THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County Court of Common Pleas
Carmen Tevis Mullen, Circuit Court Judge

Consolidated Appellate Case No. 2011-199666

Elizabeth O'Meara,.....Respondent,

v.

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

and

Sonia S. King,.....Defendant.

Yvonne Carrie Pruett,.....Respondent,

v.

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

and

Sonia S. King,.....Defendant.

Janet Sue Scheerle,.....Respondent,

v.

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

and

Sonia S. King,.....Defendant.

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Codes

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE ARBITRATION AND LIMITATION OF LIABILITY PROVISION IS UNCONSCIONABLE AND THUS UNENFORCEABLE.
2. WHETHER THE ARBITRATION AND LIMITATION OF LIABILITY PROVISION IS UNENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT.
3. WHETHER APPELLANTS' ILLEGAL AND OUTRAGEOUS CONDUCT DEFEATS ENFORCEABILITY OF THE ARBITRATION AND LIMITATION OF LIABILITY PROVISION.
4. WHETHER APPELLANTS' EQUITABLE ESTOPPEL ARGUMENT WAS PRESERVED.

STATEMENT OF THE CASE

This is a consolidated appeal from three orders of the circuit court denying Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's ("Appellants") motions to compel arbitration in three separate severe personal injury cases. Elizabeth O'Meara, Yvonne Carrie Pruett, and Janet Sue Scheerle ("Respondents") are South Carolina residents and vulnerable adults afforded protection under the South Carolina Omnibus Adult Protection Act, S.C. Code Ann. §§ 43-35-5, *et seq.* (Supp. 2012). The Respondents lived in Carolina House of Hilton Head, an assisted-living community owned by Appellants, where each suffered severe physical and mental abuse at the hands of Appellants' employees.

Mrs. O'Meara filed a Complaint against Appellants on April 6, 2011, and an Amended Complaint on April 20, 2011, asserting causes of action for gross negligence and willful misconduct, intentional infliction of emotional distress, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). (O'Meara Am. Compl. pp. 3-8).

Mrs. Pruett filed a Complaint against Appellants on April 13, 2011, and an Amended Complaint on September 24, 2012, asserting causes of action against Appellants for corporate negligence, negligence, negligent supervision, wrongful death and survival, intentional infliction of emotional distress, and violation of the South Carolina Unfair Trade Practices Act. (Pruett Am. Compl. pp. 4-13).

Mrs. Scheerle filed a Complaint on June 24, 2011, and an Amended Complaint on June 27, 2012, asserting causes of action for gross negligence and willful misconduct, intentional infliction of emotional distress, violation of the South Carolina Unfair Trade Practices Act, and corporate negligence. (Scheerle Am. Compl. pp. 3-13).

On June 6, 2011, Appellants filed Motions to Dismiss and Compel Arbitration as to Mrs. O'Meara and Mrs. Pruett based on an Arbitration and Limitation of Liability Provision in their Residency Agreements. On June 22, 2011, Mrs. O'Meara and Mrs. Pruett filed Memorandums in Opposition to Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's Motions to Dismiss and Compel Arbitration. On June 23, 2011, Appellants filed Memorandums in Support of the Motions to Dismiss and Compel Arbitration as to Mrs. O'Meara and Mrs. Pruett. The Honorable Carmen Tevis Mullen held a hearing on Appellants' motions on June 14, 2011. On August 8, 2011, Judge Mullen signed orders denying Appellants' motions as to Mrs. O'Meara and Mrs. Pruett. Appellants filed Motions to Reconsider as to Mrs. O'Meara and Mrs. Pruett on September 6, 2011, which Judge Mullen denied in form orders, without hearings, on September 20, 2011. Appellants filed notices of appeal on September 22, 2011.

On August 11, 2011, Appellants filed a Motion to Dismiss and Compel Arbitration as to Mrs. Scheerle, also based on the Arbitration and Limitation of Liability Provision in her Residency Agreement. Judge Mullen held a hearing on Appellants' motion on October 19, 2011. On October 28, 2011, Judge Mullen issued an order denying Appellants' motion as to Mrs. Scheerle. Appellants filed a Motion to Reconsider on November 15, 2011. On July 2, 2012, Appellants filed a Renewed Motion to Dismiss in response to Mrs. Scheerle's Amended Complaint. Judge Mullen held a hearing on Appellants' renewed motion on September 4, 2012, and signed an order denying the motion on September 18, 2012.

The parties agreed to proceed with the appeals without transcripts after learning they were apparently unavailable due to the court reporter's subsequent change in

employment. On October 9, 2012, the Respondents filed a Motion to Consolidate these cases. On January 16, 2013, this Court granted the Motion to Consolidate the appeals.

FACTS

The Respondents entered Carolina House of Hilton Head because each suffered from Alzheimer's Disease and dementia and sought specialized, daily care for their medical conditions and vulnerabilities. The Respondents lived in the "Memory Care Unit" in Carolina House which is known as "Clare Bridge" and is specifically designed for residents with Alzheimer's Disease or dementia. (O'Meara and Pruett Residency Agreement p. 6). Carolina House holds itself out as having specialized assisted living accommodations for residents with Alzheimer's Disease and dementia. Appellants fail to tell this Court the full nature of the Respondents' injuries at the hands of Appellants' employees. These facts are relevant to this Court's determination of whether the Arbitration and Limitation of Liability Provision is enforceable.[1]

A. The Physical and Verbal Abuse Suffered by Mrs. O'Meara, Mrs. Pruett, and Mrs. Scheerle at Appellants' Facility

In the early morning hours of December 31, 2010, Appellants' employee, Sonia S. King, whom Appellants hired to care for vulnerable residents entrusted to their care, inflicted severe physical and verbal abuse on these elderly and defenseless residents. Another of Appellants' employees, King's co-worker, witnessed and recorded these

[1] *See, e.g.*, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff . . . ." (internal quotation marks and citation omitted)); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012) ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." (internal quotation marks omitted)); *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) (refusing to enforce an arbitration agreement as to illegal and outrageous acts).

incidents of abuse and reported King to a supervisor. (O'Meara Am. Compl. pp. 2-3). Prior incidents of abuse by King and other employees of Appellants were known to various employees and to Appellants but not to the Respondents or their families. (Pruett Am. Compl. pp. 3, 8, O'Meara Am. Compl. p. 3, Scheerle Am. Compl. pp. 3, 6-7, 9). Prior to the December 31, 2010 incident, Appellants suspended King from work for abusing a resident. (Pruett Am. Compl. p. 3, O'Meara Am. Compl. p. 3, Scheerle Am. Compl. p. 4). Appellants returned King to a position where she had control over vulnerable and helpless residents despite the abuse history. (O'Meara Am. Compl. p. 5, Scheerle Am. Compl. pp. 6-7). The Beaufort County Sheriff's Department charged King with elder abuse on Mrs. O'Meara, Mrs. Scheerle, and Mrs. Pruett. King pled guilty to elder abuse under the South Carolina Omnibus Adult Protection Act and was sentenced to prison.

On December 31, 2010, Mrs. O'Meara, a ninety-three-year-old woman residing in Appellants' facility, was confined to a wheelchair, and suffered from Alzheimer's Disease and progressive dementia. (O'Meara Am. Compl. p. 2). At approximately 4:30 a.m., Appellants' employee slapped Mrs. O'Meara while attempting to force medication down her throat. (O'Meara Am. Compl. p. 2). Mrs. O'Meara was struck with such force that her nose bled and her face was severely bruised. *Id.* King then verbally abused Mrs. O'Meara, and threatened to force Mrs. O'Meara to smell her own feces. *Id.*

On December 31, 2010, Mrs. Pruett was a seventy-eight-year-old woman residing in Appellants' facility who suffered from Alzheimer's Disease and progressive dementia. Early that morning, King jerked Mrs. Pruett out of bed by her arms and undressed her. (Pruett Am. Compl. p. 3). Appellants' employee then put toothpaste on a washcloth and

proceeded to "wash" Mrs. Pruett's vaginal area with toothpaste. *Id.* King verbally abused Mrs. Pruett and threatened to "choke her out" if Mrs. Pruett tried to stop her from "washing" with toothpaste. *Id.* Mrs. Pruett's condition deteriorated following the abuse, and she died on May 30, 2012. (Pruett Am. Compl. p. 1).

