STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Case No. 2021-CP-26-01328
Jane Doe,	)	
Plaintiffs,	)	**Order Denying Defendants Massage Envy Franchising, LLC, Palmetto Wellness Group, LLC, Palmetto Wellness Group, SC, LLC, and PGD Investments, Inc., Motions to Stay Litigation and to Compel Arbitration of Plaintiff's Claims and Motions to Dismiss**
vs.	)	
MASSAGE ENVY FRANCHISING, LLC; PALMETTO WELLNESS GROUP, LLC, PALMETTO WELLNESS GROUP, SC, LLC d/b/a Massage Envy Grande Dunes, and PGD Investments, Inc.	)	
Defendants.	)	

Defendants Massage Envy Franchising, LLC, ("MEF") Palmetto Wellness Group, LLC, ("Palmetto"), Palmetto Wellness Group, SC, LLC,[1] and PGD Investments, Inc., ("PGD") moved to send the claims of the Plaintiff to arbitration or in the alternative to dismiss the claims pursuant to SCRCP 12(b)(6). Plaintiff contends no agreement to arbitrate was ever formed, the claim is outside the scope of any agreement, the arbitration terms are unconscionable, that the alleged agreement is in violation of the South Carolina Uniform Electronic Transactions Act, and that the alleged agreement violates public policy under the recently signed Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021. Briefs were filed and considered along with oral argument held on March 7, 2022. After reviewing the matter, the Court denies the motions.

ARBITRATION MOTIONS

Plaintiff alleges she was sexually assaulted at a Massage Envy franchise location, Massage Envy Grand Dunes, on September 20, 2020. Defendants contend that an unsigned arbitration

[1] Prior to these motions being heard, Palmetto Wellness Group, SC, LLC was dismissed without prejudice.

provision found on page four of a document entitled "Terms and Conditions" compels arbitration. This document was only accessible by a hyperlink titled "Terms of Use" found at the end of a multipage document entitled "General Consent." The General Consent was provided to Plaintiff on an iPad by Palmetto on August 2, 2018.

A check box and signature line were at the end of the General Consent, which itself instructed Plaintiff in the body of the consent language to "Please read and review in full to sign below." Immediately below that instruction is a densely worded , multi-page block of text broken into four paragraphs entitled "ASSUMPTION OF RISK, RELEASE, WAIVER OF LIABILITY, AND INDEMNIFICATION." In the middle of these four paragraphs is a single line of text that reads, once again, "Please read and review in full to sign below." Also contained therein is a statement that "Male/female genitalia and women's breasts will not be exposed or massaged at any time."

In support of its motion, MEF submitted the affidavit of Mr. Justin Cryder, Esq., corporate counsel in Scottsdale Arizona. The affidavit was Exhibit 1 to MEF's motion and itself has other exhibits attached. The other Defendants similarly rely on Mr. Cryder's affidavit. In his affidavit, Mr. Cryder stated that MEF maintains customer data like that seen on the iPad screens in the regular course of business.

The proof offered to suggest that Plaintiff "assented" to the arbitration agreement, which is only accessible by clicking the hyperlink and is not otherwise shown to a customer such as Plaintiff, is an electronic record that MEF maintains, which purportedly shows Plaintiff "signed" the General Consent at approximately 6:30 PM on August 2, 2018. The General Consent offered by Defendants, through Mr. Cryder, however, is dated October 28, 2019. There is no

corresponding record to show that the box next to the hyperlink was checked. The evidence offered by Defendants does purport to show other occasions where the "Terms of Use" box was checked

Cryder Exhibit "A" With Box Checked

Cryder Exhibit "C" No Entry for 10/28/19 Terms of Use

Cryder states in his affidavit that the timestamp for the "Terms of Use" entry dated March 10, 2019, indicates that this is a date that Plaintiff purportedly entered a Wellness Agreement. There is no corresponding entry to show that Plaintiff was provided with the General Consent on that same date. The electronic record for the March 10, 2019, entry shows that Plaintiff allegedly entered into this Wellness Agreement and "clicked" a box next to a terms of use hyperlink at 10:20 PM. Yet the Massage Envy Grand Dunes closes at 10 PM. There was no evidence showing the "Terms of Use" being clicked on October 28, 2019. There was also no evidence offered to show Plaintiff viewing or signing either the General Consent or Terms of Use for September 20, 2020, the date of the alleged sexual assault.

A. No Agreement was Formed

Here, the Court must ascertain both (1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement.

Parties to an arbitration must specify clearly the scope and terms of their agreement to arbitrate and a party cannot be forced to submit to arbitration of any dispute unless she has agreed to do so. *Chassereau v. Glob.–Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005). "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Id.* The burden here is on the Defendants.

The Federal Arbitration Act, which Defendants rely upon, does not conflict with South Carolina law and therefore the determination of whether a valid agreement to arbitrate exists between MEF and Plaintiff is based on *state* law: "[I]n a case where the validity and enforceability of an arbitration provision is disputed, general principles of state contract law must be applied to determine these threshold issues. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). When deciding whether the parties agreed to arbitrate a matter, courts apply ordinary state law principles that govern the formation of contracts. *Berkeley Cnty. Sch. Dist. v. Hubb Int*'l., 363 F. Supp.3d 632, 641 (D. S.C. 2019).

