THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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 Roe 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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from an order denying a motion to dismiss and compel arbitration filed by Appellants 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 (collectively "Appellants"). The case involves an arbitration agreement signed by Thayer Arredondo when her father, Hubert Whaley, entered the Ashley River Plantation assisted living facility. Throughout his residency at the facility, Mr. Whaley suffered dozens of falls, broken bones, and other injuries that ultimately resulted in his death.

On August 17, 2016, the parties participated in pre-suit mediation but were unable to reach a settlement. (R. pp. 13, 27). On October 4, 2016, Ms. Arredondo, acting as the personal representative of Mr. Whaley's estate, filed a medical malpractice wrongful death and survival Complaint asserting causes of action for negligence, negligence *per se*, and fraud. (R. pp. 8-35). On November 16, 2016, Appellants filed an answer generally

denying the allegations of the Complaint and filed a motion to dismiss and compel arbitration. (R. pp. 36-57, 82-84).

On January 26, 2017, Respondent filed a Response in Opposition to Defendants' Motion to Dismiss and Compel Arbitration. (R. pp. 85-110). The Honorable J.C. Nicholson, Jr., held a hearing on the motion on January 27, 2017. On April 18, 2017, Judge Nicholson issued an Order Denying Defendants' Motion to Dismiss and to Compel Arbitration. (R. pp. 1-6). Judge Nicholson found Ms. Arredondo did not have actual or apparent authority to enter the arbitration agreement or waive Mr. Whaley's constitutional right to a jury trial, and that the agreement was unconscionable. (R. pp. 3-5).

On May 1, 2017, Appellants filed a motion to reconsider. (R. pp. 117-145). On May 10, 2017, Judge Nicholson issued a Form 4 Order denying the motion to reconsider. (R. p. 7). On June 7, 2017, Appellants filed a Notice of Appeal. (R. pp. 159-160).

FACTS

Respondent Thayer Arredondo is the daughter of the decedent, Hubert Whaley. (R. p. 96). On October 12, 2012, Mr. Whaley was admitted to Ashley River Plantation ("the facility"). (R. p. 14). The facility is an assisted living/community residential care facility located in Charleston, South Carolina. (R. p. 11). Mr. Whaley was eighty-four-years-old at the time of his admission to the facility. (R. p. 14). After his admission, the facility required Ms. Arredondo to execute an arbitration agreement on behalf of Mr. Whaley. (R. p. 96). A review of the authority Mr. Whaley granted to Ms. Arredondo demonstrates that he did not grant her the authority to enter the arbitration agreement.

In January 2003, Mr. Whaley executed a general durable power of attorney and a healthcare power of attorney. (R. pp. 98-110). Neither document authorized Ms.

Arredondo to agree to arbitration or waive Mr. Whaley's constitutional right to a jury trial.

The general durable power of attorney names Mr. Whaley's wife as his power of attorney and Ms. Arredondo as the successor attorney. (R. pp. 105, 108-109). It provides that the attorney may act in Mr. Whaley's "name, place and stead . . . and with the same force and effect as if I were personally present . . . to do any one or more of the following acts or things . . . ." (R. p. 105). The power of attorney then lists eight specific property and financial-based categories of actions the attorney may take on Mr. Whaley's behalf, namely: (1) signing instruments concerning "business affairs" and "real, personal or mixed" property; (2) "vote on any stock"; (3) endorsing or pledging "any security or other property"; (4) "consent to or oppose any reorganization, compromise, composition, merger"; (5) demand and receive any "money, debts, rents, interest, profits", etc.; (6) "grant, bargain, sell and release . . . any real estate and personal property"; (7) "pay out, reinvest, expend, dispose of, or otherwise deal with any moneys, funds, stocks, bonds", etc.; and (8) "make, execute, sign . . . promissory notes, renewal notes, checks, and other commercial or negotiable paper." (R. pp. 105-107). The language of the power of attorney shows that it relates solely to property and financial-based decisions and is devoid of any reference to the authority to agree to arbitration or to waive Mr. Whaley's right to a jury trial.

The health care power of attorney also lists Mr. Whaley's wife as the attorney and Ms. Arredondo as the successor attorney. (R. pp. 99-100, 103). The document relates solely to health care treatment and is devoid of any reference to the authority to agree to arbitration or to waive Mr. Whaley's right to a jury trial. The healthcare power of

attorney notifies the signatory that it "gives the person you name as your agent the power to make ***health care decisions*** for you." (R. p. 98) (emphasis added). It states the "power is subject to limitations or statements of your desires that you include in this document" and then provides as an example that "you may state in this document ***any treatment*** you do not desire or ***treatment*** you want to be sure to receive." *Id.* (emphasis added). The agent is granted "full authority to make decisions for me ***regarding my health care***. . . . In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way." (R. p. 100) (emphasis added). The agent is specifically "authorized" to make the following four decisions: whether to (1) "consent, refuse, or withdraw" medical treatment; (2) "authorize, or refuse to authorize" pain medication; (3) "authorize my admission or discharge . . . from any hospital, nursing care facility"; (4) "take any other action necessary to making, documenting, and assuring implementation of ***decisions concerning my health care***, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; . . . and pursuing any legal action in my name." *Id.* (emphasis added).