On December 31, 2010, Mrs. Scheerle was a seventy-year-old mentally and physically incapacitated woman suffering from Alzheimer's Disease and progressive dementia. Early that morning, King hit Mrs. Scheerle on the right side of her face and nose, causing visible trauma. (Scheerle Am. Compl. p. 2). Mrs. Scheerle was verbally abused and frightened; Appellants' employee told Mrs. Scheerle she was crazy and to "shut up." *Id.* at 3. Mrs. Scheerle died on February 13, 2013, during the pendency of this appeal.

B. The Residency Agreements

Appellants required Mrs. O'Meara, Mrs. Pruett, and Mrs. Scheerle to enter into a Residency Agreement as a condition of entering the Carolina House assisted living facility. Mrs. O'Meara's and Mrs. Pruett's Residency Agreements are identical. Mrs. Scheerle's Residency Agreement is different only in that it specifies that South Carolina civil procedure and evidence rules apply and includes a few word changes.

The provision at issue on appeal is titled "Arbitration and Limitation of Liability Provision." The Provision reads the same in all three Agreements and is approximately five pages long and begins in the middle of the Residency Agreement. (O'Meara and Pruett Residency Agreement p. 11, Scheerle p. 7). The Arbitration and Limitation of Liability Provision contains three subsections. The first is an "Arbitration Provision." (O'Meara and Pruett Residency Agreement p. 11, Scheerle p. 7). The second is a "Limitation of Liability Provision." (O'Meara and Pruett Residency Agreement p. 14,

Scheerle p. 9). The third is a "Benefits of Arbitration and Limitation of Liability Provision." (O'Meara and Pruett Residency Agreement p. 15, Scheerle p. 10). Each page in the Residency Agreements states "SC-Carolina House of Hilton Head" in the bottom left corner.

The Arbitration and Limitation of Liability Provision begins with a sentence that anticipates its invalidity: "Should any of subsections A, B, or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected." (O'Meara and Pruett Residency Agreement p. 11, Scheerle p. 7). Portions of the Arbitration and Limitation of Liability Provision critical to the appeal are as follows:

1. Arbitration, Subsection A

The scope of the Arbitration Provision, Subsection A, reads in part as follows:

> 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 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 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.[2]

(O'Meara and Pruett Residency Agreement p. 11, Scheerle p. 7). The Arbitration Provision acknowledges that South Carolina law applies by specifying "nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory

[2] This quotation is from the O'Meara and Pruett Residency Agreements. The Scheerle Agreement uses the word "your" instead of "Resident" and "Community" instead of "Company." (Scheerle Residency Agreement p. 7).

grievance or mediation procedure." (O'Meara and Pruett Residency Agreement p. 11, Scheerle p. 7).

The Arbitration Provision subsection includes significant limitations on discovery and procedure. (O'Meara and Pruett Residency Agreement pp. 12-14, Scheerle pp. 7-9). Although the Residency Agreements reference the Federal and South Carolina Rules of Civil Procedure, the Arbitration Provision does not allow for such procedural rights, and instead prohibits depositions of all witnesses except experts, shortens the time period to provide written discovery responses to twenty days from the date of the demand for arbitration, allows the use of recorded statements without the ability to question the witness providing the statement, requires arbitration within a one-hundred-and-eighty-day period from the date of the demand for arbitration, and denies the right to appeal the arbitrator's decision. (O'Meara and Pruett Residency Agreement pp. 12-13, Scheerle pp. 8-9). The arbitration proceedings are entirely confidential, including party names, the name and location of Appellant's facility, the result and award amount, and all documents. (O'Meara and Pruett Residency Agreement p. 14, Scheerle p. 9). In addition, there is no right to recover attorneys' fees and costs, even where allowed by statute.

2. Limitation of Liability, Subsection B

The Limitation of Liability Provision, Subsection B, which is specifically made a part of the Arbitration Provision, Subsection A, denies altogether or severely limits recoverable damages.[3] A party may seek economic damages but such damages are offset

[3] The Arbitration Provision subsection states "The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision." (O'Meara and Pruett Residency Agreement p. 13, Scheerle p. 9).

by collateral source payments and the provision imposes a cap of $250,000.00 for noneconomic damages such as pain and suffering. (O'Meara and Pruett Residency Agreement p. 14, Scheerle p. 9). A party may not seek a multiplier of economic damages, such as those allowed by the South Carolina Unfair Trade Practices Act, or any amount beyond $250,000 in noneconomic damages, regardless of Appellants' conduct or the nature of the injury suffered. *Id.* An injured party is denied punitive damages, regardless of the nature of Appellants' conduct or whether punitive damages are permitted pursuant to law or statute. *Id.*

3. Claimed Benefits of Arbitration and Limitation of Liability Provision, Subsection C

The Arbitration and Limitation of Liability Provision, Subsection C, enumerates the supposed benefits of arbitration. It states that one such "benefit" is that it limits Appellants' liability.

> The parties' decision to select arbitration and to agree to a limitation of liability also are supported by the potential benefit of preserving the availability, viability, and insurability of an assisted living company for the elderly and disabled in South Carolina, by limiting such assisted living company's exposure to liability.

(O'Meara and Pruett Residency Agreement p. 15, Scheerle p. 10). Although the language claims that the parties have decided to "select arbitration", it is undisputed that Appellants presented the Respondents with a Residency Agreement that Appellants wrote, and the Respondents were required to sign the document as a condition of admission to Appellants' facility.

4. Execution of the Residency Agreements

Due to the Respondents' medical conditions, which precipitated their decisions to seek the specialized care Appellants promised, a family member signed the Residency Agreement for each Respondent.

Mrs. O'Meara's daughter, Julie Stanton, signed the Residency Agreement as the Responsible Party for Mrs. O'Meara. (O'Meara Residency Agreement p. 19). Mrs. Stanton, however, was not attorney-in-fact for Mrs. O'Meara; she held only Mrs. O'Meara's durable health care power of attorney. (Exhibit 1 to O'Meara Memo. in Opp. To Def.'s Mot. to Dismiss and Compel Arbitration). Mrs. Pruett's husband, Samuel H. Pruett, signed the Residency Agreement as her Responsible Party. (Pruett Residency Agreement p. 28). Mrs. Scheerle's daughter, Julie Jones, signed the Residency Agreement as her Responsible Party. (Scheerle Residency Agreement p. 13). At the time Ms. Jones signed the Residency Agreement, Ms. Jones was not Mrs. Scheerle's attorney-in-fact. (Scheerle Order p. 4).

5. Provisions Invoking South Carolina Law and Acknowledging Services Provided in South Carolina

The Residency Agreements contain numerous provisions invoking South Carolina law and benefits, including the following:

- The Resident must "acknowledge that the Company is licensed by the State of South Carolina as a Community Residential Care Facility." (O'Meara and Pruett Residency Agreement p. 7, Scheerle p. 4).

- The Resident must send a demand for arbitration to Greenville, South Carolina. (O'Meara and Pruett Residency Agreement p. 11, Scheerle p. 7).

- The arbitrator "must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar." (O'Meara and Pruett Residency Agreement p. 12, Scheerle p. 7).

- The Scheerle Residency Agreement provides that the "South Carolina Revised Code concerning arbitration shall govern the procedure," and the South Carolina Rules of Civil Procedure and Evidence apply. (Scheerle Residency Agreement pp. 7-9).

- Each page of each Residency Agreement states "SC-Carolina House of Hilton Head" in the bottom left corner.

The services the Respondents agreed to pay for were all to occur in South Carolina. The services included accommodations; daily meals; utility services; housekeeping; laundry; a life enrichment program of social, educational, and recreational programs at the facility; twenty-four hour staffing; transportation within a ten-mile, in-state radius; and a personal service plan for activities such as help dressing and using the restroom that are specific to each resident. (O'Meara and Pruett Residency Agreement pp. 3-4 and 20-21, Scheerle pp. 1-2).

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) (internal quotation marks and citation omitted). "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law. In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998) (internal citation omitted).

