THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No: 2022-000599

Common Pleas Case No: 2022-CP-20-00017

Edith Peoples as Personal Representative of the Estate of Floyd Young.....Respondent,

vs.

Pruit Health-Ridgeway.....Appellant,

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from the circuit court's denial of Defendant/Appellant PruittHealth-Ridgeway, LLC's ("PruittHealth") Motion to Dismiss and/or Stay and Compel Arbitration. On January 16, 2022, Plaintiff/Respondent Edith Peoples, as Personal Representative of the Estate of Floyd Young ("Peoples") initiated the underlying action by filing a Complaint in the Court of Common Pleas for Fairfield County alleging a single count of negligence based on survivorship against PruittHealth, a skilled nursing facility in Ridgeway, South Carolina. (Complaint). On February 8, 2022, Peoples served PruittHealth with her Complaint.

Subsequently, on February 11, 2022, PruittHealth filed a timely Motion to Dismiss and/or Compel Arbitration (Motion). On March 17, 2022, PruittHealth submitted a Memorandum in

Support of their Motion, and Peoples submitted a Memorandum in Opposition (Memorandum in Support of Motion; Memorandum in Opposition to Motion to Compel). On March 31, 2022, Judge Brian M. Gibbons held a hearing on PruittHealth's Motion. (Hearing Transcript).

On April 21, 2022, the circuit court denied PruittHealth's Motion. (Order). On April 28, 2022, PruittHealth timely filed a Motion to Reconsider. (Motion to Reconsider). On May 2, 2022, the circuit court issued a Form 4 denying PruittHeaths's Motion to Reconsider. (Form 4). On May 2, 2022, PruittHealth filed its Notice of Appeal. (Notice of Appeal).

FACTS

In 2012, Judge Sprott, Jr. ruled that Mr. Young was a vulnerable adult and issued a Family Court Order dated January 11, 2012. This Order found that "Mr. Young physically neglected himself" and that "[he] is unable to adequately provide for his own care and protection." Judge Sprott ordered the South Carolina Department of Social Services (DSS) "shall retain legal and physical custody of the vulnerable adult, Floyd Young in order to secure a safe and protective placement." Judge Sprott granted DSS legal and physical custody for the limited purpose of securing a safe and protective placement. The Order did not make any findings regarding Mr. Young's overall mental capacity.

In March of 2012, DSS placed Mr. Young at PruittHealth, a skilled nursing facility in Ridgeway, South Carolina. Mr. Young was placed pursuant to Judge Sprott's order. Upon his admission, an Admission Agreement was signed. DSS employee Jeanette Sanders also signed an Arbitration Agreement on March 2, 2012, which stated:

> [a]ny and all claims or controversies arising out of or in any way relating to this Agreement...including...any acts or omissions in connection with such care of services...any claim based on negligence, any claim resulting from death or injury...shall be submitted for arbitration.

The arbitration agreement waived Mr. Young's Constitutional right to a trial by jury and required any disputes over PruittHealth's care of Mr. Young to be resolved through binding arbitration (Arbitration Agreement). The agreement, was never shown or explained to Mr. Young, his family, or his Power of Attorney, Edith Peoples (Affidavit of Peoples, Cooper). Further, as fully stated in Section IV of this brief, the Arbitration Agreement deprived Mr. Young of numerous rights, including his right to a jury trial, discovery, punitive damages, and full damages.

Mr. Young resided in PruittHealth for over eight years. During his stint, Mr. Young required several trips to the Emergency room for pneumonia, sepsis, a urinary tract infection, pressure ulcers, feeding tube issues, ulcerations in the GI tract, and severe peritonitis from swallowing a latex glove, all of which Peoples claim were a result of actions or inactions by PruittHealth. (Complaint). On March 30, 2020, Mr. Young passed away. Edith Peoples, as Personal Representative of the Estate of Mr. Young, filed a survivorship action against PruittHealth. PruittHealth filed a motion to dismiss and/or stay and compel arbitration pursuant to the Arbitration Agreement.

