APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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 Doe Corporation, Defendants,

Of which 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.

Appellate Case No. 2019-001767

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 28011
Heard November 19, 2020 —
Filed March 10, 2021

REVERSED

Kenneth Luke Connor, Christopher Caleb Connor and Laura S. Jordan, all of Connor & Connor, LLC, of Aiken, for Petitioner.

G. Mark Phillips and Robert William Whelan, of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Respondents.

JUSTICE JAMES: This appeal concerns the enforceability of an arbitration agreement executed between Ashley River Plantation, an assisted-living facility (the facility), and Thayer Arredondo, the attorney-in-fact under two powers of attorney executed by Hubert Whaley, a facility resident. In an unpublished opinion, the court of appeals held the arbitration agreement was enforceable. *Arredondo v. SNH SE Ashley River Tenant, LLC*, Op. No. 2019-UP-293 (S.C. Ct. App. filed Aug. 14, 2019). We hold neither power of attorney gave Arredondo the authority to sign the arbitration agreement. Therefore, we reverse the court of appeals.

I. Background

On October 12, 2012, Arredondo decided to place Mr. Whaley, her father, in Respondents' Ashley River Plantation assisted-living facility in Charleston. Whaley was eighty-four years old, was diagnosed with dementia, and required assistance with daily

functions such as bathing, dressing, toileting, and taking medications. When Whaley was admitted into the facility, Arredondo held two valid powers of attorney, a General Durable Power of Attorney (GDPOA) and a Health Care Power of Attorney (HCPOA).

When Arredondo and Whaley arrived at the facility, Arredondo met with a facility representative and signed various documents in connection with Whaley's admission. During that meeting, the facility representative did not mention or present an arbitration agreement to Arredondo. Later that day, after Whaley was admitted, Arredondo met with a different facility representative who, according to Arredondo, told her she "needed to sign additional documents related to [her] father's admission to the facility." Included among those documents was the arbitration agreement, which Arredondo signed.

The arbitration agreement, which Arredondo obviously executed before any dispute arose between the parties, contains a mutual waiver of the right to a trial by judge or jury and requires arbitration of all claims involving potential damages exceeding $25,000. The agreement bars either party from appealing the arbitrators' decision, prohibits an award of punitive damages, limits discovery, and provides Respondents the unilateral right to amend the agreement.

On February 21, 2014, while he was still a resident at the facility, Whaley was admitted to Bon Secours St. Francis Hospital, where he died six days later. Arredondo, as Personal Representative of

Whaley's estate, brought this action alleging claims for wrongful death and survival against Respondents. The complaint alleges that during his residency at the facility, Whaley suffered serious physical injuries and died as a result of Respondents' negligence and recklessness.

Respondents moved to compel arbitration. In opposition to the motion, Arredondo argued (1) the two powers of attorney did not give her the authority to sign the arbitration agreement, and (2) even if she had authority to sign it, the agreement is unconscionable and therefore unenforceable. To buttress her unconscionability argument, Arredondo submitted an affidavit in which she described the events surrounding her execution of the arbitration agreement. Arredondo stated that when she had questions about the arbitration agreement and told the facility representative she was not comfortable signing it, the facility representative responded, "this [is] a document that everyone sign[s] when admitting their loved ones to the facility and that [Arredondo] needed to sign the 'Arbitration Agreement' in order to ensure [Whaley's] admission to the facility." Respondents insist the evidence supports only the conclusion that Arredondo's execution of the arbitration agreement was not a prerequisite for Whaley's admission into the facility. As we will discuss, our determination of whether Arredondo was required to sign the agreement in order for Whaley to be admitted is dispositive of the threshold issue of whether Arredondo had authority under the HCPOA to sign the arbitration agreement.

In denying Respondents' motion to compel arbitration, the circuit court ruled neither power of attorney gave Arredondo the authority to sign the arbitration agreement and also ruled that even if Arredondo had authority to sign it, the agreement is unconscionable. The court of appeals reversed, holding Arredondo had actual authority to execute the arbitration agreement and holding the agreement is not unconscionable. This Court granted Arredondo's petition for a writ of certiorari to review the court of appeals' decision.

II. Discussion

"Arbitrability determinations are subject to de novo review." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (quoting *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration." *Id.*

Arredondo argues the court of appeals erred in holding the two powers of attorney granted her authority to sign the arbitration agreement. She also contends the court of appeals erred in holding the arbitration agreement is not unconscionable. We hold neither power of attorney gave Arredondo the authority to execute the arbitration agreement. In

light of our holding on that point, we need not address the issue of unconscionability.

A. Arredondo's Authority to Execute the Arbitration Agreement

"Our courts have looked to contract law when reviewing actions to set aside or 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.* (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)). "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting *Watson*, 407 S.C. at 455, 756 S.E.2d at 161). Accordingly, we look to the specific language of the GDPOA and HCPOA to determine whether either document authorized Arredondo to execute a pre-dispute arbitration agreement.

Before we begin our review of the authority granted to Arredondo by the powers of attorney, we emphasize our analysis does not turn upon the presence or absence of an explicit reference to arbitration or arbitration agreements in the powers of attorney. The decision of the United States Supreme Court (USSC) in *Kindred Nursing Centers Ltd. Partnership v. Clark*[1] forecloses such an approach. In

[1] 137 S. Ct. 1421 (2017).

Kindred, the USSC reviewed two of three consolidated cases from the Supreme Court of Kentucky, one dealing with a power of attorney signed by Wellner and another signed by Clark.[2] In both cases, the agents holding the powers of attorney signed arbitration agreements when their principals were admitted into a nursing facility. The Supreme Court of Kentucky held an agent was authorized to sign an arbitration agreement depriving her principal of "an 'adjudication by judge or jury' only if the power attorney 'expressly so provide[d].'" 137 S. Ct. at 1426 (quoting *Whisman*, 478 S.W.3d at 329). The USSC dubbed this approach the "clear-statement rule" and held it violated the Federal Arbitration Act (FAA) by "fail[ing] to put arbitration agreements on an equal plane with other contracts." *Id.* at 1426-27. The USSC then held the Clark power of attorney undoubtedly authorized the agent to sign an arbitration agreement because it granted the agent the all-encompassing authority "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way" and "[g]enerally to do and perform for me and in my name all that I might do if present." *Id.* at 1425; *see Whisman*, 478 S.W.3d at 317-18. As such, no remand for further proceedings related to the Clark power of attorney was necessary. However, the USSC noted the Supreme Court of Kentucky had invalidated the Wellner arbitration agreement on two

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[2] *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306 (Ky. 2015). Belinda Whisman, the agent under a power of attorney executed by her father, was the lead respondent in the three cases before the Supreme Court of Kentucky. However, only the Wellner and Clark powers of attorney were before the USSC in *Kindred*.

alternative grounds, one based upon the prohibited clear-statement rule and the other based upon the Kentucky Court's finding that the Wellner power of attorney was not otherwise broad enough to allow Wellner's agent to sign a pre-dispute arbitration agreement. Noting these alternative holdings, the USSC remanded the Wellner case to the Supreme Court of Kentucky for an analysis of whether the alternative holding was tainted by or not wholly independent of the clear-statement rule. We discuss below the Supreme Court of Kentucky's decision on remand.

1. The General Durable Power of Attorney

Paragraph one of the General Durable Power of Attorney (GDPOA) authorized Arredondo:

> 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, and 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 agreements concerning any transfers of the above or of any other property, right or thing.

(a) Chose in action

The court of appeals held the GDPOA granted Arredondo authority to execute the arbitration agreement because it "granted Arredondo authority to execute all instruments concerning all types of property, including 'choses in action.'" Further, the court of appeals held Arredondo's authority under the GDPOA "extended to 'any other property, right or thing.'" Arredondo first takes issue with what she claims was the court of appeals' overly broad interpretation of the term "choses in action." She contends the court of appeals erroneously elevated a chose in action to include a cause of action that did not exist at the time Arredondo signed the arbitration agreement. In light of the language used in the GDPOA, we agree with Arredondo.

