THE STATE OF SOUTH CAROLINA
Supreme Court

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S.C. SUPREME COURT

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

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.

REPLY BRIEF OF PETITIONER

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Petitioner Thayer W. Arredondo, as Personal Representative of the Estate of Hubert Whaley, deceased, ("Petitioner") submits this Reply to the Brief of 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 ("Respondents"). Petitioner incorporates the arguments made in her initial Brief.

ARGUMENT

The response to Petitioners' brief is a deflection. By depicting Petitioner as attacking arbitration in general, Respondents attempt to change the narrative. This is not a case that challenges the use of arbitration. It is simply about whether Respondents' arbitration agreement is unconscionable and whether two powers of attorney conferred actual authority on Ms. Arredondo to agree to arbitrate her father's survival and wrongful death claims against Respondents.

Petitioner does not dispute the policy in favor of arbitration. (Br. of Resp't p. 5). However, that policy does not require the Court to seek ways to enforce arbitration. Nor does it favor arbitration agreements more than other contracts. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (stating the purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so"). The policy favoring arbitration means only that a court cannot refuse to enforce arbitration merely because it is arbitration and must analyze enforceability as it would for other contracts. The policy also does not mean that all arbitration agreements are enforceable under any circumstances.

I. THE COURT OF APPEALS FAILED TO FOLLOW PRECEDENT TO ANALYZE THE AGREEMENT WITH CONSIDERABLE SKEPTICISM

Respondents do not dispute that Mr. Whaley's need for medical care and a safe living environment is a necessity. They do not dispute that analyzing the arbitration agreement with

considerable skepticism warrants a finding that is unconscionable. Rather, in direct contravention of this Court's precedent and the Court of Appeals' recent opinion applying such analysis under similar circumstances, Respondents argue that South Carolina courts do not apply considerable skepticism. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) ("***We agree with*** the rationale of the Ohio courts and proceed to analyze this contract between a consumer and automobile retailer with 'considerable skepticism.'" (emphasis added)); *Doe v. TCSC, LLC*, Op. No. 5733 (S.C. Ct. App. filed July 1, 2020) (Shearouse Adv. Sh. No. 26 at 24) ("Our supreme court has recognized car sales contracts warrant not just acute scrutiny but considerable skepticism, given the bargaining disadvantage a consumer faces once he sets foot on the lot, and the reality that car ownership is often a necessity in modern society (unless one wishes to remain on foot)."). The considerable skepticism analysis is the law of South Carolina, and the Court of Appeals erred in failing to apply it in this case. Respondents argue that the considerable skepticism analysis violates the Federal Arbitration Act (FAA). (Br. of Resp't p. 28). The analysis does not single out arbitration in violation of the FAA because it applies to a "contract" in general and not to only arbitration agreements. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670.

II. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE

"Unconscionability is gauged at the time the contract was made." *Doe v. TCSC, LLC*, Op. No. 5733 (S.C. Ct. App. filed July 1, 2020) (Shearouse Adv. Sh. No. 26 at 23). The two prongs of unconscionability—(1) absence of meaningful choice and (2) terms so oppressive and one-sided that no reasonable person would make them and no fair and honest person would accept them—"invite similar proof and often overlap." *Id.* at 23. "[I]f more of one prong is present, then less of the other is required." *Id.* at 23 (internal quotation marks and alteration omitted).

A. Petitioner Lacked a Meaningful Choice

The Court of Appeals failed to consider half of the factors that courts "should take into account" when determining if a contract is tainted by the absence of a meaningful choice. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. Respondents make no argument that those factors weigh in favor of enforcing arbitration; rather, they only vaguely argue the Court of Appeals considered the factors because it ruled in Respondents' favor. (Br. of Resp't p. 26). Such a decision cannot stand when the three factors ignored by the Court of Appeals all weigh heavily in favor of finding Petitioner lacked a meaningful choice. First, the nature of injuries suffered by Mr. Whaley are the most severe possible—death. Second, he is not a substantial business concern because he is a single resident for Respondents, who have a capacity of 31,280 units across 32 states. (App. pp. 23-24); *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016) (finding a homebuyer was "not a substantial business concern" of the defendant "corporation that constructs houses in twenty-seven states" because the single homebuyer "did not comprise a large portion of [defendant]'s clientele"). Third, there is a stark disparity in the parties' bargaining power where Respondents have over 270 senior living communities in over 30 states and Petitioner is an unsophisticated individual seeking necessary, assisted living care. (App. p. 24).