STANDARD OF REVIEW

"Whether a claim is arbitrable 'is an issue for judicial determination, unless the parties provide otherwise.'" *Scott v. White Oak Manor, Inc.*, 426 S.C. 568, 573, 828, S.E.2d 82, 85 (2019) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553, S.E. 2d 110, 118 (2001)). "[A]

circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports this findings." Id. (quoting *Timmons v. Starkey*, 380 S.C. 590, 595, 671, S.E. 2d 101, 104 (Ct. App. 2008). "Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct.App.2012).

ARGUMENT

I. THE ORDER OF JUDGE SPROTT ONLY GAVE DSS AUTHORITY TO "SECURE A SAFE AND PROTECTIVE PLACEMENT."

A. DSS Only had Authority to Secure A Safe and Protective Placement

In 2012, Judge Sprott, Jr. ruled that Mr. Young was a vulnerable adult and entered a Family Court Order dated January 11, 2012. This Order found that "Mr. Young physically neglected himself" and that "[he] is unable to adequately provide for his own care and protection." Judge Sprott ordered that "[DSS] shall retain legal and physical custody of the vulnerable adult, Floyd Young in order to secure a safe and protective placement." (emphasis added). DSS was only granted legal and physical custody for the limited purpose of securing a safe and protective placement. Their power was limited to that. The Order did not make any findings regarding Mr. Young's overall mental capacity.

PruittHealth argues that the DSS employee had authority to sign the arbitration agreement on behalf of Mr. Young, based on Judge Sprott's Order. The Order put Mr. Young in the "legal and physical" custody of DSS only to "secure a safe and protective placement." Admitting Mr. Young

to the care of PruittHealth was in DSS' authority, but waiving his Constitutional Rights to a jury trial was not. Signing the arbitration agreement on behalf of Mr. Young was an overstep in DSS' limited authority as granted by Judge Sprott's Order.

Even if Judge Sprott had given DSS broader authority such as the ability to make health care decisions or generally handle finances, this still would not have given DSS authority to waive a jury trial. "[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson v. Pruitt Corporation* 416 S.C. 43, 55, 784 S.E. 2d 679 (Ct. App. 2016). See *Dickerson v. Longoria*, 414 Md. 419, 995 A.2d 721, 736-37 (2010). In the present case, DSS' authority is far more limited than in *Thompson* and thus does not extend to the right to waive a jury trial.

The Arbitration Agreement itself separates placement and arbitration and states that signing the arbitration agreement is not a preconditions to admission or receiving services. "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services ...." (Arbitration Agreement p. 5.) Mr. Young could have been placed in this facility without DSS signing the separate Arbitration Agreement. This would have been within the constraints of Judge Sprott's order.

B. The Order of Judge Sprott was only for six (6) months.

Judge Sprott's order was limited both in scope and time frame. The order states that the case will be reviewed in 6 months and was only to secure a safe and protective placement. The six month limitation bolsters the argument that Sprott did not give DSS extensive authority and that their authority was well-defined and limited to this placement.

C. Young's Admission and the Arbitration Contract were under two separate agreements.

The admission and agreement to care for Young was arguably within the scope of Judge Sprott's order. The Arbitration agreement was not. These are two separate agreements, one arguably within DSS' expressly granted authority, one not within that authority. As in *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 453 (2014), The Arbitration Agreement only concerns dispute resolution, and not other matters.

In *Coleman*, the South Carolina Supreme Court held an arbitration agreement signed in that case was separate from the agreement to admit the patient to a health care facility and "concerned neither health care nor payment, but instead provided an optional method for dispute resolution between [the facility] and [the patient or her surrogate] should issues arise in the future." 407 S.C. at 353-54, 755 S.E.2d at 454. Here the separate arbitration agreement does not concern the placement of the patient, but rather provides "an optional method for dispute resolution between [the facility] and [the patient or [his] surrogate] should issues arise in the future." As noted above the Arbitration Agreement itself separates placement and arbitration and states that signing the arbitration agreement is not a preconditions to admission or receiving services. "The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services . . ." (Arbitration Agreement p. 5.) Mr. Young could have been placed and admitted in this facility without DSS signing the separate Arbitration Agreement.

