THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jan 21 2025
S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2024-002171

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, ... Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals follow South Carolina precedent when it found that Petitioner's Arbitration Agreement was invalid because it did not objectively manifest a mutual intent to be bound to arbitrate?

2. Given that the Petitioner required only the Respondent to give up his right to trial, and put the language requiring that in bold print, did the Court of Appeals fail to consider the whole arbitration agreement?

ARGUMENT

The Court of Appeals correctly affirmed the Circuit Court's denial of Petitioners' motion to compel arbitration for two separate and independent reasons.

First, in its unpublished *per curiam* decision, the Court of Appeals found that "…the language of the Arbitration Agreement does not evince a mutual intent to be bound." (citations omitted) (Ed Medford v. Deepak Israni, *et al*., Op. No. 2024-UP-316 (S.C. Ct. App., September 25, 2024)).

Second, the Court of Appeals found that the Arbitration Agreement, which was drafted by Petitioner, was not supported by consideration. "Further, because [Petitioner] did not evince a mutual intent to be bound and did not otherwise provide consideration to [Respondent], the Arbitration Agreement was not supported by consideration." (citations omitted) (*Id*.).

Thus, the Court of Appeals' holding is based on two abiding principles of contract law, the requirement for a mutual intent to be bound, and the requirement for sufficient consideration.

I. The Court Of Appeals Holding Is Squarely In Line With South Carolina Precedent.

The principle of contract law that the Court of Appeals and the Circuit Court applied to construe the arbitration provision is the requirement that the parties must objectively manifest the

mutual intent to be bound. This principle is long established in South Carolina precedent and was recently re-emphasized in Simmons v. Benson Hyundai, LLC. "The parties must also 'manifest a mutual intent to be bound.'" Simmons v. Benson Hyundai, LLC, 438 S.C. 1, 7, 881 S.E.2d 646, 649 (Ct. App. 2022) (quoting Stanley Smith & Sons v. Limestone Coll., 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984)).

In order to determine whether both parties had objectively manifested a mutual agreement to be bound, both courts analyzed the part of the arbitration provision that the Petitioner argued was "…the key language" of its arbitration provision. (App. 136, lines 19-21)

In the Circuit Court, Petitioner argued that "…the *first sentence* is the key language." (*Id*.) (emphasis added). Four lines of transcript later, to stress its conviction that the first sentence contained the language indispensable to forming a valid agreement, Petitioner told the Court, "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*." (App. 137, lines 1-4) (emphasis added).

The Petitioner's designation of the first sentence of the arbitration provision as "the operative language" has determinative significance in construing the Petitioner's own arbitration provision.

Language in a legal instrument designated as "operative" is the language that "…designat[es] the part of a legal instrument that gives effect to the transaction involved". *Black's Law Dictionary, Abridged Seventh Edition*, 895. Furthermore, the "operative" language in a legal instrument is that language which is "…essential to the meaning of the whole". (*Id*.)

Thus, given Petitioner's sua sponte admission that the first sentence of its arbitration provision contains the "operative language" for the entire arbitration provision, both courts

analyzed the first sentence. For there to be a valid arbitration provision, the language necessary to form a valid contract must be in the operative language.

The two courts analyzed the first sentence to determine if both parties, the Respondent and the Petitioner, had each objectively manifested an intent to be bound to arbitrate. What they found was that only one party had agreed to arbitrate. That party was the Respondent. Respondent was identified by the pronoun "you" in the operative language of the arbitration provision.

In the first sentence of the arbitration provision, in the provision's operative language, the Respondent objectively manifested his intent to be bound to arbitrate with these words:

> By signing below, *you agree that any and all claims and disputes* arising from or related to this Agreement…shall be resolved by submission to neutral, binding arbitration in accordance with the Federal Arbitration Act;….
>
> (App. 85) (emphasis added)

"You" is the pronoun chosen by Petitioner to identify Respondent throughout the arbitration provision. *See* App. 74. "You", meaning Respondent, is the only party which agrees to arbitrate its claims.

