

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-199687

Yvonne Carrie Pruett,Respondent,

v.

Brookdale Senior Living, Inc. and Southern Assisted Living, LLC,Appellants,

and

Sonia S. King,Defendant.

APPELLANTS' INTIAL BRIEF

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ISSUES ON APPEAL

- I. Whether this Court should enforce a post-injury arbitration agreement reached by the parties during the pendency of this appeal?
- II. Whether the Residency Agreement entered into between the parties involves interstate commerce and is governed by the Federal Arbitration Act?
- III. Whether the Respondent's claim of unconscionability is not yet ripe and should first be decided by an arbiter, and not a Court?
- IV. Whether the Residency Agreement is not unconscionable; and, in the alternative, whether the Court should enforce arbitration and sever any provisions it finds unconscionable?

STATEMENT OF THE CASE

This is an appeal seeking to enforce two separate arbitration agreements—one entered into by the parties, and one later negotiated by counsel during the pendency of this appeal. The first agreement, between Appellants and Respondent, is an arbitration clause found in an admission agreement to an assisted-living community that was voluntarily and knowingly entered into by the Respondent and her husband. The second agreement to arbitrate, negotiated by counsel for Appellants and counsel for Respondent, was reached in October 2012 while this case was already on appeal, when the parties' counsel reached an agreement to arbitrate this matter on negotiated terms.

The Respondent Yvonne Carrie Pruett ("Respondent"), a former resident of the Carolina House of Hilton Head, served a Complaint [Complaint] on Appellants Southern Assisted Living d/b/a Carolina House of Hilton Head, and Brookdale Senior Living, Inc. (collectively "Appellants") on May 6, 2011 and an Amended Complaint on September 24, 2012. [Amended Complaint]. The Respondent also named Sonia S. King, a former employee of the Appellants, as a Defendant, but it

does not appear that she has answered either Complaint.¹ The Respondent alleged that Ms. King verbally and physically assaulted her. She alleged causes of action for negligence, intentional infliction of emotional distress, violation of the South Carolina Unfair Trade Practices Act, and assault and battery. Id.

On June 6, 2011, Appellants filed a Motion to Dismiss and Compel Arbitration², arguing that an arbitration clause in the Respondent's Residency Agreement governed this dispute. [Motion to Dismiss]. The Respondent served a Memorandum in Opposition on June 21, 2011, and the Appellants served a Memorandum in Support on June 22, 2011. [Pl. Memo In Support; Def. Memo In Support].

A hearing was held on June 14, 2011 before the Honorable Carmen Tevis Mullen. The Appellants received a written copy of the Order Denying the Motion to Dismiss and Compel Arbitration on August 23, 2011. [Order]. Appellants served a Motion to Reconsider on September 6, 2011, and the Appellants received written notice of the lower court's denial on September 22, 2011 [Order Denying Motion to Reconsider]. On that same day, September 22, 2011, Appellants filed their Notice of Appeal.

On October 5, 2012, during the pendency of this appeal, the Respondent, through her counsel, offered to arbitrate this dispute subject to certain conditions. [Letter from Kelly Jolley, dated Oct. 5, 2012]. On October 8, Appellants' counsel

¹ Ms. King was not acting for the benefit of the Appellants; therefore, she is not being defended or indemnified by the Appellants.

² Appellants filed a Renewed Motion to Dismiss and Motion to Enforce the Automatic Stay on October 2, 2012, in response to Respondent's Amended Complaint. The Court below has not ruled on this motion.

accepted the agreement to arbitrate subject to the conditions outlined by Respondent's counsel. [Electronic Mail from Manton Grier, Jr., dated Oct. 8, 2012]. An arbitration was scheduled for January 21, 2013 before the Honorable Thomas W. Cooper, Jr, retired Circuit Court Judge. [Letter from Kelly Jolley, dated Oct. 12, 2012]. Respondent withdrew from the agreement to arbitrate on November 20. [Letter from Kelly Jolley, dated Nov. 20, 2012].

On November 26, 2012, Appellants informed Judge Cooper of their intent to enforce the agreement to arbitrate, but on the following day Judge Cooper deferred on enforcing the agreement, stating that an arbitrator lacked authority to consider the arbitrability of the claim. [Electronic Mails Exchanged by Cooper, Jolley, and Grier, dated Nov. 26-27, 2012]. On December 5, Appellants filed a Motion to Compel Arbitration with Judge Cooper, based on the October 8 arbitration agreement. [Motion to Compel dated Dec. 5, 2012]. The next day, Respondent replied to the Motion. [Letter from Susan Wall, dated Dec. 6, 2012]. On December 20, 2012, Judge Cooper ruled that he lacked authority to decide the Motion to Compel arbitration, and Appellants received written notice of his decision on December 21. [Electronic Mail from Judge Cooper, dated Dec. 20, 2012]. On January 2, 2013, Appellants served an Amended Notice of Appeal, to include the October 5 arbitration agreement in this appeal.

FACTS

The facts regarding the two arbitration agreements are presented below in reverse chronological order.

A. The October 8, 2012 Arbitration Agreement.

During the pendency of this appeal, the parties entered a post-injury agreement to arbitrate. On October 5, 2012, the Respondent's counsel made an arbitration proposal with the following "guidelines":

- Exchange discovery requests – October 20, 2012
- Designate expert witnesses and provide expert CVs – November 15, 2012
- Exchange discovery responses and documents – November 20, 2012
- Depose experts during December, 2012
- Exchange witnesses and exhibit lists – December 30, 2012
- Arbitrate the week of January 21, 2013

[Letter from Kelly Jolley dated Oct. 5, 2012]. The Respondent also proposed no depositions taken or testimony given except experts, and no objections to exchanged documents being admitted. Id. The Respondent proposed three arbitrators.

