THE STATE OF SOUTH CAROLINA
Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2019-UP-293 (S.C. Ct. App. filed August 14, 2019)

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

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 .....Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on August 14, 2019. (App. p. 1). Counsel for Petitioner certifies that the Petition for Rehearing was made on August 23, 2019, and denied on September 20, 2019. (App. pp. 9, 68).

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in finding the arbitration agreement is not unconscionable when Petitioner lacked a meaningful choice and the cumulative effect of the terms is oppressive and one-sided.

II. Whether the Court of Appeals erred in finding Ms. Arredondo had actual authority to execute the arbitration agreement when the powers of attorney do not grant her the power to agree to arbitration or waive the right to a jury trial.

STATEMENT OF THE CASE

This is an appeal from a circuit court order denying Respondents 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's ("Respondents") motion to compel arbitration. The lower court found Petitioner Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley ("Petitioner"), lacked apparent or actual authority to execute an arbitration agreement on behalf of her father and that the arbitration agreement is unconscionable. (App. pp. 149-54). The Court of Appeals reversed, finding actual authority to execute the arbitration agreement and that the agreement is not unconscionable. (App. pp. 1- 8). The Court did not rule on apparent authority or issue preservation. (App. p. 8 n.3).

On October 12, 2012, eighty-four-year-old Hubert Whaley was admitted to Respondents' Ashley River Plantation assisted living/community residential care facility in Charleston, South Carolina. Petitioner, the daughter of decedent Hubert Whaley, accompanied her father on his admission. (App. p. 162 ¶ 28). Respondents told her to sign "various documents in order for [her] father to be admitted to the facility." (App. p. 244). "***After***" her father's admission, Petitioner, met

with a facility representative who told Petitioner she "needed to sign additional documents related to my father's admission to the facility", including the arbitration agreement at issue. *Id.* (emphasis added). Respondents did not explain the arbitration agreement to Petitioner. (App. p. 244). When Petitioner "had questions about the 'Arbitration Agreement' and was not comfortable signing it, [Respondents] 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 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." (App. p. 262 ¶ 1). 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." (App. p. 263 ¶ 5). Arbitration is conducted by a panel of one or three arbitrators chosen by the American Arbitration Association or mutual agreement of the parties. (App. p. 262 ¶ 2). The parties split arbitration costs, and the resident chooses a panel of one or three arbitrators except that, if the resident submits "an affidavit that they do not have the means to pay their one half of the arbitration expenses", and Respondents pay the expenses, Respondents choose the number of arbitrators. (App. p. 262 ¶¶ 2-3). The arbitrators "shall follow the current Commercial Arbitration Rules of the AAA." (App. p. 262 ¶ 2). Those rules provide for document exchange but not depositions, answers to interrogatories, or document requests to nonparties. (App. pp. 40-41). The panel "shall have no authority to award punitive or exemplary damages" and its decision is "not subject to appeal." *Id.* Respondents may amend the agreement with 30 days' notice to the resident but the resident does not have a reciprocal right to amend. (App. p. 263 ¶ 9).

No one explained to Petitioner that the arbitration agreement "would give up [Petitoiner's] father's right to bring a claim of negligence or malpractice." (App. p. 244-45). Respondents "said nothing to" Petitioner "about consulting an attorney or that [she] had the ability to withdraw the agreement in writing." (App. p. 245). Neither she nor her father consulted with an attorney before she signed the arbitration agreement. *Id.* Mr. Whaley "was not present when [Petitioner] met with" Respondents "to complete his paperwork, nor was he aware of the contents of such paperwork." (App. p. 245). Neither Petitioner nor anyone at the facility discussed the arbitration agreement with Mr. Whaley. *Id.* Petitioner neither asked for nor received Mr. Whaley's permission to sign the arbitration agreement. *Id.*

During his residency at Respondents' facility, Mr. Whaley 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. (App. pp. 164-65, 176-83). In February 2014, Mr. Whaley's family learned of bruising to his lower jaw, neck, and right cheek, and wounds to his tailbone and ankle. (App. p. 165). Mr. Whaley was admitted to Bon 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 is hospital admission. *Id.* His diagnosis included a mandible fracture, metabolic encephalopathy, possible aspiration pneumonia, and possible urinary tract infection. *Id.* at ¶ 50. Mr. Whaley died on February 27, 2014, as a result of the injuries he suffered at Respondents' facility. *Id.* at ¶ 52.