A "chose in action" is a type of property interest or a proprietary right to a claim or debt. *See Ball v. Ball*, 312 S.C. 31, 33-34, 430 S.E.2d 533, 534-35 (Ct. App. 1993) (holding a vested military pension was a "chose in action," or form of property, because the recipient "could maintain an action at law to enforce this right should the military ever wrongfully attempt to deny it to him"), *aff'd*, 314 S.C. 445, 445 S.E.2d 449 (1994); *see also Chose in Action, Black's Law Dictionary* (11th ed. 2019) (defining "chose in action" as "a proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or *a claim for damages in tort*" (emphasis added)). Arredondo and Respondents agree "chose in action" generally means "cause of action."

Respondents contend the court of appeals correctly held the GDPOA authorized Arredondo to sign the arbitration agreement because the agreement concerned a cause of action against the facility. Again, Arredondo argues this interpretation fails because Whaley did not possess a cause of action against Respondents at the time the arbitration agreement was signed. Respondents cite *Ball* for the proposition that "South Carolina courts construe the term 'property' very broadly." 312 S.C. at 33, 430 S.E.2d at 534. We agree with that basic proposition, but it does not necessarily mean the GDPOA applied to a property right that did not exist at the time Arredondo signed the arbitration agreement. We return to *Kindred* and the Supreme Court of Kentucky's decision on remand to explain.

As noted above, in *Kindred*, the USSC remanded the case of the Wellner power of attorney with instructions to the Supreme Court of Kentucky to determine whether its application of the prohibited "clear-statement rule" impermissibly tainted its alternative holding that the Wellner power of attorney otherwise did not authorize Wellner's agent to sign a pre-dispute arbitration agreement. 137 S. Ct. at 1429. The Supreme Court of Kentucky considered the remanded issue in *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). One provision of the Wellner power of attorney authorized Wellner's agent "to make, execute and deliver deeds, releases, conveyances and contracts of every nature in relation to both real and personal property, including stocks, bonds, and insurance." *Wellner*, 533 S.W.3d at 193 (quoting *Whisman*, 478 S.W.3d at 325). Similar to Respondents' position in

the instant case, the nursing facility seeking to enforce the arbitration agreement in *Wellner* claimed the term "personal property" included choses in action such as personal injury claims. *Id.* at 192-93. While the Supreme Court of Kentucky recognized "a personal injury claim is a chose-in-action, and therefore constitutes personal property," it nevertheless held—independently of the clear-statement rule—the "pre-dispute arbitration contract did not relate to any property rights of … Wellner." *Id.* at 194 ("By executing [the nursing home's] pre-dispute arbitration agreement, [Wellner's agent] did not 'make, execute and deliver deeds, releases, conveyances and contracts of [any] nature in relation to [Wellner's] property.' The only 'thing' of … Wellner's affected by the pre-dispute arbitration agreement was his constitutional rights, which no one contends to be his real or personal property." (quoting *Whisman*, 478 S.W.3d at 325-26)).

We agree with the rationale of the Supreme Court of Kentucky.[3] We hold this particular GDPOA did not authorize Arredondo to sign the arbitration agreement because the arbitration agreement did not concern a chose in action or any other property right Whaley possessed at the time Arredondo signed it.

(b) "Transfer" of property, right, or thing

We also hold the court of appeals erred in concluding Arredondo's authority under the GDPOA

[3] The USSC denied the nursing facility's subsequent petition for a writ of certiorari. *Kindred Nursing Ctrs. Ltd. P'ship v. Wellner*, 139 S. Ct. 319 (2018).

"extended to 'any other property, right or thing.'" The court of appeals took this phrase out of context, as the complete provision including this phrase authorized Arredondo to execute "any agreements concerning any transfers of the above or of any other property, right or thing." (emphases added). The GDPOA does not define "transfers." "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). The plain, ordinary, and popular meaning of the noun "transfer" is a "conveyance of right, title, or interest in real or personal property from one person to another." *Transfer*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/transfer (last visited Mar. 4, 2021). By signing the arbitration agreement, Arredondo (for herself, for Whaley, and for his heirs and executors) waived the right to a jury trial, waived any claim to punitive damages, agreed to limited discovery, and waived the right to appeal the arbitration decision. These acts were not "transfers" of anything to anyone. Thus, the provision of the GDPOA authorizing Arredondo to enter into any agreements concerning transfers of any property, right, or thing did not grant her the authority to sign the arbitration agreement.

(c) Title of GDPOA

Finally, Respondents argue the power of attorney's title—"General Durable Power of Attorney"—suggests Whaley intended for the

instrument to grant Arredondo broad authority. Rather than relying on such a generalization, we look to the actual language of the GDPOA to determine what authority it granted Arredondo. While the GDPOA gave Arredondo significant authority to make business and property decisions for Whaley, the mere title of the document did not increase Arredondo's authority beyond the plain meaning of the provisions contained in the document. Certainly, the GDPOA could have been drafted to give Arredondo the broad power to sign all documents Whaley could sign himself or otherwise do anything Whaley could do himself, but it was not so drafted. *Cf. Kindred*, 137 S. Ct. at 1429 (explaining the Clark power of attorney, which provided the agent power "to transact, handle, and dispose of all matters affecting me and/or my estate in any possible way," and "generally to do and perform for me and in my name all that I might do if present," was broad enough to authorize the execution of a pre-dispute arbitration agreement).

For the foregoing reasons, we hold the court of appeals erred in concluding the GDPOA granted Arredondo authority to execute the arbitration agreement.

2. The Health Care Power of Attorney

When Whaley was admitted to the facility, Arredondo also held a Health Care Power of Attorney (HCPOA) naming her as Whaley's attorney-in-fact. In their arguments regarding Arredondo's authority under this instrument, the parties focus solely upon the provisions of subparagraph 11(d) in the "Agent's

Powers" section of the HCPOA. Subparagraph 11(d) authorized Arredondo:

> 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; 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.

(a) Action "necessary" to making, documenting, or implementing a health care decision

The court of appeals held the HCPOA granted Arredondo the authority to sign the arbitration agreement because it authorized her "to pursue legal action and to grant any waiver required by health care providers such as [Respondents]." We will discuss that holding in a moment, but we initially address the first clause of subparagraph 11(d). Arredondo clearly had no authority to take any action under the first clause of subparagraph 11(d) unless the action taken was "necessary to making, documenting, and assuring implementation" of a decision concerning Whaley's health care. (emphasis added). The only health care decision in play when

Arredondo signed the arbitration agreement was Arredondo's decision to seek Whaley's admission into the facility. Consequently, we must determine whether signing the arbitration agreement was "necessary" to Arredondo making, documenting, and assuring implementation of that decision.

The plain, ordinary, and popular meaning of the word "necessary" is "absolutely needed" or "required." *Necessary*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/necessary (last visited Mar. 4, 2021). We hold Arredondo's signature on the arbitration agreement was not "absolutely needed" or "required" to ensure Whaley's admission into the facility. In support of her argument on the separate issue of whether the arbitration agreement is unconscionable, Arredondo submitted her affidavit in which she testified a facility representative told her she had to sign the agreement in order for Whaley to be admitted. On the issue of unconscionability, Respondents have consistently maintained Arredondo was not required to sign the arbitration agreement. During its discussion of the issue of unconscionability, the circuit court found, "[Arredondo] was only told [the arbitration agreement] must be signed to ensure [Whaley's] admission to the facility." (emphasis added by the circuit court). These arguments relative to unconscionability cut against the parties' respective interests on the threshold issue of Arredondo's authority under the HCPOA. Nevertheless, we must determine the propriety of this factual finding of the circuit court by examining the evidence in the record. *See Johnson*, 416 S.C. at 512, 788 S.E.2d at 218 ("[A] circuit court's factual findings will not be reversed on

appeal if any evidence reasonably supports the findings." (citation omitted)). We hold the evidence in the record reasonably supports only the finding urged by Respondents—the arbitration agreement was presented to Arredondo as a "voluntary standalone" agreement that was not a prerequisite for Whaley's admission into the facility. Arredondo plainly stated in her affidavit that Whaley had already been admitted into the facility and provided with a room before Arredondo was asked to sign the arbitration agreement. Similarly, in their brief to this Court, Respondents state: "[The facility] did not present the Agreement until after Arredondo received the services she requested." As Respondents stressed during oral argument before this Court, once Whaley was admitted to the facility, he was entitled to statutory protections, and the facility could not have discharged him had Arredondo refused to sign the arbitration agreement. *See* S.C. Code Ann. § 44-81-40(D) (2018) ("A resident may be transferred or discharged only for medical reasons, for the welfare of the resident or for the welfare of other residents of the facility, or for nonpayment and must be given written notice of not less than thirty days ….").

