THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-001298
Appellate Case No. 2019-01767

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 Tenants TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; and Candy D. Cure, ... Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Has Plaintiff met her burden to overcome the special and important standard for granting of a Writ of Certiorari under Rule 242(b), SCAR even though she did not articulate any basis for review or identify any novel issues, federal questions, conflicts, or substantial constitutional issues involved in the Court of Appeals' unanimous decision, and where in fact, no basis for review or appellate issue exists?

2. Should the Court overturn the Court of Appeals' holding that the Arbitration Agreement is not unconscionable?

3. Should the Court overturn the Court of Appeals' holding that Mr. Whaley's General and Healthcare power of attorneys granted Plaintiff the authority to enter into the Arbitration Agreement?

COUNTER-STATEMENT OF THE CASE

The Appellant's purported statement of the case is argumentative and goes far beyond the statement of the case. For example, the description of the Appellant's understanding when signing the Arbitration Agreement is not supported by the record. The only evidence in the record concerning the Appellant's understanding is the Agreement itself and Appellant's affidavit in opposition to the motion to compel arbitration. Notably, the Appellant's affidavit did not dispute that she read the Agreement, which contained just ten paragraphs on two pages, stated that it was "VOLUNTARY" and stated that she had "carefully read this Agreement" and that Appellant had "been provided an opportunity to seek the advice of an attorney" before signing the Agreement. (App. at 262-264). And while Appellant's affidavit created for the purpose of defeating the Agreement states that she "had questions about" the Agreement, it does not provide any information concerning what the alleged questions pertained to or whether they were answered, although she does state

that "I do not recall any explanation" that the Agreement "would give up my father's right to bring a claim of negligence or malpractice." (App. at 244). However, the Agreement does not give up her father's right to bring such a claim—it just requires that such a claim (if over $25,000) be arbitrated, and states so conspicuously: **THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES**. (App. at 264).

Additionally, the Statement of the Case cites to material in the Appendix that is not part of the Record. Specifically, the Respondent included the AAA Arbitration rules in the Appendix although they were not considered by the trial court. Nevertheless, the Appellant's "statement of the case" miscites the rules, alleging that no depositions or interrogatories are allowed under the rules; however, Appellant fails to note that in addition to document exchange, arbitrators have the power "to establish any additional procedures to obtain information that is relevant and material to the outcome of disputes," and in cases involving $500,000 in controversy, the rules give the arbitrator specific authority to order depositions. (App. at 54, 59).

Additionally, the Respondents object to the arguments and characterizations in the Appellant's statement of the case concerning the content and authority provided by the General and Healthcare Powers of Attorney, and the characterization of the allegations in Plaintiff's Complaint as fact, when they are mere allegations, denied by the Respondents.

ARGUMENT

A. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH WELL-ESTABLISHED SOUTH CAROLINA PRECEDENT AND NO FURTHER REVIEW IS REQUIRED.

Plaintiff's Petition completely fails to address the question presently before the Court, which is whether this Court should grant a writ of certiorari. A writ of certiorari is not a matter of right, but of judicial discretion. Rule 242(b), SCACR. Instead, a writ will only be granted based on "special and important reasons." *Id.*

The following factors generally "indicate the character of reasons which will be considered":

(1) Where there are novel questions of law;
(2) Where there is a dissent in the decision of the Court of Appeals;
(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
(4) Where substantial constitutional issues are directly involved; or
(5) Where a federal question is included and the decision of the Court of appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCAR. Plaintiff does not reference, must less meet, the applicable Rule's standards for determining the appropriateness of granting a writ of certiorari.

This is because the Rule 242(b) factors confirm that Plaintiff's Petition does not warrant extraordinary review of the Court of Appeals' unanimous decision (the "Opinion"). The Opinion does not conflict with any of this Court's prior decisions. Plaintiff's Petition does not raise any constitutional issues, let alone "substantial" ones. And, although Plaintiff's Petition implicates federal law under the Federal Arbitration Act ("FAA"), no federal question is present and the Opinion is consistent with, not in conflict with, volumes of federal precedent under the FAA.