II. DSS DID NOT HAVE STATUTORY AUTHORITY TO WAIVE A JURY TRIAL.

A. DSS' power is limited by Statute

The relevant portions of the South Carolina statutes are as follows:

'Protective Services' means those services whose objective is to protect a vulnerable adult from harm caused by the vulnerable adult or another. These services include, but are not limited to, evaluating the need for protective services, securing and coordinating existing services, arranging for living quarters, obtaining financial benefits to which a vulnerable adult is entitled, and securing medical services, supplies, and legal services.

S.C. Code Ann. § 43-35-10(9) (1976).

In addition to all other powers and duties that an investigative entity is given in this article, the investigative entity may:

(1) have access to facilities for the purpose of conducting investigations, as otherwise permitted by law;
(2) request and receive written statements, documents, exhibits, and other items pertinent to an investigation including, but not limited to, hospital records of a vulnerable adult which the hospital is authorized to release upon written request of the investigative entity without obtaining patient authorization;
(3) issue, through its director, administrative subpoenas for the purpose of gathering information and documents;
(4) institute proceedings in a court of competent jurisdiction to seek relief necessary to carry out the provisions of this chapter;
(5) require all persons, including family members of a vulnerable adult and facility staff members, to cooperate with the investigative entity in carrying out its duties under this chapter including, but not limited to, conducting investigations and providing protective services;
(6) require all officials, agencies, departments, and political subdivisions of the State to assist and cooperate within their jurisdictional power with the court and the investigative entity in furthering the purposes of this chapter;
(7) conduct studies and compile date regarding abuse, neglect and exploitation;
(8) issues reports and recommendations.

S.C. Code Ann. § 43-35-20(1976).

The relevant portions of the regulations are as follows: "The agency shall provide protective services for adults who have been determined to be in need of such services in order to remedy or prevent situations of abuse, neglect or exploitation." S.C. Code Ann. Regs. 114-3310 (A) (2011). Further, it states:

> [s]ervices provided may include, but not limited to, the following:
> (1) Counseling with the client or other involved persons in order to remedy or prevent abusive, neglectful, or exploitive circumstances.
> (2) Protective placement of the adult client upon a voluntary agreement or by Order of the Family Court. (Emphasis added)
> (3) Health related services to treat physical or mental illness. The caseworker shall not sign any consents for surgery unless the surgery is specifically authorized by the appropriate court.
> (4) Homemaker services to assist the client with daily living activities in the home.
> (5) Emergency caretaker services to provide responsible adult supervision on a temporary basis for an adult in nedd of protection.
> (6) Referral to Probate Court, or the appropriate agency, such as Social Security Administration or Veteran's Administration, in order to assist in the establishment of a representative or protective payee for protective services client.
> (7) Facilitation in the provision of any other Title XX service as determined by the needs of the client.
>
> S.C. Code Ann. Regs. 114-3340 (2011).

A Court must look at the plain and ordinary meaning in determining the intent of the legislature. Using this cardinal rule, it is clear that the legislation did not intend to give DSS the authority to sign binding arbitration agreements on behalf of vulnerable adults. Nothing in these statutes or regulations gives DSS the authority to sign any contracts on behalf of vulnerable adults in its custody, including arbitration agreements. The statutes generally direct investigations by DSS and focus on preventing harm to the vulnerable adult. An arbitration agreement does nothing to prevent harm to a vulnerable adult, but controls the method in which an issue between two parties

is litigated. Additionally, the regulations do not give authority for DSS to provide services beyond dealing with healthcare issues. Under these regulations DSS does not even have authority to consent to a surgery on behalf of a vulnerable adult without court approval. Though both the relevant statutes and regulations include a "not limited to" provision, the trial court was correct in interpreting legislative intent such that DSS does not have the authority to enter into arbitration agreement on behalf of a vulnerable adult.. Further, allowing DSS to bind a vulnerable adult to an arbitration agreement would be a significant overstep given the limited services that are specifically authorized by the legislation. Further, the arbitration agreement is expressly not a precondition of admission to PruittHealth. Thus, statutes giving authority to DSS for securing living quarters does not include to the authority to sign arbitration agreements.