As to the factors the Court of Appeals did consider, Respondents argue there was no surprise to Ms. Arredondo that the agreement included arbitration because it used bold language and her surprise that Respondents presented an arbitration agreement is not sufficient. (Br. of Resp't pp. 26-27). Conspicuity of the fact of arbitration does not negate surprise in the presentation of the agreement. *See Doe v. TCSC, LLC*, Op. No. 5733 (S.C. Ct. App. filed July 1, 2020) (Shearouse Adv. Sh. No. 26 at 24) (stating "the non-negotiable [arbitration] Agreement here—

while conspicuous—was still sprung on Doe along with a flurry of other closing documents" and affirming that "Doe had no meaningful choice in accepting the Agreement").

The Court of Appeals erred in finding Ms. Arredondo had a meaningful choice in executing the arbitration agreement where Respondents intentionally presented it to her after they admitted Mr. Whaley to the facility and then told her she had to sign it to maintain his residency.

B. The Cumulative Effect of the Oppressive and One-Sided Terms

In analyzing unconscionability, the Court must consider "the cumulative effect of a number of oppressive and one-sided provisions." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 674 (2007). Respondents ask the Court to analyze each provision and determine if it alone is sufficient to render the agreement unconscionable. In contrast, Petitioner focused on the cumulative effect of the provisions because the Court of Appeals singled out and analyzed only two provisions when Petitioner argued numerous other provisions were oppressive and one-sided. The cumulative effect of all of the oppressive and one-sided provisions is an unconscionable agreement. (Br. of Resp't p. 13). Petitioner's approach adheres to *Simpson*.[1]

Petitioner incorporates her prior arguments as to the oppressive and one-sided terms and responds below to Respondents' arguments.

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[1] Respondents argue the Court should not consider the Commercial Arbitration Rules of the AAA. (Br. of Resp't p. 14 n.3). Respondents chose to write their arbitration agreement to require the arbitrator(s) follow "the current Commercial Arbitration Rules of the AAA." (App. p. 262). They are properly part of the record. Petitioner cited to the Rules in her brief to the Court of Appeals (App. pp. 102, 123) and Respondents did not challenge her. (App. pp. 142-44). Petitioner included a hard copy of the Rules in the Appendix before this Court based on a suggestion made by Justice Hearn at a CLE that parties submit a paper copy of webpages cited in a brief in case the webpage content changes by the time the Court looks at it.

i. *Limited and One-Sided Discovery*

Respondents assert that various types of discovery are available at the request of a party and the discretion of the arbitrator(s). While attractive on its surface, it is not an accurate picture of the limitations' practical effects. First, a party must ask for the discovery but there is no guarantee that it will be allowed. Under our Rules of Civil Procedure, certain discovery is guaranteed without asking permission. Second, every time a party requests that the arbitrator(s) allow discovery, the party will incur a direct increase of the case costs because the requesting party (if it has the means to split the arbitration costs) must pay for the arbitrator(s)' time in deciding whether or not to grant the request.

Respondents argue the parties can get the same information from each other. (Br. of Resp't p. 16 n.4). Again, such an approach is contrary to reality. Respondents (1) possess all of Mr. Whaley's records, (2) have unlimited access to the employees who cared for him, (3) have access to Respondents' applicable policies and procedures, personnel files, and other operational documents, (4) have records illustrating conditions within the facility during Mr. Whaley's residency, including of similar incidents caused by the same employees or suffered by other residents, and (5) possess information regarding the adequacy and competency of staff, just to name a few. Respondents have unbridled access to and control of relevant and discoverable information; however, under the oppressive terms of the arbitration agreement, Petitioner does not have access to and will have to pay out-of-pocket just to ask for permission to obtain information necessary to prove her case. Considering the impracticality of these arbitration procedures, Respondents have an unfair advantage.

Respondents cite to two cases that do not support their position. First, in *Lucey v. Meyer*, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012), the only limitation at issue was that the parties were

"the only witnesses called in person" at trial. *Id.* at 142-43. This is not a discovery limitation. Second, Respondents cite to *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), as upholding arbitration using the AAA rules. (Br. of Resp't p. 15). *Carolina Care Plan* did not rule on the unconscionability of discovery limitations in an arbitration agreement but only "note[d]" in a footnote that the AAA rules state an arbitrator has broad authority to order and control discovery. *Id.* at 555 n.7, 606 S.E.2d at 758 n.7. It does not state which version of the AAA rules the Court is referring to or discuss the operation or effect of any specific provision. It is not dispositive of whether the limited discovery in this case is oppressive and one-sided. The discovery limitations, as fully discussed in Petitioner's Brief, are oppressive and one-sided.

ii. *Costs of Arbitration*

Respondents do not go "out of [their] way to ensure the [arbitration] Agreement does not impose oppressive burdens on Arredondo." (Br. of Resp't p. 21). Respondents, instead, hide their oppressive terms by not providing someone like Ms. Arredondo with information necessary to understand the practical effect of such an agreement.