Finally, neither question presented in Plaintiff's Petition presents novel questions of law. Plaintiff's first question addresses whether the Court of Appeals erred in finding that the

Arbitration Agreement (the "Agreement") under which SNH SE Ashley River Tenant, LLC, FVE Managers, Inc., Five Star Quality Care, Inc., SNH SE Tenants TRS, Inc., Senior Housing Properties Trust; SNH TRS, Inc., and Candy D. Cure (collectively "Five Star") seeks to compel arbitration of Plaintiff's claims is unenforceable due to unconscionability. Whether an arbitration agreement is unconscionable is governed by ordinary contract law principles of this State. *See* 9 U.SC. § 2 ("[A]n agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

There is no shortage of South Carolina appellate jurisprudence to guide the unconscionability analysis. And Plaintiff's Petition does not address any unique aspect of unconscionability. Rather, Plaintiff simply again reargues that the Court of Appeals got it wrong, claiming the record shows both that Plaintiff lacked meaningful choice in signing the Agreement and that certain terms of the Agreement are oppressive and one-sided. These are not novel arguments. South Carolina's appellate courts have repeatedly addressed these now elementary arguments. This Court need look no further than the numerous cases cited by both parties. While Plaintiff may disagree with the Court of Appeals' unconscionability analysis, that fact does not render the issue novel.

Plaintiff's second question fairs no better. Plaintiff frames this question as "Whether the Court of Appeals erred in finding [Plaintiff] 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." (Petition for Writ of Certiorari, "Petition" at 1). On this question, the Opinion is consistent with South Carolina and United States Supreme Court precedent, which provide that a power of attorney does not have to specifically express the authority to enter into an arbitration agreement and to find otherwise would violate the FAA. *See Kindred Nursing Centers Ltd. P'ship*

v. Clark, 137 S. Ct. 1421, 1424 (2017); *First S. Bank v. Rosenburg*, 418 S.C. 170, 790 S.E.2d 919 (Ct. App. 2016). Stated differently, collectively, the South Carolina Court of Appeals and the U.S. Supreme Court have already decided this specific question. The Court of Appeals merely applied that established law to the facts presented here. This, therefore, is not a novel issue of law.

The remaining issue Plaintiff raises relating to the authority conferred under the terms of powers of attorney presents the most fundamental matter of contract interpretation. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2017), *cert. denied* (Sept. 25, 2019) ("Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney.") (citations omitted). Interpreting a power of attorney involves examining the language of the contract "to ascertain and give effect to the intention of the parties." *Id.* Plaintiff disagrees with the Court of Appeals' holding that both the broad terms of the General Power of Attorney and Healthcare Power of Attorney authorize Plaintiff to enter into the Agreement based on the terms of those POAs. Interpreting these contracts though is not novel either.

The unanimous decision of the Court of Appeals did not involve novel issues, constitutional or federal questions, and is not in conflict with previous decisions of this Court. Extraordinary review is not warranted.

B. THE COURT OF APPEALS DID NOT ERR IN RULING THAT THE AGREMENT IS NOT UNCONSCIONABLE.

The Court of Appeals correctly held that the Agreement is not unconscionable. The Opinion recognizes that both the United States and South Carolina have policies favoring arbitration of disputes. (App. at 2). The FAA places arbitration agreements "on equal footing with all other contracts" by making them valid, irrevocable, and enforceable." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Courts must "generously[] construe" the "intention of the parties" in

accordance with the "strong presumption" in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

"[O]nly in rare circumstances has an appellate court invalidated a contract on the basis of unconscionability." *Maybank v. BB&T Corp.*, 416 S.C. 541, 575, 787 S.E.2d 498, 516 (2016). In keeping with that trend, the Court of Appeals concluded that the Agreement was not unconscionable because neither of the required elements were met: Plaintiff did not have an "absence of meaningful choice" in entering into the Agreement and the Agreement did not contain "oppressive, one-sided terms" that are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 400, 498 S.E.2d 898, 904 (Ct. App. 1998); (App. at 5). This Court should uphold the Court of Appeals' well-supported conclusion that the Agreement is not unconscionable.

