THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-001298

Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, deceased, ... Respondent,

v.

SNH SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; Candy D. Cure; John Doe, Jane Doe; Richard Roe Corporation; and Mary Doe Corporation, Defendants,

Of whom SNE SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; and Candy D. Cure are the ..... Appellants.

INITIAL BRIEF OF APPELLANT

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1. Did the lower court err in holding that authority granted to Plaintiff by two Powers of Attorney did not authorize her to enter into an arbitration agreement because arbitration was not specifically listed among the powers?

2. Did the lower court err in holding that Plaintiff did not have apparent authority to enter an arbitration agreement for her father where her father had provided Plaintiff with two broad Powers of Attorney enabling her to contract for him, institute legal actions, grant waivers to nursing providers, waive his rights, execute instruments of every kind, and execute releases of any right, and Plaintiff presented those Powers of Attorney to the Defendants?

3. Did the lower court err in holding that the terms of an arbitration agreement were unconscionable, when the reasons relied upon by the lower court contravened the mandates of the Federal Arbitration Act, South Carolina precedent, and the record before the circuit court?

Statement of the Case

This is an appeal from the circuit court's denial of the Defendants' Motion to Dismiss and to Compel Arbitration. Plaintiff filed a Notice of Intent to File Suit against Defendants on May 16, 2016, alleging "[n]umerous failures, deficiencies, omissions, and breach of the standard of care were committed by the Defendants" in causing the death of Hubert Whaley. (Notice of Intent p. 2.) Following an unsuccessful mediation, Plaintiff filed suit against Defendants on October 4, 2016 asserting claims for negligence, negligence per se, fraud, and punitive damages. (Compl.) Defendants filed an Answer on November 16, 2016. (Answer.) Contemporaneous with their Answer, Defendants filed a Motion to Dismiss and to Compel Arbitration. (Defs' Mot. to Dismiss.)

On January 27, 2017, the circuit court heard oral arguments on Defendants' Motion. (Transcript of Hearing.) The circuit court then denied Defendants' Motion by Order entered on April 18, 2017 ("Order"); Defendants received notice of the Order on April 19. (Order on Defs' Mot. to Dismiss.) Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants filed a Motion to Reconsider on May 1, 2017. (Defs' Reconsideration Mot.) The Circuit Court entered an Order denying the Motion to Reconsider, which was filed on May 10, 2017. (Reconsideration Order.) Defendants served the Notice of Appeal on Plaintiff on June 6, 2017, and the Notice was filed by the Court of Appeals on June 7, 2017. On June 14, 2017, Defendants requested the transcript from the January 27, 2017 hearing and received the transcript on July 5, 2017.

Statement of the Facts

In October 2012, Plaintiff, Thayer Arredondo, sought to have her father, Hubert Whaley, admitted as a resident at Ashley River Plantation ("Ashley River"), a senior living community owned and operated by various Defendants. At that time, Mr. Whaley was an 84-year old who suffered from confusion resulting from his diagnosed dementia. (Compl., Ex. A p. 2, 3.)

As a result of Mr. Whaley's dementia, Plaintiff was authorized to act as Mr. Whaley's Power of Attorney and Attorney-in-Fact pursuant to a General Durable Power of Attorney ("General POA") and a Healthcare Power of Attorney ("Healthcare POA"), both executed by Mr. Whaley on January 30, 2003 (collectively, "POAs"). (Pl's Resp. p. 5.) Pursuant to the POAs, Plaintiff voluntarily executed a stand-alone arbitration agreement requiring the parties arbitrate any disputes arising out of Plaintiff's relationship with Ashley River, including alleged deficiencies in Mr. Whaley's care (the "Agreement"). (Arbitration Agreement.) These three documents—the General POA, the Healthcare POA, and the Agreement—are central to the issue before this Court and are discussed more fully below.