ARGUMENTS

The circuit court was correct in holding that the Arbitration and Limitation of Liability Provision is unenforceable on numerous grounds and the evidence and law fully

supports the court's ruling. Appellants conceded at the hearing on Appellants' Motion to Dismiss and Compel Arbitration that the Arbitration and Limitation of Liability Provision in the Residency Agreement is not enforceable under the South Carolina Uniform Arbitration Act (the "South Carolina Act").[4] (O'Meara, Pruett, and Scheerle Orders p. 2). Nevertheless, Appellants attempted to circumvent South Carolina law, despite invoking South Carolina law throughout the Residency Agreement for its benefit, by arguing the Arbitration and Limitation of Liability Provision is enforceable under the Federal Arbitration Act ("FAA"). The argument is without merit because the transaction between Appellants and the Respondents for care in South Carolina did not involve interstate commerce as to the agreement between the parties and, therefore, did not invoke the FAA. Moreover, the Arbitration and Limitation of Liability Provision is unenforceable for additional, independent reasons: (1) the Arbitration and Limitation of Liability Provision is an unconscionable contract of adhesion and thus unenforceable; (2) Appellants' illegal and outrageous acts could not have been reasonably foreseen at the time the parties executed the Residency Agreements, thus defeating the provision; and (3) no person with legal authority signed the Residency Agreements for Mrs. O'Meara or Mrs. Scheerle. For all of these reasons and any other in the record, this Court should affirm the decision of the circuit court and refuse to enforce the Arbitration and Limitation of Liability Provision as to the Respondents. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

[4] *See* S.C. Code Ann. § 15-48-10(b)(4) (2005) ("This chapter however shall not apply to: . . . (4) Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract.").

I. THE ARBITRATION AND LIMITATION OF LIABILITY PROVISION IS UNCONSCIONABLE AND THUS UNENFORCEABLE

The Arbitration and Limitation of Liability Provision is unenforceable because the Provision is unconscionable under South Carolina law. This determination renders moot any analysis under the FAA or any other argument Appellants assert for enforcement of the Provision.

A. The Arbitration and Limitation of Liability Provision is Unconscionable under South Carolina Law

The circuit court correctly held the Arbitration and Limitation of Liability Provision is unconscionable. An unconscionable arbitration provision is invalid and unenforceable regardless of whether it falls under the FAA or the South Carolina Act. *See* 9 U.S.C. § 2 (2011) (stating an arbitration provision within the FAA "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*" (emphasis added)); S.C. Code Ann. § 15-48-10(a) (stating an arbitration provision falling within the South Carolina Act "is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract"). Unconscionability is a ground concerning the validity, revocability, and enforceability of a contract. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007).

The Arbitration and Limitation of Liability Provision is unconscionable for a number of reasons. The provision is one-sided with terms that favor only Appellants and are oppressive to the Respondents' rights so that an informed person with a meaningful choice would not agree to such terms and the provision deprives the Respondents of their rights under law and good conscience.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. "In analyzing claims of unconscionability in the context of arbitration agreements, . . . [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." 373 S.C. at 25, 644 S.E.2d at 668-69 (internal citation omitted).

1. The Respondents Lacked a Meaningful Choice Because the Arbitration and Limitation of Liability Provision is a Contract of Adhesion, Contrary to Fundamental Fairness

The terms of the Arbitration and Limitation of Liability Provision, drafted by Appellants, plainly state that a potential resident may either agree to the provision or go elsewhere. Therefore, not only is the Residency Agreement a contract of adhesion but the Respondents lacked any meaningful choice as to the terms set forth in the Arbitration and Limitation of Liability Provision.

"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." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. To determine whether a contract lacks meaningful choice, courts "take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.*

In *Simpson*, the Supreme Court found an arbitration provision in an automobile trade-in contract between a dealership and consumer was unconscionable and, therefore, unenforceable. 373 S.C. at 19, 644 S.E.2d at 665-66. The plaintiff filed suit against the dealer for violations of the South Carolina Unfair Trade Practices Act and the South Carolina Manufacturers, Distributors, and Dealers Act. 373 S.C. at 21, 644 S.E.2d at 666. The parties admitted the contract was one of adhesion. 373 S.C. at 27, 644 S.E.2d at 669. The Court in *Simpson*, looked to Ohio cases for the principle that a vehicle is a "necessity" and "critically important in modern day society," such that the contract between a dealer and a customer is subject to "considerable skepticism." 373 S.C. at 669-70, 644 S.E.2d at 26-27 (internal quotation marks omitted). The Court cited the following further evidence that there was an absence of meaningful choice: the plaintiff "did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter," the plaintiff's "allegation that the contract was 'hastily' presented for her signature," and the fact that the arbitration provision was "inconspicuous." 373 S.C. at 27-28, 644 S.E.2d at 670.

In this case, the Residency Agreement and Arbitration and Limitation of Liability Provision within it are subject to a greater scrutiny than the contract in *Simpson*. Receiving a safe living environment and proper medical care for vulnerable adults are more of a "necessity" and "critically important in modern day society," than transportation. Therefore, a contract between an assisted living facility and a potential resident should be subject to greater than "considerable skepticism."

The Respondents were given no opportunity to bargain for the terms of the contract and the process was fundamentally unfair. The Respondents were given no meaningful choice; each had to either sign the contract written by Appellants or they could not enter the facility. Appellants attempt to claim that the following sentence from the Arbitration and Limitation of Liability Provision provided a meaningful choice: "The Resident . . . understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision." (Appellants' Initial Br. pp. 3-4, 18-19). This is not a "meaningful choice"; there is no evidence that the Respondents could engage in a bargaining process over the inclusion of oppressive and unfair terms in the Arbitration and Limitation of Liability Provision. Rather, the language is simply a directive that each Respondent either sign the Residency Agreement with the Arbitration and Limitation of Liability Provision as presented or go to another facility.[5] The terms written by Appellants gave the Respondents no bargaining power; they were forced to sign the unconscionable provision or attempt to find another facility that offered care for Alzheimer's disease and dementia. As the nation's largest owner and operator of senior living communities in the United States, Appellants are well aware of and well versed in arbitration and limitation provisions in residency agreements. Appellants' status proves the relative disparity in the parties' bargaining power, which is obvious. The sophisticated parties were Appellants; the parties who lacked knowledge or

[5] Appellants' statement in their brief that "The Respondents never voiced a concern over the provision at the time of signing" is not supported by any evidence in the Record and should not be considered by this Court. (Appellants' Initial Br. p. 25). Regardless, the terms of the Arbitration and Limitation of Liability Provision, drafted by Appellants, do not invite the Respondents to change any terms, rather, it means that the Respondents either agree to the provisions as presented or go to another facility. It does not allow the voicing of any concern because this is an either/or contract. Furthermore, the Respondents were not in any physical or mental state to negotiate contract language.

power were the Respondents who suffered from Alzheimer's disease and needed immediate care for their most basic needs.

In further determining whether the Respondents had a meaningful choice, the Court will take into account not only the absence of a meaningful choice and the negative disparity in the parties bargaining power, but will also consider the nature of the injuries suffered. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. These cases involve severe injuries suffered by the Respondents as a result of abuse at the hands of Appellants' employees. It cannot be disputed that Appellants placed its employee, known to have earlier abused patients, in a position to harm the ill and helpless Respondents. The Respondents were entrusted to Appellants because Appellants advertised and pledged to provide specialized care. Rather than receiving care, the Respondents were violated.

2. The Self-Serving Terms of the Arbitration and Limitation Provision are Oppressive and One-Sided

The terms of the Arbitration and Limitation of Liability Provision, drafted by Appellants, are so oppressive and fundamentally unfair that no reasonable person would insist on such terms and no fair and honest person would knowingly accept them. The circuit court correctly found the Arbitration and Limitation of Liability Provision "significantly restrict[s] discovery, limit[s] compensatory damages, and prohibit[s] punitive damages." (O'Meara, Pruett, and Scheerle Orders p. 3).

In *Simpson*, the South Carolina Supreme Court concluded an arbitration provision violated public policy and was "oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker" because it prohibited the arbitrator from awarding punitive, exemplary, double, or treble damages, which prevented the plaintiff "from receiving the mandatory statutory remedies to which she may be entitled

in her underlying SCUTPA and Dealers Act claims." 373 S.C. at 28-30, 644 S.E.2d at 670-71.

