

**RECEIVED**

**Mar 15 2024**

**SC Court of Appeals**

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

---

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

**J. William P. Keesley, Circuit Court Judge**

---

**Case No. 2021-CP-42-02473  
Appellate Case No. 2023-001343**

---

**Eugene W. Villanova and Ruth L. Villanova, by and through Karen Lynn Ward, their attorney in fact, and on behalf of those similarly situated,.....Respondents,**

**v.**

**Pacifica Skylyn, LLC, d/b/a Pacifica Senior Living Skylyn, Etros, LLC, and Matthew Arledge.....Appellants.**

---

**INITIAL BRIEF OF RESPONDENTS**

---

**KNIE & SHEALY  
Patrick E. Knie (S.C. Bar No. 3564)  
P.O. Box 5159  
250 Magnolia Street (29306)  
Spartanburg, S.C. 29304  
Telephone: (864) 582-5118  
Telefax: (864) 585-1615  
[pat@knieshealy.com](mailto:pat@knieshealy.com)**

**MITCH SLADE LAW OFFICE, P.A.  
Mitch Slade (S.C. Bar No. 5146)  
P.O. Box 1007  
Spartanburg, S.C. 29304  
Telephone: (864) 582-4212  
[mitch@mitchsladelaw.com](mailto:mitch@mitchsladelaw.com)**

*Attorneys for Respondents*

**TABLE OF CONTENTS**

<b>TABLE OF CONTENTS.....</b>	<b>i</b>
<b>TABLE OF AUTHORITIES.....</b>	<b>ii</b>
<b>STATEMENT OF ISSUES ON APPEAL.....</b>	<b>1</b>
<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>STANDARD OF REVIEW.....</b>	<b>2</b>
<b>ARGUMENT.....</b>	<b>3</b>
<b>I.    THE CIRCUIT COURT CORRECTLY DENIED THE MOTION OF           PACIFICA TO COMPEL ARBITRATION.....</b>	<b>3</b>
<b>II.   THE DEFENDANTS HAVE BEEN UNABLE TO MAKE THE           NECESSARY SHOWING THAT PLAINTIFFS WAIVED THEIR           RIGHT TO A JURY TRIAL.....</b>	<b>4</b>
<b>CONCLUSION.....</b>	<b>6</b>

## TABLE OF AUTHORITIES

### CASES

<i>Allegro, Inc. v. Scully</i> , 418 S.C. 24, 791 S.E.2d 140 (2016).....	4
<i>Ellis v. Taylor</i> , 316 S.C. 245, 449 S.E.2d 487 (1984).....	4
<i>Federal Arbitration Act (FAA)</i> , 9 USC 1, <i>et.seq.</i> ( 2018) .....	6
<i>Grant v. Magnolia Manor-Greenwood, Inc.</i> , 383 S.C. 125, 678 S.E.2d 435 (2009).....	3
<i>Johnson v. Heritage Healthcare Estill, LLC</i> , 416 S.C. 508, 788 S.E.2d 216 (2016).....	2
<i>Player v. Chandler</i> , 299 S.C. 101, 382 S.E.2d 891 (1989).....	3
<i>Prima Paint Corp. v. Flood &amp; Conklin Mfg. CA.</i> , 388 U.S. 395 (1967).....	6
<i>Reed v. Boykin</i> , 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984).....	3, 4
<i>Simmons v. Benson Hyundai, LLC</i> , 438 S.C. 1, 881 S.E.2d 646 (Ct. App. 2022).....	4, 6
<i>Thornton v. Trident Med. Ctr., L.L.C.</i> , 357 S.C. 91, 592 S.E.2d 50 (Ct.App. 2003).....	2, 3
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).....	6

### RULES

Rule 12(b)(1), SCRCP.....	2
Rule 12(b)(6), SCRCP.....	2
Rule 59(e), SCRCP.....	2

## STATEMENT OF ISSUES ON APPEAL

- I. Whether the circuit court correctly denied Pacifica’s Motion to Compel Plaintiffs’ claims to arbitrate where Pacifica could not produce the complete arbitration agreement executed by Plaintiffs’ attorney-in-fact, Karen Ward.

