THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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Case No. 2017-001298

RECEIVED
SEP 27 2017
SC Court of Appeals

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.

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# REPLY BRIEF OF APPELLANT

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## Argument

Plaintiff's defense of the circuit court's order suffers from three fundamental and fatal flaws. First, Plaintiff ignores South Carolina law establishing that an agent may perform the "kinds of acts" outlined in a power of attorney even beyond what is "specifically authorized" and "expressly granted in the power of attorney." Second, Plaintiff erroneously attempts to rewrite the POAs to impose both general subject matter limitations on the scope of her authority and specific exclusions of authority that Mr. Whaley did not include when he drafted the POAs. Finally, Plaintiff's argument that the Agreement is unconscionable is based on a series of propositions that South Carolina appellate courts have previously rejected. In sum, northing in Plaintiff's response is sufficient to overcome either Plaintiff's burden of proof to oppose arbitration or the emphatic federal and state policy in favor of arbitration, both of which are necessary to uphold the circuit court's denial of Five Star's right to arbitrate this dispute.

### I. Plaintiff's Uncited Contention That the FAA Does Not Control this Appeal Contradicts Binding Precedent.

Without citation to any precedent, Plaintiff attempts to circumvent the application of the Federal Arbitration Act ("FAA") to this matter by baldly proclaiming that the FAA "does not apply to the interpretation of the authority conferred by a power of attorney." (Pls. Response, p. 10.) However, the Supreme Court of the United States recently held just the opposite and applied the FAA to a state court's interpretation of the scope of a power of attorney. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1424 (2017) (holding the scope of a power of attorney may not be more strictly interpreted in the context of arbitrations than it would be in any other context).

Under *Kindred*, interpretations of powers of attorneys authorizing an agent to execute an arbitration agreement *are subject* to the "strong presumption of validity" arising from "the strong policy favoring arbitration" and courts must "generously construe[]" the "parties' intentions" in

favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

## II. Plaintiff's Response Too Narrowly Limits Both the General Scope of Authority Granted by the POAs and the Specific Language Contained in Mr. Whaley's POAs.

### a. Plaintiff's response does not address South Carolina law requiring courts broadly interpret an agent's authority to sign contracts under a power of attorney or why disregarding the law here does not violate the FAA.

Plaintiff's response continues to advance a narrow view of interpreting actual authority granted under powers of attorney to include only the acts specifically enumerated therein. To that end, she does not distinguish, address, or cite *First South Bank v. Rosenburg*, 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016), discussed in Appellant's Brief at pages eight through ten. Instead of addressing *Rosenberg*, Plaintiff cites one sentence from a single case analyzing the existence of apparent authority for an employee to bind an employer. Pl's Response at 16; *Charleston v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). Plaintiff does not explain how *Young Clement* could govern this appeal or why *Rosenburg* does not. In light of the issues decided in that case, *Young Clement* provides no guidance for the proper analysis of the scope of express authority provided pursuant to a power of attorney and, as such, is not instructive to the issue presently before this Court. *Id.*

Instead, the framework for interpreting powers of attorneys established in *Rosenberg* governs the Court's interpretation of the POAs. Under *Rosenberg*, an agent is not limited to the authority "expressly granted" and "specifically authorized" by a power of attorney. Instead, the agent can perform any of the "kinds of acts" authorized under the power of attorney. The Court must, therefore, read the plain language of the POAs to determine whether either POA authorized

Plaintiff to perform the "kinds of acts" like entering into an agreement with Mr. Whaley's healthcare provider to adjudicate disputes related to the administration of his healthcare decisions.

In her response, Plaintiff does not offer any explanation for why an arbitration agreement is not a "kind[] of act[]" associated with her authority to initiate litigation against Mr. Whaley's healthcare providers. It is unclear if Plaintiff even disputes this fundamental principle. Instead, Plaintiff responds that she initiated this litigation pursuant to purported authority unrelated to her authority under the POAs. Even if that were true, it is unrelated to the issue before the Court: whether the decision to arbitrate is the "kind of act" associated with initiating litigation.