On October 4, 2016, Petitioner filed this action in the Charleston County Court of Common Pleas, and on November 16, 2016, Respondents filed a motion to dismiss and compel arbitration. (App. pp. 156, 230). Petitioner filed a response in opposition arguing *inter alia* that she lacked apparent and actual authority to sign the arbitration agreement and the agreement is

unconscionable. (App. pp. 233-43). Petitioner submitted her affidavit and copies of general durable and health care powers of attorney executed by Mr. Whaley in 2003 naming her as a power of attorney. (App. pp. 244-58).

Neither power of attorney authorizes Petitioner to agree to arbitration or waive Mr. Whaley's constitutional right to a jury trial. The general durable power of attorney lists eight specific property and financial-based categories of actions the attorney may take on Mr. Whaley's behalf: (1) signing instruments concerning "business affairs, property or other assets whatsoever, including all property, real, personal or mixed, stocks, securities and choses in action"; (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." (App. pp. 253-54). The language of the power of attorney shows that it authorizes property and financial-based decisions but does not encompass authority to agree to arbitration or waive Mr. Whaley's right to a jury trial.

The health care power of attorney relates to health care treatment and does not confer authority to agree to arbitration or waive Mr. Whaley's right to a jury trial. The health care 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." (App. p. 246) (emphasis added). The "power is subject to limitations or statements of your desires that you include in this document" such as, for 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." (App. p. 248) (emphasis added). The agent is specifically "authorized" to make four decisions—whether to (1) "consent, refuse, or withdraw" medical treatment; (2) "authorize, or refuse to authorize" pain medication; (3) "authorize my admission to or discharge . . . from any hospital, nursing care facility"; and (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." (App. pp. 248-49) (emphasis added).

On January 27, 2017, the Honorable J.C. Nicholson, Jr., held a hearing on Respondents' motion. (App. p. 206). On April 18, 2017, the lower court filed an Order Denying Respondents' Motion to Dismiss and Compel Arbitration. (App. pp. 149-54). The lower court found Petitioner lacked actual authority to agree to arbitrate or waive the right to a jury trial because neither the general durable power of attorney nor the health care power of attorney conferred such authority. (App. p. 151). Petitioner lacked apparent authority because Mr. Whaley was neither involved in the admission paperwork nor present for the execution of the arbitration agreement. (App. pp. 151-52). The lower court found the agreement unconscionable based on the "severely disparate" bargaining power, Petitioner's inability to negotiate the terms of a contract prepared solely by Respondents, Respondents' representation to Petitioner that she "must" sign the agreement to ensure her father's admission, and the "'take or leave it'" presentation of the agreement when Petitioner needed Respondents' services. (App. pp. 152-53).

The Court of Appeals reversed the lower court in an unpublished opinion. (App. pp. 1-8). It found the lower court's actual authority ruling violated the equal-treatment principal because the lower court supposedly based its ruling on the absence of a specific reference to arbitration in the powers of attorney. (App. pp. 2-3). "[A] power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement as long as the powers granted are broad enough to include such an act." (App. pp. 3-4). The Court then analyzed the language of the powers of attorney. (App. p. 4). It found the words "choses in action" and "any other property, right or thing" in the general durable power of attorney broadly encompassed arbitration and waiver of a jury trial. *Id.* It found the health care power of attorney's references to pursuing legal action and granting a waiver required by a health care provider authorized arbitration and waiver of a jury trial. *Id.* Finally, the Court of Appeals held the arbitration agreement is not unconscionable because Petitioner had a meaningful choice and the terms of the agreement are not one-sided or oppressive. (App. pp. 5-8). As to meaningful choice, the Court found the arbitration agreement "was neither a surprise nor inconspicuous", "no evidence" of Petitioner's sophistication, Petitioner acknowledged her "opportunity to ask questions and seek the advice of an attorney", and she understood the rights she was waiving. (App. pp. 5-6). As to the one-sided or oppressive terms of the arbitration agreement, the Court addressed two terms—discovery limitation and a punitive damages prohibition—and found them not oppressive but did not address other terms or the cumulative effect of the terms. (App. pp. 7-8).

ARGUMENT

This Court should grant this petition for writ of certiorari and reverse the Court of Appeals' opinion in its entirety.

I. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE

The Court of Appeals erred in finding the arbitration agreement is not unconscionable and disregarded the standard of review in reaching its decision. "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). Petitioner lacked a meaningful choice when she executed the arbitration agreement, and its terms are oppressive and one-sided.

