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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas**

J. Mark Hayes, II, Circuit Court Judge

**Case No. 2022-CP-42-00454
Appellate Case No. 2022-001210**

**Ed Medford, in his individual capacity, and on behalf of those similarly
situated, Respondent,**

v.

**Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a
Pacifica Senior Living Skylyn, Etros, LLC; and Matthew Arledge, Appellants.**

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court correctly rule that Pacifica failed to manifest the intention to be bound to submit its claims to arbitration?
- II. Did the circuit court correctly rule that Pacifica's failure to make a mutual promise constituted a lack of consideration?

STATEMENT OF THE CASE

This is an appeal from Judge Hayes' Order Denying Defendants' Motion To Dismiss Pursuant To Rules 12(b)(1) And 12(b)(6), SCRCPP, Or In The Alternative To Stay And Compel Arbitration.

Ed Medford, in his individual capacity and on behalf of others similarly situated, the Respondent, (Resident), filed the Complaint in the action on February 8, 2022. Resident's Complaint alleged negligent supervision, breach of contract accompanied by a fraudulent act, and related causes of action based on the living conditions at the Pacifica Senior Living Skylyn facility in Spartanburg, South Carolina. The Resident, former president of the Residents' Council at Pacifica Senior Living Skylyn, alleges that conditions at the facility have deteriorated to the point that bedbug and rodent infestations are routine, apartments do not have heat, the food is not properly prepared, and the elevators are often out of service.

On April 11, 2022, Appellants filed Defendants' Motion To Dismiss Pursuant To Rules 12(b)(1) And 12(b)(6), SCRCPP, Or In The Alternative To Stay And Compel Arbitration (Motion).

Both Appellants and Resident filed Memoranda of Law in support of their positions.

A hearing on Appellants' Motion was heard, in the virtual courtroom, before the Honorable Mark Hayes on June 29, 2022.

At the hearing, Appellants argued that the arbitration agreement embedded in the residence contract that Resident signed was valid, and that the court should order the parties to

arbitrate. Resident argued that the arbitration agreement was invalid as a matter of law because of a lack of mutual assent and a failure of consideration.

On July 28, 2022, Judge Hayes issued his Order denying Appellants' Motion.

Appellants filed their Notice of Appeal on August 29, 2022.

STANDARD OF REVIEW

Arbitrability determinations are subject to *de novo* review. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). Questions of law are decided without any deference to the court below. Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 535, 725 S.E.2d 693, 695 (2012).

ARGUMENT

The circuit court correctly denied Pacifica's motion to compel arbitration for two separate and independent reasons. First, the court found that Pacifica failed to manifest its mutual intent to be bound to arbitrate. The arbitration agreement was invalid for that reason. Second, the court also found that Pacifica failed to provide consideration and that the arbitration agreement was invalid for that reason as well. This Court should affirm.

- I. THE CIRCUIT COURT CORRECTLY FOUND THAT THE ARBITRATION AGREEMENT DID NOT OBJECTIVELY MANIFEST A MUTUAL INTENT TO BE BOUND.**
 - A. The Circuit Court Properly Applied South Carolina Contract Law To Conclude That Pacifica Did Not Objectively Manifest Its Assent To Be Bound To Arbitrate Its Own Claims.**

Pacifica’s first argument is that the circuit court erred in holding that only one party manifested the intention to arbitrate its claims. This argument is directly contradicted by the words Pacifica itself used to create its arbitration agreement.

The first sentence of Pacifica’s arbitration agreement reads:

11. ARBITRATION

By signing below, *you agree that any and all claims and disputes* arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, *shall be resolved by submission to neutral, binding arbitration* in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

(R. p. 39) (emphasis added).

When Pacifica drafted this arbitration agreement, it decided which parties it would require to “agree” to submit claims to arbitration. The drafter of the contract selects words for the contract for the purpose of objectively manifesting its intention for the contract. Pacifica designated the pronoun “you” to designate only the Resident. Thus, only one party to the contract was required to agree to submit its claims to binding arbitration.

It is undisputed that this first sentence of the arbitration agreement is the key sentence. At the hearing in circuit court, Pacifica conceded that this sentence contains the key language of the arbitration agreement. Pacifica stated:

And then toward the bottom of the agreement, actually, the second to last page – third to last page is the arbitration agreement clause itself. Section H-11, it’s titled arbitration. I’m not going to read the whole provision [i.e., the whole arbitration agreement] to Your Honor, *but the first sentence is the key language.*

(R. p. 90, lines 16-21) (explanatory brackets added) (emphasis added). Then, four lines later in the transcript, Pacifica acknowledges that it is the first sentence that contains the “operative language.” Pacifica’s counsel argued, “And I left out a few words there, but *that’s the operative language that we are asserting is valid under the FAA and requires this matter to be arbitrated.*” (R. p. 91, lines 1-4) (emphasis added).