B. Judge Sprott's Order should be construed such that it does not violate the statutes.

Judge Sprott's order is limited to placement. It should be construed as such so that it conforms with the powers granted to DSS by the statutes. It should be construed such that DSS does not exceed its own mission.

III. JUDGE SPROTT'S ORDER MAKES NO FINDING OF INCOMPETENCE.

A. There was no conservatorship or guardianship established.

As noted previously, Mr. Young was only found to be a vulnerable adult who couldn't provide for his own care and protection. This was not an action to establish a conservatorship or a guardianship. Unlike an action for a conservatorship or a guardianship, the Order did not make any findings regarding Mr. Young's mental capacity. He was not ruled incapable of making contracts. He was not ruled incompetent.

B. Facts indicate Young was not incompetent.

The Final Order from the Adult Protective Services hearing does not indicate whether or not Mr. Young was capable of making meaningful decisions. The Order only finds that he is a vulnerable adult which includes adults which are incapable due to a physical or mental condition of adequately providing for his or her own care or protection. S.C. Code 43-35-10 (11) (1976). Medical records after his admission to PruittHealth indicate he was capable of making meaningful decisions.. In records from Providence Hospital from January, 2013, around ten (10) months after the Arbitration Agreement was signed, Floyd Young was declared to be oriented times three. He signed his own Acknowledgment of Receipt and answered questions concerning whether or not he had a Living Will or Healthcare Power of Attorney. (Medical Records from Sister Charity Providence Hospital). Floyd Young had contractual capacity after the date of this agreement, yet he was not afforded the opportunity to make decisions on his own behalf.

IV. AS AN ADDITIONAL SUSTAINING GROUND, THE ARBITRATION AGREEMENT WAS UNCONSCIONABLE

Even assuming DSS had proper authority to enter Mr. Young into this arbitration agreement, the arbitration agreement is unconscionable and should not be enforced. The arbitration agreement was a stand-alone agreement, not needed for admission to the facility. The Federal Arbitration Act, Title 9, U.S. Code Section 2, provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

South Carolina law defines unconscionability as "the absence of meaning ful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). The bargaining process cannot be fair when one party has no meaningful choice concerning an arbitration provision. *Gladden v. Boykin,* 402 S.C. 140, 148, 739 S.E.2d 882,886 (2013). Adhesion contracts (take it or leave it, non-negotiable terms) are not unconscionable per se, but our courts tend to look upon them with "considerable skepticism" because they give rise to "considerable doubt that any true agreement existed to submit disputes to arbitration." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790, S.E. 2d 1, 4 (2016) (quoting Simpson, 373 S.C. at 26-27, 644 S.E. 2d at 669-70) (citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E. 2d 360, 365 (2001)). In *Smith v. D.R. Horton, Inc.,* the SC Supreme Court found that the terms of the residential purchase agreement terms were "clearly one-sided and oppressive." *Smith v. D.R. Horton, Inc.,* 417 S.C. at 50, 790 S.E. 2d at 4-5. In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See *Hooters of Am., Inc. V. Phillips,* 173 F.3d 933, 938 (4th Cir. 1999). It is under this general rubric that the courts determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms. *Simpson v. MSA of Myrtle Beach, Inc.,* 644 S.E, 2d 663, 373, S.C. 14 (S.C. 2007)

A. Floyd Young Had No Choice.

Floyd Young was not given the choice or the opportunity to make a determination about his constitutional rights to a Jury Trial. In *Simpson v. MSA of Myrtle Beach, Inc.,* 644 S.E. 2d 663, 373

S.C. 14 (S.C. 2007), The South Carolina Supreme Court stated:

> "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. See *Carlson v. General Motors Corp.*, 883 F. 2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice", id at 295, 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.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 17A AMJUR.2D Contracts § 279(2004)).