A. Lack of Meaningful Choice

The lower court correctly held Petitioner lacked a meaningful choice in executing the arbitration agreement. The Court of Appeals' opinion to the contrary disregards the any evidence standard of review, does not analyze all six factors for determining meaningful choice, and fails to analyze the agreement with skepticism.

The Court must analyze the agreement with "considerable skepticism", as required by *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26, 644 S.E.2d 663, 669 (2007). In *Simpson*, the Supreme Court adopted a rationale from Ohio courts that view "automobiles as a necessity and factor this characterization into a determination of whether a customer had a meaningful choice in negotiating the arbitration agreement." *Id.* (internal quotation marks omitted). This Court stated a contract for a vehicle trade-in "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.* This case involves a vulnerable adult in need of necessary healthcare services and a safe living environment—which

is much more of a necessity than a car. The Court of Appeals should have analyzed the agreement with considerable skepticism. (App. pp. 10-11, 119).

"In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account [1] the nature of the injuries suffered by the plaintiff; [2] whether the plaintiff is a substantial business concern; [3] the relative disparity in the parties' bargaining power; [4] the parties' relative sophistication; [5] whether there is an element of surprise in the inclusion of the challenged clause; and [6] the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (internal quotation marks and citation omitted); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). The Court of Appeals' opinion does not address the first three factors, all of which weigh in favor of finding an absence of meaningful choice. (App. pp. 5-6, 13, 119-20). The Court should have considered all six factors but, regardless, it is incorrect as to its conclusion about the last three factors.

As to the fourth factor, the lower court ruled on the parties' relative sophistication, finding Respondents "are sophisticated business and healthcare companies" and Petitioner, "on the other hand, was an individual in need of the [Respondent]s' services lacking knowledge of arbitration or of the constitutional right she was being asked to waive." (App. p. 153). On appeal from a motion to compel arbitration, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016). The Court of Appeals' reversal of undisputed facts as to the parties' relative sophistication violates the any evidence standard of review and is contrary to the record. Petitioner's uncontroverted affidavit states Respondents "did not explain the 'Arbitration Agreement' to" her, she "had questions about the 'Arbitration Agreement'", and Respondents did not explain the 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). These statements indicate Petitioner did not have education or other knowledge or sophistication to understand the Arbitration Agreement.

As to the fifth and sixth factors, the undisputed evidence is that Respondents kept the arbitration agreement from Petitioner and then surprised her with it after Mr. Whaley's admission. Her affidavit plainly states Respondents originally said "I needed to sign various documents in order for my father to be admitted to the facility. In that discussion, I was ***never*** informed of an Arbitration Agreement. ***After*** my father's admission to the facility, I met with Tasha Williams . . . . She the[n] informed me that I ***needed to sign additional documents*** related to my father's admission to the facility." (R. p. 96) (emphasis added). There is no evidence to the contrary. Respondents kept the agreement inconspicuous until after Mr. Whaley's admission and then surprised Petitioner with it, telling her she must sign it to keep her father admitted.

The Court of Appeals violated the standard of review in reaching two additional findings as to meaningful choice—(1) Petitioner acknowledged she received an opportunity to ask questions and seek advice of an attorney, although she did not take the opportunity, and (2) Petitioner understood the rights waived in the arbitration agreement. (App. pp. 6, 11-13). As to the first finding, the lower court held Petitioner did not get the opportunity to ask questions—"When Ms. Arredondo had questions about the agreement, she was simply told that it must be signed to ensure her father's admission to the facility." (App. p. 150). This is undisputed and supported by Petitioner's affidavit—"I had questions about the 'Arbitration Agreement' and was not comfortable signing it, but Ms. Williams told me that it told me [sic] 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." (App. p. 244).

Rather than an opportunity to ask questions or seek advice of counsel, Respondents blocked Petitioner's attempt to ask questions and pressured her to immediately sign the agreement "to ensure" her father's admission for needed medical care. *Id.* As to the second finding, Petitioner stated no one explained the agreement to her, she had questions about the agreement, and did not recall any explanation that it would relinquish her father's rights. (App. pp. 244-45). This evidence supports the lower court's findings. (App. pp. 150, 153). That the form agreement Respondents pressured Petitioner into signing includes a pre-drafted provision that she understands it does not negate evidence to the contrary showing the reality of the execution, including that Respondents knew Petitioner had questions. Given the circumstances surrounding execution of the agreement, the evidence supports finding Petitioner did not understand it.

The Court of Appeals' decision as to meaningful choice is contrary to the standard of review and the evidence in the record. This Court should grant the petition and reverse.