1. The Terms of the Agreement Are Not Oppressive or One-Sided.

The Court of Appeals correctly applied South Carolina law to decide that the terms of the Agreement were not oppressive or one-sided. The terms of the Agreement, which applied equally to both parties, required the parties to litigate any disputes between them involving more than $25,000 before an arbitration panel of a size selected solely by Plaintiff with members chosen by "mutual agreement of the parties" and applying rules adopted by the American Arbitration Association. (Agreement, App. at 261). The parties will divide the cost of the arbitration proceeding, but if the Resident could not pay his or her share, Five Star will pay the entire amount. The Court of Appeals did not err in finding that the mutually-applicable arbitration agreement that provides Plaintiff "control over the selection process," and utilizes rules adopted by the AAA is objectively fair and does not overcome the strong presumption in favor of arbitration.

Plaintiff's position falls apart upon review of the specific provisions at issue. First, the Commercial Arbitration Rules of the AAA, which govern the arbitration, do not render the Agreement unconscionable as Plaintiff contends.[1] As the Court of Appeals found, discovery "limitations in arbitration do not make an arbitration agreement unenforceable as "[t]he benefits received by arbitration can come with certain limitations on discovery."[2] *Lucey v. Meyer*, 401 S.C. 122, 142, 736 S.E.2d 274, 285 (Ct. App. 2012). This Court previously refused to deem unconscionable an arbitration agreement that provided for discovery in accordance with the American Arbitration Association rules, holding that "the arbitration clause does not expressly prevent discovery, and the American Arbitration Association rules provide arbitrators have broad authority to order and control discovery." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004). The arbitrators in this case will have that same authority. Five Star has not located an appellate decision from South Carolina or any other jurisdiction holding that the AAA rules are unconscionable and the Court of Appeals properly declined to be the first.

Second, Plaintiff's argument that the mutual prohibition of punitive damages is unconscionable disregards this Court's multiple holdings to the contrary. This Court has upheld a limitation of liability clause that prohibited incidental, indirect, special, consequential, or punitive

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[1] Plaintiff contends that there are never depositions under the AAA Rules. But, the arbitrator may order depositions under the Procedures for Large, Complex Commercial Disputes, which the parties may agree to apply to any dispute, and which automatically applies to all cases where the claim is at least $500,000. (AAA Commercial Arbitration Rules R-1, L-3, App. 31, 59).

[2] In fact, the Commercial Arbitration Rules governing the pre-hearing exchange of information explain that "the arbitrator shall manage any necessary exchange of information among the parties with a view of achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses. (AAA Commercial Arbitration Rule R-22(a), App. 40).

damages as not unconscionable.[3] (*See* App. at 7 (citing *Maybank v. BB&T Corp*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016)). And the arbitration agreement in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) Plaintiff cites to was vastly different. This Court held the *Simpson* agreement was unconscionable not because it banned punitive damages generally, but because it "specifically prohibited an arbitrator from awarding statutorily required treble or double damages." 373 S.C. at 26, 644 S.E.2d at 671. The Agreement here does not prohibit an arbitrator from awarding any statutorily required damages and thus does not support Plaintiff's claim that the Agreement is unconscionable. (App. at 261; App. at 8).

Third, the mutual provision in the Agreement that any claim worth less than $25,000 is not subject to arbitration does not favor Five Star as Plaintiff contends. The $25,000 limitation "applied to both parties." (App. at 6; Agreement, App. at 261). There is no evidence in the record to support Plaintiff's speculative claim that Five Star is more likely to possess claims against Mr. Whaley for less than $25,000 than Mr. Whaley would against Five Star.