Just as in *Simpson*, the terms dictated by Appellants in the Arbitration and Limitation of Liability Provision severely limit every category of recoverable damages by prohibiting an arbitrator from awarding punitive, exemplary or treble damages under the SCUTPA, or any other damages above a very low cap. These limitations are particularly egregious given the admitted abuse in these cases. The Respondents seek actual and punitive damages for gross negligence, corporate negligence, negligent supervision, intentional infliction of emotional distress, wrongful death, survival, and a violation of the SCUTPA which allows for treble damages.[6] The Arbitration and Limitation of Liability Provision prohibits an award of any damages, regardless of the nature of Appellants' conduct, except actual net economic damages (after deducting collateral source payments) and $250,000 in noneconomic damages. Such limits are not only oppressive and one-sided, meant only to protect Appellants regardless of its conduct, but are grossly unreasonable and unfair and against public policy.

First, the net economic damages limitation violates the South Carolina collateral source rule because it requires that the Respondents' damages be "offset by any collateral source payments such as payments made by medical insurance." (O'Meara and Pruett Residency Agreements p. 14, Scheerle p. 9). *See Johnston v. Aiken Auto Parts*, 311 S.C. 285, 286, 428 S.E.2d 737, 738 (Ct. App. 1993) ("Under the 'collateral source rule,' a

[6] S.C. Code Ann. § 39-5-140(a) (1976) ("If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of section 39-5-20, the court *shall* award three times the actual damages sustained and may provide such other relief as it deems necessary or proper." (emphasis added)).

tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from a source wholly independent of the wrongdoer."). Second, the limitation allowing only the defined net economic damages and $250,000 in noneconomic damages denies the Respondents the right to treble damages under the SCUTPA. *See Simpson*, 373 S.C. at 30, 644 S.E.2d at 671 (holding a prohibition on awarding treble damages violated public policy and was oppressive because it prevented the plaintiff from recovering "mandatory statutory remedies to which she may be entitled in her underlying SCUTPA" claim). Third, and most importantly, the limitations protect Appellants and deprive the Respondents of their rights even where the most violent abuse occurs, even if it directly results in death. It cannot be argued in good conscience that were Appellants to kill a resident in cold blood, the resident's survivors would be limited to a recovery of only $250,000.

Appellants' defense of these unconscionable limitations is to simply say that the Respondents signed the contract. This, in and of itself, demonstrates the indefensibility of the oppressive and unfair terms, and provides additional support for the circuit court's ruling. Appellants have no sound basis to argue that the limitations should be upheld; indeed, the contract language anticipates the invalidity of the damage limitations and prohibitions. The final sentence of the damages subsection states: "Should sub-sections a, b, c, and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected." (O'Meara and Pruett Residency Agreement p. 15, Scheerle p. 10). The circuit court correctly found these damage limitations and prohibitions "are substantively unconscionable and violate public policy." (Pruett Order pp. 3-4, O'Meara and Scheerle p. 4).

Appellants argue for the first time on appeal that the damages limitations are "found in a provision in the Residency Agreements separate from the arbitration provision" and therefore the inadequacy of the limitations should be decided by an arbitrator. (Appellants' Initial Br. p. 27). First, this issue was not raised to the circuit court and cannot be considered on appeal. *Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 406, 714 S.E.2d 904, 916 (Ct. App. 2011) (internal quotation marks omitted) ("An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the circuit court to be preserved."). If it were to be considered, the argument is wrong. Appellants concede the error of their own argument by admitting the limitation of liability subsection is "incorporated by reference" into the Arbitration Provision subsection. (Appellants' Initial Br. p. 27). Appellants further represent to this Court that subsections B and C "are subsections regarding arbitration procedures" and that "[t]he arbitration provision . . . takes up five pages", including all three subsections of the Arbitration and Limitation of Liability Provision. (Appellants' Initial Br. pp. 5-6). Therefore, the inequitable language drafted by Appellants does not allow an arbitrator to find the damages limitations inadequate because the limits are part of the Arbitration Provision subsection. The circuit court correctly ruled that the damages limitations are not only inadequate, but contrary to law, unconscionable and thus, unenforceable, and the holding should be upheld.

In addition to the unenforceable damages limitations, which are contrary to public policy and good conscience, the Arbitration and Limitation of Liability Provision mandates oppressive, one-sided, unreasonable, and unfair procedure. The terms mandate

that only expert witnesses may be deposed.[7] The Respondents are required to designate their experts, and Appellants depose them, before Appellants need designate their experts. Not only does this provision restrict discovery but it applies unequally to the parties because Appellants have the advantage of knowing the identity of and deposing the Respondents' experts before even designating their own experts. In addition, discovery must be provided within twenty days of the demand for arbitration, shortening the time for written discovery provided by the Federal and South Carolina Rules of Civil Procedure. Furthermore, no appeal may be taken from the arbitrator's decision. (O'Meara and Pruett Residency Agreement p. 13, Scheerle p. 9). Both the South Carolina Act and the FAA provide for appeals of an arbitrator's decision. 9 U.S.C. § 16 (2011); S.C. Code Ann. § 15-48-200 (2005). Additionally, use of recorded statements is allowed, but without the ability to cross examine the witnesses. *See State ex rel. Medlock v. Nest Egg Soc. Today, Inc.*, 290 S.C. 124, 131, 348 S.E.2d 381, 385 (Ct. App. 1986) ("Although the constitutional right to confrontation of witnesses has traditionally been limited to criminal prosecutions, our Supreme Court has also expressed disapproval of 'trial by affidavit' in the civil context.")

These limitations and prohibitions unfairly prejudice the party with the burden of proof yet weaker bargaining power – the resident who suffers harm at the facility. Abused residents such as the Respondents cannot depose Appellants' employees to learn what facts they know, including other incidents of abuse and knowledge of abuse by

[7] Appellants assert in Footnote 7 of their Brief that the Respondents' argument against limited depositions as unconscionable is not ripe because Appellants could agree to modify that term. (Appellants' Initial Br. p. 22 n.7). This statement is disingenuous at best. There is no evidence that Appellants offered to "modify" this or any other term of the Residency Agreement at the time of signing.

persons in managerial positions at the facility, while Appellants, who have exclusive knowledge of issues pertaining to other abuse and the facility's failure to respond or take reasonable steps to protect the vulnerable residents in their care, may conduct any investigation they choose, without revealing negative information to the Respondents. Appellants' expert could rely on only favorable employee statements written by management and the Respondents would be precluded from deposing the employees or otherwise obtaining evidence unfavorable to Appellants. The Appellants' Arbitration and Limitation of Liability Provision is clearly not "geared towards achieving an unbiased decision by a neutral decision-maker" but rather a cheap, biased and unfair resolution in Appellants' favor. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

3. The Arbitration and Limitation of Liability Provision is Against Public Policy

It is the public policy of South Carolina, as expressed by the legislature and our courts, to protect vulnerable adults such as the Respondents. " . . . South Carolina's General Assembly enacted the Omnibus Adult Protection Act . . . to protect vulnerable adults from abuse, neglect, and exploitation." *Williams v. Watkins*, 379 S.C. 530, 534, 665 S.E.2d 243, 245 (Ct. App. 2008). "The purpose of the [Omnibus Adult Protection] Act was to: address the continuing needs of vulnerable adults; define abuse, neglect, and exploitation in a uniform manner, without regard to setting; . . . define the court's role in adult protection; and provide civil and criminal penalties to perpetrators of the abuse, neglect, or exploitation of vulnerable adults." 379 S.C. at 534 n.3, 665 S.E.2d at 245 n.3. "It is axiomatic that freedom of contract is subordinate to public policy, and agreements that are contrary to public policy are illegal." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 480 (2012) (internal quotation marks omitted).

The Omnibus Adult Protection Act covers an expansive amount of conduct which could affect vulnerable adults and evidences an intent to punish and deter conduct such as that committed by Appellants. The Act imposes mandatory criminal penalties for abuse, neglect, and exploitation of vulnerable adults; requires reporting by a person who reasonably believes a vulnerable adult has been or is likely to be abused; provides immunity for good faith reporting; prohibits employers from changing an employee's status for reporting or cooperating with an abuse investigation; and even abrogates the privilege for communications between husband and wife and a professional and a patient. S.C. Code Ann. §§ 43-35-85, -25, -75, -50 (Supp. 2012).

The Arbitration and Limitation of Liability Provision in Appellants' contract violates the public policy of South Carolina to protect vulnerable adults from abuse, neglect, and exploitation. The provision is a contract of adhesion presented to families and vulnerable adults in a time of need with unfair terms. The ability of parties to contract is subordinate to public policy and, in this case, the Arbitration and Limitation of Liability Provision violates public policy and should not be enforced.