In October 2012, when Ms. Arredondo sought to admit Mr. Whaley to the facility, a facility representative said she "needed to sign various documents in order for [her] father to be admitted to the facility." (R. p. 96). She was never told about an arbitration agreement prior to her father's admission to the facility. *Id.* "After my father's admission to the facility, I met with Tasha Williams" who "informed me that I needed to sign additional documents related to my father's admission," including the arbitration agreement at issue. *Id.* The facility did not explain the arbitration agreement to Ms.

Arredondo. *Id.* She "had questions about the 'Arbitration Agreement' and was not comfortable signing it, but Ms. Williams told [her] that this was a document that everyone signed when admitting their loved ones to the facility and that [she] needed to sign the 'Arbitration Agreement'." *Id.*

The arbitration agreement is a three-page document, with the third page consisting of the parties' signature blocks. (R. pp. 114-116). The parties to the agreement are "Hubert james [sic] Whaley ('Resident') and Thayer Arredondo ('Resident's Authorized Representative,') (collectively 'Resident') and Ashley River Plantation ('Facility,' an affiliate of Five Star Quality Care, Inc., collectively 'Five Star')." (R. p. 114). The "Parties" are "the Resident and Five Star", making Five Star the only Appellant that is a party to the arbitration agreement. *Id.* The agreement states "Resident and Five Star agree 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." *Id.* Any claim "for which arbitration is not allowed by law shall be brought in an appropriate court before a judge" and the parties "waive their right to a trial by jury." (R. p. 115).

Arbitration under the agreement shall be conducted by a panel of one or three arbitrators chosen by the American Arbitration Association or mutual agreement of the parties. (R. p. 114). The resident may choose whether the panel shall be one or three arbitrators except that, if the resident is unable to pay his or her half of the arbitration expenses, and the facility pays the expenses, the facility then chooses a one or three arbitrator panel. *Id.* The panel "shall follow the current Commercial Arbitration Rules of the AAA." *Id.* Those rules provide for some document exchange but not for depositions

or document requests to nonparties.[1] The panel "shall have no authority to award punitive or exemplary damages" and its decision is "not subject to appeal." *Id.* The agreement is signed by Ms. Arredondo, and the "witness" line is blank. (R. p. 116). Tasha Williams, a "Sales Associate" of the facility, signed on its behalf. *Id.*

Mr. Whaley "was not present when [Ms. Arredondo] met with Ms. Williams of Ashley River Plantation to complete his paperwork, nor was he aware of the contents of such paperwork." (R. p. 97). Neither Ms. Arredondo nor anyone at the facility discussed the paperwork with Mr. Whaley. *Id.* Ms. Arredondo said about the arbitration agreement: "I did not ask for my father's permission to sign it, nor did he give me permission to sign it." *Id.*

No one explained to Ms. Arredondo that the arbitration agreement "would give up my father's right to bring a claim of negligence or malpractice." (R. pp. 96-97). The facility "said nothing to" Ms. Arredondo "about consulting an attorney or that [she] had the ability to withdraw the agreement in writing." (R. p. 97). Neither she nor her father consulted with an attorney before she signed the arbitration agreement. *Id.*

While a resident of the facility, Mr. Whaley suffered numerous injuries. He suffered at least fourteen falls, a jaw fracture, a spine fracture, a clavicle fracture, bruising, skin tears, abrasions, at least six urinary tract infections, bronchitis, pneumonia, mental anguish, and insults to his human dignity. (R. pp. 16-17, 28-35). In February 2014, Mr. Whaley's family learned of bruising to his lower jaw, neck, and right cheek and of wounds to his tailbone and ankle. (R. p. 17). Mr. Whaley was admitted to Bon

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[1] *See* https://www.adr.org/sites/default/files/Commercial%20Rules.pdf p. 19 (stating an arbitrator "may" "require the parties to exchange documents . . . on which they intend to rely" but making no mention of required discovery, depositions, or document requests to nonparties).

Secours St. Francis Hospital where medical staff found a progressive decline in his mental status and that he experienced "some event" two days prior to admission, which the facility denied. *Id.* He was also diagnosed with a mandible fracture, metabolic encephalopathy, possible aspiration pneumonia, and possible urinary tract infection. *Id.* Mr. Whaley died on February 27, 2014, as a result of the injuries he suffered at the facility. *Id.*

On October 4, 2016, Respondent filed this action in the Charleston County Court of Common Pleas and, on November 16, 2016, Appellants filed a motion to dismiss and compel arbitration. (R. pp. 8-26, 82-84). On January 27, 2017, the Honorable J.C. Nicholson, Jr., held a hearing on Appellants' motion to dismiss and compel arbitration. (R. p. 1).

On April 18, 2017, Judge Nicholson filed an Order Denying Defendants' Motion to Dismiss and Compel Arbitration. (R. pp. 1-6). Judge Nicholson found Ms. Arredondo lacked actual authority to agree to arbitrate or to waive Mr. Whaley's right to a jury trial because neither the general durable power of attorney nor the health care power of attorney conferred any authority regarding arbitration or waiver of a jury trial right. (R. p. 3). Judge Nicholson held Ms. Arredondo also lacked apparent authority to agree to arbitrate or waive Mr. Whaley's right to a jury trial because Mr. Whaley was neither involved in the admission paperwork nor present for the execution of the arbitration agreement and, therefore, could not have made a manifestation of authority to the facility regarding Ms. Arredondo. (R. pp. 3-4). He further found the agreement unconscionable based on the "severely disparate" bargaining power, Ms. Arredondo's inability to negotiate the terms of a contract prepared solely by the facility, the facility's

representation to Ms. Arredondo that she "must" sign the agreement for her father's admission, and the "'take or leave it'" presentation of the agreement at a time when Ms. Arredondo was "in need of the Defendants' services." (R. pp. 4-5).

