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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2019-01767

Thayer W. Arredondo, as Personal Representative of
the Estate of Hubert Whaley, Deceased,..... Petitioner,

v.

SNH SE Ashley River Tenant, LLC; FVE Managers,
Inc.; Five Star Quality Care, Inc.; SNH SE Tenants
TRS, Inc.; Senior Housing Properties Trust; SNH TRS,
Inc.; and Candy D. Cure, Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Court of Appeals err in holding that Petitioner had Actual Authority to enter an arbitration agreement under two powers of attorney?
- II. Did the Court of Appeals err in finding that the parties' arbitration agreement is not unconscionable?

STATEMENT OF FACTS

In October 2012, Plaintiff, Thayer Arredondo, admitted her father, Hubert Whaley, as a resident at Ashley River Plantation, a senior living community owned and operated by various Defendants (collectively "Ashley River"). At that time, Mr. Whaley was an 84-year old with diagnosed dementia. App. p. 177.

Because of Mr. Whaley's dementia, Arredondo acted as Mr. Whaley's Power of Attorney and Attorney-in-Fact under a General Durable Power of Attorney ("General POA") and a Health Care Power of Attorney ("Health Care POA") (collectively, "POAs"). App. pp. 237, 252, 257. With this authority, Arredondo executed a stand-alone arbitration agreement with Ashley River requiring the parties to arbitrate disputes between them exceeding \$25,000 ("the Agreement"). The Agreement covers Arredondo's current claims. App. p. 262.

These three documents—the General POA, the Health Care POA, and the Agreement—are central to the issue before this Court and are discussed more fully below.

THE GENERAL POA. The General POA appointed Arredondo to act as Mr. Whaley's agent "with the same force and effect as if [Mr. Whaley] were personally present and had executed or performed the same." App. p. 253. Under the General POA, "the signature" of Arredondo "may be accepted by third parties" "as if done under [Mr. Whaley's] Hand and Seal. . . ." App. p. 256. The first paragraph of the General POA specifically authorizes Arredondo to "execute . . . any instrument whatsoever . . . concerning any . . . [of Mr. Whaley's] property or other assets

whatsoever.” App. p. 253. Mr. Whaley did not limit Arredondo’s authority to enter into agreements, waivers, or releases of his rights.

THE HEALTH CARE POA. The Health Care POA also granted Arredondo broad authority to act for Mr. Whaley. Mr. Whaley “intended” the Health Care POA “to be as broad as possible,” authorizing Arredondo to act with the “same authority to make decisions about [Mr. Whaley’s] health care as [Mr. Whaley] would have.” App. p. 246. Arredondo’s authority specifically included “granting any waiver” to a “nursing care provider” and “pursuing any legal action in [Mr. Whaley’s] name.” App. pp. 248, 249. Immediately beneath this provision, Paragraph 11(e) gave Mr. Whaley a chance to limit Arredondo’s “broad” authority, but he did not. App. p. 249. Instead, he left Arredondo’s authority “as broad as possible” without limitation. *Id.*

THE AGREEMENT. After Mr. Whaley moved into Ashley River, Arredondo—on behalf of herself and Mr. Whaley—signed the voluntary standalone Agreement. (Agreement). The Agreement provides:

- Arredondo and Five Star “**agree[] that any claims, controversies, or disputes arising between them involving a potential monetary amount in excess of \$25,000 shall be resolved exclusively by binding arbitration.**” This bolded language appears in Paragraph 1 on the first page of the Arbitration Agreement. App. p. 262 (emphasis in original).
- “**Both the Resident and Five Star waive their right to a trial by jury.**” This bolded provision appeared in the first paragraph on the top of page 2 of the Agreement. App. p. 263 (emphasis in original).
- Arredondo also agreed that she had:
 - “carefully read” the Agreement;
 - “asked any questions necessary to understand the terms, consequences, and bind effect” of the Agreement;
 - was “executing this Agreement voluntarily”; and
 - was “provided an opportunity to seek the advice of an attorney of [her] choice before signing this Agreement.” *Id.*

- **“THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES.”** This bolded, underlined provision in all capital letters appeared just inches above Arredondo’s signature. App. p. 264 (emphasis in original).

Years later, Arredondo breached the Agreement by filing this civil action against Ashley River. App. p. 156. Ashley River moved to compel the dispute to arbitration. App. p. 149. The circuit court refused. *Id.* Ashley River appealed, and the Court of Appeals reversed. App. p. 001.

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review; factual findings may be reversed if no evidence reasonably supports them. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016). “The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration.” *Id.*

ARGUMENT

Over time, this Court has opined on a variety of arbitration provisions. Where it has, the Agreement memorializes this Court’s opinions. For instance, this Court has distinguished small claims and voiced concern that arbitration’s costs can exceed the value of smaller dispute. Addressing this concern, the Agreement exempts all disputes under \$25,000. Arredondo now complains about this limitation. This Court has affirmed arbitration agreements that use the American Arbitration Association’s (“AAA”) rules providing broad authority to order discovery. So the Agreement uses the AAA rules. Arredondo now says those rules are not fair. To balance the utility of the AAA rules with the Court’s concerns about potential costs, the Agreement allows the parties to jointly select an arbitrator to use the AAA’s rules and avoid more expensive filing fees. Ashley River did not stop there. If Arredondo cannot afford arbitration, Ashley River will pay for it. But Arredondo will not accept these provisions either. And where this Court has allowed

punitive damages waivers while striking statutory limitations as a step too far, the Agreement limits only punitive damages and preserves all of Arredondo's statutory rights. Yet, Arredondo argues that this too is unconscionable.

In the instances where this Court has not yet addressed specific provisions relevant to arbitration, the Agreement follows precedent from other jurisdictions. For example, courts allow parties to appeal issues related to the arbitration process, but not the arbitration decision itself. The Agreement includes that provision. Courts also allow a party to amend an arbitration agreement, but only if they first notify the other party. The Agreement goes one step further by giving Arredondo the right to terminate if Ashley River sought to amend. Arredondo attacks these provisions too.