Fourth, the fee splitting provision in the Agreement is not one-sided or oppressive. The Agreement provides that the parties shall split the costs of arbitration unless the Resident supplies an affidavit that he or she does not have the means to pay, at which time, Five Star will pay the Resident's share of the costs.[4] (Agreement, App. at 261). Additionally, Plaintiff cannot argue on

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[3] This Court has also held that the issue is not ripe until the plaintiff 'prevails on the merits in arbitration" and the arbitrator finds "punitive damages are warranted." *Carolina Care Plan, Inc.*, 361 S.C. at 557, 606 S.E.2d at 758-59.

[4] Moreover, Plaintiff has not carried her "substantial burden" of demonstrating the fee-splitting provision renders arbitration cost-prohibitive. *See Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 181 (4th Cir. 2013) (While "[a] fee-splitting provision can render an arbitration agreement unenforceable if, under the terms of the provision, an aggrieved party must pay arbitration fees and costs that are so prohibitive as to effectively deny the [party] access to the arbitral forum," "the party seeking to invalidate an arbitration agreement on this basis bears the 'substantial burden' of showing a likelihood of incurring prohibitive arbitration costs.").

one hand that she should be entitled to more robust litigation including more discovery than allowed under the Agreement and argue on the other hand that she cannot afford more limited discovery. And if Plaintiff truly could not afford to share the fees, she can provide an affidavit to that effect. Plaintiff cites no evidence to support her statement that Five Star "may unilaterally reject an affidavit of no-means." (Pet. at 14). Although Five Star can choose whether to utilize one or three arbitrators if it pays the Resident's share of the costs, this provision is not oppressive because the selection of the arbitrator is never made by Five Star unilaterally, rather, under the Agreement, the AAA or the parties collectively select the arbitrator. (Agreement, App. at 261). This provision is not unconscionable.

Finally, while the Agreement allows Five Star to amend the Agreement upon 30 day's written notice, this provision is not oppressive.[5] Plaintiff can at most say that this provision does not allow Plaintiff reciprocal the right to amend the Agreement.[6] But, South Carolina appellate courts have previously rejected a "rule requiring mutuality of remedy." *Lackey*, at 388, 402 S.E.2d at 905. Plaintiff may terminate the Agreement "for any reason" if Five Star provides notice that it is amending the Agreement. (Agreement, App. at 262). The Agreement provides that notice of any amendment will be made to the "Resident," which the Agreement defines to include both Mr. Whaley and Plaintiff, and not just Mr. Whaley as Plaintiff contends. (*Id.* at 261). Plaintiff would receive any notice of any amendment and could then terminate the Agreement for any reason, making it objectively fair.

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[5] Plaintiff has not claimed that Five Star amended the Agreement.

[6] Plaintiff claims that Five Star "admitted [the amendment provision] is one-sided and suggested the Court server it" at oral arguments before the Court of Appeals. (Pet. at 15). To the best of counsel's recollection, Five Star acknowledged that Plaintiff could not amend the Agreement under this provision and argued that the Court could sever the provision if it found it was unconscionable.

The Court of Appeals correctly found that the Agreement, which applies objectively fair terms equally to both parties, is not "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *See Lackey*, 330 S.C. at 400, 498 S.E.2d at 904 (Ct. App. 1998).

