Appellants' Motion to Compel Arbitration.⁴ (R. p. 191, lines 1-4; pp. 97-105.)

After the December 10, 2009 hearing, Judge Nicholson invited counsel to provide supporting case law, including cases addressing the applicability of the Federal Arbitration Act ("FAA"), to the court. (R. p. 211, lines 10-20.)

On December 16, 2009, Judge Nicholson sent an e-mail to Respondent's counsel,

² Respondent counterclaimed against Appellants for a declaratory judgment, breach of contract, breach of contract accompanied by a fraudulent act, promissory estoppel, violation of the South Carolina Payment of Wages Act, intentional misrepresentation, fraud, constructive fraud, unjust enrichment, and requested the Court impose a constructive trust on certain assets of Plaintiffs. (R. p. 8.)

³ Judge Nicholson granted the Motion to Seal and issued an Order to Seal Pleadings that was filed on December 11, 2009. (R. pp. 1-3.)

⁴ Respondent had only received Appellants' Brief on December 9, 2009, at which time the Motion to Seal was also pending.

with a copy to Appellants' counsel stating, "The court finds that there is no reason for the FAA to apply in this case please send a proposed order regarding this and any other issues you feel appropriate." (R. p. 301.) On December 18, 2009, Respondent's counsel forwarded a proposed order to Judge Nicholson and copied Appellants' counsel. (R. pp. 302-312.) Thereafter, on December 20, 2009, Appellants' counsel requested the proposed order drafted by Respondent's counsel be revised to address two issues, but Appellants did not raise the issue of unconscionability at that time or complain of its inclusion in the proposed order. (R. pp. 313-314.) After the Hearing, Appellants filed their response to Respondent's counterclaims in the form of a Motion to Dismiss, Strike and Make More Definite and Certain on December 30, 2009. (R. pp. 134-135.)

The proposed order denying arbitration was revised to accommodate Appellants' requests of December 20, 2009, signed, and filed on January 25, 2010, nearly five weeks after being submitted to Judge Nicholson. The Arbitration Order held the arbitration clause at issue did not meet the requirements of S.C. Code Ann. § 15-48-10(a); the employment contract did not involve commerce within the meaning of the FAA; the arbitration clause was further void on equitable grounds; and compelling arbitration in real estate development and construction cases under the FAA is distinguishable from compelling arbitration in personal service contracts. (R. pp. 8-12.) The Arbitration Order also granted leave to Appellants to file under seal documentation previously provided to the court. (R. p. 13.) On January 28, 2010, Appellants filed "Documents Filed Under Seal in Support of Plaintiffs' Motion to Compel Arbitration." (R. pp. 315-542.)

On February 2, 2010, Appellants filed a Motion which indicated in its body it was

made pursuant to Rule 59(a). (R. pp. 136-138.)⁵ A hearing was held on Appellants' Motion on March 2, 2010. (R. p. 218, line 1--p. 219, line 21.) At the March Hearing, Appellants presented to the Circuit Court additional documents, in support of their position that interstate commerce was involved and the FAA should apply to the arbitration clause at issue. (R. pp. 544-662.) Additionally, on March 1, 2010, Appellants filed a Memorandum in support of their motion. At the March 2, 2010 Hearing, Respondent's counsel objected, both at the Hearing and in her Memorandum, to Appellants' arguments raised in their March 1, 2010 Memorandum, on the grounds that no Rule 59(e) Motion had been filed so the only issue before the court was Appellants' Rule 59(a) Motion. (R. p. 237, line 12--p. 240, line 3.)⁶ The Circuit Court heard Respondent's objection, but then requested that Respondent respond to the merits of Appellants' arguments. (R. p. 240, lines 1-3.)

On May 4, 2010, the Circuit Court issued a Form 4 Order summarily denying Appellants' Motion. (R. p. 14.) Appellants received the Rule 59 Order on May 14, 2010, and served their Notice of Appeal on June 11, 2010.

III. FACTS

The heart of the employment agreement at issue is the provision of legal services by Respondent, a South Carolina licensed lawyer, to a South Carolina law firm. (R. p.

⁵ In their initial brief filed with this Court on September 29, 2010, Appellants mentioned a "Motion for Reconsideration" but did not identify the Rule under which the Motion was filed. (Appellants' Initial Br. p. 6.) Rule 59(a) was cited in the body of the motion filed with the Circuit Court on February 2, 2010. Clarification as to whether Appellants' Motion was a motion pursuant to Rule 59(a) or 59(e) is relevant and material to this Court's decision on appeal, but Respondent can only refer to this as the "Appellants' Motion," because Appellants have failed to set forth the subsection under which the Motion was filed in their brief.

⁶ Respondent also objected to the introduction of new documents at the March 2, 2010 hearing. (R. p. 259, line 22--p. 260, line 8.)

12.) Respondent's employment contract was a contract between an employer and an employee for legal services to be performed in South Carolina. (R. pp. 5, 185 ¶7, 262-264.) Respondent became employed as an associate attorney by the Appellant Law Firm in January of 2006. (R. p. 5.) Appellant Law Firm does not have offices outside of the State of South Carolina, and Appellant Lucey is the principal attorney in Appellant Law Firm. (R. p. 5.)

Respondent is only licensed to practice law in South Carolina. (R. p. 5.) After Respondent had been employed for several months with Appellant Law Firm, she was presented with a written employment agreement in June 2006 which contained an arbitration clause in the middle of the second page of the agreement in regular type. (R. p. 5.) The arbitration clause precluded the calling of witnesses. (R. p. 5.) In addition to the "no live witness" provision, the arbitration clause required "expedited and abbreviated procedures" which are undefined in the contract. (R. p. 263.) The 2006 employment agreement also sets forth a base salary for Respondent as well as a bonus structure for contingency cases Respondent worked on for Appellant Law Firm. (R. pp. 5, 262-264.) Nothing in the 2006 Employment Contract required Respondent to engage in interstate commerce to complete her job duties. (R. pp. 262-264.)

As of the time Respondent executed the June 2006 employment contract, she had never discussed with Appellant Lucey that arbitration would be used to resolve any issues arising out of her employment with Appellant Law Firm. Further, Respondent believed that if she did not sign the document as presented to her that she would jeopardize her job and the trial bonuses she had already earned. (R. p. 185, ¶¶ 8-10, 13, 15-16; see also R. p. 263-264, under "Subsequent Modifications" referencing eligibility for Cusack trial bonus

and Planters Place.) Although Respondent had practiced criminal law before being hired by Appellant Law Firm, she had no civil trial experience. (R. pp. 187 ¶¶ 20-21, 272.)⁷ Therefore, Appellant paid Respondent a low starting salary which was to increase after she received training. (R. p. 273.)

In May 2007, Appellant Law Firm and Respondent amended their June 2006 employment contract to address Respondent's salary bonus for a complex, multi-family construction defect case filed in Charleston County, South Carolina (referred to at the Hearing by Appellants' counsel and in the Arbitration Order as the "Ocean Club case"). (R. p. 6.) The May 2007 amendment contained no arbitration clause. (R. p. 265.)

The Ocean Club case arose out of a construction project on the Isle of Palms, Charleston County, South Carolina. (R. p. 6.) During the years 2006, 2007, 2008, and 2009, Respondent worked on the Ocean Club case. (R. p. 6.) Appellant Law Firm made intermittent payments toward Respondent's salary bonuses for the Ocean Club case during 2008 and 2009. (R. p. 6.) On July 20, 2009, the Ocean Club case was settled, and on July 22, 2009, Respondent's employment was terminated. (R. p. 7.)

Beginning in August of 2009, Respondent made demands for payment of her salary bonuses due under the employment agreement between Respondent and Appellant Law Firm. (R. p. 7.) Appellants refused to pay Respondent her salary bonuses from the Ocean Club case on the grounds Appellant Lucey had to "spearhead" the Ocean Club

⁷ On October 27, 2009, Appellants filed for arbitration with National Arbitration and Mediation, Inc. ("NAM"); however, no arbitration action is currently pending. (R. pp. 188-189, ¶¶ 25-26). Appellants' attempted filing of arbitration is a red herring on appeal; however, the positions taken by Appellants in their arbitration documents are relevant to this appeal. Although Appellants allege in the Demand for Arbitration that Respondent had practiced law for "approximately five years," Respondent actually had only practiced law since November 2002 (three years before being hired by Appellant Law Firm.) Appellants' statement that Respondent had practiced law for five years is incorrect.

case because it “proved to be beyond [Respondent’s] experience level.”⁸ (R. p. 273 ¶12.)

Further, Appellants stated on the Arbitration Request Form, “Per agreement, the parties [are] the only witnesses called in person at the arbitration hearing.” (R. p. 269.)

Respondent objected to arbitration and the underlying case ensued.

IV. ARGUMENTS⁹

A. Appellants’ Notice of Appeal was untimely so this Court has no jurisdiction of this matter.

Appellants’ Motion, captioned “Plaintiffs’ Notice of Motion and Motion for

⁸ However, Appellants have now stated that Respondent was not required to spearhead the Ocean Club case in their arguments on appeal to support their claim that the arbitration clause is not unconscionable. (See Appellants’ Initial Br. p. 31, claiming the provisions benefited Respondent and spearheading was not required.)

⁹ In addition to the arguments herein, pursuant to Rule 220(c), Respondent respectfully submits there are numerous alternate grounds in the record on appeal, not alleged as error by Appellants, for this Court to affirm the Circuit Court’s holdings, specifically: 1) It is unconscionable to present an arbitration clause to an employee after several months of employment (R. p. 5.); 2) An arbitration clause requiring “expedited abbreviated procedures” is unconscionable (R. pp. 262-264); 3) Compelling arbitration in construction cases is distinguishable from compelling arbitration for personal service contracts (R. p. 12.); 4) Appellants never alleged error in the Circuit Court that the incorrect burden of proof was used by the Circuit Court in determining that the FAA did not apply and have not pointed to anything in the record to support this; 5) If this Court severs the “no live witness” provision and compels arbitration, this Court would have to rewrite the arbitration provision to define “expedited and abbreviated” and grant a remedy not requested or preserved by Appellants in the Circuit Court; 6) Appellants never raised the argument that emails, telephone calls, receipt of faxes, and Westlaw research constituted interstate commerce prior to their February Motion, and previously only argued that Respondent’s travel constituted interstate commerce; 7) in their February Motion, Appellants never raised as error that the Circuit Court failed to rule upon the policy and basic purpose of the FAA; 8) Appellants never raised as error that the Circuit Court applied the wrong burden test in determining whether the FAA applied; 9) Appellants never raised as error that the Circuit Court failed to find that Respondent’s employment facilitated Appellant Law Firm’s business activities in interstate commerce; 10) Appellants never raised in their February Motion that Respondent had, or failed, to meet her burden of proving unconscionability; 11) Appellants never raised or argued the issue that the subject contract was in a commercial setting or subject to a heightened standard when considering unconscionability; and 12) Appellants never raised or argued that gross inequality of bargaining power is the standard by which meaningfulness of choice is determined.

Reconsideration,” was filed on February 2, 2010. The substance of the Motion indicated it was made pursuant to Rule 59(a), SCRCP. Subsection (e) of Rule 59 is not mentioned at all in Appellants’ Motion. Appellants’ Motion contained three grounds: “i) the Court, in determining whether the Federal Arbitration Act applies to this case, incorrectly focused on Defendant Meyer’s activities rather than the activities of the Firm; ii) the Court delegated the ruling on the issue of whether the arbitration clause was unconscionable to Defendant’s counsel (per attached email); and iii) the Court did not recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, especially as between sophisticated parties.”

Rule 59(a) only applies to trials and a Rule 59(a) motion is an insufficient and improper way to request review of a circuit court’s denial of a motion to compel arbitration because the court heard and ruled upon a motion; there was no hearing on the merits. See Rule 59(a), SCRCP. As such, the relief sought by Appellants in their Rule 59(a) Motion at the Circuit Court level, i.e., requesting a rehearing on a motion to compel arbitration, is not proper under Rule 59(a).

In Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003), the South Carolina Supreme Court addressed the interpretation of our rules of civil procedure and held “[i]n interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. If a rule’s language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.” It is, therefore, clear under South Carolina law that the plain language of SCRCP 59(a) means that a Rule 59(a) motion applies to a *trial* or action *tried* without a jury and is not properly expanded to

encompass a motion to compel arbitration.

In addition, the South Carolina District Court recently examined a Rule 59(a) issue similar to the case at bar in Reaves v. City of Mullins and held that because Rule 59(a)(2) only states what types of further action can be taken by a court pursuant to a motion for a new trial “after a nonjury trial,” the Rule did not apply to a case decided on a motion for summary judgment, because “*there was no trial.*” Reaves, No. 4:07-3559-TLW-TER, 2009 U.S. Dist. LEXIS 115757, at *5 (D.S.C. December 11, 2009) (emphasis added). The Reaves court applied reasoning consistent with Maxwell in the specific context of a Rule 59 motion in reaching its decision and looking at the specific language of the Rule. Further, even though the court in Reaves was examining Rule 59 under the federal rules, the language is indistinguishable from SCRCP Rule 59.¹⁰ Therefore, based upon the reasoning set forth in both Maxwell and Reaves, this Court should hold that a SCRCP Rule 59(a) motion is the wrong manner to challenge an Order regarding a motion to compel arbitration.

Though South Carolina has recognized it is appropriate to disregard a defect in the form of a motion and treat it as a Rule 59(e) motion, this relief is only appropriate if the substance of the motion indicates it is a Rule 59(e) motion and the substantial rights of the parties would not be affected by the disregard of the formal defect.¹¹ However, in

¹⁰ Federal Rule 59(a) uses the specific language “after a nonjury trial” and South Carolina Rule 59(a) uses the language “in an action tried without a jury” but the rules are substantially the same. Fed. R. Civ. P. 59(a); Rule 59(a), SCRCP.

¹¹ See e.g., Fields v. Reg. Med. Ctr., 363 S.C. 19, 609 S.E.2d 506 (2005) (treating a motion captioned as a motion for a new trial and brought pursuant to “Rule 59” as a motion pursuant to Rule 59(e) because its substance requested relief pursuant to Rule 59(e)); Standard Fed. Sav. & Loan Ass’n v. Mungo, 306 S.C. 22, 410 S.E.2d 18 (Ct. App. 1991) (explaining that defects which do not affect the substantive rights of parties can be disregarded especially when they lead to the just, speedy, and inexpensive determination

this case, the formal language of the Motion and the substance of the Motion indicate it was brought pursuant to Rule 59(a), not Rule 59(e), and the substantive rights of Respondent would be affected if the Court disregards these defects. As such, Appellants' Motion should not be converted into a Rule 59(e) Motion.

The substance of Appellants' Motion focused upon improper court actions (i.e., an improper delegation issue) and issues not raised in the original Motion Hearing, such as Appellant Law Firm's activities and the sophistication of Respondent. These grounds in support of Appellants' Motion are grounds in the nature of Rule 59(a), both in substance and effect. See Rule 59, SCRPC; Compare Blejski v. Blejski, 325 S.C. 491, 480 S.E.2d 462 (Ct. App. 1997) (A Rule 59(a) motion examines whether duress, improper comments from the court, improper pressure from the party's attorney, or the discovery of new evidence justifies the grant of a new trial) with Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (A Rule 59(e) motion is used to "call the court's attention to a possible misapprehension of an *earlier* argument" or to "revisit a *previously raised* argument") (emphasis added). Further, the substantive rights of Respondent would be affected if the defects in Appellants' Motion are disregarded because Appellants still have not clarified the basis for their Motion and did not cite Rule 59(a) or Rule 59(e) in their initial brief to this Court. Therefore, Respondent is prejudiced because Respondent is now forced to make alternative arguments on appeal because of the lack of clarity as to which Rule governs Appellants' Motion and the defects in the Motion unfairly shift the burden on appeal to Respondent to respond to

of an action). The facts in these cases are distinguishable from the case at hand, because here the substance of Appellants' Motion requests relief pursuant to Rule 59(a), the Respondent would be prejudiced by a conversion of the Motion to a Rule 59(e) Motion, and the defect has already created unjust delay and expenses caused by this appeal.

unclear and undefined issues on appeal.

If this Court holds a Rule 59(a) motion does not apply to a motion to compel arbitration, Appellants' Motion was then improperly before the Court and did not toll the time for appeal from the Arbitration Order. While it is true that "the time for appeal for all parties shall be stayed by a timely motion" under Rule 59, an improper motion under Rule 59 or an improper motion under any other rule cannot stay the time for appeal. Rule 59(f), SCRCP. In examining a motion made pursuant to Rules 52, 59, and 60, our Supreme Court recently held that a motion was improper and did not toll the time for appeal because Rule 52 "simply does not apply," a Rule 59(e) motion was successive, and a Rule 60 motion "did not ask for relief available pursuant to Rule 60." Quality Trailer Prods., Inc. v. CSL Equip. Co., 349 S.C. 216, 219-21, 562 S.E.2d 615, 617-18 (2002). As with the Rule 52 motion examined by the Supreme Court in Quality Trailer Products, the motion filed by Appellants "simply does not apply" to the Circuit Court's denial of Appellants' Motion to Compel Arbitration and, therefore, did not toll the time for appeal. Conversely, Appellants should have filed a Rule 59(e) motion to toll the time for the appeal.¹² As the result of Appellants' failure to file the proper motion, Appellants' entire appeal is untimely because more than 30 days passed between the Circuit Court's January Arbitration Order and Appellants' Notice of Appeal filed on June 11, 2010.

¹² In a similar case addressing issues raised following a Motion to Compel Arbitration, our Supreme Court held that a Rule 59(e) Motion was the proper vehicle to address issues relating to a judgment (rather issues relating to a trial). See Mail Source, LLC v. M. A. Bailey & Assoc., Inc., 356 S.C. 370, 588 S.E.2d 639 (2003).

B. Even if this Court finds that a Rule 59(a) Motion is a proper method for a Circuit Court to analyze its decision to deny a Motion to Compel Arbitration, the Circuit Court's denial of Appellants' Motion should be affirmed because Appellants failed to meet their burden under Rule 59(a) and, in the alternative, failed to file a Rule 59(e) Motion.

As Appellants' Motion was made pursuant to Rule 59(a), both in substance and form, Appellants were required to meet the standards for relief under Rule 59(a), which they did not. Therefore, the Rule 59 Order which denied Appellants' Motion should be affirmed.¹³

Pursuant to Rule 59(a), "A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of this State." Rule 59(a), SCRCP. Here, Appellants failed to present sufficient grounds to justify the grant of a new hearing pursuant to Rule 59(a). Appellants merely utilized the March 2, 2010 Hearing to argue what amounted to a new and full second Motion to Compel Arbitration, and a second "bite at the apple" rather than to present grounds which would justify conducting a new hearing on the Motion to Compel. Appellants argued at the Hearing as if the Circuit Court *had already granted* a new hearing rather than submitting arguments as to *why* a rehearing should be granted in the future, in complete disregard of the intended purpose of Rule 59(a).

Very few cases have examined the grounds by which a trial court should grant a

¹³ Respondent objected to going forward under Rule 59(e) and argued to Judge Nicholson that the Motion before the Court was a Motion under Rule 59(a). (R. p. 237, line 12—p. 240, line 4.) Respondent never acquiesced to proceeding under Rule 59(e). See Harlan v. Satterfield Constr. Co., 257 S.C. 69, 184 S.E.2d 339 (1971) (appeal dismissed when Respondent's counsel made objection and did not acquiesce to motions that were not viable at the time made by Appellant).

new trial in an action tried without a jury.¹⁴ Typically, in deciding a Rule 59(a) motion, a court considers factors such as whether the decision was against the weight of the evidence, whether it was excessive or inadequate, whether there is newly discovered evidence, or whether there was improper conduct by the court or counsel for the parties. See, e.g., Blejski, 325 S.C. 491, 480 S.E.2d 462.

In Blejski, a party filed a motion for a new trial pursuant to Rule 59(a)(2) on the grounds that she was misled by her attorney and was under duress during the trial. Id. The circuit court considered the grounds raised by the moving party, but ultimately granted the new trial for a different reason, specifically that “its own comments concerning the law might have affected [Wife’s] decision regarding the retirement in the agreement.” Id. at 496, 480 S.E.2d at 465. Upon reviewing the circuit court’s grant of a new trial, this Court held that the court’s remarks, alleged attorney pressure and duress were insufficient to support the grant of a new trial in these circumstances. Id. However, this Court in Blejski also noted that a new trial could be granted pursuant to Rule 59(a) on the ground of “the discovery of new evidence after trial.” Id. at 497, 480 S.E.2d at 466. Thus, reasons such as duress, improper comments from the court, improper pressure from a party’s attorney, and newly discovered evidence can be characterized as circumstances affecting a trial that could result in a miscarriage of justice or an unfair trial. Id.

¹⁴ The majority of South Carolina case law addressing the standard by which a new trial should be granted pursuant to Rule 59(a) applies to jury trials. For example, in a jury trial, a new trial can be granted pursuant to the thirteenth juror doctrine Lane v. Gilbert Constr. Co., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009) (quoting Norton v. Norfolk Southern Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). However, this standard appears to be inapplicable to non-jury actions, because in the absence of a jury, the trial judge sits as the jury and has the duty and authority to weigh the evidence and make conclusions of law.

Thus, Blejski suggests that South Carolina courts will review requests for new trials pursuant to Rule 59(a) on appeal for reasons similar to those considered by federal courts; specifically, a new trial in a non-jury action should be granted pursuant to Rule 59(a) if the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice. See United States v. Carolina Eastern Chemical Co., 639 F. Supp. 1420 (D.S.C. 1986) (trial court must set aside a verdict and grant a new trial if the trial somehow was not fair or if "the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice.") Therefore, in the context of Blejski, Appellants' Motion failed under this standard as it did not request any specific relief as required by Rule 7 (b), SCRCPP, only raised three grounds in support of its request for rehearing, and failed to show the Circuit Court's judgment was against the weight of the evidence.

Appellants' first ground for relief in their Motion alleged that the Circuit Court incorrectly focused on Respondent's activities, rather than the activities of Appellant Law Firm. However, Appellants failed to show that this request led to a judgment that was against the weight of the evidence, was based on false evidence, or would result in a miscarriage of justice. As Judge Nicholson explained to Appellants, "My concern was that we were simply looking at a contract between two attorneys here in Charleston, South Carolina, and I did not feel like you could expand it by saying she's working on cases that were involving out of state information or interstate commerce." (R. p. 221, lines 20-25.) The Court did not focus on Respondent's activities but, rather, on the nature of the employment contract between Respondent and Appellant Law Firm. Appellants failed to present any arguments at the Hearing on their Motion to support their contention

that the Court incorrectly focused on Respondent's activities, rather than the activities of Appellant Law Firm. (See R. p. 227, line 10—p. 234, line 18; p. 252, line 1—p. 253, line 5.) As such, this first ground was abandoned, or at the very least, Appellants failed to meet their burden under Rule 59(a).

Appellants' second ground for relief pursuant to Rule 59(a) attempts to argue Judge Nicholson delegated the ruling on the issue of unconscionability to Respondent's counsel, and his action was somehow improper. However, this issue is not preserved for review and, in the alternative, the argument is meritless. This "improper delegation" argument is not preserved for review because Appellants' counsel was aware of Judge Nicholson's request that Respondent's counsel prepare a proposed order, did not contemporaneously object to the request, and even requested the proposed order be changed to address two issues. (R. pp. 302, 313, 314.) Therefore, Appellants waived their objection to the preparation of the Arbitration Order and are barred on appeal from raising this ground.

Further, Appellants abandoned this ground and failed to present any argument on this issue during the Hearing on their Motion and, therefore, waived the issue. (R. p. 221, line 16—p. 223, line 19.) Additionally, even if Appellants had attempted to argue that Judge Nicholson's action was improper, the Circuit Court's denial of the Rule 59(a) Motion should be upheld because the request that a party prepare a proposed order is not improper and does not lead to a miscarriage of justice.¹⁵ Appellants' counsel was copied on all correspondence between the Circuit Court and Respondent's counsel and Judge

¹⁵ Rule 5(b)(3) of the South Carolina Rules of Civil Procedure outlines the service requirements for a proposed order, which implies that a request for a proposed order is a recognized and proper act by a Circuit Court Judge.

Nicholson's request was not a delegation of a ruling, but simply a request for a proposed order.

Finally, the "improper delegation" ground is meritless because here, Judge Nicholson did not issue a final order until approximately five weeks after the receipt of the proposed order, which gave him ample time to consider the issues raised by counsel in their briefs and at oral argument and to determine the applicable facts and controlling law. As such, Appellants have completely failed to present sufficient evidence or arguments to support their claim that they should have been granted a new hearing due to the Circuit Court's request that Respondent's counsel prepare a proposed order.

Appellants' third ground for relief in its Rule 59(a) Motion, specifically that the Circuit Court failed to recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, also fails to meet the standard required for a circuit court to grant a new hearing. Appellants failed to argue or prove that the Circuit Court's ruling on unconscionability was against the weight of the evidence, based on false evidence, or led to a miscarriage of justice, and therefore, failed to meet their burden under South Carolina law. See Blejski, 325 S.C. 491, 480 S.E.2d 462.

Even the cases presented to the Circuit Court after the December Hearing on Appellants' Motion to Compel Arbitration and the exhibits made a part of the record clearly support a finding that the employment agreement at issue was unconscionable.¹⁶ Appellants failed to show the Circuit Court's ruling was against the weight of the evidence and justified a new hearing. Further, Appellants failed to argue that the ruling was based on false evidence or that upholding the ruling would lead to a miscarriage of

¹⁶ See infra, Section D.

justice. As such, Appellants failed to present sufficient grounds to justify the grant of a new hearing pursuant to Rule 59(a) and, therefore, the Circuit Court's Order should be affirmed.

As an alternative to Respondent's argument that Appellants' failed to meet their burden for a new hearing under Rule 59(a), this Court should affirm the Rule 59 Order because Appellants did not bring a motion pursuant to Rule 59(e) or request proper relief pursuant to Rule 59(e).¹⁷ As a result, therefore, the denial of Appellants' Motion was proper and the only issues that could possibly be preserved for this Court's review are the issues decided in the Arbitration Order, and only if this Court finds the appeal was timely.

Respondent anticipates that Appellant may assert a scrivener's error argument in defense of its failure to file a 59(e) motion.¹⁸ However, this error is not the type of mistake for which our courts have granted relief in the past. Our courts have corrected scriveners' errors "when warranted," but the correction of Appellants' possible error is unwarranted here. In Chastain v. Hiltabidle, this Court corrected a scrivener's error when a party mistakenly asked the lower court to reconsider its ruling on a Rule 7(a) argument instead of a Rule 7(b) argument. 381 S.C. 508, 516-17, 673 S.E.2d 826, 830-31 (Ct. App. 2009). The Court held that the correction was warranted because the substance of the

¹⁷ The language in the body of Appellants' Motion cited Rule 59(a) and focused upon improper court actions (i.e., an improper delegation issue) and issues not raised in the original Motion hearing, such as Appellant Law Firm's activities and the sophistication of Respondent, *which in any event could never have been raised in a Rule 59(e) motion for the first time since the issues were not raised in Appellants' written Motion or at the December 10, 2009 Hearing on that Motion.*

¹⁸ Appellants Motion was filed, presumably to draw out Respondent's arguments on appeal before their reply brief is prepared, which action unfairly shifts the burden on appeal to Respondent to respond to unclear and undefined issues on appeal.

argument was based on 7(b), the 7(b) argument had been referenced multiple times during the proceedings, and the 7(a) argument had never been mentioned during the proceedings. *Id.* Additionally, in *Holroyd v. Requa*, this Court affirmed a circuit court's correction of a scrivener's error because the opposing party had not objected when the mistaken party corrected the scrivener's error by amending the complaint and, further, the opposing party acknowledged during trial that the erroneous statement had simply been accidentally copied from the complaint of one of the attorney's other clients. 361 S.C. 43, 60-61, 603 S.E.2d 417, 426 (Ct. App. 2004). *Chastain* and *Holroyd* are different from the facts in the case at bar¹⁹.

It was clear from the substance of Appellants' Motion that Appellants brought their Motion pursuant to Rule 59(a), but now on appeal the issue is unclear. Appellants should not be allowed to change their Motion at the Hearing or on appeal to obtain a more favorable result, especially when they did not move at or after the Hearing to amend their Motion. Additionally, Appellants never asserted a scrivener's error at the Motion Hearing and should be barred from doing so for the first time on appeal, because this argument has not been preserved.

C. Regardless of the type of Rule 59 Motion this Court finds Appellants filed, Appellants can only raise issues on appeal that were ruled on in the January 2010 Arbitration Order or raised in Appellants' February Motion because no other issues were properly preserved for this Court's review.