It is well established 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. *Stevens & Wilkinson of S.C., Inc v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014) and *Sauner v. Pub. Serv. Auth. Of SC*, 354 S.C. 397, 581 S.E.2d 161 (2003) If one of the parties has not agreed, then a prerequisite to formation of the contract is lacking. It is essential that both parties assent to the same thing in the same sense.

Under South Carolina law, the necessary elements of a contract are an offer, **acceptance,** and valuable consideration. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (Ct. App. 2012) (emphasis added). Where there is no mutual agreement as to all of the terms, there is no contract. Here, because Plaintiff did not assent or agree to arbitrate, no valid arbitration agreement was ever formed. Further, if a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to *ascertain the intention of the parties*. Where an agreement is ambiguous, the fact-finder must interpret the contract. An arbitration agreement should not be proffered "unfairly or with the design to conceal or deemphasize the provisions" so that it is not discovered by Plaintiff, resulting in a lack of agreement to arbitrate. *Mary Doe, et al. v. Massage Envy Franchising, et al.*, No. 2020-CP-10-05443 (Cothran, J., Aug. 25, 2021).

It is undisputed that Plaintiff did not open the electronic agreement reachable only by hyperlink. Under normal circumstances, a party's failure to read a contract nonetheless binds the party when signed. Plaintiff's failure to read the alleged agreement, accessible only by a hyperlink may not have been the result of disinterest or indifference, but rather due to an objectively confusing design of the General Consent.

The fact that the "Terms of Use Agreement" language was in fact a hyperlink is not apparent and Plaintiff specifically stated in her own affidavit that the "Terms of Use Agreement" language being a hyperlink was not known to her. Plaintiff had scrolled through four previous pages of legal language, none of which mentioned arbitration or the existence of a separate arbitration agreement. Under these circumstances, a prudent consumer in the position of Plaintiff could not reasonably conclude that the "Terms of Use Agreement" language was a hyperlink or that it represented anything more than an affirmation that she agreed to terms she had already been

shown on the previous "My Consent" pages, which are not the alleged arbitration agreement. Throughout the General Consent section of the iPad agreement, there are repeated statements that the customer should "read and review in full to sign below" and that "by signing below" they are agreeing to the terms of the General Consent. Nowhere is the customer encouraged to sign in order to accept an arbitration agreement or informed that there is in fact an arbitration agreement behind the hyperlink.

While terms of an agreement accessible by hyperlink may be sufficient to form a contract under some circumstances, when the General Consent is viewed together with the signature line, check box, "Terms of Use Agreement hyperlink, and the "Terms and Conditions" document, it is clear that there could not be assent on the part of Plaintiff. It simply cannot be said that Plaintiff was presented with the arbitration agreement in a fair and forthright manner as required by law. At least one other court here in South Carolina has reached the same conclusion when reviewing an identical motion. *Mary Doe, et al. v. Massage Envy Franchising, et al.*, No. 2020-CP-10-05443 (Cothran, J., Aug. 25, 2021).

In the alternative, Defendants have failed to produce evidence that Plaintiff did in fact check the box "assenting" to the agreement. Defendants claim this arbitration agreement was entered on August 2, 2018, however the iPad form presented to the Court was dated October 28, 2019. While there was a corresponding entry in the electronic records for the General Consent dated October 28, 2019, there was no entry for the "Terms of Use" being entered on October 28, 2019. Further, the electronic record for the March 10, 2019, entry shows that Plaintiff allegedly entered into a Wellness Agreement and "clicked" a box next to a terms of use hyperlink at 10:20 PM but the Massage Envy Grand Dunes closes at 10 PM.

B. Claims for Sexual Assault are Outside the Scope of the Alleged Agreement

Here, the purported agreement is ambiguous as to what is covered by the alleged agreement. In any event, sexual assault claims are not encompassed within the alleged arbitration agreement.

South Carolina jurisprudence makes clear that not all claims will be covered by an arbitration agreement. The Supreme Court has held that "applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable." *Aiken v. World Finance Corp.*, 373 S.C. 144, 464 S.E.2d 705 (S.C. 2007). *See Seifert v. U.S. Home Corp*., 750 So.2d 633, 638 (Fla.1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one arising out of or relating to the agreement."). *See also The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, Inc., 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct.App.2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.").

The Court in *Aiken* further stated:

> Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, South Carolina courts will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealing... We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties… Our decision today does not ignore the state and federal policies favoring arbitration as a less formal and more efficient means for resolving disputes.

The claims at issue in this case are not within the scope of the alleged agreement (even if the Plaintiff had assented to the alleged agreement, which she did not).

First, the Terms and Conditions document begins by stating that it covers a customer's "access to and all use of the website and/or the application(s) and the information or content contained on any one or all of them, and any of the services (defined below)." Following this is a section entitled "Description of Service." Nothing in the "Description of Service" section identifies torts such as sexual assault as being a "service" or covered by the alleged agreement. In the arbitration section of the Terms and Conditions document it identifies "disputes" covered by the agreement but, again the language of the agreement as to "disputes" covered does not identify torts such as sexual assault.