In addition to complying with the Court's guidance on substantive terms, the Agreement follows the Court's guidance on procedure too. Chief Justice Toal praised the virtues of standalone arbitration agreements. Ashley River made the Agreement a separate document. In that same opinion, Chief Justice Toal extolled voluntary agreements. the Agreement includes a provision to inform Arredondo that the Agreement is voluntary. Ashley River also did not present the Agreement until after Arredondo received the services she requested. Consistent with this Court's repeated affirmation of conspicuous arbitration provisions, the Agreement's key terms appear in bolded, capitalized, well-sized font. Yet, Plaintiff will not accept this either.

Contextualized by this Court's precedent, Arredondo's argument is not that this particular Agreement is unconscionable—it is that arbitration itself is unconscionable. But neither this state nor this country allows that result.

I. The Emphatic Policy in Favor of Arbitration Governs This Dispute.

We start with the FAA. Through it, Congress placed arbitration agreements “on an equal footing with all other contracts.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 335 (2011). Specific to this appeal, the FAA creates two guidelines. First, a party cannot escape her agreement to arbitrate unless she meets her burden to establish “a generally applicable contract defense,” and not one that singles out arbitration. *Id.* Second, courts “generously construe[]” the “intention of the parties” in accordance with the “emphatic federal policy” and “strong presumption” in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). South Carolina jurisprudence recognizes both this “strong policy favoring arbitration” and “strong presumption of validity” as well. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014).

Courts therefore analyze arbitration agreements with a “healthy regard for the federal policy favoring arbitration.” *Towles*, at 35, 524 S.E.2d at 842. Here, the healthy regard favoring arbitration permeates every issue on appeal. Because the FAA applies to questions of authority within a POA, the Court should analyze the authority conveyed by powers of attorney with a “healthy regard for the federal policy favoring arbitration.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983); *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017). So too should the Court analyze the alleged unconscionability with a “healthy regard for the federal policy favoring arbitration.” *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396–97, 498 S.E.2d 898, 903 (Ct. App. 1998). Thus, if either of the two issues on appeal is a close call—whether Arredondo can escape her agreement to arbitrate through a defect in her POAs or through unconscionability—the Court should resolve any doubt in favor of arbitration.

II. The Court of Appeals Correctly Held that Arredondo had Actual Authority to Execute the Agreement Under Two Powers of Attorney.

The Court of Appeals reached two holdings relevant to Arredondo's authority to enter into the Agreement that she now seeks to nullify. The Court of Appeals first reaffirmed that South Carolina law does not limit a power of attorney to the acts "specifically enumerated" in it. App. p. 003 (citing *First S. Bank v. Rosenberg*, 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016)). In doing so, it refused to violate the FAA by carving out a different standard for powers of attorney related to arbitration. Applying that standard, the Court of Appeals then concluded that the broad General POA and Health Care POA "authorized Arredondo to waive the right to jury trial and execute an agreement selecting the forum in which any legal action would be taken." App. p. 004.

Arredondo does not argue the Court of Appeals applied the wrong standard. She instead argues the Court of Appeals applied it incorrectly. To support this argument, Arredondo asks this Court to write limiting provisions into the POAs that Mr. Whaley did not. Arredondo's request is no more appropriate now than it was below.

A. The Court of Appeals applied the correct standard to interpret the POAs.

Mr. Whaley's POAs "expressly conferred" upon Arredondo the actual authority to act as his agent. Arredondo was her father's agent. Everyone agrees. The question, then, is not whether the POAs expressly conferred actual authority, but whether their scope included the authority to sign a standalone arbitration agreement with Ashley River, one of Mr. Whaley's health care providers. Since powers of attorney are at issue, the question boils down to how the Court should interpret them.

The answer starts from how South Carolina defines what a power of attorney is: an instrument that authorizes an agent to "perform certain specified acts *or kinds of acts* on behalf of a principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014)

(emphasis added). Under the “kinds of acts” definition, a power of attorney is not limited to what is “specifically authorized” and “expressly granted in the power of attorney.” *Rosenberg*, 418 S.C. at 179, 790 S.E.2d at 924. Deciding whether an agent had the authority to sign a guaranty, the Court of Appeals “reject[ed] [the] contention that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law.” *Id.* at 181, 790 S.E.2d at 925–26.

The Court of Appeals below held this same standard applies when an agent’s authority to sign an arbitration agreement is at issue. A power of attorney need not “explicitly refer to arbitration” to authorize an agent to execute an arbitration agreement “as long as the powers granted are broad enough to include such an act.” App. pp. 003–004. No other result could stand under the FAA. Adopting one rule that applies to the authority for guaranties and “an explicit statement” rule for the authority for arbitration agreements is “exactly what [the Supreme Court] has barred.” *Kindred Nursing Centers. Ltd. P’ship*, 137 S. Ct. at 1427.

Arredondo does not dispute this black letter law.¹ Now she selectively quotes the circuit court’s order to argue it got the right standard too. But what the circuit court actually required is exactly what the Supreme Court said it cannot. The circuit court held that “Arredondo lacked the authority to execute the Arbitration Agreement” because “Mr. Whaley never expressly gave Ms. Arredondo permission to sign the Arbitration Agreement via [the POAs].” App. p. 151. Put differently, the circuit court limited the POAs to only the act expressly stated in them even though

¹ Below, Arredondo argued without citation that the FAA “does not apply to the interpretation of the authority conferred by a power of attorney” even though the Supreme Court of the United States held the opposite. App. p. 106. *See Kindred Nursing Centers Ltd. P’ship*, 137 S. Ct. at 1428. It appears Arredondo has abandoned that argument.

South Carolina law interprets powers of attorneys to authorize the “kinds of acts” in them and the Supreme Court has held that applying a “clear-statement rule” for arbitration agreements violates the FAA. *Kindred Nursing Centers Ltd. P’ship*, 137 S. Ct. at 1427. The circuit court applied a rule the FAA prohibits.

Having set the correct standard for powers of attorney in this State, we turn to the POAs at issue. Traditional rules of contractual interpretation govern whether signing an arbitration agreement is one of the “kinds of acts” that the POAs authorize. The cardinal rule of contractual interpretation is to read the contract as a whole and give effect to the intention of the parties. *Id.* To do this, courts look to the contract’s language. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019), reh’g denied (June 6, 2019), cert. denied (Sept. 25, 2019). To resolve this appeal, the Court should simply apply these traditional rules to the language in the POAs.

