STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON THAYER W. ARREDONDO, as Personal Representative of the Estate of HUBERT WHALEY, deceased. Plaintiff, v. SNH SE ASHLEY RIVER TENANT, LLC; FVE MANAGERS, INC.; FIVE STAR QUALITY CARE, INC.; SNH SE TENANT TRS, INC.; SENIOR HOUSING PROPERTIES TRUST; SNH TRS, INC.; CANDY D. CURE; JOHN DOE; JANE DOE; RICHARD ROE CORPORATION; and MARY DOE CORPORATION. Defendants.	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT C.A. 2016-CP-10-5319 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION**

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

FACTUAL BACKGROUND

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

At the time of his admission, Hubert Whaley did not sign the alleged Arbitration Agreement presently at issue. Nothing on the face of the document suggested that Mr. Whaley lacked the capacity to execute the document. Regardless, Mr. Whaley's daughter, Thayer Arredondo, was presented the agreement for signature. (T. Arredondo Aff. ¶ 3). Ms. Arredondo was not given the opportunity to discuss the document with her father at the time it was signed, nor was she asked to seek her father's permission to sign it. (T. Arredondo Aff. ¶ 3). Further, no one from the facility reviewed the agreement that Ms. Arredondo had signed with her father after his arrival to Ashley River Plantation. (T. Arredondo Aff. ¶ 2). When Ms. Arredondo had questions about the agreement, she was simply told that it must be signed to ensure her father's admission to the facility. (T. Arredondo Aff. ¶ 2). Despite her questions, no facility representative ever explained that she was being asked to give up her father's constitutional right to a jury trial if a claim for negligence was brought against the facility, that she had the right to consult with an attorney prior to execution, or of the right to withdraw consent to the agreement. (T. Arredondo Aff. ¶ 2). The Defendants allege that Ms. Arredondo executed the Arbitration Agreement as Mr. Whaley's "Authorized Representative" and filed their Motion to Dismiss and Compel Arbitration on November 11, 2016. Plaintiff contends the alleged agreement should not be enforced (1) because Ms. Arredondo lacked the requisite authority to bind Mr. Whaley to arbitration; and (2) because the Arbitration Agreement is unconscionable.

ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where a valid arbitration agreement exists. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014). Additionally, arbitration agreements

are subject to the same defenses applicable to all other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

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

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

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

Ms. Arredondo also lacked apparent authority to execute the purported arbitration agreement. The existence of apparent authority is determined **by the principal's manifestation** to third parties that the agent has certain authority. *See, Charleston, S.C. Registry v. Young,*

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

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

Unconscionability is defined "as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Herron v. Century BMW,* 387 S.C. 525, 532, 693 S.E.2d 394, 398 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007)). In determining unconscionability, the court considers whether a contract is absent of meaningful choice and contains oppressive, one sided terms. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining power in the contract at issue." *Id.*

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

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

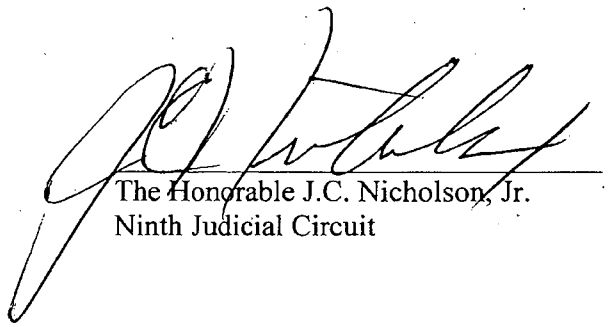
In contrast, the Defendants are sophisticated business and healthcare companies, who presented Ms. Arredondo with a form contract prepared solely by them, with terms heavily weighted to their favor and with no opportunity for meaningful review, discussion, or negotiation of terms. Ms. Arredondo, on the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

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

CONCLUSION

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

AND IT IS SO ORDERED.



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

April 7, 2017
Charleston, South Carolina