STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS C.A. No.: 2021-CP-42-03439
The Estate of Mary Ellen Williams, through the duly appointed Personal Representative, Benjamin Meador, Individually and on behalf of statutory beneficiaries, Plaintiffs, vs. Pacifica Skylyn, LLC, d/b/a/ Pacifica Senior Living Skylyn, and James A. Clements in his capacity as Administrator of Pacifica Skylyn, LLC, Defendants.	**ORDER**

This matter came before the Court on March 28, 2022 on Defendants' Motion to Dismiss pursuant to SCRCP Rules 12(B)(1) and 12(B)(6), or in the alternative to Stay and Compel Arbitration. After receiving the oral arguments remotely and reviewing the materials submitted by the attorneys, the present motion is **DENIED**.

Defendants voluntarily accepted Mary Ellen Williams, a vulnerable adult, as a resident into Defendants' assisted living facility, Pacifica Senior Living Skylyn on **April 16, 2020**. The admission paperwork contained an arbitration clause that was not a condition of admission. Plaintiffs contend Ms. Williams was competent and able to communicate but did not sign the admission paperwork. It is undisputed that the arbitration agreement was never signed by Defendants.

Defendants moved to dismiss the case and compel arbitration between the parties. However, the alleged arbitration agreement is unenforceable. There is no evidence the Arbitration Agreement was ever signed by either Mrs. Williams or anyone acting on behalf of Defendants. Additionally, the Arbitration Agreement was not required to be admitted and was not a condition of residency. Defendants did not rely on this contract to provide services or treatment to Mrs.

Williams. Plaintiffs did not sue for breach of contract, and the tort action does not arise based on the admission paperwork or arbitration agreement.

Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole. The Supreme Court's arbitration jurisprudence, with its emphasis on formal agreement to contract terms, under plays the fairness side of contract law. When the parties to a contract have disparate bargaining power, disparate knowledge, and disparate interests, both the moral and economic basis of contracting demand more than the mere outward trappings of contract. State courts remain free, under the FAA, to refuse to enforce pre-dispute arbitration agreements that violate general contract law. While there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement. Often the wording of the agreement can be targeted for lack specificity, vagueness, or lack of obviousness.

In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

> **Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.** While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, **we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case**. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

While it is true that the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[1] While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation.[2] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable

[1] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.
[2] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

to all other contracts.[3] Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract.

The touchstone of any valid contract is mutual assent and consideration. Arbitration is a matter of contract and controlled by contract law.[4] An arbitration agreement is treated like any other contract.[5] "In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all the essential and material terms of the agreement."[6]

A. LACK OF CONSIDERATION:

The necessary elements of a contract are an offer, acceptance, and valuable consideration.[7] However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument.[8] It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.[9] Where a contract lacks valuable consideration, the contract will be deemed unenforceable. Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. An agreement may lack mutuality where it permits one party to seek relief through the courts, but does not allow the same relief for the other party. The agreement allows Defendants to use the Court system for eviction actions and Defendants can use the Court system for any claims that could be brought in small claims Court. No valuable consideration exists in this case.

B. FAILURE OF MUTUAL ASSENT:

Under South Carolina law, whether parties mutually assented or reached the required "meeting of the minds" for a proposed contract is a question of fact.[10] Contract formation demands

---

[3] Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[4] Hooters of America, Inc. v. Phillips, 39 F.Supp.2d 582, 606 (D.S.C. 1998) aff. 1999 WL 194438.

[5] Id.

[6] Lindsay v. Lindsay, 491 S.E. 2d 583 (S.C. App. 1997)

[7] Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d161, 166 (S.C. 2003).

[8] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

[9] Benya v. Gamble, 321 S.E.2d 57, 60 (Ct.App.1984).

