THE STATE OF SOUTH CAROLINA
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.

PETITIONER'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner incorporates the Statement of the Case in her Petition and replies to only a few items in Respondents' Return. Respondents assert that Petitioner's statement of the case "goes far beyond the statement of the case" (Return p. 1), but fails to explain or cite any support for this argument except to disagree with the facts stated by Petitioner. Differing views of facts are commonplace. Regardless, as to the scope of the statement, the rules require a petitioner to present "[a] concise statement of the case, containing the facts material to the consideration of the questions presented." Rule 242(d)(3). Petitioner's statement of the case is procedurally proper and fully supported by the record on appeal.

Respondents' counter-statement of the case does not state the case. It states only a general disagreement with Petitioner's statement and recites the language of the arbitration agreement. (Return pp. 1-2). Petitioner does not dispute the language of the agreement. She disputes the circumstances surrounding its execution. Simply because the agreement states it is voluntary and knowing does not make it so. This is especially true when Respondents had an opportunity to present a counter-affidavit about the circumstances of the execution of the arbitration agreement but did not do so.

Finally, Respondents dispute the inclusion of the AAA Arbitration Rules in the Appendix. (Return p. 2). Petitioner cited to the Rules in her brief to the Court of Appeals (App. pp. 102, 123) and Respondents did not challenge the citation or discussion of the Rules (App. pp. 142-44). Petitioner included a hard copy of the AAA Arbitration Rules in the Appendix before this Court based on a suggestion made by Justice Hearn at a CLE for parties to submit a paper copy of webpages cited in a brief in the event the webpage content changes by the time the Court looks at the webpage. Therefore, including the rules in the Appendix is proper.

ARGUMENT

The Court should grant the petition for writ of certiorari and reverse the Court of Appeals' opinion.

I. PETITIONER SATISFIES RULE 242(B), SCACR

Respondents first dispute whether Petitioner satisfies Rule 242(b), SCACR. (Return p. 3). This dispute is without merit. While Rule 242(b), SCACR, lists some "reasons which will be considered" by the Court in deciding whether to grant certiorari, it expressly states the reasons are "neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general." Rule 242(b), SCACR. A case does not have to fall within one of the five categories listed in Rule 242(b) to warrant review by this Court. Argument on these categories is not listed as part of the required "content of petition." Rule 242(d), SCACR. The basis for certiorari is that the Court of Appeals' decision is wrong as argued in the Petition and this Reply.

II. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE

The lower court correctly found the arbitration agreement is unconscionable. For the reasons stated in the Petition and this Reply, the Court should grant certiorari on this issue and reverse the Court of Appeals' decision.

A. Petitioner Lacked a Meaningful Choice in Executing the Arbitration Agreement

Using the proper standard of review to analyze the record in this case, and analyzing the arbitration agreement with considerable skepticism, the lower court correctly held Petitioner lacked a meaningful choice in executing the arbitration agreement. Because many of Respondents' arguments are adequately addressed in the Petition, Petitioner replies to two arguments.

First, Respondents incorrectly focus on the fact that the arbitration agreement was a separate document from the admission documents. Petitioner does not argue the separateness of

the arbitration agreement evidences a lack of meaningful choice. Petitioner argues the timing and circumstances of Respondents' presentation of the arbitration agreement to her supports the lower court's finding of a lack of meaningful choice. Respondents presented the arbitration agreement to Petitioner **after** her father's admission to the facility and told her she "needed to sign the 'Arbitration Agreement' in order to ensure [her] father's admission to the facility." (App. p. 244). "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 v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). It is fundamentally unfair bargaining to admit someone's sick father to a facility and then pressure her into signing an arbitration agreement to keep him in the facility.

Second, Petitioner is not "avoid[ing] the obligations she could have read" in the arbitration agreement. (Return p. 13). The law provides that, in a situation such as this, the agreement is not valid and enforceable regardless of whether or not a party read it. *See 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."). The issue is not that Respondents should have explained the arbitration agreement to Petitioner. The issue is that they surprised her with it and pressured her into signing it with knowledge that she did not understand it. That is disparity of bargaining power that Respondents knowingly and purposely used to Petitioner's detriment.

B. The Arbitration Agreement Terms are Oppressive and One-sided

Respondents address some of the individual terms Petitioner challenges but fail to address the argument that the cumulative effect of the terms is oppressive and one-sided. In this case, "the ***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). The Court of Appeals failed to analyze the cumulative effect of the provisions and Respondents fail to even address the issue.

Argument on the challenged terms is in the Petition, and Petitioner replies to only a few of Respondents' arguments.[1] As to AAA discovery, Respondents do not deny that it is limited compared to discovery provided in the South Carolina Rules of Civil Procedure. Respondents' only substantive response is that an arbitrator "may" order depositions in a case worth at least $500,000.00. (Return p. 7 n.1). That an arbitrator "may" or may not order something is vastly different from having the right to notice depositions.