Floyd Young was not presented with the Agreement. He did not have it read to him or explained to him as required by the Agreement itself. (Affidavit of Peoples). He lacked any meaningful choice as DSS took it upon themselves to sign this extra contract over and above any Resident Agreement.

B. The Arbitration Agreement Violates Public Policy

Courts will not enforce a contract that is against public policy, statutory law or the constitution. *Carolina Care Plan,* 361 S.C. at 555, 606 S.E. 2d at 758.

1. <u>The Arbitration Agreement provides for no punitive damages except under certain circumstances.</u>

In this case, like the case in *Carolina Care Plan,* the Arbitration Agreement requires Plaintiff to "jump" through additional hoops in seeking an award of punitive damages. The Arbitration Agreement provides:

> "...provided that the arbitrator shall not make an award of punitive damages unless that award is supported by a reasoned decision that addresses every question of law and fact that a court would be required to address, and further provided that the arbitrator shall not award duplicative damages in respect of a single injury."

(Arbitration Agreement II. Decision.)

The provision disallows punitive damages except by special findings which run contrary to state law. S.C. Code Section 15-32-520 (a) (1976) provides that when punitive damages are sought the action has to be bifurcated. The Arbitration Agreement takes away that right from the Plaintiff. The jury can consider punitive damages when compensatory or nominal damages have been awarded. S.C. Code Section 15-32-520 c (1976). The Plaintiff generally has to prove by clear and convincing evidence that the Defendant's conduct was willful, wanton or reckless. S.C. Code Section 15-32-520(D)(1976). The Arbitration Agreement calls for a "reasoned decision" taking into account every question of law or fact. The proof is to a higher level and is tantamount to beyond a reasonable doubt. Furthermore, by taking away Plaintiff's right to participate in full discovery as set forth below, it essentially assures that there will be no award of punitive damages.

2. <u>The Arbitration Agreement limits Plaintiff's right to participate in full discovery.</u>

The Arbitration Agreement limits Plaintiff's right to seek full discovery except upon approval of the Arbitrator. The Arbitration Agreement provides:

> "The arbitrator may issue subpoena for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths.... On application of a party and for use as evidence, the arbitrator may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrator of a witness who cannot be subpoenaed or is unable to attend the hearing."
>
> (Arbitration Agreement F. Witnesses, Subpoenas and Depositions)

(a) Subpoenas

Rule 45 (D)(3), SCRCP, provides: "The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the

court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice."

The Arbitration Agreement takes away the attorney's right to issue a subpoena for discovery or for trial.

(b) Scope of Discovery

Rule 26 (b)(1), SCRCP, provides for the scope of discovery. It states:

> **(b)Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> > **(1)In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, inclufing the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Arbitration Agreement takes away the Plaintiff's right to seek discovery as allowed by the Rules on any matter relevant to the subject matter involving the pending action.

(c) Depositions for Discovery

Rule 30(a)(1), SCRCP provides:

> **(a)(1) When depositions May Be Taken.** After commencement of an action any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of summons and complaint upon any defendant, except that

> leave is not required if a defendant has served a notice of taking depositions or otherwise sought discovery as provided in these Rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

The Plaintiff pursuant to this Arbitration Agreement has lost the right to take depositions for discovery. These provisions are hidden within the agreement and waive Plaintiff's right not only to a jury trial but the right to adequately prepare his case or seek punitive damages. These provisions run contrary to the statute allowing punitive damages and are adverse to our rules of civil procedure. The Agreement does not allow the following:

a. Discovery depositions.

b. Written discovery

c. Attorneys cannot issue a subpoena.

d. A deposition can only be taken with permission and for use at the arbitration hearing.

Therefore, the Arbitration Agreement should be declared void in violation of public policy and the statutes of South Carolina. See *Simpson v. MSA of Myrtle Beach, Inc.* 644 S.E. 2d 663, 373, S.C. 14 (S.C. 2007)

3. <u>The Arbitration Agreement limits recovery and has a provision against double or treble damages.</u>

The Agreement in this case has a provision against double or treble damages.. The paragraph states,

"...further provided that the arbitrator shall not award duplicative damages in respect of a single injury." While the Plaintiff does not have a wage claim or Unfair Trade Practices Claim where he

is seeking treble damages, the punitive damage statute provides:

> "(A) Except as provide in subsections (B) and (c),an award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars."