THE GENERAL POA. The General POA appointed Plaintiff to act as Mr. Whaley's agent "with the same force and effect as if [Mr. Whaley] were personally present and had executed or performed the same." (General POA p. 1.) Under the General POA, "the signature" of Plaintiff "may be accepted by third parties" "as if done under [Mr. Whaley's] Hand and Seal. . . ." (General POA p. 4.) The first paragraph of the General POA specifically authorized Plaintiff to "execute . . . any and all instruments or writings of every kind . . . including . . . releases . . . of any . . . right" on Mr. Whaley's behalf. (General POA p. 1.) Mr. Whaley never placed any limitation on Plaintiff's authority to enter into agreements, waivers, or releases of his rights.

THE HEALTHCARE POA. The Healthcare POA also granted Plaintiff broad authority to act on Mr. Whaley's behalf. Mr. Whaley "intended" the Healthcare POA "to be as broad as possible" to allow Plaintiff to act with the "same authority to make decisions about [Mr. Whaley's] health care as [Mr. Whaley] would have." (Healthcare POA p. 1.) Plaintiff's authority specifically included "granting any waiver" to a "nursing care provider" and "pursuing any legal action in [Mr. Whaley's] name." (Healthcare POA p. 3, 4.) Immediately beneath this provision, Paragraph 11(e) provided Mr. Whaley an opportunity to limit Plaintiff's "broad" authority, but he did not. (Healthcare POA p. 4.) Instead, he left Plaintiff's authority to be "as broad as possible" without limitation. *Id.*

THE AGREEMENT. After Mr. Whaley was admitted to Ashley River, Plaintiff, acting on behalf of herself and Mr. Whaley pursuant to the POAs, entered into the Agreement to arbitrate any subsequent dispute between the parties. (Agreement.) Specifically, the Agreement provided:

- Plaintiff and Five Star "**agree[]d that *any claims, controversies, or disputes arising between them involving a potential monetary amount in excess of $25,000 shall be resolved exclusively by binding arbitration.***" This bolded language appears in Paragraph 1 on the first page of the Arbitration Agreement. (Agreement p. 1.) (emphasis in original).

- "**Both the Resident and Five Star waive their right to a trial by jury.**" This bolded provision appeared in the first paragraph on the top of page 2 of the Agreement. (Agreement p. 2.) (emphasis in original).

- Plaintiff further agreed that she had:

    - "carefully read" the Agreement;
    - "asked any questions necessary to understand the terms, consequences, and bind effect" of the Agreement;
    - was "executing this Agreement voluntarily;" and
    - was "provided an opportunity to seek the advice of an attorney of their choice before signing this Agreement." *Id.*

- "**THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES.**" This bolded, underlined provision in all capital letters appeared just inches above Plaintiff's signature. (Agreement p. 3.) (emphasis in original).

Plaintiff executed the Agreement on behalf of herself and Mr. Whaley on October 12, 2012. (Agreement.) Nonetheless, in violation of the Agreement, Plaintiff filed this civil action against Defendants seeking damages for alleged deficiencies related to Mr. Whaley's residency and death in February 2014. (Compl.) After Defendants filed a Motion to Dismiss and Compel Arbitration, the circuit court entered an Order denying the Motion. (Order.)

Argument

The circuit court's order denying Five Star's right to litigate this dispute through arbitration should be reversed for several reasons. First, on the issue of actual authority, the circuit court's ruling that Plaintiff's authority under the POAs is limited to only specific acts "expressly conferred" by the POAs is inconsistent with this Court's prior holding that an agent may act beyond what is "expressly granted in the power of attorney." In that regard, the circuit court's ruling also violates the clear mandates of the Federal Arbitration Act ("FAA"). Second, on the issue of apparent authority, the circuit court's conclusion that "it is impossible" Mr. Whaley made "manifestations of apparent authority" since "he was not present when the arbitration agreement was signed" ignores the two powers of attorney that, at minimum, manifested apparent authority for Plaintiff to act on behalf of Mr. Whaley. Third, on the issue of unconscionability, the circuit court's determination that the Agreement is unconscionable is based on reasoning this Court has previously rejected that would unduly restrict the right for parties to arbitrate disputes in this State.

The circuit court's denial of Defendants' motion to compel arbitration is immediately appealable and subject to de novo review. *See, e.g., Johnson v. Heritage Healthcare of Estill, LLC,*

416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Under the de novo standard, the party "opposing arbitration bears the burden" to demonstrate "a valid defense." *Johnson*, at 512; 788 S.E.2d at 218. This is a burden Plaintiff cannot carry.