Issues not raised in Appellants' written Motion are untimely and not preserved for this Court's review. Pursuant to Rule 6 (b), SCRCP, "[t]he time for taking any action

¹⁹ Respondent objected and argued at the March 2, 2010 hearing that a 59(a) motion had been filed, not a Rule 59(e) motion. (R. p. 237, line 12—p. 240, line 3.) Additionally, Appellants never amended their Motion in writing or orally at the Hearing to clarify their Motion was a 59(e) motion as opposed to a 59(a) motion.

under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them.” In interpreting the language of the South Carolina Rules of Civil Procedure, our courts apply “the same rules of construction used to interpret statutes” and enforce the rule’s stated meaning if the “language is plain, unambiguous, and conveys a clear meaning.” Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) (internal citations omitted) Therefore, it is clear that under South Carolina law the plain language of SCRCP 59(e) or 59(a) means that a motion to alter or amend must be served “not later than 10 days after receipt of written notice of the entry of the order.” See SCRCP 59(e), (a). As a result, all new issues attempted to be raised by Appellants in their March 1, 2010 Memorandum and at the March 2, 2010 Hearing are not preserved for appeal.

With respect to Rule 59(e), South Carolina law is clear that if an issue or an argument is not raised in a Rule 59(e) motion, the issue or argument is not preserved for appellate review. See, e.g., Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (holding when the lower court does not explicitly rule on an issue, and the appellant fails to file a Rule 59(e) motion requesting a ruling on that ground, then the issue is not properly before the appellate court and should not be addressed); Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005) (“An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment.”); Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) (“When a trial judge makes a general ruling on an issue, but does not address a specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to

Rule 59(e), SCRCF, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal.”); and Dismuke v. S.C. Dept. of Motor Vehicles, 371 S.C. 418, 419 n.1, 639 S.E.2d 151, 152 n.1 (Ct. App. 2006) (Court of Appeals is “powerless to review” an issue that was raised to the lower court, not included in the court’s written order, and subsequently not included in a Rule 59(e) motion because the Court of Appeals does not have an “express ruling on the issue” to review). Therefore, even if this Court finds Appellants’ Motion was a Rule 59(e) motion with surviving grounds, Appellants are limited to the three grounds filed in that Motion and the issues ruled upon in the Arbitration Order. Any issues not included in one or both of these documents are not preserved for this Court’s review.

Appellants are further limited on appeal because they abandoned the second ground of their Motion (that the Circuit Court delegated the decision of whether the arbitration clause was unconscionable to Respondent’s counsel). (R. pp. 219-236; pp. 253-257.) Appellants never claimed the Circuit Court erred in the drafting of the Arbitration Order during the March Hearing nor did Appellants ever request at the Hearing for the Circuit Court to rule upon the improper delegation ground in their Motion.²⁰ (R. pp. 219-236; pp. 253-257.)

Further, Appellants are barred from raising issues on appeal which were not raised at the original Hearing on the Motion to Compel Arbitration. These issues cannot be raised for the first time or preserved by the use of a Rule 59(e) motion. A Rule 59(e)

²⁰Conversely, at the March Hearing, Appellants argued and wanted to challenge unconscionability based upon procedural and substantive unconscionability analysis, which were issues not properly raised in a Rule 59(e) motion and which issues are drastically different and apart from their ground that the Circuit Court erred in the “delegation” of the issue by asking Respondent’s counsel to draft a proposed order.

motion must be used to preserve an issue for appeal if the “issue or argument has been raised, but not ruled on” and a Rule 59(e) motion may be used if a party “believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” Elam v. South Carolina Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). If an issue has been properly raised to the circuit court, but not ruled upon, then the purpose of a motion to alter or amend the judgment pursuant to Rule 59(e) “is to request the trial judge to “reconsider matters properly encompassed in a decision on the merits.” Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200 (1988)). If an issue has been ruled on by the court, then the purpose of the Rule 59(e) motion is to “call the court’s attention to a possible misapprehension of an *earlier* argument” or to “revisit a *previously raised* argument.” See Elam, 361 S.C. at 21-22, 602 S.E.2d at 778-79 (emphasis added).

However, if a party could have raised an issue prior to judgment but failed to do so, the party cannot use a Rule 59 motion to raise the issue for the first time. Eaddy v. Oliver, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001). If a party attempts to raise an issue for the first time in a Rule 59 motion, the issue is not preserved for the court’s review. Id.; see also Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005). The policy of this rule is similar to the policy supporting the “long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” Pon, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Just as a party must present his issues to the circuit court before trying to convince the appellate court that the circuit court erred, a party must also present his issues and arguments to the circuit court at the original hearing on the issues, instead of presenting one set of issues and arguments at the original hearing and then asserting a second set of issues and arguments through a motion to alter or amend. Our courts have commented that the rule requiring a party to raise all arguments to the lower court before raising them to the appellate court *"serves as a keen incentive for a party to prepare a case thoroughly"* and *"prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case."* *Id.* (emphasis added); see also Brown v. Singletary, 226 S.C. 482, 85 S.E.2d 738 (1955) (explaining that a party cannot "take his chances of a successful issue, reserving vices in the trial, or which he has notice, for use in case of disappointment in the result"). Therefore, issues that were not previously raised to the Circuit Court in the Motion to Compel or at the December Hearing, i.e., the appeal issues of substantive and procedural unconscionability and Appellants' request for severance of an offensive part of the arbitration clause, cannot be revisited by a Rule 59(e) motion.

1. **Severance of the "no live witnesses" portion of the arbitration clause was never raised in Appellants' written Motion to Compel or at the December 10, 2009 Hearing and is, therefore, not preserved for review and barred.**

Appellants have not preserved their argument that the "no live witnesses" requirement of the arbitration clause, if found to be unconscionable, should be severed from the clause. Appellants have failed to preserve this issue for two reasons. First, Appellants failed to raise this argument in their initial written Motion to Compel

Arbitration, so Appellants cannot attempt to raise the argument through a Rule 59 Motion. (See R. p. 35, ¶¶ 27-29.) Additionally, at the original Hearing on Appellants' Motion to Compel Arbitration on December 10, 2009, Appellants only raised seven issues in support of their Motion: (a) the Federal Arbitration Act ("FAA") applied because interstate commerce is involved; (b) the FAA trumps the South Carolina Uniform Arbitration Act; (c) the South Carolina Uniform Arbitration Act does not apply; (d) South Carolina courts favor arbitration; (e) fraud in the inducement does not take contract out of arbitration; (f) the court can compel arbitration even when a nonsignatory to a contract would be a party to the arbitration; and (g) the arbitration clause is conscionable because it allows some discovery and because Appellants pay the majority of the fees at the beginning of the proceeding. (R. pp. 190-214.)²¹ Likewise, nowhere in the 12-page Memorandum Appellants served on Respondent on December 9, 2009 in support of their Motion to Compel Arbitration²² is there any mention of severing a portion of the arbitration clause. Further, at no time did the Circuit Court or the Respondent raise the severance issue at the original Hearing.

Second, Appellants' attempt to raise the severability argument in a Memorandum

²¹ Appellants' initial arguments at the hearing can be found at R. p. 199, line 9—p. 205, line 11; and specifically by argument: (a) the Federal Arbitration Act ("FAA") applied because interstate commerce is involved (R. p. 199, line 9—p. 200, line 6; p. 203, line 11—p. 204, line 7; p. 210, line 18—p. 211, line 3); (b) the FAA trumps the South Carolina Uniform Arbitration Act (R. p. 200, lines 7-11); (c) the South Carolina Uniform Arbitration Act does not apply (R. p. 200, line 11—p. 201, line 3); (d) the South Carolina courts favor arbitration (R. p. 201, lines 4-12); (e) that fraud in the inducement does not take contract out of arbitration and therefore arbitration should be compelled for all claims (R. p. 201, line 13—p. 203, line 4; p. 205, lines 9-11); (f) the Court can compel arbitration even when a nonsignatory to a contract would be a party to the arbitration (R. p. 204, line 18—p. 205, line 8) and (g) the arbitration clause is conscionable because it allows some discovery and because Appellants pay all of the fees at the beginning (R. p. 195, lines 6-11, p. 210, lines 11-17).

²² Appellants' abandoned their Temporary Restraining Order request at the hearing.

in Support of their Motion and at the March Hearing was not raised as a ground for reconsideration or as a specific type of relief requested. Rule 7(b)(1), SCRCF requires that motions "shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Appellants' Motion did not raise the severability of a portion of the arbitration clause as a ground. (See R. pp. 136-137.)

Pursuant to Rule 7(b)(1), severability was not properly raised as a ground for reconsideration, and the Circuit Court properly ruled and disallowed any "new issues" at the Hearing to avoid prejudicing Respondent. At the Hearing, Judge Nicholson specifically stated, "I am not going to consider any new issues." (R. p. 260, lines 6-7.) Appellants have not alleged any errors on appeal for this ruling by the Circuit Court, and therefore are bound by this holding.

Therefore, as a result of Appellants' failure to raise the severability issue in its original Motion to Compel Arbitration and Appellants' failure to list the severability issue as a ground for reconsideration in its subsequent Motion, Appellants' argument on appeal that portions of the arbitration agreement can be severed in order to grant arbitration and preserve the remainder of the clause, has not been preserved for this Court's review.

- 2. Substantive and procedural unconscionability were never raised in Appellants' written Motion to Compel or at the December 10, 2009 Hearing, were not preserved for review and are, therefore, barred on appeal.**

At the original Hearing on the Motion to Compel Arbitration, Appellants only raised two equitable arguments regarding the arbitration clause. Appellants argued that the arbitration clause is conscionable because it allows some discovery and because Appellants are required to pay the majority of the fees at the beginning of the proceeding.

(R. p. 210, lines 11-17.) Other than these two arguments and the specific rulings contained in the Arbitration Order, any other issues regarding the unconscionability of the arbitration clause are not preserved for this Court's review because they were not argued at the original Hearing or raised in Appellants' written Motion to Compel. Specifically, Appellants' attempt to raise the issue of substantive unconscionability for the first time in their Memorandum in Support of their Motion (and at the subsequent March Hearing) cannot preserve this issue for review.²³ Appellants also failed to preserve issues relating to procedural unconscionability, specifically the issues of meaningful choice and the element of surprise. In addition, Appellants' attempt to raise the issue of the sophistication of the parties for the first time in their Motion and the general issue of procedural unconscionability for the first time in their Memorandum (and at the subsequent Hearing) does not preserve these issues for review.

Appellants only raised one issue possibly relating to procedural unconscionability in their Motion: the sophistication of Respondent.²⁴ However, this issue was not raised at the original Hearing and cannot be reviewed on appeal. Additionally, all other arguments regarding procedural unconscionability were raised for the first time in Appellants' Memorandum and are not preserved for review because they were not raised at the original Hearing and, in the alternative, were not raised in a timely Rule 59(e) motion.

²³ The issue was implied, but not specifically raised, in the third ground of the Appellants' Motion, but still cannot be reviewed by this Court because it was not raised at the original hearing. A 59(e) motion is used to "call the court's attention to a possible misapprehension of an *earlier* argument" or to "revisit a *previously raised* argument." Elam, 361 S.C. at 21-22, 602 S.E.2d at 778-79 (emphasis added).

²⁴ All other issues relating to procedural unconscionability, with the exception of the issue of the parties' unequal bargaining positions, were raised in Appellants' March 1, 2010 Memorandum. The issue of unequal bargaining power was contained in the Court's Order and is, therefore, preserved for review.

Moreover, it is clear from the language in Appellants' Initial Brief that Appellants are making *assumptions* as to the specific rulings on unconscionability by the Circuit Court and attempting to use their *assumptions* as grounds for appeal. For example, on page 29 of Appellants' Initial Brief, Appellants state that "[t]he Trial Court *apparently* based its decision on Respondent's position that she had been working for the Firm for six months before getting the employment contract and essentially had to agree to it or else 'jeopardize her existing job,'" and Appellants cite to Respondent's Memorandum and not to the Circuit Court's Arbitration Order in support of this assertion. (Appellants' Initial Br. p. 29 (emphasis added)) Clearly, Appellants should have raised this issue in a timely Rule 59(e) motion if they believed the Court had not ruled on it to preserve the issue for appeal. Additionally, the issues raised by Appellants in support of their argument that the arbitration clause did not contain an element of surprise are not supported by reference to the Circuit Court's Arbitration Order. (Appellants' Initial Br. p. 34.) Appellants' own assumptions on appeal cannot be substituted for the court's rulings and dramatically exemplify errors in issue preservation that prevent appeal on these issues.

Finally, Respondent would be unfairly and materially prejudiced if this Court allows the substantive and procedural unconscionability issues not preserved for review to be heard on appeal due to Appellants' failure to preserve these issue for appeal.

D. Notwithstanding the Rule 59 issues, the Circuit Court's holding that the arbitration clause is void on equitable grounds should be affirmed because the clause is unconscionable as it contains oppressive terms, violates public policy, and there was a lack of a meaningful choice when it was presented.

Judge Nicholson did not make any errors of law or make findings that were not supported by evidence in his Arbitration Order.

1. The factual findings in the Circuit Court's Arbitration Order are supported by evidence, and the Order contains no errors of law.

"The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law" and in reviewing an action at law, "the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998). In this case, the Circuit Court's holding that the arbitration clause is void on equitable grounds as unconscionable, should be affirmed as it was not based on errors of law and was clearly supported by the evidence before the Circuit Court.

Furthermore, "[a]rbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). As such, parties can request revocation of the contract under "such grounds as may exist at law or in equity," including fraud, duress, and unconscionability." Id. (quoting S.C. Code Ann. § 15-48-10(a)(2005)). An arbitration clause is unconscionable when "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." Id. at 25, 644 S.E. 2d at 668. Further, "the determination of unconscionability is fact specific and the totality of the circumstances must be assessed," and the circumstances which are relevant to a determination of unconscionability are the circumstances *at the time the agreement was executed.* Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) (emphasis added).

Therefore, Appellants' arguments 1) that Respondent made a risk-based analysis

in determining to strike through some of the language in the May 2007 Amendment which has no arbitration clause (Appellants' Initial Br. at page 32); 2) that Respondent conducted research on arbitration *after* execution of the June 2006 Employment Agreement (Appellants' Initial Br. at page 33); and 3) that because Respondent brought causes of action based upon breach of contract in 2009, she was "intimately" familiar with the terms of the Employment Agreement in 2006 (Appellants' Initial Br. at page 26) are wholly misplaced and without merit. See Holler at 269.

2. The arbitration clause is unconscionable because it contains oppressive terms.

In Lackey, this Court held that a party seeking to avoid an arbitration clause on the ground that no reasonable party would have agreed to it because it is unconscionable and "precludes judicial remedies" is required to demonstrate prejudice in the form of "identification of judicial relief not available in arbitration." 330 S.C. at 401, 498 S.E.2d at 905. In Lackey, the respondents failed to demonstrate prejudice because they "failed to demonstrate that they are unable to get the same relief in arbitration which is available in a judicial setting." Id. Contrary to Lackey, here the Respondent is prejudiced by the arbitration clause's prohibition against live witnesses.

The Fourth Circuit has stressed the importance of fair and conscionable arbitration rules by commenting that rules which deny basic rights to parties in turn "den[y] arbitration in any meaningful sense of the word" and "undermine, not advance, the federal policy favoring alternative dispute resolution." Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 941 (4th Cir. 1999); see also Simpson, 373 S.C. at 24, 644 S.E.2d at 668 (courts can refuse to enforce arbitration clauses if they are unconscionable). As the Court explained in Simpson, while parties are free to contract away their rights, the

court cannot “ignore the inconspicuous nature of a provision, which was drafted by a party in a superior bargaining position, and which functioned to contract away certain significant rights and remedies otherwise available by law.” *Id.* at 28, 644 S.E. 2d at 670.

In this case, the Circuit Court could not ignore an arbitration clause that was inconspicuous, drafted by the party in the superior bargaining position, and contracted away significant rights of the Respondent. As a result, the Circuit Court correctly held that the arbitration clause was unconscionable and unenforceable. Pursuant to the holding in the Simpson case, this Court should uphold the Circuit Court’s ruling because the clause precluded significant judicial remedies and rights. Specifically, as the Circuit Court held, if the matter proceeded to trial, the Respondent would have the right to take oral testimony of witnesses in open court in order to determine the competency of witnesses. (R. p. 11.) However, the arbitration clause, as drafted by the party in the superior bargaining position, takes away this right. Significantly, the right to have live witnesses testify in the arbitration proceeding in the clause at issue is not simply limited in number, but is “prohibited outright,” just as double and treble damages were “prohibited outright” in the arbitration clause held to be unconscionable in Simpson, 373 S.C. at 29, 644 S.E.2d at 671. This prohibition is oppressive and, as such, the Circuit Court’s holding that the arbitration agreement is unconscionable should be affirmed.

3. The arbitration clause is unconscionable because it violates public policy.

In Herron v. Century BMW, 387 S.C. 525, 535-36, 693 S.E.2d 394, 399-400 (2010), our Supreme Court held that a provision within an arbitration agreement that banned class action suits was not enforceable on public policy grounds. The Court explained that the “Legislature has made clear that the public policy of this State is to

provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." Id. Based on South Carolina state law and "the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right," the Supreme Court held that the provision banning class action suits was unenforceable on public policy grounds. Id. In addition to examining rights created by statutes, our courts have also consistently refused to enforce contracts "which [are] violative of public policy" or "provisions of the Constitution." Simpson, 373 S.C. at 29-30, 644 S.E.2d at 671 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004)). Here, the denial of a substantial right to present live witnesses in one's case is oppressive and clearly violates public policy.²⁵ As such, the terms of the arbitration clause are not only oppressive and violative of public policy, but also deny the Plaintiff procedural due process.

Appellants frequently cite Munoz in their brief, but Munoz recognizes that courts only favor arbitration "so long as the prospective litigant effectively may vindicate" a cause of action in the arbitral forum. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540,

²⁵ Further, as an alternate ground, the denial of this right also violates the due process clause of the U.S. Constitution and the South Carolina Constitution. Both Constitutions mandate that no person shall "be deprived of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. Included in procedural due process is the "right to introduce evidence and the "right to confront and cross-examine witnesses." Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). The arbitration clause at issue limits Respondent's right to cross examine witnesses. Further, essential to due process is a party's right to notice and opportunity to be heard, which "must be granted at a meaningful time and in a meaningful manner." Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). The denial of live witnesses substantially limits Respondent's ability to be heard in a meaningful manner.

542 S.E.2d 360, 364 (2001) (quoting Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000)). If a prospective litigant has not been deprived of a right or remedy, but simply must seek to vindicate his rights in a different forum, then arbitration may be proper. However, the proposed terms of arbitration in this situation deny the prospective litigant her rights, specifically her right to call witnesses. The denial of this right makes the arbitration agreement unconscionable and unenforceable on public policy grounds.

A federal district court examined a similar clause in Mazur v. Ebay, Inc., No. C 07-03967 MHP, 2008 U.S. Dist. LEXIS 16561 (N.D. Cal. March 4, 2008). In Mazur, the court found that an arbitration clause which banned witnesses was unconscionable even though it was a bilateral restriction. The court explained “[s]ince plaintiff has the burden of proof, this bilateral restriction banning witnesses has the effect of favoring HJA [the Defendant].” Id. at *20. In the case at bar, the prohibition on live witnesses casts a similar type of doubt on the fundamental fairness of the proposed arbitration. Regardless of the bilateral nature of the prohibition on witnesses, the no live witnesses provision favors the party who is attempting to avoid responsibility under the underlying contract (here, Appellant Law Firm) because the party attempting to collect monies owed (Respondent) has the burden of proof. This is even more problematic and significant in an employment action, because the party attempting to enforce the contract, as a former employee, faces a significant challenge in gathering documentary evidence which would likely still be controlled by Appellant Law Firm and its agents and/or witnesses. As such, the “no-witnesses” provision is unconscionable.²⁶

²⁶ Respondent also notes Appellants failed to preserve the argument that the bilateral nature of the “no witnesses” provision of the arbitration clause makes the clause

Additionally, the failure to provide a copy of the arbitration rules to which an employee would be bound, support a finding of unconscionability because it requires the party to go to another source to learn the full ramifications of an arbitration agreement. See Fitz v. NCR Corp., 118 Cal. App. 702 (2004).²⁷

4. The arbitration clause is unconscionable because Respondent lacked a meaningful choice in entering into the arbitration agreement.

An arbitration clause is unconscionable if a party to the clause lacks a meaningful choice in entering into the clause. An absence of meaningful choice “generally speaks to the fundamental fairness of the bargaining process in the contract at issue.” Simpson, 373 S.C. at 24, 644 S.E.2d at 669 (citing Carlson v. Gen. Motors Corp., 883 F.2d 287, 293 (4th Cir. 1989)). To determine whether a clause lacked meaningful choice, courts examine the following factors: “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.” Id.

Appellants’ position is tantamount to asking the Court to rule that any time two attorneys make an agreement, the agreement is *per se* conscionable because of their sophistication. However, our courts clearly require a case-by-case review of arbitration clauses and have held that “there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability.” Simpson, 373 S.C. at 36, 644 S.E.2d at 674. Here, the Respondent, an

conscionable and enforceable. The argument was not raised at the original Hearing on the Motion to Compel Arbitration and is not preserved for this Court’s consideration.

²⁷ As an alternate ground, the arbitration clause is also unconscionable because Appellant failed to provide Respondent a copy of the rules which would govern the arbitration proceedings.

attorney, may very well be more sophisticated than some parties in some respects, but she lacked a meaningful choice in entering into the arbitration clause because of the circumstances surrounding the agreement and because of the *relative* sophistication of the parties and the *relative* disparity in their bargaining power.

Respondent was an attorney who had practiced criminal law in South Carolina prior to the time she entered into the arbitration clause and had only worked in the private sector for Appellant Law Firm. Respondent's sophistication level relative to Appellant Lucey's was minimal. Respondent had no experience in civil law. (R. p. 272.) Additionally, Appellants alleged in their Demand for Arbitration that Respondent was first paid a lower salary which increased after she received training. (R. p. 273.) In fact, Respondent's lack of sophistication and experience in civil law was the *basis* of Appellant Lucey choosing to pay Respondent a lower salary and including a "training" period at the beginning of her employment with Appellant Law Firm. Additionally, as a new associate who was already hired but had been working for only six months, Respondent had very little bargaining power in comparison to Appellants. Respondent was in a position where she was forced to either sign the agreement or quit her job at a time when she had already earned bonuses and had recently been injured in a car accident. (R. pp. 263-264; p. 185, ¶ 10; p. 186, ¶¶ 12-16.) These facts were presented to the Circuit Court and, after examining the facts and controlling law, Judge Nicholson found the arbitration clause was unconscionable. As such, the ruling on the issues of disparity in bargaining power and sophistication is clearly supported by the evidence and should be affirmed.

In addition to the disparity in bargaining power and sophistication, the arbitration

clause was inconspicuous, and Respondent will suffer the loss of substantial rights if arbitration is compelled. Our courts have held that even in light of the presumption that a party to a contract has read and understood its terms, it is still "necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences." Simpson, 373 S.C. at 27, 644 S.E.2d at 670. In Herron, the Supreme Court noted that an arbitration agreement which was "a separate, one-page document," was signed by the parties, and was "clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font" was conspicuous. Herron, 387 S.C. at 533, 693 S.E.2d at 398. The Court in Herron distinguished the agreement from the arbitration agreement in Simpson which was "inconspicuously buried" in paragraph ten of sixteen of the contract and did not require a separate signature. Id.; Simpson, 373 S.C. at 27-28, 644 S.E.2d at 670. Here, the Circuit Court found that the arbitration clause in the contract at hand was not conspicuous because it was buried in a paragraph on the second page of the agreement in regular type. This finding is clearly supported by the evidence and should be affirmed.

Additionally, here, as in Simpson, the consequences of the arbitration clause included the loss of a right. Simpson lost the right to be awarded double or treble damages under the controlling statute. Simpson, 373 S.C. at 28, 644 S.E.2d at 670. The Respondent here lost the right to call live witnesses. This finding is also clearly supported by the evidence and the controlling law and should be affirmed.

Due to the oppressive terms of the arbitration agreement, a violation of public policy, and Respondent's lack of a meaningful choice, the arbitration agreement between Appellant Law Firm and Respondent is clearly unconscionable. The Circuit Court's

ruling on this matter is supported by ample case law and evidence and should be affirmed on appeal.

E. The Circuit Court's holding that the Federal Arbitration Act is inapplicable should be affirmed because the Circuit Court found the arbitration clause is void on equitable grounds or, in the alternative, because interstate commerce was not involved in the transaction between the parties.

If the arbitration clause is void as the Circuit Court determined, then the Federal Arbitration Act cannot apply to the employment agreement because of the absence of a valid arbitration agreement. See 9 U.S.C. §2. (stating FAA does not apply to a contract that is not enforceable on grounds that exist in equity or at law). Further, even if this Court finds the Circuit Court's findings of fact are unsupported by the evidence and determines the arbitration clause is not void on equitable grounds, in order for an arbitration agreement to be enforceable under the Federal Arbitration Act ("FAA"), the "underlying transaction" must involve interstate commerce. Mathews v. Flour Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994); see also Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). To determine whether a transaction involves interstate commerce and is subject to the FAA, "the court must examine the agreement, the complaint, and the surrounding facts." Towles, 338 S.C. at 36, 524 S.E.2d at 843 (citing Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 460, 476 S.E.2d 149, 152 (1996)).

In their brief, Appellants argue the Circuit Court's decision was misplaced and did not apply the legal reasoning of "our appellate" courts when the court denied arbitration under the FAA. (Appellant's Initial Br. p. 25). However, in their argument, Appellants ignore relevant, controlling case law of South Carolina, including Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) and Mathews v. Fluor Corp., 312 S.C. 404,

407, 440 S.E.2d 880, 881 (1994)²⁸ and instead cite to out-of-state precedent which is in direct conflict with South Carolina law. For example, the Nabors Drilling USA LP v. Carpenter case cited at page 17 of Appellants' Brief found that the FAA applied to a contract based upon the court's finding that the *employer* was regularly engaged in activities involving interstate commerce. (Appellants' Initial Br. p. 17 (citing Nabors, 198 S.W.3d 240 (Tex. App. 2006)) This proposition is wholly opposite to the holding in Timms which clearly states that for a personal services contract in South Carolina one party's activities do not necessarily make the FAA applicable to a contract containing an alleged arbitration clause. See 310 S.C. 469, 427 S.E.2d 642. Further, Appellants' reliance on out-of-state cases such as In re Sacred Heart Hosp. of Norristown, 200 B.R. 826 (Bankr. E.D. Pa. 1996), Southwind Group, Inc. v. Landwehr, 188 S.W.3d 730 (Tex. App. 2006) and Crawford v. West Jersey Health Sys. (Voorhees Div.), 847 F. Supp. 1232 (D.N.J. 1994) to support their position that the subject matter implicates and/or has even the slightest nexus with interstate commerce renders the FAA applicable (See Appellants' Initial Br. p. 17) directly contradicts South Carolina precedent in Mathews, 312 S.C. 404, 440 S.E.2d 880 (holding that arbitration agreement is not enforceable under FAA even when the domicile of both parties involved in controversy was outside of South Carolina and nearly all activities to complete the contract occurred outside of South Carolina, because the subject matter of the agreement was situated in South Carolina) (overruled by Munoz, 343 S.C. 531, 542 S.E.2d 360, only to the extent it considered the contemplation of the parties at the time of execution of the agreement as a relevant factor in determining whether the FAA applied)). As set forth below, these arguments by Appellant are wholly

²⁸ Appellants fail to recognize the "incidental" nature of completion of contracts which the Court in Mathews recognized did not affect interstate commerce.

without merit, and this Court should uphold the Circuit Court's decision based on applicable South Carolina case law.

Many South Carolina cases have examined whether the underlying transaction of an arbitration agreement involves interstate commerce, but, the majority of these cases are inapplicable to the case at hand because of vastly distinguishable facts.²⁹ As the Circuit Court correctly held in its Arbitration Order, agreements involving construction and/or real estate development contracts are distinguishable from contracts for personal services. (R. p. 12.) See also, Timms, 310 S.C. at 472, 427 S.E.2d at 644 (holding that cases which are "construction contracts clearly predicated upon transactions involving the purchase and use of materials and supplies from outside the state" are distinguishable from cases which do not involve construction or real estate development).