The Appellants' counsel asked Respondent to clarify the proposal, and specifically asked whether the Respondent intended to use the deposition testimony from a 30(b)(6) deposition that had been scheduled in a similar case styled Janet Scheerle v. Brookdale Senior Living, Southern Assisted Living, and Sonia King, Case No. 2011-CP-07-2654. [Email String between Grier and Jolley, dated Oct. 5-8, 2012]. Appellants also asked whether Respondent intended to use documents produced in the Scheerle case. Id. On October 8, Respondent clarified the proposal, stating (a) she will not use the 30(b)(6) testimony except for impeachment purposes and (b) she will request the same documents in the Pruett case as she did in the Scheerle case. The only caveat provided by the Respondent was that "[i]f our discovery requests only get us a string of objections, we won't be arbitrating at all." Id.

On October 8, 2012 Appellants accepted the Respondent's offer to arbitrate. Id. Retired circuit court judge Tommy W. Cooper, Jr. was selected by the parties as arbitrator, and arbitration was scheduled for January 21, 2013. On October 30, 2012, Judge Cooper sent the parties an engagement letter. [Engagement Letter of Judge Tommy W. Cooper, Jr.].

While all of this was happening, the parties were engaged in a discovery dispute in the Scheerle case. The Appellants had asserted attorney-client and attorney work-product privileges over certain internal investigation files relating to an investigation done in anticipation of litigation because of the three incidents involving former employee Sonia King.³ On November 7, 2012, Judge Mullen ordered the Appellants to produce the internal-investigation files after conducting an *in camera* review. [Email Order from Judge Mullen's Chambers, dated Nov. 7, 2012]. Appellants served a Motion to Reconsider her ruling on November 19, 2012. As of the date this Initial Brief was filed, Judge Mullen had not ruled on the Motion to Reconsider.

On November 20, 2012, pursuant to the agreement, Appellants produced responsive documents and served answers to interrogatories. [Appellants' Answers to Interrogatories and Requests to Produce]. Respondent served written discovery responses; however, she did not produce documents identified in those responses.

³ Sonia King allegedly abused three residents—Bonnie Pruett, Elizabeth O'Meara, and Janet Scheerle. All three cases are pending in the Court of Appeals regarding the enforceability of arbitration. While the Pruett and O'Meara cases were on appeal, the Scheerle case remained for a while in the lower court due to a court administration delay in setting a hearing for Appellants' Motion to Reconsider Judge Mullen's ruling on the Motion to Compel Arbitration. During this delay, the Respondent's counsel served discovery requests, and the Appellants asserted their privilege as to the internal investigation files.

The Appellants asserted attorney-client and work-product privileges as to the internal investigation files. However, rather than file a motion to compel with the arbitrator, the Respondent instead withdrew from the October 8 arbitration agreement, claiming that “it is clear that your client has no intention of living up to the agreement and conditions precedent to arbitration and, thus, the arbitration will not go forward.” [Letter from Kelly Jolley, dated Nov. 20, 2012]. Because of the Respondent’s withdrawal, the arbitration scheduled for January 21, 2013 was cancelled.

On December 5, 2012, Appellants filed a Motion to Compel Arbitration with Judge Cooper, the arbitrator, because the parties implicitly agreed to provide him with the jurisdiction to decide such issues. On December 20, 2012, however, Judge Cooper ruled that, as arbitrator, he lacked authority to decide the issue. Appellants filed an Amended Notice of Appeal on January 2, 2013.

B. The Residency Agreement’s Arbitration Provision

On September 30, 2008, Respondent entered into a Residency Agreement (“Agreement”) with Appellant Southern Assisted Living d/b/a Carolina House of Hilton Head, an assisted-living facility owned and controlled by Appellant Brookdale Senior Living, Inc. Respondent’s husband, Sam Pruett, signed the Agreement as “Responsible Party.” [Agreement, p. 19]. Mr. Pruett also signed a “Responsible Party Agreement” whereby he agreed to provide necessary assistance and payments on behalf of Respondent. *Id.*, p. 22.

The Agreement contains an arbitration provision as follows:

A. ARBITRATION PROVISION

1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at the Company, excluding any action for eviction, and including disputes regarding the interpretation of this Agreement, whether arising out of State or Federal Law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a jury will not decide their case.** The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceedings shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.

Id., p. 11 (emphasis in original). Underneath this clause are subsections regarding arbitration procedures. Id., pp. 11-14. As responsible party, Mr. Pruett also initialed underneath each arbitration section acknowledging "as having read and understood the provisions [relating to arbitration]." Id., p. 14.

A separate part of the Agreement contained a section titled, "**BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISION**," which outlines the benefits of arbitration that flow to both resident and facility. The section informs the resident that the arbitration provision allows the facility to provide services at an affordable rate, while at the same time providing a quick resolution for elderly

residents who may have a limited life expectancy. The section is also designed to give a resident a meaningful choice about whether to accept arbitration, as it informs the resident or her responsible party “that other assisted living companies’ Agreements may not contain an arbitration provision, or limitations of liability provision.” Id., p. 15 (emphasis in original). Further, the section contains an acknowledgment in bold font that “[t]he undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an Attorney.” Id., p. 15 (bold in original).