As courts in other jurisdictions have recognized, the characterization of an arbitration agreement as either a mandatory condition to admission or an optional, collateral agreement often determines the authority issue when the agent holds a power of attorney empowering her to make necessary health care decisions. *Compare LP Louisville E., LLC v. Patton*, 605 S.W.3d 300, 311 (Ky. 2020) ("[W]hen an agreement to arbitrate is presented as a condition of admission to a nursing home, unless otherwise

agreed, a power of attorney expressing general authority to make necessary health care decisions includes the incidental or reasonably necessary authority to enter that agreement."), *with Dickerson v. Longoria*, 995 A.2d 721, 739 (Md. 2010) (explaining an agent authorized to make health care decisions on his principal's behalf did not have authority to execute a voluntary arbitration agreement because "[t]he decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement"), *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182, 185-86 (Ga. Ct. App. 2009) (explaining health care power of attorney did not authorize daughter to execute "optional" arbitration agreement on mother's behalf when daughter was authorized "to make any decision [the mother] could make to obtain or terminate any type of health care"), *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008) (explaining health care surrogate did not have authority to execute arbitration agreement on her father's behalf because the execution of an arbitration agreement is not a health care decision when the arbitration agreement is not required for admission into the nursing home), *Coleman v. United Health Servs. of Ga., Inc.*, 812 S.E.2d 24, 26 (Ga. Ct. App. 2018) (explaining agent authorized to take action necessary to admit principal to health care facility did not have authority to execute "voluntary" arbitration agreement), *Wisler v. Manor Care of Lancaster PA, LLC*, 124 A.3d 317, 324 (Pa. Super. Ct. 2015) (stating an agent's authority to consent to medical treatment on behalf of a principal "does not necessarily entail the authority to consent

to arbitration, agreement to which was not a precondition to be admitted to [the facility]"), *and Miller v. Life Care Ctrs. of Am., Inc.*, 478 P.3d 164, 172-74 (Wyo. 2020) (explaining durable health care power of attorney did not give agent authority to execute arbitration agreement because arbitration agreement was not required for admission to health care facility and, therefore, was unrelated to principal's health care).

(b) Authority to grant any waiver <u>required</u> by a health care provider

We now return to the court of appeals' holding that subparagraph 11(d) of the HCPOA granted Arredondo the authority to sign the arbitration agreement because the HCPOA authorized her "to pursue legal action and to grant any waiver required by health care providers such as [Respondents]." Addressing the second part of this holding first, we note subparagraph 11(d) gave Arredondo the authority to sign only those waivers "<u>required</u> by [a] … health care provider." (emphasis added). As Respondents contend, the arbitration agreement includes a series of waivers (of the right to adjudication by a judge or jury, of the right to an award of punitive damages, and of the right to an appeal). As we have already discussed, Arredondo was not required to sign the arbitration agreement for Whaley to be admitted. Since Arredondo was not required to sign the arbitration agreement, it logically follows that any waivers contained in the agreement were not required by the facility. For the reasons set forth above in our discussion of the term "necessary," we conclude the HCPOA did not give Arredondo the

authority to grant the waivers recited in the arbitration agreement.

(c) Authority to pursue legal action

The court of appeals also held the provision in subparagraph 11(d) of the HCPOA authorizing Arredondo to "pursu[e] any legal action in [Whaley's] name" granted her the authority to sign the arbitration agreement. Arredondo claims that because she signed the arbitration agreement before any potential legal claim accrued, this provision did not grant her authority to sign the agreement. Respondents argue this language of the HCPOA did not limit Arredondo's authority to taking action only after a cause of action accrues. Respondents contend Arredondo's authority to pursue legal action included selecting arbitration as a preferred forum for dispute resolution.

We first note the parties overlook the context in which this provision appears in subparagraph 11(d) of the HCPOA. This provision authorized Arredondo to pursue legal action only to "force compliance with [Whaley's] wishes as determined by [Whaley's] agent, or to seek actual or punitive damages for the failure to comply." For that reason alone, we hold this provision of the HCPOA is of no significance in this case. However, even if this provision authorized Arredondo to pursue legal action unrelated to forcing compliance with Whaley's health care wishes, this provision still did not authorize Arredondo to sign a pre-dispute arbitration agreement. In *Wellner*, the Supreme Court of Kentucky analyzed a provision of the Wellner power of attorney authorizing the agent

to "demand, sue for, collect, recover and receive all … demands whatsoever," and to "institute legal proceedings." 533 S.W.3d at 193-94. The Court recognized "the power to institute or defend suits concerning [Wellner's] property rights would necessarily encompass the power to make litigation-related decisions within the context of a suit so instituted, *including the decision to submit the pending dispute to mediation or arbitration*." *Id.* at 193 (quoting *Whisman*, 478 S.W.3d at 323) (internal quotation marks omitted). Yet, the Court held the provision did not grant the agent authority to execute a pre-dispute arbitration agreement: "the act of executing a pre-dispute arbitration agreement upon admission to a nursing home ha[s] nothing at all to do with … institut[ing] legal proceedings." *Id.* at 193-94 (quoting *Whisman*, 478 S.W.3d at 325) (internal quotation marks omitted) (second alteration in original). Here, Arredondo did not execute the arbitration agreement in connection with an existing claim Whaley had against the facility. We again agree with the Supreme Court of Kentucky's reasoning and conclude Arredondo's execution of the pre-dispute arbitration agreement did not constitute the pursuit of legal action.

We hold the court of appeals erred in holding the HCPOA granted Arredondo authority to execute the arbitration agreement.

III. Conclusion

Under the facts of this case, neither the GDPOA nor the HCPOA granted Arredondo authority to execute the arbitration agreement. Therefore, we

reverse the court of appeals and hold the arbitration agreement is unenforceable. We need not address Arredondo's argument that the arbitration agreement is unconscionable. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

REVERSED.

BEATTY, C.J., KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in a separate opinion.

JUSTICE FEW: I concur in the majority opinion. I write only to address Respondents' and the court of appeals' reliance on the obsolete phrase "chose in action." The majority takes two steps regarding Respondents' argument as to the meaning of the phrase "chose in action." The majority's first step is to hold that the phrase does not mean what Respondents claim it means. I completely agree with the majority. The second step is unnecessarily to define the phrase. In doing so, the majority brings a new and undeserved life to a phrase that—in my opinion—has no precise meaning in modern law. It is time for attorneys and courts to stop using such antiquated phrases, not to resuscitate them.

Historically, a "chose" was a "thing," as in a physical thing. *See* William C. Anderson, A DICTIONARY OF LAW 179 (1891) (defining "CHOSE" as "A thing recoverable by an action at law: a thing, personalty"); 1 Alexander M. Burrill, A LAW DICTIONARY AND GLOSSARY 288 (1869) (defining "CHOSE" as "A thing"). A "chose in action" was the legal right to bring an action in court to recover the thing, "A thing of which one has not the possession or actual enjoyment, but only a right to it, or a right to demand it by action at law." Burrill, *supra*, at 288. Even in the nineteenth century, however, the phrase had no precise definition, and the general definition changed over time according to usage. *See, e.g.*, William R. Anson, PRINCIPLES OF THE LAW OF CONTRACT 362 n.(b) (1919) ("The term *chose in action* has been in common use for a long time, but some doubts have been recently raised as to its precise meaning." (citing *Law Quarterly Review for 1983, 1894, 1895*)). In one lengthy attempt at explaining the meaning of the phrase, two authors wrote, "Originally

the term was only applied to a right of action in the strict sense, that is, the right to bring an action at law, but subsequently it was extended to the right of taking proceedings in equity." 1 Stewart Rapalje and Robert L. Lawrence, A DICTIONARY OF AMERICAN AND ENGLISH LAW 207 (1883); *see also id.* ("A right of presentation to a benefice when the church is vacant is called in the old books a chose in action; but this use of the word is obsolete.") (citation omitted). Other early commentators described varying limits for the use of the phrase. *See, e.g.*, Percy Bordwell, *Seisin and Disseisin (Concluded) v. Chattels*, 34 Harv. L. Rev. 717, 722-23 (1921) (stating "it is hard to include a right to a chattel in the adverse possession of another as a chose in possession, just as it is hard to include under choses in action such incorporeal rights as patents, copyrights, and trade names which have none of the ephemeral characteristics of rights of action"); Thaddeus D. Kenneson, *Purchase for Value Without Notice*, 23 Yale L.J. 193, 194 (1914) (stating "a chose in action always presupposes a personal relation between two individuals").