B. The Issue of Whether the Arbitration and Limitation of Liability Provision is Unconscionable was Ruled Upon and Preserved

Appellants attempt to assert that the issue of the unconscionability of the Arbitration and Limitation of Liability Provision is not ripe, claiming that the Respondents did not raise the issue to the circuit court. (Appellants' Initial Br. pp. 15-17). This is wholly incorrect; the issue of unconscionability was squarely before the lower court and ruled upon. The Order of the circuit court plainly states: "Plaintiff opposed enforcement of the arbitration clause found in the Residency Agreement on four grounds: . . . (3) the arbitration and limitation of liability clauses contained in the

Residency Agreement *are unconscionable* . . . ." (O'Meara and Pruett Order pp. 1-2, Scheerle p. 1) (emphasis added).

Furthermore, Appellants' argument that the issue is not ripe cannot be considered because Appellants did not argue ripeness or preservation to the circuit court, did not raise it in their motions to reconsider, and the circuit court therefore did not rule on Appellants' ripeness issue. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.") (internal quotation marks omitted)).

If this Court were to consider Appellants' ripeness argument, it is without merit. Appellants cite *Carolina Care Plan, Inc. v. United Healthcare Svcs., Inc.,* 361 S.C. 544, 606 S.E.2d 752 (2004), but that case does not support Appellants' position. The procedural history in *Carolina Care Plan* was unusual. The plaintiff filed an amended complaint to include a cause of action for unconscionability after the defendant moved to compel arbitration. 361 S.C. at 548-49, 606 S.E.2d at 754-55. The defendant then filed a Rule 12(b)(6), SCRCP, motion to dismiss the unconscionability cause of action. 361 S.C. at 549, 606 S.E.2d at 754. Here, there was no reason for or requirement that the Respondents claim unconscionability in their complaints. The Respondents were not invoking the Arbitration Provision or asserting a claim of breach of contract. Rather, the Respondents properly and timely argued the Arbitration and Limitation of Liability Provision was unconscionable in response to Appellants' motion to compel arbitration and the circuit court correctly ruled that the Provision is unconscionable. Moreover, *Carolina Care Plan* is inapplicable in the instant case because the Respondents have

claims for punitive damages that do not fall under the SCUTPA. The Respondents seek punitive damages under negligence and intentional infliction of emotional distress causes of action. (O'Meara Am. Compl. pp. 5-6, Pruett Am. Compl. pp. 7-10, Scheerle Am. Compl. pp. 6-7, 13).

In short, the Respondents' assertion of unconscionability of the Arbitration and Limitation of Liability Provision was raised to the court below and ruled upon and thus is ripe and preserved for this Court's review. Appellants' claim that the issue is not ripe but may be later raised by the Respondents and argued after arbitration is again meritless. Appellants' Arbitration and Limitation of Liability Provision prohibits appeal, mandating a final and binding arbitrator's decision. Regardless, Appellants failed to raise the issue below and it is not preserved for appeal.

C. The Arbitration and Limitation of Liability Provision is Not Severable

The circuit court correctly denied Appellants' request in their motions to reconsider to sever any unconscionable portions of the Arbitration and Limitation of Liability Provision. Appellants have attempted throughout this case and in its brief to twist the language of the subsections of the Arbitration and Limitation of Liability Provision to separate them in a way beneficial to Appellants. This cannot be done. At issue in this appeal is the entire "Arbitration and Limitation of Liability Provision", including Subsections A, B and C. Appellants' assertion that any of the subsections of the Arbitration and Limitation of Liability Provision may stand alone is contrary to law; contracts must be read as a whole. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause.").

Appellants cite to *Simpson* to support their contention that this Court should sever any unconscionable portions of the Arbitration and Limitation of Liability Provision and even rewrite the contract. *Simpson*, in fact, provides to the contrary. The Supreme Court in *Simpson* refused to sever or rewrite the arbitration provision at issue. 373 S.C. at 34-35, 644 S.E.2d at 674. The Supreme Court began its analysis by noting that the terms of the contract at issue "anticipated just such a scenario" in which the drafter would seek severance. 373 S.C. at 33, 644 S.E.2d at 673.

"If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." 373 S.C. at 34, 644 S.E.2d at 673 (internal quotation marks omitted).

> [T]he arbitration clause in the adhesion contract between Simpson and Addy is wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.

373 S.C. at 34-35, 644 S.E.2d at 674.

The same result, refusing to rewrite the contract by severing multiple unenforceable provisions, is warranted in this case. The Arbitration and Limitation of Liability Provision is wholly unconscionable and thus unenforceable. Appellants should not be able to draft an unconscionable adhesion contract and then attempt to band-aid it with severability clauses, allowing them to benefit from language limiting the Respondents' fundamental rights. Furthermore, Appellants offer no suggestions or

alternatives as to how an arbitration would be workable without offensive provisions or what terms this Court should substitute. Appellants failed to write a fair and enforceable contract and the Respondents request that this Court refuse to sever or rewrite any parts of the Arbitration and Limitation of Liability Provision and instead uphold the circuit court in finding the entire Provision unenforceable.

II. THE ARBITRATION AND LIMITATION OF LIABILITY PROVISION IS NOT ENFORCEABLE UNDER THE FEDERAL ARBITRATION ACT

Although Appellants concede the Arbitration and Limitation of Liability Provision does not comply with the South Carolina Act, Appellants claim the South Carolina Act is preempted by the FAA. Appellants have the burden to prove the FAA applies and Appellants cannot do so. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, *2 (D.S.C. Dec. 15, 2011) ("A court shall compel arbitration pursuant to the FAA if a party demonstrates . . . ."). In this case, the circuit court correctly held the FAA does not apply to the Arbitration and Limitation of Liability Provision because the transaction between Appellants and the Respondents does not involve interstate commerce.

A. The Contract for Personal Services in South Carolina Does Not Involve Interstate Commerce as its Essential Character

It cannot be disputed that the essential character of the transaction between Appellants and the Respondents was a contract for personal health care services in South Carolina. The transaction was purely intrastate. Each Respondent agreed to pay Appellants to reside in a specific care facility in Hilton Head Island, South Carolina, and

to receive residential and medical care in that South Carolina facility provided by employees and agents of Appellants working in South Carolina.

"[T]he FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316 (internal quotation marks omitted). "[W]hether a transaction involves interstate commerce depends on the facts of the case." *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Bradley*, 398 S.C. at 455, 730 S.E.2d at 316 (internal quotation marks omitted). "Our courts consistently look to the ***essential character of the contract*** when applying the FAA." *Id.* (internal quotation marks omitted) (emphasis added).

In thirteen opinions since 1977, our South Carolina courts have substantively addressed whether a transaction involved interstate commerce.[8] In ten of those opinions, none of which addressed transactions similar to the one between Appellants and the Respondents, our courts found the transaction did involve interstate commerce.[9] *See,*

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[8] *See Bradley*, 398 S.C. at 455-59, 730 S.E.2d at 316-18; *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590-95, 553 S.E.2d 110, 115-18 (2001); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363-64 (2001); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 460-61, 476 S.E.2d 149, 152-53 (1996); *Mathews v. Fluor Corp.*, 312 S.C. 404, 407-08, 440 S.E.2d 880, 881-82 (1994) (overruled in part by *Munoz*, 343 S.C. at 539 n.3, 542 S.E.2d at 363 n.3); *Timms v. Greene*, 310 S.C. 469, 472-73, 427 S.E.2d 642, 644 (1993); *Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 638-40, 239 S.E.2d 647, 650-52 (1977); *Lucey v. Meyer*, 401 S.C. 122, 133-39, 736 S.E.2d 274, 280-83 (Ct. App. 2012); *Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 95-100, 592 S.E.2d 50, 51-54 (Ct. App. 2003); *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 361 n.2, 577 S.E.2d 482, 486 n.2 (Ct. App. 2003); *Blanton v. Stathos*, 351 S.C. 534, 539-41, 570 S.E.2d 565, 568-69 (Ct. App. 2002); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 35-36, 524 S.E.2d 839, 843 (Ct. App. 1999); *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 430-32, 343 S.E.2d 45, 46-47 (Ct. App. 1986).

