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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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 similary situated, ...Respondents,

v.

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

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's Counsel certifies the Petition for Rehearing in this case was finally ruled on by the Court of Appeals by Order dated November 21, 2024.

INTRODUCTION

The Petitioner asks this Court to correct errors of law in the COA's decision affirming the denial of Petitioner's Motion to Compel Arbitration pursuant to Rule 242(b)(3), SCACR. The COA's decision in this case failed to consider the uncontroverted evidence of the language of the applicable arbitration provision. The unchallenged evidence in this case demonstrates that Petitioner and Respondent agreed to a valid, enforceable arbitration provision. This Court should grant Certiorari to correct the errors of law in the Court of Appeals' decision.

QUESTION PRESENTED

1. Whether the Court of Appeals erred and departed from longstanding principles of contract interpretation when it ignored the uncontroverted evidence of the full text of the arbitration provision?

STATEMENT OF THE CASE

This appeal arises from a putative class action related to air conditioning outages at Pacifica Senior Living Skylyn ("Pacifica" or "the Facility"). (App. 42). Respondents Eugene and Ruth Villanova ("Respondents") resided in independent living apartments at the Facility and brought this action through their attorney-in-fact, Karen Ward, on behalf of themselves and a putative class of other residents. The chief allegation is that air conditioning outages in July of 2021 were caused by Pacifica's failure to properly maintain the facility. (App. 46-47).

In December 2019, Ms. Ward executed Pacifica's standard Residence and Services Agreement on behalf of Respondents ("the Residence and Services Agreement" or "the Agreement"), and Respondents moved into Pacifica. (App. 68-93). The Agreement outlines the

terms and conditions governing Respondents' residence at Pacifica, including an arbitration provision. (*Id.*). In connection with this litigation, Pacifica searched for and located a copy of the Agreement executed by Ms. Ward on behalf of Respondents. (*Id.*). The Agreement includes the following provision above paragraph twelve:

> required by court order. Each party shall bear its own costs and fees in connection with the arbitration, unless otherwise provided by law. You may withdraw your agreement to arbitrate within thirty (30) days after signing this Agreement by giving written notice of your withdrawal to the Community. After termination of the Agreement, this arbitration clause shall remain in effect for the resolution of all claims and disputes that are unresolved as of that date. In the event that any part of this arbitration clause is determined to be unenforceable, the remaining portions of the clause shall remain valid and shall be enforced by the parties. The parties shall select an arbitrator in accordance with the Federal Arbitration Act. If the Federal Arbitration Act does not permit arbitration in accordance with this clause, then the matter shall be arbitrated in accordance with State law.
>
> **By signing below, you warrant this Arbitration Agreement has been explained to you, that you understand its significance, that you voluntarily agree to be bound by it**, and that you understand that agreeing to arbitration is not a condition of admission to the Community.

(App. 72) (emphasis added). Ms. Ward's signature immediately followed. (*Id.*). The Agreement submitted by Petitioner in support of its motion to compel arbitration is missing the page immediately preceding the above arbitration provision.

Petitioner moved to compel Respondents' claims to arbitration pursuant to the arbitration provision. (App. 57-58). Although Petitioner did not locate a complete copy of the Agreement, it submitted an affidavit from Debra Kimbrell, the Business Office Director for Pacifica, testifying to the language of the full arbitration provision included in all of Pacifica's Residence and Services Agreements at the time Respondents moved into the Facility. (App. 92-93). As more fully explained in Ms. Kimbrell's affidavit, the Agreement is missing the page preceding Ms. Ward's

signature, which is labeled subparagraph eleven and titled "**Arbitration**". (App. 68). The arbitration provision established by affidavit testimony provides for 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, including, without limitation, personal injury or wrongful death claims." (App. 131-132).

On April 1, 2022, Petitioner filed a Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), SCRCP, or in the alternative, to Stay and Compel Arbitration. (App. 57-58). Following a hearing, the circuit court denied the Motion to Compel Arbitration on July 13, 2022. (App. 31-33). Respondents did not dispute that Ms. Ward signed the Agreement containing the arbitration provision; instead, they asserted that Petitioner's failure to produce a full copy of the arbitration provision contained in the Agreement precluded arbitration in this case. (App. 153-155). The Circuit Court concluded that, because Petitioner did not "produce a copy of an executed contract containing the full arbitration agreement," Petitioner could not make the necessary showing that Respondent had agreed to arbitration. (App. 32).