## STATEMENT OF THE CASE

This appeal arises from a putative class action relating to air conditioning outages at Pacifica Senior Living Skylyn (“Pacifica”). (*See* Pl.’s Compl.).

The Plaintiffs, who were independent living residents of Pacifica, brought this action through their attorney-in-fact, Karen Ward, on behalf of themselves and a putative class of other residents. The chief complaint is that there was a complete air conditioning outage beginning in July of 2021 which lasted sixty (60) consecutive days caused by Pacifica’s failure to properly maintain the facility. (*Id.*). As a result, temperatures routinely exceeded one hundred (100) degrees at Pacifica.

In December of 2019, Ms. Ward executed Pacifica’s Residence and Services Agreement on behalf of the Plaintiffs. (*See* executed Residence and Services Agreement, Exhibit A to Mem. in Supp. of Mot. to Compel Arbitration.). The Agreement intended to outline the terms and conditions governing Plaintiffs’ residence at Pacifica, including an arbitration agreement. (*Id.*). The arbitration agreement signed by Ms. Ward omitted much of the key language of the Agreement including, but not limited to, the following:

**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.**

Pacifica moved to compel Plaintiffs’ claims to arbitration pursuant to a purported

arbitration agreement which did not include this essential language necessary for a valid arbitration agreement. (*See* Pacifica’s Mot. to Compel Arbitration). Pacifica attempted to demonstrate what should have been in the arbitration agreement but what in fact was omitted. On April 1, 2022, Pacifica filed a Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCPP, or in the alternative, to Stay and Compel Arbitration. (*See* Pacifica’s Mot. to Compel Arbitration).

Following the hearing, the circuit court denied the Motion to Compel Arbitration on July 13, 2022. (*See* Judge Keesley Or. Denying Mot. to Stay and/or Compel Arbitration, July 13, 2022). In pertinent part, Judge Keesley’s Order states as follows:

The ability to avail oneself of access to the courts to resolve disputes is a fundamental constitutional right, and the court finds that the defendants have not made the necessary showing that this right was waived. Since the defendants are unable to produce a copy of an executed contract containing **the full arbitration agreement** and have no evidence that plaintiffs are responsible in any way for the full documents being unavailable, the motion is respectfully denied.

Pacifica filed a timely motion to reconsider pursuant to Rule 59(e), SCRCPP. The circuit court denied the motion to reconsider reiterating that a complete copy of the agreement had not been produced. (*See* Judge Keesley Or. Denying Mot. to Reconsider, July 24, 2023). This appeal followed.

#### **STANDARD OF REVIEW**

A trial court’s determination concerning arbitrability is subject to *de novo* review. *See, Johnson v. Heritage Healthcare Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016).

Nevertheless a trial court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App. 2003).

## ARGUMENT

### **I. The circuit court correctly denied the Motion of Pacifica to Compel Arbitration.**

The arbitration agreement contained within the Residence and Services Agreement executed by Ms. Ward did not include critical language including exactly what rights the executing party would be giving up including, but not limited to the following:

**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.**

The missing arbitration agreement is purportedly controlled by the FAA which requires that an arbitration clause is separate from the contract in which it is imbedded and the issue of its validity is distinct from its substantive validity of the contract as a whole. Since a separate contract does not exist within the body of the Residence Agreement but simply some references to an arbitration agreement, there is in fact no agreement to arbitrate in the contract at issue in this case.

South Carolina law requires that in order to have a valid and enforceable contract, there must be a meeting of minds between the parties with regard to all of the essential and material terms of the agreement. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009), citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

The parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Vague expressions or indefiniteness

and uncertainty as to any of the essential terms of the agreement have been held to prevent the creation of an enforceable contract. *Reed v. Boykin*, 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984). Here, the matter of waiving Plaintiff's right to a jury trial is worse than indefinite or vague, it is completely absent from the contract. Without showing that the full terms of an arbitration agreement and jury trial waiver were in the executed contract, Pacifica cannot prove an agreement to arbitrate existed. *See Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 6, 881 S.E. 2d 646, 648 (Ct. App. 2022) ("Our first step, then, is to decide whether [the parties] formed an agreement to arbitrate. If we conclude they did not, the first step would also be the last because the FAA cannot make parties arbitrate when they have not agreed to do so.").

