THE STATE OF SOUTH CAROLINA
Supreme Court

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

RECEIVED
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S.C. SUPREME COURT

Appellate Case No. 2019-001767

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.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Did the Court of Appeals err 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. Did the Court of Appeals err in finding Petitioner 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).

I. Respondents Instructed Petitioner She Must Sign the Arbitration Agreement after Admitting Mr. Whaley to the Facility

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 instructed 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 also "needed to sign additional documents related to [her] 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.* Respondents did not present any contrary evidence regarding the circumstances of the execution of the arbitration agreement.

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 whether the arbitration panel will consist of one or three arbitrators. (App. p. 262 ¶¶ 2-3). However, if the resident submits "an affidavit that they do not have the means to pay their one half of the arbitration expenses", the Respondents pay the full expenses and then get to choose the number of arbitrators. (App. p. 262 ¶ 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 unilaterally amend the agreement at any time 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 [her] 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.*

II. Mr. Whaley's Death

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, development of pressure ulcerations, at least six urinary tract infections, bronchitis, pneumonia, physical suffering, mental anguish, violations of his rights, 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 the hospital admission. *Id.* His diagnosis included a mandible fracture, metabolic encephalopathy, possible aspiration pneumonia, and possible urinary tract infection. *Id.* at ¶ 50. As a result of the injuries he suffered at Respondents' facility, Mr. Whaley died on February 27, 2014. *Id.* at ¶ 52.

III. The General Durable Power of Attorney and Health Care Power of Attorney Address Only Property, Financial, and Health Care Decisions

On October 4, 2016, Petitioner filed this action in the Charleston County Court of Common Pleas. (App. p. 156). On November 16, 2016, Respondents filed a motion to dismiss and compel arbitration. (App. p. 230). Petitioner filed a response in opposition to the motion 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 Mr. Whaley's general durable power of attorney and health care power of attorney that name 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 is limited to eight specific property and financial-based categories of actions that the attorney may take on Mr. Whaley's behalf. (App. pp. 253-54). None of them encompass the authority to agree to arbitration or to waive Mr. Whaley's right to a jury trial. The health care power of attorney is limited to health care treatment only and does not confer authority to agree to arbitration or waive Mr. Whaley's right to a jury trial. (App. pp. 246-50). The "power" conferred in the document relates to "***any treatment*** [Mr. Whaley] does not desire or ***treatment*** [Mr. Whaley] want[s] to be sure to receive." *Id.* (emphasis added). The agent is granted only "authority to make decisions for [Mr. Whaley] regarding [his] ***health care***." (App. p. 248).

IV. Proceedings in the Lower Court and the Court of Appeals

On January 27, 2017, the Honorable J.C. Nicholson, Jr., held a hearing on Respondents' motion. (App. p. 206). After considering the evidence presented, including the arbitration agreement, powers of attorney, Petitioner's undisputed affidavit, and arguments of the parties, the lower court filed an Order Denying Defendants' Motion to Dismiss and Compel Arbitration on

April 18, 2017. (App. pp. 149-54). The lower court found Petitioner lacked actual authority to agree to arbitrate or waive Mr. Whaley's right to a jury trial because neither the general durable power of attorney nor the health care power of attorney conferred such authority. (App. p. 151). Petitioner also 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 further found the agreement unconscionable based upon the parties' "severely disparate" bargaining power, Petitioner's inability to negotiate the terms of a form contract prepared solely by Respondents, Respondents' representation to Petitioner that she "must" sign the agreement to preserve 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 decision on actual authority violated the equal principal treatment. (App. pp. 2-3). The Court of Appeals determined that the lower court based its actual authority ruling on the absence of a specific reference to "arbitration" in the powers of attorney, explaining "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. 2-4). The Court of Appeals 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 also found the health care power of attorney authorized arbitration and waiver of a jury trial by its references to pursuing legal action and granting a waiver required by a health care provider. *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 of Appeals found "no evidence" of Petitioner's sophistication, the arbitration agreement "was neither a surprise nor inconspicuous", Petitioner acknowledged her "opportunity to ask questions and seek the advice of an attorney", and that Petitioner understood the rights she was waiving. (App. pp. 5-6). As to the one-sided or oppressive terms of the arbitration agreement, the Court of Appeals addressed only two terms—a discovery limitation provision and a punitive damages prohibition—but did not address other terms or the cumulative effect of such terms. (App. pp. 7-8).