The arbitration provision is not buried inconspicuously in the Agreement, as it takes up five pages (more than 25%) of the 19-page Agreement. The front page of the Agreement states that “**THIS AGREEMENT IS SUBJECT TO ARBITRATION,**” and further recommends that “**you consult your legal counsel to ensure proper understanding of this Agreement before signing.**” Id., p. 1 (bold in original).

The Agreement is interstate in character because many of the goods and services delivered under the agreement come from out of state. It specifies the basic services each resident will receive from the facility, including daily meals, amenities, furnishing, housing, and the ability to further agree to receive medical services from third parties. Specifically, the Agreement provides that residents will receive three meals daily. That food is supplied by Sysco Corporation of Texas. [2nd Affidavit of Timothy J. Cesar, ¶ 4]. Direct Supply of Wisconsin provides the medical supplies that the residents receive pursuant to the Agreement. Id.

The Agreement also affects interstate commerce because it is between parties residing in two different states. The Respondent is a South Carolina

resident, while Southern Assisted Living is a North Carolina corporation. The parent company, Brookdale Senior Living, is a Delaware corporation with its headquarters in Tennessee and relevant corporate offices in Wisconsin, Illinois, and Florida. It advertises nationally.

The facility and the Agreement itself are also involved in interstate commerce in other ways. When a resident pays for the goods, services, and housing provided under the Agreement, she writes a check that is sent to a Wells Fargo bank in Texas, and the funds are deposited into accounts owned by Brookdale Senior Living, an out-of-state corporation. [2nd Cesar Affidavit, ¶ 5]. The facility also receives and admits out-of-state residents, including residents from Connecticut, Florida, and New York. Id.

STANDARD OF REVIEW

“Appeal from the denial of a motion to compel arbitration is subject to de novo review.” New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). “Nevertheless, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” Id.

ARGUMENT

I. THE RESPONDENT BREACHED THE OCTOBER 8, 2012 ARBITRATION AGREEMENT BY IMPROPERLY WITHDRAWING FROM A SCHEDULED ARBITRATION.

A. The October 8, 2012 Arbitration Agreement Was Not Conditioned on the Production of the Internal Investigation Files.

The Respondent improperly rescinded a post-injury agreement to arbitrate on the basis of an alleged condition precedent that did not exist and was never

negotiated by the parties. A party may not rescind a contract unless the other party commits “a substantial and fundamental breach[.]” Martin v. Carolina Water Services, Inc., 280 S.C. 235, 240, 312 S.E.2d 556, 560 (Ct. App. 1984). “It is a general legal principle that a breach of contract warranting rescission ‘must be so substantial and fundamental as to defeat the purpose of the contract.’” Rogers v. Salisbury Brick Corp., 299 S.C. 141, 143, 382 S.E.2d 915, 917 (1989).

In this case, the Respondent claims that the agreement to arbitrate was conditioned on the Appellants producing the internal-investigation files. However, the proposal—which the Respondent drafted—contained no such condition. On October 5, 2012, the Respondent proposed arbitration along with certain “guidelines.” Those guidelines included an arbitration schedule for (a) exchanging discovery requests, (b) designating expert witnesses, (c) deposing experts, (d) exchanging witness and exhibit lists, and (e) arbitrating the week of January 21, 2013. [Letter from Kelly Jolley, dated Oct. 5, 2012]. The proposal also stated that there would be no depositions taken or testimony given other than experts. Id. Further, the proposal stated that there would be no objections to exchanged documents being deemed admitted. Id.

Because the Respondent’s counsel would have the advantage of taking a 30(b)(6) deposition in the similar case of Scheerle v. Brookdale Senior Living et al., the Appellants wanted to ensure that the 30(b)(6) deposition would not be used in the arbitration.⁴ Thus, before accepting the arbitration proposal, Appellant’s

⁴ The Appellants believe that they were not required to present a 30(b)(6) witness while the Scheerle case was pending on appeal, as discovery matters were stayed because the arbitration agreement in the Scheerle Residency Agreement limited discovery. However,

counsel asked whether the Respondent intended to use the information from the 30(b)(6) deposition at the arbitration. [Email from Manton Grier, Jr. dated Oct. 8, 2012 at 12:45 PM]. Respondent's counsel responded as follows:

The proposal includes discovery requests and responses from both sides. You will have the same fact discovery options in Pruett that we will. We will be requesting the same documents in Pruett that we did in Scheerle. The question from our side is whether you'll be providing the documents we request. If you do, we won't need the Scheerle documents. If our discovery requests only get us a string of objections, we won't be arbitrating at all.

[Email from Kelly Jolley, dated Oct. 8, 2012, at 12:53 PM]. Thus, the only "condition" was that the Respondent would not arbitrate if "our discovery requests only get us a string of objections." *Id.* There was no condition that the Appellants produce the internal-investigation files—which, at the time of the arbitration agreement, were still being reviewed *in camera* by Judge Mullen in the Scheerle case.

The Respondent drafted the post-injury arbitration proposal in this case. As the drafter of that proposal, the Respondent could have conditioned the arbitration on the production of the internal-investigation files. The Respondent knew the Appellants had asserted a privilege as to those files in the Scheerle case. However, because the Respondent never made such a condition, she cannot avoid a scheduled arbitration on this basis. The non-production of those files was not a breach of the arbitration proposal, let alone a "substantial and fundamental breach" justifying rescission. Therefore, this Court should order the parties to re-convene within a reasonable time the arbitration that had already been scheduled before Judge Cooper.

in the spirit of cooperation, the Appellants had agreed to allow the deposition to go forward.

