THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. William A. McKinnon, Circuit Court Judge

Case No. 2023-CP-42-04147
Appellate Case No. 2024-000468

Lorraine Voros, by and through her Attorney-in-Fact, John Voros,.....Respondent,

v.

Pacifica Skylyn, LLC,.....Appellant.

INITIAL 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 McKinnon's Order Denying the Defendant's Motion to Dismiss pursuant to Rules 12(B)(1) and 12(B)(6), SCRCP, or in the Alternative to Stay and Compel Arbitration.

Lorraine Voros, the Respondent (Resident), by and through her Attorney-in-Fact, filed the Complaint in this action on October 26, 2023. Resident's Complaint alleged Negligence, Neglect of a Vulnerable Adult, and related causes of action against the Appellant, Pacifica Skylyn, LLC, and its facility in Spartanburg, South Carolina.

On November 29, 2023, Appellant filed Defendant's Motion to Dismiss Pursuant To Rules 12(B)(1) and 12(B)(6), SCRCP, or in the Alternative to Stay and Compel Arbitration (Motion).

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

A hearing on Appellant's Motion was heard, in the virtual courtroom, before the Honorable William A. McKinnon on January 30, 2024.

At the hearing, Appellant 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 was invalid as a matter of law because of a lack of mutual assent and a failure of consideration.

On February 5, 2024, Judge McKinnon issued his Order denying the Appellant's Motion.

Appellant then filed its Motion to Reconsider on February 15, 2024, and Judge McKinnon issued his Order on February 20, 2024 denying Appellant's Motion to Reconsider.

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 had failed to manifest its mutual intent to be bound to arbitrate. The arbitration agreement was invalid for that reason. The court also found that Pacifica failed to provide consideration and that the arbitration 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:

> **II. 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 agreed to arbitrate such proceedings.

(Residence and Services Agreement, Ex. A to Motion to Dismiss or in the Alternative to Stay and Compel Arbitration at XI., P. at p. 18 (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 the Resident and the Resident alone. 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 it's really kind of the first couple of sentences of

the arbitration agreement." (Transcript of Motion Hearing, Jan. 20, 2024, p. 6, ll. 9-11).

But in the Initial 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 Pacifica admitted in court that contains the operative language.

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 which states the first step in deciding if the parties have an agreement to arbitrate, requires the application of contract law. Simmons v. Benson Hyundai, LLC, 438 S.C. 1, 7 , 881 S.E.2d 646 (Ct. App. 2022).

South Carolina contract law requires 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).

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, " This court finds nothing in the arbitration agreement to indicate the Defendant Pacifica intended to be bound by the arbitration agreement. In the event that Defendant Pacifica did intend to be bound by the arbitration agreement, Defendant Pacifica could have easily used the words 'the parties agree'. It is noteworthy that Defendant Pacifica was the author of the arbitration agreement and thus any ambiguity in the agreement should be held against Defendant Pacifica as its author." (J. McKinnon Or. Denying Mot. to Stay and/or Compel Arbitration, February 5, 2024, p. 3). 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. Bannon v. Knauss, *Id*. at 593.

The circuit court correctly applied South Carolina contract law to this arbitration agreement when it found, "After consideration of the arguments of counsel and their memorandums, this Court finds and concludes that the arbitration agreement found within the Residence Agreement fails to form a valid and binding contract." (J. McKinnon Or. Denying Mot. to Stay and/or Compel Arbitration, February 5, 2024, p. 4).

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 points out 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 emphasizes the language in all capitalized letters that "THIS AGREEMENT IS SUBJECT TO ARBITRATION" (p. 2). It was intended by Pacifica that the Respondent only be bound. Appellant's brief tries to use "miscellaneous" provisions contained within the arbitration agreement to buffer its argument. South Carolina law characterizes terms like these as ancillary logistical terms, not required in an arbitration contract. Appellant 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 assent 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 cliche′, "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 cliche′. It both began and ended its opinion by declaring its 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 of favoring

arbitration.'" *Id*. At 276.

South Carolina courts have now recovered and restored the proper meaning to the cliche′ that the law "favors arbitration." In Simmons v. Benson Hyundai, *supra* at 4, the court said:

> Our supreme court has recently returned the legal cliche′ 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 cliche′s longstanding power to absolve contractual flaws vanishes.

With the power of the cliche′ 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 F3d 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 promissor and the other party accepts, not by mutual promise, but by actual performance.'"* Southern Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). A bilateral contract, on the other hand, exists when both parties exchange mutual promises.'" *Id*. 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.

O'Neil's analysis is premised on a now disavowed public policy strongly presuming the validity of arbitration agreements. Starting from that premise, O'Neil goes on to misapply established law. It provides no support for Pacifica's argument.

Neither Pacifica's "whole scope" argument, nor the argument derived from O'Neil's reasoning support Pacifica's contention that the circuit court erred when it found, "After consideration of the arguments of counsel and their memorandums, this Court finds and concludes that the arbitration agreement found within the Residence Agreement fails to form a valid and binding contract." (J. McKinnon Or. Denying Mot. to Stay and/or Compel Arbitration,

February 5, 2024, p. 4).

II. 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.

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*." (Initial Brief of Appellant, p. 5) (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 contract, 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) (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, *supra* at 7. The question then becomes, what particular thing of value did Pacifica objectively promise to the Resident in exchange for her promise to give up her right to trial and submit her 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 Claim 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:

> **II. 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 agreed to arbitrate such proceedings.

(Residence and Services Agreement, Ex. A to Motion to Dismiss or in the Alternative to Stay and Compel Arbitration (Section XI., P. at p. 18). 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 her

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., *supra* at 294.

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, "This court finds there is a lack in consideration flowing from Defendant Pacifica to the Plaintiff and therefore the arbitration agreement is invalid for that reason alone." (J. McKinnon, Or. Denying Mot. to Stay and/or Compel Arbitration, February 5, 2024, p. 3). Pacifica describes the ancillary logistical terms which follow the first sentence as necessary to interpreting the "whole scope" of the arbitration agreement. (Initial Brief of Appellant, pp. 7-8). 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 her 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... (Residence and Services Agreement, Ex. A to Motion to Dismiss or in the Alternative to Stay and Compel Arbitration, Section X1. P. at p. 18) (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.

Pacifica states the following on Page 7 of its Brief: "Here, the mutual intent to be bound is clear from the whole scope and effect of the language used in the arbitration clause."

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, *supra* at 593. ("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 BOLDFACE TYPED, PACIFICA OBJECTIVELY MANIFESTS THAT ONLY ONE PARTY AGREES TO ARBITRATE AND GIVES 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.**" ((Residence and Services Agreement, Ex. A to Motion to Dismiss or in the Alternative to Stay and Compel Arbitration , Section XI., P. at p. 18). 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.

As additional evidence that only one party (the respondent) was intended to be bound, the Respondent was the only person or entity that signed the arbitration agreement. (Section XI., P. at p. 19), however both the Respondent and Appellant signed the "Residence and Care Agreement. (Section XI., P. at p. 20).

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,

KNIE & SHEALY

/s/ Patrick E. Knie

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