The Timms case is most directly on point because it involved a contract for personal services in South Carolina. 310 S.C. 469, 427 S.E.2d 642. The Timms case involved a contract for patient-residential services between a nursing home and a patient, and the case at hand involves a contract for legal services between a South Carolina law firm doing business in South Carolina and an attorney licensed to practice law in South Carolina. Despite the fact that the nursing home in Timms was a division of a Delaware Limited Partnership, accepted federal insurance proceeds, marketed services to persons residing outside South Carolina, hired employees from outside South Carolina, and

²⁹ Respondent notes that Appellants' reliance on EEOC v. Rinella and Rinella is misplaced and is also distinguishable from the case at hand. See 401 F. Supp. 175 (N.D. Ill. 1975). The Rinella case examined the activities of a law firm, but examined the activities in the context of whether the law firm employer qualified as an employer engaged in an industry affecting interstate commerce such that it was subject to Title VII. Id. This case has no bearing on the determination of whether the "underlying transaction" between a South Carolina attorney and a South Carolina law firm involved interstate commerce such that the contract is subject to the FAA.

purchased goods, equipment, and supplies from outside South Carolina, the Court held that the contract between the nursing home and patient was “devoid of any basis for holding that commerce was involved in the *transaction between the parties*.” *Id.* at 472, 427 S.E.2d at 644 (emphasis added). The Court explained that “these factors could evidence the Center’s involvement in interstate commerce, [but] their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract *between the parties*.” *Id.* (emphasis added).³⁰ Here, the *transaction between a law firm and an associate attorney* is also devoid of interstate commerce. Just as the nursing home’s involvement in interstate commerce was insufficient to bring the contract between the nursing home and patient within the FAA, the Respondent’s minimal and incidental interstate activities do not affect the employment agreement between the parties or bring this agreement within the FAA because nothing in the Employment Agreement requires Respondent to engage in interstate commerce.³¹

Additionally, as the Circuit Court explained in its Arbitration Order, even if it were to find that Respondent’s out-of-state activities were related to her employment

³⁰ Respondent asserts that Appellants’ use of the Crawford case is unpersuasive as it is a case from a federal district court in New Jersey and is inapposite to Timms, which is a case decided by our South Carolina Supreme Court. Compare Crawford v. West Jersey Health Sys., 847 F. Supp. 1232 (D.N.J. 1994) with Timms, 310 S.C. 469, 427 S.E.2d 642. Crawford held that one party’s involvement in interstate activities, such as accepting payments from out-of-state insurance carriers, advertising in out-of-state newspapers, and receiving goods from out-of-state vendors, could bring the underlying employment contract within the FAA even if these activities were not related to the underlying contract. 847 F. Supp. at 1240. However, Timms held that one party’s involvement in the same type of interstate commerce activities, such as marketing services, accepting insurance proceeds and purchasing goods, did not affect the underlying contract between the parties and did not bring the contract within the FAA. 310 S.C. at 472, 427 S.E.2d at 644.

³¹ See Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 96, 592 S.E.2d 50, 53 (Ct. App. 2003) citing to Mathews and recognizing that when a contract does not require a party to engage in interstate commerce the FAA does not apply.

agreement with Appellants, then the activities do not "rise to the level of involving or affecting interstate commerce." (R. p. 10.) South Carolina case law has clearly held that a party's minimal activities outside the state of South Carolina which are merely incidental to the completion of a transaction do not transform the entire underlying transaction into a transaction that involves interstate commerce and is enforceable by the FAA. See Mathews, 312 S.C. 404, 440 S.E.2d 880 (holding that arbitration agreement is not enforceable under FAA even when the domicile of both parties involved in controversy was outside of South Carolina and nearly all activities to complete the contract occurred outside of South Carolina, because the subject matter of the agreement was situated in South Carolina) (overruled by Munoz, 343 S.C. 531, 542 S.E.2d 360 only to the extent that the contemplation of interstate commerce is no longer a factor).

Even if the Court finds that Respondent's activities with clients are relevant to her employment agreement, the fact that Respondent engaged in minimal out-of-state travel and worked with clients who were domiciled outside of South Carolina is insufficient to form the basis of "interstate commerce" within the FAA and to bring her employment agreement within the FAA, particularly for an attorney whose practice is regulated by the State of South Carolina, not Congress acting pursuant to its Commerce Clause powers. As a result, the reasoning in Timms, which was a case involving personal services, is most applicable to the case at hand. As the Circuit Court held, the heart of the underlying transaction between Appellants and Respondent is an employment agreement between a South Carolina law firm and a South Carolina attorney for legal services to be performed in South Carolina. Notably, Respondent is not licensed to perform these services (the service of practicing law) outside the State of South Carolina, and the employment

agreement does not require her to be licensed to practice law anywhere other than South Carolina. As such, the underlying transaction between Appellants and Respondent does not involve interstate commerce and, therefore, is not enforceable under the FAA. The underlying transaction is simply an employment contract involving parties domiciled in South Carolina, the subject matter of which is the practice of South Carolina law.

Further, in Towles, this Court examined an arbitration agreement within an employment agreement between a medical director and a healthcare company. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). This Court examined the employee's responsibilities and activities and found that the employee's activities "provide sufficient evidence of interstate commerce to invoke the FAA." Id. at 36, 524 S.E.2d at 843. In examining the employee's activities this Court noted that the employee participated in out-of-state sales presentations and conferences, participated in telephone conferences with his employer's "corporate medical affairs staff in Minnesota," "reviewed proposals for services from out-of-state medical and ancillary service providers [and] claims from out-of-state providers," "established medical policy," and oversaw "quality management for plan participants." Id. While the factors and types of responsibilities examined may be particularly relevant to the case at hand to the extent both cases involve employment agreements, the facts involved in the employment agreement between Appellants and Respondent are very different than the facts involved in the Towles case.

Here, the underlying transaction between Appellants and Respondent did not involve or affect commerce. An employment agreement between an associate attorney licensed to practice law only in South Carolina and a South Carolina law practice doing business in South Carolina is markedly different than an employment agreement between

a medical director and a large, national healthcare company. Specifically, the activities of the employee in Towles involved activities centered around service proposals, sales, and claims from out-of-state companies. See id. Additionally, the employee's telephone conferences in Towles were telephone conferences *with* his out-of-state employer. See id. By participating in calls with an out-of-state employer, the employment agreement, which was the underlying transaction, involved interstate commerce. However, Appellant is not an out-of-state employer, and Respondent did not participate in out-of-state telephone calls relative to the underlying employment agreement. Instead, Respondent worked as an attorney on cases filed in South Carolina for some clients who may have lived outside the State of South Carolina from time to time.³² Respondent's involvement with out-of-state clients was limited to their involvement in a South Carolina lawsuit and their agreement with Appellant Law Firm. Thus, the agreement between Appellant Law Firm and Appellants' clients may have involved interstate commerce, but the employment agreement between Appellants and Respondent did not involve interstate commerce.

The Thornton case is also factually distinguishable from the case at hand. Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003) In Thornton, the Court held that there was a substantial impact on interstate commerce in an employment contract in which "an essential requirement for performance under the agreement was Thornton's relocation from Michigan to South Carolina within a fixed period of time." Id. at 97, 592 S.E.2d at 53; (cf. Mathews, 312 S.C. 404, 440 S.E.2d 880 ("incidental" contacts do not give rise to interstate commerce)). Additionally, pursuant to

³² The Ocean Club complex consisted of condominiums, and the client was actually the homeowners' regime. (Appellants' Initial Br. p. 11.)

the contract, the employer promised to pay the employee money to induce his relocation and the employee promised relocate his practice across state lines and to “repay the [relocation] money should he fail to perform fully under the contract.” *Id.* The employment contract in Thornton was centered around out-of-state recruiting, which clearly has a significantly greater impact on interstate commerce than the employment contract in this case, which was simply a contract between a South Carolina lawyer (already living in South Carolina) and a South Carolina law firm. Clearly, the employment agreement between Appellants and Respondent did not involve interstate commerce and the Circuit Court’s ruling on this issue should be affirmed as it is not based on incorrect conclusions of law and is supported by ample evidence.

F. This Court should affirm the Circuit Court’s holding that the South Carolina Uniform Arbitration Agreement does not apply to the agreement at issue.

The applicability of the South Carolina Uniform Arbitration Act does not appear to be at issue. However, Appellants have raised the issue as a ground for appeal and, therefore, Respondent will address the issue. The Arbitration Order noted that “[b]oth parties agree for different reasons that the South Carolina Uniform Arbitration Agreement (“SCUAA”) does not apply in this case.” (R. p. 4.) In light of this agreement and after reviewing the pleadings, exhibits, and legal authority, the Circuit Court held that the “SCUAA does not apply or require arbitration between the parties.” (R. p. 4.) The transcript of the proceedings clearly supports the Circuit Court’s finding that both parties agreed that the SCUAA does not apply and, therefore, there is no basis for reversing this finding. (R. p. 200, line 11—p. 201, line 3.)

Further, in addition to holding that the SCUAA does not apply, the Circuit Court also held that the arbitration clause does not meet the requirements of S.C. Code § 15-48-

10(a) and, therefore, is not only inapplicable but also unenforceable under the SCUAA. Judge Nicholson's finding was based on our courts' consistent practice of strictly construing the notice requirements of § 15-48-10(a). (R. p. 9.) See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 588-89, 553 S.E.2d 110, 114 (2001) ("We have strictly construed the notice requirements of section 15-48-10(a) . . . the terms of section 15-48-10(a) are clear, and those terms must be applied according to their literal meaning."). The arbitration clause between Appellant Law Firm and Respondent clearly did not meet the notice requirements of § 15-48-10(a). (R. pp. 262-264.) As such, this Court should affirm the Circuit Court's holding that even if the SCUAA applied, the contract does not include the notice requirement and is therefore unenforceable under the SCUAA.

Additionally, pursuant to S.C. Code § 15-48-10(b)(1), the SCUAA does not apply to arbitration agreements between employers and employees unless the agreement provides that it shall apply. Appellants have asserted that the SCUAA does not apply because the Federal Arbitration Act preempts it. (Appellants' Initial Br. pp. 40-41.) However, preemption is a moot issue because the plain language of the statute clearly states that the SCUAA does not apply to arbitration agreements between employers and employees unless the agreement provides that it shall apply. The arbitration agreement between Appellants and Respondent does not make any reference to the SCUAA and, therefore, the SCUAA does not apply to the agreement.

Finally, Appellants also argue that Section 15-48-10(b)(1) exempts employment agreements from the notice requirement of Section 15-48-10(a). (R. p. 9.) The plain language of the statute does not support this interpretation. Section 15-48-10(b)(1) does not exempt arbitration agreements between employers and employees from the notice

requirement. Instead, it exempts arbitration agreements between employers and employees from the entire SCUAA unless the agreement specifically states that the SCUAA applies. For these reasons, the Circuit Court's holding that the arbitration clause cannot be enforced under the SCUAA should be affirmed.

V. CONCLUSION

Because Appellants have failed to support their factual allegations with the record on appeal, have argued merely in a summary fashion, and additionally, for the reasons stated herein, this Court should either dismiss this appeal in its entirety based on lack of jurisdiction, or affirm the judgment of the Circuit Court and remand the matter for trial.



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**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

FINAL REPLY BRIEF OF THE APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iv
I. INTRODUCTION	1
II. ARGUMENTS	2
A. Respondent's Arguments Surrounding Appellants' Motion for Reconsideration are Without Merit.....	2
1. Appellants' Notice of Appeal Was Timely	2
2. The Trial Court Properly Treated Appellants' Motion for Reconsideration Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.....	5
3. Appellants Properly Preserved All Issues Enumerated in Appellants' Brief for this Appeal.	6
a. There Were Two Issues Before the Trial Court: 1) Whether the Federal Arbitration Act Applies and 2) Whether the Arbitration Clause Was Unconscionable, and All Issues Raised by Appellants in This Appeal Relate to These Two Issues.....	7
b. Appellants Were Not Required to Set Forth All of Their Arguments in Their Motion for Reconsideration	9
c. Appellants' Discussion of Substantive and Procedural Unconscionability Is Encompassed in the Issue of Whether the Trial Court Erred in Its Determination that the Arbitration Clause Was Unconscionable.....	10
d. This Court Is Not Barred from Severing the "no live witnesses other than Respondent and Appellant" Portion of the Arbitration Clause	12
e. Respondent Was Not Prejudiced by the Trial Court's reconsideration of its Denial of the Motion to Compel Arbitration.....	13
B. The Arbitration Clause Is Not Void on Equitable Grounds	15
1. The Arbitration Clause Does Not Preclude Respondent from Having Available to Her Judicial Remedies or Rights	15

2.	Respondent Had a Meaningful Choice in Agreeing to the Arbitration Clause.....	16
C.	Interstate Commerce Was Involved in the Transaction Between the Parties and the Federal Arbitration Act Applies	18
III.	CONCLUSION	21

TABLE OF AUTHORITIES

CASES

<u>Andreas v. Volkswagen of America, Inc.</u> , 336 F.3d 789, 793 (8th Cir. 2003)	4
<u>Calderon v. Kansas Dep't of Social & Rehabilitative Servs.</u> , 181 F.3d 1180, 1186 (10th Cir. 1999).....	4, 5
<u>Cambridge Plating Co., Inc. v. Napco, Inc.</u> , 85 F.3d 752, 760 (1st Cir. 1996)	4
<u>Camp v. Camp</u> , 376 S.C. 237, 662 S.E.2d 458 (Ct. App. 2008).....	3
<u>Camp v. Camp</u> , 386 S.C. 571, 576, 689 S.E.2d 634, 636-37 (2010)..	2, 3, 4, 5, 10
<u>Corbin v. Kohler Co.</u> , 351 S.C. 613, 620-21, 571 S.E.2d 92, 96-97 (Ct. App. 2002).....	4
<u>Dismuke v. S.C. Dep't of Motor Vehicles</u> , 371 S.C. 418, 419, 639 S.E.2d 151, 152 n.1. (Ct. App. 2006).....	9
<u>Elam v. S.C. Dep't of Transp.</u> , 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)	6
<u>Fields v. Regional Medical Center Orangeburg</u> , 363 S.C. 19, 26, 609 S.E.2d 506, 510 (2005)	3, 5
<u>Ford v. State Ethics Comm'n</u> , 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ...	4
<u>Herron v. Century BMW</u> , 387 S.C. 525, 536, 693 S.E.2d 394, 400 (2010).....	12, 13, 16
<u>Mickle v. Blackmon</u> , 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970)	3, 5
<u>Registration Control Sys., Inc. v. Compusystems, Inc.</u> , 922 F.2d 805, 808 (Fed. Cir. 1990)	4
<u>Richland County v. Kaiser</u> , 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002)	5
<u>Simpson v. MSA of Myrtle Beach, Inc.</u> , 373 S.C. 14, 24, 664 S.E.2d 663, 667 (2010)	11, 12, 15, 16, 17
<u>Standard Fed. Sav. & Loan Ass'n. v. Mungo</u> , 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991).....	5
<u>Strand v. US Bank Nat'l Ass'n ND</u> , 693 N.W.2d 918, 924 (N.D. 2005).....	11
<u>Timms v. Greene</u> , 310 S.C. 469, 427 S.E.2d 642 (1993)	18
<u>Towles v. United Healthcare Corporation</u> , 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).....	19

RULES

Rule 7(b)(1), <u>SCRCP</u>	4, 9, 10
Rule 50(a), <u>SCRCP</u>	2
59(a), <u>SCRCP</u>	2, 4, 13
Rule 59(e), <u>SCRCP</u>	2, 4, 6, 9, 13

OTHER AUTHORITIES

Charles Alan Wright & Arthur R. Miller, <u>Federal Practice and Procedure</u> , § 1192 (2d ed.1990)	4
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I. INTRODUCTION

Respondent divides her arguments in her Initial Brief between procedural and substantive arguments. The first twenty-seven pages assert procedural issues relating to arguments that Appellants are prevented from having this Court hear issues in this appeal because Appellants' Motion for Reconsideration had the incorrect Rule subsection enumerated on the Motion. The remainder of Respondent's Initial Brief deals with the substantive arguments of whether the Federal Arbitration Act (the "FAA") applies and whether the arbitration clause is unconscionable. Appellants address both sections of the brief and would refer the Court to Appellants' Initial Brief for a more detailed discussion of the substantive arguments of unconscionability and the application of the Federal Arbitration Act (the "FAA").

For the reasons more fully set forth below, Respondent's arguments are without merit. Appellants' Notice of Appeal was timely since the Trial Court was able to discern the relief requested and properly heard Appellants' Motion for Reconsideration under Rule 59(e) of the South Carolina Rules of Civil Procedure ("SCRCP"). Further, Appellants properly preserved all issues enumerated in their Brief for this appeal. As to Respondent's substantive arguments, the arbitration clause is not void on equitable grounds, and the FAA applies because the transaction between the parties involves interstate commerce. Even if the Court were to find that the "no live witnesses other than Respondent and Appellant" provision of the arbitration clause was unconscionable, the Court has the ability to sever that portion of the arbitration clause, as further discussed below.

II. ARGUMENTS

A. Respondent's Arguments Surrounding Appellants' Motion for Reconsideration are Without Merit

While Respondent argues that Appellants' Motion for Reconsideration referenced the incorrect Rule, in that it stated it was being made under Rule 50(a), rather than Rule 59(e), SCRCP, it is clear that under South Carolina law the Circuit Court has flexibility in hearing Motions, regardless of how they are enumerated.¹ As in the case of Camp v. Camp, "neither party was prejudiced by [Appellants'] motion for reconsideration, and it appears from the record the [Trial] [C]ourt was able to both comprehend the motion and deal with it fairly."²

1. Appellants' Notice of Appeal Was Timely.

Respondent asserts that Appellant's Motion for Reconsideration was untimely because it referenced Rule 59(a), SCRCP, instead of Rule 59(e), SCRCP, and a Rule 59(e) motion was not filed.³ Contrary to Respondent's wide-ranging arguments concerning Appellants' alleged improper use of Rule 59, SCRCP,⁴ the record and the law demonstrate that Appellants' Notice of Appeal was timely filed and, in turn, this Court of Appeals has jurisdiction to consider this matter entirely on the merits.

Our Supreme Court has long acknowledged that, in the interests of fairness and justice, a court should "treat [a] motion based on its substance and

¹ Camp v. Camp, 386 S.C. 571, 576, 689 S.E.2d 634, 636-37 (2010).

² Id.

³ Respondent's Brief, pp.8-12.

⁴ Id.

effect opposed to how it was captioned by [the moving] party"⁵

Furthermore, as to Respondent's arguments that the substance of Appellants' Rule 59, SCRCP, motion did not comprehensively set forth the grounds upon which reconsideration was sought,⁶ our Supreme Court has also stated:

Because the particularity requirement is to be read flexibly in light of the peculiar circumstances of each case, we do not believe applying the particularity requirement in an overly technical fashion . . . would serve the purpose behind the rule. Applying an overly technical analysis [does] not reduce prejudice to either party nor would it assure the court that it would be able to deal with [a] motion [for reconsideration] fairly.⁷

In Camp v. Camp, the Supreme Court addressed a situation, as herein, where the respondent asserted the appellant had not timely filed the notice of appeal since the appellant's reconsideration motion did not set forth, with particularity, the grounds for the motion. This Court of Appeals had originally dismissed the appeal,⁸ but the Supreme Court reversed. In reinstating the appeal, the Supreme Court noted:

the particularity requirement "is to be read flexibly in 'recognition of the peculiar circumstances of the case.' " "By requiring notice to the court and the opposing party of the basis for the motion, [Rule 7(b)(1), SCRCP,] advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.'" Therefore, when a motion is challenged for a lack of particularity, the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.' " "The particularity requirement should not be applied in an

⁵ Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 510 (2005) (citing Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970)).

⁶ Respondent's Brief, pp.10-12. Respondent essentially argues Appellants failed to meet the particularity requirement of Rule 7(b)(1), SCRCP.

⁷ Camp v. Camp, 386 S.C. 571, 576, 689 S.E.2d 634, 636-37 (2010).

⁸ Camp v. Camp, 376 S.C. 237, 662 S.E.2d 458 (Ct. App. 2008).

overly technical fashion when the purpose behind the rule is not jeopardized."⁹

The Supreme Court concluded that "[w]hen neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical reading of the rules does not serve the purpose of Rule 7(b)(1), SCRCP."¹⁰

In this case, the Trial Court clearly and succinctly recognized these important propositions, stating:

I'm not trying to be smart with you [Counsel for Respondent], but if I made a mistake I'll correct it irrespective of whether it's [Rule] 59(a)], SCRCP,] or [Rule] 59(e)], SCRCP]. Okay? So base your argument on that, okay. That's my concern if whether I made a mistake and that's what the motion for reconsideration - - generally, it's for the Courts to correct themselves. And I've done that on, I won't say several occasions, but I have corrected myself on some motions.¹¹

The Trial Court was not concerned with whether Appellants made their reconsideration motion under Rule 59(a), SCRCP, or Rule 59(e), SCRCP, or simply as a general motion for reconsideration. The Trial Court understood the issues raised, the grounds asserted, and the arguments made. Nevertheless, while the Trial Court did not agree with the Appellants' issues, grounds, and/or

⁹ Camp, 386 S.C. at 575, 689 S.E.2d at 636 (citing Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996) (quoting Registration Control Sys., Inc. v. Compusystems, Inc., 922 F.2d 805, 808 (Fed. Cir. 1990)); Calderon v. Kansas Dep't of Social & Rehabilitative Servs., 181 F.3d 1180, 1186 (10th Cir. 1999) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1192 (2d ed.1990)); Andreas v. Volkswagen of America, Inc., 336 F.3d 789, 793 (8th Cir. 2003) (internal citations omitted)).

¹⁰ Camp, 386 S.C. at 576, 689 S.E.2d at 637. While the Respondent may assert she was "prejudiced," the standard of prejudice is "whether the [Trial] [C]ourt can comprehend the basis for the motion and deal with it fairly." Camp, 386 S.C. at 575, 689 S.E.2d at 636 (citing Calderon, 181 F.3d at 1186 (quoting 5 Federal Practice and Procedure, § 1192)).

¹¹ R.p.242, lines 2-9 (emphasis added). This is in also accord with the well-settled proposition that a judge has complete discretion to change his or her decision until such time as the decision is ultimately reduced to writing, signed by the judge, and filed with the Trial Court. Corbin v. Kohler Co., 351 S.C. 613, 620-21, 571 S.E.2d 92, 96-97 (Ct. App. 2002) (citing Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001)).

arguments, there was no indication the Trial " [C]ourt [failed to] comprehend the basis for the [Appellants' reconsideration] motion [or was unable to] deal with it fairly." ¹²

Appellants properly made their Motion for Reconsideration, and their appeal was timely noticed. This Court of Appeals should dismiss the Respondent's contrary arguments as baseless and proceed to hear this appeal on the merits.

2. The Trial Court Properly Treated Appellants' Motion for Reconsideration Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

When a party styles its motion incorrectly, if the court is able to discern the relief requested, the court may treat such motion as having been filed under the correct rule for purposes of deciding the motion.¹³ "It is the substance of the requested relief that matters regardless of the form in which the request for relief was framed".¹⁴ Civil procedure rules are construed to secure the just, speedy, and inexpensive determination of every action; further defects not affecting the substantial rights of the parties should be disregarded. It is the substance of the relief sought that matters regardless of the form in which the request for relief was framed.¹⁵

¹² Camp, 386 S.C. at 575, 689 S.E.2d at 636 (citing Calderon, 181 F.3d at 1186 (quoting 5 Federal Practice and Procedure, § 1192)).

¹³ Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27-28, 609 S.E.2d 506, 510 (2005) (finding party's motion for new trial was properly treated as a motion for reconsideration under Rule 59(e), SCRCP, even though it was erroneously captioned); Mickle v. Blackmon, 255 S.C. 136, 140, 177 S.E.2d 548, 549 (1970) (treating motion based on its substance and effect as opposed to how it was captioned by party).

¹⁴ Richland County v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002).

¹⁵ Standard Fed. Sav. & Loan Ass'n. v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991).

Appellants acknowledge that Rule 59(e) is the proper mechanism by which a party may move to alter or amend a judgment.¹⁶ Appellants did not move to amend their Motion because it was clear that the Trial Court was able to discern that Appellants were seeking a reconsideration of the Trial Court's earlier denial of Appellants' Motion to Compel Arbitration. Ostensibly, in an effort to construe the rules in such a way to secure the just, speedy, and inexpensive determination of the action before it, the Trial Court conducted the March 2, 2010 hearing as a Motion for Reconsideration. In fact, the Trial Court judge plainly voiced this understanding during the hearing: "[I]f I made a mistake I'll correct it irrespective of whether it's [Rule] 59(a)[, SCRPC,] or [Rule] 59(e)[, SCRPC]."¹⁷ Thus, even if Appellants moved under the wrong subsection of Rule 59, the Trial Court understood the motion to be one for reconsideration of the court's earlier ruling on Appellants' Motion to Compel Arbitration and addressed it accordingly.

3. Appellants Properly Preserved All Issues Enumerated in Appellants' Brief for this Appeal.

Respondent asks this Court to limit the arguments that Appellants can make on appeal to only those specifically stated in their Motion for Reconsideration filed February 2, 2010, and to disregard any discussion or argument made by Appellants in their supporting Memorandum filed March 1, 2010, or at the hearing on the Motion for Reconsideration held March 2, 2010.¹⁸ There is no authority to support such a request.

¹⁶ Rule 59(e), SCRPC; see e.g. Elam v. S.C. Dep't of Transp.; 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) ("Appellant . . . timely served a written 'motion for reconsideration' pursuant to Rule 59(e), SCRPC.").

¹⁷ R.p.242, lines 3-4.

¹⁸ Respondent's Brief, pp. 19-25.

As Respondent points out, a motion under Rule 59, must be made within ten days after receipt of the written order of the court.¹⁹ Appellants made their Motion for Reconsideration within ten days of receipt of the Trial Court's Order Denying Motion to Compel Arbitration.²⁰ There is no requirement that a memorandum supporting or opposing a motion be filed at any specific time, provided it is filed and served by the date of the hearing so that it can be considered by the court. Parties routinely file and serve supporting memoranda just prior to the hearing and, in fact, Respondent served her Memorandum in Opposition to Appellants' Motion to Compel Arbitration at the hearing on the motion held December 10, 2009.²¹

Appellants filed a Memorandum in Support of their Motion for Reconsideration prior to the March 2, 2010, hearing, which contained a detailed analysis of their arguments regarding reconsideration. This Memorandum, as well as the oral arguments made by Appellants' counsel at the March 2, 2010 hearing, were properly before the Court when it issued its Order denying the Motion for Reconsideration and are preserved for this appeal.

a. **There Were Two Issues Before the Trial Court: 1) Whether the Federal Arbitration Act Applies and 2) Whether the Arbitration Clause Was Unconscionable, and All Issues Raised by Appellants in This Appeal Relate to These Two Issues.**

It is clear there were two issues before the Trial Court at the December 10, 2009, Motion to Compel Arbitration hearing and the March 2, 2010 Motion for

¹⁹ Id., p. 20; Rule 59, SCRCP.

²⁰ Appellants' Motion for Reconsideration was filed on February 2, 2010, eight days after the Trial Court's Order Denying Motion to Compel Arbitration.

²¹ By way of example, the issue of unconscionability of the arbitration clause was not mentioned to the Trial Court until Respondent raised it at the hearing as she handed her Memorandum to Appellants' counsel. Appellants had no notice of the content of Respondent's argument until that moment, as the Memorandum was not served on Appellants' counsel prior to the hearing. (R.pp.97-133).

Reconsideration hearing: (1) the application of the FAA, and (2) the conscionability of the arbitration clause. The application of the FAA was addressed in Appellants' Memorandum in Support of the Motion to Compel Arbitration²² and was discussed in detail at the December 10, 2009 hearing.²³ Moreover, it was addressed by Appellants again in their February 2, 2010 Motion for Reconsideration²⁴ and supporting memorandum²⁵ and at the March 2, 2010 hearing.²⁶

The second issue, unconscionability, was raised by the Respondent at the December 10, 2009 hearing²⁷ (and in Respondent's Memorandum in Opposition to the Motion to Compel Arbitration,²⁸ which was handed up to the Trial Court and to Appellants at the hearing). Appellants briefly responded to Respondent's arguments on unconscionability at the December 10, 2009 hearing²⁹ and addressed the issue more fully in their February 2, 2010 Motion for Reconsideration³⁰ and supporting memorandum,³¹ after the Trial Court incorporated Respondent's unconscionability arguments into its Order denying Appellants' Motion to Compel.³² Moreover, the issue was addressed at the

²² R.pp.89-91, pp. 5-7.

²³ R.pp.199-200, 203-204, 206-208, 210-211.

²⁴ R.pp.136-139.

²⁵ R.pp.140, 149, 151-163.

²⁶ R.pp.220-223, 225-235, 250-253.

²⁷ R.pp.208-209.

²⁸ R.pp.102-103.

²⁹ R.pp.210.

³⁰ R.pp.136-139.

³¹ R.pp.140, 163-177.

³² In fact, at the March 2, 2010 hearing, the Trial Court commented initially that despite its use and signing of Respondent's Proposed Order, which addressed unconscionability in detail, the Trial Court did not view the arbitration clause as unconscionable and indicated that it would remove that language from the Order. R.pp.235-236.

March 2, 2010 hearing.³³

As described above, both issues were raised to the Trial Court in the Motion to Compel and Motion for Reconsideration hearings, and the Trial Court ruled on both issues. Thus, both issues were preserved for review by this Court.

In support of her position that the issues raised by Appellants in the Memorandum or at the hearing on the Motion for Reconsideration have not been preserved for appeal, Respondent cites case law holding that the Court of Appeals is powerless to review an issue that was not included in the lower court's written order or in a Rule 59(e) motion because the Court of Appeals does not have an express ruling on the issue.³⁴ However, the issues raised by Appellants on appeal were all addressed by the Trial Court and are encompassed in the Trial Court's determination that 1) the FAA does not apply and 2) the arbitration clause is unconscionable.

b. Appellants Were Not Required to Set Forth All of Their Arguments in Their Motion for Reconsideration.