**II. The Defendants have been unable to make the necessary showing that Plaintiffs waived their right to a jury trial.**

Finally, an agreement that omits material terms may be determined to be unenforceable for indefiniteness. A contract leaving material terms open for future agreement is void for indefiniteness. *Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1984).

Defendant bears the burden for proving both the arbitration clause contains all material provisions and that it describes them in definite terms. *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016). Defendants argue that they are entitled to introduce parol evidence by way of the Affidavit testimony of Debra Kimbrell who was the business office director of Pacifica. (*See* Affidavit of Debra Kimbrell, Exhibit B, Pacifica's Mem. in Supp. of Mot. to Compel Arbitration.). In her Affidavit, Ms. Kimbrell admits that after a diligent search she was unable to locate a copy of the Residence and Services Agreement for the Plaintiffs which contained the language necessary to form a valid arbitration agreement. (*See*, Aff. of D.

Kimbrell at p. 1). In her Affidavit, Ms. Kimbrell further states that she investigated the Residence and Services Agreement which were used during the time frame that the Plaintiffs would have signed the Agreement and a copy of an exemplar of that agreement was attached to her Affidavit. (*See*, Aff. of D. Kimbrell at p. 2). Nothing in Ms. Kimbrell's Affidavit in any way establishes that the complete arbitration agreement was part of the document signed by Karen Ward on behalf of the Plaintiffs, and she acknowledges that a page containing a portion of the arbitration agreement is omitted from the document signed by Ms. Ward. (*See*, Aff. of D. Kimbrell at p. 2). The portion which was omitted reads as follows:

## 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 of 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. If someone other than the resident signs this arbitration clause, he/she understands and agrees that he/she is agreeing to arbitrate on behalf of the resident and on behalf of him/herself as an individual. **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.** The arbitration shall be conducted in Spartanburg, South Carolina by a mutually agreed upon single neutral arbitrator. In reaching a decision, the arbitrator shall prepare a written decision that includes findings of fact, the reasons

underlying the decision, and conclusions of law.  
The parties agree not to disclose the existence,  
content, or results of the arbitration without the  
prior written consent of the parties, unless  
disclosure is

From reading the omitted portion, it is clear that the Plaintiffs were never advised that they were giving up their constitutional right to having the dispute decided in a court of law before a jury. The omitted portion also includes other important facts to establish an arbitration agreement that were never before Ms. Ward when she signed the Residence and Services Agreement.

There is no parol evidence in this case. Karen Ward was never presented with the language set forth above, and therefore, it is a misnomer to claim that such language is in fact parol evidence.

The Defendants also claim the policy of South Carolina is to favor arbitration in other disputes citing a 2001 decision in that regard. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Later South Carolina cases have found just the opposite. The *Simmons*' court in a March 2022 opinion followed the language of *Prima Paint* in stating:

The Federal Arbitration Act (FAA), 9 USC 1, *et.seq.* ( 2018) commands that arbitration agreements be treated the same as all other contracts - no more, no less. *Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 4, 881 S.E.2d 646 (Ct. App. 2022). *See also, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 404, n. 12. (1967).

In the present case, however, there is no complete arbitration agreement, and no explanation that there was an expectation that the Plaintiffs would be waiving their constitutional right to a jury trial. Under these circumstances where there is no contract to arbitrate, the lower

court correctly denied the motion to compel arbitration.

**CONCLUSION**

For the foregoing reasons, Plaintiffs request this Court to affirm the circuit court and remand this case to circuit court.

Respectfully submitted,

KNIE & SHEALY

*/s/ Patrick E. Knie*

---

Patrick E. Knie  
Attorney for Plaintiffs  
S.C. Bar No. 3564  
P.O. Box 5159  
250 Magnolia Street  
Spartanburg, S.C. 29304  
Telephone No. (864) 582-5118  
Telefax No. (864) 585-1615  
[pknie@knielaw.com](mailto:pknie@knielaw.com)

MITCH SLADE LAW OFFICE, P.A.  
Mitch Slade (S.C. Bar No. 5146)  
P.O. Box 1007  
Spartanburg, S.C. 29304  
Telephone: (864) 582-4212  
[mitch@mitchsladelaw.com](mailto:mitch@mitchsladelaw.com)

*Attorneys for Respondents*

March 14, 2024