B. Oppressive and One-Sided Terms

The lower court correctly held the terms of the arbitration agreement are oppressive and one-sided. (App. pp. 152-53). The Court of Appeals erred in finding the agreement is geared towards achieving an unbiased decision by a neutral decision-maker, and its current opinion endorses an oppressive and unconscionable practice that curtails the rights of elderly and vulnerable residents in need of care.[1] The Court also addressed the punitive damages prohibition and discovery limitations individually rather than addressing the cumulative effect of all of the oppressive and one-sided terms. "[T]he ***cumulative effect*** of a number of oppressive and one-sided provisions contained with the entire" Arbitration Agreement make it "wholly unconscionable and unenforceable." *Simpson*, 373 S.C. at 34-35, 644 S.E.2d at 674 (emphasis added). Each

[1] *See, e.g.*, S.C. Code Ann. § 43-35-10(11) ("A resident of a facility is a vulnerable adult.")

offensive provision is addressed below, beginning with the two that the Court of Appeals discussed.

i. Limited and One-Sided Discovery

The arbitrators follow the "Commercial Arbitration Rules of the AAA" and have authority "to direct discovery in all controversies." (R. p. 114 ¶ 2). The Commercial Arbitration Rules do not provide for depositions and do not allow pre-hearing subpoenas of witnesses or non-party documents. (App. pp. 40-41). This case illustrates the oppressive and unfair nature of these limitations. Petitioner may get limited documents from Respondents but cannot request documents from non-parties and cannot depose anyone, including Respondents' experts or employees that allegedly caused Mr. Whaley's suffering, injuries, and death. Respondents, on the other hand, know what their experts and employees will testify to prior to arbitration. The discovery limitations effectively result in a trial by ambush that 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 Court of Appeals cited to *Lucey v. Meyer*, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012), to hold the discovery limitations are not oppressive. (App. p. 7). However, *Lucey* does not support the Court's holding and, instead, supports Petitioner's arguments. The only limitation in *Lucey* was that the parties were "the only witnesses called in person." *Lucey*, 401 S.C. at 142-43. This is not a discovery limitation because it affects only trial and not discovery. The parties in *Lucey* could conduct usual discovery, including witness depositions, and could introduce "depositions of witnesses into arbitration proceedings." *Id.* at 143. While this Court held in *Lucey* that the live trial witness limitation "cannot, standing alone, be a reason to invalidate an arbitration agreement", the substantial limitations imposed in this case create significant injustice not seen in *Lucey*, especially when considered in conjunction with the other oppressive terms. *Id.*

ii. Punitive Damages Prohibition

Punitive damages are not recoverable under the arbitration agreement. (App. p. 262 ¶ 2). Although the prohibition is stated in terms of whether the arbitration panel has "authority" to award such damages, the provision really operates as a waiver of a legal right. *Id.* While a punitive damages prohibition alone may not render the entire agreement unconscionable, the Court of Appeals erred by failing to consider it "in conjunction with [Petitioner]'s lack of meaningful choice in agreeing to arbitrate" and "based on the cumulative effect of a number of oppressive and one-sided provisions." *Simpson*, 373 S.C. at 30, 34-35, 644 S.E.2d at 671, 674. Punitive damages are intended to punish and deter the defendant and others from similar conduct as well as "compensation for the reckless or willful invasion of the plaintiff's private rights." *Clark v. Cantrell*, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000). Respondents' self-exemption from these important legal principles, in conjunction with the effect of the other provisions, supports the lower court's finding that the arbitration agreement is oppressive and one-sided.

iii. Requirement of $25,000.00 in Damages to Arbitrate

A claim worth less than $25,000.00 is not subject to arbitration. (App. p. 262 ¶ 1). The practical effect of this provision is that Respondents may pursue their claims in court while a resident's claims are subject to arbitration. A resident's most likely claim is personal injury for survival or wrongful death, or a serious injury. The value of these claims likely exceeds $25,000, making them subject to arbitration. On the other hand, the most likely claim of an assisted living facility is for a resident's unpaid bills, which are likely less than $25,000.00[2] and not subject to

[2] Respondents' website states that the current monthly rates start at $3,290.00 for assisted living and $3,740.00 for memory care. https://www.fivestarseniorliving.com/communities/sc/charleston/ashley-river-plantation/floor-plans-new.

arbitration. The Court of Appeals erred in finding that this "limitation applied to both parties" because it ignores the practical application and effect of the provision. (App. p. 6).