[10] Jaffe v. Gibbons, 290 S.C. 468, 471, 351 S.E.2d 343, 345 (Ct. App. 1986).

the mutual assent of the proposed parties.[11] There is no dispute Defendants did not sign any arbitration contract with Mrs. Williams. The purpose of requiring a signature is to secure the objective manifestation of a proposed party's assent to a contract's terms.[12] The Arbitration clause, drafted exclusively by Defendants, designates the method by which its parties demonstrate assent to its terms. Unlike employee handbooks or other documents where the non-drafting party alone is asked to sign, Defendants chose to require both parties' signatures by placing signature blocks for itself and Mrs. Williams in the Agreement.

Defendants' drafting choice should be construed to require the Facility's signature for two reasons. First, no mutual assent exists. The mutual assent requirement is based on a party's objective manifestations.[13] Under long-standing South Carolina law, when a contract demands all parties' signatures, it is ineffective until all parties have signed.[14] Since Defendants chose dual signatures as the designated means by which the Agreement was to be executed, the failure to sign renders the Agreement "inchoate and incomplete" such that it "never takes effect as a valid contract."

Second, to the extent the dual signature blocks create an ambiguity regarding the Agreement's designated method of assent, it must be construed against Defendants because it alone chose the Agreement's format and language.[15] Given Defendants' choice to place a signature block for itself in the Agreement, it was reasonable for Mrs. Williams to conclude the proposed contract was not binding without Defendants objectively manifesting assent through its signature.[16]

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. The alleged agreement by its express terms requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The arbitration provision

---

[11] Edens v. Laurel Hill, Inc., 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (*citing* Kitchens v. Lee, 221 S.C. 59, 69 S.E.2d 67 (1952)).

[12] Mosely v. WAM, Inc., 606 S.E.2d 140, 143 (N.C. App. 2004) (quoting Burden Pallet Co., Inc. v. Ryder Truck Rental, Inc., 271 S.E.2d 96, 97 (N.C. App. 1980) ("The object of a signature to a contract is to show assent")).

[13] Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009)).

[14] Dean, 229 S.C. at 436, 93 S.E.2d at 208.

[15] See Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355-56, 755 S.E.2d 450, 455 (2014) (holding ambiguity in nursing home arbitration agreement must be construed against drafter).

[16] See Abdiana Props., Inc. v. Bengtson, 575 S.W.3d 754, 761 (Mo. App. 2019)(finding it "reasonable to conclude" drafting party intended inclusion of signature line for itself to make its signature a condition of mutual assent).

itself references the parties' intention to select arbitration, however, there is no party signature on behalf of Facility and its affiliates. The fact that there is a signature line for "Authorized Agent of Facility" and that it is left blank further indicates that there was no mutual assent.

C. NO MEETING OF THE MINDS ON MATERIAL TERMS:

South Carolina law requires that in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement.[17] Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract. Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (S.C. App., 1984). Finally, an agreement that omits material terms may be determined to be unenforceable for indefiniteness. "A contract leaving material terms open for future agreement is void for indefiniteness.[18] Parties cannot form a valid contract without forming "a meeting of the minds . . . with regard to all essential and material terms."[19] Even if a contract mentions a material term, the contract fails if the term is defined or described in vague terms.[20] These are contract formation requirements, and Defendants bear the burden of proving both that the Arbitration clause contains all material provisions and that it describes them in definite terms. Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016) ("Part of proving that some enforceable contract exists is being able to identify the terms thereof").

The Arbitration clause purports to be a dispute resolution contract but it provides no useful guidance on who will be tasked with resolving claims or how the accompanying proceedings will be conducted. The Arbitration clause's arbitrator selection process is too vague to permit enforcement. The process must begin with the parties collaborating on a choice of arbitrator. Ultimately, when a contract is indefinite on an important term, the proper judicial

[17] Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009) citing Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).
[18] Ellis v. Taylor, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994).

[19] Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (citing Player, 299 S.C. at 105, 382 S.E.2d at 894).
[20] Reed v. Boykin, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984) (quoting 1 Corbin on Contracts § 95 (1963) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract")).

response is not to imply or infer a term but rather to refuse enforcement.[21] Arbitrator selection and the rules governing arbitration proceedings are material terms of an arbitration contract. Here, the Arbitration Agreement lacks any valid terms on arbitration procedures. There is no guidance on the timetable for arbitration proceedings and no designation of rules to govern procedure or evidence. Without a "meeting of the minds" between the parties as to choice of arbitrators and rules of arbitration, there can be no contract to arbitrate.