Second, no reasonable person would expect sexual assault to be encompassed in an arbitration agreement. South Carolina courts are consistent on this point holding "Because even the most broadly worded arbitration agreements still have limits found in general principles of contract law, an appellate court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Aiken v. World Finance Corp*., 373 S.C. 144, 644 S.E.2d 705 (2007).

Third, Plaintiff was guaranteed by Defendants that she would not be sexually assaulted during the course of her massage and therefore it could not be anticipated that such an event would be covered by an arbitration agreement. Plaintiff was told, in the General Consent section for example, that "Male/female genitalia and women's breasts will not be exposed or massaged at any time."

C. The Alleged Agreement, including the Delegation Clause, is Unconscionable and Therefore Unenforceable

In addition to the bases cited above, the alleged agreement at issue is unenforceable as procedurally and substantively unconscionable. Just as state law determines whether an agreement to arbitrate existed under the FAA, courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and unconscionability." *York v. Dodgeland of Columbia, Inc*., 406 S.C. 67, 749 S.E.2d 139 (S.C. App. 2013); s*ee also Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116; accord *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA." (Citing *Doctor's Assoc., Inc*., 517 U.S. at 685, 116 S.Ct. 1652)); see 9 U.S.C. § 2 (providing grounds "at law or in equity for the revocation of any contract" remain applicable).

South Carolina jurisprudence holds unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. at 24–25, 644 S.E.2d at 668 (2007) Thus, unconscionability is "due to both an absence of meaningful choice and oppressive, one-sided terms." Id. at 25, 644 S.E.2d at 669.

While courts analyze both prongs, they invite similar proof and often overlap, and "if more of one [prong] is present, then less of the other is required." *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020) *See also* Farnsworth on Contracts § 29.4 at 4-212 (2020-1 Supp.); *see* Corbin on Contracts § 29.4 at 388 (2002 ed.) (noting "most cases do not fall neatly" into categorical boxes).

1. The Alleged Agreement is Procedurally Unconscionable

Absence of meaningful choice on the part of one party speaks to the fundamental fairness of the bargaining process. *York*, 406 S.C. at 67. "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.* As our supreme court noted in *Simpson*, the "loss of the right to a jury trial" and foregoing statutorily provided remedies are also relevant to this determination.

Defendants provided the Plaintiff with no meaningful choice as whether to sign the agreement or not. This take-it-or-leave-it scenario meant that Plaintiff could not use services without agreeing to the arbitration terms. Further, Plaintiff had no opportunity to bargain over the terms of the delegation clause or the agreement to arbitrate more generally since the terms were not readily accessible to Plaintiff.

The claim that the "opt out option" given to Plaintiff made the alleged agreement fair and not coercive is belied by the context of how the alleged agreement is presented. Defendants neglect to focus on the fact that the alleged "opt out option" was so far hidden that no reasonable person could be expected to find the hidden language. Not to mention, the "opt out option" is multi layered requiring the Plaintiffs to spend more money to send mail to another state with detailed and difficult directions to ensure that Defendant MEF would in fact let them out of their arbitration agreement.

The bargaining inequality between the Plaintiff and Defendants is stark: Defendant MEF as a national corporation controlled all aspects of the arbitration agreement and controlled how

those terms were electronically presented to Plaintiff. Procedural unconscionability is therefore established.

2. The Alleged Agreement is Substantively Unconscionable

Substantive unconscionability refers to harsh, one-sided, and oppressive contract terms. The alleged agreement here is also substantively unconscionable.

The alleged agreement is a 10-page, single-spaced document, which includes a "Limitation of Liability" paragraph, providing that to the maximum extent permitted by law, Massage Envy "shall not be liable for any damages whatsoever, and in particular, . . . shall not be liable for any special, indirect, consequential, punitive, or incidental damages . . . arising out of or related to. . . any service, whether such damages arise in contract, warranty, negligence, tort, under statute, in equity, at law, or otherwise."

The next paragraph requires Plaintiff to "indemnify" Massage Envy and "hold [it] harmless from any claims, demands, liabilities, damages, losses, and expenses, including, without limitation reasonable attorneys' fees and costs, made by any third party due to or arising out of or connected in any way with . . . any service or product provided by [a Massage Envy franchise]" – i.e., to pay the franchisors fees, damages, and costs if the member sues a franchise that files a cross-claim against the franchisor.

It imposes sweeping confidentiality restrictions, precluding Plaintiff from disclosing even "[t]he fact that an arbitration exists or is proceeding, the nature of the Dispute, all documents exchanged in connection with the arbitration, [and] all testimony . . . given in the arbitration proceeding," except in severely limited circumstances.

Massage Envy's arbitration agreement additionally purports to apply to all disputes between the parties to that agreement, except for claims in small claims court and "claims

regarding the infringement, protection or validity of . . . trade secrets, copyright, trademark or patent rights." It requires all disputes to be resolved under Arizona law, regardless of where the member lived, obtained massages, or signed Massage Envy's membership agreement. It prohibits all class actions, group actions, and other non-individual actions in arbitration or elsewhere. Although the agreement is binding on Plaintiff, it gives Massage Envy the right at any time, to modify, alter, or update [any term of that agreement] without prior notice.