But in the Brief of Appellants, Pacifica’s basic criticism of the circuit court’s decision is that the court erroneously focused its analysis on the first sentence. This is the same sentence Pacific admitted in court that contains the “operative language” which “requires this matter to be arbitrated”.

Contrary to the arguments in its Brief, Pacifica’s admission that the first sentence is the “operative” sentence reveals that, if the arbitration agreement is in fact valid, the words manifesting Pacifica’s assent to be bound to arbitration must be found in the first sentence.

The question of whether the first sentence manifests Pacifica’s mutual intent to be bound must be decided by applying South Carolina contract law: “we now proceed to the first step: deciding if the parties have an agreement to arbitrate, which we decide applying South Carolina contract law.” Simmons v. Benson Hyundai, LLC, 438 S.C. 1, 7 881 S.E.2d 646 (Ct. App. 2022) (citation omitted).

South Carolina contract law required the court to interpret the first sentence by the objective manifestation of the parties’ assent at the time the contract was made. “Interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract was made. It does not depend on the subjective, after the fact meaning one party assigns to it.” Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E.2d 470, 472 (Ct. App. 1984) (citation omitted).

The drafter chose the word “you” to designate solely one party. The drafter then deliberately chose only that party to “agree” to submit its claims to arbitration. The objective manifestation of the words Pacifica chose for the “operative language” of its agreement plainly shows that only one party agreed to arbitrate its claims.

As the circuit court stated in its Order, “Construing this contract according to the designations of the parties chosen by Defendant Pacifica, there is no objective manifestation of both parties’ mutual intent to be bound.” (R. p. 5). Bannon holds that the contract must be interpreted by the objective manifestation of the parties’ assent at the time the contract was made, not by any subjective after the fact interpretations, as Pacifica attempts here.

The circuit court correctly applied South Carolina contract law to this arbitration agreement when it found, “There is no objective manifestation in this arbitration agreement of a mutual intent to be bound.” (R. p. 8).

B. Pacifica’s “Whole Scope” Argument Is Contradicted By Its Admission That The First Sentence Contains The “Operative Language” Required To Make The Agreement Valid.

Pacifica admitted in court that the first sentence of the arbitration agreement contains the “operative language” of the agreement. If Pacifica’s “operative language” did not objectively manifest its intent to be bound, no agreement was formed. On page two of its Brief, Pacifica describes the sentences that follow the key first sentence as “parameters for arbitration” (Br. of App. p. 2). According to Pacifica these sentences set out the “parameters”, or terms, for a contract. These terms, or “parameters”, include provisions for allocating the costs of arbitration and choosing an arbitrator. South Carolina law characterizes terms like these as ancillary logistical terms, not required in an arbitration contract. “[Plaintiff] cites no authority for the proposition that discovery rules, cost allocations, or arbitration initiation procedures are material

terms that an arbitration agreement must explicitly designate. Rather, these terms are ‘ancillary logistical’ ones not required within an arbitration agreement.” York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013). “Ancillary logistical” terms or “parameters” cannot themselves form the mutual intent to be bound if Pacifica did not objectively manifest its intent to be bound to arbitrate its claims in the first sentence. In the “ancillary logistical” terms that Pacifica characterizes as the “whole scope” of the agreement, neither party is manifesting its assent to give up its right to trial and submit to arbitration. Any significance due the sentences that follow first sentence is wholly dependent on **both parties** objectively manifesting the agreement to submit their respective claims to arbitration in the first sentence. However many “ancillary logistical” claims are amassed together in the “whole scope”, by themselves they cannot form the objective manifestation of assent required of both parties.

This argument does not provide any grounds for error in the circuit court’s finding that Pacifica failed to objectively manifest its asset to submit its claims to arbitration.

C. Pacifica States That O’Neil Rejected The Resident’s Argument. In Fact, Subsequent Decisions Have Rejected O’Neil’s Policy Based Reasoning.

O’Neil v. Hilton Head Hospital, 115 F.3d 272 (1997) was decided in 1997, over 25 years ago. It was decided in an era in which the legal cliché, “the strong federal policy in favor of arbitration”, *Id.* at 273, served to resolve all manner of contractual infirmities and flawed analysis in favor of arbitration.