Petitioner sought reconsideration of the Circuit Court's Order and asked the Circuit Court to clarify the basis for its decision. Specifically, Petitioner asked the Circuit Court to clarify if its Order concluded that a party cannot prove the terms of a contract by an objective method, or if the Circuit Court found the evidence proffered by Petitioner insufficient to do so. (App. 179-181). The Circuit Court denied the motion for reconsideration without clarifying the basis of its decision.

Petitioner timely noticed an appeal, arguing that the Circuit Court erred in disregarding the unchallenged evidence of the Agreement's arbitration provision. (App. 5-14). Respondents again did not challenge the substance of Ms. Kimbrell's affidavit. The Court of Appeals affirmed the Circuit Court's decision and held that Petitioner did not meet its burden of proof to establish the

terms of the Agreement. Petitioner now asks this Court to grant Certiorari to enforce the arbitration provision proven by unchallenged affidavit testimony.

ARGUMENT

1. This Court should grant Certiorari to enforce the language of the arbitration provision established by unchallenged affidavit testimony.

The clear language of the Agreement, considered with the uncontroverted affidavit testimony of Pacifica Business Office Director Deb Kimbrell yields only one conclusion: the Agreement included a valid arbitration provision at the time it was signed by Respondents' attorney-in-fact.[1] The Circuit Court and Court of Appeals erred in disregarding this unchallenged evidence when each court found that Pacifica did not meet its burden of proof merely because Pacifica could not produce a complete copy of the 2019 Residence and Services Agreement at the time Respondents filed their lawsuit in 2021.

The Court of Appeals' decision necessarily rested on one of two premises: (a) that a party may not refer to extrinsic evidence to supply a missing term in an arbitration agreement as a matter of law; or (b) that a party may refer to extrinsic evidence to supply a missing term, but the uncontroverted affidavit testimony and supporting documentation submitted by Pacifica was insufficient to do so in this case.

The Court of Appeals did not cite any authority that precludes consideration of extrinsic evidence, such as Ms. Kimbrell's affidavit testimony, to supply the missing portion of the Agreement's arbitration provision. Petitioner submitted credible and uncontroverted evidence concerning the terms of the missing portion of the arbitration provision. The Court of Appeals

[1] Respondents have not challenged Ms. Ward's authority to enter into arbitration provisions on their behalf at any stage of this litigation.

erred when it endorsed the Circuit Court's conclusion that such evidence is insufficient to prove the terms of the Agreement. This Court should grant Certiorari to correct this error of law.

a. Petitioner proved the terms of the Arbitration Agreement by affidavit testimony.

The Court of Appeals' decision leaves a fundamental question unanswered—can a party prove the complete terms of an arbitration provision by an objective method where the party has misplaced a page of the signed contract? This Court should grant Certiorari to answer this question in the affirmative.

In determining whether parties agreed to submit a particular dispute to arbitration, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Johnson v. Circuit City Stores,* 148 F.3d 373, 377 (4th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920 (1995)); *see also Arrants v. Buck,* 130 F.3d 636, 640 (4th Cir.1997) ("Courts decide whether there is an agreement to arbitrate according to common law principles of contract law."). Under South Carolina law, a court ordinarily is not allowed to consider extrinsic, or parol, evidence related to the meaning of contractual terms where the written contract appears to express the whole agreement of the parties. *See Columbia East Associates v. Bi-Lo, Inc.*, 299 S.C. 515, 520, 386 S.E.2d 259, 261 (Ct. App. 1989). However, "where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent." *Id.* In cases where "the writings laid down show upon their face an incompleteness, then that which makes them complete may be shown by parol [evidence]." *Midland Timber Co. v. Furman*, 111 S.C. 287, 289-90, 97 S.E. 831, 831 (1919).