iv. Costs of Arbitration

Respondents and the resident split the costs of arbitration unless the resident submits an affidavit stating he does "not have the means" to pay his half. (App. p. 262 ¶ 3). If the resident does not have the means, Respondents will pay, but then Respondents get to choose the number of arbitrators. *Id.* This provision is oppressive, one-sided, and not geared towards an unbiased decision by a neutral decision-maker. It purposefully omits necessary information such that no person could read the provision and know what it means or make a meaningful choice as to whether to agree to it. For example, what is the standard for a resident to "not have the means to pay their one half of the arbitration expenses"? (App. p. 114 ¶ 3). If a resident is below the poverty line, is that sufficient, or is there a different standard of not having "means" to pay? Who gets to decide whether the resident satisfies this standard? What are the "arbitration expenses"? *Id.* There is no information about the amount of arbitration expenses to enable the reader to determine the effect of this provision. The fee schedule for the American Arbitration Association is based on the amount of the claim. For example, the up-front fee for a claim greater than $1,000,000.00 is a $7,700 initial filing fee and an $8,475 final filing fee, half of which is $8,087.50 that a resident must pay. *See* Commercial Arbitration Rules and Mediation Procedures Administrative Fee Schedules, http://info.adr.org/feeschedule/. No reasonable individual seeking treatment at an assisted living facility would agree to pay $8,087.50[3] solely to initiate an arbitration for survival and wrongful death. *Cf. Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605,

[3] This amount alone exceeds the filing fee to bring a civil action in the State of South Carolina by a factor of fifty-three (i.e., $150.00 x 53.91 = $8087.50)

613, 586 S.E.2d 581, 585 (2003) (holding a mere $500.00 arbitration fee not unconscionable because the cost term "not so oppressive that no reasonable person would make them and no fair and honest person would accept them"). This amount does not include the arbitrator's compensation, which is an hourly rate in the hundreds of dollars. *See* Costs of Arbitration, https://www.adr.org/sites/default/files/document_repository/AAA228_Costs _of_Arbitration.pdf.

The Arbitration Agreement says it avoids "costly" litigation but there is no proof that arbitration, in which parties pay a decision-maker by the hour and pay much higher filing fees, costs less than litigation. (R. p. 114 ¶ 1). Further, Respondents may unilaterally reject an affidavit of no-means and, at that point, know that a resident cannot pay the arbitration costs, effectively pricing a plaintiff out of pursuing a claim. A resident who cannot pay for arbitration is left to either drop the case or agree to let Respondents choose one arbitrator rather than three, which greatly reduces the likelihood of a neutral and unbiased decision-maker.

v. No Right to Appeal

The Arbitration Agreement prohibits an appeal on any basis. (App. p. 262 ¶ 2). The practical effect of this provision is that an arbitration decision may not be overturned even on the basis of legal error and, in reality, could simply be a form order with no explanation of the ruling. (App. p. 48, R-46(b)). The Federal Arbitration Act and South Carolina Uniform Arbitration Act allow an appeal of an arbitrator's decision. 9 U.S.C. § 16 (2011); S.C. Code Ann. § 15-48-200. The elimination of any review of the arbitration, in combination with the other restrictions and limitations discussed herein, is oppressive and one-sided.

vi. Respondents' Unilateral Right to Amend

Respondents can amend the arbitration agreement upon 30 days' written notice to the resident, who can then terminate it if he or she chooses. (App. p. 243 ¶ 9). However, the resident

has no reciprocal right to amend. The parties discussed this provision at oral argument, and Respondents admitted it is one-sided and suggested the Court sever it. Notably, the provision does not place a scope on the type of amendment and provides notice only to the resident, who is in an assisted living facility already and may be unable to understand a notice, and not to the resident's authorized representative that Respondents required to sign the arbitration agreement.

vii. "Voluntary" Agreement

The arbitration agreement states "Resident and Five Star acknowledge and agree that each is executing this Agreement voluntarily and without any duress or undue influence by the other Party or anyone else." (App. p. 263 ¶ 10). This pre-drafted statement is false, and Respondents knew of its falsity because they willfully prevented Petitioner from getting answers to her questions about the agreement and told her to sign it to keep her father in their facility. *See, e.g.*, *Holler v. Holler*, 364 S.C. 256, 267, 612 S.E.2d 469, 475 (Ct. App. 2005) ("If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind."). Respondents knew the arbitration agreement said one thing but their conduct proved the opposite.