2. Plaintiff Did Not Lack Meaningful Choice.

Unless the Court finds that the Agreement was "so oppressive that no reasonable person would make them and no fair and honest person would accept them," *see id.*, it need not reach the issue of meaningful choice. This is because Plaintiff must prove both oppressive terms and a lack of meaningful choice to establish unconscionability. And this Court has held that the mere fact that an agreement is a contract of adhesion does not lead to unconscionability. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365, n. 5 (2001). Regardless, the Court of Appeals did not err in finding that Plaintiff did not lack meaningful choice in agreeing to arbitrate disputes with Five Star. "Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013) (internal citations omitted); *see also Maybank v. BB&T Corp.*, 416 S.C. 541, 575, 787 S.E.2d 498, 515 (2016) ("The absence of meaningful choice on the part of one party is generally indicative of a fundamental unfairness of the bargaining process in the contract."). No such finding is warranted here, where the Court of Appeals properly concluded that the Agreement was a separate clearly labeled document that

explained the terms of the Arbitration Agreement, which Plaintiff knew she was signing, and which was presented to Plaintiff only after Mr. Whaley's admission to the facility.

Plaintiff's argument that she lacked meaningful choice in entering into the Arbitration Agreement is premised on the incorrect idea that the Arbitration Agreement must be viewed with "considerable skepticism." In making this argument, Plaintiff seeks to extend this Court's ruling in *Simpson*, 373 S.C. 14, 644 S.E.2d 663, that an arbitration agreement governing the purchase of a used automobile should be reviewed with "considerable skepticism." However, South Carolina appellate courts have never extended this standard outside the context of used cars and construction disputes, although it has had multiple opportunities to do so. In addition, while courts outside South Carolina have adopted the "considerable skepticism" standard in the used car context like this Court did in *Simpson*, Five Star has not located a case extending this approach to arbitration agreements between residents and senior living facilities. The Court should decline to extend it past its limited reach here.[7]

Plaintiff argues that the Court of Appeals erred because it "should have considered" six factors courts may look to in judging whether a party lacked meaningful choice in entering into a contract. (Pet. at 8). The Court of Appeals considered these factors and listed them in its opinion:

> 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.

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[7] In addition, the "considerable skepticism" standard should not apply because the Agreement here is factually different from the one at issue in *Simpson.* There, the arbitration provision was buried in a 16-page document that the plaintiff was forced to sign when she purchased her used vehicle without the opportunity to consult with counsel and waived her right to statutorily guaranteed damages. *Simpson*, at 29, 644 S.E.2d at 671. Here, the Agreement was a stand-alone three-page document, which Plaintiff knew she was signing, and which advised her that she could seek the advice of an attorney.

(App. at 5 (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (internal citations omitted)). There is no indication that the Court of Appeals did not take all of these factors into account in evaluating the unconscionability of the Agreement and Plaintiff cites no authority for her position that the Court of Appeals was required to list its findings on each of these six factors.

The Court of Appeals properly concluded that Plaintiff did not lack meaningful choice in executing the Agreement. Plaintiff was not surprised by the Agreement and it was not inconspicuous. To the contrary, it was a separate and clearly labeled contract. (App. at 5). In fact, the Agreement stated in bolded, conspicuous letters just above the signature line: "**THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES**." Further, Plaintiff's own statements refute her argument that the Agreement was inconspicuous and that she was surprised to find out that she agreed to arbitration. In her sworn affidavit, Plaintiff acknowledges that she knew she was signing an Arbitration Agreement. (Aff. of Plaintiff, App. at 244).[8]

Plaintiff's allegations that Five Star intentionally kept the Agreement from her and then forced her to sign it for her father to become a resident at the Facility are not supported by the record and the Court of Appeals correctly declined to credit these allegations. Although Plaintiff alleges Five Star did not present Plaintiff the Agreement until "[a]fter [her] father's admission to the facility," *id.*, there is no evidence that Five Star timed presenting Plaintiff with the Agreement to force her agreement as Plaintiff implies. In fact, in light of Plaintiff's allegation that Mr. Whaley had already been admitted to the Facility when Plaintiff signed the Agreement, Plaintiff's

[8] The Court of Appeals explained, "Using a separate contract for arbitration agreements is conducive to greater freedom of choice for the consumer. It also better protects the nursing home from a contention that the arbitration contract is unconscionable." (App. at 5-6) (citing *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 357, 755 S.E.2d 450, 456 (2014) (Toal, C.J., dissenting)).

statement that she was required to sign the Agreement to "ensure [her] father's admission" carries no weight.