[9] *Zabinski*, 346 S.C. at 595-96, 553 S.E.2d at 117-18; *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364; *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 152; *Episcopal Housing Corp.*, 269 S.C. at

e.g., *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117 ("The heart of the transaction in this case is the sale and development of real property on Hilton Head Island." (emphasis added)); *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 461, 476 S.E.2d 449, 152-53 (addressing a transaction in which "the object of the contract . . . was the removal and disposal of water and sludge materials located on property situated in South Carolina" to a North Carolina facility (emphasis added)); and *Thornton*, 357 S.C. at 97-98, 592 S.E.2d at 53 (addressing a physician recruiting agreement requiring a physician to move from Michigan to South Carolina).

The only case addressing whether a transaction involved interstate commerce with a transaction similar to the one at issue is *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993), and in that case, the Supreme Court squarely found the FAA did not apply. The circuit court below relied on *Timms* in its finding that the transaction between Appellants and the Respondents did not involve interstate commerce.[10] (O'Meara, Pruett, and Scheerle Orders pp. 2-3).

640, 239 S.E.2d at 652; *Lucey*, 401 S.C. at 138-39, 736 S.E.2d at 283; *Thornton*, 357 S.C. at 99-100, 592 S.E.2d at 54-55; *McMillan*, 353 S.C. at 361 n.2, 577 S.E.2d at 486 n.2; *Blanton*, 351 S.C. at 541, 570 S.E.2d at 568-69; *Towles*, 338 S.C. at 36, 524 S.E.2d at 843; *Circle S. Enters.*, 288 S.C. at 431-32, 343 S.E.2d at 47.

[10] Appellants cite an opinion of the United States District Court for the District of South Carolina as one in which a nursing home transaction involved interstate commerce. *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 WL 6318575 (D.S.C. 2011). The *McCutcheon* case, however, is fully distinguishable from the Respondents' cases (and all South Carolina appellate court cases addressing whether a transaction involves interstate commerce) because, in *McCutcheon*, the arbitration provision specifically stated: "The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act . . . ." 2011 WL 6318575 at *1. The District Court did not apply the precedent in *Timms* to the transaction because it found the case distinguishable due solely to the inclusion of the cited language in the arbitration provision. 2011 WL 6318575 at *5 ("*Timms* is distinguishable from the present case, because the Arbitration Agreement signed by plaintiff specifically stated the underlying transaction involves

In *Timms*, the plaintiff brought suit against a nursing home for "injuries to her head and ears which she alleged occurred while left unattended under a hair dryer" at the nursing home. 310 S.C. at 470, 427 S.E.2d at 642. The nursing home sought to compel arbitration based on an arbitration provision in a residency agreement. 310 S.C. at 470-71, 427 S.E.2d at 642-43. The nursing home argued the transaction for patient-residential services involved interstate commerce based on an affidavit averring the nursing home:

1. is a division of National HealthCorp, L.P., a Delaware Limited Partnership;
2. markets its services to persons residing outside this State;
3. hires employees from outside the State;
4. purchases a majority of its goods, equipment and supplies outside the State for use at the [home]; and
5. contemplates payment in part by Medicare or Medicaid.

310 S.C. at 473, 427 S.E.2d at 644.

The Supreme Court rejected these matters as insufficient to prove the transaction involved interstate commerce. The Court found instead that "the contract for patient-residential service with the [home] is obscure, if not devoid, of any basis for holding that commerce was involved in the ***transaction between the parties***." 310 S.C. at 472, 427 S.E.2d at 644 (emphasis added). The Court held, although the above-listed factors "could evidence the [home]'s involvement in interstate commerce, we find that their relationship to ***the agreement between the [home] and the respondent*** is insufficient to form the basis

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interstate commerce. Thus, the Arbitration Agreement 'on its face evidences interstate commerce.'"). Of course, the Arbitration and Limited Liability Provision at issue does not specifically state that the transaction involves interstate commerce or that the Agreement shall be governed by the Federal Arbitration Act. Furthermore, the Arbitration and Limited Liability Provision is unconscionable and against public policy and thus, unenforceable.

of the contract between the parties." 310 S.C. at 473, 427 S.E.2d at 644 (emphasis added).

Two points made by the *Timms* Court are instructive in this case. First, the court specified the ***transaction between the parties*** was a "contract for patient-residential service." 310 S.C. at 472, 427 S.E.2d at 644. That is exactly what is involved in the instant matter. Second, the factors the Supreme Court rejected in *Timms* as not evidencing a transaction involving interstate commerce between the parties are the same factors as those presented by Appellants in this case.

Appellants allege the following facts as evidence that the transaction involves interstate commerce:

1. Carolina House "uses goods and materials obtained from out-of-state vendors in order to serve its residents." (Appellants' Initial Br. p. 16). The only materials Appellants allege they obtain from out-of-state are those listed in numbers two through four below.

2. Appellants "fulfills their contractual obligation" to provide residents with three daily meals and snacks "by providing food it receives from Sysco Company." (Appellants' Initial Br. p. 16).

3. Carolina House "receives its medical supplies from One Source, a Wisconsin Corporation." (Appellants' Initial Br. p. 16).

4. Carolina House received its "carpeting from a North Carolina vendor." (Appellants' Initial Br. p. 16).

5. The checks residents write to Appellant Brookdale Senior Living "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." (Appellants' Initial Br. p. 16).

6. The Residency Agreements "are between Southern Assisted Living, a North Carolina corporation, and the Respondents, who are South Carolina resident[s]." (Appellants' Initial Br. p. 16).

Considering the same list of factors (stated in a different order) argued by Appellants in this case, the *Timms* court rejected each one, holding the factors insufficient to form the ***basis of the contract between the parties***. While Appellants' facility might be involved in interstate commerce, that did not form the basis for the contract between Appellants and the Respondents. The Residency Agreements do not specify or mention any goods or materials (including snacks, medical supplies or carpeting) coming from out of state and do not state that the Respondents' payments will eventually be sent by Appellants to an out-of-state bank. Rather, the bottom left corner of every page of the Residency Agreements state "SC–Carolina House of Hilton Head," providing further evidence that both parties to the Residency Agreements were South Carolina residents: the facility and the Respondents.

Appellants assert our Supreme Court in *Timms* "may have applied a standard that is no longer applicable," arguing the Court looked only to the contract itself to determine whether the contract involved interstate commerce. (Appellants' Initial Br. p. 10). This is incorrect. The Supreme Court did not apply a standard no longer applicable and the factors the Supreme Court considered were contained in an affidavit and not simply based on the language in the contract. 310 S.C. at 473, 427 S.E.2d at 644. Additionally, *Timms* was recently cited by the South Carolina Appellate Court, describing the holding as follows: "[T]he Court reasoned that the performance of the contract, the provision of patient-resident services in South Carolina, did not require any activities in interstate commerce." *Lucey v. Meyer*, 401 S.C. 122, 134-35, 736 S.E.2d 274, 281 (Ct. App. 2012).

The *Timms* case is dispositive as to the FAA issue before this Court in the instant case. As in *Timms*, this Court should affirm the circuit court's finding that the transaction between Appellants and the Respondents was a contract for patient-residential service in South Carolina, and did not require any activities in interstate commerce. The FAA does not apply and the Arbitration and Limitation of Liability Provision is unenforceable under South Carolina law.