B. Under the Supreme Court’s standard and traditional rules of contractual interpretation, the General POA provided Arredondo broad authority to sign the Agreement.

Starting with the General POA, the parties agree on the relevant provision. Here, the General POA authorizes Arredondo to

make, **sign, execute**, issue, assign, transfer, endorse, **release**, satisfy **and deliver any and all instruments or writings of every kind** and description **whatsoever**, whether sealed or unsealed, of, in or **concerning any** or all of my business affairs, **property or other assets whatsoever, including all property**, real, personal or mixed, stocks, securities and **choses in action**, and wheresoever situated, including, without limiting the generality hereof thereto, notes, bonds, mortgages, leases, deeds, conveyances, bills of sale, and assignments, endorsements, **releases**, satisfactions, pledges or any agreements concerning any transfers of the above **or of any other property, right or thing**.

App. p. 253 (emphasis added).

Separating what is important to this appeal from what is not in this broad grant of authority, the General POA authorizes Arredondo to “execute . . . any instrument . . . whatsoever.” This includes signing a release or arbitration agreement. The instrument can be “concerning any” of Mr. Whaley’s “property or other assets whatsoever.” South Carolina courts “construe the term ‘property’ very broadly. *Bowman v. Bowman*, 357 S.C. 146, 155, 591 S.E.2d 654, 659, n. 6 (Ct. App. 2004) (quoting *Ball v. Ball*, 312 S.C. 31, 33, 430 S.E.2d 533, 534 (Ct.App.1993)). It is a “general term that is used to designate a right of ownership” that includes “choses in action.” *Id.* Here, the General POA specifically enumerates “choses in action” as a type of property. App. p. 253. It also includes “any agreements concerning any transfers of the above or of any property, right, or thing.” *Id.* The General POA specifically states that where it lists kinds of agreements Arredondo can execute, it is “without limiting the generality hereof thereto.” *Id.*

Below, Arredondo argued the General POA is limited to “Mr. Whaley’s business affairs and real or personal property.” App. p. 109.² Abandoning that argument, Arredondo now says the Court of Appeals improperly “equates” a chose in action to an arbitration agreement. Arredondo’s Br. p. 19. But the arbitration agreement is an instrument, not a chose in action. And the General POA does not authorize Arredondo to sign a chose in action, which would be impossible and “absurd.” *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (A contractual “interpretation leading to an absurd result should be avoided.”). It authorizes her to sign any instrument at all concerning a cause of action. The Court of Appeals properly analyzed this “broad

² The General Power of Attorney’s title specifies Mr. Whaley intended it be broad. “General” means “involving, applicable to, or affecting the whole” or “involving, relating to, or applicable to every member of a class, kind, or group.” <https://www.merriam-webster.com/dictionary/general>. *Cf. Stott*, 426 S.C. at 573, 828 S.E.2d at 85 (in which the plaintiff had a “durable power of attorney *for finance*”) (emphasis added).

language” to determine Mr. Whaley’s intent to authorize his daughter to sign any instrument related to a chose in action, including the Agreement. App. p. 004.

C. The Health Care POA provided Arredondo authority to sign the Agreement.

The Health Care POA also provided Arredondo authority to sign the Agreement for him. Subparagraph “d” under the Agent’s Powers section of the Health Care POA provided Arredondo authority

To take **any other action necessary** to making, documenting, and assuring implementation of decisions concerning my health care, **including, but not limited to**, granting of **any waiver or release from liability** required by any hospital, physician, nursing care provider, or other health care provider ... and pursuing **any legal action in my name**, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

App. pp. 248–49 (emphasis added).

Like with the General POA, interpreting the Health Care POA requires the Court interpret Mr. Whaley’s intent. The Court’s interpretation is framed by Mr. Whaley’s proclamation that “[m]y Agent’s authority to interpret my desires *is intended to be as broad as possible*, except for any limitations I may state below.” App. p. 248. Provided with the option to list limitations, Mr. Whaley chose to list none.

Arredondo abandons her argument below that her authority to pursue litigation was limited to punitive damages and now argues her authority to pursue any legal action is irrelevant “[b]ecause the arbitration agreement was signed before any ‘legal action’ arose.” Arredondo’s Br. p. 18. For starters, by nature liability waivers typically come *before* the legal action arises, not after. Otherwise, they would be settlement agreements. Second, Arredondo has full authority to pursue **any legal action**, including making any decision related to the legal action, from the moment Mr. Whaley signed the Health Care POA. One of those decisions is selecting arbitration

as her preferred forum. The Health Care POA does not limit that authority until a legal action accrues.

Arredondo next argues that waiver “does not refer to a right to a jury trial, but, instead, to waiving liability only when required by a health care provider and only to ensure implementation of a health care decision.” Arredondo’s Br. p. 18. This also fails for two reasons. First, subparagraph “d” specifically allows Arredondo to take “any other action necessary[.]” App. pp. 248–49. Waiving liability was just one example listed, but the POA was “not limited to” these examples. *Id.* The Health Care POA is broader than Arredondo now alleges.

Second, Arredondo tries to join two disjointed provisions. The provision at issue authorizes Arredondo to “grant[] any waiver or release from liability. . . .” *Id.* Under the normal rules of construction, “from liability” modifies “release” and not “waiver.” Otherwise, “waiver” would have no meaning. *J.T.M. Co. v. Vane*, 283 S.C. 512, 516, 323 S.E.2d 794, 796 (Ct. App. 1984); *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994). Arredondo was therefore authorized to grant any waiver of any kind or any release from liability. Moreover, even under Arredondo’s reading, it is illogical to interpret a power of attorney to authorize an agent to waive or release a principal’s entire claim, but not to agree to arbitrate that same claim. *Koon*, 379 S.C. at 155, 666 S.E.2d at 233 (A contractual “interpretation leading to an absurd result should be avoided.”).