Because the arbitration agreement is both procedurally and substantively unconscionable, the arbitration agreement cannot be enforced, and Defendants' motions must be denied.

D. The South Carolina Uniform Electronic Transactions Act

The South Carolina Uniform Electronic Transactions Act (SCUETA) applies to electronic records and electronic signatures relating to a transaction. The alleged arbitration agreement at issue here is an agreement requiring electronic signature that is stored by electronic means.

In order to legally conduct transactions or create valid agreements electronically, the parties each must "agree to conduct transactions by electronic means." SCUETA § 26-6-50 (B). MEF has presented no evidence Plaintiff agreed to conduct any transaction electronically. Nothing about the "Terms of Use" click box indicates anything other than it being applied to the check-in process for the single pre-scheduled massage planned by Plaintiff. Likewise, nothing about the "Terms of Use" box suggests that the individual checking the box would be entering an entirely separate arbitration agreement, contained on an entirely separate website that operates to forfeit important legal and constitutional rights. Therefore, MEF's motion is denied on this ground.

E. The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which declares "pre-dispute" agreements that

force sexual assault and harassment victims into arbitration illegal. This Court need not decide whether or not the Act would apply to this case, however the Act does represent a strong statement of public policy that the exact type of agreement that Defendants seek to enforce here is highly disfavored (especially in light of these sorts of agreements being deemed illegal).

In light of the foregoing, each Motion seeking to Compel Arbitration is denied.

F. Defendants Palmetto and PGD

Palmetto and PGD were not signatories to the alleged agreement at issue here. The alleged agreement itself makes clear that it should only be interpreted as an agreement between Defendant MEF and the customer. Defendants Palmetto and PGD argue, however, that compelling arbitration as to the claims against these entities is appropriate because either (1) they meet the agreements definition of a "related entity" and/or a "third-party beneficiary;" or (2) equitable estoppel and the co-signatory rule apply.

There is no dispute at least among the Defendants that Palmetto and PGD are "independently owned and operated" businesses distinct from Defendant MEF. For the purposes of this motion, nowhere in the alleged agreement where related entities or third-party beneficiaries are defined does that definition include an "independently owned and operated" business or "Independently owned and operated Massage Envy franchised locations."

State law controls when an arbitration agreement may be enforced against someone who did not sign it. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 173-174 (2019). To support this argument, Palmetto and PGD argue that Plaintiff is relying on the arbitration agreement to assert her claims and as such these entities may avail themselves of arbitration. This argument fails. Plaintiff is asserting, *inter alia*, claims arising from an alleged breach of a duty owed to Plaintiff, for alleged negligence on the part of all Defendants including Palmetto and PGD, and for

fraud. None of these claims "arise out of" or "rely on" the alleged agreement. *Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014) (denying motion to compel nonsignatory to arbitration where moving defendant "conflates the duties created by the [client relationship agreement] contracts and general tort duties.").

The estoppel argument asserted here "is not implicated simply because a claim relates to or would not have arisen 'but for' a contracts existence." *Wilson v. Willis*, 426 S.C. 326, 340, 342-343, 827 S.E.2d 167, 176 (2019). The court's analysis of benefits estoppel in *Weaver v. Brookdale Senior Living, Inc.* is informative:

> Weaver has not "exploited" or otherwise sought to enforce or benefit from the residency agreement, **any more than a pedestrian run over by a truck has benefited from the contract for the purchase of the truck**. . . . Like the nonsignatories in *Wilson*, Weaver has not "attempted to procure any direct benefit" from the residency agreement "while attempting to avoid its arbitration provision."

431 S.C. 223, 232, 847 S.E.2d 268, 273 (Ct. App. 2020) (internal citations omitted).

For all the reasons set forth above, including that there is no evidence of assent on the part of Plaintiff and because the alleged agreement at issue is unconscionable, the alleged agreement cannot be enforced against Plaintiff. Separately, this Court denies the Motions of Palmetto and PGD because they were not signatories to the alleged agreement; are not covered "entities," related parties," or "third party beneficiaries;" cannot properly assert estoppel; and, therefore, could not avail themselves of its benefits in any event.

12(b)(6) MOTIONS

Defendants MEF, Palmetto, and PGD each moved alternatively to dismiss Plaintiff's claims pursuant to SCRCP 12(b)(6). For the following reasons, the Court denies these Motions. Defendant Palmetto separately made a Motion to Strike which will be granted in part and denied in part and will be addressed by separate Order.

A. Standard of Review

Under South Carolina law, a Rule 12(b)(6) Motion to Dismiss "cannot be sustained if the facts alleged in the Complaint, along with any reasonable inferences therefrom, would entitle the Plaintiff to relief." *Brown v. Leverette*, 291 S.C. 364, 353 S.E. 2d 697 (1987). In its consideration, the court's ruling must be premised solely upon the allegations set forth by Plaintiff. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006); *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). Further, in reviewing a motion to dismiss, the Complaint should be construed liberally so that "substantial justice" is done between the parties. *HH Hunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699 (Ct. App. 2010). If the facts alleged and inferences deducible therefrom would entitle the Plaintiff to any relief under any theory of the case, dismissal under Rule 12(b)(6) is improper. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 42 (2012); *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003).