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48, 790 S.E.2d at 3.

ARGUMENT

This case arises out of Appellants' negligent care of Mr. Whaley that resulted in his death. His daughter and personal representative, Ms. Arredondo, brought this action in circuit court seeking survival and wrongful death damages for Mr. Whaley's injuries and death. Appellants seek to force an arbitration of those claims based on an arbitration agreement executed after Mr. Whaley's admission to the facility. As explained below, Ms. Arredondo had no actual or apparent authority to execute the arbitration agreement. Further, the agreement is unconscionable as the parties to it had severely disparate bargaining power and the terms are oppressive and one-sided, unfairly favoring Appellants. The evidence and law support these findings by the lower court. Further, this Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

I. THE LOWER COURT CORRECTLY FOUND MS. ARREDONDO DID NOT HAVE ACTUAL AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT

The lower court correctly concluded the powers of attorney did not confer actual authority on Ms. Arredondo to execute the arbitration agreement. This is demonstrated by a review of the full language and meaning of the powers of attorney.

"[A]ctual authority is expressly conferred upon the agent by the principal . . . ." *Roberson v. Southern Fin. of S.C., Inc.*, 365 S.C. 6, 11, 615 S.E.2d 112, 115 (2005); *accord Charleston v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004) ("[A]ctual authority is that which is expressly conferred upon the agent by the principal . . . ."). The explanation of the powers of attorney in the Facts section demonstrates that the general durable power of attorney relates to financial and property decisions and the health care power of attorney relates specifically to decisions concerning Mr. Whaley's health care. Neither document is subject to an interpretation that it conferred actual authority to Ms. Arredondo to execute the arbitration agreement and waive Mr. Whaley's right to a jury trial.

The health care power of attorney grants the authority only to "authorize my admission or discharge" from a nursing care facility. (R. p. 100). Ms. Arredondo was presented with the arbitration agreement after Mr. Whaley's admission to the facility. (R. p. 96). Therefore, she had no authority when she signed the arbitration agreement. Further, the health care power of attorney specifies that "In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way." (R. p. 100). Ms. Arredondo "did not discuss the arbitration agreement with [her] father at the time the document was signed. [She] did not ask for [her] father's permission to sign it, nor did he give [her] permission to sign it."

(R. p. 97). The law and evidence support the lower court's finding that she did not have actual authority to execute the arbitration agreement.

A. A Review of the Full Language of the Provisions of the Powers of Attorney Relied Upon by Appellants Demonstrates they do Not Confer Actual Authority to Execute the Arbitration Agreement

Appellants point to three provisions of the powers of attorney as alleged sources of actual authority to execute the arbitration agreement. (Br. of App. pp. 10-11). A review of the full language of these provisions, not the isolated words chosen by Appellants, shows that none of these provisions confer actual authority to execute an arbitration agreement or waive the right to a jury trial.

In response to Appellants' argument section I. regarding the Federal Arbitration Act, Respondent notes that the FAA applies to arbitration agreements. 9 U.S.C. § 2 (2011). It does not apply to the interpretation of the authority conferred by a power of attorney.

As to the health care power of attorney, Appellants point to two clauses in the same sentence. Each clause is identified below by numbers [1] and [2] for ease of reference.

> [M]y agent is authorized as follows: . . .
>
> d. To take any other action necessary to making, documenting, and assuring implementation of ***decisions concerning my health care***, including, but not limited to, [1] granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; . . . [2] pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.

(R. pp. 100-101) (emphasis added). Taking into account the entire sentence, it is apparent that "granting any waiver" and "pursuing any legal action in my name" refer

back to "decisions concerning my health care."[2] *Id.* An arbitration agreement and jury trial waiver are not decisions that concern health care. "[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson v. Pruitt Corp.*, 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); *accord Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354, 755 S.E.2d 450, 454 (2014) ("The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future.").[3]

Further, as to the waiver clause, it specifically refers to a "waiver or release ***from liability***." (R. pp. 100-101) (emphasis added). An arbitration agreement is not a waiver of liability but a waiver of the right to a trial by jury in court. This clause cannot be interpreted as granting actual authority to execute an arbitration agreement.

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[2] Appellants argue that pursuing a legal action should include the "ability to select the forum and venue . . . , including arbitration." (Br. of App. p. 11). Arbitration and venue are not the same thing. "[V]enue is the place or geographical location of trial." *Dove v. Gold Kist*, 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994) (citing *In re Asbestosis Cases*, 276 S.C. 579, 281 S.E.2d 112 (1981) ("venue" refers to the county where the action should be brought)). The same decisionmaker and civil procedure and evidence rules apply in any venue. On the contrary, arbitration is the absence of our state civil procedure and evidence rules and involves a different decisionmaker that is paid by the parties.