In their Motion for Reconsideration, Appellants ask the Trial Court to reconsider its Order denying Appellants' Motion to Compel Arbitration. Appellants further describe three grounds that support their motion, stating the "grounds...include the following."³⁵

As set forth above in the discussion of Camp v. Camp, our Supreme Court has found that the requirement of particularity of Rule 7(b)(1), SCRCP, should not be "applied in an overly technical fashion when the purpose behind the rule is

³³ R.pp.223, 235-236, 238, 244-247, 253-254, 256-258.

³⁴ Respondent's Initial Brief, p. 20 (citing Dismuke v. S.C. Dep't of Motor Vehicles, 371 S.C. 418, 419, 639 S.E.2d 151, 152 n.1. (Ct. App. 2006)).

³⁵ R.pp.30-36 (emphasis added).

not jeopardized."³⁶ Avoidance of prejudice to either party and the court's ability to deal fairly with a motion for reconsideration are the purposes behind Rule 7(b)(1)'s requirement of particularity.³⁷ Thus, so long as the Trial Court was able to both comprehend the motion and deal with it fairly, without prejudice to either party,³⁸ Appellants' failure to set forth with particularity the grounds for their motion for reconsideration does not render the court without jurisdiction to hear the motion and thus render Appellants' appeal untimely.

c. Appellants' Discussion of Substantive and Procedural Unconscionability Is Encompassed in the Issue of Whether the Trial Court Erred in Its Determination that the Arbitration Clause Was Unconscionable.

Respondents have asked this Court not to consider Appellants' arguments regarding procedural and substantive unconscionability because procedural and substantive unconscionability were not raised at the December 10, 2009, hearing on the Motion to Compel Arbitration and were not contained in the Trial Court's Order Denying Appellants' Motion to Compel Arbitration.³⁹ Unconscionability (both procedural and substantive), first asserted by Respondent in her opposition to Appellants' Motion to Compel Arbitration, and then raised by Respondent in the last few minutes of the hearing on Appellants' Motion to Compel Arbitration, was addressed briefly by Appellants' counsel.⁴⁰ Counsel for Respondent argued

³⁶ Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636.

³⁷ Id.

³⁸ Respondent cannot argue that she was prejudiced by the Motion for Reconsideration because she was given the opportunity by the Trial Court to fully brief these issues. Respondent not only fully briefed these issues, but she also submitted a six-page Affidavit, which addressed each point in her brief. Moreover, the Trial Court allowed Respondent a period of time after the Motion for Reconsideration in which to submit any additional facts to support her position.

³⁹ Respondent's Initial Brief, pp.23, 25-27.

⁴⁰ R.pp.208-209. Appellants did not raise the issue of unconscionability because Appellants do not consider the arbitration clause to be unconscionable and, therefore, did not consider this an issue

that the arbitration clause was unconscionable because there was "a clear absence of meaningful choice" because "an employee, six months into a relationship with an employer, who is trying to be successful in a profession, is at a disadvantage."⁴¹ She also argued that it was against public policy because Respondent could not have any live witnesses at the arbitration hearing.⁴² Respondent's first argument is an argument of procedural unconscionability.⁴³ Respondent's second argument is one of substantive unconscionability.⁴⁴

It is disingenuous for Respondent to represent to this Court that procedural and substantive unconscionability were not preserved for appeal when these are simply terms that describe the two types of unconscionability, *both of which* much exist in order for an arbitration clause to be unconscionable.⁴⁵ It is clear from the record before the Trial Court that unconscionability was raised by Respondent, addressed by Appellants and ruled on by the Trial Court.

until Respondent raised it at the hearing. Appellants were not aware that this issue would be raised until this point in the hearing, since Respondent did not serve Appellants with her memorandum prior to the hearing.

⁴¹ R.p.208.

⁴² The arbitration clause states that "the parties [will be] the only witnesses called in person." (R.p.263, para. 6).

⁴³ Procedural unconscionability focuses upon formation of the contract and fairness of the bargaining process, including factors such as inequality of bargaining power, oppression, and unfair surprise." Strand v. US Bank Nat'l Ass'n ND, 693 N.W.2d 918, 924 (N.D. 2005).

⁴⁴ Substantive unconscionability refers to the undue harshness in the contract terms themselves. Woods v. QC Fin. Servs., Inc., 280 S.W.3d 90, 95 (Mo. App. 2008).

⁴⁵ Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 664 S.E.2d 663, 667 (2010) ("In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.") (emphasis added).

d. **This Court Is Not Barred from Severing the “no live witnesses other than Respondent and Appellant” Portion of the Arbitration Clause.**

Respondent suggests to this Court in her brief that the Trial Court ruled that it was not going to consider the severability issue because it was a “new issue” not previously raised.⁴⁶ To the contrary, the Trial Court’s discussion of not considering new issues is separate from and unrelated to the severability issue. The Trial Court did not specifically identify any “new issue” raised by Appellant, rather it indicated it would consider additional facts as to the issues that were raised and that it would consider factual evidence that was submitted and invited Respondent’s counsel to submit any factual evidence.⁴⁷

Further, should the Court determine that the “no live witnesses other than Respondent and Appellant” provision is unconscionable, it has the ability to consider the issue of severance. Generally, “courts will attempt to sever an illegal provision in an otherwise valid contract and enforce the remaining terms.”⁴⁸ The South Carolina Supreme Court has “acknowledge[d] that in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause.”⁴⁹

⁴⁶ Respondent states: “Pursuant to Rule 7(b)(1), severability was not properly raised as a ground for reconsideration, and the Circuit Court properly ruled and disallowed any “new issues” at the hearing [on the motion for reconsideration] to avoid prejudicing Respondent.” (Respondent’s Initial Brief, p. 25).

⁴⁷ The Trial Court stated: “Ms. Bloodgood, in fairness to you I am going to consider what’s been submitted. I will not consider any new issues. If there’s anything that you want to submit to counter that I’ll be happy to give you a certain timeframe to get it to me.” (R.p.257, lines 18-22).

⁴⁸ Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (2010).

⁴⁹ Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 35 n.9, 644 S.E.2d 663, 674 (2007).

In Herron v. Century BMW, the Court recently reiterated this rule when considering whether a ban on class actions contained in an arbitration agreement was unenforceable. Finding this provision in the arbitration agreement unenforceable, the Court *sua sponte* continued its analysis to determine whether the provision was severable.⁵⁰ The opinion does not indicate that the appellants had addressed the notion of severability at the trial court level; rather, it appears that the Court addressed severability on its own, as a natural part of the determination of the treatment that should be given when a provision is deemed unenforceable.⁵¹ Thus, the Court can consider severability as part and parcel of the issue of unconscionability which is currently before it.

The severability issue was addressed in detail in Appellants' Memorandum in Support of its Motion for Reconsideration.⁵² Appellants' counsel had no reason to address severability further at the hearing on the Motion for Reconsideration, as the Trial Court judge instructed Appellants' counsel that he did not need to hear her on the issue of unconscionability as he did not "view [the arbitration clause] as unconscionable" and was going to correct the Order.⁵³

e. Respondent Was Not Prejudiced by the Trial Court's reconsideration of its Denial of the Motion to Compel Arbitration.

The fact that the Trial Court reconsidered its Order denying Appellants' Motion to Compel Arbitration and *sua sponte* converted the Rule 59(a) motion to a Rule 59(e) motion in no way prejudiced Respondent. Following the

⁵⁰ Herron, 387 S.C. at 536, 693 S.E.2d at 400.

⁵¹ Id.

⁵² R.pp.176-178.

⁵³ R.pp.235-236.

reconsideration hearing, and at the Trial Court's invitation,⁵⁴ Respondent filed a six page single spaced Affidavit in which she stated: "To the extent the Court is considering any facts in the 44-page brief filed by [Appellants] on March 1, 2010, or those facts argued by [Appellants] at the hearing based on the three (3) grounds raised in their Motion filed February 2, 2010, this affidavit is being submitted in opposition thereto."⁵⁵ The Affidavit further addressed documents introduced by Appellants and considered by the Trial Court at the March 2, 2010, hearing.⁵⁶ The Affidavit set forth "specific facts" "to assist the [Trial] Court in making a decision on Plaintiff's Motion for Reconsideration"⁵⁷ and addressed "statements made by [Appellant's] counsel at the hearing in this matter."⁵⁸

In addition, Respondent's counsel had the opportunity to address the arguments presented by Appellants at the hearing on the Motion for Reconsideration.⁵⁹ In fact, she apparently convinced the Trial Court to change its mind at the hearing with regard to the issue of whether the arbitration clause was unconscionable.⁶⁰ Further, having ultimately received a ruling in her favor, Respondent has not shown, and cannot show, that she was prejudiced in any way with the Trial Court reconsidering its Order under Rule 59, SCRCP.

⁵⁴ At the hearing on the Motion for Reconsideration, the Trial Court stated to Respondent's counsel "Ms. Bloodgood, in fairness to you I'm going to consider what's been submitted. I will not consider any new issues. If there's anything that you want to submit to counter that I'll be happy to give you a certain timeframe to get it to me. (R.p.257). The Trial Court gave Respondent ten days to submit anything to it. (Id., R.p.258).

⁵⁵ R.p.184.

⁵⁶ Id.

⁵⁷ Id., p.185.

⁵⁸ Id., p.188.

⁵⁹ R.pp.237-250.

⁶⁰ When Appellants' counsel began to address "the issue of unconscionability," the Trial Court stated: "Don't worry about that, okay?...I understand it's in the order, but, I can correct that...I'm not concerned about that...I understand I signed the order but I don't view it as unconscionable, okay." (R.pp.235-236).

B. The Arbitration Clause Is Not Void on Equitable Grounds.

1. The Arbitration Clause Does Not Preclude Respondent from Having Available to Her Judicial Remedies or Rights.

Respondent argues that the Court should uphold the Trial Court's ruling because the arbitration clause "precluded significant judicial remedies and rights."⁶¹ The right to which Respondent refers is the "right to take oral testimony of witnesses in open court in order to determine the competency of the witnesses."⁶² In support of her argument, Respondent cites the case of Simpson v. MSA of Myrtle Beach, in which a customer signed an arbitration agreement with an automobile dealership that contained limitations on statutory remedies.⁶³ The issue before the South Carolina Supreme Court was whether the language prohibiting the arbitrator from awarding punitive, exemplary, double or treble damages was oppressive and made the arbitration clause unconscionable.⁶⁴ The Supreme Court reasoned that the arbitration clause went beyond banning punitive damages and specifically prohibited outright an arbitrator from awarding *statutorily required* treble or double damages.⁶⁵ The court held that the arbitration clause violated statutory law because it prevented Simpson from receiving the mandatory statutory remedies to which she may be entitled and that "permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts

⁶¹ Respondent's Initial Brief, p. 30

⁶² Respondent's Initial Brief, p. 30, citing Order Denying Plaintiff's Motion to Compel Arbitration, p. 8

⁶³ Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).

⁶⁴ Id. at 28, 644 S.E.2d at 670.

⁶⁵ Id. at 29, 644 S.E.2d at 671.

that adversely affect the public interest."⁶⁶

The Simpson case is clearly distinguishable from the case at hand. Here, there is no mandatory right or remedy that is taken away by the arbitration clause, which merely states that the parties will be the only live witnesses at the arbitration. There is no prohibition against, or limitation on, depositions or discovery. Respondent may take depositions of witnesses, cross examine witnesses, subpoena documents and present the transcripts of the deposition testimony and documents at the arbitration hearing. The limitation on live witnesses provision applies equally to both Respondent and Appellants.⁶⁷

Respondent's reliance on the case of Heron v. Century BMW is also misplaced. That case involved an arbitration clause that banned a class action lawsuit, which was a "non-waivable right" allowed by the Dealers Act.⁶⁸ As in Simpson, the South Carolina Supreme Court found the arbitration clause to be unenforceable because it took away a right provided by the statute that *could not be waived*. Such is not the case here.

2. Respondent Had a Meaningful Choice in Agreeing to the Arbitration Clause.

Respondent argues that Appellants' position is tantamount to asking the Court to rule that anytime two attorneys make an agreement, it is per se conscionable because of their sophistication.⁶⁹ To the contrary, Appellants are asking this Court to consider the facts of this case and rule that Respondent did

⁶⁶ Id.

⁶⁷ Respondent argues that Appellants filed to preserve this argument because they did not raise it at the original hearing on the Motion to Compel Arbitration. The fact that the clause applies to both parties is clear and obvious from language of the clause itself, which is part of the record before the Trial Court. (Respondent's Initial Brief, p. 32, f.n. 26; R.pp.262-264).

⁶⁸ Herron, 387 S.C. at 535-536, 693 S.E.2d at 399-400.

⁶⁹ Respondent's Initial Brief, p. 33.

not lack a meaningful choice in agreeing to the arbitration clause. The 2006 Agreement is only three pages long and contains the "terms of the offer" previously given to Respondent, as well as additional benefits that Respondent will receive, including various bonuses on specific cases.⁷⁰ The language in the arbitration clause is clear and unambiguous on its face. Respondent does not allege that she did not read the clause or that she did not understand it. Rather, she alleges that she "believed that if she did not sign the document as presented to [her] that [she] would jeopardize the trial bonuses [she] had already earned and even [her] job."⁷¹

Respondent does not provide reasoning for why she felt this way and there is no factual basis for her reasoning, especially in light of the language of the 2006 Agreement, which states in the first paragraph, "Please feel free to clarify anything that I misstate," and in the last paragraph, "After spending some time reviewing it, if you are in agreement with this, please so indicate by countersigning below and returning to me at your convenience. If you first need a meeting to discuss, just let me know."⁷² Respondent never even inquired about the arbitration clause.

Finally, the placement of the arbitration clause on page two of the three-page 2006 Agreement does not make it unconscionable. The conspicuous nature of the clause is only a factor that the court considers.⁷³ Furthermore, Respondent

⁷⁰ R.pp.262-264

⁷¹ R.p.186, para 13.

⁷² R.p.262; R.p.264.

⁷³ Simpson, 373 S.C. at 227-28, 644 S.E.2d at 670. ("Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law.").

does not allege that she did not see or read the arbitration clause. Given the fact that most of the 2006 Agreement contains language providing benefits, including significant bonuses, to Respondent, it would be odd for her to fail to read any of its language.

C. Interstate Commerce Was Involved in the Transaction Between the Parties and the Federal Arbitration Act Applies.

Respondent argues that Appellants "ignore relevant controlling case law of South Carolina, including Timms v. Greene."⁷⁴ Contrary to Respondent's assertion, Appellants do not ignore these cases, but further rely on them as precedent for determining whether interstate commerce is involved such that the FAA applies. In Timms v. Greene, the primary case relied upon by Respondent, the South Carolina Supreme Court considered the nursing home center's involvement in interstate commerce, but stated "although these factors could evidence the Center's involvement in interstate commerce, we find that *their relationship to the agreement* between the Center and the respondent is insufficient to form the basis of the contract between the parties."⁷⁵ The contract at issue was with the resident of the nursing home for patient-residential service.

Unlike Respondent, the resident in Timms never went out of state for services, nor did the contract require her to. However, the 2006 Agreement and 2007 Amendment clearly envision that Respondent will be engaged in interstate commerce, since activities across state lines, such as out of state telephone calls, Westlaw research and depositions, were all necessary activities that she

⁷⁴ Respondent's Initial Brief, p. 36, citing Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993).

⁷⁵ Timms v. Greene, 310 S.C. 469, 472, 427 S.E.2d 642, 644 (1993) (emphasis added).

would perform for Appellant Firm and its clients. There is no requirement that she be licensed to practice law in any other state in order for her work for the Firm to "involve" or "affect" interstate commerce. Moreover, as discussed in Appellants' Initial Brief, Respondent's causes of action in the lawsuit arise out of bonuses she claims are due in the Ocean Club case, a case in which her work clearly affected interstate commerce.⁷⁶

Respondent asserts that Appellants "cite out of state precedent which is in direct conflict with South Carolina law."⁷⁷ To the contrary, one of the primary cases relied upon by Appellants is Towles v. United Healthcare Corporation, in which this Court held that the employment arbitration policy signed by the employee medical director was enforceable because the employee's responsibilities involved interstate commerce.⁷⁸ This case, involving an employer-employee relationship is certainly more applicable to the facts at hand than a nursing home resident's contract with a nursing home. Further, because there is no case law on point in South Carolina with regard to an arbitration clause between two attorneys, Appellant may point out to the Court cases from other jurisdictions, just as Respondent has done.

Finally, it is important to note that Respondent concedes the agreements between Appellant Firm and Appellants' clients "may have involved interstate commerce"⁷⁹ It is this very relationship between Appellants' and its clients, that Respondent furthered in her work under the 2006 Agreement and 2007

⁷⁶ Appellants' Initial Brief, pp. 11 – 14; 22 – 25.

⁷⁷ Respondent's Initial Brief, pp. 36 and 37.

⁷⁸ Towles v. United Healthcare Corporation, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).

⁷⁹ Respondent's Initial Brief, p. 42

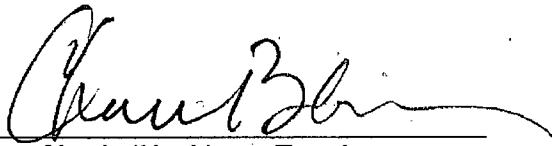
Amendment. She was not an employee who sat in an office and never engaged in interstate commerce. She was an associate attorney who earned her compensation under the contracts at issue by engaging in activities for the Firm's clients that clearly affected and involved interstate commerce.

III. CONCLUSION

For the reasons set forth herein and discussed in detail in Appellants' Initial Brief, Appellants respectfully request this Court to reverse the holding of the Trial Court and order the causes of action asserted by Respondent to be arbitrated in accordance with her prior agreement.

Respectfully submitted:

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Attorneys for the Appellants

Charleston, South Carolina

January 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

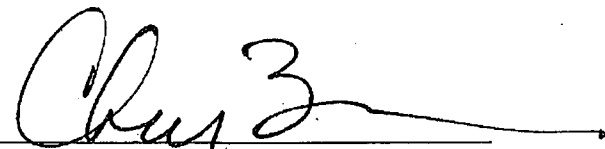
Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

RULE 211 (B), SCACR,
CERTIFICATE OF COUNSEL

I, Cherie Blackburn, Esquire, hereby certify that the **FINAL REPLY BRIEF**
submitted by the Appellants, Justin O'Toole Lucey and Justin O'Toole Lucey,
P.A., complies with Rule 211(b), SCACR.

Signed: 

Cherie Blackburn, Esquire

Charleston, South Carolina

January 4, 2011

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
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Appellants,

v.

Amy Meyer,

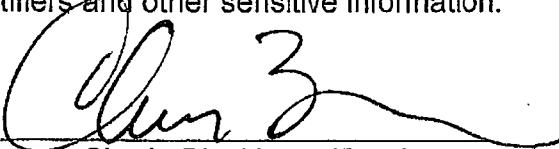
Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

CERTIFICATE OF COUNSEL
COMPLIANCE WITH AUGUST 13, 2007
SUPREME COURT ORDER

I, Cherie Blackburn, Esquire, hereby certify that this the **FINAL REPLY BRIEF** submitted by the Appellants, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A., complies with the Supreme Court's Order dated August 13, 2007, concerning the redaction of personal identifiers and other sensitive information.

Signed: 

Cherie Blackburn, Esquire

Charleston, South Carolina

January 4, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Justin O'Toole Lucey and
Justin O'Toole Lucey, P.A., Appellants,

v.

Amy Meyer, Respondent.

And Lorcan Lucey, GMAC
Mortgage Corporation,
Citimortgage, Inc., and
John Doe Finance, Third Party Defendants.

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 4960
Heard January 26, 2012 - Filed March 28, 2012

REVERSED

Cherie Blackburn, of Charleston, for Appellants.

Nancy Bloodgood and Lucy C. Sanders, both of
North Charleston, for Respondent.

LOCKEMY, J.: In this civil action involving an employment contract, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. (Firm) (collectively Appellants) appeal the trial court's denial of their motion to compel arbitration. Appellants contend the trial court erred in: (1) finding the Federal Arbitration Act (FAA) did not apply because the relationship between Firm and Amy Meyer did not involve interstate commerce; (2) finding the arbitration clause was unconscionable; (3) striking the entire arbitration clause when it was more appropriate to sever the alleged unconscionable portion and compel arbitration; and (4) finding the South Carolina Arbitration Act (SCAA) applicable to the contract. We reverse.

FACTS

Meyer began practicing law in 2002 and is licensed to practice law only in South Carolina. Prior to joining Firm, Meyer was employed as an Assistant Solicitor for the Ninth Circuit, specializing in white collar crime, but had no civil trial experience. She also practiced public accounting for 6 years as a certified public accountant before going to work with the Solicitor's Office. In January 2006, Firm hired Meyer as an associate attorney.

In June of 2006, Meyer and Firm executed an employment agreement (2006 agreement). Explaining the purpose of the 2006 agreement, the beginning paragraph stated:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalese, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

The 2006 agreement contained an arbitration clause in the middle of the second page in regular type which stated:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

A base salary and bonus structure for contingency cases along with other benefits were also included in the 2006 agreement. The paragraph preceding the signature line stated:

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

Under "Subsequent Modifications," the 2006 agreement listed additional benefits to Meyer, including an increased bonus of fifteen percent on a case referred to as the Harper case and a graduated trial bonus on cases which Meyer shared the work with Lucey in getting ready for trial.

The 2006 agreement specifically referenced certain cases that Meyer would be working on, including the Cusack, Harper, Shoshan, Hanson, and Turner cases. Appellants allege each of these cases involved interstate commerce. They state Shoshan was an employment lawsuit against a non-South Carolina resident car parts manufacturing subsidiary of a German company which had a North Charleston factory. Turner was a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank. Harper involved a treating doctor who resided in and was deposed in Florida. Firm's primary liability expert for the Harper case resided in and was deposed in Georgia, while another of Firm's experts for the case resided in and was deposed in

California. Appellants also allege that most of this out-of-state work was handled by Meyer.

In May of 2007, Firm and Meyer amended the 2006 agreement (2007 amendment) to address Meyer's salary bonus for work on a complex construction defect case (the Ocean Club case) involving a construction project on the Isle of Palms near Charleston, SC. After being provided a draft of the 2007 amendment for review, Meyer crossed out and initialed certain language to which she objected and then signed the document. Appellants stated Meyer was not spearheading the Ocean Club case.

Firm's primary client in the Ocean Club case was the Ocean Club Horizontal Property Regime, which was composed of homeowners located in various states. On February 2, 2009, Meyer prepared a summary of the travel expenses incurred in connection with the case, showing repeated travel outside of South Carolina. Further, documentation was presented showing many out-of-state depositions in which Meyer participated. During Meyer's work for this case, Firm made intermittent payments toward her salary bonuses. On July 20, 2009, the Ocean Club case was settled, and on July 22, 2009, Meyer's employment was terminated.

In July of 2009, Meyer began making demands for vacation, 401K money, and bonus money allegedly due under the Ocean Club case. In response, Firm filed an arbitration proceeding on October 22 with National Arbitration and Mediation, Inc. (NAM). Meyer did not respond to the NAM arbitration filing and sent a draft complaint to Appellants on October 30, 2009. On November 2, 2009, Appellants filed a complaint, a motion for a temporary restraining order and preliminary injunction, and a motion to compel arbitration. Appellants state they filed the complaint in an effort to prevent the filing of the draft complaint from Meyer, because the draft complaint contained confidential information about Firm's clients and disregarded the binding arbitration clause contained in the 2006 agreement. On November 30, 2009, Meyer filed an answer, counterclaims, and third party complaint. Meyer asked for an award of \$1.7 million for the value of her time on the Ocean Club case.

After a hearing on December 9, 2009, the trial court denied the motion to compel arbitration. The trial court made the following conclusions: (1) the arbitration clause did not meet the requirements of SCUAA; (2) the employment contract did not involve commerce within the meaning of the FAA; (3) the arbitration clause at issue was further void on equitable grounds; and (4) there were differences in compelling arbitration in real estate development and construction cases under the FAA and compelling arbitration for personal service contracts.

Appellants filed a Rule 59(a) motion asking the trial court to reconsider the following: (1) the determination that the FAA did not apply, because the trial court improperly focused on Meyer's activities, rather than the activities of the Firm; (2) the delegation to Meyer's counsel of the ruling on the issue of whether the arbitration clause was unconscionable; and (3) the failure to recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, especially as between sophisticated parties. However, during the hearing on the motion for reconsideration, Appellants failed to pursue their second argument regarding improper delegation. The trial court issued a Form 4 denial of the Appellants' 59(a) motion for reconsideration, and this appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in its determination the employment contract between the parties did not involve interstate commerce within the meaning of the FAA such that the FAA does not apply?
2. Did the trial court err in its determination that the arbitration clause at issue is unconscionable, thus it is invalid and not enforceable?
3. Did the trial court err in failing to sever the "limitation of live witnesses" portion of the arbitration clause and then enforce the remainder?
4. Did the trial court err in its determination that the SCUAA applies to the agreement between the parties and that the employment agreement is not in compliance with such act?

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. (quoting Simpson, 373 S.C. at 22, 644 S.E.2d at 667).

LAW/ANALYSIS

I. Timeliness of Appellants' Notice of Appeal

As a threshold procedural matter, we will address Meyer's argument that Appellants' Rule 59(a) motion for reconsideration was an insufficient and improper way to request review of a trial court's denial of a motion to compel arbitration. Thus, Meyer contends this is an untimely appeal because the improper motion did not toll the time for appeal from the arbitration order. We disagree.

Appellants' motion stated they are requesting reconsideration pursuant to Rule 59(a), SCRCP. Rule 59(a) states:

Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

The grounds for Appellants' motion are stated as follows: (1) the trial court incorrectly focused on Meyer's activities, rather than the activities of the Firm when determining whether the FAA applied; (2) the trial court delegated the ruling on the issue of whether the arbitration clause was unconscionable to Meyer's counsel; and (3) the trial court failed to recognize or evaluate the factors which render arbitration clauses reasonable and unconscionable, especially as between sophisticated parties. The Appellants then filed a memorandum in support of their motion for reconsideration which expands upon their three grounds.

"A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCF, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion." Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCF. "Rule 7(b)(1), SCRCF requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" Camp, 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.'" Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996)). "By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." Id. (quoting Calderon v. Kansas Dep't of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir. 1999)). However, when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1), SCRCF. Id. at 575-76, 689 S.E.2d at 636-37.

When the trial court is able to discern the relief requested, "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" Richland Cnty. v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)); see

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) (holding it was proper to treat plaintiff's written motion as a Rule 59(e) motion to the extent the motion addressed the trial court's evidentiary rulings, which the plaintiff challenged in her briefly stated oral motion at the end of the trial, even though it was erroneously captioned as a motion for new trial).

At the hearing for reconsideration, Meyer raised her contention that the Appellants filed their motion improperly pursuant to Rule 59(a), instead of Rule 59(e). The court responded:

I'm not trying to be smart with you, but if I made a mistake I'll correct it irrespective of whether it's 59(a) or 59(e). Okay? So base your argument on that, okay. That's my concern if whether I made a mistake and that's what the motion for reconsideration -- generally, it's for the Courts to correct themselves. And I have done that on, I won't say several occasions, but I have corrected myself on some motions. . . . So don't give up any of your arguments for appellate, okay?

Addressing Meyer again at the end of the hearing, the trial court stated:

All right. I'm giving you an opportunity to give me any facts you want to give me that you didn't give me last time. That's what I'm giving you ten days for. Okay? . . . I'm not going to consider any new issues. I'll be happy to receive any facts that you want to present to me on those issues.

The trial court explained that despite the rule cited in the motion, it understood the motion to be one for reconsideration of the issues, and it would address the motion as such. The grounds, with the exception of the second ground that Appellants dropped, were issues brought up in the initial hearing.

Acknowledging the flexibility of the particularity requirement, we find the court fairly addressed the motion as a Rule 59(e) motion for reconsideration. Any potential prejudice to Meyer was relieved by permitting ten days after the hearing to file any other arguments that she felt applicable. For the foregoing reasons, we hold the filing of the captioned Rule 59(a) motion for reconsideration tolled the time period to file a notice of appeal, and therefore, Appellants' notice of appeal was timely.

II. Interstate Commerce within the definition of the FAA

Appellants argue the trial court erred in finding the employment contract with Meyer did not involve interstate commerce. Specifically, they contend interstate commerce is broadly construed for purposes of the FAA; thus, because the employment contract's named cases required out-of-state travel and work from Meyer, the contract involved interstate commerce. We agree.

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). The FAA provides: "A written provision in any [] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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. § 2 (2009). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.'" Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995)); see also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). "Because the statute provides for the enforcement of

arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce." Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (quoting Citizens Bank, 539 U.S. at 56).

"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.")). "Our courts consistently look to the essential character of the contract when applying the FAA." Id. at 96, 592 S.E.2d at 52 (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved").

Our supreme court and this court have ruled on several cases which are applicable to our determination of whether the contract at bar involves interstate commerce. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where a builder was domiciled in South Carolina, but under the contract, was assigned rights to a Delaware creditor); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding interstate commerce was involved in a contract requiring removal of water and sludge from property in South Carolina to a facility in North Carolina); Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) (stating that a contract between a nursing home and patient did not involve interstate commerce, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract, the provision of patient-resident services in South Carolina, did not require any activities in interstate commerce); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and

manufactured solely within the State of South Carolina."); Blanton v. Stathos, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because "the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce").