B. Negligence and *Respondeat Superior*

Defendants MEF, PGD, and Palmetto each attempt to attack Plaintiff's Complaint by arguing that none of the Defendants may be held vicariously liable for the conduct of the allegedly abusive therapist and that Plaintiff's Complaint fails to allege sufficient acts of omissions that could constitute negligence.

1. Control

Under South Carolina law, the theory of *respondeat superior* makes an employer or master liable to a third-party for injuries caused by the tort of his employee or agent committed within the scope of employment or agency. *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). Pursuant to this theory, "the principal (employer) is liable in addition to the agent

(employee), not by reason of his consent to be liable, but by operation of law." *South Carolina Ins. Co. v. James C. Greene & Co.,* 290 S.C. 171, 348 S.E.2d 617 (Ct. App. 1986). Essentially, the tort of the employee is "imputed [to the employer] by law without any requirement of fault" on the part of the employer. *Wade* at 319, (citing *Greene & Co.).* When the evidence presented supports a "reasonable inference" that an employment relationship exists - the issue should be submitted to the jury. *Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978). Here, Plaintiff has alleged sufficient facts that the allegedly abusive therapist was an employee and/or agent of Defendants MEF, PGD, and Palmetto.

Agency for a franchisor can be established in various ways, most commonly are proof of "actual agency" or "apparent agency." To determine whether an actual agency relationship exists, the test is whether the purported principal has the right to direct and control the conduct of the alleged agent in the performance of his work and in the manner in which the work is to be done. *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E. 2d 424, 426 (1982); *Watkins v. Mobil Oil*, 291 S.C. 62, 65-66, 352 S.E.2d 284, 286 (Ct. App. 1986). The key distinction is whether the principal has the right to direct the "manner or means" of the agent's work, and not simply the result or objective. *Young v. Warr,* 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969). Finally, agency may be "implied or inferred," and further, "may be circumstantially proved by the conduct of the purported agent." *Id.* at 143.

Furthermore, it is the franchisor's right or power to exercise such control, and not the extent to which it actually exercised such power, that is controlling. "The proper test to be applied is not the actual control exercised by the alleged master, but 'whether there exists the *right and authority* to control and direct the particular work or undertaking." *Anderson v. West*, 270 S.C. 184, 187, 241 S.E.2d 551, 553 (1978) (quoting *Hutson v. Herndon*, 243 S.C. 257, 263, 133 S.E.2d 753, 756

(1963)). Therefore, evidence of what the franchisor *could* have required of its franchisee - and not what it *actually* did - determine whether the franchisor had the right or power to control the franchisee's operations. Generally, "questions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship." *Fernander* at 142 (citing *Reid v. Kelly & Play Air, Inc.*, 274 S.C. 171, 174, 262 S.E.2d 24 (1980)).

Plaintiff specifically pleads that MEF controls, operates, and manages some or all of the day-to-day operations of its franchise locations. *See* Plaintiff's Complaint at ¶ 5 ("Massage Envy owns, operates, controls manages and/or does business as Palmetto Wellness Group, LLC and Palmetto Wellness Group, SC, LLC and/or Massage Envy Grand Dunes located at 980 Cipriana Drive, Myrtle Beach, South Carolina"); 19 ("MEF controls the day-to-day operations of all of its franchises, both directly and through their agent regional developers ("RD")"); 20; 25; 57 ("Massage Envy Franchising, LLC controls every aspect of Palmetto Wellness Group, LLC and Palmetto Wellness Group, SC, LLC, its employees and its day-to-day operations").

As pled in the Complaint, PGD's role was as Regional Developer and part of that role included implementing policies like the ones developed by MEF related to sexual assault and misconduct. *See* Plaintiff's Complaint at ¶ 23. Plaintiff alleges that Regional Developers are utilized by MEF to control the day-to-day operations of the franchisee business including by way of inspections done by the Regional Developers, like PGD, to ensure franchisees are following and implementing mandatory policies and procedures promulgated by MEF. *See* Exhibit "A" at ¶¶ 19 – 20.

As for Palmetto, Plaintiff alleged that the Abusive Therapist was employed as massage therapists at Massage Envy Grande Dunes which is owned and operated by Palmetto, during Massage Envy Grande Dunes operating hours, on a Massage Envy Grande Dunes massage table,

during the course of a massage on a Massage Envy Grande Dunes customer. *See* Exhibit B at ¶¶ 44 – 46, 52.