In South Carolina, a "chose in action" included a right to property in the form of "notes or bonds," such as those "taken by an administrator at a sale of his intestate's estate." *Rhame v. Lewis*, 34 S.C. Eq. 269, 303 (13 Rich Eq. 93, 105) (Ct. App. 1867) (citing *Thackum v. Longworth*, 11 S.C. Eq. 267, 274 (2 Hill Eq. 132, 134) (Ct. App. L. & Eq. 1835)). Still, the phrase was used to describe "a thing" in the sense of an existing right in property that is not in the owner's current possession. The phrase is used in one subsection of our Rules of Civil Procedure, Rule 17(e), and in several current sections of the South Carolina

Code, each retaining the link between the phrase and "property." *See, e.g.*, S.C. Code Ann. § 12-6-30(11) (2014) (defining "Tangible property" in the Income Tax Act to exclude "choses in action"); S.C. Code Ann. § 12-16-20(4) (2014) (defining "Intangible personal property" in the Estate Tax Act to include "choses in action"); S.C. Code Ann. § 16-23-710(17) (2015) ("'Property' … includ[es] … choses in action, and other similar interest in property."); S.C. Code Ann. § 33-36-840(2) (2006) (providing after merger of not-for-profit corporations, "The new or surviving corporation … possesses … all property, real and personal, applications for membership, all debts due on whatever account, and all other choses in action of each of the consolidating or merging corporations."); S.C. Code Ann. § 40-39-10(3) (Supp. 2020) (defining "Pledged goods" as to "Pawnbrokers" as "tangible personal property … , choses in action, … , which property is deposited with or otherwise actually delivered into the possession of a pawnbroker in the course of his business").

In the 1979 edition of BLACK'S LAW DICTIONARY, "Chose" still meant, "A thing; an article of personal property," *Chose*, BLACK'S LAW DICTIONARY (5th ed. 1979), and "Chose in action" still meant, "Right of proceeding in a court of law to procure payment of sum of money, or right to recover a personal chattel or a sum of money by action," *Chose in action*, BLACK'S LAW DICTIONARY (5th ed. 1979). Eventually, as usage changed, courts and commentators have expanded the definition. *See, e.g.*, *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 344 n.3, 745 S.E.2d 90, 93 n.3 (2013) ("A 'chose in action' has been variously defined … ."); Anson, *supra*, at 362 n.1 ("The term '*chose* in action'

may have once meant the physical *thing* to be recovered; but it now means an aggregate of legal relations that include one or more rights *in personam*. It does not include patents or copyrights, for in these rights are *in rem*."); *chose in action*, BLACK'S LAW DICTIONARY (11th ed. 2019) (stating the phrase includes "A proprietary right in personam, such as … a claim for damages in tort").

If there was a time in our history when the phrase conveyed a precise meaning, the phrase has lost that meaning as the passage of time brought new usages. What is left of "chose in action" is a descriptive phrase with no precise meaning, a phrase we should stop using because it is not only vague and meaningless but also obsolete. Today, if lawyers wish to write legal instruments such as powers of attorney with precise meaning, they should use phrases that in current usage are defined precisely, and they should avoid phrases like "chose in action" that mean nothing.

As the majority explains, the Supreme Court of the United States reversed the Kentucky Supreme Court's interpretation of a power of attorney regarding arbitration because the "clear statement rule" the Kentucky court's interpretation created "fails to put arbitration agreements on an equal plane with other contracts." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1427, 197 L. Ed. 2d 806, 812 (2017). Our Court, therefore, may not find a power of attorney inadequate to grant the authority to agree to arbitration based on what the document *does not say* about arbitration. In this case, our Court must examine what the General Durable Power of Attorney *does say* about Ms. Arredondo's authority to

bind her father. Respondents rely on what they claim is clarity in the phrase "choses in action." In using the phrase "chose in action," however, the General Durable Power of Attorney does not grant any authority because the phrase does not mean anything. The majority's first step ends the analysis because the phrase "choses in action" does not say a thing about Ms. Arredondo's authority to bind her father to an arbitration provision.

APPENDIX B

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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 Doe Corporation, Defendants,

Of which 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 Appellants.

Appellate Case No. 2017-001298

Appeal from Charleston County
J.C. Nicholson, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-293
Heard June 5, 2019 — Filed August 14, 2019

REVERSED

G. Mark Phillips and Robert William Whelan, both of Nelson Mullins Riley & Scarborough, LLP, of Charleston, for Appellants.

Kenneth Luke Connor and Christopher Caleb Connor, both of Connor & Connor LLC, of Aiken; and Laura Stewart Jordan, of Augusta, Georgia, for Respondent.

PER CURIAM: 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 (collectively, Appellants) appeal the trial court's denial of their motion to compel arbitration. They assert the trial court erred in holding neither the General Durable Power of Attorney nor the Health Care Power of Attorney provided nursing home resident Hubert Whaley's daughter, Thayer W. Arredondo, with actual or apparent authority to execute the Arbitration Agreement. They also assert the trial court erred in finding the Arbitration Agreement was unconscionable. We reverse.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016) (quoting *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014)). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). "The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration." *Id.* (citing *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001)). "The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (citing *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000)).

LAW/ANALYSIS

1. We agree with Appellants' argument the trial court erred in holding the authority granted to Arredondo by the two Powers of Attorney did not authorize her to enter into the Arbitration Agreement because arbitration was not specifically listed among the powers.

The Federal Arbitration Act (FAA)[1] "makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting 9 U.S.C.A. § 2). "That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "[T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his or her right of access to the courts and right to a trial by jury." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 566-67, 813 S.E.2d 292, 304 (Ct. App. 2018), *cert. denied*, (S.C. Sup. Ct. Order dated Aug. 21, 2018) (quoting *Dickerson v. Longoria*, 995 A.2d 721, 736-37 (Md. 2010)).

"A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal." *Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)). The United States Supreme Court rejected the Kentucky Supreme Court's

[1] 9 U.S.C.A. §§ 1-16 (West 2009).

application of its "clear statement rule," which provided a power of attorney could not entitle a representative to enter into an arbitration agreement without specific language granting that authority. *Kindred Nursing Ctrs. Ltd. P'ship*, 137 S. Ct. at 1426-27. The Supreme Court explained, "Because that rule singles out arbitration agreements for disfavored treatment, we hold that it violates the FAA." *Id.* at 1425. Under South Carolina law, an act does not have to be specifically enumerated in a power of attorney in order for the agent to be authorized to perform the act on behalf of the principal. *See First S. Bank v. Rosenberg*, 418 S.C. 170, 181, 790 S.E.2d 919, 925-26 (Ct. App. 2016) (rejecting appellant's contention "that an agent cannot sign a guaranty on behalf of his principal pursuant to a power of attorney unless the power of attorney specifically authorized the execution because this assertion is unsupported by South Carolina law"). Applying the equal treatment principal, we hold 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. Thus, we find the trial court erred in imposing a more restrictive requirement for authority to execute an arbitration agreement.

We turn to the language of the Powers of Attorney to determine whether they provided authority for Arredondo to execute the Arbitration Agreement on behalf of her father.

"Our courts have looked to contract law when reviewing actions to set aside or 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), *cert. pending*, (citing *In re Thames*, 344 S.C. at 571, 544 S.E.2d at 857; *Watson*, 407 S.C. at 454, 756 S.E.2d at 161). "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.* (quoting *Watson*, 407 S.C. at 454-55, 756 S.E.2d at 161). "Whe[n] the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* (quoting *Watson*, 407 S.C. at 455, 756 S.E.2d at 161).