Plaintiff's authority to initiate litigation on Mr. Whaley's behalf included the authority to decide to: file suit in state or federal court, pursue the claim in a bench trial or jury trial, exclude certain claims from the complaint, consent to mediation, settle the entire claim before trial, or waive Mr. Whaley's claim entirely. Plaintiff does not dispute the Healthcare POA conferred her authority to make these decisions. And the decision to arbitrate is no different. Any decision distinguishing Plaintiff's authority to conduct litigation from her authority to litigate claims through arbitration would necessarily "single out arbitration agreement for disfavored treatment" in violation of the FAA. *Kindred*, 137 S. Ct. at1425.

**b. Plaintiff's narrow reading of the POAs would deprive the POAs of their intended meaning.**

Even while ignoring *Rosenberg*, Plaintiff correctly identifies three of the provisions that authorize Plaintiff to execute the Agreement: (1) the right to waive "any right" under the General POA, (2) the right to grant a "waiver" to health care providers under the Healthcare POA, and (3) the right to initiate litigation under the Healthcare POA. Plaintiff then goes on to attempt to rewrite the POAs to limit the three provisions well beyond the meaning of their plain language.

**i. Plaintiff attempts to read untenably narrow general subject matter limitations into the POAs.**

Starting with the General POA, Plaintiff claims it is limited by subject matter "solely to property and financial-based decisions." (Pls. Response, p. 3.) Contrary to Plaintiff's contention, the General POA authorizes Plaintiff to execute releases related to "any and all . . . other assets" outside of Mr. Whaley's business affairs and property. These assets, according to the General POA, include releases of choses in action and releases of any other right or thing. Provided in whole, the General POA authorizes Plaintiff to

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

(Ex. C to Pl's Response in Opp. To Mot. To Dismiss at ¶ 1) (emphasis added.) Separating the chaff from the wheat in this provision, it authorizes Plaintiff to execute, release, and deliver any instrument whatsoever concerning any property or other assets whatsoever, including choses in action concerning any property, right, or thing. Property, right, or thing are plainly disconnected concepts. Plaintiff's argument that this language concerns only "Mr. Whaley's business affairs and real or personal property" is not supported by the plaint language of the General POA. (Resp. p. 13). And Plaintiff cites no law to support her position. In fact, "South Carolina courts construe the term 'property' broadly. The term 'property' is a general term that is used to designate a right of ownership and it includes every subject of whatever nature upon which the right of ownership can legally attach, including choses in action." *Bowman v. Bowman*, 357 S.C. 146, 155, 591 S.E.2d

654, 659, n. 6 (Ct. App. 2004) (*quoting Ball v. Ball*, 312 S.C. 31, 33, 430 S.E.2d 533, 534 (Ct.App.1993)).

Turning next to the Healthcare POA, Plaintiff argues that it is limited to only the administration of healthcare to Mr. Whaley. Plaintiff's argument misreads the plain language of the Healthcare POA and misapplies narrow rulings from this Court in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016) and from the supreme court in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). In both *Thompson* and *Coleman*, the agent derived its sole authority to act on behalf of the principal from the South Carolina Adult Health Care Consent Act (the "AHCCA"). The AHCAA provides a next of kin limited authority to consent to the provision or withholding of medical care and to authorize payment for the healthcare for patients who are unable to consent. *Thompson*, 416 S.C. at 50, 784 S.E.2d at 683. Unlike the POAs here, the ACHAA does not authorize the next of kin to sign any waivers or initiate any litigation on behalf of the principal. Stated differently, the ACHAA does not grant the next of kin any authority ancillary to the provision of healthcare. In *Thompson* and *Coleman*, the courts held ACHAA does not authorize a next of kin to execute an arbitration agreement under the limited authority to consent to the provision of medical care and pay for the care.

Beyond the difference in the agent's authority to act, which is discussed more below, the rationale supporting *Thompson* and *Coleman* is distinguishable under Plaintiff's own arguments. First, both holdings were limited to "voluntary arbitration agreements." *Coleman*, 407 S.C. at 354, 755 S.E.2d 454; *Thompson*, 416 S.C. at 51, 784 S.E.2d at 684. Here, Plaintiff claims the Agreement was necessary for Mr. Whaley to be admitted to Ashley River Plantation. Reading the entire decisions, *Coleman* and *Thompson* show the courts would have reached a different result if the arbitration agreements were mandatory. Second, Plaintiff heavily relies on a single quote from the

*Thompson* Court's discussion of apparent authority as if the quote applies more generally to actual authority conferred pursuant to a power of attorney. The facts of *Thompson* make clear it does not. In *Thompson*, the defendant claimed that the passive conduct of an elderly, incompetent mother to "allow[]" her son to sign her admission paperwork into a senior living facility and "handle" her financial affairs created apparent authority. In that context, the Court held the provision of and payment for healthcare was distinguishable from executing a voluntary arbitration agreement. The quote, therefore, has no application to the issue of actual authority under two broad powers of attorney conferring authority on an agent to both sign waivers and prosecute litigation on behalf of her principal.