Plaintiff also attaches a copy of a franchise agreement to her Complaint. The franchise agreement requires that the franchisee follow certain "System Standards" which include mandatory policies found in MEF's Operations Manual. The System Standards "regulate certain necessary aspects of the operation and maintenance of your Business" and the Franchise Agreement contains a list of fifteen different operational aspects of the franchisee business that MEF will control through its System Standards. Part of the fifteenth sub paragraph states that MEF will control: "any other aspects of operating and maintaining your Business that we determine to be useful to preserve or enhance the efficient operation, image or goodwill of the Marks and Massage Envy Locations." Cited in Plaintiff's briefing was the Table of Contents of the MEF Operations Manual which contains more than sixty mandatory policies, including numerous policies related to customer safety and daily operations of the franchise business.

In *Fernander*, the South Carolina Supreme Court analyzed whether an agency relationship was established between Burger Chef, Inc., a franchisor, and A & H Foods, a franchisee. *Id.* In reviewing the franchisor-franchisee relationship, the court looked at several factors and found that the franchisor did have control of the franchisee, and thus, may be liable for the actions of the franchisee's employee. The aforementioned factors included: the employee's belief that he worked for the franchisor; the display of the franchisor's distinctive sign/logo; the franchisor's control of the menu and equipment used in its services; and the franchisor's operating policies including management of the employees. *Id*.

The case of *Hahn v. Massage Envy Franchising, LLC*, 2014 WL 5100220 (S.D. Cal. Sept. 25, 2014), is also instructive. In *Hahn*, a class of Massage Envy customers brought suit in reference

to what they claimed to be unconscionable terms in the membership agreement regarding the expiration of accumulated prepaid massages after cancellation of the membership agreement. *Hahn*, 2014 WL 5100220 at *1. At the summary judgement stage MEF made strikingly similar arguments to what they argue here, lack of control. The court rejected this argument, and the trial court found that Massage Envy Franchising, LLC required its franchisees to utilize the allegedly unconscionable membership agreement and cancellation forms that Massage Envy Franchising, LLC designed. *Id.* The court further stated: "In addition, ***Defendant [MEF] exercised wide-reaching control over its franchisees' day-to-day operations beyond what was necessary to protect Defendant's brand and goodwill***. The evidence demonstrates that Defendant originated the business practices at issue, and exercised control to ensure its clinics implemented them as intended." *Id.* at *13 (emphasis added).

Here, Plaintiff has alleged that Defendant MEF exerts sufficient control over the day-to-day operations of the franchisee, that Defendant PGD, as the Regional Developer and agent of Defendant MEF exerts similarly sufficient control, and that Palmetto was the direct employer of the allegedly abusive therapist who allegedly sexually assaulted Plaintiff on the premises during a massage.

2. The Course and Scope of Employment

The Complaint also sufficiently alleges that this sexual assault occurred during the course and scope of the employment of the allegedly abusive therapist such that each Defendant, at the pleadings stage, may be held liable for the therapist's conduct.

Plaintiff pled in her Complaint that this alleged sexual assault was committed during the course and scope of the therapist's employment. *See* Plaintiff's Complaint at ¶¶ 52, 56, 63, 73, 74, 107, and 108. Plaintiff also pled that each of the Defendants ratified the Abusive Therapist's

conduct. *Id.* at ¶¶ 56, 61, 62, and 65. The improper touching, as alleged by Plaintiff, took place at the subject Massage Envy location, during operating hours, on a Massage Envy massage table, during the course of a massage on a Massage Envy customer. *Id.* at ¶¶ 44 – 46, 52. Plaintiff alleges that this type of assault is particularly foreseeable to those in the massage industry and at Massage Envy locations in particular based on alleged past sexual assault allegations and allegations of improper touching made against Massage Envy Franchising. *Id.* at ¶ 9. Plaintiff alleges that Defendant MEF is aware of the past allegations and has created policies and procedures for dealing with massage therapists improperly touching its customers, and advertised same. *Id.* at ¶¶ 13 – 14, 20.

What is considered "within the scope of employment" is determined by implication from the circumstances of the case. *Hamilton v. Miller*, 301 S.C. 45, 389 S.E.2d 652 (1990). If the employee is "doing some act in furtherance of the master (employer's) business, he will be regarded as acting within the scope of his employment." *Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 768-99 (1945). Contrarily, when the employee acts "for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment." *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). "If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended . . . and the master is not liable for his acts during such time." *Lane v. Modern Music, Inc.*, 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964).

Even setting aside whether the actions of the allegedly abusive therapist were within the course and scope of his employment, Plaintiff has also advanced a negligence theory based in premises liability under *Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992)

and the Restatement (Second) of Torts § 317 (1965). Here, as alleged in Plaintiff's Complaint, the alleged assault occurred on premises controlled by each of the Defendants, the allegedly abusive therapist was subject to the control of each of the Defendants, and each of the Defendants (because of the allegations in the Complaint of numerous sexual assaults having occurred or occurring at Massage Envy locations) knew or should have known of the opportunity and necessity of controlling the allegedly abusive therapist.

Plaintiff has alleged sufficient facts to support her allegations that this alleged assault occurred within the course and scope of the therapist's employment; the fact that the conduct alleged could constitute intentional criminal conduct does not by itself remove it from the course and scope of employment. *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 116, 341 S.E.2d 385 (Ct. App. 1986); Murphy v. Jefferson Pilot Communications Co, 364 S.C. 453, 613 S.E2d 808 (Ct. App 2005).