The Opinion also properly concluded that the Agreement "described the nature of arbitration and the trial rights a resident was waiving." (App. at 6). By signing the Agreement, Plaintiff "acknowledged that she had been given the opportunity to ask questions and seek the advice of an attorney, although she did not take advantage of this opportunity." *Id.* Plaintiff's Affidavit does not support her contention that she was not given an opportunity to ask questions but rather alleges that Plaintiff *had questions* about the Agreement, and she did not recall Five Star explaining the Agreement to her.

Plaintiff's argument amounts to an attempt to avoid the obligations she could have read in the Agreement. A party to an arbitration agreement "cannot legitimately claim [the other party] failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Towles v. UnitedHealthCare Corp.*, 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999). This Court has previously explained that "arbitration agreements governed by the FAA will not be set aside on the ground that the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it." *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365, n. 6.

Plaintiff also argues that the Opinion disregards "undisputed facts" in finding that Plaintiff did not meet her burden as to her education, experience, or business acumen to determine Plaintiff's relative sophistication. (App. at 6 (citing *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016)). But Plaintiff's Affidavit does not provide evidence which would allow the Court to find any of the above purported facts, as the Court of Appeals

determined. Plaintiff's statements that she had questions about the Arbitration Agreement and that Five Star did not explain the Agreement to her do not allow the Court to evaluate whether Plaintiff had the education, experience, or business acumen to understand the Agreement. The Court of Appeals' unconscionability analysis, which reveals that the Agreement Plaintiff voluntarily and knowingly entered into was not oppressive or one-sided, should be upheld.

C. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE POWER OF ATTORNEYS CONFERRED ACTUAL AUTHORITY TO ENTER INTO THE ARBITRATION AGREEMENT.

The Court of Appeals reversed the trial court's finding that the General Power of Attorney and Healthcare Power of Attorney signed by Mr. Whaley did not authorize Plaintiff to enter into the Agreement because arbitration was not specifically listed among the powers in the instruments. Faced with South Carolina and United States Supreme Court precedent to support this holding, Plaintiff instead contends that the Court of Appeals misinterpreted the trial court's order. However, the language of the trial court's order confirms that it did not. The Court of Appeals correctly concluded that both of these broad instruments conferred authority for Plaintiff to execute the Agreement. Plaintiff's attempts to limit the terms of the POAs are contrary to contract principles that govern POAs. When viewing the actual words used in the POAs, those words evidence that the parties intended to confer the authority to enter into the Agreement. Notably, only one POA was necessary to give Plaintiff authority to sign the Agreement, Thus, even if the Court finds that one of the two POAs did not vest Plaintiff with sufficient authority, the Opinion should be affirmed.

1. The Trial Court Improperly Limited the POAs to Specific Acts "Expressly Conferred" by the POAs.

The trial court's erroneous conclusion that the POAs did not confer authority for Plaintiff to sign the Agreement was based on its finding that "Mr. Whaley never expressly conferred any

authority to [Plaintiff] to execute the arbitration agreement" and the POAs did not "expressly [give] [Plaintiff] permission to sign the Arbitration Agreement." (Order Denying Mot. to Compel Arb., App. at 151). While Plaintiff now argues that the Court of Appeals misinterpreted the trial court's ruling, the language of the trial court's order makes clear that it erroneously required a heightened finding that the POAs expressly grant the power to enter into an arbitration agreement, which Plaintiff does not dispute contravenes South Carolina and United States Supreme Court case law.