B. The Facts are Undisputed that Respondents Contracted for Personal Services in South Carolina

In this case, each Residency Agreement is a personal services contract whereby each Respondent paid Appellants to provide a residence to each in South Carolina and provide medical and support care at that residence in South Carolina. The allegations in the complaints relate solely to actions occurring at Appellants' Hilton Head Island, South Carolina, facility. *See Bradley*, 398 S.C. at 455, 730 S.E.2d at 316 ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." (internal quotation marks omitted)). The transaction present in this case is "confined to this state." *See Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 152-53 (holding a transaction to move waste materials from South Carolina to North Carolina was "not confined to this state" because there was a "nexus between the contract and interstate commerce"). Neither the Respondents' complaints nor the surrounding facts of these cases involve or in any way relate to the payments that the Respondents gave to Appellants and Appellants then sent to an out-of-state bank, or the snacks offered to the Respondents, the origin of the carpet

the Respondents walked on, or the medical supplies used for the Respondents' care that came from out-of-state vendors.[11]

Appellants cite three South Carolina cases in their argument that the transactions for personal care in South Carolina affects interstate commerce - *Zabinski*, 346 S.C. 580, 553 S.E.2d 110; *Munoz v. Green Tree Financial Corp.*, 343 S.C. 396, 540 S.E.2d 864 (2001); and *Soil Remediation Co.*, 323 S.C. 454, 476 S.E.2d 149. (Appellants' Initial Br. pp. 6-11). All three cases, however, involve distinguishable business transactions and in fact support the Respondents' argument that their agreements for care and residential services did not involve interstate commerce. *See Zabinski*, 346 S.C. at 595-96, 553 S.E.2d at 117-18 (holding a transaction for the sale and development of real property in South Carolina involved interstate commerce based on the similarity to construction transactions); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 (holding a transaction to finance home improvements involved interstate commerce where the South Carolina builder assigned its rights in the contract to a Delaware corporation, the agreement was prepared in Minnesota, and the loan proceeds were disbursed from a Minnesota bank); *Soil Remediation Co.*, 323 S.C. at 461, 476 S.E.2d at 152-53 (finding a transaction to move water and sludge from South Carolina to North Carolina involved interstate commerce).

In *Soil Remediation Co.*, the Supreme Court noted the defendant conceded that the "object of the contract" between the parties was to remove materials from one state to another. 323 S.C. at 461, 476 S.E.2d at 152-53. In this case, the object of the contract

[11] *See, e.g., Bradley*, 398 S.C. at 459, 730 S.E.2d at 318 (holding the use of an out-of-state financial institution in the sale of real estate did not bring the sale within interstate commerce because it "was tangential to the performance of the Agreement" and noting "if the utilization of out-of-state financing . . . was sufficient to constitute interstate commerce, then every transaction that involved these ancillary factors would be subject to the FAA").

between the parties was for the Respondents to live safely in a South Carolina assisted-living facility and receive medical care in that facility in South Carolina. The circuit court's finding that the transaction between Appellants and the Respondents does not involve interstate commerce is supported by the contract, the Complaints, and the surrounding facts. Accordingly, this Court should affirm the finding.

III. APPELLANTS' CONDUCT WAS OUTRAGEOUS, ILLEGAL AND UNFORSEEABLE, DEFEATING ENFORCEABILITY OF THE ARBITRATION AND LIMITATION OF LIABILITY PROVISION

In addition to unconscionability and unenforceability under the FAA, a third, independent basis upon which this Court should refuse to enforce the Arbitration and Limitation of Liability Provision is that Appellants' conduct was outrageous, illegal and was unforseeable. South Carolina courts have consistently refused to enforce otherwise enforceable arbitration agreements where the facts revealed "illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate." *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). Physical and emotional abuse of three elderly women suffering from Alzheimer's Disease and dementia in a residential care facility squarely satisfies the *Chassereau* case.

The reasoning behind our courts' refusal to force parties to arbitrate claims arising out of illegal and outrageous conduct is based upon the logic that a party could not have foreseen such conduct when they entered into the arbitration agreement. A reasonable person entering into an assisted living facility, or a family member making the difficult decision to move a loved one to an assisted living facility, would not reasonably contemplate that the result would be physical and verbal abuse and no reasonable or fair minded person would knowingly agree to arbitrate claims arising from illegal and

outrageous acts where their rights are severely and unfairly limited. Our courts have refused to enforce arbitration provisions based upon much less egregious conduct than is present in these cases.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Partain v. Upstate Automotive Group*, 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010) (per curiam). In *Partain*, the plaintiff-purchaser of a car alleged the defendant-seller committed a bait-and-switch by having the plaintiff test drive one car and then actually selling him a different car. 386 S.C. at 490, 689 S.E.2d at 603. The Supreme Court held the case was controlled by the illegal and outrageous acts exception based on its determination that the plaintiff "cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct." 386 S.C. at 494, 689 S.E.2d at 605.

In *Chassereau*, the plaintiff purchased an above-ground pool from the defendants and stopped paying after the defendants refused to fix the pool. 373 S.C. at 170, 644 S.E.2d at 719. Two documents executed during the sale of the pool contained arbitration provisions. *Id.* The defendants' employees began "systematically harassing" the plaintiff by repeatedly calling her at work, disclosing private information to her family, friends, and coworkers, and making false and defamatory statements about the plaintiff. *Id.* The plaintiff brought suit for defamation, intentional infliction of emotional distress, and unlawful communication. *Id.* The court on appeal refused to enforce the arbitration provisions and the Supreme Court affirmed. In affirming, the Supreme Court cited recent precedent refusing to enforce an arbitration agreement "to illegal or outrageous acts that

no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate." 373 S.C. at 172, 644 S.E.2d at 720 (citing *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007)). The Court stated "[a]lthough we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." 373 S.C. at 172, 644 S.E.2d at 720. Further, ". . . South Carolina courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen."[12] *Id.*

This Court should likewise refuse to force the Respondents to arbitrate their claims against Appellants. No reasonable person entrusting themselves or their loved one to an assisted living, health care facility would agree to arbitrate claims arising from severe physical and mental abuse. Further, no reasonable person would agree to arbitrate such claims on the terms present in this Arbitration and Limited Liability Provision, including limitations on meaningful discovery, application of collateral sources of recovery, an arbitrary limit of $250,000 in pain and suffering, and denial of punitive damages, no matter how egregious Appellants' conduct. Abuse, especially of our most vulnerable citizens, is precisely the illegal and outrageous conduct that punitive damages

[12] Since 2005, our courts have issued six opinions refusing to force parties to arbitrate actions arising out of outrageous and illegal acts. *See Partain*, 386 S.C. 488, 689 S.E.2d 602; *Chassereau*, 373 S.C. 168, 644, S.E.2d 718 (finding defendants' conduct in making harassing and intimidating phone calls to plaintiff's work place and leaving false and defamatory messages was not subject to arbitration); *Aiken*, 373 S.C. 144, 644 S.E.2d 705; *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 666 S.E.2d 294 (Ct. App. 2008); *Simpson v. World Fin. Corp. of S.C.*, 367 S.C. 184, 191, 623 S.E.2d 877, 881 (Ct. App. 2005) (finding defendant's employees' conduct in using plaintiff's personal information to illegally procure loans and embezzle funds was not subject to arbitration because it was unbelievable that plaintiff "could have foreseen the future tortious conduct of [the defendant]'s employees at the time she entered into the loan agreements"); *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 634, 611 S.E.2d 305, 308 (Ct. App. 2005) (finding defendants' conduct in making harassing and intimidating phone calls to plaintiff's work place and leaving false and defamatory messages was "tortious behavior that the parties . . . could not have reasonably foreseen and for which we seriously doubt they intended to provide a limited means of redress").

are designed to redress, both to compensate and to punish and set an example to prevent future abuse.

IV. APPELLANTS DID NOT RAISE EQUITABLE ESTOPPEL BELOW AND THE ISSUE IS NOT PRESERVED ON APPEAL

Appellants, for the first time on appeal, attempt to argue equitable estoppel as to Respondents O'Meara and Scheerle. This Court should decline to address this issue because Appellants failed to preserve the issue for review on appeal. Further, Appellants' argument is without merit because, *inter alia*, the Respondents do not assert a breach of contract claim seeking to enforce the Residency Agreement and did not receive a benefit from the Residency Agreement.

Appellants cannot raise equitable estoppel for the first time on appeal. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Herron*, 395 S.C. at 465, 719 S.E.2d at 642. "It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.* (internal quotation marks and citation omitted). Appellants did not raise this issue to the court below as to either Mrs. O'Meara or Mrs. Scheerle and cannot do so for the first time on appeal.

As to Mrs. O'Meara, Appellants argued in their Memorandum in Support of Motion to Dismiss and Compel Arbitration only that the authority of Julie Stanton to sign the Residency Agreement on behalf of her mother should be decided by an arbitrator. (O'Meara Memo. in Support of Mot. to Dismiss and Compel Arbitration pp. 8-9). The circuit court ruled on that issue, holding that the trial court was the proper forum to decide the issue. (O'Meara Order p. 4). Appellants' Motion to Reconsider argued only

that "such issues must be decided by an arbiter not a court." (O'Meara Mot. to Reconsider p. 2). Thus, equitable estoppel was never raised or ruled upon.