3. Duty and Proximate Cause

To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach. *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000).

Plaintiff pled in her Complaint that Defendants MEF, PGD, and Palmetto were or should have been on notice of the Abusive Therapist's propensities to commit such an assault. *See, e.g.*, Plaintiff's Complaint at ¶¶ 44, 58, 69. Beyond the foreseeability of an assault involving this particular therapist, Plaintiff also pled that Defendants MEF, PGD, and Palmetto were in a special position to know the risk that its massage therapists in general posed to customers because of the

past sexual assault allegations arising at Massage Envy locations. *See, e.g.*, Plaintiff's Complaint at ¶¶ 8 – 16, 25.

Plaintiff pled in the Complaint that a duty existed, including under Restatement (second) of Torts §§ 314c and 315. *See, e.g.*, Plaintiff's Complaint at ¶¶ 77, 86, 111. Restatement (Second) of Torts Sec 314A(4) "One who voluntarily takes the custody of another under circumstances such as to deprive the other of her normal opportunities for protection is under a similar duty to the other."; Section 315 (duty exists to control the conduct of a third person so as to prevent him from causing physical harm to another person when a special relation exists between the actor and the other which gives the other a right to protection).

Plaintiff also specifically pled that the policies and procedures in place, that were dictated and controlled by Defendant MEF, implemented and supervised at least in part by Defendant PGD, and executed by Defendant Palmetto, were themselves negligent and insufficient. Plaintiff alleges that, as a result of these failed policies, massage therapists were not properly screened for employment, not properly trained, and not properly supervised. *See, e.g.*, Plaintiff's Complaint at ¶¶ 20, 25, 92(a) and (f), 97, 99(c) – (e), (g), (l), (m), (s), (t), (v). Plaintiff also specifically pled that the injuries she suffered were proximately caused by the various forms of misconduct outlined in the Complaint on the part of the Defendants and the Defendants' alleged agent (the allegedly abusive therapist). *See, e.g.*, Plaintiff's Complaint at ¶¶ 64, 67, 93, 94, 97, 100.

For these reasons, the Motions of Defendants MEF, PGD, and Palmetto the Motions of Defendants MEF, PGD, and Palmetto as to *Respondeat Superior* and Negligence are denied.[2]

[2] Defendant Palmetto, in the course of their Motion to Dismiss, moved for a more definite statement. The Motion by Palmetto for a More Definite Statement is denied.

C. Negligence Per Se

Defendants MEF, PGD, and Palmetto argue that Plaintiff's claims for Negligence *per se* must be dismissed. As discussed above, each Defendant may be held liable for the conduct of the allegedly abusive therapist under theories of vicarious liability. Further, Plaintiff has alleged wholly distinct theories under Negligence *Per Se* related to alleged similar instances of sexual assaults at Message Envy franchise locations, the alleged conspiracy to conceal the danger of these sexual assaults from Massage Envy consumers, and violations of the South Carolina Unfair Trade practices Act (SCUTPA). *See, e.g.*, Plaintiff's Complaint at ¶ 37. Those allegations are directly pertinent to Plaintiff's claims for negligence and negligence per se. The damages sought by Plaintiff are properly pled.

In *Rayfield v. South Carolina Department of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), the Supreme Court enunciated the test for determining when a duty created by statute will support an action for negligence:

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.
>
> If the plaintiff makes this showing, he has proven the first element of a claim for negligence: viz., that the defendant owes him a duty of care. If he then shows that the defendant violated the statute, he has proven the second element of a negligence cause of action: viz., that the defendant, by act or omission, failed to exercise due care. This constitutes proof of negligence *per se.*

Indisputably, SCUTPA is specifically designed to protect consumers from unfair and deceptive practices, as a consumer of Defendant's products and services, Plaintiff is a member of the class SCUTPA is designed to protect.

Viewed in the light most favorable to Plaintiffs, the Motions of Defendants MEF, PGD, and Palmetto as to Negligence *Per Se* are denied.

D. Reckless Infliction of Emotional Distress and Intentional Infliction of Emotional Distress

South Carolina recognizes that "one's willful, malicious conduct proximately causing another's emotional distress may be actionable" as intentional infliction of emotional distress or the reckless infliction of emotional distress.[3] *Williams v. Lancaster County Sch. Dist.*, 369 S.C. 293, 305, 631 S.E.2d 286 (Ct. App. 2006) citing *Ford v. Hutson*, 276 S.C. 157, 161, 276 S.E.2d 776, 778 (1981). To state a recoverable claim for the tort of intentional infliction of emotional distress, or outrage, the plaintiff must establish that:

1.) The defendant intentionally or recklessly inflicted severe emotional distress, or knew that distress would probably result from his conduct;
2.) The defendant's conduct was so extreme and outrageous that it exceeded all possible bounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community;
3.) The actions of the defendant caused the plaintiff's emotional distress; and
4.) The emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Ford, 276 S.C. 157, 162 (1981).