I. The Court's Analysis is Subject to an Emphatic Policy in Favor of Arbitration.

We start with the FAA since it establishes the foundational policy lens through which the Defendants' motion must be viewed. The FAA places arbitration agreements "on equal footing with all other contracts" by making them "valid, irrevocable, and enforceable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 333 (2011). Under the FAA a court may not refuse an arbitration agreement unless the party opposing arbitration establishes "a generally applicable contract defense," and not some defense that singles out arbitration agreements. *Id.* Congress enacted the FAA to replace an "ancient judicial hostility to arbitration" with an "emphatic federal policy" in favor of arbitration that requires courts to "generously construe[]" the "intention of the parties" in accordance with the "strong presumption" in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

A strong presumption in favor of arbitration is also well-settled policy in South Carolina. South Carolina appellate courts have consistency recognized that arbitration agreements "enjoy a strong presumption of validity" arising from "the strong policy favoring arbitration" under both federal and state law. *Towles*, at 35; 524 S.E.2d at 842; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014). Carrying out this "strong policy," South Carolina courts analyze arbitration agreements with a "healthy regard for the federal policy favoring arbitration." *Towles*, at 35; 524 S.E.2d at 842. In short, both the FAA and South Carolina law require that courts resolve any doubt in favor of enforcing arbitration.

The circuit court recognized that the FAA applied to this case. (Order p. 2, 3.); *see also Dean*, at 382; 759 S.E.2d at 733 (applying the FAA to senior living community arbitration agreements). But the circuit court then did what the FAA prohibits: it applied a heightened standard for interpreting powers of attorney that South Carolina courts do not apply to powers of attorney in other contexts. (Order.) In doing so, the circuit court failed to acknowledge the FAA's guiding policy in favor of arbitration agreements. *Id.* Contrary to the circuit court's approach, determining the scope of actual or apparent authority conferred by the POAs requires deference to the "emphatic federal policy" establishing a "strong presumption" in favor of arbitration. And any alleged unconscionability must be judged in the same light.

II. The Circuit Court Erred by Concluding Plaintiff did not Possess Actual or Apparent Authority to Execute the Agreement on Behalf of Her Father.

The sole question before the Court on authority is whether Plaintiff met her burden of proving the scope of her authority under the POAs did not encompass executing an arbitration agreement with Mr. Whaley's healthcare provider. Because the Agreement is one of the kinds of acts that were authorized or reasonably appeared to be authorized under at least three discrete provisions of the POAs the lower court's order should be reversed.

a. The POAs conferred actual authority on Plaintiff to execute an agreement with Mr. Whaley's healthcare provider to select the venue for potential legal claims and a jury trial.

According to both this Court and the Supreme Court of the United States, an agent may sign agreements that fall within kinds of acts a power of attorney authorizes even if the authority is not expressly listed by the power of attorney. In this case, the POAs authorize Plaintiff to (1) pursue legal action in Mr. Whaley's name; (2) execute waivers required by his healthcare providers; and (3) execute any instruments, releases, or waivers of Mr. Whaley's rights. (General POA p. 1; Healthcare POA p. 3, 4.) Signing an arbitration agreement with a senior living facility

providing care to Mr. Whaley is the kind of act each of these provisions authorized. Moreover, while this Court has not analyzed this specific question, this Court has implicitly held that a general or healthcare power of attorney sufficiently authorizes an agent to sign an agreement with a healthcare provider on behalf of a principal. Now that the issue is squarely before this Court, it should affirm that this is the law.

i. Plaintiff's authority under the POAs is not strictly limited to the specific acts and authorities "expressly conferred" by the POAs.