In 1997, the O’Neil court was firmly committed to this cliché. It both began and ended its opinion by declaring it adherence to this policy.

At the beginning of its opinion, in the second paragraph, it stated, “The FAA embodies a strong federal policy in favor of arbitration, and, accordingly, there is a strong presumption in favor of the validity of arbitration agreements.”, *Id.* at 273.

Then, in the last paragraph of its opinion, O’Neil reiterates its adherence to the policy of favoring arbitration. “The Supreme Court has repeatedly emphasized that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Id.* at 276 (citation omitted).

O’Neil, a Fourth Circuit decision applying South Carolina law, has never been binding on South Carolina courts’ analysis of state contract law. Now, since Palmetto Constr. Grp., LLC v. Restoration Specialists, 432 S.C. 633, 856 S.E.2d 150 (2021), O’Neil’s analytical framework favoring arbitration has been rejected by our supreme court. *See Palmetto Constr. Grp., LLC*, 432 S.C. at 639, 856 S.E.2d at 153 (“There is, however, no public policy – federal or state – ‘favoring’ arbitration.”).

South Carolina courts have now recovered and restored the proper meaning to the cliché that the law “favors arbitration”. In Simmons v. Benson Hyundai, 438 S.C. at 4, 881 S.E.2d at 647 (citation omitted), the court said:

Our supreme court has recently returned the legal cliché that the law “favors” arbitration to its proper context, reminding that “statements that the law ‘favors’ arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy – federal or state – ‘favoring’ arbitration.”

Now that our courts have restored the proper context to construing arbitration contracts, the cliché’s longstanding power to absolve contractual flaws vanishes.

With the power of the cliché removed, the flaws in O’Neil’s reasoning are more apparent.

In the first instance, O’Neil’s reasoning departs from the law by considering a party’s subsequent conduct in interpreting the arbitration contract. *See* McCord v. Laurens Cty. Health Care Sys., 429 S.C. 286, 294, 838 S.E.2d 220, 224 (Ct. App. 2020) (stating that where the contract language is “unambiguous, the parties’ intentions must be determined from the contract language itself.”).

Instead of confining its analysis to the plain and clear language of the O’Neil arbitration contract, the O’Neil court focuses on the subsequent conduct of a party. “Not only has the hospital consistently argued that it is bound by the arbitration agreement, *it has, by virtue of this suit, shown its commitment to the arbitration process.*” O’Neil, 115 F.3d at 275 (emphasis added). Despite the unambiguous language of the arbitration contract it is construing, the O’Neil court departs from the law by considering the party’s subsequent conduct, judging its intent in the contract by the fact it brought a lawsuit after the formation of the contract. Rather than confining its analysis to the language of the contract, the court focuses on subsequent conduct.

In the second instance, the O’Neil court applied bilateral contract law, which by definition requires at least two reciprocal promises, to a unilateral, one promise employment contract. There is no mutual promise in the arbitration contract O’Neil construed. *See* O’Neil, 115 F.3d at 273. Ms. O’Neil formed a valid arbitration contract by accepting a job which required arbitration as a condition for acceptance. “*A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance.* A bilateral contract, on the other hand, exists when both parties exchange mutual promises.” S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (citations omitted) (emphasis added). While O’Neil’s arbitration contract was a valid unilateral contract, there were no mutual promises in it. The O’Neil court simply applied the

now disavowed strong presumption in favor of arbitration and declared that mutual promises existed in a unilateral contract. It provides no support for Pacifica's argument.

Neither Pacifica's "whole scope" argument, nor the argument it derived from O'Neil's reasoning, support Pacifica's contention that the circuit court erred when it found "There is no objective manifestation in this arbitration agreement of a mutual intent to be bound." (R. p. 8).

II. THE CIRCUIT COURT CORRECTLY FOUND THAT PACIFICA DID NOT MAKE THE MUTUAL PROMISE REQUIRED TO MAKE THE ARBITRATION AGREEMENT VALID.

A. Where The Consideration Is Provided By Mutual Promises, Each Party Must Promise Something Of Value To The Other.

Pacifica explicitly acknowledges that in this arbitration agreement, the necessary consideration must be provided by mutual promises. "Contrary to the circuit court's conclusion, *the arbitration clause demonstrates a mutual intent to be bound, and contains concurrent, mutual promises sufficient to provide consideration for a valid and enforceable contract.*" (Br. of App. p. 3) (emphasis added).