The definition of "emotional distress" includes "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 359, 650 S.E.2d 68 (2007). Although severe emotional distress is often manifested by "shock, illness, or other bodily harm," such objective symptomatology is not a prerequisite for recovering damages. *Id.* (citing Restatement (Second) of Torts § 46, cmt. k.); *see also Ford v. Hutson*, 276 S.C. 157, 276 S.E. 2d 776 (1981); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 673 (2000); *Brown v. Pearson*, 326 S.C. 409, 483 S.E.2d 477 (1997).

[3] Plaintiff acknowledges that despite being listed as two different causes of action in the Complaint, the "Reckless Infliction of Emotional Distress" and "intentional infliction of emotional distress" are separate terms that describe the same cause of action.

As discussed above, each Defendant may be held liable for the conduct of the allegedly abusive therapist under theories of vicarious liability. Plaintiff alleges she was the victim of a sexual assault committed by the allegedly abusive therapist, causing severe emotional distress. *See* Plaintiff's Complaint at ¶ 4, 44-45, 54, and 149. Plaintiff also alleges that representations were made to her about the safety of the services being offered at Massage Envy locations and the policies in place, like the "zero tolerance policy". Plaintiff alleges that the scope and nature of these sexual assaults were hidden from her and other customers. *See* Plaintiff's Complaint at ¶ 17, 28 – 29, 147, 178 – 79. Plaintiff was also assured by Defendants, according to the Complaint, that she would not be sexually assaulted during the service. *Id.* at ¶ 28(a).

Viewed in the light most favorable to Plaintiffs, the Motions of Defendants MEF, PGD, and Palmetto to dismiss this cause of action are denied.

E. Unfair Trade Practices

The South Carolina Unfair Trade Practices Act ("SCUTPA") provides for an action by a private party "who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful." *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). As defined by SCUTPA, "trade or commerce, includes "the advertising, offering of sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state." *Id. Citing* S.C. Code. Ann § 39-5-10(b) (1985). An unfair or deceptive practice need not be capable of repetition to support a claim for it to support a SCUTPA claim, but capability of

repetition may be used to show an "impact on the public interest." *See Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998).

As alleged in Plaintiff's Complaint, Defendants MEF, PGD, and Palmetto made several false statements to deceive consumers including Plaintiff. *See, e.g.*, Plaintiff's Complaint at ¶ 17. Plaintiff alleges she entered into a Wellness Agreement with MEF prior to obtaining her massage. *See, e.g., id*. at ¶ 28. Within this Wellness Agreement, Plaintiff was guaranteed by MEF that she would not be sexually assaulted. *Id*. Specifically, the Wellness Agreement stated, "Male/female genitalia and women's breasts will not be exposed or massaged at any time." *Id.* Alleged Defendant MEF has a database of prior instances of sexual abuse within the franchise locations and discussed the problem with their franchisees. *Id*. at ¶ 25. Plaintiff further alleges Defendants MEF, PGD, and Palmetto chose to actively hide and conceal this information from Plaintiff. *Id*. at ¶ 37.

Finally, Plaintiff pled that because of the above-mentioned acts, omissions, and practices she suffered actual damages in the form of, *inter alia*, paying for massages where she was sexually assaulted, and is entitled to recover such damages, together with all other appropriate damages, attorneys' fees, and costs of suit pursuant to SCUPTA Stat.§ 39-5-20.; *see, e.g., id.* at ¶ 173-74.

Viewed in the light most favorable to Plaintiffs, the Motions of Defendants MEF, PGD, and Palmetto to dismiss this cause of action are denied.

F. Fraudulent Concealment

Plaintiff alleges that Defendants MEF, PGD, and Palmetto "concealed and/or suppressed material facts concerning the safety of their customers." *See* Plaintiffs Complaint at ¶ 178. Plaintiff alleges that Defendants MEF, PGD, and Palmetto have concealed the extent of those assaults by claiming a "commitment to safety" and "zero tolerance" in order to attract customers. *Id.* at ¶ 38, 41. Further, Plaintiff alleges that Defendants MEF, PGD, and Palmetto made affirmative

misrepresentations to Plaintiff in the form of the "Wellness Agreement." Identical or nearly identical statements were also made in the iPad slides made a part of this record. As pled the representations were:

> a. "Male/female genitalia and women's breasts will not be exposed or massaged at any time."
>
> b. "To the best of the Franchisee's knowledge, only professional massage therapists and estheticians who comply with state, city, and/or local licensing of certification requirements are hired by the Franchisee."
>
> c. "Inappropriate or illegal behavior by clients or staff will not be tolerated in any manner."
>
> *See* Plaintiff's Complaint at ¶ 28.

Under these circumstances, Plaintiff's Claim for Fraudulent Concealment has been properly plead.

Viewed in the light most favorable to Plaintiffs, the Motions of Defendants MEF, PGD, and Palmetto to dismiss this cause of action are denied.

AND IT IS SO ORDERED

_____
The Honorable Kristi F. Curtis
South Carolina Circuit Court Judge

July ___, 2022
Horry, South Carolina

Horry Common Pleas

Case Caption: Jane Doe VS Massage Envy Franchising LLC , defendant, et al

Case Number: 2021CP2601328

Type: Order/Stay

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762