The Court's analysis begins with the POAs. A power of attorney authorizes an agent to "perform certain specified acts ***or kinds of acts***" on behalf of a principal. *First South Bank v. Rosenberg*, 418 S.C. 170, 179, 790 S.E.2d 919, 924 (Ct. App. 2016) (emphasis added). Where a dispute centers on the scope of the "kinds of acts" an agent may perform under a power of attorney, the traditional rules of contractual interpretation apply. *Id.* Outside of referencing the traditional rules of contractual interpretation, neither this Court nor the Supreme Court of South Carolina has established a uniform approach to interpret the scope of the "kinds of acts" authorized by specific power of attorney. This Court has, however, unambiguously rejected the interpretation advocated by Plaintiff and erroneously adopted by the circuit court in this case.

The circuit court interpreted the POAs to exclude signing the Agreement solely because "Mr. Whaley never expressly conferred any authority to Ms. Arredondo to execute the arbitration agreement" and the POAs did not "expressly [give] Ms. Arredondo permission to sign the Arbitration Agreement . . . ." (Order p. 3.) The circuit court apparently founded its rationale on a line of cases analyzing the existence of, not the scope of, agency relationships in cases that did not involve a power of attorney. (Order p. 3.) (citing *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App.

2004)). But here it is the scope, not the existence, of an otherwise conceded agency relationship that is in dispute.

Under facts similar to this case involving a power of attorney, this Court rejected the approach utilized by the circuit court below. In *First South Bank v. Rosenberg*, a principal attempted to repudiate a guaranty executed under a power of attorney authorizing his agent to sign documents necessary to close a real estate transaction, but that did not specifically list a guaranty among the documents that could be signed. 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016). The principal argued this "court should adopt the position that the authority to bind under a guaranty must be expressly granted in the power of attorney." *Id.* at 179; 790 S.E.2d at 924. This Court's response was direct: "We disagree." *Id.*

Contrary to the circuit court's narrowly focused analysis in this case, which would have held the guaranty in *Rosenberg* invalid since it was not specifically listed in the power of attorney, this Court applied the traditional rules of contractual interpretation to read the arbitration agreement as a whole document and give effect to the intention of the parties. *Id.* The Court held that South Carolina law does not support the position that every potential authorized act must be specifically spelled out in a power of attorney: "[W]e reject Brust's contention that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law." *Id.* at 181; 790 S.E.2d at 925-26.

This Court's rejection of the "expressly granted" argument interpreting a power of attorney in other contexts dictates that applying that interpretation in the context of arbitration agreements would violate the FAA. The FAA's "equal-treatment principle" prohibits states from "disfavoring contracts that" waive the "right to go to court and receive a jury trial." *Kindred Nursing Centers*

Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1424 (2017) (reversing an order denying a motion to compel arbitration based on the purported scope of a power of attorney). Just months after the circuit court's order, *Kindred* confirmed that a trial court may not require "an explicit statement" of authority in a power of attorney for "an agent" to be authorized to "relinquish her principal's right" to a jury trial unless the law of the state uniformly limits powers of attorney to only what is explicitly stated therein. *Id.* The Court held that such a requirement is "exactly what [the Supreme Court of the United States] has barred." *Id.*

Just as the Supreme Court did in *Kindred*, this Court has rejected the same kind of requirement for an explicit statement of specific authority to act under a power of attorney. *Rosenberg*, at 179; 790 S.E.2d at 924. The circuit court nonetheless required the POAs "expressly confer" authority to sign an arbitration agreement that "waived [Mr. Whaley's] constitutional right to a jury trial." (Order p. 3.) Just like the lower court's order in *Kindred*, the circuit court's order in this case is "exactly what [the Supreme Court of the United States] has barred" and it violates the FAA. *Kindred*, at 1424. The circuit court's failure to look beyond what was "expressly conferred" by the POAs' authority cannot stand under South Carolina or federal law.

ii. The POAs unambiguously demonstrate an intent for Plaintiff to possess actual authority to execute contracts like the Agreement, especially when "construed generously" in favor of arbitration.