The cumulative effect of the terms discussed above demonstrates that the Court of Appeals erred in finding the terms are not one-sided and oppressive. The arbitration agreement is not aimed towards achieving an unbiased decision by a neutral decision-maker, and this Court should grant the petition and reverse the Court of Appeals' decision to the contrary.

II. PETITIONER DID NOT HAVE ACTUAL AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT AND WAIVE A JURY TRIAL RIGHT

The Court of Appeals erred in finding Petitioner had actual authority to execute the arbitration agreement and waive a jury trial right. Its decision is based on a misinterpretation of the lower court's order and of the language and context of the powers of attorney.

As an initial matter, Petitioner argued to the Court of Appeals that Respondents' argument that anyone with a power of attorney is authorized to agree to arbitration is unpreserved. (App. pp. 109-10). The Court of Appeals erred in not ruling on issue preservation. (App. p. 18).

The Court of Appeals' decision is based on its misinterpretation of the lower court's order as holding there is no actual authority because the powers of attorney do not specifically reference arbitration. (App. pp. 2-4). The lower court did not hold that a power of attorney must "explicitly refer to arbitration" to grant authority to execute an arbitration agreement. (App. pp. 3, 151). The lower court heard extensive argument from Respondents that the "broad" language of the powers of attorney encompassed arbitration and a jury trial waiver, and from Petitioner that the powers of attorney dealt specifically with healthcare and financial decisions but did not encompass arbitration or a jury trial waiver. (App. pp. 212-15, 220-21, 227-28). After hearing these arguments, the lower court held that neither power of attorney "conferred" actual authority on Petitioner to execute an arbitration agreement or waive Mr. Whaley's right to a jury trial. (App. p. 151). To the extent the Court's holding is based on the lower court's use of "expressly conferred" language in the next sentence of the order, it is incorrect because that language is taken directly from valid case law: "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 Court of Appeals' interpretation that the lower court imposed a "restrictive requirement" is incorrect and should be reversed. (App. p. 4).

The Court of Appeals' holding that the powers of attorney confer actual authority to agree to arbitration and waive a jury trial right is incorrect. A review of the full language and context of the powers of attorney shows they do not confer such authority. (App. pp. 105-09).

As to the health care power of attorney, the Court of Appeals based its decision on two items—(1) "pursue legal action" and (2) "waiver"—but took them out of context. "[P]ursuing legal action in my name" is not the equivalent of signing an arbitration agreement. (App. p. 249). Because the arbitration agreement was signed **before** any potential "legal action" arose, that phrase cannot support authority to execute the agreement. The word "waiver" refers to a waiver "of liability". (R. p. 101). The complete clause says "To 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." (R. p. 101) (emphasis added). Considering the word "waiver" in context, it is not referring to waiving the right to a jury trial but, instead, to waiving liability only when **required** by a health care provider and only to assure implementation of a health care decision.

As to the general durable power of attorney, the Court of Appeals relied on language referring to "choses in action" and to "any other property, right, or thing" but misinterpreted these items. (App. p. 4). A "chose in action" is a cause of action, not an arbitration agreement or jury trial waiver. The Court of Appeals' opinion equates a cause of action and an arbitration agreement without any authority for this proposition. The terms "property, right or thing" refer back to the words "transfers of" and, therefore, do not include an arbitration agreement or jury trial waiver

because neither the agreement nor the waiver is a "transfer of" anything. (R. p. 105). The power of attorney lists eight categories of authority. If the language the Court of Appeals relied upon is as broad as it states, then there is no need to list out eight categories of authority. Rather, that list supports the lower court's interpretation.

The lower court correctly held the powers of attorney do not confer the authority to execute an arbitration agreement or waive Mr. Whaley's right to a jury trial. The Court should grant the petition and reverse the Court of Appeals' decision to the contrary.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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Date: October 18, 2019

THE STATE OF SOUTH CAROLINA
Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 2019-UP-293 (S.C. Ct. App. filed August 14, 2019)

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

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 .....Respondents.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Petition for a Writ of Certiorari* and *Appendix* have been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on October 18th, 2019.

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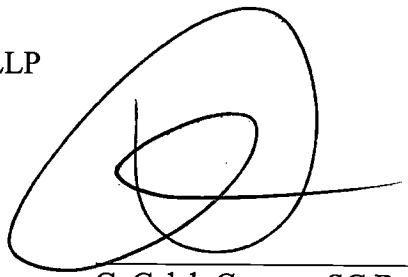

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