The Court of Appeals denied the petition for rehearing on September 20, 2019, and this Court granted the Petition for Writ of Certiorari on March 31, 2020.

STANDARD OF REVIEW

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

ARGUMENT

The arbitration agreement is unconscionable, and Petitioner lacked the authority to execute the agreement to arbitrate and waive her father's right to a jury trial. The Court of Appeals erred in holding otherwise, and this Court should reverse.

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. Petitioner Lacked a Meaningful Choice

The lower court correctly held Petitioner lacked a meaningful choice in executing the arbitration agreement. In finding to the contrary, the Court of Appeals failed to analyze the arbitration agreement with skepticism, did not analyze all six factors in determining whether an absence of meaningful choice existed, and disregarded the any evidence standard of review.

This Court must analyze the agreement with "considerable skepticism" as required by *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. In *Simpson*, this Court adopted a rationale that viewed "automobiles as a necessity and factor[ed] this characterization into a determination of whether a customer had a meaningful choice in negotiating the arbitration agreement." *Id.* (internal quotation marks omitted). Because the *Simpson* arbitration agreement "involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society", this Court analyzed the contract "with considerable skepticism." *Id.* at 27, 644 S.E.2d at 670. Similarly, this case involves a vulnerable adult in need of medical care and a safe living environment—which is much more necessary than a car. Therefore, 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 of Appeals erred as to the three factors it did consider because its conclusions violate the standard of review.

As to the fourth factor, the lower court found 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 . . . if ***any evidence*** reasonably supports the findings." *Smith*, 417 S.C. at 48, 790 S.E.2d at 3 (emphasis added). 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." (App. pp. 244-45). These statements indicate Petitioner did not have education, knowledge, or sophistication to understand the arbitration agreement. Despite the fact that no one disputed the evidence of the parties' relative sophistication and Respondents offered no counter-affidavit, the Court of Appeals reversed the lower court's factual findings. This violated the any evidence standard of review and is contrary to the record.

As to the fifth and sixth factors, the undisputed evidence also confirms that Respondents concealed the arbitration agreement from Petitioner and then surprised her with it after Mr. Whaley's admission to Respondents' facility. Respondents originally told Petitioner that she "needed to sign various documents in order for [her] father to be admitted to the facility. In that

discussion, [she] was ***never*** informed of an Arbitration Agreement. ***After*** [her] father's admission to the facility, [she] met with Tasha Williams . . . . [who] the[n] informed [her] that [she] ***needed to sign additional documents*** related to [her] father's admission to the facility." (App. p. 244) (emphasis added). There is no evidence to the contrary. Respondents kept the arbitration agreement inconspicuous until after Mr. Whaley's admission and then surprised Petitioner with the agreement. "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 a fundamentally unfair bargaining process to admit someone's infirmed parent into a facility and then pressure her into signing an arbitration agreement to keep the parent in the facility. The Court of Appeals erred in violating the standard of review as to these conclusions.

The Court of Appeals also 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, which expressly states: "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 providing an opportunity to ask questions or seek advice of

counsel, Respondents ignored 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 give up her father's rights. (App. pp. 244-45). This evidence also supports the lower court's findings. (App. pp. 150, 153). That the form agreement predrafted by Respondents claims Petitioner understands its terms does not negate undisputed evidence to the contrary showing that Respondents knew Petitioner had unanswered questions about the arbitration agreement. Given the circumstances surrounding execution of the agreement, there is evidence to support the lower court's finding that Petitioner did not understand it. (App. p. 153).