Analyzing the POAs in light of the traditional rules of contractual interpretation and the holding in *Rosenberg*, three discrete provisions in particular evidence Mr. Whaley's intent to authorize Plaintiff to execute agreements such as the one at issue. The traditional rules of contract interpretation instruct the Court to "look[] to the language of the contract" and "give effect to the intention of the parties." *Rosenberg*, at 180; 790 S.E.2d at 925. (internal quotation omitted). The "intention of the parties" must be "generously construed" in accordance with the "strong

presumption" in favor of arbitration even if the authority to execute an arbitration agreement is not "expressly granted in the power of attorney." *Mitsubishi Motors Corp*, 473 U.S. at 626; *Rosenberg*, at 179; 790 S.E.2d at 924. In this case, at least three separate provisions of the POAs demonstrate Mr. Whaley's unambiguous intent to grant Plaintiff this authority.

First, the Healthcare POA authorized Plaintiff to "pursu[e] any legal action in [Mr. Whaley's] name." (Healthcare POA p. 4.) According to the Healthcare POA, Mr. Whaley intended this authority "to be as broad as possible." (Healthcare POA p. 1.) Presented with the opportunity to limit Plaintiff's "broad" authority, Mr. Whaley elected not to do so. (Healthcare POA p. 4.) Inherent in her "broad" and unlimited authority to "pursu[e] any legal action" on Mr. Whaley's behalf is Plaintiff's ability to select the forum and venue for that "legal action," including arbitration. (Healthcare POA, p. 4.)

Second, the Healthcare POA authorized Plaintiff to "grant[] any waiver" to a "nursing care provider." (Healthcare POA p. 3, 4.) Mr. Whaley intended this authority to be "as broad a possible" and elected not to limit it in any manner or otherwise exempt waivers of a jury trial from the Healthcare POA, as the POA form gave him the ability to do.

Third, the General POA authorized Plaintiff to "execute . . . any and all instruments or writing of every kind . . . including . . . releases . . . of any . . . right" on Mr. Whaley's behalf. (General POA p. 1.) Again, Mr. Whaley did not place any limitation of Plaintiff's authority to release any of his rights – including his "right to a jury trial."

Analyzing the POAs as a whole and these three provisions in particular reveals a clear "intention of the parties" for Plaintiff to "perform . . . the kinds of acts" like executing the Agreement. This becomes inescapable when the POAs are construed generously to accomplish the "empathic federal policy" establishing "a strong presumption" in favor of arbitration.

Moreover, acceptance of the Plaintiff's argument would require the Court find that Plaintiff had the authority to initiate a lawsuit in Mr. Whaley's name, but not the authority to choose whether to file it in state court or federal court. She would have the authority to bring a lawsuit in Mr. Whaley's name, but not the authority to elect a bench trial. She would have the authority to bring a lawsuit, but not the authority to consent to mediation or make other efforts to resolve such "legal action" – since settling a case short of a jury trial similarly "waives" that right. Most absurd, Plaintiff would have the right to completely waive Mr. Whaley's entire claim against Defendants, but would not have the right to waive only the jury trial component of his claim.

Of course these decisions, like the decision to arbitrate, are within the ambit of Plaintiff's authority as Mr. Whaley's General Power of Attorney. Each of these rights, including the right to arbitrate, cannot be disjoined from the specific authority Plaintiff was granted under the POAs. Any other interpretation would paralyze attorneys-in-fact from asserting, filing, or settling claims on behalf of the principal, and would test the imagination of those drafting powers of attorneys to anticipate every possible scenario. Instead the intention of the parties should be given effect.

iii. South Carolina appellate courts have implicitly recognized agents holding a power of attorney are authorized to execute arbitration agreements with their principal's healthcare provider.

While South Carolina appellate courts have not yet addressed the specific question before this Court, the appellate courts have analyzed on several occasions the authority to execute arbitration agreements with healthcare providers. Those opinions are instructive here. The Supreme Court of South Carolina has upheld arbitration agreements in the senior living context where the plaintiff "held a general power of attorney for [the resident], and as such, signed an arbitration agreement with [defendant senior living community] on her mother's behalf upon [her mother's] admission." *Johnson*, 416 S.C. at 510; 788 S.E.2d at 217. In addition, this Court has

held an agent lacked authority to sign an arbitration agreement because she "did not possess a health care power of attorney to sign either contract on Jones' behalf." *Scott v. Heritage Healthcare of Estill, LLC*, No. 2014-UP-317, 2014 WL 3845113, at *1 (S.C. Ct. App. Aug. 6, 2014). It follows that in *Scott* the agent *would have* possessed the required authority to sign an arbitration agreement if she possessed a health care power of attorney – like the one in this case.