As to punitive damages, Respondents argue the issue is premature because an arbitrator has not yet ruled on whether punitive damages are warranted. (Return p. 8 n.3). This is nonsensical. An arbitrator will never address damages that are strictly prohibited by the arbitration agreement. Respondents' position would unfairly prevent someone from ever challenging a punitive damages prohibition.

As to the excessive costs of arbitration, Petitioner meets the burden of showing arbitration is cost-prohibitive. (Return p. 8 n.4). Notably, Respondents do not address that half of the arbitration fee to be paid by a plaintiff is $8,087.50, which is fifty-three times the $150.00 filing fee for an action in South Carolina State Court, and does not include the hourly rate paid to three arbitrators. (Pet. p. 13; Return p. 9). Respondents also do not address any criteria or standard for when they may deem a plaintiff to not have the means to pay for arbitration. (Return p. 9). The reality is that Respondents may choose to reject an affidavit of no means knowing that a plaintiff

[1] Respondents do not address either the "voluntary" agreement provision or the prohibition on an appeal. (Pet. pp. 14-15).

is priced out of arbitration and there is nothing a plaintiff can do to contest that decision. Respondents assert Petitioner makes a contrary argument—"on the 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." (Return pp. 8-9). Arguing for a $150.00 filing fee and normal discovery in contrast to an $8,087.50 filing fee, an hourly rate for arbitrators, and limited discovery is not contrary, it is commonsense.

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

The lower court correctly found Petitioner did not have actual authority to execute the arbitration and waive a jury trial. For the reasons stated in the Petition and this Reply, the Court should grant certiorari on this issue and reverse the Court of Appeals' decision. Petitioner replies to only a few of Respondents' arguments.

As to the general durable power of attorney, Petitioner and the lower court's interpretation of the power of attorney does not result in Petitioner's ability to "initiate a lawsuit in Mr. Whaley's name" without the ability to "choose whether to file it in state or federal court, elect a bench trial, consent to mediation or resolve the legal action." (Return p. 17). A reading of the full power of attorney provides for the power to "sue for . . . other demands whatsoever, including insurance or any choses in action . . . with full power to institute or defend any suit, action or proceeding in my name as he may deem advisable." (App. p. 254 ¶ 5). This provision confers the "full power" to bring or defend a lawsuit but, notably, does not indicate expressly or impliedly any power to agree to arbitration or waive Mr. Whaley's right to a jury trial.

A "chose in action" does not include an arbitration agreement or a jury trial waiver. (Return p. 16). It is a cause of action or a right to recover or receive a remedy, and is generally considered a type of property. *See Ball v. Ball*, 312 S.C. 31, 34, 430 S.E.2d 533, 534-35 (Ct. App. 1993) ("This

right of action is a chose in action, an interest which, as we noted, South Carolina courts include in the definition of the term 'property.'"); *Geigers v. Kaigler*, 9 S.C. 401, 429 (1877) ("So that it would seem to be the rule of law that if the legal owner and holder of a chose in action, in consideration of something other than money, acknowledges satisfaction, the claim is absolutely extinguished."). The Court of Appeals erred in interpreting this phrase to include an arbitration agreement or a jury trial waiver.

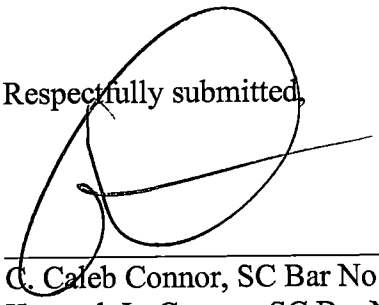
As to the healthcare power of attorney, Petitioner and the lower court's interpretation does not "lead to internal inconsistencies" by failing to confer the authority to file a lawsuit or sign a waiver or release of liability. (Return p. 18). Those types of decisions and actions **unrelated to healthcare** are provided for in Mr. Whaley's general power of attorney. A person signs separate general and healthcare powers of attorney because they deal with different subject matter. "[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.").

The likely effect of the Court of Appeals' broad interpretation of the language at issue in this case is that a person must specify that a power of attorney does **not** have the power to agree to arbitrate. That should not be the law of South Carolina.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari and reverse the Court of Appeals' decision.

Respectfully submitted,



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Date: December 6, 2019

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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Petitioner's Reply to Respondents' Return to Petition for a Writ of Certiorari* have been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below on December 6, 2019.

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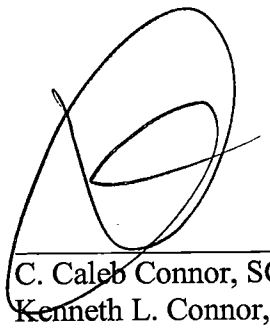

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