We disagree with Arredondo's argument her authority under the General Durable Power of Attorney was limited solely to business affairs. The broad language of this Power of Attorney granted Arredondo authority to execute all instruments concerning all types of property, including "choses in action." Furthermore, this authority extended to "any other property, right or thing." Likewise, the Health Care Power of Attorney was not limited to health care decisions as Arredondo contends. It also authorized Arredondo to pursue legal action and to grant any waiver required by health care providers such as Appellants. *But c.f.*, *Hodge*, 422 S.C. at 567, 813 S.E.2d at 304 (noting courts in other jurisdictions have held "the decision to sign an arbitration agreement was not a health care decision ... [when] signing the arbitration agreement was not a prerequisite to admission to a health care facility" (quoting *Dickerson*, 995 A.2d at 738). Thus, we hold the Powers of Attorney authorized Arredondo to waive the right to jury trial and execute an agreement

selecting the forum in which any legal action would be taken.

2. We agree with Appellants' argument the trial court erred in finding the Arbitration Agreement was unconscionable.

Although a court may invalidate an arbitration agreement on the defense of unconscionability, it may not invalidate such an agreement "under state laws applicable *only* to arbitration provisions." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116. "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." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (quoting *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668). "In analyzing claims of unconscionability of arbitration agreements, ... [courts should] focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668).

"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*, 373 S.C. at 25, 644 S.E.2d at 669. "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." *Id.* (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 293, 295 (4th Cir. 1989).

We find Arredondo did not lack meaningful choice when she executed the Arbitration Agreement. Even if the Arbitration Agreement was an adhesion contract, "[t]he fact that a contract is one of adhesion does not make it unconscionable." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901 (Ct. App. 1998); *see Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541 n.5, 542 S.E.2d 360, 365 n.5 (2001) (noting "[i]nequality of bargaining power alone will not invalidate an arbitration agreement" (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 183 (3d Cir. 1999))).

We find the Arbitration Agreement was neither a surprise nor inconspicuous. It was a separate contract and clearly labeled. In a dissent, Chief Justice Toal explained the benefits of using a separate contract for an arbitration agreement as follows: "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." *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 357, 755 S.E.2d 450, 456 (2014)

(Toal, C.J., dissenting) (citing *Hayes v. Oakridge Home*, 908 N.E.2d 408, 413 (Ohio 2009) (holding an arbitration agreement that was a free standing document and its execution "was voluntary and not a condition of [ ] admission" into the nursing home was not unconscionable)).

The record contains no evidence of Arredondo's education, experience, or business acumen to determine her relative sophistication. *See Johnson*, 416 S.C. at 512, 788 S.E.2d at 218 (stating the party opposing arbitration bears the burden of demonstrating that he or she has a valid defense to arbitration).

The Arbitration Agreement described the nature of arbitration and the trial rights a resident was waiving. It further stated the decision by the arbitration panel was final. By signing the Arbitration Agreement, Arredondo acknowledged 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. *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 39, 524 S.E.2d 839, 845 (Ct. App. 1999) ("After receiving and signing the Acknowledgment, [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." (citing *Citizens & S. Nat'l Bank v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986)). Thus, the trial court

erred in holding Arredondo did not understand the rights she was waiving.

We find the terms of the Arbitration Agreement were not one-sided or oppressive. The Arbitration Agreement stated the purpose of the Agreement was "to avoid costly and time-consuming litigation." It mandated all claims involving a potential monetary amount in excess of $25,000 would be resolved by binding arbitration. This limitation applied to both parties. The Arbitration Agreement authorized the resident to choose whether the dispute would be decided by one or three neutral arbitrators. The members of the arbitration panel were to be chosen by the American Arbitration Association or by mutual agreement of the parties. In addition, the Arbitration Agreement provided for a physician to serve on the arbitration panel if a medical issue may come before the panel.[2]

The parties were to divide the cost of the arbitration proceeding. However, if the resident was not able to pay his or her half of the arbitration costs, Appellants would pay the entire amount but would get to choose the number of arbitrators. The Arbitration Agreement did not prohibit a resident from pursuing a claim or complaint with a local, state, or federal agency and did not limit any resident's rights provided by state or federal law.

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[2] The Arbitration Agreement provides, "Where a medical issue may more likely than not come before the Panel, and the panel is three in number, one member of the Panel shall be a Physician."

Arredondo asserts the terms of the Arbitration Agreement were oppressive because it limited discovery. The arbitration panel was to follow the current Commercial Arbitration Rules of the American Arbitration Association. It was to direct the timetable and discovery in all controversies. This court recognized limitations in arbitration do not make an arbitration agreement unenforceable as "[t]he benefits received by arbitration come with certain limitations on discovery." *Lucey v. Meyer*, 401 S.C. 122, 142, 736 S.E.2d 274, 285 (Ct. App. 2012) (noting "'while discovery generally is more limited in arbitration than in litigation, that fact is simply one aspect of the trade-off between the "procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration" that is inherent in every agreement to arbitrate' and '[b]ecause limited discovery is a consequence of perhaps every agreement to arbitrate, it cannot, standing alone, be a reason to invalidate an arbitration agreement'" (quoting *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007)).

Arredondo also argues the terms were oppressive because the Arbitration Agreement prohibited an award of punitive damages. The supreme court upheld a limitation on liability clause that prohibited incidental, indirect, special, consequential, or punitive damages, finding it was not contrary to public policy and that its enforcement would not be unconscionable. *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016). It explained,

> Under its terms, it does not deprive [the respondent] of all damages arising under the

> contract but merely limits the type of damages he is entitled to recover. Specifically, [the respondent] is precluded from seeking consequential damages, indirect damages, special damages, or punitive damages in claims arising from his relationships with Appellants; he is still entitled to actual damages. While clauses limiting liability are to be strictly construed, we find no reason to ignore the plain language of the clause based on either public policy or unconscionability grounds.

Id.; *contra Simpson*, 373 S.C. at 28-30, 644 S.E.2d at 670-71 (finding an arbitration agreement that prohibited "punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect)" was unenforceable "because it prevents [the plaintiff] from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims" and noting the provision "goes beyond banning 'punitive' damages generally and specifically prohibits an arbitrator from awarding statutorily required treble or double damages").

Here, the Arbitration Agreement still allowed for awards of equitable relief and economic and non-economic damages. It did not prohibit any mandatory statutory remedies. We find neither the limitations on discovery nor the prohibition of punitive damages made the terms of the Arbitration Agreement oppressive. We hold the Arbitration Agreement was "geared towards achieving an unbiased decision by a neutral decision-maker." *See One Belle Hall Prop.*

Owners Ass'n, Inc., 418 S.C. at 60, 791 S.E.2d at 291 (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Thus, the trial court erred in holding the Arbitration Agreement was unenforceable due to unconscionability.

CONCLUSION

We find the Durable General Power of Attorney and the Health Care Power of Attorney granted Arredondo authority to execute the Arbitration Agreement on behalf of her father. In addition, we find the Arbitration Agreement was not unconscionable. Accordingly, we hold the trial court erred in denying Appellants' motion to compel arbitration.[3]

REVERSED

HUFF, THOMAS, and KONDUROS, JJ., concur.

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[3] As we find the above issues dispositive, we need not address Appellants' remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when prior issue is dispositive).

APPENDIX C

STATE OF SOUTH CAROLINA	)	IN THE COURT
	)	OF COMMON
	)	PLEAS
COUNTY OF CHARLESTON	)	NINTH
	)	JUDICIAL
	)	DISTRICT
THAYER W. ARREDONDO, as Personal Representative of the Estate of HUBERT WHALEY, deceased	)	C.A. 2016-CP-10-5319
Plaintiff,	)	
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 DOE CORPORATION.	)	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBIRATION**
Defendants.	)	

This matter came to be heard upon Defendants' Motion to Dismiss and to Compel Arbitration on January 27, 2017. All parties were represented by counsel, provided oral arguments, and also submitted written memoranda and exhibits supporting their positions. The Court hereby DENIES Defendant's Motion to Dismiss and Compel Arbitration for the reasons set forth below.