Respondents assert Petitioner's argument about the payment provision (stating they will pay the costs if a resident submits an affidavit of no-means) is "illusory" because, if the resident submits an affidavit, Respondents will pay without question. (Resp't p. 22). Under Respondents' reading of its own provision, any resident bringing a claim against it could state he or she does not have the means to pay (because there is no measure of "means" provided)[2], and Respondents would

[2] Notably, Respondents argue no proof is necessary to support a no-means affidavit but then accuse Petitioner of providing "no evidence" that she "cannot afford the fees." (Br. of Resp't p. 23).

pay. This does not address whether a no-means affidavit will suffice if the resident engaged counsel and whether Respondents then expect a resident's counsel to front the costs of litigation.

Respondents argue that, if Petitioner cannot pay the expenses and it refused to pay them (leaving her without a remedy), then her remedy is to have the issue resolved by an arbitrator. (Br. of Resp't p. 22). This is circular. To have an arbitrator(s) to resolve the dispute, someone must pay the arbitration and the arbitrator(s)' costs. If the arbitrator(s) decided the issue against Ms. Arredondo, she would be left to pay half of those costs. If that is the actual intent of the agreement, it plainly demonstrates the agreement is oppressive and one-sided.

Respondents assert that the arbitration agreement does not require payment of the AAA administrative fees because the parties pick an arbitrator(s) who then uses the AAA rules. (Br. of Resp't pp. 22-23). At no point does the arbitration agreement instruct a resident how to initiate arbitration. It states only that the "Panel shall follow the current Commercial Arbitration Rules of the AAA." (App. p. 262). The Commercial Arbitration Rules of the AAA provide for payment of administrative fees. (App. pp. 29, 50). If these fees do not apply, as Respondents assert, the only other possibility is that the arbitration agreement provides no information as to the "costs of administration, all expenses of the Panel, and all hearing costs" that a resident can expect to pay. (App. p. 262). Without this information, how can a resident assess whether they have the means to pay? *See Georgetown Mfg. & Warehouse Co. v. S.C. Dep't of Agriculture*, 301 S.C. 514, 518, 392 S.E.2d 801, 804 (Ct. App. 1990) ("Common sense and good faith are the leading touchstones of the construction of a contract and contracts are to be so construed as to avoid an absurd result."). Even if Respondents initially pay for arbitration when a resident submits an affidavit of no means, an arbitrator may still enter an award in Respondents' favor that charges those costs back to a resident. (App. pp. 49-51). The costs of arbitration are oppressive and one-sided.

Finally, the AAA administrative fees are in the Record (App. pp. 5) and, regardless, are indisputable public information of which the Court can take judicial notice. *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (stating "original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable").

iii. *No Right to Appeal*

Respondents now argue that Petitioner may appeal the entry or non-entry of a judgment on the arbitrator(s)' decision. (Br. of Resp't p. 19). Respondents make this argument as if it means the provision is not oppressive and one-sided. The "appeal" Respondents refer to is not comparable to any appeal in South Carolina Courts. Rather, the arbitrator(s)' findings of fact "are virtually immune from challenge" and a decision of law is reviewed "using a deferential standard on the far side of the spectrum away from a usual expansive do novo standard." *Star Dev. Grp., LLC v. Darwin Nat'l Assur. Co.*, 2020 U.S. App. LEXIS 14766, *12 (4th Cir. 2020) (internal quotation marks omitted). Even a reviewing court's conclusion that the arbitrator(s) "committed serious error does not suffice to overturn [the] decision." *Id.* at *12 (internal quotation marks omitted). Respondents ignore that there is no requirement for the arbitrator(s) to issue an explanation of their decision, prohibiting any realistic review of the decision. (App. p. 48). The practical effect is that there is no meaningful review allowed and this, in combination with the other restrictions and limitations, is oppressive and one-sided.