The missing page in the Agreement creates an ambiguity as to the intention of the parties because, while it is clear the Agreement contained an Arbitration Agreement and that Respondent agreed to all its terms, the Agreement does not contain the provision in its entirety. (App. 73). In

an effort to clarify this ambiguity, Pacifica submitted affidavit testimony with its Motion to Compel Arbitration demonstrating that the arbitration provision included, *inter alia*, the following language:

> 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.

(App. 92-93). Ms. Kimbrell further testified that Pacifica used the same arbitration clause in each of its Residence and Services Agreements at the time Respondents were admitted to the facility. (*Id.*).

The Court of Appeals erred in holding that Petitioner has failed to meet its burden of proof concerning the validity of the arbitration provision. Respondents have not disputed the authenticity of the Agreement produced by Pacifica with its Motion to Compel Arbitration and have not denied that Ms. Ward separately signed the arbitration provision in connection with the Villanovas' admission to the Facility. (App. 170). Likewise, Respondents did not challenge the substance or admissibility of Ms. Kimbrell's affidavit testimony. Respondents have not presented any generally applicable contract defenses to the Agreement and have not challenged the validity of the arbitration provision supplied by Ms. Kimbrell's affidavit. Respondents also have not presented any authority suggesting the court could not properly consider such evidence to supply the missing terms of the Arbitration Agreement.

Even though Petitioner produced a copy of the Agreement that includes Ms. Ward's signature immediately below the language acknowledging that Ms. Ward understood and agreed

to the Arbitration Agreement, Respondents have contended throughout this litigation that they should not be bound to arbitration because Pacifica is missing a page of the Agreement. In short, Respondents seek to avoid their contractual obligations because Pacifica misplaced a page of the Agreement.

The fact that there are missing pages to the Agreement is of no import in analyzing whether to compel arbitration because the missing terms are easily supplied through an objective method. "[W]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain." *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 106 (1991) (citing 1 Williston, Contracts § 46, at 152–153 (3d ed.)). *See also* 12 Williston on Contracts § 34:3 (4th ed.) ("Any doubt concerning the terms of an agreement or to supply missing terms in an otherwise valid agreement may be resolved in light of any relevant course of dealing, usage of trade, or course of performance.") (citing *Rossi v. University of Utah*, 2021 UT 43, 496 P.3d 105 (Utah 2021)). These authorities are in accord with South Carolina law. *See e.g. Columbia East Associates*, 299 S.C. at 520, 386 S.E.2d at 261 (explaining when it is appropriate to refer to extrinsic evidence in interpreting a contract); *Frewil, LLC v. Price*, 411 S.C. 525, 531, 769 S.E.2d 250, 253 (Ct. App. 2015) (permitting parol evidence where written contract contained an ambiguity); *Figgie Int'l, Inc. v. Destileria Serralles, Inc.*, 190 F.3d 252, 254 (4th Cir. 1999) (applying South Carolina law to conclude that usage of trade, established via affidavit, could supply terms of sale where a manufacturer lost the original sales agreement).

Here, the affidavit of Debra Kimbrell establishes the terms of the Agreement through an objective method of comparison to other Residence and Services Agreements signed during the same general time frame. (App. 92-93). The arbitration provision in each agreement is identical,

and the portion of the Respondents' Agreement signed by Ms. Ward matches those other agreements word for word. (App. 68; 131-132). The Court of Appeals erred in disregarding this uncontroverted evidence and failed to give effect to the true and complete intent of the parties to the Agreement.

The Court of Appeals' error effectively placed an arbitration provision on unequal footing with contracts generally, in violation of a well-established principle in the arbitration setting. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). This point can be illustrated with a simple example. Assume, for example, that the same parties had a disagreement concerning the monthly rent for the Villanovas' apartment and the only copy of the parties' agreement was illegible with respect to the rent amount. It is inconceivable that the court would refuse to consider evidence presented by Pacifica as to its standard rent amount during the time frame when the admission occurred, supported by affidavit testimony and Residence and Services Agreements entered with other residents during that same period. Yet here the Court of Appeals erroneously disregarded credible, unchallenged evidence concerning the missing terms of the Agreement.

