THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2019-CP-42-03075

Betty Nanney,
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,
Laura Anne Winn, and Olishia Gaffney,

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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In addition, of course, to the points already made in their principal brief, Appellants would make the following point in reply to Plaintiff's[1] brief.

ARGUMENT IN REPLY

1. Plaintiff's unconscionability argument is without merit.

As explained in Appellants' principal brief, for a contract to be unconscionable there must be *both* (1) an absence of meaningful choice *and* (2) unreasonably oppressive terms,[2] neither of which is present here, and indeed the circuit court never actually provided any analysis to the contrary. (*See* Br. of Appellants p. 25 (citing Order Denying MTCA pp. 17–18).)

Regarding Plaintiff's contention about the supposed incongruity between the arbitration process and the discovery needs in medical malpractice cases (to include her contention about the supposed unfairness resulting from the requirements of S.C. Code Ann. § 15-79-125[3]), first off, this amounts to a wholesale attack on the enforceability of arbitration agreements in the medical malpractice context, which violates the FAA. *See AT&T Mobility LLC v.*

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[1] Shorthand references defined in Appellants' principal brief (e.g., referring to Plaintiff-Respondent, Betty Nanney, by and through her Attorney-in-Fact, Leslie Nanney, as "Plaintiff") are continued in this reply brief.

[2] *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

[3] Plaintiff says this allowed Appellants to "kn[o]w the identity of [her] expert and an outline of her [expert's] opinions before the Complaint was even filed." (Br. of Respondent pp. 28–29.) Appellants submit there is nothing unfair about them being made aware of the accusations against them.

Concepcion, 563 U.S. 333, 339 (2011) (instructing that arbitration agreements must be placed on equal footing with other contracts and that, while a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, it may not do so "by defenses that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue"). Similarly, and besides being unfounded factually—given that the Arbitration Agreement is a one-page instrument with the words "***PLEASE READ CAREFULLY***" / "**FACILITY-RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT**" at the top[4]—Plaintiff's argument about the supposed "lack of conspicuousness"[5] of the Arbitration Agreement amounts to an improper attempt to invalidate it on the basis of a state law defense that does not apply to contracts generally,[6] which, again, violates the FAA. *See Concepcion*, 563 U.S. at 339.

Moreover, and in any event, Plaintiff's concerns are unfounded. She herself recognizes that the Arbitration Agreement calls for arbitration to be conducted under the South Carolina ADR Rules, that the South Carolina ADR Rules *must*

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[4] (Arbitration Agreement (emphasis in original).)

[5] (Br. of Respondent p. 26.)

[6] Pursuant to S.C. Code Ann. § 15-48-10, "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." There is no such requirement under the FAA.

("shall") be "construed to secure the just, speedy, inexpensive and collaborative resolution" of disputes, and that "an arbitration proceeding amounting to a trial by ambush" would *not be consistent* with the South Carolina ADR Rules. (Br. of Resp. p. 27; *see also* Rule 1, SCADR.) Accordingly, by her own logic (indeed all logic), there is no cause for concern. The Arbitration Agreement expressly calls for arbitration *consistent with* the South Carolina ADR Rules, the very same rules that Plaintiff acknowledges *are geared toward* "secur[ing] the just, speedy, inexpensive and collaborative resolution" of disputes and *do not allow for* "an arbitration proceeding amounting to a trial by ambush."

Further still, both the South Carolina ADR Rules (*see* Rule 12) and the FAA itself (*see* § 7[7]) provide all the tools necessary for the proceedings, including

[7] FAA § 7 provides:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United

discovery therein, to be conducted in a way that affords Plaintiff a fair and meaningful opportunity to present her case in arbitration, with no more limitation thereon than that which is inherent in the arbitration process generally as an alternative to litigation, an alternative, which, again, "both state and federal policy favor . . . ." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

CONCLUSION

For the foregoing reasons, together with those set forth in their principal brief, Appellants ask this Honorable Court to reverse the circuit court and stay this lawsuit in favor of arbitration (or remand the case to the circuit court with instructions for it to do so) or, alternatively, to remand the case to the circuit court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce Appellants' rights under the Arbitration Agreement.

<SIGNED ON THE FOLLOWING PAGE>

> States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

Respectfully submitted,

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October 15, 2020

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I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellants, hereby certify that (1) **Appellants' Motion for Leave to File/Serve Initial Reply Brief Out of Time**, (2) the **Initial Reply Brief of Appellants**, and (3) the **Record on Appeal** were served on all other parties to this matter on October 15, 2020, by emailing the same (*see* attached copy of said email) to their counsel of record:

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October 15, 2020

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Subject:	RE: Nanney v. THI (Appellate Case No. 2020-000500) -- Initial Brief of Appellants and Appellants" Designation of Matter
Date:	Thursday, October 15, 2020 11:41:51 PM
Attachments:	image001.png Case No. 2020-0500 - Nanney v. THI of SC -- Motion to File Initial Reply Brief Out of Time.pdf Case No. 2020-0500 - Nanney v. THI of SC -- Initial Reply Brief of Appellant.pdf Case No. 2020-0500 - Nanney v. THI of SC -- Record on Appeal.pdf

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Attached please find Appellants' Motion for Leave to File/Serve Initial Reply Brief Out of Time, the Initial Reply Brief of Appellants (conditionally filed/served with the motion), and the Record on Appeal in the above-referenced appeal. They will be filed with the Court of Appeals via separate email.

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