B. In the Alternative, the Respondent Should Have Presented Her Discovery Dispute to the Arbitrator Rather than Improperly Withdrawing from the Arbitration.

Under the Federal Arbitration Act, arbitrators have authority to conduct necessary discovery. 9 U.S.C. § 7; Fischer v. Prudential-Bache Securities, Inc., 831 F.2d 290 (4th Cir. 1987) (table). In Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith, Inc., 432 F. Supp.2d 1375, 1379 (N.D. Ga. 2006), the court recognized that the FAA impliedly permits an arbitrator to order document discovery prior to a hearing. See also Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 555 n.7 606 S.E.2d 752, 758 n.7 (2005) (noting that when an arbitration clause does not prohibit discovery, the AAA rules provide arbitrators broad authority to order and control discovery).

In this case, by offering an arbitration proposal and scheduling arbitration, the Respondent implicitly agreed that the arbitrator would resolve any discovery dispute between the parties. The arbitration agreement prohibited fact depositions but allowed the exchange of written discovery. Naturally, issues regarding the proper scope of discovery are inherent in litigation and arbitration. By agreeing to arbitrate this dispute and agreeing to limited written discovery, the parties gave the arbitrator the “jurisdiction” to resolve any dispute that may arise regarding the scope of that discovery.

When the Respondent made the arbitration proposal, there was no condition that arbitration could be cancelled on the basis of a simple discovery dispute. To the extent the Respondent believed that the internal-investigation files should have been produced—which the Appellants strongly deny—she should have filed a

motion to compel with the arbitrator, an experienced former circuit court judge who is amply qualified to resolve such a dispute.

Thus, the Respondent had no basis to rescind the arbitration on the basis of a discovery dispute without first presenting that dispute to the arbitrator. Accordingly, this Court should order the parties to proceed to arbitration within a reasonable time.

II. THE ARBITRATION AGREEMENT IN THE RESIDENCY AGREEMENT IS A VALID AND ENFORCEABLE AGREEMENT UNDER THE FEDERAL ARBITRATION ACT BECAUSE THE RESIDENCY AGREEMENT INVOLVES INTERSTATE COMMERCE.

“South Carolina law generally favors arbitration.” Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2005). “Any doubts regarding the scope of arbitrable issues should be resolved in favor of arbitration.” Zabrinsky v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). “Unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.” Id. “A motion to compel arbitration . . . should only be denied where the [arbitration] clause is not susceptible to any interpretation which would cover the asserted dispute.” Id.

A. The Scope of the Federal Arbitration Act.

Although the South Carolina Uniform Arbitration Act excludes claims for personal injury, parties may still enter pre-injury agreements to arbitrate personal-injury claims through the Federal Arbitration Act (“FAA”). When the FAA governs a dispute, it preempts conflicting state law. Allied-Bruce Terminix Cos., Inc. v. Dobson,

513 U.S. 265, 269 (1995); Soil Remediation Co. v. Nu-Way Environmental, Inc., 323 S.C. 454, 459, 476 S.E.2d 149, 152 (1996).

Section 2 of the FAA states that a “contract evidencing a transaction involving commerce to settle by arbitration . . . 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. “To ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” Zabrinsky v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001).

The basic purpose of the FAA “is to overcome courts’ refusal to enforce agreements to arbitrate.” Allied-Bruce, 513 U.S. at 270. Because the FAA was intended to enforce arbitration agreements and put them on “the same footing as other contracts,” Congress intended the FAA to have a broad scope and for courts to interpret it liberally. Id. at 270, 275. The language of the FAA evidences a strong federal policy favoring arbitration. Mastrobouno v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995).

Prior to the Supreme Court’s decision in Allied-Bruce, many courts refused to apply the FAA to contracts where the parties did not contemplate an interstate transaction, or where the interstate transaction was “too slight.” 513 U.S. at 269. In Allied-Bruce, a homeowner had signed a termite-prevention contract containing an arbitration clause. The defendant was a multistate company that used termite-treating and house-repairing materials that came from out of state. The Supreme Court of Alabama upheld a denial of a motion to compel arbitration, finding that,

although there was an interstate connection, the connection between the termite contract and interstate commerce was too slight. The Alabama court had held that the FAA applies only if the parties “contemplated substantial interstate activity.” Id. at 269.

The United States Supreme Court rejected this narrow interpretation. It held that the FAA applies to transactions that “in fact” involve interstate commerce, “even if the parties did not contemplate an interstate commerce connection.” Id. at 281. The FAA’s phrase “involving commerce” evidenced “an intent to exercise Congress’ commerce power to the full.” Id. at 277. There is no requirement that the transaction “substantially” involve interstate commerce, as argued by the Respondent in her Memorandum in Opposition filed in the lower court. [Memo In Opp., p. 3].

Allied-Bruce is significant because since that opinion a decided majority of published opinions in South Carolina have upheld the application of the FAA. Significantly, in Munoz v. Green Tree Financial Corp., 343 S.C. 531, 539 n.3, 542 S.E.2d 360, 363 n.3 (2001), the Court overruled its prior precedent to the extent it considered whether the parties contemplated interstate commerce as a factor in applying the FAA. In that case, the Munoz family signed an installment contract and security agreement with the builder to finance \$15,000 in home improvements. Both the Munoz family and the builder were from South Carolina. However, the builder assigned the agreement to a creditor on the same day. The creditor, a Delaware corporation with a principal place of business in Minnesota, had prepared the agreement in Minnesota and forwarded it to the builder in South Carolina. The

loan proceeds were disbursed from a bank in Minnesota. “Although the Munozes may not have contemplated an interstate transaction, *their contractual relationship with Creditor* in fact involves interstate commerce and therefore the FAA applies.” Id. at 539, 542 S.E.2d at 364 (emphasis added).