In Thornton v. Trident Med. Ctr., L.L.C., James Thornton entered into a recruiting agreement with Trident Medical Center. 357 S.C. 91, 93, 592 S.E.2d 50, 51 (Ct. App. 2003). The agreement required Thornton to relocate his medical practice from Michigan to Charleston, SC, for a total of at least four years and included the additional terms: (1) a net collectable revenue guarantee which provided Thornton with a guaranteed income for twenty-four months; (2) a signing bonus; (3) a relocation agreement for payment of moving expenses; and (4) an agreement providing that Thornton was being recruited into the existing practice of SCCA. Id. An arbitration clause was included in the contract. Id. Thornton left Charleston before the contracted four years and filed a declaratory judgment seeking a determination that the arbitration clause was unenforceable. Id. at 94, 592 S.E.2d at 51. In finding the contract involved interstate commerce such that the FAA applied, this court decided the "subject matter of the contract clearly [extended] beyond Thornton's obligation to provide medical services in South Carolina." Id. at 97, 592 S.E.2d at 53. This court found the recruiting agreement was primarily to induce Thornton to move from Michigan to South Carolina. Id. at 97-98, 592 S.E.2d at 53. Additionally, the agreement included reimbursement for Thornton's relocation expenses and prevented Thornton from practicing in any other state other than South Carolina for four years. Id. Thus, "the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines," and "[t]he express purpose [] was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." Id. at 98, 592 S.E.2d at 53.

In contrast, our supreme court found the agreement in Timms v. Greene did not involve interstate commerce. 310 S.C. 469, 473, 427 S.E.2d 642, 644 (1993). The Timms contract was between a nursing home and one of the

nursing home's residents and included an arbitration clause. Id. at 470-71, 427 S.E.2d at 643. In support of its decision, the supreme court found the only evidence raised to show interstate commerce was that the nursing home: (1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; (2) marketed its services to persons residing outside this State; (3) hired employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the state for use at the home; and (5) contemplated payment in part by Medicare or Medicaid. Id. at 473, 427 S.E.2d at 644. The court stated although the listed factors could show the nursing home's involvement in interstate commerce, their relationship to the agreement between the nursing home and the resident was "insufficient to form the basis of the contract between the parties." Id.

Towles v. United Healthcare Corp. is also relevant to our analysis here. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). United Healthcare Corporation (United) was a national company headquartered in Minnesota. Id. at 33, 524 S.E.2d at 841. United hired Winfield Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, which included an arbitration clause. Id. at 33-34, 524 S.E.2d at 841-42. This court noted Towles' responsibilities included helping to establish medical policy, overseeing utilization review and quality management for plan participants, attending out-of-state conferences, participating in telephone conferences with United's corporate medical affairs staff in Minnesota, and reviewing claims from out-of-state providers and specialty providers located in North Carolina and Georgia. Id. at 36, 524 S.E.2d at 843. Furthermore, Towles participated in sales presentations in South Carolina and Georgia and worked with officials from national companies in resolving questions of utilization review and medical necessity for PHP participants. Id. Towles also reviewed proposals for services from out-of-state medical and ancillary service providers. Id. This court found those activities provided "sufficient evidence of interstate commerce to invoke the FAA." Id.

In the case at bar, the trial court found this situation to be most similar to Timms because "an attorney is providing legal services for a South Carolina law firm doing business in South Carolina." The trial court then stated that even if the facts are as the Appellants state them to be, they fail to

rise to the level of involving or affecting interstate commerce because domicile of the parties to the litigation, activities outside the state of South Carolina incident to the completion of a transaction, and receipt of insurance proceeds do not render a transaction as "involving" or "affecting" interstate commerce within the purview of the FAA. In the hearing for the motion to reconsider, the trial court stated:

My concern was that we were simply looking at an employment contract between two attorneys here in Charleston, South Carolina, and I did not feel like you could expand it by saying that she's working on cases that were involving [out-of-state] information or interstate commerce. That's the reason basically I ruled the way I ruled.

This court finds Towles, instead of Timms, is most applicable to the case at bar.¹ In using Towles analysis, this court holds the employment contract at bar does involve interstate commerce. We note Firm is a law firm based solely in South Carolina, and Meyer is only admitted to practice law in the state of South Carolina. While Firm is not a national employer as United

¹ Equal Emp't Opportunity Comm. v. Rinella & Rinella is also persuasive in our analysis, although not controlling. 401 F. Supp. 175 (N.D. Ill. 1975). Rinella was a Title VII action; however, its discussion on how a local law firm dealing primarily in divorces affects interstate commerce is instructive. Id. at 181-82 ("Notwithstanding the defendants' divorce orientation, they admit that their practice encompasses other types of business, i.e., corporate, probate and real estate. They further admit that various attorneys travel out of state on firm business. Samuel Rinella, for instance, travelled to London, England and to Arizona, and Richard Rinella travelled to Washington, D.C. The firm's long distance phone bill in calendar year 1974 was \$1,277.01; its out-of-state travel expenses amounted to approximately \$2,000 for the same year. The firm also purchased both office intercommunication equipment from an out-of-state company for \$8,400, and law and reference books from out-of-state publishers billed at approximately \$2,500. These various factors establish that Rinella & Rinella indeed affects interstate commerce and, accordingly, is subject to the proscriptions of Title VII.").

was, Firm handles business with many out-of-state clients, similar to United. We think it is important factually that this is not a situation where Meyer simply worked in South Carolina on cases that involved out-of-state clients and businesses. Meyer travelled extensively to conduct legal work and billed hours for her out-of-state work and travel. Pre-bill worksheets for the Ocean Club case reflect travels to Atlanta, Georgia; Sarasota and Daytona Beach, Florida; Charlotte, North Carolina; Minneapolis, Minnesota; and Knoxville and Kingsport, Tennessee. Additionally, Meyer is requesting \$1.7 million for the value of her time on the Ocean Club case, implicating the number of hours she spent on this case which involved out of state work. Further, Appellants allege the other cases listed in the 2006 employment agreement involved interstate commerce. Unlike the Ocean Club case, there is not substantial documentation regarding out-of-state traveling or work Meyer may have done in those cases. Considering the liberal application of the Commerce Clause, and recognizing the FAA is to be construed to full extent of the Commerce Clause, we find Meyer's out-of-state activities rose to the level of "involving interstate commerce," thus, triggering the FAA. For the foregoing reasons, we reverse the trial court and find the FAA does apply to the parties' employment contract.

III. Unconscionability

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Towles, 338 S.C. at 37, 524 S.E.2d at 843-44. "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (quoting S.C. Code Ann. § 15-48-10(a) (2005)). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005).

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." Simpson, 373 S.C. at 24, 644 S.E.2d at 668 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001)). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no

reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Simpson, 373 S.C. at 25, 644 S.E.2d at 668; see Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999). Our supreme court has adopted the Fourth Circuit's view, and "[i]t is under this general rubric that [this court determines] whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (emphasis added).

1. Absence of meaningful choice

Appellants argue the trial court erred in finding there was an absence of meaningful choice because Meyer had been working for Firm for six months before receiving the 2006 employment agreement and she essentially had to agree to it or else "jeopardize her existing job." We agree.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669; see Carlson v. General Motors Corp., 883 F.2d 287, 295-96 (4th Cir. 1989). "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 (quoting Carlson, 883 F.2d at 293, 295); see also Holler v. Holler, 364 S.C.

256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.").

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson, 373 S.C. at 26-27, 644 S.E.2d at 669 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The finding of an adhesion contract is not per se unconscionable, however it is the beginning point to the analysis. Id. at 27, 644 S.E.2d at 669.

We hold Meyer had a meaningful choice involving the 2006 agreement. Meyer argues her lack of civil experience put her at a disadvantage as it relates to the relative sophistication of the parties. However, we find her substantial work as an assistant solicitor in addition to her time at law school permitted Meyer to have enough sophistication that any disadvantage would be minimal in this situation. In concluding the 2006 agreement, Firm stated:

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

The 2006 agreement, as shown above, allowed Meyer as much time as she needed to understand and accept the conditions. In addition, the 2006 agreement stated a meeting could be set up if there was a need to discuss the terms, allowing for negotiation of the terms. Because of this apparent opportunity for negotiation, this was not an adhesion contract. It did not force Meyer to "take-it-or-leave-it." Rather, it indicated Meyer had some bargaining power, while perhaps not as much as the Firm. We also note Meyer felt comfortable striking out language to which she objected in the 2007 amendment; again, supporting her ability to negotiate these contracts. Further, this was not a lengthy contract at three pages. The arbitration clause

is on the second page, and it is not "buried" within the short contract; thus, there does not appear to be any element of surprise.

While Meyer argues that because the employment climate for law firms was difficult, she felt she was forced to agree to the contract, we do not find that is a valid reason for holding there was an absence of meaningful choice. It is unfortunate the employment or economic climate may have been difficult at that particular time, but the external environment did not extinguish Meyer's meaningful choice of whether to sign the contract or not. Further, we recognize Lucey and the Firm did not contribute to the negative economic climate; therefore, we cannot use that as a factor against them in this case. For the foregoing reasons, we hold the trial court erred in finding there was an absence of meaningful choice.

2. Oppressive and one-sided terms

Appellants argue the terms of the arbitration clause are not unduly harsh because its sole limitation is the presentment of live witnesses and there is no other limitation of evidence or testimony. We agree.

As stated previously, this prong of the test sets forth that we are to review the terms to see if 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.

"Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays." Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). The benefits received by arbitrating come with certain limitations on discovery. See Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007) (stating that if parties conducted little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," thus, prejudice will likely not exist, and the law would favor arbitration; however, if the parties conducted significant discovery, then the party seeking arbitration took "advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration); In re Cotton Yarn Antitrust Litig., 505 F.3d

274, 286 (4th Cir. 2007) (stating "while discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the 'procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration' that is inherent in every agreement to arbitrate and "[b]ecause limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement").

The arbitration clause in the 2006 agreement provides:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

While the arbitration clause here does limit discovery by allowing the parties to be the only witnesses called in person, this cannot, standing alone, be a reason to invalidate an arbitration agreement. Appellants are correct in stating that the arbitration restriction applies equally to both parties, and the clause places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings. We find the arbitration clause is not one-sided, nor is it oppressive to Meyer. Because a finding of unconscionability requires an absence of meaningful choice as well as oppressive, one-sided terms, we reverse the trial court.

IV. Severability

Appellants contend that even if the provision limiting live witnesses is substantively unconscionable, the trial court should have severed that portion of the arbitration clause and compelled arbitration. Because we find the arbitration clause is not unconscionable, we need not review this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

V. Applicability of the SCUAA

Appellants contend that because the FAA applies to the employment contract at issue, it preempts the SCUAA and there is no need to meet the requirements of the state statutes. In addition to the FAA's preemption of the SCUAA, the SCUAA itself provides that it does not apply to arbitration agreements between employers and employees unless the agreement states that the SCUAA shall apply.

Because all parties agree the arbitration clause did not meet the SCUAA notice requirements,² and the trial court ruled it did not meet SCUAA requirements, there is no controversy for this court to rule upon. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating "[a]n appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy").

CONCLUSION

Based on the foregoing reasons, the trial court's denial of Appellants' motion to compel is

REVERSED.

HUFF and PIEPER, JJ., concur.

² Appellants acknowledge the arbitration clause did not meet SCUAA's notice requirements, but argued that was irrelevant because SCUAA was inapplicable altogether.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson, Jr., Circuit Court Judge
Case No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A., ... Appellants,

v.

Amy Meyer, ... Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance, ... Third Party Defendants.

PETITION FOR REHEARING PURSUANT TO SCACR RULE 221
AND SUGGESTION FOR REHEARING EN BANC
PURSUANT TO SCACR RULE 219(b)

RECEIVED

APR 12 2012

SC Court of Appeals

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I. ARGUMENT

On March 28, 2012, this Court filed a decision reversing the lower court's denial of Appellants' motion to compel arbitration. See Lucey v. Meyer, No. 4960, 2012 S.C. App. LEXIS 85 (Ct. App. Mar. 28, 2012). The Lucey Opinion 1) ignored and failed to apply South Carolina Supreme Court controlling precedent, including precedent cited in the lower court's order denying arbitration; 2) conflicts with this Court's decision filed on March 7, 2012 in Flexon v. PHC-Jasper, Inc., No. 4950, 2012 S.C. App. LEXIS 61 (Ct. App. Mar. 7, 2012); and 3) disregards United States Supreme Court precedent setting forth specific requisites necessary before the Federal Arbitration Act (FAA) applies. Further, the Lucey Opinion is not supported by the record and fails to address Respondent's challenges to arguments and new documentation that Appellants attempted to introduce for the first time in a motion for reconsideration and/or on appeal.

- A. The Lucey Opinion Failed to Consider the South Carolina Supreme Court Case of Mathews v. Fluor Corp. Which Held That Out-of-State Activities Incident to Completion of A Contract Situated Within South Carolina Do Not Affect Interstate Commerce.

The lower court made a factual finding that "The heart of this transaction between the Lucey law firm and Meyer is an employment agreement between a South Carolina law firm and a South Carolina attorney for legal services to be performed in South Carolina."¹ (R. pp. 9, 12, 221, and 227.) In doing so, the lower court clearly found as

¹ Although this finding of fact was not separately enumerated in the order as with the lower court's other findings of fact, it was specifically stated as the transaction at issue in the lower court's order. (R. pp. 9, 12.) The lower court also orally stated this was his previous finding of fact during the March 2, 2010 motion for reconsideration hearing: "[W]e were simply looking at an employment contract between two attorneys here in Charleston, South Carolina...." (R. p. 221; see also R. p. 227, "I have trouble expanding the local employment agreement just because she's involved in a case that involves citizens outside the state....")

fact that the subject matter of the employment contract at issue was situated *within* South Carolina. Once this finding was made, Respondent's out-of-state activities became merely incidental to the completion of her employment contract with Firm. See Mathews v. Fluor Corporation, 312 S.C. 404, 407, 440 S.E.2d 880, 881-882 (1994) ("[T]he object of the contract was real estate located in South Carolina. Although the contracting parties are domiciled outside of South Carolina and the transactions incident to the sale were conducted in foreign jurisdictions, there is no evidence in the record that the express terms of the contract involved interstate commerce.")²

1. The Lucey Panel Erred by Ignoring the Lower Court's Finding That The Subject Matter of the Employment Contract AT Issue Was Situated In South Carolina, and by Failing to Follow the Precedent of Mathews v. Fluor Co.

Mathews v. Fluor Co., supra, is directly on point with the case at bar, and the lower court relied on Mathews to address incidental activities and domiciles of parties and witnesses involved in the Ocean Club case. (R. p. 10.) The Lucey panel ignored the Mathews holding regarding incidental activities. The Lucey panel used activities incidental to the completion of the contract, i.e., Respondent's out-of-state "travel and work" to transform the subject matter of a local employment contract into one affecting interstate commerce in direct contradiction to the lower court's finding of facts and the holding in Mathews. Had the Lucey panel engaged in the proper analysis under Mathews, it would have concluded that Respondent's out-of-state activities were merely

² The lower court did not base its finding upon contemplation of interstate commerce so Mathews is controlling. (R. pp. 4-13; c.f. Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 363 (2001) (holding that Mathews is overruled only to the extent that contemplation of interstate commerce is a factor))

incidental to completion of an employment contract situated within South Carolina and affirmed the lower court's decision that the FAA does not apply.

Instead, the Lucey panel relied almost entirely on Respondent's travel in one case (Ocean Club) to hold the FAA applied. This was error as even before considering any alleged "evidence" or documentation relating to Respondent's travel in the Ocean Club case, this Court must find that Appellants' arguments based on Respondent's out-of-state travel and work in the Ocean Club case is properly before it. The Lucey panel cannot make such a finding. The Lucey panel was prohibited from considering Appellants' arguments based on Respondent's travel in the Ocean Club case. This Court has held that it is "powerless to review" an issue that was raised to the lower court, not included in the court's written order, and subsequently not included in a Rule 59(e) motion because there is not an "express ruling on the issue." Dismuke v. S.C. Dept. of Motor Vehicles, 371 S.C. 418, 419 n.1, 639 S.E.2d 151, 152 n. 1 (Ct. App. 2006); see also, Respondent's Br. p. 20.

The lower court's order filed on January 25, 2010 did not rule on Appellants' argument pertaining to Respondent's travel in Ocean Club. (R. pp. 4-13.) Appellants' Rule 59(e) motion does not call to the attention of the lower court that Appellants raised the issue of Respondent's travel in Ocean Club and the lower court failed to address the issue in its written order. (R. pp. 136-137.) Therefore, the Lucey panel was powerless to review Appellants' arguments on appeal relating to Respondent's travel in Ocean Club.

What the record in this case does reflect is that Respondent's employment contract did not require out-of-state work or travel (R. pp. 262-265) and that each and every day of travel found in Respondent's timesheets is associated with depositions in

one case, the Ocean Club case. (R. pp. 319, 320, 321, 322, 323, 324, 325.) The only depositions Respondent attended out-of-state were all taken in a case filed in South Carolina concerning real property in South Carolina. (R. pp. 371-395, 406-420, 434-441.) Further, Respondent was not licensed to practice law in another state and neither the lower court nor this Court found Respondent practiced law outside the State of South Carolina. (R. pp. 4-13.) As such, Respondent's "out-of-state travel and work" in a state court case filed in the State of South Carolina is not sufficient as a matter of law to transform the transaction of her contract into one to which the FAA applies.

2. The Lucey Panel Improperly Ignored the Lower Court's Finding That the Subject Matter of the Employment Contract Was Situated Within South Carolina.

The Lucey panel erred when it ignored the lower court's finding that the subject matter of the employment contract at issue was situated within South Carolina, implicitly reversing the lower court. Pursuant to Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2003), if there is any evidence in the record to reasonably support a lower court's findings, then the lower court's finding of fact will not be reversed on appeal.

The Ocean Club case referred to in Respondent's employment contract was a multi-family construction defect case filed in Charleston County, South Carolina. (R. p. 6, ¶ 7.) The Ocean Club case arose out of a construction project on the Isle of Palms, Charleston County, South Carolina. (R. p. 6, ¶ 9.) Respondent is only licensed to practice law in the State of South Carolina, and the Employer Law Firm is located solely in South Carolina. (R. p. 5, ¶¶ 2, 4.) Therefore, there was ample evidence to support the lower

court's finding that the subject matter of Respondent's employment contract was situated within South Carolina, and this finding of fact cannot be reversed.

B. The FAA Does Not Apply to Contracts for Licensed South Carolina Professionals Performing Work for South Carolina Professional Service Employers Who Do Not Have a "General Interstate Business Practice."

On March 7, 2012, this Court filed an opinion in Flexon v. PHC-Jasper, Inc., supra. As with the Lucey parties, the Flexon parties agreed that the South Carolina Arbitration Act did not apply. No judges on the Flexon panel were on the Lucey panel. In Flexon, this Court held that a medical professional licensed in South Carolina, living in South Carolina, and providing professional services to a South Carolina professional services employer did not further an interstate business of the employer such that the FAA applied to the employment contract. In reaching its decision, the Flexon panel relied on and adopted the holdings of Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884 (Ark. 2007) (treatment of out-of-state patients, employer's receipt of payments from out-of-state insurance carriers, employer's purchase of goods from out-of-state vendors, and employee travel outside of the state were insufficient to compel arbitration because the employer failed to prove an alleged general interstate business, the employee's activities did not facilitate a general interstate business practice, and the FAA contains no express preemptive provision).

In Tahiri, the employer attempting to enforce the arbitration provision argued that interstate commerce was involved because there was evidence to show it treated out-of-state patients, received payments from out-of-state insurance carriers, purchased goods from out-of-state vendors, and paid for the plaintiff to travel outside of Arkansas. Tahiri, supra at 892. After weighing these factors and applying the law, the Tahiri Court found

these facts alone insufficient to compel arbitration under the FAA. Id. The Tahiri Court noted that if the factors were all that were considered, it could easily be argued that every contract involves some nexus to interstate commerce rendering the FAA always applicable, which is in contradiction to FAA jurisprudence. Id.

Tahiri does not disregard interstate connections. The employer in Tahiri failed to establish that the employee's activities facilitated any alleged interstate business activity of the employer. Id. at 891-893. Moreover, Tahiri found the employer failed to prove any attempt by the employer to obtain patients from out of state and to promote the clinic's reputation outside of Arkansas. Id. The Tahiri employment agreement itself indicated the employee contracted to provide professional services, not to purchase interstate goods or to receive payment from out-of-state insurance companies. Id.

The Lucey panel relied solely on this Court's holding in Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) and did not even mention the Flexon decision issued three weeks earlier. In stark contrast to the case at bar and Flexon, the Towles case involved a national employer with business locations outside of South Carolina with a general interstate business practice. Towles, 338 S.C. at 33; 524 S.E.2d at 841; Lucey, supra at * 19-20. If the Lucey panel had weighed the factors and law consistent with this Court's decision in Flexon, the lower court's order denying arbitration should have been affirmed.

C. The Lucey Panel Misapprehended What Findings Must Be Made Pursuant to Citizens Bank v. Alafabco for the FAA to Apply and Created an FAA Preemption Contrary to the United States Supreme Court's Holding in Volt Info. Scis., Inc. v. Board of Trustees of Leland.

The Lucey panel did not properly weigh the facts and U.S. Supreme Court law applicable to this case. Even though Lucey cites to U.S. Supreme Court decisions in

Section II of the Opinion, the requisite findings necessary for the FAA to apply pursuant to U.S. Supreme Court precedent were not adhered to by the Lucey panel. In particular, the Lucey panel did not weigh the evidence in this case per the holding in Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56-57, 123 S. Ct. 2037 (2003) in order to decide whether the FAA applied. Lucey also improperly created a federal preemption denounced by Volt Info. Scis., Inc. v. Board of Trustees of Leland, 489 S.C. 468, 109 S. Ct. 1248 (1989) (there is no express preemptive provision of the FAA.)³

Under Citizens Bank, supra, there is a three-part analysis required to determine if the FAA applies to an employment contract when specific impact on interstate commerce is not alleged.⁴ First, a transaction must be within the flow of commerce. Second, without a showing of any specific effect upon interstate commerce, the economic activity in question in the aggregate must represent “a general practice...subject to federal control.” Third, the general interstate practice must bear on interstate commerce in a *substantial way*. (emphasis supplied). 539 U.S. at 56-57.⁵ Therefore, once the Lucey panel decided that Respondent’s “out-of-state travel and work” had a connection to interstate commerce, it was still required to determine: 1) if the economic activity

³ The Citizens Bank case was cited with approval in Flexon (citing Tahiri, 257 S.W.3d at 892.) (“Were this court to hold otherwise, it would equate to a finding that the FAA is applicable to any contract containing an arbitration clause, as it could be argued that every contract involves some nexus to interstate commerce....Instead, the question is simply whether the *contract* evidences a *transaction* involving commerce.”) (emphasis original).

⁴ Appellants failed to raise or prove any specific impact on interstate commerce under Citizens Bank in the lower court and argued “[W]hat lawyers do on a daily basis involves interstate commerce” (R. p 200, Ins. 5-6) so this Court must follow the general interstate business practice analysis in Citizens Bank.

⁵ This test under Citizens Bank was also cited with approval in Tahiri at 889-890.

represented a "general practice...subject to federal control"⁶ and 2) if Respondent's activities facilitated Firm's general interstate business in a *substantial way*. Supra, 539 U.S. at 57 (emphasis supplied) (internal citations omitted).

The Lucey panel did find interstate connections based on Respondent's travel outside of South Carolina. However, the panel failed to complete the analysis by considering the second and third parts of the Citizens Bank analysis. Supra, 539 U.S. at 57-58. As such, Lucey erroneously creates substantive law holding that the FAA applies in every contract where any interstate activity is shown. Citizens Bank requires more than a mere showing of interstate connections when an employment contract is the transaction. Id. As a result, it is now unclear whether the South Carolina Court of Appeals does or does not adhere to Citizens Bank due to its holding in Lucey.

In light of Citizens Bank's requirement that an employer prove a general practice that needs to bear on interstate commerce in a substantial way, and there being no proof of any interstate business practice of Appellant Law Firm, the Lucey panel's partial reliance on EEOC v. Rinella and Rinella, 401 F. Supp. 175 (N.D. Ill. 1975) is also misplaced. See Lucey, supra at *23 fn. 1. The issue in Rinella was whether Title VII applied to a law firm. See 401 F. Supp. 175 (N.D. Ill. 1975). Citizens Bank postdates Rinella and requires specific finding of 1) a "general practice...subject to federal control" by the employer and 2) that an employee's activities facilitated the practice in a substantial way. 539 U.S. at 56-57. Therefore, this Court's should not have relied on Rinella to reach its decision in this case because Rinella addressed only what factors

⁶ The practice of law in South Carolina is not subject to federal control.

may demonstrate interstate commerce and does not address the mandated findings that the United States Supreme Court required in Citizens Bank. 539 U.S. at 56-57.

Finally, as the FAA has no express preemptive provision, establishing interstate ties or connections is not enough. See, e.g., Volt Info. Scis., Inc. v. Board of Trustees of Leland, 489 U.S. 468, 477, 109 S. Ct. 1248 (1989) (FAA contains no pre-emptive provision and does not “reflect a congressional intent to occupy the entire field of arbitration.”) There must be specific findings beyond mere interstate ties for the FAA to apply, which issue the Lucey panel did not make.

1. Appellants Failed to Prove a General Interstate Business Practice Pursuant to Flexon’s adoption of Tahiri and Pursuant to Citizens Bank v. Alfabaco.

Without proof of that Appellant Law Firm had an interstate business practice, the FAA is not applicable to the employment contract at issue. Further, the FAA is not applicable because Respondent did not facilitate an alleged general interstate business practice of Appellant Law Firm in any manner. Nowhere in the record of the lower court is there any evidence to support an interstate business practice. In contrast, the lower made a finding of fact that Appellant Law Firm did not engage in interstate commerce (R. p. 11), which cannot be reversed on appeal as the record reasonably supports this finding. See Simpson v. MSA of Myrtle Beach, *supra*. Further, the Lucey panel found that Appellant Law Firm was “based solely in South Carolina, and Respondent is only admitted to practice law in the state of South Carolina.” Lucey, *supra* at *21.

As with Tahiri, the record before this Court is completely devoid of proof of any general interstate business practice of Appellant Law Firm. Appellants did not allege a general interstate business practice in their motion to compel. Appellants never filed an affidavit setting forth facts in support of a general interstate business practice which

substantially affected interstate commerce. The only affidavit filed on behalf Appellant Law Firm to support its motion does not even mention out-of-state clients, solicitation of out-of-state clients, or out-of-state advertising. (R. pp. 37-44.)

a. There Is No Evidence of Appellants' Out-of-State Advertising or Solicitation of Out-of-State Clients.

As with the employer in Tahiri, there is no evidence of any out-of-state advertising or out-of-state solicitation of clients in the Lucey case. The client in the Ocean Club case was a not-for-profit horizontal property regime that owned real property located on the Isle of Palms, Charleston County, South Carolina. (R. pp. 6, 58-59.)

At the lower court level, Appellants failed to introduce any evidence of how many out-of-state clients Appellant Law Firm had. The only allegation regarding out-of-state clients is based on alleged evidence not properly before this Court (i.e., "retainer" agreements with Ocean Club homeowners).⁷ In any event, these retainer agreements are irrelevant as the plaintiff in the Ocean Club case was the horizontal property regime, not the individual property owners.

b. Appellants' Use of Westlaw Research Services Fails to Establish an Alleged "General Interstate Business Practice."

Appellants asked this Court to hold that the FAA applied because Respondent used Westlaw to conduct research on the internet. However, the use of out-of-state vendors by an employer is insufficient for the FAA to apply to an employee's contract with an employer. Tahiri, supra at 892. This is particularly true when an employer fails to show how much of an out-of-state item is used by an employee. Id.

⁷ See R. at pp. 613-662 for documents submitted at the March 2, 2010 hearing. See also Section C. 1. *infra*.

Respondent's use of Westlaw as evidence of interstate connections was not properly before the Lucey panel either; it was raised for the first time in Appellants' motion for reconsideration so it cannot be considered by this Court.⁸ Appellant Law Firm also failed to show how often Respondent used the Westlaw service. Finally, of the eight (8) check copies for payments to Westlaw, the records shows only one (1) payment was made for the Ocean Club case (R. p. 564), and that was for the amount of \$124.15. It cannot be seriously maintained that \$124.15 facilitates an interstate business practice in a substantial way.

c. The Receipt of Payments from Out-of-State Insurance Companies Does Not Establish "General Interstate Business Practice."