Arredondo ignores that the Health Care POA includes the authority to pursue “any” legal action and to seek actual damages or punitive damages in Mr. Whaley’s name for failure to comply with his health care decisions. If it were the parties’ intention to limit the Health Care POA to jury trials, the POA would have said so, and they would not have used the phrase “any legal action.” The Court of Appeals correctly gave effect to this language. App. p. 248.

Finally, Arredondo relies on a single quote from the *Thompson* court's discussion of apparent authority as if the quote applies more generally to actual authority conferred by a power of attorney. The facts of *Thompson* make clear it does not. *Thompson v. Pruitt Corp.*, 416 S.C. 43, 48, 784 S.E.2d 679, 682 (Ct. App. 2016). In *Thompson*, the court found that where an elderly, incompetent mother's son was "allow[ed]" to sign the mother's admission paperwork to a senior living facility and to "handle" the mother's financial affairs, he had apparent authority. *Id.* at 55–56, 784 S.E.2d at 686. However, the court held the apparent authority did not extend to executing a voluntary arbitration agreement. *Id.* Arredondo's quote is inapplicable to whether the POAs authorized her to sign the Agreement.

D. Arredondo's error preservation claim concerns an argument not advanced by Ashley River.

In one single paragraph on page 17 of her brief, Arredondo argues that Ashley River did not preserve an argument that "any person with a power of attorney is authorized to agree to arbitration." Arredondo's Br. p. 17. But Ashley River has never made that argument, then or now. The point is not that every POA authorizes execution of an arbitration agreement, the point is the two POAs here do. Ashley River made that exact argument below.

III. The Court of Appeals correctly determined that the Agreement is not unconscionable.

Arredondo cannot prevail on unconscionability without proving two elements. First, an "absence of meaningful choice." *Lackey*, 330 S.C. at 400, 498 S.E.2d at 904 (Ct. App. 1998). Second, "one-sided terms" that are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* Arredondo has the burden to prove both.

Under this analysis, courts must "focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). That focus must account for the

“strong presumption” in favor of the validity of arbitration agreements. *Id.* Any doubts about whether Arredondo can avoid her agreement to arbitrate must be “resolved in favor of arbitration.” *Towles*, 338 S.C. at 41, 524 S.E.2d at 846 (quoting *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997)). Indeed, “only in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability.” *Maybank v. BB&T Corp.*, 416 S.C. 541, 575, 787 S.E.2d 498, 516 (2016).

The new approach Arredondo relies on to argue unconscionability at this Court suffers fundamental flaws. First, Arredondo argues that, under *Simpson*, the Court should consider the “cumulative effect” of standard arbitration provisions to render otherwise conscionable terms unconscionable. Arredondo’s Br. p. 16. But that is not what the Court did in *Simpson*. Instead, *Simpson* confirms that the Court analyzes each term individually to determine whether it is, itself, unconscionable. *Simpson*, 373 S.C. at 28–33, 644 S.E.2d at 670–73. The Court does not analyze the “cumulative effect” of terms unless more than one term is alone unconscionable. *See id.* at 33–34, 644 S.E.2d at 673–74. Only then does the Court use the cumulative effect to determine whether to sever the unconscionable terms or strike the entire agreement. *See id.* Arredondo’s approach misinterprets the law and when corrected, her arguments—both new and old—fail under established law.

Second, after Arredondo lost in the Court of Appeals, she raised new arguments about terms she now alleges are unconscionable based on arguments and evidence she never raised to the circuit court. If Arredondo’s arguments rely on new evidence not in the record below, she waived them. *I’On, L.L.C v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). If others raise new grounds to sustain the circuit court’s orders, “the appellate court is likely to ignore [them].” *Id.*

What then remains of Arredondo's argument is a collection of unconscionability contentions that South Carolina courts have rejected. This Court should reject Arredondo's request to overturn that precedent.

A. The Agreement achieves an unbiased decision by a neutral decision-maker – the “focus” of an unconscionability analysis.

Arbitration here will yield an unbiased decision by a neutral decision-maker. First things first, Arredondo has an absolute right to veto any arbitrator Five Star proposes. App. p. 262. She also has the right to propose her own list of arbitrators. *Id.* If the parties cannot agree on their own, then the AAA will help in one of two ways. *Id.* Either, the AAA will send a list of neutral arbitrators for the parties to consider.³ If the parties cannot agree on anyone from that list, then the AAA will provide new lists until the parties do agree. *See* n.3. Or the AAA will provide a list of neutral arbitrators and select the arbitrators for the parties. *Id.* If the parties chose this option, then AAA provides a process for the parties to object to the arbitrator's neutrality. *Id.* In other words, the Agreement ensures Arredondo will not be subject to a decision-maker she believes is not neutral.

Arredondo has the first right to decide whether the panel is one or three members. *Id.* If she submits an affidavit that she cannot afford arbitration, then Five Star will pay the full freight. *Id.* In that instance, Five Star will select the panel size—with Arredondo still choosing by consent who sits on that panel. *Id.* The panel will be a neutral decision-maker.

It will also reach an unbiased decision. This is so because the panel must follow the AAA rules. App. p. 262. The AAA promulgated well-respected rules to ensure unbiased decisions. Arredondo has the right to appeal if the decision is somehow biased or the decision-maker is not

³*See* https://www.adr.org/sites/default/files/document_repository/AAA_Arbitrator_Select_2pg.pdf. Arredondo relies on information outside the record to support her unconscionability claims. *See infra* § III(B)(2)(a). If the Court considers that evidence, the Court should also consider the procedures for selecting an arbitrator through the AAA.

neutral. The Agreement ensures this: a panel of arbitrators both parties select will decide Arredondo's claims under well-respected neutral rules promulgated by the AAA. The "focus" on an unbiased decision weighs heavily in favor of the validity of the Agreement. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

B. None of the terms are "so oppressive that no reasonable person would make them, and no fair and honest person would accept them."

Rather than question the neutrality of the arbitrators or the lack of bias in the proceeding, Arredondo argues seven provisions of the Agreement are "offensive" if considered cumulatively. Yet most are hallmarks of fair arbitration. These include limited discovery and limited appeals. This Court has already rejected others, including allegations that punitive damages are limited and the incorrect assertion that the remedies are not mutual. Properly considered, Arredondo fails to meet her burden to prove these terms rise to the "rare circumstance" of unconscionability.