A power of attorney authorizes an agent to "perform certain specified acts ***or kinds of acts***" on behalf of a principal. *First S. Bank v. Rosenberg*, 418 S.C. 170, 179, 790 S.E2d 919, 924 (Ct. App. 2016) (emphasis added). Where a dispute involves the "kind of acts" an agent may perform under a power of attorney, the traditional rules of contract interpretation apply. *Id.* The Court of Appeals rejected the approach taken by the trial court, holding, based on Court of Appeals precedent, that a power of attorney need not expressly specify a power in a power of attorney, relying on its previous decision in *Rosenberg*. 418 S.C. 170, 179, 790 S.E.2d 919, 924 (holding that the authority to bind under a guaranty need not be expressly specified in the power of attorney). The Court of Appeals went on to find that under the FAA's "equal-treatment principle" the POA did not have to explicitly grant the right to enter into the Agreement, relying on *Kindred*. (App. at 4). In *Kindred*, the Supreme Court confirmed that a court may not require "an explicit statement" of authority in a power of attorney for "an agent" to be authorized to "relinquish her principal's right" to a jury trial unless the law of the state uniformly limits powers of attorney to only what is explicitly stated therein. 137 S. Ct. at 1424. Under this controlling principle, the Court of Appeals found that the trial court "erred in imposing a more restrictive requirement for authority to execute an arbitration agreement." (App. at 4).

2. The Trial Court Erred in Determining that the POAs Authorized Plaintiff to Execute the Agreement.

After finding that the trial court applied a heightened requirement to the Arbitration Agreement unsupported by state and federal law, the Court of Appeals properly concluded that both the General POA and Healthcare POA granted Plaintiff authority to execute the Agreement based on three provisions in those instruments.

First, the General POA granted Plaintiff the authority

> 1. 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**, 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 agreement concerning** any transfers of the above or **of any other property, right or thing**.

(General POA, App. at 253) (emphasis added). The Court of Appeals found that this "broad language," which granted Plaintiff the authority to execute all instruments concerning all types of property, including "choses in action" and which "extended to 'any other property, right or thing" authorized Plaintiff to sign the Agreement. (App. at 4).

Citing no authority for her position, Plaintiff argues for a narrow interpretation of this expansive provision. Plaintiff argues that a "chose in action" is a cause of action and does not cover an arbitration agreement or jury trial waiver. (Pet. at 17). A "chose in action" is "a right to something (as payment of a debt or damages for injury) that can be recovered in a lawsuit." CHOSE IN ACTION, https://www.merriam-webster.com/dictionary/chose#legalDictionary. But an agreement that designates the forum where a party may bring a lawsuit and waives the party's right to a jury trial, like the Agreement, surely concerns Mr. Whaley's "right to something ... that can be recovered in a lawsuit." Further, the POA's authority extends to executing instruments and releases

concerning "any other assets whatsoever, including all property...." and covers the authority to execute any instrument whatsoever concerning "any other property, right or thing." (General POA, App. at 253). Plaintiff's arguments that "any other property, right, or thing" only relates to the transfer of property further is at odds with the expansive provision.

Acceptance of Plaintiff's narrow reading would require the Court find that Plaintiff could initiate a lawsuit in Mr. Whaley's name but could not choose whether to file it in state or federal court, elect a bench trial, consent to mediation or resolve the legal action since settling short of a jury trial waives that right. Under Plaintiff's reading, she would also have the right to waive Mr. Whaley's entire claim against Five Star but could not waive just the jury trial component of the claim.

The Court of Appeals correctly declined to adopt Plaintiff's narrow reading of the General POA, which is contrary to contract principles that require a court to "consider the contents of the whole instrument" when determining the intent and purpose of a contract. *J.T.M. Co. v. Vane*, 283 S.C. 512, 516, 323 S.E.2d 794, 796 (Ct. App. 1984); *see also Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) ("A contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results."). When the POAs are analyzed as a whole, the POAs reveal a clear intention of the parties for Plaintiff to "perform ... the kinds of acts" like executing the Agreement.