Nonetheless, while separate provisions of the POAs allow for Plaintiff to consent or refuse medical treatment like the provisions in ACHAA, Five Star is not relying on those provisions to show Plaintiff's authority to execute the Agreement. Instead, this case focuses on express provisions of authority that are absent from ACHAA including the authority to grant "any waiver or release from liability ... pursu[e] legal action... and... seek actual or punitive damages." (Healthcare POA, p. 4). Plaintiff claims these provisions of authority are limited to decisions concerning the administration of healthcare to Mr. Whaley and apparently do not include executing an arbitration agreement if it is considered in total isolation of all relevant circumstances. Plaintiff's response, however, does not explain the basis for its proposed narrow interpretation. A narrow interpretation that would exclude filing a lawsuit or signing a waiver or release of liability as not concerning healthcare. Stated differently, Plaintiff's interpretation would create internal inconsistencies in the Healthcare POA. It would confer Plaintiff the authority to execute waivers and releases of liability and initiate litigation while simultaneously stripping Plaintiff of that same authority since those acts are not "decisions that concern healthcare." Such an interpretation is

contrary to basic laws of contractual interpretation. *J.T.M. Co. v. Vane*, 283 S.C. 512, 516, 323 S.E.2d 794, 796 (Ct. App. 1984) ("In determining the intent and purport of a contract, a court should not look solely to one clause read in isolation from the rest of the document; rather, it should consider the contents of the whole instrument."); *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) ("A contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results.")

A more appropriate reading of the Healthcare POA authorizes Plaintiff to execute waivers or releases of liability and initiate litigation where the waiver, release, or litigation relates to Mr. Whaley's healthcare decisions. There is no question that this case, at its core, concerns Mr. Whaley's healthcare. And there is no dispute Plaintiff had the authority to admit Mr. Whaley into Ashley River Plantation. But the POA goes on to authorize Plaintiff to take certain actions ancillary to the provision of Mr. Whaley's healthcare, including the authority to sign waivers and initiate litigation. This ancillary authority, when considered in the context of the Healthcare POA as a whole, plainly authorizes Plaintiff to enter into an agreement with Mr. Whaley's healthcare provider to arbitrate disputes arising from the provision of healthcare to Mr. Whaley.

Finally, Plaintiff's proposed interpretation runs afoul of two fundamental principles governing this appeal. First, her interpretation of her own authority to make "healthcare decisions" to encompass all contracts and decisions related to the plaintiff's stay in the nursing home—admission, payment, treatment, litigation, selection of damages—other than an agreement to arbitrate, violates the FAA because it singles out arbitration agreements among other agreements she could sign that are also not specifically enumerated in the POAs. *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427 (2017). Second, to the extent any language in either POA is ambiguous, it must be "construed liberally and most strongly in favor of the party who did

not write or prepare the contract and is not responsible for the ambiguity." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 499–500, 649 S.E.2d 494, 502 (Ct. App. 2007). Any doubt "should be resolved against" Mr. Whaley and Plaintiff's interpretation does not do so. *Id.*

**ii. Plaintiff improperly attempts to read non-existent specific limitations into the POAs.**

In addition to misreading the general subject matter of the POAs, Plaintiff cites six specific limitations on her authority to act on behalf of her father that she contends deprived her of authority to execute the Agreement. Each is without merit.

First, Plaintiff seems to argue her authority to initiate litigation under the Healthcare POA is limited to punitive damages or otherwise requires her to assert a claim for punitive damages. A complete reading of the Healthcare POA shows Plaintiff possessed authority to initiate litigation to "seek actual or punitive damages." Inherent in this provision is Plaintiff's authority to initiate suit without seeking punitive damages, thereby waiving those damages. Plaintiff's interpretation of her authority to initiate litigation ignores the disjunctive "or" in that provision.