1. This Court, the South Carolina's Court of Appeals, and the United States Supreme Court Have Rejected Arredondo's Original Arguments.

a. The scope of discovery provided by the AAA rules is not unconscionable.

Arredondo first asks this Court to invalidate the AAA's commercial rules. She says these are no good in South Carolina because they limit discovery. But courts in this state have held that more limited discovery is "inherent in every agreement to arbitrate." *Lucey v. Meyer*, 401 S.C. 122, 142, 736 S.E.2d 274, 285 (Ct. App. 2012). Indeed, it 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.'" *Id.* (quoting *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007)). This Court has upheld arbitrations using AAA rules because those "rules provide that arbitrators have broad authority to order and control discovery, including depositions." *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 555, 606

S.E. 2d 752, 758 n.7 (2005). Here, the Agreement gives the Panel “the authority to . . . direct discovery in all controversies.” App. p. 262. This Court should not change course now by invalidating the AAA’s rules as inherently so one-sided and oppressive that no party would agree to them. No court has ever held that. This Court should not be the first.

Indeed, no court has held this because the AAA rules provide for more robust discovery than Arredondo claims. In some instances, Arredondo misstates the relevant rules. For instance, she claims she cannot investigate or challenge Ashley River’s experts. Arredondo’s Br. p. 11. But the arbitrator can order the parties to exchange expert reports and take depositions for good cause. P-2, App. p. 054. She also claims she cannot obtain documents from non-parties. Arredondo’s Br. p. 11. But R-34(d) entitles the arbitrator “to subpoena witnesses or documents . . . upon the request of any party or independently.” App. p. 044. Next, she claims she “is precluded from engaging in fact finding” from Ashley River’s employees. Arredondo’s Br. p. 11. But the arbitrator can order broad document discovery, witness summaries, and depositions where “relevant and material.” L-3, App. 059; R-1(c), App. 031; P-2, App. p. 054. Arredondo downplays what the AAA rules allow because she no longer likes her agreement to arbitrate.

In other instances, she dramatizes the rule’s effect. Generally, she ignores the arbitrator’s broad authority to “manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment.” R-22(a), App. p. 40.⁴ This includes requiring parties to exchange the documents they will rely on, permitting parties to serve more document requests, and issuing

⁴ Arredondo also claims, with no support, that the rules are one-sided. But the AAA rules apply to both parties. What she can get from Ashley River is the same as what Five Star can get from her. Her chance to challenge Ashley River’s experts is the same as Ashley River’s chance to challenge hers. The AAA rules apply equally to all parties.

electronic search parameters. R-22, R-23, App. pp. 40–41. The AAA rules also authorize the arbitrator to

- establish “any additional procedures to obtain information that is relevant and material to the outcome of disputed issues”;
- require parties to “exchange expert reports”;⁵
- require parties to identify their witnesses, disclose “the subject matter of their anticipated testimonies,” and exchange written witness statements;
- in cases like this where the amount in controversy exceeds \$500,000, order “depositions” for good cause where the proposed deponent “may possess ... relevant and material” information.

L-3, App. 059; R-1(c), App. 031; P-2, App. p. 054.

An arbitration panel Arredondo selects will implement these fair rules that balance proving her claim with the benefits of arbitration. Using the AAA rules is a fair and advisable way to achieve an unbiased result from a neutral decision maker.

b. An agreement to arbitrate claims in excess of \$25,000 is not unconscionable.

The Agreement requires arbitration of claims brought by either party in excess of \$25,000. This Court has upheld an arbitration provision that, like the Agreement, does not require arbitration for small claims court disputes. *Herron v. Century BMW* 387 S.C. 525, 533, 693 S.E. 2d 394, 398–99 (2010) *cert. granted*, judgment vacated sub nom. *Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011), and opinion reinstated, 395 S.C. 461, 719 S.E.2d 640 (2011). Like with disputes under \$25,000, court can be a more efficient forum to dispose of small matters. *See* S.C. R. Civ. P. 33(b)(9) (limiting use of interrogatories when the amount in controversy is less than \$25,000); 30(a)(2) (limiting the use of depositions when the amount in controversy is less than \$10,000);

⁵ This provision provides for broader discovery than is available under the South Carolina Rules of Civil Procedure.

S.C. Mag. Ct. R. 15 (recognizing need for speedy determination of actions without discovery in magistrate's court). Without this limitation, the Agreement would be subject to attacks for mandating arbitration where the amount in controversy is so small that it exceeds the arbitration filing fee. *Gladden v. Boykin*, 402 S.C. 140, 153, 739 S.E.2d 882, 889 (2013) (Beatty, J. dissenting) (noting that arbitration provision "would effectively leave a plaintiff with no recovery where the cost to arbitrate exceeds the potential recovery [inspection fee]."). The Agreement appropriately addresses this concern.

Arredondo speculates that the mutual \$25,000 threshold "practic[ally]" allows Five Star to litigate its claims in courts while she litigates her claims in arbitration.⁶ Arredondo's Br. p. 13. Arredondo asks the Court to assume that a resident's "most probable claim" would be for "serious injuries, including potential claims for survival and wrongful death," while Ashley River's claims would be smaller. *Id.* Arredondo's speculation is unfounded. Residents can pursue small contract claims like incorrect billing or property damage claims in court. On the other hand, Ashley River can pursue much larger claims like past rent or indemnification for injuries the resident causes⁷ in arbitration. The \$25,000 amount in controversy requirement is an appropriate mutual remedy that allows either party to litigate smaller disputes in court.

c. That the arbitrator's decision is not appealable is not unconscionable.

Limited appellate rights are fundamental to arbitration. Congress codified them in the FAA. This is because the parties "forgo the procedural rigor *and appellate review* of the courts" to achieve "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to

⁶ Even if this were true, the Court has reiterated that arbitration agreements need not have mutual remedies. *Simpson*, 373 S.C. at 32, 644 S.E.2d at 672.