S.C. Code Section 15-32-530(A)(1976).

When taken literally the Arbitration Agreement seems to limit the calculation of punitive damages in that it duplicates the compensatory damages award. This is likewise oppressive and one-sided and not geared toward achieving an unbiased decision by a neutral decision maker. When taken in conjunction with Mr. Young's lack of meaningful choice, the Arbitration Agreement is unenforceable.

4. The Arbitration waives Plaintiff's right to have South Carolina law apply.

The Agreement provision states, This Agreement shall be governed by and enforced under federal law, specifically the Federal Arbitration Act... The parties specifically exclude the application of South Carolina's Uniform Arbitration Act." Plaintiff lost his right to have South Carolina law be applicable to the contract.

C. Arbitration Agreement was not signed by Floyd Young, read by Floyd Young or explained to Floyd Young.

As briefed previously, Judge Sprott did not find that that Floyd Young was not competent to sign. The Agreement was not presented to him for consideration, read or explained to him as required by the Agreement itself or to have a meeting of the minds as required by South Carolina Contract law. (Affidavit of Peoples, Cooper)

D. Arbitration Agreement was not sent to or approved by Mr. Young's duly appointed GAL and was not sent to his attorney.

There is no evidence that the Arbitration Agreement was even considered by Mr. Young's Guardian Ad Litem or attorney, shown to them, discussed with them or that they were given notice that significant rights belonging to Mr. Young were being waived. (Affidavit of Peoples, Cooper) As such, the Arbitration Agreement is unconscionable and there was no authority for DSS to enter into this agreement.

E. Mr. Young was not afforded the right to consult legal counsel as allowed by the Agreement.

Section IV of the Arbitration Agreement, entitled Patient/Resident's Understanding of Agreement, provides:

> The Patient/Resident or the Patient/Resident's Representative, has read this Agreement in its entirety, and understand that language in which it is written. If this Agreement has been read on behalf of the Patient/Resident by the Patient/Resident's Representative, the Patient/Resident's Representative has explained to the Patient/Resident, to the extent of the Patient/Resident's capacity to understand such explanation, the nature of this Agreement and its essential terms. The Patient/Resident understands that:
>
> A. The Patient/Resident has the right to seek legal counsel concerning this Agreement.
>
> B. The signing of this Agreement is not a precondition to admission, expedited admission, or the furnishing of services to the Patient/Resident by the Healthcare Center.

The allowing Plaintiff to seek legal counsel was a condition precedent to the establishment of this contractual agreement.

F. DSS transferred custody to his duly appointed guardian who never consented.

DSS apparently closed their file on this matter without notifying Floyd Young, his sister and Power of Attorney. Once DSS was not longer involved or retained custody of Floyd Young, the Arbitration Agreement was never presented to Mr. Young or his family for consideration or

ratification. (Affidvit of Peoples, Cooper)

G. The Arbitration Agreement includes every controversy forever and survives the termination of any resident agreement..

Section C of paragraph III of the Arbitration Agreement states: "The provisions of this Agreement shall remain in effect after any other agreements between the parties have been terminated." The Arbitration Agreement purports to outlast any such agreement and be in affect forever. This provision exceeds the bounds of the Federal Arbitration Act. The FAA is limited to controversies that arise out of a contract ot transaction. Any attempt to load every conceivable dispute that the parties may ever have into the FAA regardless of whether the dispute has any relationship to the underlying transaction exceeds the limits of conscionability.