Turning to the Healthcare POA, the Court of Appeals found that two provisions authorized Plaintiff to enter into the Agreement. First, the Healthcare POA permitted Plaintiff to "pursu[e] any legal action in [Mr. Whaley's] name. (Healthcare POA, App. at 246; App at 4). The Healthcare POA also authorized Plaintiff to "grant[] any waiver" to a "nursing care provider." (Healthcare POA, App. at 248-49). Mr. Whaley intended this authority to be "as broad as possible" and elected

not to limit it in any manner or otherwise exempt waivers of a jury trial from the Healthcare POA, as the form gave him the ability to do. *Id.* at App. 246. Inherent in this "broad" and unlimited authority to "pursu[e] any legal action" on Mr. Whaley's behalf is Plaintiff's ability to select the forum and venue for that legal action, including arbitration. *Id.* at App. 250.

Plaintiff claims these provisions of authority are limited to decisions concerning the administration of healthcare to Mr. Whaley and apparently do not include executing an arbitration agreement if it is considered in total isolation of all relevant circumstances. But, like with the General POA, Plaintiff's interpretation of the Healthcare POA would lead to internal inconsistencies in the document and contravenes basic contract principles. Under Plaintiff's interpretation, the Healthcare POA would not confer the authority to file a lawsuit or sign a waiver or release of liability because viewed in a vacuum, those items do not concern healthcare. Based on this reading, Plaintiff would have the authority to execute waivers and releases of liability and initiate litigation while stripping Plaintiff of that same authority since, according to Plaintiff, those acts are not "decisions that concern healthcare."

A more appropriate reading of the Healthcare POA when viewing the instrument as a whole, as the Court of Appeals found, authorizes Plaintiff to execute waivers or releases of liability and initiate litigation where the waiver, release, or litigation relates to Mr. Whaley's healthcare decisions. The Healthcare POA "authorized [Plaintiff] to pursue legal actions and to grant any waiver required by health care providers such as [Five Star]." (App. at 4). There is no dispute that Plaintiff had the authority to admit Mr. Whaley into Five Star's facility. The Healthcare POA also authorizes Plaintiff to make certain actions ancillary to the provisions of Mr. Whaley's healthcare, including the authority to sign waivers and initiate litigation. When viewing the context of the Healthcare POA as a whole, the Healthcare POA authorizes Plaintiff to enter into an agreement

with Mr. Whaley's healthcare provider to arbitrate disputes arising from the provision of healthcare.

The Court of Appeals correctly applied long-established South Carolina law to the facts here and reached the only logical conclusion: the decision to arbitrate is plainly within Plaintiff's authority as Mr. Whaley's power of attorney. Any other interpretation would paralyze attorneys-in-fact from asserting, filing, or settling claims on behalf of the principal.

CONCLUSION

For the reasons discussed herein, Five Star asks this Court to deny Plaintiff's Petition.

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2017-001298
Appellate Case No. 2019-01767

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 Tenants TRS, Inc.; Senior Housing Properties Trust; SNH TRS, Inc.; and Candy D. Cure, ... Respondents.

PROOF OF SERVICE

I hereby certify that I have caused a copy of Respondent's Return to Petition for Writ of Certiorari to be served upon all counsel of record, by mailing copies of same, postage prepaid, U.S. First Class Mail, to the following address:

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Charleston, South Carolina
November 18, 2019

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November 18, 2019

Via Hand Delivery
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, Deceased v. SNE SE Ashley River Tenant, LLC, et al.
Appellate Case No. 2019-001767
NMRS File No. 041123/01507

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven (7) copies of the Respondents' Return to Petition for Writ of Certiorari and Proof of Service in the above-referenced matter. Please file the original and return a filed copy of the Return and Proof of Service to our office with the bearer of this letter.

By copy of this correspondence and the enclosed pleadings we are serving all counsel of record with the same. Thank you for your assistance with this matter. Please do not hesitate to contact me should you have any questions or concerns.

Very truly yours,

Robert W. Whelan

RWW:gh
Enclosures

cc: C. Caleb Connor, Esquire
Kenneth L. Connor, Esquire