[3] Appellants attempt to minimize the law in *Thompson* and *Coleman* because the signatories to the arbitration agreements in those cases did not have a power of attorney. (Br. of App. pp. 13-14). This is irrelevant to the point of law on which Respondent relies. Whether a power of attorney existed in those cases does not change the law that a health care decision does not include an agreement to resolve legal claims by arbitration or without a jury.

As to the legal action clause, it refers to "punitive damages", which the arbitration agreement at issue prohibits. (R. p. 114 (stating the arbitration panel "shall have no authority to award punitive or exemplary damages")). Therefore, that clause cannot be interpreted to grant authority to execute an arbitration agreement that contains a provision that prohibits something the power of attorney expressly permits.

Appellants incorrectly represent to the Court that the health care power of attorney states "Mr. Whaley intended this authority 'to be as broad as possible.'" (Br. of App. p. 11). The health care power of attorney states in full: "My Agent's authority ***to interpret my desires*** is intended to be as broad as possible, except for any limitations I state below." (R. p. 100) (emphasis added). The full sentence shows that "as broad as possible" refers to the agent's authority to interpret Mr. Whaley's desires, and not to an interpretation of the agent's authority in general.

The third provision Appellants point to is in the general durable power of attorney. Again, a full reading of the provision shows it cannot reasonably be interpreted to have anything to do with arbitration or the waiver of a jury trial. The full provision is 99 words, of which Appellants only state 15 words in their brief. This is telling as to the significance of the omission in properly interpreting the provision. The attorney-in-fact has authority:

> To make, sign, execute, issue, assign, transfer, endorse, release, satisfy and deliver any and all instruments or writing 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.

(R. p. 105) (emphasis added). This provision refers to authority related to Mr. Whaley's business affairs and real or personal property, including financial property such as stocks and securities. It does not grant the authority to enter into an arbitration agreement and waive his right to a trial by jury.

Appellants' argument that interpreting the provisions as Respondent asserts would mean that Ms. Arredondo would have some rights as it relates to litigating this case but not the right to waive a jury trial is illogical and misses the issue before the Court. The issue is whether she had authority ***in October 2012 as attorney-in-fact*** to execute the arbitration agreement. The choices she makes in litigating this case ***today*** arise out of her status as the ***court-appointed personal representative*** of Mr. Whaley's estate. (R. p. 8 (stating Ms. Arredondo "was duly appointed as the Personal Representative of the Estate of Hubert Whaley . . . on March 6, 2015 in the Charleston County Probate Court in South Carolina.")). The Court should disregard this argument.

B. Appellants' Argument II.a.iii is Unpreserved and Meritless as South Carolina does Not have a Brightline Rule that Every Power of Attorney Confers the Authority to Agree to Arbitration

Appellants' Argument section II.a.iii arguing essentially that anyone with a power of attorney may execute an arbitration agreement is unpreserved and wholly unsupported by the law. Appellants filed a motion to reconsider that does not raise this issue. Appellants argued in the motion to reconsider only that Ms. Arredondo had authority to agree to arbitrate based on certain provisions of the powers of attorney. (R. pp. 120-122). Appellants did not reference the argument they make on appeal that an agent with a power of attorney is authorized to execute an arbitration agreement with a health care provider. (*Id.*; Br. of App. pp. 12-13). "In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court."

Holy Loch Distribs. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000); *Floyd v. Floyd*, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." (internal quotation marks omitted)).

Further, this argument is not supported by South Carolina law. It is illogical to argue that the mere existence of a power of attorney means that the agent can sign an arbitration agreement as this would make an interpretation of the power of attorney, and thus Appellants' arguments to the lower court, unnecessary. The existence of a power of attorney conveys some authority to the agent but the issue is determining the scope of that authority. None of the cases cited by Appellants support this bright line rule. (Br. of App. pp. 12-13). For example, in the unpublished opinion of *Scott v. Heritage Healthcare of Estill, LLC*, Op. No. 2014-UP-317, 2014 WL 3845113 (S.C. Ct. App. filed Aug. 6, 2014)[4], Appellants incorrectly state that the Court of Appeals refused to enforce an arbitration agreement because the resident's sister did not have a health care power of attorney. (Br. of App. pp. 12-13). What the Court actually held is that the resident's sister "lacked authority to enter into the Arbitration Agreement on Jones' behalf because Jones was competent at the time of her admission." 2014 WL 3845113, *2.

Appellants' argument would make the language of a power of attorney irrelevant and eliminate the infirmed person's power to dictate what his or her agent may do. The correct approach is the one used by the lower court to analyze the language of a power of attorney on a case-by-case basis to determine what powers an agent possesses.

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[4] Respondent notes that Appellants' citation to an unpublished opinion is improper under Rule 268(d)(2), SCACR.

C. Appellants' Argument II.a.i is Unpreserved and Meritless as the Lower Court Expressly Followed State and Federal Arbitration Law

Appellants' Argument section II.a.i. regarding whether the powers of attorney "expressly conferred" the authority to agree to arbitrate and waive the right to a jury trial is unpreserved and a misreading of the lower court's order and the law applicable to this case. (Br. of App. pp. 8-10). Appellants filed a motion to reconsider that does not raise this issue. Appellants argued in the motion to reconsider only that Ms. Arredondo had authority to agree to arbitrate based on certain provisions of the powers of attorney. (R. pp. 120-122). Appellants did not reference or challenge the lower court's use of the "expressly conferred" language or cite to the South Carolina case they now raise on appeal. (*Id.*; Br. of App. p. 8). "In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs.*, 340 S.C. at 24, 531 S.E.2d at 284; *Floyd*, 365 S.C. at 73, 615 S.E.2d at 474 ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." (internal quotation marks omitted)). This issue is not preserved, and the Court should decline to consider it.