iv. *Respondents' Unilateral Right to Amend*

Respondents incorrectly state that the arbitration agreement gives Ms. Arredondo notice and the right to terminate the agreement. (Br. of Resp't pp. 23-24). The agreement states Respondents will give written notice of an amendment "***to Resident***", which is specifically defined

as Mr. Whaley, an elderly and infirm resident who Respondents admitted to their facility with knowledge of his diagnosed dementia. (App. pp. 262-63, 177). Therefore, the agreement does not provide a mechanism for notice to "all parties" (Br. of Resp't p. 23), does not fall within the law cited by Respondents, and is oppressive and one-sided.

v. *"Voluntary" Agreement*

Respondents argue that the agreement is voluntary because it says so. This completely disregards Ms. Arredondo's ***uncontested*** affidavit stating that they "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'." (App. p. 244). "Voluntary" means "unconstrained by interference; not impelled by outside influence." *Black's Law Dictionary* 1605 (8th ed. 2007). Forcing someone to sign an agreement to keep their elderly and infirm parent in an assisted living facility is constrained and impelled by outside influence. The conspicuity of the provision is not dispositive in the face of contrary, uncontested evidence or the law. *See, e.g.*, *Doe v. TCSC, LLC*, Op. No. 5733 (S.C. Ct. App. filed July 1, 2020) (Shearouse Adv. Sh. No. 26 at 24) (stating "the non-negotiable [arbitration] Agreement here—while conspicuous—was still sprung on Doe along with a flurry of other closing documents").

"Arbitration under the [Federal Arbitration] Act is a matter of consent, not coercion . . . ." *Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 479 (1989). Respondents' conduct in instructing Ms. Arredondo that she must sign the arbitration agreement shows coercion rather than consent to arbitration. The voluntary-agreement provision is oppressive and one-sided.

vi. *Punitive Damages and Arbitration of Disputes Involving Over $25,000.00*

In conjunction with the effect of the other provisions discussed above, the prohibition on punitive and exemplary damages, and the requirement that all disputes involving more than $25,000.00 are resolved by arbitration, are oppressive and one-sided.

vii. *Cumulative Effect of the Oppressive and One-Sided Terms*

Considering the cumulative effect of these oppressive and one-sided terms demonstrates the arbitration agreement is unconscionable and the Court of Appeals erred in holding otherwise. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 674 (2007).

C. Severance Is Not an Appropriate Remedy Where Numerous Unconscionable Provisions Are Present

Respondents ask the Court to sever any provisions it finds unconscionable rather than refusing to enforce the entire arbitration agreement. (Br. of Resp't p. 25). This issue is not preserved because Respondents never asked the lower court to sever any unconscionable provisions. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

Even if the Court reaches the issue, severance is not appropriate in the face of numerous unconscionable provisions.

In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), this Court held "the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than 'rewriting' the contract by severing multiple unenforceable provisions." *Id.* at 35, 644 S.E.2d at 674. The Court explained as one of two reasons for its refusal to sever that the arbitration agreement "contained a total of three unconscionable provisions while arbitration clauses examined by courts prescribing severability generally contained only one offending provision." *Id.* at 35 n.9, 644 S.E.2d at 674 n.9. In this case, Petitioner argues seven provisions are unconscionable, weighing in favor of invalidating the entire agreement. Respondents offer no suggestions or alternatives as to how an arbitration would be feasible without the offensive provisions or what terms, if any, this Court should substitute. In forcing the pre-drafted terms

upon Petitioner, Respondents failed to write a fair and enforceable contract. The Court should refuse to sever or rewrite any parts of the arbitration agreement and, instead, hold that it is unconscionable and unenforceable.

III. THE POWERS OF ATTORNEY DO NOT GIVE MS. ARREDONDO ACTUAL AUTHORITY TO AGREE TO ARBITRATE OR WAIVE A JURY TRIAL RIGHT ON BEHALF OF HER FATHER

Mr. Whaley's powers of attorney do not confer actual authority on his daughter to agree to arbitration or waive the constitutional right to a jury trial on his behalf. Before getting to the pertinent, substantive issue of the interpretation of the powers of attorney at issue, Petitioner must correct a number of misstatements by Respondents.

Petitioner does not, as Respondents argue, "ask[] this Court to write limiting provisions into the POAs that Mr. Whaley did not." (Br. of Resp't p. 6). Petitioner asks the Court to interpret the plain language of the powers of attorney. Respondents instead ask the Court to write authority into the powers of attorney that Mr. Whaley did not confer.