Appellants also asked the lower court to find the FAA applied to Respondent's employment contract because Appellant Law Firm received settlement payments in the Ocean Club case from out-of-state insurance companies. The lower court properly rejected Appellants' argument, finding Timms v. Greene controlling. See Timms v. Greene, 310 S.C. 469, 472, 427 S.E.2d 642, 644 (1993) (holding that receipt of Medicare and Medicaid payments did not form the basis of the contract between the parties or create a transaction in interstate commerce). The Tahiri Court's opinion adopted in Flexon is also instructive.

As stated above, the Tahiri Court found the employer failed to show that the employee's activities facilitated an interstate business activity. Tahiri, supra at 892. In reaching its decision, the Tahiri Court found an employer's mere receipt of payments from out-of-state insurance companies is not enough to make the FAA applicable to an employee's contract. (Id. at 891-892; see also, Timms, supra at 644.) Particularly

⁸ See Section C infra.

relevant to the case at bar is Tahiri's analysis regarding the terms of the employee's contract. The Tahiri court looked at the express terms of the contract and found the employee contracted to provide professional services, not to receive payments from out-of-state insurance companies. Tahiri, supra at 892. Likewise, Respondent contracted with Appellant Law Firm to provide legal services in South Carolina; she did not contract to receive payments from out-of-state insurance companies. Tahiri's analysis of the terms of an employee's contract is also consistent with South Carolina precedent in Zabinski v. Bright Acres Assocs., 346 S.C.580, 594, 553 S.E.2d 110, 117 (2001). The Lucey Opinion even cited Zabinski for this proposition but then completely failed to address the terms of Respondent's contract, which do not require any out of state activities to facilitate a general interstate business practice of Appellant Law Firm. Lucey, supra at*14-15; accord, Timms, supra, and Mathews, supra. This Court should find, therefore, under Timms, Flexon's adoption of Tahiri, Mathews, and Zabinski that the Appellant Law Firm's receipt of insurance proceeds does not make the FAA apply to Respondent's employment contract.

2. The Domicile of Parties and Witnesses in a South Carolina State Lawsuit Does Not Transform An Employment Contract Into a Transaction that Substantially Facilitates a General Interstate Business Practice of Firm.

Appellant Law Firm and Respondent were both domiciled in South Carolina, and the lower court found Respondent's contract was situated within South Carolina. (R. pp. 4, 9, 12, 221, and 227.) Appellants have argued that the domicile of witnesses, law firms, manufacturers, and parties in the Ocean Club case make the FAA applicable. However, in Mathews, the South Carolina Supreme Court held that even the domicile of parties to the actual contract at issue do not transform the transaction into one involving interstate

commerce when the subject matter is situated within South Carolina and the parties to the contract are domiciled outside South Carolina. Matthews, supra, 440 S.E. 2d at 881-882. The out-of-state domicile of parties, witnesses, and law firms involved in the state court case (Ocean Club) on which Respondent worked is even farther removed.

Additionally, Appellant Law Firm never alleged as error in a Rule 59(e) motion that 1) the lower court failed to find a "general interstate business practice" based on Appellants' "domicile" arguments in its motion to compel arbitration, and 2) failed to address this argument in its written order. This Court has held that it is "powerless to review" an issue that was raised to the lower court, not included in the court's written order, and subsequently not included in a Rule 59(e) motion because there is not an "express ruling on the issue." See Dismuke v. S.C. Dept. of Motor Vehicles, 371 S.C. 418, 419 n.1, 639 S.E.2d 151, 152 n. 1 (Ct. App. 2006); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). Therefore, on appeal this Court cannot find a "general interstate business practice" of Firm based upon Appellants' domicile arguments because it is powerless to review the issue.

C. The Lucey Panel Did Not Rule On Respondent's Procedural Arguments Regarding the Record and Issues on Appeal.

The Lucey panel only ruled on the issue of the Rule 59(a) versus Rule 59(e) classification of Appellants' February 2, 2010 motion. Lucey Opinion. The Lucey panel ignored Respondent's procedural challenges to Appellants' arguments which were raised for the first time in a motion for reconsideration, at a reconsideration hearing, or on appeal. Respondent has repeatedly objected to and challenged the introduction of new documents at the March 2, 2010 hearing of the lower court and on appeal, as well as new

arguments raised after the December Hearing. (R. pp. 240, 248-250, 259, 315-316; Respondent's Br. pp. 18-26.)

Moreover, this Court may not consider any of Appellant's procedural arguments because they were raised for the first time on appeal in their Reply. Appellants created the ambiguity of the Rule 59 motion in lower court, did not state under which subpart of Rule 59 their motion was filed in their appellate brief in chief, and waited until Respondent attacked their appeal on this ground to reply. Appellants were required to raise all issues in their brief in chief. No new issues may be raised in a reply brief. See Hunter v. Staples, 335 S.C. at 103, 515 S.E.2d at 267; Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283,285 (Ct. App. 1993) (acknowledging appellant may not use reply brief to address issues not argued in its brief in chief.) Appellants argued that Respondent had not suffered prejudice for the first time in their Reply. See Appellant's Reply Br. P. 19. For the Lucey panel to consider Appellants' arguments relating to Respondent's affidavit filed in March pursuant to what she believed to be a Rule 59(a) hearing (R. p. 184) as "curing" any potential prejudice defies this precedent.

Accordingly, this Court rendered a decision in Lucey based upon issues not properly before it. As a result, Respondent has suffered prejudice because the Lucey panel found that arbitration should have been ordered. In light of this prejudice, this Court should not find that its reliance on improper arguments and evidence was harmless error or allow the Lucey Opinion to stand. This is not a situation where Respondent has requested this Court to apply an "overly technical" reading of the rules. Respondent only requested the Court adhere to its own rulings and the plain meaning of Rule 59 when hearing this case on appeal. This Court should not reverse the lower court when there is a

faulty record and improper arguments, as such action ends Respondent's substantive right to pursue her claims in court rather than through arbitration.

1. The Lucey Panel Did Not Decide This Case on the Record.

Once the Lucey panel decided Appellants' February 2, 2010 motion was made pursuant to Rule 59(e), this Court was required to disregard the documents from Pages 543 through 662 of the Record because that evidence was newly introduced at the March 2, 2010 Hearing pursuant to Appellants' motion for reconsideration. Appellants never attempted to introduce these documents prior to the March hearing. In fact, Appellants' counsel affirmatively stated at the March hearing the documents were not filed with the other 16 documents on January 28, 2010⁹ and were "some additional documents" being submitted on March 2, 2010 as attachments to Appellants' memorandum in support of their motion for reconsideration. (R. pp. 219-220, 230, 231, 315-316.)

Interpreting the language of the South Carolina Rules of Civil Procedure, South Carolina courts apply "the same rules of construction used to interpret statutes" and enforce the Rule's stated meaning if "the language is plain, unambiguous, and conveys a clear meaning." Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). Unlike Rule 59(a) which authorizes a court to take additional testimony and amend findings of fact, Rule 59(e) does not. See SCRCP 59(a) and 59(e). Therefore, this Court should not have considered any new documentation introduced at the March 2, 2010 hearing.

2. The Lucey Panel Failed to Apply This Court's Procedural Case Law and Made Findings of Fact That Are Unsupported by the Record.

⁹ These particular documents were permitted to be filed after the hearing by the lower court's order denying arbitration. (R. p.13.)

The Lucey panel made findings of fact relating to Respondent's travel in the Ocean Club case that are not supported by the record. Additionally, had the Lucey panel properly addressed and ruled upon Respondent's procedural challenges¹⁰ to Appellants' arguments and proposed "evidence," it would not have erroneously based its decision on the cases referenced in Respondent's 2006 contract (hereinafter "2006 contract cases"). The Lucey panel also assumed facts not in the record relating to the execution of the 2007 Ocean Club amendment. Because the Lucey Opinion relies on alleged evidence not properly before this Court on appeal and ignored appellate procedural law relating to issue preservation, the Lucey panel committed error.

- a. Respondent Did Not Travel to Minnesota or Daytona Beach as the Lucey Panel Found and the Travel was Not Extensive.

Excerpts of Respondent's pre-billed timesheets do not show that Respondent travelled to Daytona Beach or Minnesota for depositions as stated in the Lucey Opinion. These depositions were attended by Respondent at Appellant Law Firm's offices in South Carolina. (R. pp. 317-325, 479-481.) As a result, the Lucey panel erroneously found that Respondent travelled to Minnesota and Daytona Beach.

The Lucey panel also found Respondent travelled "extensively." The Lucey panel then attempted to make a connection between the amount of damages Respondent is seeking through her claims and her travel, finding that the damages necessarily implicated the "number of hours she spent on this case which involved out of state work." However, the record shows that, in fact, Respondent's travel was minimal, not extensive. In addition, the value of Respondent's time she seeks as damages does not belong in an

¹⁰ See Respondent's Br. pp. 18-26.

analysis relating to the question of whether Respondent's travel substantially facilitated a "general interstate business practice" of Firm.

Respondent began working on the Ocean Club case on July 25, 2006. (R. p. 318.) On July 20, 2009, the last remaining defendants in the case settled. (R. 66, ¶ 122.) On July 21, 2009, Appellant Justin Lucey met with Respondent about the Ocean Club case and then ordered Respondent to leave the Appellant Law Firm's property. (R. pp. 66-67.) Based on the evidence in the record before the Lucey panel, Respondent was involved with the Ocean Club case 1,092 days. Of those days, the evidence demonstrates Respondent was outside of South Carolina no more than 8 days¹¹ attending depositions or less than one percent (1%) of the entire time the case was pending. (R. pp. 371-325.) Further, even considering other "travel" days in Respondent's pre-billed timesheets, Appellants themselves concede Respondent spent only twelve days outside of South Carolina on the Ocean Club case. (Appellants' Br. P. 23.) This amounts to just one percent (1%) of the days the Ocean Club case was pending. Whether one-percent or less than one-percent is used, the percentages do not show that Respondent travelled "extensively" and certainly cannot demonstrate Respondent's travel days facilitated a general interstate business practice of Firm in a substantial way.¹²

- b. There is No Evidence in the Record of Out-of-State Activities by Respondent in the Cusack, Shosan, Hanson, and Turner Cases Which the Lucey Panel Found Existed.

The Lucey panel found that "Appellants allege the other cases listed in the 2006 employment agreement involved interstate commerce. Unlike the Ocean Club case, there is not substantial documentation regarding out-of-state traveling or work Meyer may

¹¹ The deposition cover sheets show 6 days of travel.

¹² See also Section B supra.

have done in those cases.” Lucey Opinion. Not only is there not “substantial” documentation, there is absolutely no documentation whatsoever relating to Respondent’s out-of-state activities the Harper, Cusack, Shosan, Hanson, and Turner cases that this Court may rely upon to decide this case.¹³

As an initial matter, and even before considering any alleged evidence or documentation relating to the 2006 contract cases, this Court must find that Appellants’ arguments based on Respondent’s work on the 2006 contract cases is properly before it. This Court cannot make such a finding. No argument relating to 2006 contract cases was raised in Appellants’ motion to compel arbitration (R. pp. 30-36) or their memorandum in support of their motion to compel arbitration (R. pp. 85-96.) The only reference to the 2006 contract cases was a one-sentence statement made by Appellants’ counsel at the December 10, 2009 hearing: “I would also take the position that the services she has provided originally on the cases that she’s working on, because she does, that original contract talks about the ten percent bonus she’s going to get on cases she spearheaded, those cases were interstate commerce as well.” (R. pp. 203-204.) No written evidence was submitted to the lower court in support of Appellants’ argument regarding the 2006 contract cases. (R. pp. 315-316.) Lucey’s Affidavit filed on November 2, 2009 in support of Appellants’ motion to compel arbitration does not address the 2006 contract cases. (R. pp. 37-41.) Appellants’ failed to seek a Rule 59(e) review based upon the 2006 contract cases. (R. pp. 136-137.) The only “evidence” relating to the 2006 contract cases was introduced for the first time pursuant to a motion for reconsideration. (See

¹³ The only alleged evidence of these activities is contained in Appellants’ arguments in their brief in the lower court. Appellants cite to the arguments in their appeal brief and misname argument as “fact.”

“Documents Presented to the Trial Court at the March 2, 2010 Hearing on Plaintiffs’ Motion for Reconsideration”; R., pp. 543-662.)

This Court cannot consider Appellants’ arguments based on the 2006 contract cases or the facts that allegedly support these arguments. This Court has held that it is “powerless to review” an issue that was raised to the lower court, not included in the court’s written order, and subsequently not included in a Rule 59(e) motion because there is not an “express ruling on the issue.” Dismuke v. S.C. Dept. of Motor Vehicles, *supra*; Noisette, *supra*; *see also*, Respondent’s Br. p. 20.

The lower court’s order filed on January 25, 2010 did not rule on Appellants’ argument pertaining to the 2006 contract cases.¹⁴ (R. pp. 4-13.) Appellants did not call to the attention of the lower court that the court erred by not considering Respondent’s work in the 2006 contract cases. Appellants’ Rule 59(e) motion does not call to the attention of the lower court that they raised the issue of the 2006 contract cases and the lower court did not address it in its written order. (R. pp. 136-137.) Therefore, the Lucey panel was powerless to review Appellants’ arguments on appeal relating to the Harper, Cusack, Shosan, Hanson and Turner contract cases.

Addressing the 2006 contract cases’ documentation submitted during the March 2, 2010 hearing itself, Appellants seek to raise issues and arguments not previously raised and not preserved through a timely filed Rule 59(e) motion. Specifically, Appellants argued at the March 2, 2010 Hearing for the first time that the domicile of attorneys and witnesses Respondent communicated with in the 2006 contract cases, depositions,

¹⁴ In any event, Appellants’ arguments relating to the domicile of parties, witnesses, and law firms are without merit as the subject matter of Respondent’s contract is situated in South Carolina. *See* Section B. 2 *supra*.

Respondent's reimbursement for travel expenses in the Harper case, and an annuity purchased from an out-of-state insurance company used to settle the Harper rendered the FAA applicable. No possible reading of Appellants' arguments in their motion to compel, memorandum in support of their motion to compel, or arguments at the December Hearing could possibly encompass these new issues. No possible reading of Appellants' Rule 59(e) motion encompasses these new arguments either. (R. pp. 136-137.) Appellants' attempted introduction of the newly alleged evidence amounts to a back door attempt to circumvent the requirements of Rule 59(e) and avoid the reality that Appellants wholly failed to create a record to support their motion to compel arbitration. This Court should not condone the failure of Appellants to develop the issues and record in the lower court or their failure to preserve issues for appeal. To do so, promotes a policy that contradicts the long-established preservation requirements for appellate review our Supreme Court has recognized. See, e.g., Pon, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 422, 525 S.E.2d 716, 724 (2000) (rule requiring a party to raise all arguments to the lower court before raising them to the appellate court "serves as a keen incentive for a party to prepare a case thoroughly" and "prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.")

- c. The Lucey Panel Found Facts Not in The Record and Improperly Focused on the 2007 Amendment to the Employment Contract When Determining Whether There Was an Absence of Meaningful Choice.

Regarding the issue of unconscionability, and specifically meaningful choice, the Lucey panel stated, "We also note Meyer felt comfortable striking out language to which

she objected in the 2007 amendment; again, supporting her ability to negotiate these contracts.” Lucey Opinion. To reach this conclusion, the Lucey panel had to assume facts not in the record at the December 2009 Hearing or in any of the documents filed pursuant to that hearing; specifically, that Respondent could have addressed the arbitration clause in the 2006 contract at the time the 2007 amendment was signed and that no factors other than Respondent’s sophistication existed at the time of the 2007 amendment. The Lucey panel erred in assuming facts that were not in the record.

The Lucey panel’s reliance on Respondent’s sophistication in 2007 was further in error because the proper focus of a court’s inquiry into unconscionability of an arbitration clause is at the time the contract is executed. See Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005). The 2007 contract amendment only addressed the Ocean Club case bonus and contained no arbitration clause. (R. p. 265.) Therefore, this Court should have only considered the factors present in 2006 when the original contract containing the arbitration clause was executed.

Finally, Appellants failed to preserve any arguments relating to Respondent’s striking through language in the May 2007 amendment. Not only was this argument not raised in Appellants’ Rule 59(e) motion (R. pp. 136-137), Appellants never raised the “2007 language strikeout” argument in their motion to compel (R. pp. 30-36), in their memorandum in support of their motion to compel arbitration (R. pp. 85-96), or at the December hearing (R. pp. 190-214.) Therefore, any argument relating to the “2007 language strikeout” was not properly before the Lucey panel. See Dismuke and Noisette supra. Furthermore, had the Lucey panel addressed Respondent’s challenges to these issues, the Lucey panel would likely not have reversed the lower court based on error.

See Respondent's Br. pp. 27-28; Eaddy v. Oliver, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (if a party could have raised an issue prior to judgment but failed to do so, the party cannot use a Rule 59 motion to raise the issue for the first time).

3. Appellants Did Not Preserve Their Arguments Regarding the "No Live Witnesses" Provision or the Public Policy Issues by Moving for Reconsideration on Specific Arguments the Lower Court's General Rulings Failed to Address.

Though this Court found the lower court treated Appellants' motion as one for reconsideration under Rule 59(e), it failed to rule on Respondent's challenges and to adhere to controlling case law relating to proper issue preservation and appellate procedure. In Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991), the South Carolina Supreme Court held that when the lower court does not explicitly rule on an issue, and the appellant fails to file a Rule 59(e) motion requesting a ruling on that ground, then the issue is not properly before the appellate court and should not be addressed. See also Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005) (finding "[a]n issue is not preserved where the lower court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."); see also, Dismuke, supra.

The Lucey panel found that the "no live witnesses" provision was not unconscionable because it was "bilateral" and reversed the lower court's finding that the arbitration clause was unconscionable. In doing so, the Lucey panel again relied on a specific argument that was not timely raised by Appellants and took away Respondent's substantial right to pursue her case in circuit court. Appellants never raised the issue in their Rule 59 motion that as the "no live witnesses" provision was "bilateral," did not render the arbitration clause unconscionable. No possible reading of the two surviving

grounds of Appellants' Rule 59 motion can encompass this argument.¹⁵ (R. pp. 136-137.)

Therefore, this issue was preserved for this Court's review.

Further, Appellants never asserted in their Rule 59 motion that the lower court's arbitration order finding that the "no live witnesses" provision violated public policy was an error of law. This issue is likewise not preserved for appeal. See Jones, supra 612 S.E. 2d at 726; Dismuke, supra.

II. SUGGESTION FOR REHEARING EN BANC

Respondent suggests that the Court rehear this case en banc because consideration by the full court is necessary to secure or maintain uniformity of its decisions. The Lucey panel's decision cannot be reconciled with this Court's decision in Flexon. Both cases involve employment contracts between a local employer and a local employee for personal services to be performed locally. In Flexon, the employment contract was for medical services; in Lucey, the employment contract was for legal services. In both cases, the employer's business was situated within South Carolina. In both cases, the employment contract was for professional services by employees licensed to practice in South Carolina.¹⁶ In Flexon and Lucey, the employee's performance of the employment contracts did not require interstate commerce activities. Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977); see also Timms, Mathews, and Zabinski, supra.

¹⁵ The Lucey panel properly found that Appellants abandoned their "improper delegation" ground (second ground of Rule 59 motion) because it was not briefed or argued pursuant to their motion for reconsideration or on appeal.

¹⁶ The "courts consistently look at the essential character of the contract when applying the FAA." Thornton v. Trident Med. Ct., LLC, 357 S.C. 91, 96, 592 S.E.2d 50, 52 (Ct. App. 2003).

This case also involves questions of exceptional importance relating to arbitration and appellate procedure. Local employment contracts for personal services performed by local residents, should all be treated alike, otherwise it will be impossible to know whether or not the FAA applies. Further, the Lucey Opinion creates a result that dictates the FAA will always apply to a contract with terms that do not require interstate activities once any interstate connection is shown; even without the employer proving an alleged general interstate business practice; and even though such an outcome is not consistent with federal or state law.

Finally, appellate opinions should not assume facts not in the record or treat untimely arguments of counsel as fact. A court is "powerless to review" an issue that was raised to the lower court, not included in the court's written order, and subsequently not included in a Rule 59(e) motion because the Court of Appeals does not have an "express ruling on the issue" to review. Dismuke v. S.C. Dept. of Motor Vehicles, 371 S.C. 418, 419 n.1, 639 S.E.2d 151, 152 n.1 (Ct. App. 2006). For the reasons stated above, the record on appeal cannot be ignored or supplemented after the fact and the entire Court should address this important issue. Therefore, Respondent respectfully suggests an en banc rehearing of this case is necessary to address all of these misapprehensions in the Lucey Opinion.

III. CONCLUSION

For the reasons stated herein, Respondent asks the Court to grant her Petition for a Rehearing and suggests pursuant to SCACR Rule 217 (b) that this rehearing be en banc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Case No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A., ... Appellants,

v.

Amy Meyer, ... Respondent.

And Lorcan Lucey, GMAC Mortgage

Corporation, Citimortgage, Inc., and John

Doe Finance, ... Third Party Defendants.

**PROOF OF SERVICE FOR RESPONDENT'S PETITION FOR REHEARING
PURSUANT TO SCACR RULE 221 AND SUGGESTION FOR REHEARING EN
BANC PURSUANT TO SCACR RULE 219(b)**

RECEIVED

APR 12 2012

SC Court of Appeals

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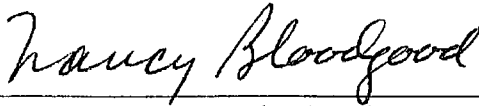
I, Nancy Bloodgood, Esquire, certify that on April 12, 2017 served a copy of the **Respondent's Petition for Rehearing pursuant to SCACR Rule 221 and Suggestion for Rehearing En banc Pursuant to SCACR rule 219(b)** via First Class Mail by placing a copy of said documents in the United States mail with sufficient postage thereon to the following:

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**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J.C. Nicholson, Jr., Circuit Judge
Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

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I, Cherie W. Blackburn, Esquire, hereby certify that on the ____ of May, 2012, I served a copy of the **RETURN TO PETITION FOR REHEARING PURSUANT TO SCACR RULE 221 AND SUGGESTION FOR REHEARING EN BANC PURSUANT TO SCACR RULE 219(b)**, submitted by the Appellants, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A., on counsel for the Respondent via United States Mail, postage pre-paid, and addressed as follows:

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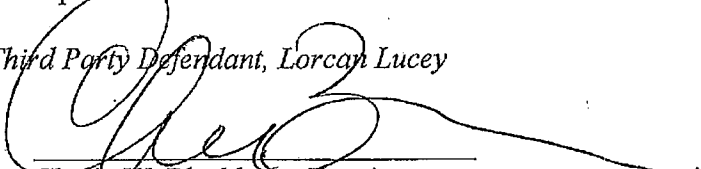
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Honorable J.C. Nicholson, Jr., Circuit Judge

Civil Action No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A.,

Appellants,

v.

Amy Meyer,

Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance,

Third Party Defendants.

**RETURN TO PETITION FOR REHEARING PURSUANT TO RULE 221,
SCACR, AND SUGGESTION FOR REHEARING EN BANC PURSUANT TO
RULE 219(b), SCACR**

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On March 28, 2012, this Court issued an opinion reversing the trial court's denial of the Appellants' motion to compel arbitration. The Respondent has now filed a petition for rehearing and suggestion for rehearing *en banc*. In seeking rehearing, the Respondent makes the following four arguments: (1) the panel ignored the supreme court's decision in *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994); (2) the panel's opinion conflicts with *Flexon v. PHC-Jasper, Inc.*, Op. No. 4950, (S.C. Ct. App. filed Mar. 7, 2012), an opinion that was filed by a different panel three weeks earlier; (3) the panel disregarded the United States Supreme Court's opinion in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003); and (4) the panel made findings based on documents the Respondent argues should not have been considered. As explained in more detail below, this Court's opinion did not overlook any controlling precedent, nor did it misapprehend any matter when it reversed the trial court's order. See Rule 221(a), SCACR (establishing the standard for rehearing to be limited to points the panel "overlooked or misapprehended). Accordingly, the petition for rehearing should be denied, and *en banc* rehearing is unnecessary.

I. The Lucey Opinion Considered and Applied South Carolina Supreme Court Controlling Precedent.

The Respondent first argues that the panel overlooked *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994), which she claims is "directly on point" and stands for the proposition that if the subject matter of the employment contract at issue is situated within South Carolina, then any out-of-state activities are merely incidental to the completion of the contract and do not implicate interstate commerce. Underpinning this argument is the Respondent's declaration that the Court of Appeals was bound by the trial court's finding that the subject matter of the employment contract was purely intrastate. (See Petition for Rehearing, p. 5). This is a misstatement of the law. When determining whether a claim is

subject to arbitration, an appellate court need not defer to the trial court's ruling on the matter but instead engages in a *de novo* review. See *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Although factual findings will not be reversed on appeal if there is evidence reasonably supporting those findings, the determination of interstate commerce is the very legal issue at stake, and the trial court's legal determination on that matter is not given deference. See *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

Furthermore, the panel did not overlook the *Mathews* case, but instead relied on more recent and stronger precedent. The *Mathews* case was decided in 1994, and involved a contract for the sale of land located in South Carolina. In *Mathews*, our Supreme Court found that interstate commerce was not implicated in the land sale even though, incident to the sale, a North Carolina engineer and Pennsylvania lender were used. In 2001, *Mathews* was overruled "to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied." See *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001).

The *Mathews* case was not relied on by the panel because it is factually distinct, is nearly twenty years old, and has been expressly overruled to the extent explained above. Since the *Mathews* decision, this Court, the South Carolina Supreme Court, and the United States Supreme Court, have issued myriad decisions favoring arbitration and defining interstate commerce broadly. For example, in *Towles v. United Healthcare Corp.*, 338 S.C. 29, 36-37, 524 S.E.2d 839, 843 (Ct. App. 1999), which the panel specifically addressed in its opinion, the Court of Appeals required that claims arising under an employment agreement be arbitrated. In so finding, the Court held:

For the FAA to apply, an agreement must evidence a transaction involving commerce, specifically interstate commerce. The terms involving commerce amount to the functional equivalent of affecting commerce and signal an intent to exercise Congress' commerce clause power to the full. The phrase evidencing a transaction only requires that the transaction in fact involve interstate commerce, even if the parties did not contemplate an interstate commerce connection. To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.

Id. at 35-36, 524 S.E.2d. at 843 (citations and internal quotation marks omitted).

The panel's choice not to focus on *Mathews* does not reflect a misapprehension of the law. Indeed, the Respondent's Brief itself did not focus on the *Mathews* case, so it should be no surprise that the opinion did not either. Instead, the focus of the opinion was on "the agreement, the complaint, and the [surrounding] facts" as required by *Soil Remediation Co. v. Nu-Way Envtl., Inc.* and its progeny, to determine whether the employment agreement involved commerce within the meaning of the FAA. 323 S.C. 454, 60, 476 S.E.2d 149, 152 (1996). As the *Lucey* panel explained, "this was not a situation where [Respondent] simply worked in South Carolina on cases that involved out-of-state clients and business. [Respondent] travelled extensively to conduct legal work and billed hours for her out-of-state work and travel." Recognizing the liberal application of the Commerce Clause, the panel properly found these activities implicated interstate commerce.

II. The *Lucey* Opinion Does Not Conflict with *Flexon v. PHC-Jasper, Inc.*

The Respondent next argues that the *Lucey* opinion conflicts with *Flexon v. PHC-Jasper, Inc.*, an opinion that was issued three weeks earlier by a different panel. The two opinions merely reach different results based on the unique facts of each case; they are not in conflict.

In *Flexon*, the plaintiff physician who resided in Hardeeville, South Carolina, entered into an employment agreement with a medical center also located in Hardeeville. The physician sued the medical center for a breach of the employment contract, and the medical center moved to compel arbitration, which the trial court denied. On appeal, the medical center argued the agreement implicated interstate commerce because (1) even though its principal place of business was in South Carolina, it was wholly owned by a Delaware corporation; and (2) the physician was licensed in Georgia as well as in South Carolina, and as a result of the employment contract, the physician had to close his established practice in Georgia. The panel in *Flexon* affirmed the trial court's denial of the medical center's motion to compel, finding:

[The physician] was a South Carolina resident, and [the medical center] hired him to provide medical services "at the medical practice offices located at 1010 Medical Center Drive, Hardeeville, South Carolina . . . and such other practice sites in Beaufort and Jasper counties as may be reasonably designated . . . from time to time" We agree with the trial court's finding that the Agreement and surrounding facts did not implicate interstate commerce.

Flexon at 4.

Unlike *Flexon*, which involved a South Carolina doctor whose employment agreement involved practicing medicine exclusively in medical centers located in South Carolina, the case at hand involved an attorney whose employment agreement involved practicing law for a law firm that had many out-of-state clients. In addition, the subject matter of her claims is that she is owed up to \$1.7 million dollars in bonus monies as a result of her work on the Ocean Club case, a case in which, as the *Lucey* opinion points out, she travelled outside the state and billed hours for this out-of-state work and travel. No such out-of-state

work existed in the *Flexon* case, and the two panels of this Court did exactly what case law requires of them: determine arbitrability based on the unique circumstances of each case.