In fact, no located South Carolina appellate court decision has struck down an arbitration agreement with a senior living community based on an agent's purported lack of authority where the signatory possessed a power of attorney to act on behalf of the resident. *See generally Thompson v. Pruitt Corp.*, 416 S.C. 43, 49, 784 S.E.2d 679, 682 (Ct. App. 2016), *reh'g denied* (Apr. 21, 2016), *cert. denied* (Dec. 2, 2016) (finding no authority to enter into an arbitration agreement under "common law agency principles" where the agent did not possess a power of attorney); *Dean*, 408 S.C. at 388, 759 S.E.2d at 736 (expressing concern the agent did not "possess a health care power of attorney to sign" an arbitration agreement); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 351, 755 S.E.2d 450, 453 (2014) (refusing to enforce an arbitration agreement where the agent lacked a power of attorney). Reversing the circuit court's Order is the logical result of the precedent already well-established in this State.

b. The circuit court erred in concluding Plaintiff did not possess apparent authority.

The circuit court improperly concluded that Plaintiff did not possess apparent authority to execute the arbitration agreement because "it is impossible that Mr. Whaley made manifestations of apparent authority upon which the facility could rely" since "he was not present when the arbitration agreement was signed." (Order p. 4.) However, this conclusion improperly ignores the Powers of Attorney.

Apparent authority is "created as to a third person" by the principal's "written" words which reasonably cause a third person to "believe the principal consents to have the act done on his behalf" by the agent. *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013) (quotation omitted). Mr. Whaley, through the POAs, expressed an intent for third parties to accept Plaintiff's actions on his behalf. The General POA states that "the signature" of Plaintiff "may be accepted by third parties" "as if done under [Mr. Whaley's] Hand and Seal. . . ." (General POA p. 1.) With respect to the Healthcare POA, Mr. Whaley knew healthcare providers would rely on it. That was its very purpose. Through these POAs, which Plaintiff provided to Defendants, Mr. Whaley vested Plaintiff with apparent authority to act as on his behalf regardless of whether he was present.

Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), relied on by the lower court, is inapposite to these facts because the plaintiff did not possess a power of attorney. Here, the principal made express manifestations of an intent for the agent to release the principal's rights, sign waivers, and pursue legal actions. (General POA; Healthcare POA.) Plaintiff had apparent authority to execute the Agreement.

This position is further supported by South Carolina statute. South Carolina law protects any third person who accepts "in good faith" a power of attorney so long as the person does not have "actual knowledge" that an agent is "exceeding or improperly exercising" his authority. S.C. Code Ann. § 62-8-119. Under that protection, the third person "may rely" on the power of attorney as if "the agent had not exceeded and had properly exercised the authority." *Id.* Applied here, the Legislature has authorized Defendants to accept Plaintiff's signature under the Powers of Attorney since the record contains no evidence Defendants had "actual knowledge" Plaintiff would later claim she exceeded her scope of authority under the POAs. In this regard, this case is not about

just one arbitration agreement. Upholding the circuit court's order could have significant implications across the healthcare community by calling into question many, if not most, general and healthcare powers of attorney.

III. The Circuit Court Erred in Finding the Agreement was Unconscionable.

The circuit court's conclusion that the Arbitration Agreement is unconscionable runs contrary to decisions of this Court. A finding of unconscionability requires proof of two elements: an "absence of meaningful choice" on the part of one party and "oppressive, one-sided terms" that are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 400, 498 S.E.2d 898, 904 (Ct. App. 1998). Rather than analyzing the terms of the agreement, the circuit court relied on vague conclusions—"the one-sidedness of the terms of this agreement" and the "terms heavily weighted in [Five Star's] favor." (Order p. 5.) However, the circuit court did not identify any specific term that was "one-sided" or "heavily weighted" in Defendants' favor.

a. The terms of the Agreement are objectively fair and unoppressive.