The "correct standard for powers of attorney in this State" is not in dispute. (Br. of Resp't pp. 6-8). Petitioner does not argue that a power of attorney is limited to acts specifically enumerated in it. This discussion by Respondents is an attempt to characterize Petitioner as unreasonable and distracts from the key point—the interpretation of the actual plain language of the two powers of attorney at issue. The only reason that there is any discussion on appeal about express language of the powers of attorney is because of the Court of Appeals' decision. It held that "a power of attorney does not need to explicitly refer to arbitration in order to grant the agent authority to execute an arbitration agreement so long as the powers granted are broad enough to include such an act" and, in the next sentence, found the lower court "erred in imposing a more restrictive requirement for authority to execute an arbitration agreement." (App. pp. 3-4). Petitioner argues that the Court of Appeals erred to the extent it interpreted the lower court's

decision as requiring an express statement and using that interpretation as a basis to reverse. (Br. of Pet. pp. 17-18).

"Our courts have looked to contract law when reviewing actions to [] interpret a power of attorney." *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties, and, in determining that intention, the court looks to the language of the contract." *Id.* at 577, 828 S.E.2d at 87. As is usually the case, the parties disagree as to the meaning and interpretation of the language of the powers of attorney. That the interpretation affects whether Petitioner validly entered into an arbitration agreement does not change the standard. The FAA does not dictate the interpretation of the plain language of a power of attorney. It simply requires that any interpretation rule "must in fact apply generally, rather than single out arbitration." *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1428 n.2 (2017). Petitioner's arguments do not infringe on that principle.

A. The Health Care Power of Attorney

The Court of Appeals relied on two phrases to find the health care power of attorney conferred actual authority on Ms. Arredondo to agree to arbitrate or to waive a jury trial right on behalf of Mr. Whaley—(1) "pursue legal action" and (2) "waiver required by health care providers." (App. p. 4). Respondents arguments as to both of these items are incorrect.

i. "Pursue legal action"

In response to Petitioner's argument that the authority to "pursu[e] any legal action in my name" (App. p. 249) cannot support the authority to agree to arbitrate or to waive a jury trial right because Respondents forced Ms. Arredondo to sign the agreement before any legal action arose, Respondents argue that "liability waivers typically come *before* the legal action arises" (Br. of

Resp't p. 10). This response misses the mark because agreeing to arbitrate or waive a jury trial right is not a liability waiver.

Respondents also ignore the context in which the phrase appears. The full clause, which begins after a semi-colon that clearly separates it from the prior text,[3] states: "signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply." (App. p. 249). The pursuit of legal action is related to forcing compliance with Mr. Whaley's wishes related to refusals of treatment or leaving a medical facility. None of those are applicable to signing an arbitration agreement to enter an assisted living facility.

Respondents argue the phrase "any legal action" must mean the power of attorney is not limited to jury trials and, therefore, supports arbitration. (Br. of Resp't p. 11). This is incorrect. The public judicial system includes courts that do not utilize a jury including, for example, probate court, family court, and administrative law court.

This provision does not confer actual authority to agree to arbitrate or waive the right to a jury trial.

ii. "Waiver required by health care providers"

Respondents address the phrase "granting any waiver or release from liability required by any hospital, physician, nursing case provider, or other health care provider" and argue that "waiver" stands alone and all of the words after "release" modify and apply only to a release and

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[3] Moise, Scott, *Columns: the Scrivener: Semicolons*, 14 S. CAROLINA LAWYER 47, 47 (July 2003) (explaining semicolons are used "between independent clauses that are not joined by a coordinating conjunction").

not to a waiver. (Br. of Resp't p. 11). This argument is contrary to prior precedent.[4] In *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 102, 705 S.E.2d 28, 35 (2011), this Court addressed the following statutory language: "'The taxes imposed by this section are imposed on every person ***engaged or continuing*** within this State in the business of furnishing accommodations to transients for consideration.'" *Id.* at 102, 705 S.E.2d at 35 (quoting S.C. Code Ann. § 12-36-920(E)) (italicized emphasis added). This Court held "the language and sentence structure . . . reveals that 'within this State' modifies the preceding terms 'engaged or continuing.'" *Id.* The same logic applies to the language at issue here—"from liability required by any hospital, physician, nursing case provider, or other health care provider" modifies the preceding terms "waiver or release" and demonstrates that the Court of Appeals incorrectly interpreted this phrase. It is not "illogical" to authorize an agent to waive or release liability but not agree to arbitrate such liability (Br. of Resp't p. 11), especially considering that the authorization to waive or release liability applies only when a health care provider requires the waiver or release to obtain treatment.