Second, Plaintiff argues she "did not discuss the arbitration agreement with her father" and, therefore, violated the provisions of the Healthcare POA. (Pl.'s Response, p. 9-10.) The Healthcare POA, however, merely provides that the attorney must "*attempt to discuss* the proposed decision with me ... if I am able to communicate in any way." (Healthcare POA, p. 3) (emphasis added). There is no requirement that any decision actually be discussed, and Plaintiff has presented no evidence (1) of whether she attempted to discuss the decision with Mr. Whaley or (2) that Mr. Whaley was "able to communicate in any way" concerning the decision. Plaintiff has the burden of proof to tender such evidence. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508,

512, 788 S.E.2d 216, 218 (2016). To the contrary, the record shows Mr. Whaley was an 84-year old man who suffered from "confusion" and "Dementia." (Compl., Ex. A p. 2, 3.)

Third, Plaintiff attempts to join two provisions that are more appropriately read separately. The provision at issue authorizes Plaintiff to "grant[] any waiver or release from liability. . . ." Under the normal rules of construction "from liability" modifies "release" and not "waiver." Otherwise, "waiver" would be deprived of any meaning. *J.T.M. Co.*, at 516, 323 S.E.2d at 796; *Holden*, at 221, 452 S.E.2d at 631. Plaintiff, therefore, was authorized to grant any waiver of any kind or any release from liability. Moreover, even if the terms are read together, it would be nonsensical for a power of attorney to enable an agent to waive or release a principal's entire claim, but not to agree to arbitrate that same claim. Plaintiff offers no explanation for this strained construction.

Fourth, Plaintiff argues Mr. Whaley's clear statement of his intention to make Plaintiff's "authority to interpret [Mr. Whaley's] desires" "as broad as possible" is limited to only healthcare decisions. The Healthcare POA does not include any such limitation. Moreover, the "desires" Plaintiff is authorized to interpret include the "desire" to initiate litigation, to grant waivers, to release third-parties from liability, and, of course, to enter into arbitration agreements. The POAs do not contain any indication Mr. Whaley intended to exclude certain authority granted under the Healthcare POA from his desire to make the authority "as broad as possible."

Fifth, Plaintiff argues that her authority terminated upon Mr. Whaley's admission to Ashley River Plantation. (Pl.'s Response, p. 9). However (1) the Healthcare POA does not include Plaintiff's proposed limitation, and (2) Plaintiff's interpretation would eliminate all of her powers specifically listed in the Healthcare POA to make post-admission decisions. In fact, many of the powers in the POA concern decisions that would necessarily occur after Mr. Whaley's admission,

including to terminate his treatment, seek alternative treatment, authorize or refuse treatment or medication, initiate litigation, seek actual or punitive damages, or authorize his discharge from a healthcare provider. Plaintiff's argument that her authority terminated when Mr. Whaley was admitted runs contrary to the other authorities granted under the Healthcare POA and violates basic tenets of statutory construction. *J.T.M. Co.*, at 516, 323 S.E.2d at 796; *Holden*, at 221, 452 S.E.2d at 631.

Sixth, Plaintiff claims that even if she could and did bind Mr. Whaley to the arbitration agreement, she should nonetheless win because "Ms. Arrendando also lacked the authority to bind Mr. Whaley's estate to the arbitration agreement." (Resp. p. 18) (emphasis added). At the risk of stating the obvious, Mr. Whaley's estate did not exist when he executed the POAs or when Plaintiff executed the Arbitration Agreement. Additionally, South Carolina law is clear that a personal representative's ability to sue for wrongful death or survival can be no greater than that of the decedent. S.C. Code § 15-51-10. Therefore the "right to bring a wrongful death claim is thus conditioned upon the decedent's right to maintain a claim or action." *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp 939 (D.S.C. 1989). But where the decedent does not have certain rights, his estate cannot acquire greater rights than he had. *Id.* Thus, Plaintiff's authority to bind her father's estate before he died is irrelevant to the matter before the Court.

**c. Plaintiff incorrectly analyzes the governing impact of *Kindred* to this case.**

Plaintiff argues *Kindred* has no impact on the lower court's decision since the Court did not ultimately render a judgment on the scope of the powers of attorney at issue. But that is not what is important from *Kindred*. Instead, *Kindred* emphatically reaffirms that a lower court may not require a power of attorney contain an "explicit statement" to authorize an agent to execute an arbitration agreement unless powers of attorney in that state are universally required to contain an

"explicit statement" to authorize an agent to perform any act. *Kindred*, 137 S. Ct. at1427. Here, the circuit court required the POAs contain an express statement of authority for Plaintiff to enter into the Agreement. But in *Rosenberg*, this Court did not require such an express statement in a power of attorney for an agent to execute a similarly binding agreement on behalf of his principal. *Rosenberg*, 418 S.C. 170, 179, 790 S.E.2d 919, 924 (Ct. App. 2016). Plaintiff does not dispute *Rosenberg's* holding. Therefore, the circuit court's requirement in the context of arbitration for an express statement of authority that this Court has not required in other contexts cannot stand under the *Kindred*.