Analysis of the Agreement reveals its terms are not oppressive and one-sided. The Agreement, equally applicable to both parties, required the parties to litigate any dispute between them before an arbitration panel of a size selected solely by Plaintiff with members chosen by "mutual agreement of the parties" and applying rules adopted by the American Arbitration Association. (Agreement p. 1.) The Plaintiff even has the authority to veto any arbitrator Defendants propose. *Id.* This Court has previously overturned a trial court order finding a nearly identical provision unconscionable. *Lackey*, at 400; 498 S.E.2d at 904 ("Contrary to the finding of the trial court, the 'veto' power held by respondents provides enough control over the selection process to assure the appointment of a neutral arbitrator.")

Moreover, this Court has confirmed it must analyze the terms of arbitration agreement with deference to the FAA's "liberal federal policy favoring arbitration agreements" mandating the Court answer "questions of arbitrability" with a "healthy regard for the federal policy favoring arbitration." *Lackey*, at 396; 498 S.E.2d at 903 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Under this deferential analysis, a mutually-applicable arbitration agreement that provides Plaintiff "control over the selection process," does not impose additional fees, and utilizes rules adopted by the AAA are objectively fair and unoppressive and, in any event, does not overcome the strong presumption in favor of arbitration.

b. Plaintiff did not lack meaningful choice.

The circuit court's determination that the parties lacked "meaningful choice" is not supported by the record. To analyze whether a party had meaningful choice in signing a contract, a court must weigh "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." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Citing these factors, the circuit court founded its ruling on (1) a supposed "take-it or leave-it" nature of the contract depriving Plaintiff of the opportunity to negotiate the terms of the Agreement, (2) the difference in bargaining power and sophistication of the parties, and (3) Defendants' alleged failure to explain the Agreement to Plaintiff. But each of these purported rationales contradicts binding precedent in this State.

First, "federal substantive law under the FAA holds an arbitration clause is not invalid simply because it is part of an adhesion contract." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365, n. 5 (2001) ("We find the arbitration clause is not unconscionable as an

adhesion contract.") Instead, unconscionability "requires something more." *Id.* The Plaintiff's lack of input into the terms of the "form contract prepared solely by" Defendants is, therefore, not sufficient to prove lack of meaningful choice.

And while a "take-it-or-leave-it" contract is perfectly lawful in South Carolina, the Agreement was not one. Instead, Plaintiff admits that Defendants did not present the Agreement to her until "[a]fter [her] father's admission to the facility." (Affidavit p. 1.) In other words, Plaintiff had already "taken" the thing she desired – her father's admission to Ashley River - before she was presented with the Agreement. Moreover, the Court can take judicial notice that greater Charleston and the South Carolina Lowcountry are replete with alternative senior living communities. The Agreement, under these conditions, is not an adhesion contract.

Second, the "mere fact" that the parties are not the same size "cannot be the basis of a finding of unconscionability of an arbitration clause in a contract." *Smalls v. Advance Am.*, No. 2:07-3240-TLW-TER, 2008 WL 4177297, at *15 (D.S.C. Sept. 5, 2008) (quoting *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir.1991)). Even where one party is a large corporation and the other party is an individual, "[i]nequality of bargaining power alone will not invalidate an arbitration agreement." *Munoz*, at 54;, 542 S.E.2d at 365, n. 5. The circuit court's conclusion that the Agreement is unconscionable because Defendants were a "sophisticated business" and Plaintiff was "an individual in need of Defendants' services" is, therefore, erroneous under settled law and the FAA.

Third, South Carolina law "does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Towles*, at 39; 524 S.E.2d at 845 ("Towles cannot legitimately claim United failed to provide actual notice of the arbitration provision because the law does not impose a duty to explain a document's

contents to an individual when the individual can learn the contents from simply reading the document."). The South Carolina Supreme Court has stated that absent fraud, mistake, or unfair dealing "a party to a contract incorporating an arbitration agreement cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'" *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981). Moreover, the supreme court has noted that "arbitration agreements governed by the FAA will not be set aside on the ground the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it." *Munoz*, at 541; 542 S.E.2d at 365, n. 6. Therefore, Defendants' alleged failure to explain the Agreement is simply irrelevant to a proper analysis of alleged unconscionability.