When the consideration for the contract is provided by mutual promises, both parties must make a promise, and they must promise each other something of value. "In the law of contracts, mutuality, both in definition and application, is largely synonymous with consideration. *It demands that there be obligations assumed by both parties, that there be a promise for a promise.*" Humble Oil & Refining Co. v. DeLoache, 297 F. Supp. 647, 658 (1969) (internal citation omitted) (emphasis added). If the consideration is provided by mutual promises, both parties must be obligated by their respective promises to provide something of value. Moreover, it stands to reason that where mutual promises for something of value constitute consideration, those mutual promises must be objectively manifested in the words of

the arbitration agreement. *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 7, 881 S.E.2d 656, 649 (Ct. App. 2022). The question then becomes, what particular thing of value did Pacifica objectively promise to the Resident in exchange for his promise to give up his right to trial and submit his claims to arbitration?

B. The Plain And Ordinary Meaning Of The Language Of The Arbitration Agreement Shows That Pacifica Did Not Make A Promise To Submit Its Claims To Arbitration.

The first sentence of the arbitration agreement is the key sentence because it contains the language that is indispensable to bind a party to a contract based on mutual promises. Pacifica acknowledges that this sentence contains the language operative for forming the arbitration contract.

The first sentence states in full:

11. ARBITRATION

By signing below, you agree that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity, including, without limitation, personal injury or wrongful death claims, shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act; except that any claim or dispute involving unlawful detainer proceedings (eviction) or any claims that can be brought in small claims court shall not be subject to arbitration unless both parties agree to arbitrate such proceedings.

(R. p. 39). This first sentence is the only sentence in the agreement in which a party agrees to be bound to arbitrate its claims against the other party, and in which a party promises something of value – agreeing to arbitrate and forgoing the right to trial – to the other party. In this sentence, the Resident is the only party that agreed to arbitrate its claims. Pacifica can point to no sentence in the entire Agreement where it agreed to submit its claims to arbitration and forgo the right to trial.

The plain language of this sentence, chosen by Pacifica as the drafter, says that only “you” agree. “You” is the word chosen by Pacifica to designate one party – the Resident. In construing a contract, “We look first to the language of the contract. If that language is clear and unambiguous, ‘the language alone, understood in its plain, ordinary, and popular sense, determines the contract’s force and effect.’” McCord v. Laurens Cty. Health Care Sys., 429 S.C. at 292, 838 S.E.2d at 223.

The plain and ordinary meaning of the operative language of the arbitration agreement shows that Pacifica did not make a mutual promise to arbitrate its claims. As the circuit court correctly found, “Defendant Pacifica has not provided any consideration to the other party to the contract.” (R. p. 9). Pacifica describes the ancillary logistical terms which follow the first sentence as necessary to interpreting the “whole scope” of the arbitration agreement. In its Brief, Pacifica itself describes these terms as “parameters for arbitration”. (Br. of App. p. 2). These terms are simply ancillary terms in which neither party is promising to arbitrate its claims or forgo its right to trial. Any significance due to the sentences following the first sentence is wholly dependent on a valid arbitration agreement being formed in the first sentence.

C. Pacifica’s Arguments Reveal That It Recognizes That The Agreement It Drafted Does Not Contain The Mutual Promises Necessary For Consideration.

In order for Pacifica’s argument to succeed, it must show that it made a mutual promise in the first sentence of the arbitration agreement.

Since the key to forming a valid arbitration agreement is for both parties to “agree” to arbitrate, determining which parties “agree” to arbitrate is crucial to deciding whether the arbitration agreement is valid.

In the actual arbitration agreement at issue here, only one party, the Resident (designated by “you”), agrees to arbitrate its claims. The fact that only “you” has agreed to arbitrate is demonstrated in the first portion of the first sentence:

By signing below, **you agree** that any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity.... (R. p. 39) (boldface added).

This quotation from the actual arbitration agreement shows that when Pacifica drafted this agreement, only one party, “you”, agreed to arbitrate. The words “you agree” are the most crucial words in the entire arbitration agreement.

Yet in its Brief, when Pacifica refers to this portion of the first sentence, Pacifica omits the words “...you agree that...”. Here is that same portion of the first sentence as Pacifica refers to it on page two of its Brief:

“The scope of the arbitration clause is broad – **the parties agreed to binding arbitration of** ‘any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community, whether made against the Community or any other individual or entity....’ (*Id.*)” (Br. Of App. p. 2) (boldface added).

Pacifica omits the words from the actual arbitration agreement that immediately precede its quotation. Instead of those words, Pacifica replaces them with words indicating a mutual promise, “...the parties agreed to binding arbitration of ...”.