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

B. Oppressive and One-Sided Terms

The lower court also 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 of Appeals 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 makes it "wholly unconscionable and unenforceable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34-35,

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

644 S.E.2d 663, 674 (2007) (emphasis added). Each offensive provision is addressed below, beginning with the two that the Court of Appeals analyzed.

i. Limited and One-Sided Discovery

The arbitration agreement provides that the arbitrators will follow the "Commercial Arbitration Rules of the AAA" and have authority "to direct discovery in all controversies." (App. p. 262 ¶ 2). The Commercial Arbitration Rules do not allow pre-hearing subpoenas of witnesses or non-party documents. (App. pp. 40-41). The Rules provide that an arbitrator "may" order a deposition only in an "exceptional" case worth at least $500,000.00 when the requesting party shows "good cause" for the deposition. (App. p. 59). A requirement to prove "good cause" for a simple deposition is vastly disparate from the Rules of Civil Procedure that allow a party to notice depositions of any person. *See* Rule 30, SCRCP. Under the arbitration agreement at issue, Petitioner may obtain some documents from Respondents but cannot require production of documents from non-parties. Further, Petitioner is precluded from engaging in fact-finding with respect to the alleged negligent conduct of Respondents' employees and the surrounding events or circumstances that caused Mr. Whaley's suffering, injuries, and death. Petitioner also has no right to depose Respondents' experts, including investigation of their qualifications or the bases and validity of their opinions. 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 and are 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 of Appeals' 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. Rather, it affects only the presentation of evidence at trial. The parties in *Lucey* could conduct usual discovery, including the exchange of discovery requests and the taking of witness depositions. *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 circumstances in this case are much more oppressive than 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). While the prohibition refers to the panel not having "authority" to award punitive damages, it actually operates as a waiver of a legal right afforded by South Carolina law. *Id.* A punitive damages prohibition alone may not render the entire agreement unconscionable, but the Court of Appeals erred by failing to consider it "in conjunction with [Petitioner]'s lack of meaningful choice in agreeing to arbitrate" and "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 provide "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

Under the arbitration agreement, 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 a court of law while a resident's claims are relegated to arbitration. A resident's most probable claim is personal injury for serious injury, including potential claims for survival and wrongful death. The value of these claims likely exceeds $25,000.00, making them subject to arbitration. On the other hand, the most probable claim for an assisted living facility is a resident's unpaid bills, which are likely less than $25,000.00[2] and not subject to 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' arbitration agreement requires that the resident split the costs of arbitration, including all costs of administration, expenses of the panel, and hearing costs, 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 are then afforded the right to choose whether one or three arbitrators will decide the case. *Id.* This provision is oppressive, one-sided, and not geared towards an unbiased decision by a neutral decision-maker as 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 a standard for not having the means to pay? What are the "arbitration expenses"? *Id.* The arbitration agreement lacks any

[2] Respondents' website stated 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.

information on the amount of arbitration expenses so as 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 $7,700.00 initial filing fee and an $8,475.00 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—fifty-three times the $150.00 fee to file an action in South Carolina state court—just to *initiate* an arbitration for survival and wrongful death claims. *Cf. Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 613, 586 S.E.2d 581, 585 (2003) (holding a mere $500.00 arbitration fee not unconscionable because the cost term is "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 states 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. (App. p. 262 ¶ 1). Respondents also may arbitrarily reject an affidavit of no-means. At that point, Respondents know that a resident cannot pay the arbitration costs, effectively pricing a plaintiff out of pursuing a claim and preventing them access to any means of relief. A resident who cannot pay for arbitration is left to either drop the case or agree to let Respondents choose whether one or three arbitrators will decide the case, which greatly reduces the likelihood of a neutral and unbiased decision-maker.