Respondents' only challenge to Ms. Kimbrell's affidavit testimony is that the affidavit does not say that Ms. Ward was presented with the full Arbitration Agreement at the time she executed the Agreement. (App. 153-154; 170-171). However, Ms. Kimbrell *did* testify that, based on her investigation, "the only reasonable inference" is that the complete Agreement was included when Ms. Ward signed the Agreement because Ms. Ward acknowledged as much when she separately signed the Agreement. (App. 93). Ms. Ward is presumed to have read and understood the consequences of the arbitration provision by virtue of her signature after the following language: "By signing below, you warrant that this Arbitration Agreement has been explained to you, that

you understand its significance, that you voluntarily agree to be bound by it, and that you understand that agreeing to arbitration is not a condition of admission to the Community." (App. 98). *See Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. . . . Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."). Ms. Ward acknowledged that the Agreement included an arbitration provision and that she read and understood the significance of the provision. Thus, to ascertain the true intent of the parties to the Agreement, this Court should grant Certiorari to consider the uncontroverted affidavit testimony establishing the terms of the arbitration provision.[2]

b. The terms of the arbitration provision constitute a valid, binding arbitration provision that encompasses Respondents' claims in this litigation.

Although the decisions below do not address the validity of the arbitration provision, Petitioner urges this Court to grant Certiorari and enforce the arbitration provision upon a finding that Petitioner has proven its terms. The Agreement's arbitration provision covers all the parties to this action and all the claims asserted in the Complaint. The arbitration provision is broadly written to encompass and apply to "any and all claims and disputes arising from or related to this Agreement or your residency, care or services at the Community. . . ." This language plainly covers all causes of action asserted in the Complaint, all of which arise from the Villanovas' residence at Pacifica.[3]

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[2] Neither of the Circuit Court's Orders appear to reach a factual conclusion as to the weight of Ms. Kimbrell's affidavit testimony. The Court of Appeals likewise did not address the weight of Ms. Kimbrell's testimony. Therefore, Pacifica submits this Court is permitted to review this factual issue *de novo*.

[3] The application of the Federal Arbitration Act has not been challenged in this case and was not addressed by the circuit court, so a full discussion of the issue is not included in this brief. However, Pacifica included a thorough explanation for why the FAA applies in this case in its memorandum in support of Pacifica's motion to compel arbitration. (App. 61-65). *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (finding nursing home residency agreement implicated interstate commerce because, *inter alia*, defendant

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski* v. *Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth.* v. *Great W Coal,* 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)). Moreover, "A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers* v. *FDIC,* 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). As explained by the South Carolina Supreme Court in *Landers,*

> Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract but **embraces every dispute between the parties having a significant relationship to the contract.**

402 S.C. at 109-10, 739 S.E.2d at 214 (internal citations omitted) (emphasis added). Stated differently, an agreement to arbitrate will be enforced unless a party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken* v. *World Fin. Corp.,* 373 S.C. 144,151,644 S.E.2d 705, 709 (2007). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 110. *See also Landers,* 402 S.C. at 109, 739 S.E.2d at 214 ("The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.") (internal citations omitted). A dispute related to utilities and maintenance of the Facility falls squarely within the

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was "contractually required to provide meals and medical supplies, which are instrumentalities of interstate commerce" and noting "many—if not all—federal and state courts have held that nursing home residency contracts similar to the one at issue here implicate interstate commerce and the FAA.").

category of disputes that are subject to mandatory arbitration pursuant to the arbitration provision in the Residence and Services Agreement.

Additionally, as the Respondents' attorney-in-fact, Ms. Ward clearly had authority to enter into the Agreement, including the agreement to arbitrate all claims relating to the Respondents' residence at Pacifica. *See Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017) (reversing state law frustrating Federal Arbitration Act's purpose where agreement to arbitrate was within scope of power of attorney in nursing home context). Importantly, Respondents have not challenged Ms. Ward's capacity to agree to the arbitration provision on their behalf. Respondents are compelled to arbitrate their claims in this case pursuant to the valid and binding arbitration provision contained in the Residence and Services Agreement. This Court should grant Certiorari to enforce the arbitration provision contained in the Agreement.

CONCLUSION

Petitioner requests this Court grant Certiorari to correct the errors of law addressed herein, reverse the Court of Appeals, and remand the case to circuit court with instructions to stay the case and compel the Respondents' claims to arbitration.

Respectfully submitted,

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