Although the Respondent's petition for rehearing couches her argument in terms of inconsistent South Carolina precedent, her argument in the petition actually focuses more on the incompatibility of the *Lucey* opinion and an opinion from Arkansas, *Arkansas Diagnostic Center, P.A. v. Tahiri*, 257 S.W.3d 884 (Ark. 2007). While the panel in *Flexon* noted that the trial court relied on the *Tahiri* case, the *Flexon* panel itself merely agreed that the facts of its case were similar to those in *Tahiri*, but it did not otherwise adopt the holding of a case from Arkansas. This Court is not in the business of granting rehearing based on a petitioner's perception that the opinion conflicts with precedent established by courts in other states. Former Chief Judge Alex Sanders once likened the Court of Appeals to a well-behaved child, and as such, it should not be convinced to jump off a bridge just because another state has. *See State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991).¹

III. The *Lucey* Opinion Does Not Disregard United States Supreme Court Precedent.

The Respondent further argues that this Court overlooked the United States Supreme Court opinion in *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003). According to

¹ Incidentally, even the case law cited in the *Tahiri* opinion supports the *Lucey* panel's holding regarding interstate commerce. The *Tahiri* opinion discusses a federal case from the District of New Jersey, *Crawford v. West Jersey Health Systems*, 847 F.Supp. 1232 (D.N.J. 1994), and explains that in *Crawford*:

The federal district court . . . found that a physician's employment agreement with West Jersey Physician Associates, P.A., also fell within the FAA. That court observed that determining whether the contract at issue evidenced a transaction involving commerce was not a rigorous inquiry, but that the contract need have only the slightest nexus with interstate commerce. Accordingly, based on the evidence presented, the court found that because Dr. Crawford's employment facilitated her employer's interstate business activities, her employment agreement evidenced a transaction involving commerce.

Tahiri, 257 S.W.3d at 890 (internal citations and quotations omitted). As this holding indicates, the issue is not limited to whether the employee was involved in interstate commerce, but whether the employee was furthering the employer's interstate commerce.

Respondent, *Citizens Bank* requires a three-part analysis “to determine if the FAA applies to an employment contract when specific impact on interstate commerce is not alleged.” (Petition for Rehearing, p. 8) Although *Citizens Bank* did fashion a three-prong test, that test is used to determine whether the Commerce Clause reaches profoundly local activity. In fact, *Citizens Bank* illustrates how broad the net of interstate commerce reaches and how the net of the Federal Arbitration Act is equally far-reaching.

In *Citizens Bank*, a contractor sued a bank, arguing the bank failed to provide necessary project capital under a debt-restructuring agreement. See *Alafabco, Inc. v. Citizens Bank*, 872 So.2d 798, 800 (Ala. 2002). The bank moved to compel arbitration. The Alabama Supreme Court found the agreement lacked the requisite interstate nexus and denied the motion to compel. *Id.* at 805. The United State Supreme Court reversed, reaffirming that the Federal Arbitration Act is applicable according to the broadest permissible interpretation of Congress’s commerce power. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). Particularly, the U.S. Supreme Court found that even though the debt-restructuring agreement was local in the sense that it was between a borrower and a lender, both of whom were located inside the state, the transaction nevertheless involved interstate commerce because the original loans were made to finance projects in other states and the debt was secured in part by assets which included goods assembled from out-of-state parts and materials. *Id.* at 57. The holding in *Citizens Bank* guided the panel in this case to the result it reached. See *Lucey v. Meyer*, Op. No. 4960 at 6.

In addition to mischaracterizing the holding of *Citizens Bank*, the Respondent’s petition argues: “the lower [court] made a finding of fact that Appellant Law Firm did not engage in interstate commerce (R. 11), which cannot be reversed on appeal as the record

reasonably supports this finding.” (Petition for Rehearing, p. 10) As previously noted, this Court’s standard for reviewing arbitrability is *de novo*, and therefore, this Court makes its own findings regarding whether or not the transaction involved interstate commerce. See *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005).

Respondent goes on to argue that establishing interstate connections is not enough to trigger the rules of the Federal Arbitration Act to this dispute, and she lends gravitas to this statement by citing to *Volt Info. Sci., Inc. v. Bd. of Trustees of the Leland Stanford Junior U.*, 489 U.S. 468 (1989). The *Volt* opinion does not support that proposition.

In *Volt*, the United State Supreme Court explained that the Federal Arbitration Act does not prevent the enforcement of agreements to arbitrate under rules different from those established by the FAA. Where, as was the case in *Volt*, the parties agreed to the state rules of arbitration, that agreement would be honored and enforced. *Id.* at 479. In *Lucey*, the agreement was silent regarding the rules of arbitration, which is why the parties now argue about whether interstate commerce was involved. See *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (construing the FAA to apply to every arbitration agreement into which private parties had entered within the full reach of the Commerce Clause).

IV. The *Lucey* Opinion is Supported by the Record and All Evidence in the Record Was Properly Before the Court.

Finally, Respondent argues the panel did not rule on her procedural arguments regarding the record and issues on appeal. Most of these arguments begin on page 14 of the petition for rehearing, but Respondent disburses her arguments related to preservation of error throughout the petition. Appellants have attempted to weed out those arguments and address each of them in this section. As explained in more detail below, these procedural arguments made by the Respondent are manifestly without merit, and therefore, the panel had no

obligation to specifically address them in its opinion. *See* Rule 220(b)(2), SCACR (“The Court of Appeals need not address a point that is manifestly without merit.”).

A. The Panel Properly Considered Appellants’ Arguments and the Evidence Related to Respondent’s Travel in the Ocean Club Case.

Respondent argues that the *Lucey* panel was prohibited from considering the Respondent’s out-of-state travel in connection with the Ocean Club case because the trial court’s order did not specifically address the out-of-state travel that Respondent engaged in and the Appellants’ did not point out this omission in its Rule 59(e) motion. (*See* Petition for Rehearing, p. 4.) This argument has no merit.

The ultimate issue before the trial court and the Court of Appeals was whether the circumstances surrounding the employment agreement between the parties implicated interstate commerce. The trial court ultimately found it did not, and the Appellants’ filed a motion for reconsideration, arguing interstate commerce was implicated. The Appellants raised the issue to the trial court and the trial court ruled upon the issue, thereby preserving it for appeal. *See, e.g., Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (finding appellant was not required to file a Rule 59(e) motion reiterating the arguments it made at the summary judgment hearing to preserve issues for appeal even though trial judge’s order granting respondents’ motion for summary judgment did not restate the ground on which appellant opposed the motion); *see also In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 686 S.E.2d 683 (2009) (declaring that the guiding principle of appellate courts is that procedural rules should not be interpreted to create a trap for unwary lawyers). Like in *Spence v. Wingate*, once the trial court issued its order finding interstate commerce was not implicated, the Appellants were not obligated to rehash all of their arguments on that issue in order to preserve it for appeal.

B. The Retainer Agreements with Ocean Club Homeowners Were Properly Before This Court.

Respondent takes the position that the retainer agreements between the Lucey Firm and the Ocean Club homeowners were not properly before this Court because they were submitted at the March 2, 2010 hearing on Appellants' motion for reconsideration. (*See* Petition for Rehearing, p. 11 fn. 7, and 16.) While it is true that a party cannot raise *an issue* for the first time in a Rule 59(e) motion that could have been raised *at trial*, the rules do not prohibit a trial court from *accepting additional evidence* at a Rule 59(e) hearing on a *pre-trial* matter. *Cf. McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 29 (Ct. App. 1987) (finding no prejudicial error in the trial court's refusal to grant a continuance where the trial court allowed additional evidence to be submitted after the hearing on the motion for summary judgment and heard additional arguments at the subsequent hearing on the motion for reconsideration). Here, the issue of whether the parties engaged in interstate commerce was squarely before the trial court prior to the motion for reconsideration. Nothing prevents a trial court from accepting additional evidence with regard to that issue at a motion for reconsideration, especially where, as here, the trial court gave the Respondent ample opportunity to respond and Respondent submitted additional evidence in response. (R. 256; The lower court informed Respondent that it would consider evidence submitted and gave her the opportunity to submit any evidence to counter it.) (*See also* R. 184-18; Affidavit of Respondent submitted at the lower court's invitation subsequent to the hearing.) The Respondent's argument otherwise is manifestly without merit.

Additionally, this argument was never raised in the Respondent's Brief. Although the Respondent generally argued that new issues could not be raised in a Rule 59(e) motion, she never argued to this Court that it should disregard the additional evidence submitted at the

hearing or that the *Lucey* panel should disregard pages 543-662 of the Record on Appeal. Accordingly, this is not a matter that the panel overlooked or misapprehended because it was never brought to the panel's attention in the first place. (Nor, as explained above, was it error to consider this evidence in any event.)

C. This Court is Not Precluded from Considering Whether Plaintiff Suffered Prejudice When the Trial Court Heard Appellants' Rule 59(a) Motion as a Rule 59(e) Motion.

The Respondent next makes a convoluted argument regarding the panel's "power" to consider the prejudice argument made in the Appellants' Reply Brief. (*See* Petition for Rehearing, p. 14-15) Some context will help to fully understand (1) what argument is being made, and (2) why the argument is specious.

In the Respondent's Brief, she alleged that the trial court erred by considering Appellants' motion for reconsideration as a motion under Rule 59(e), even though it was couched as a motion under Rule 59(a). In their Reply Brief, the Appellants argued the Respondent was not prejudiced when the trial court allowed the rehearing, despite their having mislabeled the subsection to Rule 59. The Respondent now appears to argue that this Court was prohibited from considering the arguments the Appellants made regarding prejudice because they were raised for the first time in the Reply Brief. However, the reason the Appellants did not make this argument until their Reply Brief is obvious: there was no need to defend the alleged procedural defects until those arguments were raised to the Court of Appeals via the Respondent's Brief. Indeed, the very purpose of a Reply Brief is to respond to points made in a Respondent's Brief. *See* Rule 208(a)(3), SCACR. The Respondent's argument is manifestly without merit.

D. This Court's Findings of Fact Were Supported by the Record.

The Respondent also argues the panel misapprehended the extent of her out-of-state travel. She claims she did not travel to Daytona Beach or Minnesota, and that the panel misrepresented her travel as being "extensive." The record reveals that Respondent appeared on behalf of the Ocean Club client at a deposition in the Ocean Club case that took place on March 13, 2007 in Minneapolis, Minnesota. (R. 470 – 471). Pages one and two of the deposition transcript showing such attendance do not specify that her appearance is via telephone or video; regardless she appeared on behalf of the client at a deposition that was conducted in Minnesota. *Id.* In addition, Respondent appeared via teleconference as counsel for the client at a deposition that took place in Daytona Beach, Florida on May 6, 2008. (R. 480 – 481) Certainly, her attendance via teleconference at a deposition in Florida is considered interstate commerce. Further, she does not dispute traveling to Atlanta, Georgia; Sarasota, Florida; Charlotte, North Carolina; Knoxville, Tennessee; or Kingsport, Tennessee. Considering Respondent admittedly traveled to and worked from at least five cities in four states in connection with the Ocean Club case, it was certainly not an error for the panel to describe such travel as "extensive."

Respondent also complains about the panel's mention of other cases listed in the 2006 employment agreement.² However, all of the arguments Respondent makes regarding these other cases are manifestly without merit. Respondent contends that no written evidence was submitted to the lower court in support of Appellant's argument regarding the 2006 contract cases. To the contrary, Appellant presented to the lower court evidence of out of state depositions, service of out of state subpoenas and the use of out of state experts in Harper and Westlaw research conducted in Harper, Turner and Cusack. (R.pp.558-612). Further, there is no evidence contradicting Appellant's position that Respondent engaged in telephone

² It is worth noting that the panel merely mentioned the other cases to acknowledge that it was choosing not

conversations that crossed state lines, sent e-mails and faxes that crossed state lines and preformed Westlaw research across state lines in connection with her work on other cases, including those specifically identified in the employment contract, such as Harper, Turner, and Cusack, Shoshan, Hanson and Turner. (See R.pp.558-612 and Final Brief of Appellants, p. 9-10).

Likewise, the Respondent's argument that the panel was prohibited from mentioning that the Respondent had struck out language in the employment contract, as amended, is without merit. The panel merely noted a fact that was before it in the Record on Appeal, and despite the Respondent's numerous arguments to the contrary, the appellate court indeed has the "power" to consider evidence that was presented below and is properly designated in the Record on Appeal. See Rule 210(c) & (h), SCACR; (R. 265) If the Respondent thought the signed employment contract showing language she struck out was not appropriate for the panel to consider, she should have filed a motion to strike it from the Record on Appeal. Instead, the Respondent actually listed it in her own Designation of Matter, so she cannot now complain that the panel considered it. Cf. *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (explaining a party cannot complain of an error which her own conduct induced). Thus, even assuming the panel should not have considered the stricken language – an assumption with which the Appellants disagree – any error in doing so was invited by the Respondent, and she cannot now complain.

Finally, with regard to whether the arbitration provision was unconscionable, the Respondent argues that the Appellants failed to rehash their argument that the "no live witnesses" provision was bilateral and not unconscionable in their Rule 59(e) motion, and therefore, the *Lucey* panel was prohibited from reversing the trial court's decision on this

to rely on them in its determination of interstate commerce.

basis. Respondent is simply incorrect. The issue of whether the arbitration provision was unconscionable was before the lower court and argued at the hearing on the Motion to Compel held December 10, 2009. (R. 208 – 210) In addition, Appellant addressed the issue of the bilateral nature of the arbitration provision in its Memorandum in Support of Motion for Reconsideration, emphasizing the fact that the witness provision in the arbitration clause applied to both parties and citing supporting case law. (R.174-176) Again, this is a situation where both parties fully argued the matter before the trial court, and the trial court ruled in favor of the Respondent. The issue was raised to and ruled upon by the trial court, and was therefore preserved for appeal. *See, e.g., Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (finding appellant was not required to file a Rule 59(e) motion reiterating the arguments it made at the summary judgment hearing to preserve issues for appeal even though trial judge's order granting respondents' motion for summary judgment did not restate the ground on which appellant opposed the motion).

V. The *Lucey* Panel's Decision Was Well-Reasoned, Well-Supported, and Correct.

In addition to responding to each of the *particular* arguments raised in the Petition for Rehearing, the Appellants also note that the Respondent's general argument – that the *Lucey* panel issued an unsound opinion – is entirely without merit. The *Lucey* panel recognized that “[t]he policy of the United States and South Carolina is to favor arbitration of disputes.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The FAA codifies this liberal policy favoring arbitration, mandating that

[a] a written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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. § 2 (2009). As the Lucey opinion correctly noted, the words “involving commerce” are the functional equivalent of “affecting commerce,” and therefore signal “an intent to exercise Congress’ commerce power to the full.” See *Lucey* at 6 (quoting *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003)).

Here, the law firm with which Respondent was employed handled business with many out-of-state clients, Respondent travelled out of state to conduct legal work for the firm, and she billed hours for this out-of-state work. (R. 318-327; 371-395; 406-420; 427-429; 434-441) The employment agreement between the parties specifically referenced cases that involved and affected interstate commerce, such as: Shoshan (an employment lawsuit against a non-South Carolina resident car parts manufacturing subsidiary of a German company, which had a North Charleston factory); Turner (a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank); Harper (a case involving experts in Georgia, Florida, North Carolina, and California); and Ocean Club (a complex construction case involving clients who lived in Tennessee, North Carolina, Georgia, Illinois, New York, Michigan, Florida, Ohio, Virginia, California, Indiana and New Jersey). (R. 262-265; 558-610) Accordingly, the *Lucey* panel correctly determined the contract between the parties involved interstate commerce. *Accord Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce in construction contract where a South Carolina builder was assigned rights to a Delaware creditor); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996) (finding interstate commerce where contract required removal of sludge from property in South Carolina to a facility in North Carolina); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977) (finding interstate commerce where contract for construction of an 18-story building required

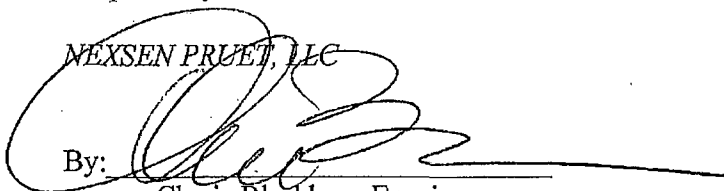
equipment and supplies produced and manufactured outside of South Carolina); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003) (finding interstate commerce in recruiting contract that required party to move from Michigan to South Carolina, and reimbursed party for those moving expenses); *Towles v. Un. Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) (finding interstate commerce in employment agreement between medical director and national company, where director attended out-of-state conferences, participated in phone conferences in Minnesota, reviewed claims from North Carolina and Georgia, and participated in a presentation in Georgia); *Equal Emp't Opportunity Comm. v. Rinella & Rinella*, 401 F.Supp. 175 (N.D. Ill. 1975) (finding interstate commerce in the context of a Title VII action where law firm had attorneys who travelled out-of-state on firm business, placed long distance phone calls, purchased equipment from an out-of-state company, and purchased law books from out-of-state publishers).

VI. The Court Should Decline Respondent's Suggestion for Rehearing *En Banc*.

Just as panel rehearing is unnecessary, so too is *en banc* consideration. Rule 219(a) of the South Carolina Appellate Court Rules establishes that *en banc* consideration is disfavored and will not be ordered unless (1) it is necessary for opinion uniformity or (2) an exceptionally important question is presented. The *Lucey* opinion neither conflicts with any other South Carolina authority (see section II above), nor involves a question of exceptional importance. Accordingly, Respondent's suggestion for *en banc* rehearing should be rejected. See Rule 219(b), SCACR (explaining that unless a member of the Court calls for a vote, the suggestion for *en banc* rehearing will be rejected).

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May 14, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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J. C. Nicholson, Jr., Circuit Court Judge
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RECEIVED

MAY 30 2012

SC Court of Appeals

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**RESPONDENT'S REPLY BRIEF TO APPELLANTS' RETURN
TO RESPONDENT'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC**

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I. The Lucey Panel Overlooked and Misapprehended South Carolina Supreme Court and United States Supreme Court Controlling Precedent.

When a point is overlooked or misapprehended by the appellate court, a rehearing is appropriate. See SCACR 221(a). The Lucey panel 1) overlooked Mathews v. Fluor Corporation, 312 S.C. 404, 440 S.E.2d 880 (1994); 2) misapprehended the holding of Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003); and 3) did not have appellate jurisdiction over some issues and erred by improperly relying upon documents not part of the Record in this case.

A. Mathews Was Found As the Law of This Case by the Lower Court But Was Overlooked by the Lucey Panel.

In reaching its decision, the lower court cited to the South Carolina Supreme Court's decision in Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994). Specifically, the lower court relied on Mathews to find "activities outside the state of South Carolina incident to the completion of a transaction" did not render Respondent's employment agreement with Appellant Law Firm within the purview of the Federal Arbitration Act ("FAA"). (See R. p. 10.) Appellants allege this Court did not overlook Mathews. However, nowhere in the Lucey panel's 19-page opinion is the Mathews case cited. (See Lucey.) Appellants also allege that because the Mathews case is twenty-years old, it is not "stronger" precedent. (See Appellants' Return at p. 2; Section B infra.) This Court routinely cites to cases older than Mathews and just because Mathews is an older case does not mean it is not still good law for the holding cited by the lower court and argued by Respondent.¹ This Court should have considered the holding in Mathews because it remains good law.

¹ Nothing in the record before this Court indicates the lower court rendered its decision based upon any consideration that the parties in this case contemplated interstate commerce.

Appellants contend that the determination of the subject matter of the contract is a legal, not a factual issue. The object of the contract is a factual finding and is separate from the analysis of whether the FAA applies to a contract. (See Mathews, p. 407, "In the present case, the object of the contract was the sale of real estate situated in South Carolina.") Here, the subject matter of Respondent's employment agreement was the employment of an attorney licensed in South Carolina to provide legal services to a law firm located in South Carolina, which law firm has no general interstate business practice. (See Trial Court's Order, R. p. 5-9; see also, Section B *infra* discussing Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003). As such, any incidental interstate connections, such as Respondent's work on the Ocean Club case, could not further any general interstate business practice of Appellant Firm, as the lower court found there was none.

In finding Respondent's employment agreement was situated within South Carolina, the lower court considered where Appellant Firm conducted business. The lower court made findings of fact that Respondent worked for a law firm which did business in South Carolina, and which was not an interstate business. (See R. p. 10, "Here, an attorney is providing legal services for a South Carolina law firm doing business in South Carolina.") These findings of fact cannot be reversed on appeal when there is evidence to reasonably support them. (See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E. 2d 663, 667 (2003)). Appellants cannot prevail by simply re-characterizing factual findings as legal conclusions.

Further, there were no facts or evidence before the lower court at the December 2009 hearing relating to the location and extent of Appellant Firm's business other than: 1) it was

Therefore, the lower court's application of Mathews was correct. c.f. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539-39, 542 S.E.2d 360, 363 (2001) (holding Mathews is overruled only to the extent that contemplation of interstate commerce is a factor).

located in Mount Pleasant, South Carolina; 2) it was owned by Appellant Lucey; and 3) and it had no out-of-state bank accounts from which Respondent received salary payments. These findings of fact were clearly set forth in the lower court's order. (See R. pp. 5-6, ¶¶ 1, 2, 3, 11, 12.) In addition, nowhere in the lower court's order were there any findings of fact to support the conclusion that Appellant Firm was engaged in a general interstate business practice. By contrast, the only finding of fact the lower court made was that Appellant Firm was a local law firm doing business in South Carolina.

B. The Lucey Panel Misapprehended the United States Supreme Court's Holdings in Citizens Bank v. Alafabco.

The Lucey panel relied upon the United States Supreme Court case of Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003). The Lucey panel's reliance upon Citizens Bank was proper; however, the panel misapprehended what findings were necessary under the Citizens Bank three-prong test² and stopped short of making the findings required for the FAA to apply to Respondent's contract. A rehearing is necessary to correct the Lucey panel's misapprehension of the holdings of Citizens Bank and to perform the full analysis required; specifically, if any general interstate business activity of Appellant Law Firm was facilitated by Respondent's activities in a substantial way. See SCACR 221(a).

² Under Citizens Bank, the three-part analysis required to determine if the FAA applies to an employment contract when specific impact on interstate commerce is not alleged is: 1) a transaction must be within the flow of commerce; 2) without a showing of any specific effect upon interstate commerce, the economic activity in question in the aggregate must represent "a general practice...subject to federal control"; and 3) the general interstate practice must bear on interstate commerce in a *substantial way*. (emphasis supplied) See Respondent's Petition for Rehearing at pp. 7-14 for a detailed analysis of this argument; see also Flexon at 6 citing to Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884 (Ark. 2007) at 891-892 (discussing facts and concluding clinic failed to prove an interstate business activity and failed to prove a doctor's employment facilitated its alleged interstate business activities).

Appellants agree that there is a three-prong test under Citizens Bank and acknowledge that the test is used to determine whether the Commerce Clause reaches “profoundly local activity.” (See Appellants’ Return at p. 6.) However, rather than demonstrate to this Court that the three-prong test has been satisfied and/or does not apply to Respondent’s employment agreement with Appellant Firm, Appellants merely summarize the facts of Citizens Bank and do not explain why the lower court’s finding that Respondent’s agreement was situated within South Carolina (i.e., was “local”) was not supported by reasonable evidence.

Appellants never assert in their Return that this Court should not apply the Citizens Bank’s three-prong test to this case. The lower court found Respondent’s employment agreement local in nature, i.e., that the contract was situated within South Carolina. Thus, Appellants were required on appeal to demonstrate a general interstate business practice of Appellant Firm that Respondent’s legal activities facilitated, and facilitated in a substantial way, which they did not.

The Mathews case is consistent with Citizens Bank. Both cases stand for the proposition that not all activities incidental to the completion of a contract evidence a transaction in interstate commerce. Mathews holds that the express terms of a contract are an appropriate consideration when making this determination. (Id. at 407, “Since this Court is unable to discern from the evidence presented whether the contract required respondent to administer anything related to interstate commerce, we hold that the subject transaction is outside the scope of the Act”)³. Citizens Bank merely extends the analysis that the South Carolina Supreme Court set forth in Mathews by creating a test to guide the courts in their

³ Accord, Zabinski v. Bright Acres Assoc., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001)

decisions. Not only are the express terms of a contract to be considered, but also a general interstate business activity must be furthered in a substantial way when no specific impact on commerce is alleged.

Respondent submits that this Court, conducting a *de novo* review, cannot overturn the lower court's finding of fact that the object of the contract was situated within South Carolina or make findings of fact of its own to support a general interstate business practice of Appellant Firm. It follows that the Citizens Bank test cannot be satisfied. As such, a rehearing is necessary to correct the Lucey panel's misapprehension of Citizens Bank.

Finally, Appellants rely heavily on the case of Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999), which the Lucey panel cited repeatedly. Towles predates Citizens Bank and does not encompass the analysis the United States Supreme Court enunciated in Citizens Bank. The Lucey panel should not have relied solely upon Towles in light of Citizens Bank. Also, there is a glaring distinction between Towles and the case at bar; in Towles, the employer had a general interstate business practice, which the Lucey panel acknowledged. In this case, the lower court found the employer does not have a general interstate business practice.⁴ When Towles and Citizens Bank are both applied to this case, the Lucey opinion cannot stand. A rehearing should therefore be granted to correct this misapprehension.

⁴ Respondent respectfully submits this Court cannot find that the mere existence of attorney-client relationships with persons who have a residence outside of South Carolina establishes a "general interstate business practice" of Appellant Firm. The Commerce Clause regulates business transactions, and the mere forming of a confidential relationship between an attorney and a client is not by itself an activity subject to federal control, especially when no other facts are present. Quite simply put, without a showing of "commerce" there can be no "interstate commerce" to support a finding of a "general interstate business practice" of Appellant Firm.

II. Flexon and Lucey Conflict Because Flexon Properly Applied the Test in Citizens Bank and Lucey Did Not.

Both the Flexon and Lucey cases involve licensed professionals in South Carolina working for professional services employers with offices located only in South Carolina. However, opposite results were reached in these cases by two different panels of this Court. Appellants err when they argue that the differing results occurred because of the "unique facts of each case." (See Return at p. 3.) While Respondent agrees that a factual analysis is necessary in each case to determine whether a transaction involves commerce within the meaning of the FAA, this Court must also apply controlling legal precedent. The Flexon decision was properly based on the holdings and test enunciated in Citizens Bank, but the Lucey decision was based on Towles. As such, the Flexon decision comports with United States Supreme Court law, and Lucey does not. Furthermore, once the Lucey panel cited to Citizens Bank, it was incumbent upon the panel to complete its analysis under that case. This misapprehension by the Lucey panel requires a rehearing.⁵

In, Flexon, the employer was based solely in South Carolina and the doctor was hired to practice medicine in South Carolina. Even though the doctor in Flexon was licensed in both South Carolina and Georgia and moved his practice to South Carolina as a result of his employment with the clinic, the panel found interstate commerce was not involved. Additionally, the Flexon panel was unconcerned that the doctor traveled outside South Carolina during his employment or that the business was owned by a Delaware parent company when finding interstate commerce was not involved. In finding the FAA did not apply, the Flexon opinion adopted the legal analysis of Tahiri. See Flexon. It is important to

⁵ This misapprehension also supports a rehearing en banc as this Court's opinions are not uniform, and the conflict between the cases creates a question of exceptional importance, specifically, does this Court apply the test enunciated in Citizens Bank, or not.

note that though the Flexon panel did not cite directly to Citizens Bank, it did cite to the Citizens Bank analysis in the Tahiri opinion. (See Flexon at 6 citing to Arkansas Diagnostic Center, P.A. v. Tahiri, 257 S.W.3d 884 (Ark. 2007) at 891-892). Furthermore, even though “Citizens Bank” does not explicitly appear on the Tahiri opinion pages cited by Flexon, the Tahiri opinion pages cited to at 891-892 analyze the test promulgated by Citizens Bank which had been set forth at pages 889-890. The Tahiri court did exactly what appellate courts are supposed to do: it set forth the test, and then performed the Citizens Bank analysis. Appellants’ statement that Flexon is not based upon Citizens Bank and instead is based upon an out-of-state court’s opinion, Tahiri, is in error and a red herring.

In stark contrast to Flexon, the Lucey panel found that even though Appellant Firm was based solely in South Carolina and Respondent was only licensed to practice law in South Carolina, the FAA applied. The Lucey panel reached this conclusion without finding that Appellant Firm proved a general interstate business activity which Respondent’s activities facilitated in a substantial way. Read alone, Lucey stands for the proposition that the employer need not prove an interstate business practice, or necessarily prove that the employee’s activities facilitated the employer’s interstate business practice in a substantial way. The Lucey analysis does not comply with the holding in Citizens Bank and will result in cases being improperly decided by the lower courts of this state.

~~--- III. This Court Did Not Have Appellate Jurisdiction Over Issues And Documents the Lucey Panel Relied Upon.~~

The rules of appellate procedure are designed to require parties to prepare their cases and preserve issues so that this Court has the power to hear issues on appeal. While Respondent agrees this Court did have the discretion to render a finding in this case that

Appellants' Rule 59 was pursuant to SCRCP 59(e), this Court did not have the power to rule upon issues and documents not within its appellate jurisdiction. Were this Court to consider the procedural arguments espoused by Appellants at the March hearing and Respondent's travel in the Ocean Club case, the rules of appellate would be stretched so far as to render them meaningless. It is imperative that this Court comply with its own procedural rules; therefore, a rehearing is necessary to correct the procedural misapprehensions of the Lucey panel.