In *Doe v. TCSC, LLC,* 430 S.C. 602, 846 S.E. 2d 874 (S.C. App 2020), the Court of Appeals concluded that language of an agreement which stated "or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract)" was unconscionable. An unconscionable contract is not a valid contract. "Courts have discretion though to decide whether a contract is so infected with unconscionability that it nust be scrapped entirely, or to sever the offending terms so the remainder may survive. Once again, we are guided by the parties' intent." *Columbia Architectural Grp., Inc. V. Barker,* 274 S.C. 639, 641, 266 S.E. 2d 428, 429 (1980) *Doe v. TCSC, LLC,* 430 S.C. 602, 846 S.E. 2d 874 (S.C. App. 2020)

V. THE FEDERAL ARBITRATION ACT DOES NOT APPLY

The Supreme Court of South Carolina has held that arbitration agreements in conjunction with nursing home residency contracts are governed by the Federal Arbitration Act. *Dean v. Heritage*

Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E. 2d 727 (2014). "Because arbitration under the FAA rests entirely upon consent, it is always up to the court to determine if the parties have an agreement to arbitrate." *Simmons v. Benson Hyundai, LLC,* No. 2019-000344, 2022 WL 791174, at *2 (S.C. Ct. App. Mar. 16, 2022), *reh'g denied* (Mar.25, 2022) (internal citations omitted). "Arbitration may not be compelled unless the court is satisfied 'the making of the agreement for arbitration... is not in issue.'" *Id.* (citing 9 U.S.C. § 4). Whether an agreement to arbitrate was formed is a question for the court. *Id.* While PruittHealth argues that the FAA governs the arbitration agreement and, therefore, arbitration is mandatory, the FAA is not an issue in this case. Unlike the *Dean* case, this issue is not whether interstate commerce is involved. Instead, the issue here is whether or not the agreement to arbitrate was sufficiently entered into. This decision boils down to whether or not DSS had authority to bind Mr. Young to the arbitration agreement.

CONCLUSION

The decision of the trial judge should be affirmed. DSS did not have authority under Judge Sprott's Order to enter into this arbitration agreement. DSS did not have authority under South Carolina law. The agreement itself is unconscionable and should not be enforced.

Respectfully submitted,

November 16, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No: 2022-000599

Common Pleas Case No: 2022-CP-20-00017

Edith Peoples as Personal Representative of the Estate of Floyd Young.....Respondent,

vs.

Pruit Health-Ridgeway.....Appellant,

PROOF OF SERVICE

I certify that on November 16, 2022, I served the Designation of Matter to be Included in the Record on Appeal , the Certificate of Counsel and the Initial Brief of Respondent on all counsel of record for Appellant as listed below:

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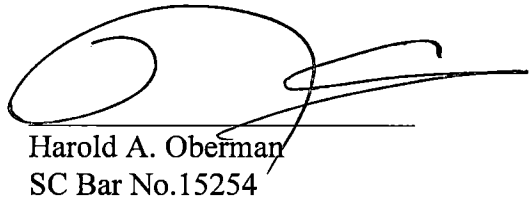

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November 16, 2022

Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

VIA EMAIL & U.S. MAIL

RE: Edith Peoples v. Pruitt Health - Ridgeway
Appellate Case No. 2022-000599

Dear Ms. Kitchings:

I enclose the original and one (1) copy of the Respondent's Initial Brief and Designation of Matter To Be Included in the Record on Appeal, along with the Proofs of Service and Certificate of Counsel, with regard to the above-captioned matter.

Upon filing, please return a clocked in copy of each to our office in the enclosed envelope.

With warmest personal regards, I remain

Yours very truly,

Harold A. Oberman

HAO/cbc
ENCLOSURE

cc: Joshua S. Whitley, Esquire
Allie A. Maples, Esquire
Creighton B. Coleman, Esquire
Bradley Jordan, Esquire

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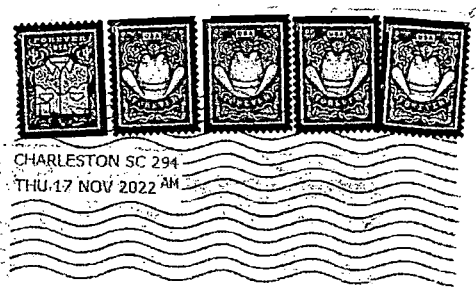

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