Appellants are also incorrect on the merits of this argument. The lower court did not base its ruling on actual authority solely on the fact that the powers of attorney do not state Ms. Arredondo may execute an arbitration agreement. A review of the hearing transcript and the lower court's Order reveals that it heard argument on and considered the interpretation of the provisions of the powers of attorney. (R. pp. 64-67, 72-73, 79). The lower court determined those documents could not be interpreted to confer actual authority. The Order does not state the Court's ruling is based solely on an absence of express language stating the agent may execute an arbitration agreement but that "neither

of these documents conferred on Ms. Arredondo the authority to execute the Arbitration Agreement on Mr. Whaley's behalf and waive his constitutional right to a jury trial." (R. p. 3).

The lower court's order states the correct, applicable South Carolina law. *Id.* The "expressly conferred" language is taken directly from a case that states: "While actual authority is that which is ***expressly conferred*** upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Charleston v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004) (emphasis added). The lower court's discussion of this established principle of law is correct.

Appellants' reliance on *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), is also misplaced. An accurate explanation of the Kentucky Supreme Court's findings in *Kindred* demonstrates that the lower court in this case ruled squarely in line with the United States Supreme Court's opinion. The Kentucky Supreme Court was presented with whether powers of attorney executed by two deceased nursing home residents conferred on the named attorneys-in-fact the power to enter into an arbitration agreement. *Id.* at 1425. The Kentucky Supreme Court concluded one power of attorney "did not permit [the attorney-in-fact] to enter into an arbitration agreement . . . [because] neither the provision authorizing her to bring legal proceedings nor the one enabling her to make property-related contracts reached quite that distance." *Id.* It concluded the other power of attorney did grant the attorney-in-fact the authority to enter an arbitration agreement because it granted the power to "dispose of all matters affecting me and/or my

estate in any possible way." *Id.* After conducting this individual assessment of the powers conferred by each power of attorney, the Kentucky Supreme Court went a step further and held that, regardless of the interpretation of the language of each power of attorney, they "could not entitle a representative to enter into an arbitration agreement without *specifically* saying so." *Id.* at 1426. This is the ruling the United States Supreme Court reversed. *Id.* at 1429. It held that "such a rule is too tailor-made to arbitration agreements . . . to survive the FAA's edict against singling out those contracts." *Id.* at 1427.

Significantly, after reversing the categorical rule that a power of attorney must specifically say it grants the power to enter into an arbitration agreement, the United States Supreme Court discussed the propriety of the Kentucky Supreme Court's original analysis of whether the language of the power of attorney encompassed the authority to arbitrate. *Id.* at 1429. "The Kentucky Supreme Court began its opinion by stating that the Wellner power of attorney was insufficiently broad to give Beverly the authority to execute an arbitration agreement . . . . If that interpretation of the document is wholly independent of the court's clear-statement rule, ***then nothing we have said disturbs it.***" *Id.* (internal citation omitted) (emphasis added). Therefore, under *Kindred*, it is proper for a court to analyze the language of a power of attorney to determine whether it encompasses the authority to agree to arbitrate. That is exactly what the lower court did in this case. It listened to counsels' arguments as to the meaning and interpretation of the authority granted in the powers of attorney and determined Mr. Whaley did not grant Ms. Arredondo actual authority to agree to arbitration or waive his right to a jury trial. The Court should affirm the lower court on this issue.

II. THE LOWER COURT CORRECTLY HELD MS. ARREDONDO DID NOT HAVE APPARENT AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT

The lower court correctly ruled Ms. Arredondo did not have apparent authority to execute the arbitration agreement and waive Mr. Whaley's right to a jury trial.[5] (R. pp. 3-4). As to the alleged source of apparent authority, Appellants again rely exclusively on the powers of attorney. They argue the powers of attorney are written representations by Mr. Whaley to the facility that manifest his intent for Ms. Arredondo to act on his behalf. (Br. of App. pp. 13-14). The lower court, having just ruled that the powers of attorney did not confer actual authority to Ms. Arredondo to execute the arbitration agreement, also correctly ruled they also could not be a source of apparent authority and determined there was no evidence of a representation by Mr. Whaley to Appellants as he was not present during the admissions process or the execution of the arbitration agreement. (R. pp. 3-4, 97). The lower court's ruling is correct and should be affirmed, and Appellants' argument fails for numerous independent reasons.

First, for the reasons stated above, the powers of attorney do not confer authority on Ms. Arredondo to execute the arbitration agreement and waive Mr. Whaley's right to a jury trial. Therefore, they cannot be the basis for apparent authority in this case. Indeed, Appellants' argument that the powers of attorney are the basis for both types of authority demonstrates the weakness of its apparent authority argument. The documents either provide actual authority or they do not. The powers of attorney cannot fall short of actual authority but support a finding of apparent authority.