**d. Plaintiff's argument against apparent authority asks this Court to make new law.**

Plaintiff argues "[t]he powers of attorney cannot fall short of actual authority but support a finding of apparent authority." (Pl's Response at 19). Plaintiff does not provide any citation for this argument. Plaintiff's argument would require this Court find that an agent cannot possess apparent authority to perform an act unless he also possesses actual authority to perform that act. The Court should not create new law by combining actual and apparent authority into a single analysis of authority. Additionally, Plaintiff ignores the many statements in the POAs—in addition to the above—that show an intention by Mr. Whaley, for third-parties such as Five Star to rely upon the POAs. See Healthcare POA, p. 3 ("My Agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below."; General POA, p. 1, 4 ("KNOW ALL MEN BY THESE PRESENTS that .... The signature or acts of Attorney on my behalf may be accepted by third persons or other parties as fully authorized by me ...").

Plaintiff also argues she did not have apparent authority because Five Star has "presented no evidence of reliance" and "presented no evidence of a change in position to [Five Star's] detriment." This new argument that Plaintiff did not raise at the trial court ignores Plaintiff's

burden of proof. Plaintiff has the burden to present evidence to support her opposition to arbitration. *Johnson*, 416 S.C. at 510; 788 S.E.2d at 217. But even if Five Star were required to present evidence, the Agreement itself is evidence of both reliance and detriment. Plaintiff represented herself as an "authorized representative" with authority to execute the Agreement. (The Agreement, p. 3.) Based on that representation, Five Star allowed Plaintiff to sign the Agreement on behalf of Mr. Whaley. Moreover, the law of South Carolina recognizes that arbitration is a "more efficient means than litigation of resolving disputes" and Five Start's loss of the opportunity to arbitrate this case to an efficient resolution on the merits is patently detrimental. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct. App. 1998).

## III. Plaintiff's Arguments That the Agreement is Unconscionable Have Either been Expressly Rejected in South Carolina or Have Never Been Applied in This Setting.

Plaintiff's response arguing the Agreement is unconscionable merely restates arguments South Carolina appellate courts have previously rejected.

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

Plaintiff correctly states that this Court should "focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." (Pls. Response, p. 22); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668-69 (2007). In an effort to show the Agreement fails this test, Plaintiff relies on the use of the AAA rules to govern the arbitration, the mutual waiver of punitive damages and appellate review, and the ability of both parties to file claims for less than $25,000 in a court. Plaintiff does not cite any judicial precedent to support her argument. The Supreme Court of South Carolina, however, has already considered and rejected these arguments.

First, the supreme court upheld an arbitration agreement, just like the one here, that provided discovery in accordance with the American Arbitration Association rules. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004). Refusing to find the agreement unconscionable, the supreme court held "the arbitration clause does not expressly prevent discovery, and the American Arbitration Association rules provide that arbitrators have broad authority to order and control discovery." *Id.* Moreover, no located appellate decision from South Carolina or any other jurisdiction has held the AAA rules, codified by the most reputable arbitration organization in the country, 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). This Court should not be the first to so find.

Second, the supreme court has twice held that an arbitration agreement is not unconscionable unless it "goes beyond banning 'punitive damages' generally" to "specifically prohibit[] an arbitrator from awarding statutorily required treble or double damages." *Simpson*, at 29, 644 S.E.2d at 671; *Carolina Care Plan, Inc.*, 361 S.C. 557, 606 S.E.2d 758-59 (also recognizing "[a] number of courts in other jurisdictions have held that an arbitration agreement limiting or excluding punitive damages is enforceable.") In other words, an arbitration agreement is unconscionable only if it prohibits damages that are required by state law. Moreover, the supreme court held that the issue is not ripe until the plaintiff "prevails on the merits in arbitration" and the arbitrator finds "punitive damages are warranted." *Carolina Care Plan, Inc.*, 361 S.C. 557, 606 S.E.2d 758-59. Thus, the mutual prohibition on punitive damages cannot be a basis for the Court to find the agreement unconscionable.