Finally, Respondents attack Petitioner's citation to *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), because *Thompson* involved an apparent authority issue, which is not present in this case. (Br. of Resp't p. 12). Petitioner cited to *Thompson* for the proposition that authority to make financial and health care decisions for a principal does not include authority to agree to arbitrate. (Br. of Pet. p. 19). That principle is applicable regardless of whether the issue is apparent or actual authority and supports Petitioner's argument that the proper interpretation of

[4] If the Court agrees with Respondents' interpretation of this clause, it would result in a decision to affirm as modified because the Court of Appeals specifically held that the power of attorney authorized Ms. Arredondo "to grant any waiver ***required by health care providers such as Appellants***" even though Respondents supposedly did not require execution of the arbitration agreement. (App. p. 4).

the health care power of attorney does not include the authority to agree to arbitration or to waive a jury trial.

The Court of Appeals erred in interpreting the health care power of attorney as conferring actual authority to arbitrate and waive the right to a jury trial.

B. The General Power of Attorney

Petitioner initially corrects Respondents' misstatement.[5] Petitioner does not abandon the argument that the general power of attorney is limited to Mr. Whaley's business affairs and real or personal property. (Br. of Resp't p. 9). Petitioner focused her arguments on the specific provisions the Court of Appeals relied on in its decision.

Respondents focus solely on ***one paragraph*** of a five-page document. (Br. of Resp't pp. 9-10). If that paragraph was as broad as Respondents argue (which it is not), then there would be no need for the seven other paragraphs that come after it in a list of "the following acts or things" as to which Mr. Whaley granted Ms. Arredondo authority. (App. pp. 253-55). "[A] court must gather the parties' intention from the contents of the entire agreement, not from any particular clause therein. If practical, a court should interpret the agreement so as to give effect to all of its provisions." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (internal citation omitted). Respondents argue the general power of attorney "authorizes Arredondo to 'execute . . . any instrument . . . whatsoever.'" (Br. of Resp't p. 9). That cannot be the correct interpretation of the contract because it renders the other seven paragraphs

[5] In response to Petitioner's error preservation argument, Respondents state that they never argued a person with a power of attorney is authorized to agree to arbitration. (Br. of Resp't p. 12). Respondents argued to the Court of Appeals that because Ms. Arredondo had a power of attorney, and the "Legislature has authorized Defendants to accept Plaintiff's signature under the Powers of Attorney", the arbitration agreement is valid. (App. p. 14). This is an argument that simply having a power of attorney gives the agent authority to sign an arbitration agreement. If Respondents now abandon that argument, then the Court need not rule on issue preservation.

in the list of "acts or things" Ms. Arredondo may do on Mr. Whaley's behalf as meaningless or superfluous. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous" (internal quotation marks omitted)).

Even assuming the Court could focus on only one paragraph, Respondents' interpretation of that one paragraph is flawed. Respondents argue the arbitration agreement is an "instrument, not a chose in action" and, therefore, Petitioner had authority to sign it and an interpretation based on authorizing her to "sign a chose in action" is "absurd." (Br. of Resp't p. 9). Petitioner never made an argument about whether the arbitration agreement authorized Ms. Arredondo to sign a chose in action. Petitioner argued that the general power of attorney gave her the authority to sign an instrument "concerning" "choses in action" and that arbitration and a jury trial waiver are not choses in action. (Br. of Pet. p. 19). Considering the full context and language of the general durable power of attorney, the Court of Appeals erred in interpreting it as conferring actual authority to arbitrate.

If the language in these powers of attorney authorizes an agent to agree to arbitration and waive a jury trial right, the probable result is that a person will have to expressly exclude the authority to agree to arbitration and waive a jury trial right to avoid a counter-interpretation of his or her intentions. The current statutory law of our State does not support this, S.C. Code Ann. § 62-8-201,[6] and it would be contrary to the FAA by placing arbitration on a higher footing than other types of contracts. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404

[6] This effective date of this statute (and the entire Uniform Power of Attorney Act) is January 1, 2017, after Mr. Whaley executed the powers of attorney at issue.

n.12 (1967) (stating the purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so").

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, either of which is dispositive of the entire appeal.

Respectfully submitted,

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