FACTUAL BACKGROUND

Hubert Whaley, deceased, was admitted to Ashley River Plantation on October 12, 2012, and placed under the care, supervision, and control of the Defendants. Mr. Whaley was a resident at Defendants' facility from October 12, 2012 to until February 21, 2014, shortly before his death on February 27, 2014, with the exception of hospital admissions. Plaintiff alleges that Mr. Whaley suffered injuries and death due to the Defendants' negligence, and filed the current action in the Charleston County Court of Common Pleas.

At the time of his admission, Hubert Whaley did not sign the alleged Arbitration Agreement presently at issue. Nothing on the face of the document suggested that Mr. Whaley lacked the capacity to execute the document. Regardless, Mr. Whaley's daughter, Thayer Arredondo, was presented the agreement for signature. (T. Arredondo Aff. ¶ 3). Ms. Arredondo was not given the opportunity to discuss the document with her father at the time it was signed, nor was she asked to seek her father's permission to sign it. (T. Arredondo Aff. ¶ 3). Further, no one from the facility reviewed the agreement that

Ms. Arredondo had signed with her father after his arrival to Ashley River Plantation. (T. Arredondo Aff. ¶ 2). 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. (T. Arredondo Aff. ¶ 2). Despite her questions, no facility representative ever explained that she was being asked to give up her father's constitutional right to a jury trial if a claim for negligence was brought against the facility, that she had the right to consult with an attorney prior to execution, or of the right to withdraw consent to the agreement. (T. Arredondo Aff. ¶ 2). The Defendants allege that Ms. Arredondo executed the Arbitration Agreement as Mr. Whaley's "Authorized Representative" and filed their Motion to Dismiss and Compel Arbitration on November 11, 2016. Plaintiff contends the alleged agreement should not be enforced (1) because Ms. Arredondo lacked the requisite authority to bind Mr. Whaley to arbitration; and (2) because the Arbitration Agreement is unconscionable.

ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where a valid arbitration agreement exists. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S. Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014). Additionally, arbitration agreements are subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S. Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

In this case, the agreement at issue fails because Ms. Arredondo lacked the requisite authority to execute the Arbitration Agreement on Mr. Whaley's behalf. Furthermore, the Arbitration Agreement is procedurally and substantively unconscionable and cannot be enforced.

1. Ms. Arredondo lacked the requisite authority to execute the Arbitration Agreement.

Ms. Arredondo lacked authority to execute the purported arbitration agreement on Mr. Whaley's behalf. The legal consequences of an agent's actions can only be attributed to the principal **when the agent has actual or apparent authority**. *Charleston, S.C. Registry v. Young Clement Rivers & Tisdale*, 359 S.C. 635, 642 (2004) *(citations omitted).* Here, neither is present. Actual authority is that which is "expressly conferred upon the agent by the principal." *Id.* Here, Ms. Arredondo lacked actual authority to execute the agreement on Mr. Whaley's behalf as Mr. Whaley never expressly conferred any authority to Ms. Arredondo to execute the arbitration agreement. Although Ms. Arredondo had a Healthcare Power of Attorney and a General Durable Power of Attorney for Mr. Whaley, neither of these documents conferred on Ms. Arredondo the authority to execute the Arbitration Agreement on Mr. Whaley's behalf and waive his constitutional right to a jury trial. As Mr. Whaley never expressly gave Ms. Arredondo permission to sign the Arbitration Agreement via these documents or otherwise, Ms. Arredondo lacked the authority to execute the Arbitration Agreement and it is unenforceable.

Ms. Arredondo also lacked apparent authority to execute the purported arbitration agreement. The existence of apparent authority is determined **by the principal's manifestation** to third parties that the agent has certain authority. *See, Charleston, S.C. Registry v. Young, Clement, Rivers, & Tisdale, LLC*, 359 S.C. 635, at 642 (2004). "Agency may not be established solely by the declarations and conduct of an alleged agent…either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Frasier v. Palmetto Holmes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct.App. 1996) *(citations omitted).* Here, Mr. Whaley was not involved in the admissions process and he was not present when the arbitration agreement was signed. Given his absence, it is impossible that Mr. Whaley made manifestations of apparent authority upon which the facility could rely. Because Ms. Arredondo lacked the requisite authority to enter into a contract on Mr. Whaley's behalf waiving his constitutional rights, no agreement to arbitrate exists. In addition to lacking the authority to bind Mr. Whaley to the Arbitration Agreement, Ms. Arredondo also lacked the authority to bind Mr. Whaley's estate to the Arbitration Agreement. *Thompson v. Pruitt Corp*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016).

2. <u>The Arbitration Agreement is procedurally and substantively unconscionable.</u>

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." *Herron v. Century BMW,* 387 S.C. 525, 532, 693 S.E.2d 394, 398 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007)). In determining unconscionability, the court considers whether a contract is absent of meaningful choice and contains oppressive, one sided terms. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining power in the contract at issue." *Id.*

In determining whether there is an absence of meaningful choice, the court can consider the relative disparity of the parties' bargaining power, the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

Here, the Arbitration Agreement at issue, and the circumstances surrounding its execution, meets the definition of unconscionable. For example, the bargaining power between the parties in this case is severely disparate. Neither Hubert Whaley nor Thayer Arredondo had any bargaining power as they had no input into the terms of the agreement nor had any realistic opportunity to negotiate the terms of this agreement. In fact, when Ms. Arredondo had questions about the agreement, she was only told that it **must** be signed to ensure her father's admission to the facility.

In contrast, the Defendants are sophisticated business and healthcare companies, who presented Ms. Arredondo with a form contract prepared solely by them, with terms heavily weighted to their favor and with no opportunity for meaningful review, discussion, or negotiation of terms. Ms. Arredondo, on the other hand, was an individual in need of the Defendants' services lacking knowledge of arbitration or of the constitutional right she was being asked to waive. This Agreement was offered on a "take or leave it" basis as it was represented as a condition for admission to a facility which held itself out as providing healthcare services that Mr. Whaley and his family desperately needed.

In light of the one-sidedness of the terms of this agreement, the manner in which the agreement was presented, the relative disparity of the parties' bargaining power, and the parties' relative sophistication, it is it is apparent that agreement is unconscionable.

CONCLUSION

For the above reasons, the Defendants' Motion to Dismiss and Compel Arbitration is hereby denied. This case is properly before the Court and discovery shall proceed.

AND IT IS SO ORDERED

/s/ J.C. Nicholson, Jr.
The Honorable J.C. Nicholson, Jr.
Ninth Judicial Circuit

April 17, 2017
Charleston, South Carolina

APPENDIX D

STATE OF	)	
SOUTH CAROLINA	)	GENERAL
	)	DURABLE POWER OF
COUNTY OF	)	ATTORNEY
CHARLESTON	)	

KNOW ALL MEN BY THESE PRESENTS that I, the undersigned Principal, Hubert James Whaley, hereinafter sometimes referred to as "Principal", in the County and State aforesaid, have made, constituted and appointed, and by these presents to make, constitute and appoint Kathryn Ellen Craven Whaley, hereinafter referred to as "Attorney", my true and lawful Attorney-in-Fact for me and in my name, place and stead, and to my use, and with the same force and effect as if I were personally present and had executed or performed the same, to do any one or more of the following acts or things, to wit:

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, and 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 agreements concerning any transfers of the above or of any other property, right or thing.

2. To vote on any stock standing in my name or owned by me in any corporation either in this State or elsewhere, in person or by proxy.

3. To endorse, pledge, deposit, assign, transfer or sell or otherwise dispose of any such or any security or other property, right or thing whatsoever.

4. To consent to or oppose any reorganization, compromise, composition, merger, consolidation, substitution or other change regardless of the form thereof.

5. To ask for, demand, sue for, levy, recover and receive all such sum and sums of money, debts, rents, interest, profits, goods, wares, dues, stock, securities, obligations, evidences of debt, accounts and other demands whatsoever, including insurance or any choses in action, and all real and personal property and the rents and profits and income therefrom whatsoever, which are or shall be due, owing or payable to me or detained from me in any manner or ways or means whatsoever, and upon receipt of any such debts, dues or sums of money, or other things aforesaid, acquittance or other sufficient discharges, for me and in my name, to make, seal and deliver, with full power to institute or defend any suit, action or proceeding in my name as he may deem advisable.