In Zabrinsky v. Bright Acres Associates, the Court cited Allied-Bruce and held that the FAA applied to a partnership dispute involving a South Carolina partnership selling and developing land located entirely in South Carolina. 346 S.C. at 595, 553 S.E.2d at 117-18. Although developing South Carolina land is typically an intrastate activity, “the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors.” Id.; see also Soil Remediation, 323 S.C. at 461, 476 S.E.2d at 153 (holding contract to remove water and sludge materials from a South Carolina property involved interstate commerce because one party subcontracted with a third-party who would remove the materials to a North Carolina facility).

B. Assisted Living and Nursing Home Admission Agreements Typically Involve Interstate Commerce.

Much like the agreements at issue in Allied-Bruce, Zabrinsky, and Soil Remediation, admission agreements to assisted-living facilities or nursing homes typically involve interstate commerce because the facilities usually fulfill their contractual duties by providing supplies and goods from out-of state. See Pickering v. Urbantus, LLC, 827 F. Supp2d. 1010 (S.D. Iowa 2011); Miller v. Cotter, 863 N.E.2d 537 (Mass. 2007); Briarcliff Nursing Home v. Turcotte, 894 So.2d 661, 667 (Ala. 2004).

In McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 at *5 (D.S.C., Dec. 15, 2011), the District Court of South Carolina (Judge Norton) granted a motion to compel arbitration under the FAA and found “the type of nursing home care involved here affects interstate commerce.” The court stressed that the home received food from Sysco Corporation of Texas—the same company supplying food to Appellants in this case—and bought supplies from manufacturers in several other states. Id. “The supplies must be shipped across state lines to reach [the] facility.” Id. Because of this, the FAA applied to the admission agreement.

Similarly, in Triad Health Mgmt. of Georgia, III, LLC v. Johnson, 679 S.E.2d 785 (Ct. App. Ga. 2009), the court held that the FAA applied to a nursing home admission contract, where the home bought supplies from out-of-state vendors, treated out-of-state patients, and had patients insured through Medicaid and Medicare. “Given the evidence establishing a nexus between Triad’s nursing home operations and interstate commerce, and in light of the United States Supreme Courts’ *expansive interpretation of commerce for purposes of the FAA* [in Allied-Bruce], we conclude that the Admission Contract was a contract evidencing a transaction involving commerce, and the FAA therefore applies.” Id. at 788 (emphasis added).

In denying arbitration in this case, the lower court improperly relied on Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). In that case, the Court examined the face of the nursing home agreement and held that it did not involve interstate commerce. The Court noted that, although the facility was involved in

interstate commerce, there was nothing tying the *agreement* itself to interstate commerce. Id. at 473, 427 S.E.2d at 644.

The lower court's reliance on Timms was misplaced for several reasons. First, Timms was decided almost 20 years ago and before FAA's reach was expanded by Allied-Bruce. Second, Timms is limited in scope because the transaction was confined to South Carolina in that it was a South Carolina home, with no evidence that the agreement involved interstate commerce. In Soil Remediation, the Court recognized that "[t]he present case differs from . . . Timms in that the transaction is not confined to this state[.]" 323 S.C. at 461, 476 S.E.2d at 153. Third, the facts differ from Timms in that the Agreement in this case specifies that residents will receive goods and services. As discussed below, the goods and services specified in the agreement come from out-of-state. Nothing in Timms indicates that the admission agreement referenced any supplies or goods that would ultimately be procured from out-of-state vendors. Timms is factually distinguishable in other ways, including the fact the Agreement in this case was signed on behalf of a North Carolina corporation that owns the facility, and that residents must pay for their housing and services through payments to a Wells Fargo bank in Texas. In short, Timms concerned a factual record that failed to show *the agreement itself* involved interstate commerce.

Finally, Timms may have applied a standard that is no longer applicable. In Timms, the Court stated that, "[i]n determining whether the contract on its face evidences commerce, we are required to look to the entire contract." 310 S.C. at 472, 427 S.E.2d at 644. By examining merely the face of the contract, Timms seemed

to articulate the pre-Allied-Bruce standard, where the contemplation of the parties is a factor. However, as other cases have made clear, “[t]o ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, *and the surrounding facts.*” Zabrinsky, 346 S.C. at 594, 553 S.E.2d at 117 (emphasis added). In fact, Munoz held the FAA applied to a contract between a South Carolina resident and a South Carolina vendor, because it was later assigned to an out-of-state creditor. 343 S.C. at 539, 542 S.E.2d at 364. To the extent Timms applied a standard that considered only the face of the contract or the parties’ contemplation, it has been implicitly overruled by Allied-Bruce.⁵

C. The Residency Agreement Involves Interstate Commerce and is Governed by the FAA.

In this case, much like the facts in Allied-Bruce and Zabrinsky, the facility uses goods and materials obtained from out-of-state vendors in order to serve its residents. The Agreement states that residents will receive three meals daily and snacks are available 24 hours a day. [Agreement, p. 3]. The facility fulfills this contractual obligation by providing food it receives from Sysco Company, the same Texas Corporation used by the nursing home in McCutcheon. [Affidavit of Timothy J. Cesar at ¶ 3]. The facility also receives its medical supplies from One Source, a Wisconsin Corporation, and carpeting from a North Carolina vendor. Id.