Third, Plaintiff's argument that the $25,000 threshold favors Five Star is both speculative and illogical. There is no evidence before the Court that Five Star is more likely to possess claims against Mr. Whaley for less than $25,000 than Mr. Whaley would against Five Star. Any fee dispute, by either party, under $25,000 could be litigated in court. This does not apply to a claim by Five Star for unpaid rent any more than it applies to a claim by Mr. Whaley for overpayment. Moreover, even if this speculative argument supported by with concrete evidence, this Court has previously rejected a "rule requiring mutuality of remedy" in the context of arbitration agreements. *Lackey*, at 388, 402 S.E.2d at 905.

At their core, Plaintiff's arguments, all of which have been previously rejected by South Carolina appellate courts, fail to overcome the "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)). This Court should affirm that an arbitration agreement providing Plaintiff "control over the selection process," not imposing additional fees, and utlizing rules adopted by the AAA is not "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Lackey*, at 388, 402 S.E.2d at 905.

**b. Plaintiff did not lack meaningful choice.**

Plaintiff's argument that she lacked meaningful choice is built on the foundational proposition that the Agreement must be viewed with "considerable skepticism." However, South Carolina appellate courts have never, despite multiple opportunities to do so, extended the "considerable skepticism" standard outside the context of used cars and construction disputes. While many jurisdictions have adopted the "considerable skepticism" approach in the used car

context, Five Star was unable to locate any case extending the application of "considerable skepticism" to arbitration agreements between residents and senior living communities.

Moreover, the Agreement is meaningfully different than the arbitration agreement at issue in the sole case cited by Plaintiff. In *Simpson*, the arbitration provision was buried within a 16 page document that Plaintiff was forced to sign at the time she purchased her used vehicle without the opportunity to consult with counsel. *Simpson*, at 29, 644 S.E.2d at 671. The Agreement waived both her right to a jury trial and her right to statutorily guaranteed damages. *Id.* The court relied heavily on the inconspicuous nature of the arbitration agreement since it was not bolded or otherwise highlighted for Plaintiff. *Id.*

In this case, the Agreement was a stand-alone three page arbitration agreement. The Agreement provided a warning in bold font just inches above the signature line that "**THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES.**" (The Agreement.) There is no question Plaintiff knew she was signing an arbitration agreement and was not surprised to learn of its existence when she filed this lawsuit. Moreover, even accepting Plaintiff's contention that Five Star told her she needed to sign the Agreement, there is no evidence Plaintiff was not allowed to review the Agreement or take it home to review it with counsel. Even further, the Agreement was revocable if Plaintiff subsequently reviewed it with counsel and decided it was unfair to her father's rights. The Agreement was not inconspicuous, does not waive statutorily guaranteed damages, and was not signed without the opportunity to review with counsel. In short, it is nothing like the arbitration agreement in *Simpson*.

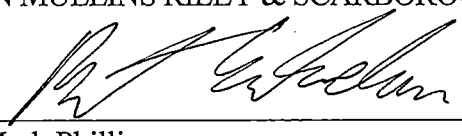
Without restating all of its arguments contained in its Initial Brief, Five Star concludes by noting that Plaintiff cannot escape that the law "does not impose a duty to explain" a contract when

the signing party can "learn the contents from simply reading the document." *Towles*, at 39; 524 S.E.2d at 845. If the Court found these facts deprived Plaintiff of "a meaningful choice," then it would struggle to find any case where a consumer plaintiff had a meaingful choice in an arbitraiton agreement with a corporate counterparty.

## Conclusion

For these reasons, this Court should reverse the lower court's denial of Appellant's Motion to Dismiss and Compel Arbitration.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

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**PROOF OF SERVICE**

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I certify that I have served the Reply 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 September 25, 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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September 25, 2017

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September 25, 2017

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SEP 27 2017
SC Court of Appeals

**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 please find the original and one copy of Appellants' Reply Brief in the above-referenced matter. Please file the original and return the clocked-in copy to me in the envelope provided.

By copy of this letter, I am hereby serving Plaintiff's counsel of record with a copy of the same. If you should have any questions or concerns, please do not hesitate to contact me.

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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09/25/2017
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