v. No Right to Appeal

The arbitration agreement also 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 decision, in combination with the other restrictions and limitations discussed herein, is oppressive and one-sided.

vi. Respondents' Unilateral Right to Amend

The arbitration agreement provides that Respondents can amend the agreement upon 30 days written notice to the resident at any time. (App. p. 243 ¶ 9). The resident, however, has no reciprocal right. The parties discussed this provision at oral argument before the Court of Appeals, and Respondents admitted it is one-sided and suggested the Court sever it. (App. p. 17). Notably, the provision places no scope or limitation on the type of amendment and provides notice only to the resident, and not to the resident's authorized representative. Certainly, the unilateral right to amend at any time is inherently one-sided.

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 predrafted provision is false, and Respondents knew of its falsity because they willfully prevented Petitioner from obtaining answers to her questions about the agreement and instructed 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 showed the opposite.

viii. Cumulative Effect of the Oppressive and One-Sided Terms

The cumulative effect of the terms discussed above demonstrates that the arbitration agreement is oppressive and one-sided. The terms cannot be viewed in isolation but must be viewed as a whole to accurately determine the effect on Petitioner's rights. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34-35, 644 S.E.2d 663, 674 (2007) ("[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." (emphasis added)). The Court of Appeals erred in not considering the cumulative effect of the terms.

Contrary to the findings of the Court of Appeals, the arbitration agreement at issue is not aimed towards achieving an unbiased decision by a neutral decision-maker. This Court should reverse the Court of Appeals and affirm the decision of the lower court finding the arbitration agreement unconscionable and unenforceable.[3]

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

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

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[3] A finding in Petitioner's favor on this issue eliminates the need to address the remaining authority issue. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

Respondents argued to the Court of Appeals that any person with a power of attorney is authorized to agree to arbitration. (App. pp. 86-87). Petitioner argued that Respondents failed to raise and preserve this argument in the lower court. (App. pp. 109-10). "In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." *Holy Loch Distribs. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000); *Floyd v. Floyd*, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." (internal quotation marks omitted)). The Court of Appeals did not rule on issue preservation. (App. pp. 2-4). The Court should reverse the Court of Appeals on this issue and find it is not preserved. (App. p. 18).

The Court of Appeals misinterprets the lower court's order regarding actual authority. (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, as well as arguments 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 considering these arguments and the terms of the powers of attorney, the lower court correctly 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). The Court of Appeals erred in finding the lower court's ruling violated the equal treatment principle (App. p. 3) because the lower court's decision is based on the actual language and intent of the powers of attorney and not based on the absence of an explicit reference to "arbitration".

To the extent the Court of Appeals' holding is based on the lower court's use of the phrase "expressly conferred" (App. p. 151), the Court of Appeals 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. (App. p. 4). "[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". (App. p. 249). 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." (App. p. 249) (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 ensure 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 also misinterpreted these items. (App. p. 4). A "chose in action" is a cause of action, not an arbitration agreement or jury trial waiver. *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.'"). The Court of Appeals' opinion equates a cause of action to 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 arbitration agreement nor the jury trial waiver is a "transfer of" anything. (App. p. 253). The power of attorney lists eight categories of authority. (App. pp. 253-54). If the language the Court of Appeals relied upon is as broad as it held, then there was no reason to list eight categories of authority. The list supports the lower court's interpretation that the powers conferred are limited to those categories and do not include the power to agree to arbitration or waiver of the right to a jury trial.

"[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 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. This Court should reverse the Court of

Appeals' decision to the contrary. A ruling in Petitioner's favor on this issue is dispositive of the entire appeal. *See Futch*, *supra* note 3.

CONCLUSION

For these reasons, the Court should reverse the Court of Appeals and hold that the arbitration agreement is unconscionable and Petitioner did not have the actual authority to agree to arbitration or waive Mr. Whaley's right to a jury trial. The Court should remand the case to the lower court to proceed as pled.

Respectfully submitted,

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