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[5] The lower court ruled "Ms. Arredondo also lacked the authority to bind Mr. Whaley's estate to the arbitration agreement." (R. p. 4). Appellants do not appeal this ruling and, therefore, it is the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

Second, Appellants fail to satisfy the elements of apparent authority. "[O]ur courts have required three elements be proven to establish apparent authority: (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was a reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." *Charleston v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 643, 598 S.E.2d 717, 721 (Ct. App. 2004) (quotation marks omitted). Appellants do not even recite these elements in their brief and do not make an argument as to the second and third elements. "To establish apparent agency, it is not enough simply to prove that the purported principal by either affirmative conduct or conscious and voluntary inaction has represented another to be his agent or servant. A party must also prove reliance upon the representation and a change of position to his detriment in reliance on the representation." *Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986).

Appellants fail to satisfy the first element because the powers of attorney do not confer authority on Ms. Arredondo to execute the arbitration agreement and waive Mr. Whaley's right to a jury trial. Appellants do not challenge the lower court's factual findings that Mr. Whaley "was not involved in the admissions process" and "not present when the arbitration agreement was signed". (R. p. 4). Rather, they argue Mr. Whaley represented Ms. Arredondo's authority by the written words of the powers of attorney. (Br. of App. pp. 13-14). This argument again fails because, as explained above, the powers of attorney do not confer authority to Ms. Arredondo. If the Court affirms the lower court's finding that the powers of attorney do not confer authority on Ms. Arredondo to execute the arbitration agreement and waive Mr. Whaley's right to a jury

trial, then it must also find that Appellants failed to show a representation of apparent authority.

Appellants fail to satisfy the second element of apparent agency because they have made no argument and presented no evidence of reliance upon a representation made by Mr. Whaley. "The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations." *Moore v. N. Am. Van Lines*, 310 S.C. 236, 239, 423 S.E.2d 116, 118 (1992). Appellants state in their brief that Ms. Arredondo "provided" the powers of attorney to them but there is no evidence or assertion that Appellants read the powers of attorney or relied on them in any way related to the arbitration agreement.

Appellants fail to satisfy the third element of apparent agency because they have made no argument and presented no evidence of a change in position to their detriment. Appellants do not assert in this case that they would not have admitted Mr. Whaley without an executed arbitration agreement. Further, they received payment for his care.

Finally, Appellants' citation to S.C. Code Ann. § 62-8-119 is misplaced and misreads the purpose of the statute. (Br. of App. pp. 14-15). The statute was passed in June 2016 and became effective on January 1, 2017. 2016 Act No. 279, § 1. The events in this case involving Appellants' receipt of Mr. Whaley's powers of attorney occurred in 2012, over four years before the effective date of the statute. Therefore, the statute does not apply to this case. The statute also does not apply to the situation presented in this case—an interpretation of the scope of authority granted in a general durable and health care power of attorney. The Reporter's Comments to § 62-8-119 state: "The purpose of this section is to protect a third person that in good faith accepts a power of attorney

which appears on its face to be valid when the third person accepting the power of attorney is without knowledge that it contains a forged signature or a latent defect in the execution. The Act places the risk that a power of attorney is invalid upon the principal and the agent rather than the person that accepts the power of attorney." *Reporter's Comments* to § 62-8-119. This is not a situation in which the validity of a power of attorney is challenged. The issue in this case is interpretation of the scope of authority granted by a valid power of attorney.

Under Appellants' reading of § 62-8-119, anyone who received a power of attorney could not read the document and then rely on the statute if the agent exceeded his or her authority. That is not the aim of the statute. The Act specifically provides for the interpretation of the meaning of a power of attorney. *See* S.C. Code Ann. § 62-8-107 ("The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney . . . ."). Section 62-8-119 is not applicable to the facts of this case involving the interpretation of the scope of powers in a validly executed power of attorney, and the Court should disregard this argument.

Appellants fail to satisfy the elements of apparent authority, and the Court should affirm the lower court's ruling that Ms. Arredondo did not have apparent authority to execute the arbitration agreement or waive Mr. Whaley's right to a jury trial.

III. THE LOWER COURT CORRECTLY FOUND THE ARBITRATION AGREEMENT IS UNCONSCIONABLE.

The law and evidence support the lower court's holding that the arbitration agreement is unconscionable. Under the Federal Arbitration Act, an unconscionable arbitration agreement is invalid and unenforceable because unconscionability is a basis

for revoking a contract. *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)); *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) ("[C]ourts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability.").

"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 v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668-69 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

A. Respondent Lacked a Meaningful Choice because the Arbitration Agreement is a Contract of Adhesion, Contrary to Fundamental Fairness

The lower court correctly found the arbitration agreement is an adhesion contract as to which Respondent lacked a meaningful choice. "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.

> 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; 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. at 25, 644 S.E.2d at 669 (internal quotation marks and citation omitted). These factors weigh in favor of finding the arbitration agreement in this case unconscionable.