⁷ See App. 178–79 (noting Whaley's aggressiveness, slapping and kicking people walking by his wheelchair, grabbing a resident's arm and refusing to let go, and charging at residents and charging at staff workers).

resolve specialized disputes.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (emphasis added). Unable to attack this precedent, Arredondo overstates the Agreement’s scope. The Agreement does not eliminate appeals altogether, just appeals on the merits of the decision. Thus, appellate courts “determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it.” *U.S. Postal Serv. v. Am. Postal Workers Union, AFL-CIO*, 204 F.3d 523, 527 (4th Cir. 2000). This is what both the Agreement and the FAA allow.

The Agreement states, “[t]he *decision of the Panel* shall be final, binding upon the Parties, not subject to appeal, and any court having jurisdiction *may* enter a *judgment* on the award.” App. p. 262 (emphasis added). Courts have recognized that a provision, like this one, stating that an arbitration decision is non-appealable refers to the *merits* of an award but does not affect the parties’ right to vacating of awards where warranted. *Southco, Inc. v. Reell Precision Mfg. Corp.*, 331 F. App’x 925, 927 (3d Cir. 2009) (“[G]enerally, a contract provision stating that arbitration is “non-appealable” signifies that the parties to the contract may not appeal the merits of the arbitration; not that the parties agree to waive a right to appeal the district court’s judgment confirming or vacating the arbitration decision.”); *see also Rollins, Inc. v. Black*, 167 Fed. Appx. 798, 799 n.1 (11th Cir. 2006) (“[A ‘binding, final, and non-appealable’ arbitral award] simply means the parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator’s abuse of authority. . . .”). Similarly, under these provisions, the parties retain the right to appeal entry or non-entry of a judgment. *Id.*

d. The limitation on punitive damages is not unconscionable.

The Supreme Court has repeatedly rejected Arredondo's argument that a punitive damages limitation is unconscionable. This Court has twice held that an arbitration agreement is not unconscionable unless it "goes beyond banning 'punitive damages' generally" to "specifically prohibiting an arbitrator from awarding statutorily required treble or double damages." *Simpson*, at 29, 644 S.E.2d at 671; *Carolina Care Plan, Inc.*, 361 S.C. at 557, 606 S.E.2d at 758–59 (also recognizing "[a] number of courts in other jurisdictions have held that an arbitration agreement limiting or excluding punitive damages is enforceable"). In other words, a damage limitation in an arbitration agreement is unconscionable only if it prohibits damages that state law requires.

The Court recently again confirmed this established law in *Maybank*, where it held there was "no reason to ignore the plain language of the clause based on either public policy or unconscionability grounds." 416 S.C. at 576, 787 S.E.2d at 516. The Court found that a contract to prevent a bank customer from recovering punitive damages was not unconscionable or against public policy. *Id.* The provision here is far less restrictive than the one in *Maybank*. Well beyond punitive damages, the contract there barred the plaintiff from recovering "consequential damages, indirect damages, [or] special damages." *Id.*

The punitive damages limitation here does not affect Arredondo's statutory rights at all. In addition to allowing all statutory damages, the Agreement also preserves Arredondo's rights to file actions or complaints with local, state, or federal regulatory authorities. These authorities have power to take action against the facility to advance the public good. *See, e.g.*, S.C. Code Ann. Regs. 61–17 (authorizing SC DHEC to take adverse action where appropriate); 42 C.F.R. § 488.330 (authorizing the Centers for Medicare & Medicaid Services and Department of Health and Human Services to take adverse actions where appropriate).

Relative to punitive damages, this Court has also held that the issue is not ripe until the plaintiff “prevails on the merits in arbitration” and the arbitrator finds “punitive damages are warranted.” *Carolina Care Plan, Inc.*, 361 S.C. at 557, 606 S.E.2d at 758–59. Thus, the mutual prohibition on punitive damages cannot be a basis for the Court to find the Agreement unconscionable.

Because she cannot argue otherwise, Arredondo concedes the punitive damages limitation “alone may not render the entire agreement unconscionable.” Arredondo’s Br. p. 12. That concession is dispositive. Even so, Arredondo argues the cumulative effect of the Agreement transforms the punitive damages limitation from conscionable to unconscionable. Arredondo’s Br. p. 12 (citing *Simpson*, 373 S.C. at 30, 34–35, 644 S.E.2d at 671, 674). But that is not what *Simpson* held. Instead, the Court analyzed whether each individual term was alone unconscionable and then, if so, whether the cumulative effect avoids severability. *Simpson*, 373 S.C. at 28–34, 644 S.E.2d at 670–74. This Court should not overturn *Simpson*, *Maybank*, and *Carolina Care*. It should instead confirm that mutual punitive damages provisions are not unconscionable.

2. Arredondo’s new arguments do not establish unconscionability.

a. Splitting the costs of arbitration unless the resident does not have the means to pay is not unconscionable.

Arredondo now argues that Ashley River’s obligation to pay Arredondo’s share of the arbitration fees is oppressive. Ashley River goes out of its way to ensure the Agreement does not impose oppressive burdens on Arredondo. In doing so, it agrees to pay Arredondo’s share of the cost if she cannot. Arredondo does not argue this is substantively oppressive, rather, she argues the provision is confusing. Her argument shows how far she will stretch to avoid her agreement to arbitrate this dispute.

“Where the Resident supplies an affidavit that they do not have the means to pay their one half of the arbitration expenses, Ashley River will also pay the Resident’s share of the costs and expenses.” App. p. 262. Arredondo claims this is confusing. But it provides a simple cause and effect. If Arredondo submits an affidavit that she cannot pay her share of the fees, then Ashley River will pay the costs and expenses to arbitrate. She nakedly contends that Ashley River can claim the affidavit is insufficient. The plain language shows that is an illusory concern. If Arredondo supplies the affidavit, then Ashley River pays. There is no mention of what is sufficient, because Ashley River does not determine the sufficiency. Arredondo again reads terms into the Agreement that do not exist.