The Lucey panel's finding that Appellant Firm had out-of-state clients was based upon documents not properly before this Court.⁶ Further, Appellants arguments about the March hearing documents are tantamount to stating that because they designated these documents as part of the Record on Appeal, this Court can rely upon them. That is not what the appellate rules and procedural law of this state require. This Court must find it had the power, i.e., appellate jurisdiction, to review the documents and the issues raised by them.⁷ A party simply including documents and new issues in the Record does not render them properly within this Court's appellate jurisdiction. Respondent challenged Appellants' reliance on the retainer agreements, and Appellants were so keenly aware of these procedural challenges by Respondent that they discussed the challenged retainers in their Reply Brief at Page 14 and argued Respondent was not prejudiced. Yet, while Respondent's procedural challenges were before the Lucey panel, they were overlooked.

⁶At pages 9-10 of their Return, Appellants assert Respondent never challenged the documents submitted at the March hearing. This is untrue. Respondent made numerous procedural challenges to issues raised for the first time in the March 2010 hearing, which the documents at pages 543-662 of the record purport to support. See Respondent's Brief pp. 4, 7-26.

⁷See Dismuke v. S.C. Dept. of Motor Vehicles, 371 S.C. 418, 419 n.1, 639 S.E.2d 151, 152 n. 1 (Ct. App. 2006); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

Not only are the retainer agreements of out of state Ocean Club unit owners not part of the Record, they are irrelevant. The facts determinative of the object of the employment contract are the venue of the Ocean Club case and the choice of law, not where the owners are domiciled. The formation of client relationships without commerce a showing of commerce is not enough bring this agreement within the FAA because nothing in the Employment Agreement requires Respondent to engage in interstate commerce.⁸

The Lucey panel also relied on Respondent's out of state travel to conclude the FAA applied to her employment contract. This Court is "powerless to review" the issue of Respondent's travel because Appellants failed to raise the travel issue to the lower court, it was not addressed in the lower court's written order, and was not included in Appellants' Rule 59(e) motion. See Dismuke v. S.C. Dept. of Motor Vehicles, 371 S.C. 418, 419 n.1, 639 S.E.2d 151, 152 n. 1 (Ct. App. 2006); see also Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991).

Appellants also cite to McCall v. Finley as support for their proposition that additional evidence can be submitted after an initial hearing and additional arguments can be made on a motion for reconsideration. (See Return p. 9.) However, McCall v. Finley firmly stands for the proposition that "Whatever doesn't make any difference, doesn't matter." See 294 S.C. 1, 4, 362 S.E.2d 26, 29 (Ct. App. 1987); see also, Spreeuw v. Barker, 385 S.C. 45, 58, 682 S.E.2d 843, 849 (Ct. App. 2009) (citing McCall for this proposition). Obviously, since the Lucey panel's opinion hinges on the fact that Appellant Firm had "out-of-state clients" based on the existence of retainer agreements, Respondent was prejudiced because

⁸ See Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 96, 592 S.E.2d 50, 53 (Ct. App. 2003) (citing to Mathews and recognizing that when a contract does not require a party to engage in interstate commerce, the FAA does not apply).

these retainer agreements do make a difference in this case; they are the only alleged evidence of Appellant Firm's "out-of-state" clients that the Lucey panel relied upon.

This Court's inquiry as to the March hearing documents and Respondent's travel must first be into proper issue preservation and appellate jurisdiction. Otherwise, the Lucey opinion creates an improper rule of law that will permit the waiver of defects in appellate jurisdiction and allows parties to defy the very purpose behind issue preservation.

IV. Conclusion

As this case contains questions of exceptional importance relating to issue preservation and appellate jurisdiction to review specific issues and facts, a rehearing *en banc* review is appropriate. This case also fashions precedent which does not comply with this Court's decision in Flexon and Citizens Bank and, therefore, also requires a rehearing *en banc*.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J. C. Nicholson, Jr., Circuit Court Judge
Case No.: 2009-CP-10-6873

Justin O'Toole Lucey, Justin O'Toole Lucey, P.A., ... Appellants,

v.

Amy Meyer, ... Respondent.

And Lorcan Lucey, GMAC Mortgage
Corporation, Citimortgage, Inc., and John
Doe Finance, ... Third Party Defendants.

**PROOF OF SERVICE FOR RESPONDENT'S REPLY BRIEF TO
APPELLANT'S RETURN TO PETITION FOR REHEARING**

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I, Nancy Bloodgood, Esquire, certify that on May 25, 2012, I served a copy of the
Respondent's Reply to Appellant's Return to Respondent's Petition for Rehearing
via First Class Mail by placing a copy of said documents in the United States mail with
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Justin O'Toole Lucey and
Justin O'Toole Lucey, P.A., Appellants,

v.

Amy Meyer, Respondent.

And Lorcan Lucey, GMAC
Mortgage Corporation,
Citimortgage, Inc., and
John Doe Finance, Third Party Defendants.

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 4960
Heard January 26, 2012 - Filed March 28, 2012
Withdrawn, Substituted and Refiled October 24, 2012

REVERSED

Cherie Blackburn, of Charleston, for Appellants.

Nancy Bloodgood and Lucy C. Sanders, both of
North Charleston, for Respondent.

LOCKEMY, J.: In this civil action involving an employment contract, Justin O'Toole Lucey and Justin O'Toole Lucey, P.A. (Firm) (collectively Appellants) appeal the trial court's denial of their motion to compel arbitration. Appellants contend the trial court erred in: (1) finding the Federal Arbitration Act (FAA) did not apply because the relationship between Firm and Amy Meyer did not involve interstate commerce; (2) finding the arbitration clause was unconscionable; (3) striking the entire arbitration clause when it was more appropriate to sever the alleged unconscionable portion and compel arbitration; and (4) finding the South Carolina Arbitration Act (SCAA) applicable to the contract. We reverse.

FACTS

Meyer began practicing law in 2002 and is licensed to practice law only in South Carolina. Prior to joining Firm, Meyer was employed as an Assistant Solicitor for the Ninth Circuit, specializing in white collar crime, but had no civil trial experience. She also practiced public accounting for 6 years as a certified public accountant before going to work with the Solicitor's Office. In January 2006, Firm hired Meyer as an associate attorney.

In June of 2006, Meyer and Firm executed an employment agreement (2006 agreement). Explaining the purpose of the 2006 agreement, the beginning paragraph stated:

As I have several times told you I would, I am writing, albeit belatedly, to confirm the terms of the offer I gave you previously, and several modifications since. With the possible exception of some of the legalese, this is an attempt to put into writing the matters we have previously discussed and agreed to. Please feel free to clarify anything that I misstate.

The 2006 agreement contained an arbitration clause in the middle of the second page in regular type which stated:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

A base salary and bonus structure for contingency cases along with other benefits were also included in the 2006 agreement. The paragraph preceding the signature line stated:

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

Under "Subsequent Modifications," the 2006 agreement listed additional benefits to Meyer, including an increased bonus of fifteen percent on a case referred to as the Harper case and a graduated trial bonus on cases which Meyer shared the work with Lucey in getting ready for trial.

The 2006 agreement specifically referenced certain cases that Meyer would be working on, including the Cusack, Harper, Shoshan, Hanson, and Turner cases. Appellants allege each of these cases involved interstate commerce. They state Shoshan was an employment lawsuit against a non-South Carolina resident car parts manufacturing subsidiary of a German company which had a North Charleston factory. Turner was a partnership/employment lawsuit involving a dental student who had been marketed a dental practice by a Georgia professional practice referral service and who obtained a loan from a Georgia bank. Harper involved a treating doctor who resided in and was deposed in Florida. Firm's primary liability expert for the Harper case resided in and was deposed in Georgia, while another of Firm's experts for the case resided in and was deposed in

California. Appellants also allege that most of this out-of-state work was handled by Meyer.

In May of 2007, Firm and Meyer amended the 2006 agreement (2007 amendment) to address Meyer's salary bonus for work on a complex construction defect case (the Ocean Club case) involving a construction project on the Isle of Palms near Charleston, SC. After being provided a draft of the 2007 amendment for review, Meyer crossed out and initialed certain language to which she objected and then signed the document. Appellants stated Meyer was not spearheading the Ocean Club case.

Firm's primary client in the Ocean Club case was the Ocean Club Horizontal Property Regime, which was composed of homeowners located in various states. On February 2, 2009, Meyer prepared a summary of the travel expenses incurred in connection with the case, showing repeated travel outside of South Carolina. Further, documentation was presented showing many out-of-state depositions in which Meyer participated. During Meyer's work for this case, Firm made intermittent payments toward her salary bonuses. On July 20, 2009, the Ocean Club case was settled, and on July 22, 2009, Meyer's employment was terminated.

In July of 2009, Meyer began making demands for vacation, 401K money, and bonus money allegedly due under the Ocean Club case. In response, Firm filed an arbitration proceeding on October 22 with National Arbitration and Mediation, Inc. (NAM). Meyer did not respond to the NAM arbitration filing and sent a draft complaint to Appellants on October 30, 2009. On November 2, 2009, Appellants filed a complaint, a motion for a temporary restraining order and preliminary injunction, and a motion to compel arbitration. Appellants state they filed the complaint in an effort to prevent the filing of the draft complaint from Meyer, because the draft complaint contained confidential information about Firm's clients and disregarded the binding arbitration clause contained in the 2006 agreement. On November 30, 2009, Meyer filed an answer, counterclaims, and third party complaint. Meyer asked for an award of \$1.7 million for the value of her time on the Ocean Club case.

After a hearing on December 9, 2009, the trial court denied the motion to compel arbitration. The trial court made the following conclusions: (1) the arbitration clause did not meet the requirements of SCUAA; (2) the employment contract did not involve commerce within the meaning of the FAA; (3) the arbitration clause at issue was further void on equitable grounds; and (4) there were differences in compelling arbitration in real estate development and construction cases under the FAA and compelling arbitration for personal service contracts.

Appellants filed a Rule 59(a) motion asking the trial court to reconsider the following: (1) the determination that the FAA did not apply, because the trial court improperly focused on Meyer's activities, rather than the activities of the Firm; (2) the delegation to Meyer's counsel of the ruling on the issue of whether the arbitration clause was unconscionable; and (3) the failure to recognize or evaluate the factors which render arbitration clauses reasonable and conscionable, especially as between sophisticated parties. However, during the hearing on the motion for reconsideration, Appellants failed to pursue their second argument regarding improper delegation. The trial court issued a Form 4 denial of the Appellants' 59(a) motion for reconsideration, and this appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in its determination the employment contract between the parties did not involve interstate commerce within the meaning of the FAA such that the FAA does not apply?
2. Did the trial court err in its determination that the arbitration clause at issue is unconscionable, thus it is invalid and not enforceable?
3. Did the trial court err in failing to sever the "limitation of live witnesses" portion of the arbitration clause and then enforce the remainder?
4. Did the trial court err in its determination that the SCUAA applies to the agreement between the parties and that the employment agreement is not in compliance with such act?

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Davis v. KB Home of South Carolina, Inc., 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. (quoting Simpson, 373 S.C. at 22, 644 S.E.2d at 667).

LAW/ANALYSIS

I. Timeliness of Appellants' Notice of Appeal

As a threshold procedural matter, we will address Meyer's argument that Appellants' Rule 59(a) motion for reconsideration was an insufficient and improper way to request review of a trial court's denial of a motion to compel arbitration. Thus, Meyer contends this is an untimely appeal because the improper motion did not toll the time for appeal from the arbitration order. We disagree.

Appellants' motion stated they are requesting reconsideration pursuant to Rule 59(a), SCRCP. Rule 59(a) states:

Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of the State. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been

entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

The grounds for Appellants' motion are stated as follows: (1) the trial court incorrectly focused on Meyer's activities, rather than the activities of the Firm when determining whether the FAA applied; (2) the trial court delegated the ruling on the issue of whether the arbitration clause was unconscionable to Meyer's counsel; and (3) the trial court failed to recognize or evaluate the factors which render arbitration clauses reasonable and unconscionable, especially as between sophisticated parties. The Appellants then filed a memorandum in support of their motion for reconsideration which expands upon their three grounds.

"A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion." Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. "Rule 7(b)(1), SCRCP requires that motions 'shall state with particularity the grounds therefor, and shall set forth the relief or order sought.'" Camp, 386 S.C. at 575, 689 S.E.2d at 636. "The particularity requirement 'is to be read flexibly in recognition of the peculiar circumstances of the case.'" Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir. 1996)). "By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly." Id. (quoting Calderon v. Kansas Dep't of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir. 1999)). However, when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1), SCRCP. Id. at 575-76, 689 S.E.2d at 636-37.

When the trial court is able to discern the relief requested, "[i]t is the substance of the requested relief that matters 'regardless of the form in which

the request for relief was framed." Richland Cnty. v. Kaiser, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) (holding it was proper to treat plaintiff's written motion as a Rule 59(e) motion to the extent the motion addressed the trial court's evidentiary rulings, which the plaintiff challenged in her briefly stated oral motion at the end of the trial, even though it was erroneously captioned as a motion for new trial).

At the hearing for reconsideration, Meyer raised her contention that the Appellants filed their motion improperly pursuant to Rule 59(a), instead of Rule 59(e). The court responded:

I'm not trying to be smart with you, but if I made a mistake I'll correct it irrespective of whether it's 59(a) or 59(e). Okay? So base your argument on that, okay. That's my concern if whether I made a mistake and that's what the motion for reconsideration -- generally, it's for the Courts to correct themselves. And I have done that on, I won't say several occasions, but I have corrected myself on some motions. . . . So don't give up any of your arguments for appellate, okay?

Addressing Meyer again at the end of the hearing, the trial court stated:

All right. I'm giving you an opportunity to give me any facts you want to give me that you didn't give me last time. That's what I'm giving you ten days for. Okay? . . . I'm not going to consider any new issues. I'll be happy to receive any facts that you want to present to me on those issues.

The trial court explained that despite the rule cited in the motion, it understood the motion to be one for reconsideration of the issues, and it would address the motion as such. The grounds, with the exception of the

second ground that Appellants dropped, were issues brought up in the initial hearing.

Acknowledging the flexibility of the particularity requirement, we find the court fairly addressed the motion as a Rule 59(e) motion for reconsideration. Any potential prejudice to Meyer was relieved by permitting ten days after the hearing to file any other arguments she felt applicable. For the foregoing reasons, we hold the filing of the captioned Rule 59(a) motion for reconsideration tolled the time period to file a notice of appeal, and therefore, Appellants' notice of appeal was timely.

II. Interstate Commerce within the definition of the FAA

Appellants argue the trial court erred in finding the employment contract with Meyer did not involve interstate commerce. Specifically, they contend interstate commerce is broadly construed for purposes of the FAA; thus, because the employment contract's named cases required out-of-state travel and work from Meyer, the contract involved interstate commerce. We agree.

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001)). The FAA provides: "A written provision in any [] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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. § 2 (2009). "The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.'" Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277 (1995)); see also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) ("We have interpreted the term 'involving commerce' in the FAA as the functional

equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power."). "Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce." Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (quoting Citizens Bank, 539 U.S. at 56).

"In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case." Id. (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.")). "Our courts consistently look to the essential character of the contract when applying the FAA." Id. at 96, 592 S.E.2d at 52 (finding it was proper to "focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce [was] involved").

Our supreme court and this court have ruled on several cases which are applicable to our determination of whether the contract at bar involves interstate commerce. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (finding interstate commerce involved in a construction contract where a builder was domiciled in South Carolina, but under the contract, was assigned rights to a Delaware creditor); Soil Remediation Co. v. Nu-Way Env'tl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding interstate commerce was involved in a contract requiring removal of water and sludge from property in South Carolina to a facility in North Carolina); Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993) (stating that a contract between a nursing home and patient did not involve interstate commerce, despite the fact that the nursing home was a division of a Delaware partnership, marketed its services to persons residing outside of the state, and purchased the majority of its supplies and equipment from out-of-state; the Court reasoned that the performance of the contract, the provision of patient-resident services in South Carolina, did not require any activities in interstate commerce); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a

contract for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); Blanton v. Stathos, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because "the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce").

In Thornton v. Trident Med. Ctr., L.L.C., James Thornton entered into a recruiting agreement with Trident Medical Center. 357 S.C. 91, 93, 592 S.E.2d 50, 51 (Ct. App. 2003). The agreement required Thornton to relocate his medical practice from Michigan to Charleston, SC, for a total of at least four years and included the additional terms: (1) a net collectable revenue guarantee which provided Thornton with a guaranteed income for twenty-four months; (2) a signing bonus; (3) a relocation agreement for payment of moving expenses; and (4) an agreement providing that Thornton was being recruited into the existing practice of SCCA. Id. An arbitration clause was included in the contract. Id. Thornton left Charleston before the contracted four years and filed a declaratory judgment seeking a determination that the arbitration clause was unenforceable. Id. at 94, 592 S.E.2d at 51. In finding the contract involved interstate commerce such that the FAA applied, this court decided the "subject matter of the contract clearly [extended] beyond Thornton's obligation to provide medical services in South Carolina." Id. at 97, 592 S.E.2d at 53. This court found the recruiting agreement was primarily to induce Thornton to move from Michigan to South Carolina. Id. at 97-98, 592 S.E.2d at 53. Additionally, the agreement included reimbursement for Thornton's relocation expenses and prevented Thornton from practicing in any other state other than South Carolina for four years. Id. Thus, "the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines," and "[t]he express purpose [] was to provide a monetary incentive, consisting of multiple related promises, to induce Thornton to relocate his professional medical services practice from Michigan to South Carolina." Id. at 98, 592 S.E.2d at 53.

In contrast, our supreme court found the agreement in Timms v. Greene did not involve interstate commerce. 310 S.C. 469, 473, 427 S.E.2d 642, 644 (1993). The Timms contract was between a nursing home and one of the nursing home's residents and included an arbitration clause. Id. at 470-71, 427 S.E.2d at 643. In support of its decision, the supreme court found the only evidence raised to show interstate commerce was that the nursing home: (1) was a division of National HealthCorp, L.P., a Delaware Limited Partnership; (2) marketed its services to persons residing outside this State; (3) hired employees from outside the State; (4) purchased a majority of its goods, equipment and supplies outside the state for use at the home; and (5) contemplated payment in part by Medicare or Medicaid. Id. at 473, 427 S.E.2d at 644. The court stated although the listed factors could show the nursing home's involvement in interstate commerce, their relationship to the agreement between the nursing home and the resident was "insufficient to form the basis of the contract between the parties." Id.

Towles v. United Healthcare Corp. is also relevant to our analysis here. 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). United Healthcare Corporation (United) was a national company headquartered in Minnesota. Id. at 33, 524 S.E.2d at 841. United hired Winfield Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, which included an arbitration clause. Id. at 33-34, 524 S.E.2d at 841-42. This court noted Towles' responsibilities included helping to establish medical policy, overseeing utilization review and quality management for plan participants, attending out-of-state conferences, participating in telephone conferences with United's corporate medical affairs staff in Minnesota, and reviewing claims from out-of-state providers and specialty providers located in North Carolina and Georgia. Id. at 36, 524 S.E.2d at 843. Furthermore, Towles participated in sales presentations in South Carolina and Georgia and worked with officials from national companies in resolving questions of utilization review and medical necessity for PHP participants. Id. Towles also reviewed proposals for services from out-of-state medical and ancillary service providers. Id. This court found those activities provided "sufficient evidence of interstate commerce to invoke the FAA." Id.

In this case, the trial court found the facts to be most similar to Timms because "an attorney is providing legal services for a South Carolina law firm doing business in South Carolina." The trial court then stated even if the facts are as the Appellants state them to be, they fail to rise to the level of involving or affecting interstate commerce because domicile of the parties to the litigation, activities outside the state of South Carolina incident to the completion of a transaction, and receipt of insurance proceeds do not render a transaction as "involving" or "affecting" interstate commerce within the purview of the FAA. In the hearing for the motion to reconsider, the trial court stated:

My concern was that we were simply looking at an employment contract between two attorneys here in Charleston, South Carolina, and I did not feel like you could expand it by saying that she's working on cases that were involving [out-of-state] information or interstate commerce. That's the reason basically I ruled the way I ruled.

Despite the trial court's reasoning, this court finds Towles most applicable to these facts.¹ Using the Towles court's analysis, this court holds

¹ Equal Emp't Opportunity Comm. v. Rinella & Rinella is also persuasive in our analysis, although not controlling. 401 F. Supp. 175 (N.D. Ill. 1975). Rinella was a Title VII action; however, its discussion regarding how a local law firm dealing primarily in divorces affects interstate commerce is instructive. Id. at 181-82 ("Notwithstanding the defendants' divorce orientation, they admit that their practice encompasses other types of business, i.e., corporate, probate and real estate. They further admit that various attorneys travel out of state on firm business. Samuel Rinella, for instance, travelled to London, England and to Arizona, and Richard Rinella travelled to Washington, D.C. The firm's long distance phone bill in calendar year 1974 was \$1,277.01; its out-of-state travel expenses amounted to approximately \$2,000 for the same year. The firm also purchased both office intercommunication equipment from an out-of-state company for \$8,400, and law and reference books from out-of-state publishers billed at approximately \$2,500. These various factors establish that Rinella & Rinella indeed affects

the employment contract involves interstate commerce. Even though Firm is not a national employer as United was, Firm handles business with many out-of-state clients, similar to United. However, our holding does not deem all employment contracts involving attorneys' services subject to the FAA. It is critical that this is not a situation where Meyer simply worked in South Carolina on cases that involved out-of-state clients and businesses. Here, Meyer was employed to work on specific cases, which were identified in the contract, that Appellants allege involved interstate commerce. Despite the fact there is not substantial documentation regarding out-of-state traveling or work Meyer may have done in the cases in the initial contract, the subsequent amendment to the contract was designed with the express purpose of allowing additional compensation and provisions for the Ocean Club case, a case which involved significant out-of-state work. The 2007 Amendment references a \$10,000 advance on her Ocean Club work, with the expectation of further compensation to come in the near future as partial settlements occurred. Meyer travelled extensively to conduct her legal work and billed hours for her out-of-state work and travel. Pre-bill worksheets for the Ocean Club case reflect travels to Atlanta, Georgia; Sarasota Beach, Florida; Charlotte, North Carolina; Minneapolis, Minnesota; and Knoxville and Kingsport, Tennessee. Moreover, Meyer brought this claim to recover \$1.7 million for the value of her labor on the Ocean Club case, implicating the substantial amount of work and time she spent on this particular case. Considering the liberal application of the Commerce Clause, and recognizing the FAA is to be construed to full extent of the Commerce Clause, we find Meyer's out-of-state activities rose to the level of "involving interstate commerce," and thus, triggered the enforcement of the FAA. *Compare Flexon v. PHC-Jasper, Inc.*, __ S.C. __, 731 S.E.2d 1, 4 (Ct. App. 2012) (affirming the trial court's finding that the agreement did not involve interstate commerce because it was a contract calling for "local services to be performed by a Hardeeville resident at a medical facility located in Hardeeville," and thus, did not implicate the FAA). For the foregoing reasons, we reverse the trial court and find the FAA does apply to the parties' employment contract.

interstate commerce and, accordingly, is subject to the proscriptions of Title VII.").

III. Unconscionability

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. Towles, 338 S.C. at 37, 524 S.E.2d at 843-44. "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (quoting S.C. Code Ann. § 15-48-10(a) (2005)). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a) (2005).

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." Simpson, 373 S.C. at 24, 644 S.E.2d at 668 (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001)). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Simpson, 373 S.C. at 25, 644 S.E.2d at 668; see Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999). Our supreme court has adopted the Fourth Circuit's view, and "[i]t is under this general rubric that [this court determines] whether a contract provision is unconscionable due to both an absence of meaningful choice **and** oppressive, one-sided terms." Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (emphasis added).

1. Absence of meaningful choice

Appellants argue the trial court erred in finding there was an absence of meaningful choice because Meyer had been working for Firm for six months before receiving the 2006 employment agreement and she essentially had to agree to it or else "jeopardize her existing job." We agree.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* at 25, 644 S.E.2d at 669; see *Carlson v. General Motors Corp.*, 883 F.2d 287, 295-96 (4th Cir. 1989). "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 (quoting *Carlson*, 883 F.2d at 293, 295); see also *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.").

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669 (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The finding of an adhesion contract is not per se unconscionable, however it is the beginning point to the analysis. *Id.* at 27, 644 S.E.2d at 669.

We hold Meyer had a meaningful choice involving the 2006 agreement. Meyer argues her lack of civil experience put her at a disadvantage as it relates to the relative sophistication of the parties. However, we find her substantial work as an assistant solicitor in addition to her time at law school permitted Meyer to have enough sophistication that any disadvantage would be minimal in this situation. In concluding the 2006 agreement, Firm stated:

Please acknowledge receipt of this communication when you receive it. After spending some time reviewing it, if you are in agreement with this, please so indicate by counter-signing below and returning to me at your convenience. If you need a meeting to discuss, just let me know.

The 2006 agreement, as shown above, allowed Meyer as much time as she needed to understand and accept the conditions. In addition, the 2006 agreement stated a meeting could be set up if there was a need to discuss the terms, allowing for negotiation of the terms. Because of this apparent opportunity for negotiation, this was not an adhesion contract. It did not force Meyer to "take-it-or-leave-it." Rather, it indicated Meyer had some bargaining power, while perhaps not as much as the Firm. We also note Meyer felt comfortable striking out language to which she objected in the 2007 amendment; again, supporting her ability to negotiate these contracts. Further, this was not a lengthy contract at three pages. The arbitration clause is on the second page, and it is not "buried" within the short contract; thus, there does not appear to be any element of surprise.

While Meyer argues that because the employment climate for law firms was difficult, she felt she was forced to agree to the contract, we do not find that is a valid reason for holding there was an absence of meaningful choice. It is unfortunate the employment or economic climate may have been difficult at that particular time, but the external environment did not extinguish Meyer's meaningful choice of whether to sign the contract or not. Further, we recognize Lucey and the Firm did not contribute to the negative economic climate; therefore, we cannot use that as a factor against them in this case. For the foregoing reasons, we hold the trial court erred in finding there was an absence of meaningful choice.

2. Oppressive and one-sided terms

Appellants argue the terms of the arbitration clause are not unduly harsh because its sole limitation is the presentment of live witnesses and there is no other limitation of evidence or testimony. We agree.

As stated previously, this prong of the test sets forth that we are to review the terms to see if 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.

"Arbitration laws are passed in order to expedite the settlement of disputes and should not be used as a means of furthering and extending delays." Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). The benefits received by arbitrating come with certain limitations on discovery. See Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 127, 647 S.E.2d 249, 251-52 (Ct. App. 2007) (stating that if parties conducted little or no discovery, then the party seeking arbitration has not taken "advantage of the judicial system," thus, prejudice will likely not exist, and the law would favor arbitration; however, if the parties conducted significant discovery, then the party seeking arbitration took "advantage of the judicial system," prejudice will likely exist, and the law would disfavor arbitration); In re Cotton Yarn Antitrust Litig., 505 F.3d 274, 286 (4th Cir. 2007) (stating "while discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the 'procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration' that is inherent in every agreement to arbitrate and '[b]ecause limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement'").

The arbitration clause in the 2006 agreement provides:

Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

While the arbitration clause here does limit discovery by allowing the parties to be the only witnesses called in person, this cannot, standing alone, be a

reason to invalidate an arbitration agreement. Appellants are correct in stating that the arbitration restriction applies equally to both parties, and the clause places no apparent restrictions on the introduction of depositions of witnesses into arbitration proceedings. We find the arbitration clause is not one-sided, nor is it oppressive to Meyer. Because a finding of unconscionability requires an absence of meaningful choice as well as oppressive, one-sided terms, we reverse the trial court.

IV. Severability

Appellants contend that even if the provision limiting live witnesses is substantively unconscionable, the trial court should have severed that portion of the arbitration clause and compelled arbitration. Because we find the arbitration clause is not unconscionable, we need not review this argument. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

V. Applicability of the SCUAA

Appellants contend that because the FAA applies to the employment contract at issue, it preempts the SCUAA and there is no need to meet the requirements of the state statutes. In addition to the FAA's preemption of the SCUAA, the SCUAA itself provides that it does not apply to arbitration agreements between employers and employees unless the agreement states that the SCUAA shall apply.

Because all parties agree the arbitration clause did not meet the SCUAA notice requirements,² and the trial court ruled it did not meet SCUAA requirements, there is no controversy for this court to rule upon. Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating "[a]n appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy").

² Appellants acknowledge the arbitration clause did not meet SCUAA's notice requirements, but argued that was irrelevant because SCUAA was inapplicable altogether.

CONCLUSION

Based on the foregoing reasons, the trial court's denial of Appellants' motion to compel is

REVERSED.

HUFF and PIEPER, JJ., concur.