6. To grant, bargain, sell and release in fee simple or convey for any lesser interest and deliver or lease, sublease, mortgage or encumber any real estate and personal property, either or both, in said State or elsewhere, or any interests or estates I may have therein for such prices and on such terms as he may

think proper, and with full power in my name to make, seal, execute and deliver good and sufficient deeds of conveyance in fee simple or any other estate, with or without general warranty, and any other deeds or any papers necessary or proper to carry out the foregoing as fully and effectually as I might or could do if I were personally present, and to give full acquittances or releases for the purchase money or proceeds of the transaction.

7. To pay out, reinvest, expend, dispose of or otherwise deal with any moneys, funds, stocks, bonds, securities or accounts and to deposit all or any moneys, funds, checks, negotiable or commercial paper or any property belonging to me in any bank or banking institution and change the same from one bank to another at pleasure and for me and in my name and stead at any and all times to draw upon, and, when so permitted by any such bank, to overdraw same.

8. To make, execute, sign, issue, assign, endorse and transfer promissory notes, renewal notes, checks, and other commercial or negotiable paper of every kind and description, and to draw, accept or endorse drafts and bills of exchange (foreign or domestic) and to discount any promissory notes, drafts or bills, as security for any promissory note, draft or bill so made, drawn, accepted, endorsed or discounted as aforesaid, to pledge and leave with any such bank or other person, firm or corporation any business paper, wharf, warehouse or other receipt, bill of lading, bill or sale or collaterals or chattel or real estate mortgages, stocks, securities, notes, bonds or other evidence of debt or other evidences of ownership or

title to, or of any interest or security in, any property belonging to me or standing in my name.

To handle all of my accounts, as well as any and all financial affairs and accounts. To cause to be prepared and filed such State and Federal income tax forms as may need to be filed on my behalf.

This Power of Attorney shall not be affected by physical disability or mental incompetence of me the Principal, which renders me, the Principal, incapable of managing my own estate. It is my intent that the authority conferred herein shall be exercisable notwithstanding my physical disability or mental incompetence.

This Power of Attorney shall remain in full force and effect until the earlier of the following events: (1) Attorney has resigned as provided herein; (2) I have revoked this General Power of Attorney by a written instrument recorded in the public records of the County aforesaid; or (3) a Conservator shall have been appointed for me by a Court of competent jurisdiction.

In the event that Attorney shall become unable or unwilling to serve or continue to serve, then Attorney may resign by delivering to me in writing a copy of Attorney's resignation and recording the original in the public records of the County aforesaid. Upon such resignation and recording, Attorney shall thereupon be divested of all authority under this General Power of Attorney.

In order to make the transfers described herein, Attorney is fully authorized and empowered to

execute documents and papers, including deeds of my interest in real property, bills of sale of my personal property, assignment of intangibles (including my certificates of deposit) to make or endorse, or both, my checks, make savings withdrawals from savings accounts, enter my safe deposit box and remove all or any part of the contents thereof, and to perform any other and further acts or things necessary, appropriate, or incidental thereto, with the same validity and force and effect as if I were personally present, competent, and personally exercised the powers myself. No person dealing with Attorney shall be responsible to determine or ensure proper application of funds or property.

All acts and things done by my Attorney pursuant to this General Power of Attorney during any period of my disability or other mental incompetence shall have the same force and effect and inure to the benefit of and bind me and my heirs, devisees, legatees, and personal representative as if I were mentally competent and not disabled.

The powers herein conferred may be exercised by Attorney alone without the necessity of Court Order and the signature or acts of Attorney on my behalf may be accepted by third persons or other parties as fully authorized by me and with the same force and effect as if done under my Hand and Seal and as if I were present in person, acting on my own behalf and competent. No person who may act in reliance upon the representation of Attorney for the authority granted to Attorney shah incur any liability to me or to my estate as a result of permitting Attorney to exercise any power.

Any action taken by Attorney pursuant to this Power shall be deemed conclusively to be an acceptance of the appointment hereunder as Attorney-in-Fact.

Attorney and Attorney's heirs, successors, and assigns are hereby released and forever discharged of any and all liability upon any claim or demand of any nature whatsoever by me, my heirs, or assigns, the beneficiaries under my will or any trust which I have created or shah hereafter create, or any person whomsoever on account of action taken or failure to act of Attorney pursuant to this General Power of Attorney.

In the event that Kathryn Ellen Craven Whaley should be unwilling or unable to serve, or unable or unwilling to continue to serve as my Attorney in Fact, or in the event (s)he should become disabled or incapacitated, then I hereby nominate, constitute and appoint Thayer Luanne Whaley Arredondo my alternate Attorney-in-Fact, with all of the powers enumerated elsewhere in this document.

IN WITNESS WHEREOF, as Principal I have executed this General Power of Attorney and have hereunto set my Hand and Seal this 30th day of January in the year of our Lord two thousand and in the two hundred and twenty-sixth year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF:

/s/ [illegible] /s/ Hubert J. Whaley (SEAL)
Hubert James Whaley

/s/ L. Bontae Wood

/s/ W. D. Murphy

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

PERSONALLY appeared before me the undersigned witness, who, being duly sworn, says that (s)he saw the Principal, above named, sign, seal and deliver the within written General Power of Attorney, for the uses and purposes therein mentioned, and that (s)he, with the other witnesses, in the presence of each other, subscribed to same and witnessed the execution and delivery thereof.

/s/ L. Bontae Wood

Sworn to before me this
30th day of January, 2003

/s/ W. Dean Murphy

Notary Public for South Carolina
My commission expires: July 2, 2003

Residence Address

WITNESS NO. 2:

/s/ L. Bontae Wood Date: Jan. 30, 2003
Signature

L. Bontae Wood Telephone: (843) 766-7004
Print Name

659 St. Andrews Blvd. Chas., S. C. 29407
Residence Address

THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PERSONALLY appeared before me L. Bontae Wood, and made oath that she saw the within named Hubert James Whaley sign, seal, and as his act and deed, deliver the within document and that she with W. Dean Murphy, III witnessed the execution thereof.

SWORN to before me, this 30th

day of January, 2003

/s/ W. Dean Murphy /s/ L. Bontae Wood

Notary Public of South Carolina

My Commission Expires: 7/02/11

APPENDIX E

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE-SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.

2. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF. YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.

3. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY

COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.

4. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT'S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.

5. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.

6. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO PERSONS SIGN AS WITNESSES. EACH OF THESE PERSONS MUST EITHER WITNESS YOUR SIGNING OF THE POWER OF ATTORNEY OR WITNESS YOUR ACKNOWLEDGMENT THAT THE SIGNATURE ON THE POWER OF ATTORNEY IS YOURS.

THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

A. YOUR SPOUSE; YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR

LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.

B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.

C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.

D. A BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.

E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.

F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.

G. ANY PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

7. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OLD OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH

TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE; UNLESS THE PERSON IS A RELATIVE OF YOURS.

8. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

HEALTH CARE POWER OF ATTORNEY

(South Carolina Statutory Form, Code of Laws Section 62-5-504)

9. DESIGNATION OF HEALTH CARE AGENT:

I, Hubert James Whaley, hereby appoint:
(Principal)

Kathryn Ellen Craven Whaley

(Agent)
1224 Forestwood Drive
(Address)
Charleston, SC 29407

766-7941 _____
Home Telephone Work Telephone

as my Agent to make health care decisions for me as authorized in this document.

10. EFFECTIVE DATE AND DURABILITY:

By this document, I intend to create a durable Power of Attorney effective upon, and only during, any period of mental incompetence.

11. AGENT'S POWERS:

I grant to my Agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my Agent cannot determine the choice I would want made, then my Agent shall make a choice for me based upon what my Agent believes to be in my best interests. My Agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by Section e., below, my Agent is authorized as follows:

a. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or

other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;

b. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;

c. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;

d. 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; 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.

e. The powers granted above do not include the following powers, or are subject to the following rules or limitations:

_____
_____
_____
_____

12. ORGAN DONATION (INITIAL ONLY ONE) :

My Agent may /s/ HJW /may not ____ consent to the donation of all or any of my tissue or organs for purposes of transplantation.