Appellants also failed to raise this issue as to Mrs. Scheerle. The circuit court ruled that Julie Jones did not have authority to bind her mother to arbitration and the trial court was the proper forum for that determination. (Scheerle Order at pp. 4-5). Appellants argued in their Motion to Reconsider only that the issue should be decided by an arbitrator. (Scheerle Mot. to Reconsider or, to Alter or Amend Judgment p. 2). Therefore, again, Appellants' equitable estoppel argument was not preserved because it was neither raised to nor ruled upon by the circuit court.

The circuit court correctly held that the trial court is the proper forum to determine whether Julie Jones and Julie Stanton had the authority to bind their mothers to the Arbitration and Limitation of Liability Provision in the Residency Agreement. Appellants incorrectly assert that the Respondents argued Ms. Jones and Ms. Stanton lacked authority to bind their mothers to the entire Residency Agreement. In fact, the Respondents argued only that neither woman had the authority to bind their mother to arbitration. (O'Meara Memo. in Opp. to Defendants, Brookdale Senior Living, Inc. and Southern Assisted Living, LLC's Mot. to Dismiss and Compel Arbitration pp. 1, 5; O'Meara Order pp. 2, 4; Scheerle Order pp. 1, 4-5). "[T]he determination regarding whether a valid arbitration agreement existed [i]s a 'gateway matter' that the circuit court could properly consider." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126, 713 S.E.2d 799, 804 (Ct. App. 2011). Furthermore, Appellants did not dispute or appeal the lower court's findings that Julie Stanton and Julie Jones lacked the authority to bind their respective mothers, Mrs. O'Meara and Mrs. Scheerle, to the Arbitration and Limitation of

Liability Provision. *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). Accordingly, the circuit court's ruling on this issue was correct and must be upheld.

If this Court were to consider Appellants' unpreserved argument based upon the concepts of equitable estoppel/third party beneficiary, the argument is wholly without merit. The doctrine of equitable estoppel rests on a general principle of fairness which prevents one party, with knowledge of the situation, from misleading the other by words or conduct in such a way that the other party is prejudiced.

> To establish estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. The party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.

Kelly v. Logan, Jolley, & Smith, LLP, 383 S.C. 626, 632, 682 S.E.2d 1, 7 (Ct. App. 2009) (internal citation omitted).

Appellants cannot possibly claim the Respondents, as victims of Appellants' abuse, falsely represented or concealed anything while possessing knowledge of the true facts. If anything, Appellants should be estopped from arguing the enforceability of the Arbitration and Limitation of Liability Provision where Appellants drafted the unconscionable provision and had reason to know they were placing these Respondents in harm's way.

The cases cited by Appellants are inapplicable because all are based on the premise that is absent in the matter before this Court: that a plaintiff should not be able to

invoke certain contract provisions while avoiding others. Furthermore, the cases cited by Appellants do not involve claims of abuse, do not speak to the unconscionability of the Arbitration and Limitation of Liability Provision, and do not include public policy considerations that defeat enforceability.[13] Unlike the cases cited by Appellants, these Respondents do not seek to enforce the Residency Agreement and the Court has already ruled that the Arbitration and Limitation of Liability Provision is unenforceable for numerous reasons independent of whether or not Julie Jones and Julie Stanton had authority to bind Mrs. O'Meara and Mrs. Scheerle to the Provision. A party is not estopped from challenging a contract provision as unconscionable, unenforceable under state law, or against public policy simply because the contract is signed by the party.

Appellants first cite to *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) as support for prohibiting Mrs. O'Meara and Mrs. Scheerle from challenging the Arbitration and Limitation of Liability Provision. *Pearson,* however, did not involve contracts that were grossly unconscionable and contrary to public policy, unenforceable under the Federal Arbitration Act, and the case did not include the drafter's illegal and outrageous abusive conduct.

Pearson further does not apply to the facts of these cases or the causes of action asserted by the Respondents. In *Pearson*, a medical professional placement corporation

[13] Appellants' citation to the unpublished opinion *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 WL 4089435 (D.S.C. Sept. 13, 2011) violates the South Carolina Appellate Court Rules. Rule 268(d)(2), SCACR, states "unpublished orders have *no precedential value and should not be cited* except in proceedings in which they are directly involved." (emphasis added). Accordingly, this Court should not consider the *THI* opinion and should disregard Appellants' argument related to the unpublished opinion. Should the Court consider this unpublished opinion, it is distinguishable because, in that case, plaintiff sued on the contract, did not dispute that she received a benefit, did not raise unconscionability or public policy concerns, and the arbitration provision did not contain offensive language depriving plaintiff of basic procedural rights.

and a hospital entered into a contract in which the corporation agreed to place temporary physicians at the hospital. 400 S.C. at 285, 733 S.E.2d at 599. The plaintiff doctor entered into a contract with the medical professional placement corporation and was temporarily placed at the hospital. 400 S.C. at 285-86, 733 S.E.2d at 599. Both contracts between the corporation and hospital and the corporation and the doctor contained the same arbitration provision. 400 S.C. at 286, 733 S.E.2d at 599. When the doctor sued the corporation and the hospital, the hospital sought to compel him to arbitrate. *Id.* The Court held because the doctor asserted a breach of contract claim and therefore sought damages under the contract between the corporation and hospital, and benefitted from their contract, he could not disclaim the arbitration provision. 400 S.C. at 297, 733 S.E.2d at 605.

Unlike the doctrine in *Pearson*, Respondents Mrs. O'Meara and Mrs. Scheerle have not asserted a breach of contract action, claiming benefits under the Residency Agreements. Indeed, the Respondents did not receive any benefits from the Residency Agreement. Instead, Respondents were abused at the hands of Appellants' employees and Mrs. Scheerle subsequently died. Also, the Respondents, unlike Pearson, raised the issue of unconscionability and unfair restriction on procedural and legal rights under the Arbitration and Limitation of Liability Provision in opposition to Appellants' motion to compel arbitration, which issues were ruled upon by the lower court.

The *McCutcheon* case cited by Appellants also involved a breach of contract claim wherein plaintiff invoked the contract as a basis for recovery, and the case is thus distinguishable on that basis alone. In addition, the arbitration provision in *McCutcheon* specified that the transaction involved interstate commerce; that language is, of course,

not found in the Arbitration and Limitation of Liability Provision at issue in this appeal. Further, the provisions in the *McCutcheon* contract did not contain the offensive language depriving the resident of basic procedural rights and legally allowable damages, language present in the Arbitration and Limitation of Liability Provision in Mrs. O'Meara and Mrs. Scheerle's Residency Agreements. Also, the plaintiff in *McCutcheon* did not raise public policy/unconscionability concerns to defeat the arbitration provisions.

Appellants' attempt to circumvent, on appeal, the lower court's correct ruling that the Arbitration and Limitation of Liability Provision is unenforceable by asserting equitable estoppel for the first time should be disregarded. Not only did Appellants fail to preserve the argument for appeal, the argument is untimely, and Appellants' use of equitable concepts is misdirected. Appellants cannot invoke equity where Appellants are the very party that drafted an unfair Arbitration and Limitation of Liability Provision that, on its face, is shocking to good conscience, attempting to deprive the Respondents, who were abused in their facility, from their right to fair redress under the laws of South Carolina.

CONCLUSION

The lower court correctly found that the Arbitration and Limitation of Liability Provision did not involve interstate commerce and was unconscionable and unenforceable. The Arbitration and Limitation of Liability Provision denies fundamental legal rights and is offensive to good conscience and fair dealing and should not be enforced by this Court.

For the reasons set forth herein, and any others in the Record, the Respondents respectfully request that the Order as to each Respondent, denying Appellants' motion to enforce arbitration, be affirmed.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County Court of Common Pleas
Carmen Tevis Mullen, Circuit Court Judge

Consolidated Appellate Case No. 2011-199666

Elizabeth O'Meara,.....Respondent,

v.

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

and

Sonia S. King,.....Defendant.

Yvonne Carrie Pruett,.....Respondent,

v.

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

and

Sonia S. King,.....Defendant.

Janet Sue Scheerle,.....Respondent,

v.

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

and

Sonia S. King,.....Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that on April 4, 2013, the foregoing **INITIAL BRIEF OF RESPONDENTS** was served on all counsel of record via U.S. Mail, postage prepaid and addressed as follows:

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