The words Pacifica omitted show that only one party made a promise. Pacifica omitted those words (which it put in the actual agreement) and replaced them with different words which do indicate that Pacifica made a mutual promise.

The words that Pacifica inserted before its quotation from the first sentence have a different meaning from the words it put in the original arbitration agreement. In order for

Pacifica to argue for the meaning it needs to make the arbitration agreement valid, it has to make its argument with different words that have a different meaning from the words it put in the actual document.

Pacifica employs this same type of argument on page seven of its Brief: “The arbitration clause in this case contained **mutual promises to submit to binding arbitration** ‘any and all claims and disputes arising from or related to’ the Agreement. (R. p. 39).” (Br. of App. p. 7). (boldface added).

The words Pacifica inserted before its quotation from the first sentence seem to show that mutual promises were made in the first sentence. But the words Pacifica inserted are not in the actual first sentence. The words from the actual first sentence, which Pacifica has omitted, show that only one party made a promise. Pacifica replaces the omitted words with words which are needed to form mutual promises.

Pacifica’s argument requires it to omit the words it used to make the original agreement, and instead insert words with the meaning it needs to make the agreement valid.

But the arbitration agreement must be construed according to the objective manifestation of the meaning at the time the contract was made. Bannon v. Knauss, 282 S.C. 589, 593, 320 S.E2d 470, 472 (Ct. App. 1984) (“Interpretation of the contract is governed by the objective manifestation of the parties’ assent at the time the contract was made.”).

Pacifica’s own arguments show that it recognizes that the actual arbitration agreement did not contain mutual promises.

III. IN BOLDFACED TYPE, PACIFICA OBJECTIVELY MANIFESTS THAT ONLY ONE PARTY AGREES TO ARBITRATE AND GIVE UP ITS RIGHT TO TRIAL.

The entire purpose of an arbitration agreement is for a party to relinquish its right to trial in favor of resolving disputes through arbitration. A valid arbitration agreement, based on mutual promises to arbitrate, requires “both parties” to give up their right to trial and accept the use of arbitration. As the drafter of the arbitration agreement, Pacifica had a specific intention in mind when it chose the wording for the agreement. The words Pacifica chose for creating the agreement objectively manifest Pacifica’s intention for creating the agreement. To ensure that it objectively manifested its specific intention for creating the arbitration agreement, Pacifica put the purpose for creating it in boldfaced type: **“You give up your constitutional right to have any such dispute decided in a court of law before a jury, and instead accept the use of arbitration.”** (R. p. 39). Pacifica intended specifically what it wrote in boldfaced type. When Pacifica wrote this arbitration agreement, it intended for just one party to give up its right to trial, and Pacifica named that party in boldfaced type: **“You”**. The circuit court correctly held that this arbitration agreement does not objectively manifest Pacifica’s intent to be bound, nor did Pacifica provide consideration for the Resident’s promise to arbitrate.

CONCLUSION

The circuit court found that Pacifica’s arbitration agreement failed to form a valid arbitration contract. The Court should affirm the circuit court.

Respectfully submitted,

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Ed Medford, in his individual capacity, and on behalf of those similarly situated, Respondent,

v.

Deepak Israni; R Cucamonga, LLC; PAC R Cucamonga LP; Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC; and Matthew Arledge, Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the *Final Brief of Respondent* complies with Rule 211(b), SCACR. Pursuant to Rule 211(b)(2), SCACR, Respondent corrected four typographical errors.

On page four of Respondent’s Final Brief, in the first sentence of the second paragraph, the word “Initial”, which had preceded the words “Brief of Appellants”, has been deleted.

On the Table of Contents page, a section heading and a subsection heading have been corrected to accurately represent those headings in the body of the Brief.

Under Argument I.C., the phrase, “The Law Has Rejected O’Neil’s Policy Based Reasoning” has been deleted and replaced with the phrase actually in the body of the Brief at that point: “Subsequent Decisions Have Rejected O’Neil’s Policy Based Reasoning.”

The section heading for Section II on the Table of Contents page read, “Pacifica Concedes That Mutual Promises Are Required To Provide The Necessary Consideration For The Arbitration Contract. But The Plain Ordinary Meaning Of Its Arbitration Agreement Proves That Pacifica Did Not Promise To Arbitrate Its Claims.” That section heading has been corrected to read as it does in the body of the Brief.

The references to Rules 12(b)(1) and 12(b)(6), SCRCPP, in Judge Hayes’ Order were inadvertently left out of the Table of Authorities in Respondent’s Initial Brief. That oversight has been corrected in the Table of Authorities for Respondent’s Final Brief.

June 28, 2023

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