

**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

RECEIVED
Nov 04 2020
SC Court of Appeals

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.

FINAL REPLY BRIEF OF APPELLANTS

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
Gaillard T. Dotterer, III (SC Bar No. 103620)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
1. Plaintiff’s unconscionability argument is without merit.	1
CONCLUSION	4

TABLE OF AUTHORITIES

Page(s)

Cases

AT&T Mobility, L.L.C. v. Concepcion,
563 U.S. 333 (2011).....1, 2

Simpson v. MSA of Myrtle Beach, Inc.,
373 S.C. 14, 644 S.E.2d 663 (2007).....1, 4

Statutes

S.C. Code Ann. § 15-48-10.....2

S.C. Code Ann. § 15-79-125.....1

9 U.S.C. § 73, 4

Rules

Rule 1, SCADR.....3

Rule 12, SCADR.....3

In addition, of course, to the points already made in their principal brief, Appellants would make the following point in reply to Plaintiff's¹ 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 R. 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. § 15-79-125³), 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.*

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 top⁴—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*

⁴ (R. p. 151 (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* § 7⁷) 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,
YOUNG CLEMENT RIVERS, LLP

By: s/Russell G. Hines
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
Gaillard T. Dotterer, III (SC Bar No. 103620)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

November 4, 2020

**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

RECEIVED

Nov 04 2020

SC Court of Appeals

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.

APPELLANTS' CERTIFICATION FOR FINAL REPLY BRIEF

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
Kate C. Mettler (SC Bar No. 103762)
Gaillard T. Dotterer, III (SC Bar No. 103620)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

I, Russell G. Hines, do hereby certify that the **Final Reply Brief of Appellants** complies with Rule 211(b), SCACR, and the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, filed April 15, 2014.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: *s/Russell G. Hines*

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Russell G. Hines (SC Bar No. 72100)

Kate C. Mettler (SC Bar No. 103762)

Gaillard T. Dotterer, III (SC Bar No. 103620)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29401

P.O. Box 993 (29402)

(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

November 4, 2020