Arredondo also claims the Agreement does not provide her a remedy if Ashley River refuses to pay the arbitration expenses. But the arbitration panel itself provides her remedy. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 53, 790 S.E.2d 1, 6 (2016) (“controversies as to the enforceability of any other contractual provision . . . are to be resolved by the arbitrator”) (Kittredge, J., dissenting). If Ashley River refused to pay—and it will not refuse—then the arbitration panel would order it to pay. Simple enough.⁸

Finally, Arredondo builds her argument on a foundation of a new and inaccurate claim that she would have to pay \$8,087.50 in AAA administrative fees. Arredondo’s new argument improperly relies on information outside the record. The Court should not consider it. *See I’On, L.L.C.*, 338 S.C. at 420, 526 S.E.2d at 723 (“The basis for respondent’s additional sustaining grounds must appear in the record on appeal[.]”). More importantly, the Agreement does not submit the dispute to the AAA. Instead, the parties pick an arbitrator who decides the case under

⁸ Arredondo also argues, once again without citation, that it is unfair for Ashley River to choose the number of arbitrators if it pays. But she cites nothing to meet her burden that three arbitrators is any less fair than one. Or that the opposite is true.

the AAA's rules. App. p. 262. This is different. Arredondo will never incur the fees she now raises. *Dean*, 408 S.C. at 382–83, 759 S.E.2d at 733 (“[T]here is no reason any potential arbitration proceeding between the parties cannot ‘follow the rules of’ the AAA in a different arbitral forum”). Instead, Arredondo will not incur any AAA fee if the parties can agree on an arbitrator – as almost every reasonable party does. If they cannot, then the parties will each pay the AAA between \$625 and \$1,750 to send a list of neutral arbitrators for the parties to choose from.⁹ Again, Ashely River will pay Arredondo's fees if Arredondo submits an affidavit that she cannot afford it. Arredondo greatly overstates the fees involved. And there is no evidence in the record that Arredondo cannot afford the fees. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 613, 586 S.E.2d 581, 585–86 (2003) (“Further, as the party seeking to invalidate the arbitration agreement on the ground that arbitration would be prohibitively expensive, appellant has not met its burden of showing the likelihood of incurring such costs.”).

b. A limited right to amend subject to the resident's approval is not unconscionable.

Arredondo raised the alleged unconscionability of Ashley River's right to amend for the first time at oral argument before the Court of Appeals. Arredondo misstates Ashely River's response. Arredondo also misstates the relevant provision. Ashley River did not have an unfettered right to amend; instead, Arredondo had to consent. App. p. 263. But that was not her only option. She also could terminate the entire Agreement for any reason if Ashely River proposed an amendment – which it did not. *Id.* Arredondo's complaint is hypothetical.

Numerous courts across the country have found a unilateral right to amend is not unconscionable if all parties have a right to notice. *See Iberia Credit Bureau, Inc. v. Cingular*

⁹ See https://www.adr.org/sites/default/files/document_repository/AAA_Arbitrator_Select_2pg.pdf.

Wireless LLC, 379 F.3d 159 (5th Cir. 2004); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003); *Pierce v. Kellogg, Brown & Root, Inc.*, 245 F. Supp. 2d 1212, 1215 (E.D. Okla. 2003). The Agreement goes a step further. Beyond notice, it gives Arredondo to the right to terminate the Agreement if she does not consent. Arredondo's speculative concern about an amendment she could reject if Ashley River proposed it is not unconscionable.

c. The paragraph confirming the voluntary nature of the Agreement is not unconscionable.

Lastly, Arredondo argues, for the first time, that the tenth paragraph, "VOLUNTARY NATURE OF THE AGREEMENT," is unconscionable. App. p. 263. Arredondo's argument is not actually that this paragraph is unconscionable, but that it is false. It is not. The Agreement was voluntary. To make sure Arredondo knew that, Ashley River put in conspicuous, capitalized, and underlined font that she did not have to sign the standalone arbitration agreement – an agreement she signed after Ashley River admitted her father. Arredondo's affidavit that she subjectively thought the Agreement was mandatory does not change that the Agreement said in conspicuous, capitalized, and underlined font that it was not.

Arredondo acknowledged that she read the Agreement. While she had some unidentified "questions," she has never claimed she did not understand that the Agreement was voluntary. Nor could she have. It has long been the law in this State that "in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'" *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597,

599, 281 S.E.2d 121, 123 (1981).¹⁰ The conspicuous provision informing Arredondo that the Agreement was voluntary is not unconscionable.

3. South Carolina law favors severing any term this Court finds unconscionable.

Even if the Court were to find certain terms objected to by Arredondo are unconscionable, that would “not end the inquiry on the enforceability of the remainder of the contract, as courts will attempt to sever an illegal provision in an otherwise valid contract and enforce the remaining terms.” *Herron*, 387 S.C. at 536, 693 S.E.2d at 400. Normally, severability depends primarily on the intent of the parties. *Id.*, n. 5; *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980).

Here, the Agreement itself expresses the parties’ intent:

7. SEVERABILITY. If any provision of this Agreement is declared to be unlawful, invalid, or unenforceable for any reason, then notwithstanding such unlawfulness, invalidity or unenforceability, the remaining terms and provisions of this Agreement shall remain in full force and effect.

App. p. 263.

The parties’ intent to sever any unenforceable provision should control. Ashley River concedes that if the Court were to find all seven, or even most, of the provisions complained of by Arredondo unconscionable, severance would not be appropriate. In *Simpson*, the Court noted that it “generally would encourage severability of an unconscionable provision” but did not do so because of (1) the number of unconscionable provisions and (2) the “sheer magnitude of unconscionability” present in those provisions. *Simpson*, 373 S.C. at 35, 644 S.E.2d at 674, n.9.

¹⁰ Arredondo supports her argument by citing a discussion of duress, which Arredondo has never claimed existed. Arredondo’s Br. p. 15–16 (citing *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469 (2005)). And while the Court also discussed unconscionability in section B of the *Holler* opinion, Arredondo does not cite that section of the opinion as it has no relevance here.

Thus, without many unconscionable terms equal in magnitude to those present in *Simpson*, severance is appropriate.