⁵ Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994) cited Timms for the proposition that “the express terms of the contract [must involve] interstate commerce.” Munoz, however, expressly overruled Mathews “to the extent it considered whether the parties contemplated interstate commerce as a factor in determining if the FAA applied.” 343 S.C. at 363 n.3, 542 S.E.2d at 539 n.3. Presumably, Munoz (and Allied-Bruce) also overruled Timms to the same extent.

Further the residents are required to pay monthly fees, and those fees are specified in the Agreement. [Agreement, p. 21]. To pay those fees, residents draft checks written out to Brookdale Senior Living, Inc. [2nd Affidavit of Timothy J. Cesar at ¶ 5]. The checks are then sent to a Wells Fargo bank in Texas and deposited into accounts owned by Brookdale Senior Living, Inc., which ultimately receives that money at one of its corporate offices in Milwaukee, Wisconsin. *Id.* Finally, the Agreement itself is between Southern Assisted Living, a North Carolina corporation, and the Respondent, a South Carolina resident. [Agreement, p. 3].

Thus, the Agreement involves interstate commerce in many ways. Unlike the situation in *Timms*—where there was no evidence that the agreement involved interstate commerce—there is ample evidence that the Agreement involves interstate commerce. This Agreement is much closer to the agreements in *Allied-Bruce* and *Zabrinsky*, where out-of-state vendors supplied the materials in those agreements. Because the Agreement involves interstate commerce, the lower court erred by failing to compel arbitration under the FAA.

III. THE ISSUE OF WHETHER THE ARBITRATION CLAUSE IN THE RESIDENCY AGREEMENT IS UNCONSCIONABLE IS NOT RIPE BECAUSE THE RESPONDENT FAILED TO ALLEGE THAT THE ARBITRATION CLAUSE ITSELF WAS UNCONSCIONABLE.

When a plaintiff fails to adequately plead that an arbitration clause is unconscionable, the issue of unconscionability “is not yet ripe because an arbitrator has not ruled on the issue.” *Carolina Care Plan*, 361 S.C. at 556-57, 606 S.E.2d at 758-59.

In *Carolina Care Plan*, the plaintiff, an HMO, entered into an agreement that included an arbitration clause excluding punitive damages. A defendant moved to

dismiss or stay the proceedings and compel arbitration. In response, the HMO filed an amended complaint, which included allegations that the arbitration provision was unconscionable and violated public policy because it limited discovery and certain rights and remedies, including punitive damages. The trial court dismissed the causes of action in the amended complaint related to the making of the arbitration clause and ordered arbitration.

On appeal, the HMO argued, among other things, that the arbitration clause was unenforceable as a matter of law because it sought to limit the HMO's remedies, including punitive damages. The Court, however, affirmed the trial court and held that the unconscionability issue was not ripe, because an arbiter, not a court, must decide whether the clause was unconscionable. Id. The court reasoned that, first, the HMO failed to adequately plead that the arbitration provision was unconscionable. Id. at 554, 606 S.E.2d at 757. Second, it was unclear whether the HMO would prevail on the merits at arbitration and "whether an arbitrator would find that punitive damages are warranted." Id. at 557, 606 S.E.2d at 759; see also Hawkins v. Aid Assn. for Lutherans, 338 F.3d 801 (7th Cir. 2003) (holding that complaints about the unavailability of punitive damages must first be presented to an arbiter) (cited by Carolina Care Plan, 361 S.C. at 557, 606 S.E.2d at 759).

In this case, the Respondent failed to allege that the arbitration clause itself was unconscionable. In her Amended Complaint, the Respondent fails to mention the arbitration clause. [Amended Complaint]. After Appellants filed a Motion to Compel Arbitration, the Respondent served a copy of a Memorandum in Opposition, but again the Respondent failed to contest the arbitration clause on the grounds of

unconscionability.⁶ [Memo in Opp.]. The Memorandum argued against the enforceability of arbitration on three grounds unrelated to unconscionability: (1) that the SC Arbitration Act did not apply; (2) that the FAA did not apply; and (3) that Sam Pruett lacked authority to bind the Respondent to arbitration. Id.

Thus, because the Respondent failed to allege that the specific arbitration provision was unconscionable, the issue was not yet ripe.⁷ The trial court erred by refusing to compel arbitration on the basis of unconscionability.

IV. IN THE ALTERNATIVE, THE RESIDENCY AGREEMENT WAS NOT UNCONSCIONABLE, AS IT GAVE THE RESPONDENT A MEANINGFUL CHOICE WITH REASONABLE TERMS.

Even assuming for the sake of argument that the issue of unconscionability was ripe, the lower court improperly found that the arbitration and limitations of liability clauses in the Agreement were unconscionable. An agreement is unconscionable only if (a) there was an absence of meaningful choice due to one-sided provisions and (b) the terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Munoz, 343 S.C. at 541, 542 S.E.2d at 365.

A. The Respondent Had a Meaningful Choice.

“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.”

⁶ Unfortunately, the parties lack a transcript of that hearing, as the court reporter apparently lost her job and abandoned the transcript, requiring the parties to agree to move forward without the transcript.

⁷ The Respondent’s claim that the provision limiting depositions to experts only is unconscionable is also not ripe, as the Agreement allows the parties to modify the arbitration discovery. The Respondent never asked whether Appellants would have agreed to modify discovery, which they have done at times.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In Munoz, the debtors argued that an arbitration clause in an installment contract and security agreement was unconscionable because it was “part of an adhesion contract and they were not advised it was included in the contract.” 343 S.C. at 541, 542 S.E.2d at 365. In finding that the arbitration agreement was not unconscionable, the Court stressed that an adhesion contract was not per se unconscionable, and “a person who can read is bound to read an agreement before signing it.” Id.