In addition to contravening this precedent, the lower court's determination that Plaintiff lacked "meaningful choice," if affirmed, would disrupt the right to arbitrate disputes in South Carolina – a right the FAA clearly protects. In this case, Defendants presented an arbitration agreement to Plaintiff after her father was admitted to Ashley River, the Agreement was a stand-alone agreement titled "**ARBITRATION AGREEMENT**" on the top of the first page. (Agreement p. 1.) The Agreement included a final unambiguous disclaimer just inches above the line Plaintiff voluntarily signed: "**THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES.**" (Agreement p. 3.) Moreover, Plaintiff acknowledged she was given the opportunity to read the entire Agreement on her own and seek the advice of counsel. (Agreement p. 2.) If these facts constitute a lack of "meaningful choice," then, few arbitration agreements in South Carolina would be valid – a result that would contradict the very purpose of the FAA.

Finally, the circuit court order's unconscionability analysis contains several statements of fact that are simply unsupported by the record. For instance, the Order states that "Ms. Arrendondo was not given the opportunity to discuss the document with her father at the time it was signed, nor was she asked to seek her father's permission to sign it." (Order p. 2.) But the records before the circuit court states only that Ms. Arrendondo "did not discuss the arbitration agreement with my father at the time the document was signed" and "did not ask for [her] father's permission to sign it. . . ." (Affidavit p. 2.) Additionally, the Order states without support that ". . . no one from the facility reviewed the agreement that Ms. Arredondo had signed with her father after his arrival to Ashley River Plantation." (Order p. 2.) The circuit court also states that Ms. Arredondo was "lacking knowledge of arbitration or of the constitutional right she was being asked to waive" despite nothing in the record establishing that purported fact. (Order p. 5.) The circuit court's determination that the Agreement is unconscionable is both contrary to binding precedent and unsupported by the record.

Conclusion

In having her father admitted to Ashley River, the Plaintiff presented Defendants with two Powers of Attorney vesting her with broad authority to contract for her father, institute legal proceedings on his behalf, waive his rights, and secure healthcare services for him. Acting upon these powers, the Plaintiff chose to sign a clear and conspicuous agreement to arbitrate matters like this one. Because she had actual and apparent authority to do so, and because its terms were fair, unoppressive, and consistent with the FAA, this Court should reverse the lower court's denial of Appellant's Motion to Dismiss and Compel Arbitration.

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Counsel for Appellants

August 18, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-001298

Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, deceased, ... Respondent,

v.

SNH SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; Candy D. Cure; John Doe, Jane Doe; Richard Roe Corporation; and Mary Doe Corporation, Defendants,

Of whom SNE SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; and Candy D. Cure are the ..... Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, by depositing a copy of it in the United States Mail, postage prepaid, on August 18, 2017, addressed to their counsel of record, Laura S. Jordan and C. Caleb Connor, CONNOR & CONNOR, LLC, 302 Park Avenue SE, Aiken, South Carolina 29801.

[*SIGNATURE ON FOLLOWING PAGE*]

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August 18, 2017

Via U.S. Mail

The Honorable Jenny A. Kitchings
Clerk of Court
Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, Deceased v. SNE SE Ashley River Tenant, LLC; FVE Managers, Inc.; Five Star Quality Care, Inc.; SNH SE Tenant TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; Candy D. Cure; John Doe; Jane Doe; Richard Roe Corporation; and Mary Doe Corporation
Case No. 2016-CP-10-5319
Our File No. 41123/01507

Dear Ms. Kitchings:

Enclosed for filing please find the following:

(1) Appellant's Initial Brief; and
(2) Designation of Matter to be Included in the Record on Appeal.

Please file the originals and return a clocked-in copy to me in the envelope provided. Please do not hesitate to contact me should you have any questions or concerns.

Very truly yours,

Robert W. Whelan

RWW:kds
Enclosures
cc: Laura S. Jordan, Esquire
C. Caleb Connor, Esquire
Kenneth L. Connor, Esquire

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The Honorable Jenny A. Kitchings
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