As an initial matter, the arbitration agreement in this case is "subject to considerable skepticism." *Id.* at 26, 644 S.E.2d at 669. In *Simpson*, the Supreme Court adopted a rationale from the Ohio courts that viewed "automobiles as a necessity and factor[ed] this characterization into a determination of whether a customer had a meaningful choice in negotiating the arbitration agreement." *Id.* (internal quotation marks omitted). When analyzing a contract for a vehicle trade-in, our Supreme Court stated the contract "involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society." *Id.* at 27, 644 S.E.2d at 670. Therefore, the Court analyzed the contract "with considerable skepticism." *Id.*

In this case, the arbitration agreement that was part of the facility's admission paperwork is subject to greater skepticism than the contract in *Simpson*. Obtaining a safe living environment and proper medical care for a vulnerable adult is more of a "necessity" and more "critically important in modern day society" than transportation. Therefore, the arbitration agreement between an assisted living facility and a potential resident should be subject to "considerable skepticism" in the Court's analysis as to whether Ms. Arredondo had a meaningful choice.

Turning to the factors listed above, Mr. Whaley suffered severe physical and mental injuries. Further, his wrongful death beneficiaries suffered the loss of his life and companionship. (R. pp. 16-17, 20, 28-35). Second, Mr. Whaley was not a substantial business concern to Appellants. He was one resident for a company that has "a total unit

capacity of 31,280" across 32 states.[6] *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016) (finding a homebuyer was "not a substantial business concern" where they were "a single client to a corporation that constructs houses in twenty-seven states"). Third, the disparity in the parties' bargaining power is stark. Appellant Five Star Quality Care, Inc., is a nationwide operator of senior living communities with "more than 270 senior living communities in over 30 states."[7] Respondent, on the other hand, is one potential resident among tens of thousands. The sophisticated parties were Appellants; the party who lacked knowledge or power was Ms. Arredondo. Finally, Ms. Arredondo specifically stated there was an element of surprise to the inclusion of the arbitration agreement to the admission paperwork. "In that discussion [about the documents to sign for Mr. Whaley's admission to the facility], I was never informed of an Arbitration Agreement. After my father's admission to the facility, I met with Tasha Williams . . . [who] informed me that I needed to sign additional documents," including the arbitration agreement. (R. p. 96).

Appellants' arguments on this issue are meritless. First, that Appellants did not present the arbitration agreement until after Mr. Whaley's admission does not negate its status as an adhesion contract. (Br. of App. p. 17). Appellants' tactic, of admitting the ill family member and then telling someone they need to sign an arbitration agreement as part of the admission, could be seen as more underhanded than merely presenting the

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[6] http://s21.q4cdn.com/102119002/files/doc_presentations/2017/08/FVE_2Q17_Investor_Presentation_August_2017_FINAL.pdf (p. 6 of Investor Presentation August 2017).

[7] https://www.fivestarseniorliving.com/communities (listing the states in which Five Star has facilities and showing South Carolina is where Five Star operates the largest number of facilities, twenty-three).

agreement at the time of admission. Regardless, the only evidence in the record is that Appellants' "sales representative" told Ms. Arredondo "this was a document that everyone signed when admitting their loved ones to the facility and that I ***needed to sign*** the 'Arbitration Agreement' in order ***to ensure my father's admission*** to the facility." (R. p. 96) (emphasis added). This supports the lower court's finding that the agreement is a take-it-or-leave-it adhesion contract. (R. p. 5).

Second, the lower court did not, as Appellants assert, find the agreement unconscionable based ***solely*** on the fact that one party is an individual and one party is a national corporation. (Br. of App. p. 17). Rather, the lower court properly considered that as a factor in the analysis—"whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication,"—and this consideration by the lower court is supported by the law and the record. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Third, the lower court did not, as Appellants assert, disrupt the law by requiring a facility to read or explain an arbitration agreement to a party. (Br. of App. pp. 17-18). Rather, the lower court found that, when Ms. Arredondo attempted to ask Appellants questions about the agreement, she was cut off and told she must sign the agreement to ensure her father's admission to the facility. (R. pp. 5, 96). This finding is supported by the evidence and the law. *See Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670 (stating "regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms, we find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences"). Here, Appellants made the arbitration agreement seem inconspicuous by presenting it as mere

additional paperwork to be signed after Mr. Whaley was admitted to the facility when, in reality, its consequences had extreme implications for Mr. Whaley's rights.

There is ample evidence to support the lower court's finding that "[t]his Agreement was offered on a 'take [it] or leave it' basis as it was represented as a condition for admission to a facility that held itself out as providing healthcare services that Mr. Whaley and his family desperately needed." (R. p. 5). The arbitration agreement is an adhesion contract as to which Ms. Arredondo lacked a meaningful choice.

As adhesion contracts are not *per se* unconscionable, Respondent argues below as to the facts that support the lower court's finding that the terms of the arbitration agreement are oppressively one-sided such that no reasonable person would make or accept them.

B. The Self-Serving Terms of the Arbitration Agreement are Oppressive and One-Sided

The terms of the arbitration agreement, drafted solely by Appellants, are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

The arbitration agreement limits available discovery methods and provides Appellants with an unfair advantage in learning the truth and preparing for arbitration. The agreement states the arbitration panel "shall follow the current Commercial Arbitration Rules of the AAA." (R. p. 114). "The Panel shall have the authority . . . to direct discovery in all controversies." *Id.* However, absent from the agreement are the actual rules that Ms. Arredondo was agreeing to follow and, given the hasty presentation of the agreement and direction that she needed to sign it to ensure her father's admission,

she had no opportunity to review herself, or with an attorney, the one-sided rules Appellants told her to agree to in this case.