In this case, the Respondent had a meaningful choice. The Agreement contains a clause titled “Benefits of Arbitration and Limitation of Liability Provisions.” That clause states, “[t]he Resident, Responsible Party . . . understands that other assisted living companies’ Agreements may not contain an arbitration provision, or limitations of liability provision.” [Agreement, p. 15]. Just below that provision it states in bold font, “[t]he undersigned acknowledges that he or she **has been encouraged to discuss this Agreement with an attorney.**” Id. (emphasis in original). Sam Pruett, as Responsible Party for the Respondent, initialed this provision indicating that he “read and understood the provisions of section V., subsection C.” Id.

Further, the arbitration clause is not buried inconspicuously in the agreement. Appearing on the first page in all-caps and underlined font is a reminder that, “THIS AGREEMENT IS SUBJECT TO ARBITRATION.” [Agreement, p. 1]. The front page also contains a recommendation, in bold font, to “**consult your legal counsel to ensure proper understanding of this Agreement before signing.**” Id.

The limitation on liability provision contains an italicized warning to “*Read Carefully Before Signing.*” Id., p. 14. And in addition to signing the Agreement, Sam Pruett initialed as “having read and understood the provisions” underneath the separate sections of (a) the arbitration provision, (b) the limitations on liability provision, and (c) the benefits of arbitration and limitation of liability provision. Id., pp. 14-15.

In this case, there is no evidence that the Agreement was presented on a take-it-or-leave-it basis. In fact, the Respondent negotiated the move-in fee, which was waived by the executive director, with the changes being initialed by her and Mr. Pruett. Id., p. 8. There is also no evidence of the types of facilities to which the Respondent could have been placed, as the Respondent failed to present any evidence through affidavit or otherwise regarding whether she had a meaningful choice to either negotiate the arbitration agreement or reside at one of the many other facilities in the Hilton Head area. See Hayes v. Oakridge Home, 908 N.E.2d 408 (Ohio 2009) (finding that nursing home resident failed to satisfy her burden or producing evidence supporting her challenge that the admission agreement was unconscionable). The only evidence that the Respondent presented regarding unconscionability is the arbitration provision itself.

Thus, because the Agreement had a conspicuous arbitration provision that advised the Respondent to consult an attorney, and because it reminded her that other facilities may not request arbitration in the admission agreement, the Respondent had a meaningful choice. The Respondent never voiced a concern over the provision at the time of signing.

B. The Terms of the Arbitration Agreement Were Not Oppressive and One-Sided.

In finding the arbitration agreement unconscionable, the lower court focused on the provisions that (1) prohibit payment of “[i]nterest and/or late fees on unpaid assisted living charges; (2) limit discovery; and (3) limit damages. [Order, p. 3]. Each is discussed below.

1. The Prohibition on Interest and Late Fees Favors the Resident and Limits the Facility’s Remedies.

Section V(B)(2)(c) provides that “[i]nterest and/or late fees on unpaid assisted living charges shall not be awarded.” This provision actually limits the *Appellants’ remedies*, as it prevents them from recouping interest or late fees in an arbitration dispute over a resident’s failure to pay fees. This section cuts against the lower court’s finding that the arbitration and limitation on liability clauses were unconscionable.

2. The Limitations on Discovery are Relatively Few and Consistent with Keeping Arbitration a Low-Cost, Quick Proceeding and Would Not Prevent a Complainant From Vindicating Her Rights.

The lower court improperly ruled that the limitation on depositions to only expert witnesses, taken with other provisions, rendered the arbitration provision unconscionable. Discovery limitations in arbitration, however, are part of the trade-off for the “simplicity, informality, and expedition of arbitration.” In re: Cotton Yarn Antitrust Litigation, 505 F.3d 274, 286 (4th Cir. 2007) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)). “Because limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement.” Id.

In this case, the Respondent bore the burden of establishing that the limits on discovery would prevent her from vindicating her rights. See Id. at 283. The Respondent, however, presented no evidence in this regard.

The arbitration agreement provides for “permissible discovery per the Federal Rules of Civil Procedure.” [Agreement, p. 12]. Thus, the parties are allowed to serve interrogatories and requests to produce and admit. The agreement also allows for expert witnesses, an exchange of witness lists, and provides a timeline in order to resolve the arbitration within 180 days. Id., pp. 12-13. Further, the Agreement allows the parties to stipulate to expanded or modified discovery. Id., p. 12. The only discovery “limitation” addressed by the lower court was the limitation of depositions to experts only.

The Respondent failed to carry her burden of showing that this single discovery limitation prevented her from vindicating her rights. Most arbitration agreements provide for less discovery than the one at issue. Arbitrations are meant to be informal, simple, and quick. A simple limit on deposition discovery alone—when other types of discovery are available—is not enough to render an agreement unconscionable.

3. The Limitations on Damages and Liability are Reasonable and Not a Basis for a Court Finding Unconscionability.

First, whether arbitration remedies are inadequate is an analysis separate from the arbitrability of the Respondent’s claims. “Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of the agreement, these challenges must first be considered by the arbitrator.” Hawkins, 338 F.3d at 807 (cited by Carolina Care

Plan, 361 S.C. at 557, 606 S.E.2d at 759). Here, the limitations on damages and liability are found in a provision in the Residency Agreement separate from the arbitration provision. The “Arbitration Provision” is found at Section V(A) of the Agreement and consists of roughly three pages. Although incorporated by reference, the “Limitation of Liability Provision” is a separate provision found at Section V(B) of the Agreement. Thus, an arbiter should decide whether the arbitration remedies are inadequate.