4. Arredondo has not met her burden of proving she lacked meaningful choice.

The Court need not reach the issue of lack of meaningful choice unless it first determines the Agreement's terms are so oppressive that no person would ever agree to them. *Lackey*, 330 S.C. at 400, 498 S.E.2d at 904. If it does reach this issue, Arredondo's argument fails because the Court of Appeals analyzed the relevant factors, considered the Agreement resolving all doubt in favor of arbitration, and applied the correct standard of review.

a. The Court of Appeals appropriately analyzed the meaningful choice factors.

The Court of Appeals appropriately analyzed the Agreement as a conspicuous, stand-alone document written in standard font and limited emphasis to draw attention to key terms. Chief Justice Toal has explained that “[u]sing a separate contract for arbitration agreements . . . better protects the nursing home from a contention that the arbitration contract is unconscionable.” App. p. 5–6 (citing *Coleman v. Mariner Health Care, Inc.* 407 S.C. 346, 357, 755 S.E.2d 450, 456 (2014) (Toal, C.J., dissenting)). It appropriately held Arredondo was not surprised that the Agreement required arbitration. App. p. 005. The Agreement had a clear title, included bolded language that the resident was waiving jury trial rights, and the law presumes that Arredondo read the document before signing it. App. p. 262. Finally, the Court of Appeals correctly held that the record lacked any evidence of Arredondo's level of sophistication since the only evidence was that she had some potential questions about the Agreement that she apparently did not ask. App. pp. 006, 244. As for the remaining factors, the Court of Appeals addressed them by holding that even if Arredondo is right that the Agreement is an adhesion contract, Arredondo still could not carry her burden. App. pp. 005–007.

Because she cannot claim the Agreement is inconspicuous, Arredondo claims she was “surprised” by the Agreement after Ashely River admitted her father as a resident. Arredondo’s Br. p. 9. But she misinterprets the factors. Instead, the factors focus on whether Arredondo was surprised *of the fact that the contract contains an arbitration agreement*. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (listing the factors of meaningful choice including “whether there is an element of surprise **in the inclusion of the challenged clause**; and the conspicuousness **of the clause**”) (emphasis added). Here, she was not.

b. The Court of Appeals did not have to analyze the Agreement with skepticism.

Arredondo claims that the Court of Appeals and “[t]his Court must analyze the Agreement with ‘considerable skepticism’ as required by *Simpson*.” Arredondo’s Br. p. 7. This is not so. *Simpson* is a limited case addressing an adhesion contract between a car dealer and a consumer where non-mutual arbitration provision eliminating the consumer’s statutory right to damages was buried in a single paragraph within the terms and conditions of a sales contract. *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. Citing now outdated decisions of the Ohio Court of Appeals, the Court reviewed that specific contract under those specific facts with “considerable skepticism.” *Id.*¹¹ This Court has never required considerable skepticism universally. In the thirteen years since *Simpson*, this Court has decided many arbitration cases, yet it has mentioned “considerable skepticism” just twice, neither time adopting Arredondo’s proposed requirement. In many cases, the Court has not mentioned it at all. The day after *Simpson*, this Court analyzed whether the parties to an adhesion contract lacked meaningful choice without the approach the *Simpson* court used under that case’s

¹¹ The Ohio Court of Appeals apparently viewed arbitration agreements with considerable skepticism five times between 2004 and 2008, but never since. The Ohio Supreme Court has never done so.

specific facts. *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013). Most recently, *Smith v. D.R. Horton, Inc.*, the Court observed that courts “tend to” view certain adhesion contracts with considerable skepticism, not that they are required to. 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). The Court of Appeals was not required to apply the automobile dealer approach from *Simpson*.

Adopting this rule would violate the FAA. The FAA displaces any rule that discriminates on its face against arbitration, or that “covertly accomplishes the same objective.” *Kindred Nursing Centers Ltd. P’ship*, 137 S. Ct. at 1426. South Carolina’s appellate courts have never viewed adhesion contracts outside arbitration agreements—which are standard—with considerable skepticism.¹² The FAA prohibits then viewing arbitration agreements with that novel standard. *Id.*

c. The standard of review does not require reversal.

Finally, Arredondo argues that the Court of Appeals “violated the standard of review” in finding that she had a chance to ask questions, seek the advice of an attorney, and that she understood the rights waived by the Agreement. Arredondo’s Br. p. 9. The Court of Appeals’ findings are correct. While Arredondo claims she had questions, she never alleged she did not have a chance to ask them. App. pp. 244–45. And while Arredondo claims she did not seek the advice of an attorney, she never alleged that she did not have a chance to seek that advice. *Id.* Finally, while Arredondo claims she was uncomfortable signing the Agreement, she never alleged she did not understand the rights she waived. *Id.*

¹² The Court and the South Carolina Court of Appeals have mentioned “considerable skepticism” on six reported occasions, including *Simpson*. All six were appeals from motions to compel arbitration. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016); *Partain v. Upstate Auto. Group*, 378 S.C. 152, 662 S.E.2d 426 (Ct. App. 2008); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013); *One Belle Hall Property Owners Assoc., Inc. v. Trammell Crow Res. Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016).

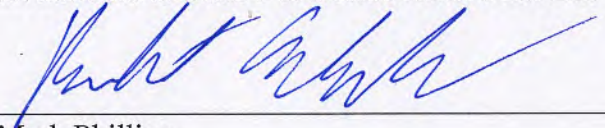
Instead, she alleges that she does “not recall any explanation by [Ashley River] that the ‘Arbitration Agreement’ was a document by which I would give up my father’s right to bring a claim of negligence or malpractice.” *Id.* First, that is simply not true. The Agreement does not waive those claims, it just requires arbitration of them. Second, “when a person signs a document, he is responsible for exercising reasonable care to protect himself by reading the document and making sure of its contents.” *Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014). The law does not impose a duty to explain to an individual what can be learned simply by reading the document. *Id.*; *First Baptist Church of Timmonsville*, 276 S.C. at 599, 281 S.E.2d at 123. The Court of Appeals correctly held that Arredondo had a chance to ask questions, seek the advice of an attorney, and that she understood the rights waived by the Agreement. Nothing in the record supports the opposite.

CONCLUSION

The Court should affirm the Court of Appeal’s decision.

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