The Commercial Arbitration Rules do not mandate any discovery.[8] They provide only that the arbitrator "may . . . require the parties to exchange documents in their possession or custody on which they intend to rely" at the arbitration, to update any such exchange, to make available documents not readily available to the other party that are reasonably believed to exist and "to be relevant and material" to the case, and to make documents available in a convenient form. *Id.* The practical use of these rules demonstrates that these limitations unfairly prejudice the party with the burden of proof yet weaker bargaining power –the resident who suffers harm at the facility. Residents such as Mr. Whaley cannot depose Appellants' employees to learn what facts they know, while Appellants, who have exclusive knowledge of issues pertaining to the facility's conduct in this case, may conduct an investigation without revealing negative information. Appellants' expert could rely on only favorable employee statements written by management and Respondent would be precluded from deposing the employees or otherwise obtaining evidence unfavorable to Appellants. This is not "geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

The arbitration agreement also eliminates Mr. Whaley's right to seek punitive damages or to appeal the arbitrator's decision. The arbitration agreement expressly prohibits "punitive or exemplary damages." (R. p. 114). These damages would be recoverable under South Carolina law in circuit court. Such a limitation protects

[8] https://www.adr.org/sites/default/files/Commercial%20Rules.pdf pp. 19-20.

Appellants and deprives Respondent of rights even where the most violent neglect and abuse occurs. Further, no appeal may be taken from the arbitration decision. *Id.* The Federal Arbitration Act provides for an appeal of an arbitrator's decision. 9 U.S.C. § 16 (2011). The South Carolina Uniform Arbitration Act also provides for an appeal. S.C. Code Ann. § 15-48-200. The elimination of any review of the arbitration award, in combination with the other restrictions and limitations discussed herein, makes the agreement oppressive and one-sided.

The Record on Appeal also supports a finding that the arbitration agreement is oppressive and one-sided because it essentially permits Appellants to bring claims in circuit court while preventing Respondent from doing so. Any claim brought by Appellants against Mr. Whaley is likely to be a claim for payment. The arbitration agreement only applies to claims that are over $25,000. (R. p. 114). Appellants' claims are likely to fall under this threshold. Whereas, Mr. Whaley's claims for nursing home abuse and neglect are likely to exceed $25,000, ensuring that he must arbitrate while Appellants may seek a ruling in circuit court. (R. p. 94).

Finally, contrary to Appellants' assertion, the lower court's findings of fact are supported by the evidence. (Br. of App. p. 19). As an initial matter, Appellants do not assert that the alleged incorrect factual statements affected the lower court's ruling. Therefore, the argument is irrelevant. Regardless, the findings are supported by the evidence. The lower court found "Ms. Arredondo 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. (R. pp. 2, 97). Ms. Arredondo's affidavit supports that finding as it states that, when she asked questions about the arbitration agreement, she

was told that "everyone signed" the agreement and she "needed to sign [it] in order to ensure" her father's admission to the facility." (R. p. 96). This, combined with the fact that Mr. Whaley was not present during the signing and she did not ask his permission to sign it reasonably support the finding that she was given no opportunity to discuss it with him but, rather, was pressured to immediately sign.

The lower court found "no one from the facility reviewed the agreement that Ms. Arredondo had signed with her father after his arrival to Ashley River Plantation." (R. p. 2). This is supported by the undisputed evidence that "No one from the facility went through the paperwork that [Ms. Arredondo] had signed with [her] father after his arrival to Ashley River Plantation in [her] presence, and to the best of [her] knowledge, no one went through the paperwork individually with him at any time." (R. p. 97). Finally, the lower court found "Ms. Arredondo . . . lack[ed] knowledge of arbitration or of the constitutional right she was being asked to waive." (R. p. 5). This is supported by the undisputed evidence that "Ms. Williams did not explain the 'Arbitration Agreement' to [Ms. Arredondo]. . . . [and Ms. Arredondo] do[es] not recall any explanation by Ms. Williams that the 'Arbitration Agreement' was a document by which [she] would give up [her] father's right to bring a claim of negligence or malpractice." (R. pp. 96-97). The lower court's factual findings are supported by the undisputed evidence in this case.

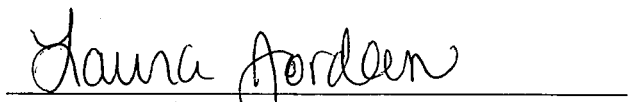
CONCLUSION

The lower court correctly found that Ms. Arredondo lacked actual or apparent authority to execute the arbitration agreement and that the agreement is unconscionable as it is an adhesion contract as to which Ms. Arredondo lacked a meaningful choice and contains one-sided and oppressive terms.

For the reasons set forth herein, and any others appearing in the Record on Appeal, Respondent requests this Court affirm the decision of the lower court and remit the case to the circuit court.

November 10, 2017

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
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 Roe 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.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that no changes have been made to the Final Brief of Respondent except as permitted by Rule 211(b), SCACR. The one change made is as follows: on page 23 in paragraph 3, the citation of (Cmplt. at pp. 9-10, Ex. B to Cmplt) was changed to (R. pp. 16-17, 20, 28-35) to correct a typographical omission in the original citation.

Respectfully submitted,

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