Second, even if this issue were ripe, it should not render the agreement unenforceable. The Agreement does not exculpate the Appellants from liability. See, e.g., Huckaby v. Confederate Motor Speedway, Inc., 276 S.C. 629, 281-223 (1981) (upholding exculpatory contract). The Agreement provides that “[n]et economic damages shall be awardable, including but not limited to, past and future medical expenses[.]” [Agreement, p. 14]. Although the Agreement limits noneconomic damages to \$250,000, offsets collateral source payments, and prohibits the award of punitive damages, the Respondent’s husband, Sam Pruett, initialed the section as “having read and understood” it. Id., p. 15.

Regardless, the limitations should not render the Agreement unconscionable, especially where the Respondent will still have the opportunity to raise this issue before an arbiter. See Hayes v. Oakridge Home, 908 N.E.2d 408, 415 (Ohio 2009) (holding arbitration agreement in nursing home excluding punitive damages and attorney fees not unconscionable).

C. **In the Alternative, This Court Should Sever Any Portions of the Agreement it Finds Unconscionable and Enforce Arbitration.**

If a court determines that a contractual provision is unconscionable, it may sever that provision and enforce the remainder of the contract. See Beach Co. v. Twillman, Ltd, 351 S.C. 56, 64, 566 S.E.2d 863, 866-67 (Ct. App. 2002) (enforcing contract to extent it required plaintiff to waive jury trial, but severing portion that waived his compulsory counterclaims). Here, the Agreement contains a severability clause, stating that “[s]hould any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.” [Agreement, p. 18]. The Agreement also provides that if any portions of the arbitration provision or limitation on liability provision are deemed invalid, the validity of the remaining subsections is not affected. Id., p. 11. Thus, to the extent this Court finds a provision invalid, it should sever that provision and compel the parties to arbitrate on the remaining terms.

Finally, the lower court erroneously relied on Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 35, 644 S.E.2d at 674, in refusing to sever the portions of the Agreement it found offensive. In that case, the arbitration clause was an adhesion contract, filled with “oppressive and one-sided provisions contained within the entire clause.” The clause waived mandatory statutory remedies under the South Carolina Dealers Act. Such a waiver would have defeated the statutes’ “very purposes of punishing acts that adversely affect the public interest.” Id. at 30, 644 S.E.2d at 671.

Further, the clause was entirely one-sided in that the dealer’s claims for claim and delivery, repossession, injunctive relief, or monies owed for the purchase

of the vehicle were not stayed by arbitration. Id. at 31, 644 S.E.2d at 672. Thus, the dealer “may bring a judicial proceeding that completely disregards any pending consumer claims that require arbitration.” Id. A dealer could initiate a claim and delivery action, repossess the vehicle, and sell it—all while the consumer’s claims over the same vehicle were still pending in arbitration. The terms in the Simpson agreement were grossly one-sided and oppressive, unlike the terms in this case.

Most importantly, however, is that all of the oppressive terms in Simpson were contained within the lengthy arbitration provision itself. The arbitration provision was one very long paragraph, without breaks, that included the offending provisions “within the entire clause.” Id. at 34, 644 S.E.2d at 674. The Court would have been required to re-write the arbitration provision, which it declined to do.

In this case, the basic arbitration clause in the Agreement is the same, separate clause appearing on pages 2 and 3 of this Brief. [Agreement, Section (V)(A)(1), p. 11]. Unlike the clause in Simpson, the arbitration clause at Section (V)(A)(1) is clear of any offending terms. Neither the Respondent nor the lower court has indicated that any of the provisions in Section (V)(A)(1) are unconscionable. Although the court referenced Subsection (V)(A)(6)(b) (limiting depositions to experts), the bulk of the lower court’s finding of unconscionability rests on the provisions found in the “Limitation of Liability Provision” found in Section (V)(B).

Therefore, in the alternative, this Court may easily sever any portion it finds offending. The allegedly offending portions are found within separate, and easily severable, subsections. Unlike in Simpson, it would not be required to rewrite the contract.

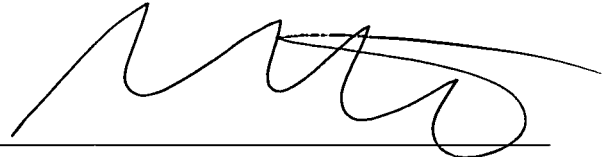
CONCLUSION

The Court should enforce one or both arbitration agreements. The first arbitration agreement should be enforced because it was a post-injury agreement, negotiated by counsel, and reached during the pendency of appeal. There was no condition that arbitration could be cancelled because of a simple discovery dispute. The Respondent could have presented her discovery dispute to the arbitrator, but instead she breached the agreement by improperly withdrawing from it.

As to the arbitration clause in the Residency Agreement, it is governed by the FAA because it involves the provision of goods and supplies that are procured through interstate commerce. The Respondent failed to allege that the arbitration clause itself was unconscionable and, therefore, the issue of unconscionability is not ripe until first addressed by an arbiter. Finally, the arbitration and limitation on liability clauses are not unconscionable but, to the extent this Court believes otherwise, the offending provisions should be severed.

Therefore, this Court should order the parties to proceed to arbitration.

Respectfully submitted,



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