13. EFFECT ON DECLARATION OF A DESIRE FOR NATURAL DEATH (LIVING WILL) :

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My Agent will have authority to make decisions concerning my health care only in situations to which the Declaration does not apply.

14. STATEMENT OF DESIRES AND SPECIAL PROVISIONS:

With respect to any Life-Sustaining Treatment, I direct the following (INITIAL ONLY ONE OF THE FOLLOWING 4 PARAGRAPHS) :

(1) /s/ HJW GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be

provided or continued if my Agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) _____ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want life-sustaining treatment:

A. If I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or

B. If I am in a state of permanent unconsciousness.

OR

(3) _____ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

OR

(4) _____ DIRECTIVE IN MY OWN WORDS:

_____

_____

_____

_____

15. STATEMENT OF DESIRES REGARDING TUBE FEEDING:

With respect to Nutrition and Hydration provided by means of nasogastric tube or tube into the stomach, intestines or veins, I wish to make clear that (INITIAL ONLY ONE):

/s/ HJW I DO NOT WANT to receive these forms of artificial nutrition and hydration, and they may be withheld or withdrawn under the conditions given above.

OR

_____ I DO want to receive these forms of artificial nutrition and hydration.

IF YOU DO NOT INITIAL EITHER OF THE ABOVE STATEMENTS, YOUR AGENT WILL NOT HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OF ALLEVIATION OF PAIN BE WITHDRAWN.

16. SUCCESSORS:

If an Agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes

unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my Agent, each to act alone and successively, in order named:

A. First Alternate Agent: Thayer Luanne Whaley Arredondo

Address: 2647 Elissa Drive

Charleston, SC 29414
Telephone 571-4272

B. Second Alternate Agent: _____

Address: _____

_____

Telephone _____

17. ADMINISTRATIVE PROVISIONS:

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This Power of Attorney is intended to be valid in any jurisdiction in which it is presented.

18. UNAVAILABILITY OF AGENT:

If at any relevant time, the Agent or Successor Agents named herein are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by

the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

BY SIGNING HERE, I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on this 30th day of January, 2003. My current home address is:

1224 Forestwood Drive, Charleston, SC 29407

/s/ Hubert J. Whaley
Sign your name

Hubert James Whaley
Print your name

WITNESS STATEMENT

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, or undue influence.

I am not related to the principal by blood, marriage or adoption, either as a spouse, a lineal ancestor, descendent of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to a any portion of the principal's estate upon his/her decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as the Health Care Agent or Successor Health Care Agent by this document.

WITNESS NO. 1:

/s/ W. Dean Murphy Date: 1/30/03
Signature

W. Dean Murphy, III Telephone: (843) 766-7004
Print Name

659 St. Andrews Blvd. Chas., S.C. 29407

APPENDIX F

ARBITRATION AGREEMENT

This ARBITRATION AGREEMENT is entered into as of this 12 day of October, 2012, by Hubert james Whaley("Resident") and Thayer Arredondo ("Resident's Authorized Representative,") (collectively "Resident") and Ashley River Plantation ("Facility," an affiliate of Five Star Quality Care, Inc., collectively "Five Star"); and the Resident and Five Star are the ("Parties").

1. AGREEMENT TO ARBITRATE. Should a dispute arise between the Parties, they desire to avoid costly and time-consuming litigation. ***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***. The arbitration shall be conducted in the county where the Facility is located. Accordingly, neither Resident nor Five Star will be permitted to pursue court action regarding these claims, controversies or disputes.

2. CONDUCT OF THE ARBITRATION. The arbitration shall be conducted by a panel of either one or three neutral arbitrators (the "Panel"), said number being chosen by the Resident. The member(s) of the Panel shall be chosen by the American Arbitration Association ("AAA") or by mutual agreement between the parties. Where a medical issue may more likely than not come before the Panel, and the Panel is three in number, one member of the

Panel shall be a physician. The Panel shall follow the current Commercial Arbitration Rules of the AAA. The Panel shall have the authority to set a timetable for the arbitration and to direct discovery in all controversies. The Panel shall obey the law. The Panel shall have the authority to grant equitable relief that could be ordered by a court. The Panel shall have authority to award economic and non-economic damages (including, damages for pain and suffering and mental anguish); but shall have no authority to award punitive or exemplary damages. The Panel's award may not exceed any award that could be granted by a court. The decision of the Panel shall be final, binding upon the Parties, not subject to appeal, and any court having jurisdiction may enter a judgment on the award.

3. COSTS OF ARBITRATION. Resident and Five Star shall equally bear the costs and expenses of any arbitration proceedings; including all costs of administration, all expenses of the Panel, and all hearing costs. Where the Resident supplies an affidavit that they do not have the means to pay their one half of the arbitration expenses, Five Star will also pay the Resident's share of the costs and expenses. Where Five Star also pays the Resident's share of the costs and expenses, then regardless of Paragraph 2 above, Five Star shall have the right to chose whether the Panel shall be one or three neutral arbitrators.

4. RESIDENT RIGHTS PRESERVED. Nothing in this Agreement shall prohibit Resident or Five Star from pursuing a claim or complaint with a local, state or federal administrative agency, including, without

limitation, any state office of the long-term care ombudsman. This Agreement does, however, preclude either Resident or Five Star from pursuing court action regarding any such claim or complaint as described in Paragraph 1 above. Nothing in this Agreement shall limit or restrict any resident rights provided under applicable state or federal law.

5. WAIVER OF JURY TRIAL. Any claim, controversy, or dispute between the Parties for which arbitration is not allowed by law shall be brought in an appropriate court before a judge. ***Both Resident and Five Star waive their right to a trial by jury.***

6. GOVERNING LAW. The Parties acknowledge that the Facility is located in the state of SCand is operated by an affiliate of Five Star, a Maryland corporation with its corporate office in Massachusetts. Goods and services provided by Five Star to the Facility and/or Resident involve interstate commerce. Further, certain services provided to Resident by the Facility may be covered by the federal Medicare or Medicaid programs, or regulated by other federal statutes and regulations, also involve interstate commerce. Therefore, the Parties agree that the Federal Arbitration Act shall govern the construction and enforcement of this Agreement.

7. SEVERABILITY. If any provision of this Agreement is declared to be unlawful, invalid or unenforceable for any reason, then notwithstanding such unlawfulness, invalidity or unenforceability, the remaining terms and provisions of this Agreement shall remain in full force and effect.

8. APPLICABILITY TO RELATED PARTIES. Resident and Resident's Authorized Representative agree that this Agreement shall be binding upon them personally. This agreement shall be binding upon and inure to the benefit of all persons whose claim is derived through or on behalf of the Resident, including that of the Resident's family, heirs, guardian, executor, administrator and assigns. This agreement shall be binding upon and inure to the benefit of Five Star's affiliates and subsidiaries and their respective directors, officers, employees, representatives, or agents.

9. AMENDMENT. This Agreement may be amended by Five Star upon thirty (30) days written notice to Resident. If Five Star provides notice to Resident that it intends to amend the Agreement, Resident may terminate the Agreement for any reason by providing written notice to Five Star within 30 days of receipt of Five Star's notice.

10. VOLUNTARY NATURE OF AGREEMENT. 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. Resident and Five Star further acknowledge and agree that each has carefully read this Agreement and has asked any questions necessary to understand the terms, consequences and binding effect of this Agreement. Finally, Resident and Five Star acknowledge that both Parties have been provided an opportunity to seek the advice of an attorney of their choice before signing this Agreement.

Signature Page to Follow:

/
/
/
/

THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES.

RESIDENT	SECOND RESIDENT
Signature: _____	Signature: _____
Print Name: Hubert James Whaley	Print Name: _____
Witness:	Witness: _____

RESIDENT'S AUTHORIZED REPRESENTATIVE

Signature: /s/ Thayer W. Arredondo
Relationship to Resident: daughter
Print Name: Thayer Arredondo
Witness: _____

FIVE STAR QUALITY CARE, INC.

Signature: /s/ Tasha Williams
Print Name: Tasha Williams
Title: Sales Associate