D. UNCONSCIONABILITY:

General contract defenses such as unconscionability, grounded in state contract law, may invalidate the arbitration clause.[22] The Arbitration Agreement is both procedurally and substantively unconscionable. A contracting party must act in good faith and may not take advantage of superior bargaining position to impose grossly unfair, non-mutual burdens on a consumer. The problem is not that arbitration is always inherently unfair, but that it can easily be made so. Arbitration is a creature of contract, and so the party drafting the contract can create both procedural rules and substantive law for the arbitration.

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.[23]

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.[24] 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.[25] Courts typically consider any actual negotiations over the clause, whether the clause was presented on a take-it-or-leave-it basis, the conspicuousness of the waiver, the degree of bargaining

---

[21] Ebert v. Ebert, 339, 465 S.E.2d 121, 126 (Ct. App. 1995) (citing 17A Am. Jur. 2d Contracts § 192 (1991)).

[22] Doctor's Assoc. Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

[23] Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

[24] See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989).

[25] Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

disparity between the parties, and the experience and sophistication of the party opposing the waiver.[26]

VI. WRONGFUL DEATH CAUSE OF ACTION

No person other than the court-appointed personal representative can waive the rights of the statutory beneficiaries. The wrongful death claims are separate claims apart from the Patricia's claims. According to South Carolina's Wrongful Death Act:

> Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages.

South Carolina Code Annotated §15-51-10 (1977). The wrongful death beneficiaries are as follows:

> Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused

This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company,

---

[26] E.g., Morgan Guar. Trust Co. v. Crane, 36 F.Supp. 2d 602, 603-4 (S.D.N.Y. 1999) ("The factors a court must consider in determining whether a contractual waiver of a right to a jury trial was entered into knowingly and voluntarily include: 1) the negotiability of contract terms and negotiations between the parties concerning the waiver provision; 2) the conspicuousness of the waiver provision in the contract; 3) the relative bargaining power of the parties; and 4) the business acumen of the party opposing the waiver.")' Oei v. Citibank, 957 F.Supp. 492, 523 (S.D.N.Y. 1997) ("In addressing jury waiver clauses, courts have consistently examined the following factors: negotiability of the contract terms, disparity in bargaining power between the parties, the business acumen of the party opposing the waiver, and the conspicuousness of the jury waiver provision."); Luis Acosta, Inc. v. Citibank, 920 F. Supp. 15, 18 (D.P.R. 1996) (in determining whether waiver was knowing and intentional courts look to "whether the waiver clause was set forth in bold and conspicuous lettering, or whether instead it was buried deep in the contract," "whether or not the parties were represented by counsel at the time of the contracting," and whether there is a gross inequality in bargaining power between the parties"); Coop. Fin. Ass'n v. Garst, 871 F. Supp. 1169, 1172 (N.D. Iowa 1995) (stating that in determining the validity of a jury trial waiver courts "have considered whether the waiver provision is on a standardized form agreement or newly-drafted document, in fine print or in large or bold print, set off in a paragraph of its own, in a take-it-or-leave-it or negotiated contract, and the length of the contract).

97 S.C. 27, 81 S.E. 189 (1914). However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants." Ping, 376 S.W.3d at 599-600.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, the South Carolina Non-Economic Awards Act of 2005 requires the wrongful death beneficiaries' claims to be separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

Following this, the wrongful death claimants should not be bound by arbitration agreements which strip them of their right to a jury trial when they never signed away their right in the first place.

The Motion is **DENIED**.

Spartanburg Common Pleas

Case Caption: Mary Ellen Williams , plaintiff, et al VS Pacifica Skylyn, Llc , defendant, et al

Case Number: 2021CP4203439

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132