Nowhere in what Petitioner itself insisted is the operative language of the provision does Petitioner agree to arbitrate its claims against Respondent. Nowhere in the language which Petitioner represented to the Circuit Court as the operative language of the provision does Petitioner objectively manifest its intention to be bound to arbitrate.

Squarely in line with South Carolina precedent, both the Court of Appeals and the Circuit Court applied a long-established principle of contract law to the operative language of Petitioner's arbitration provision and correctly concluded that Petitioner did not objectively manifest an intent to be bound.

II. South Carolina Law Does Not Provide Precedent For Petitioner's Argument Because Petitioner Misreads York v. Dodgeland.

It is an unavoidable fact that nowhere in the first sentence of the provision does Petitioner agree to arbitrate its claims.

Given that unavoidable fact, Petitioner is compelled to argue that the words "you agree", combined with a summary of what the party designated by "you" is agreeing to, can legitimately be construed to mean that "both parties agree to arbitrate", or that "Petitioner and Respondent agree to arbitrate". This is how Petitioner argues that "you agree" really means "both parties agree to arbitrate":

> '…the words following "you agree" demonstrate that Petitioner, as the offeror, also promised to submit "*any and all claims and disputes* arising from or *related to this Agreement* or your residency, care, or services at the Community" to arbitration. (emphasis added) (App. 110-111).'
>
> Petition, p.5-6.

Petitioner purports to find the precedent it needs for this argument in York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013).

The York court decided several issues dealing with arbitration provisions. None of the issues the York court addressed are concerned with the questions disputed in this case. Petitioner's attempt to interpret York as precedent for its argument fails. It fails because none of the issues York decided are the issue in this case.

In York, the question being addressed was whether the **purchaser** had agreed to arbitrate. In York, the purchaser was in the same position as the Respondent in this case. In York, the seller was in the same position as the Petitioner in this case.

York did not address the question of whether the seller had agreed to arbitrate. Therefore, it was not ruling on the issue of whether a party in Petitioner's place win this case as objectively manifesting an intent to be bound to arbitrate.

In York, the purchaser challenged the arbitration provision claiming that the language of the provision created an ambiguity about whether **she**, **the purchaser**, had in fact agreed to arbitrate. In York, the purchaser is in the same position as Respondent is here. Unlike York, Respondent is not challenging whether he objectively manifested an intent to bound. To the contrary, Respondent has challenged whether Petitioner has objectively manifested the intent to be bound to arbitrate.

When the York court was addressing the issue of whether the purchaser had agreed to arbitrate, it began its quotation with the part of the arbitration provision that was relevant to the issue it was deciding. It began its quotation at the word "purchaser" in order to determine if the purchaser had agreed to arbitrate. This is the York quote of the arbitration provision from the section of the opinion addressing that issue. It is also the part of the arbitration provision that Petitioner cites as precedent for its argument. This quotation is from Petitioner's Petition:

> **PURCHASER AGREED THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OF ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT….**
>
> Petition, p.5 (Internal citation from York omitted)

At this point in its decision, the York court leaves out the first part of the first sentence of the arbitration provision. It leaves out the first part of the sentence which objectively manifests the seller's consideration for the arbitration contract because that part of the sentence is irrelevant to whether the purchaser agreed to arbitrate.

This is the entire first sentence of the actual York arbitration provision:

> **IN CONSIDERATION FOR SELLER AGREEING TO SELL TO PURCHASER THE ABOVE DESCRIBED VEHICLE, PURCHASER AGREES THAT ANY AND ALL DISPUTES IN ANY WAY RELATED TO ANY NEGOTIATION OR POTENTIAL PURCHASE, FINANCING, OR ACTUAL PURCHASE OR ANY VEHICLE OR SERVICE FROM DEALER SHALL BE SUBJECT TO THE FEDERAL ARBITRATION ACT.**
>
> York v. Dodgeland of Columbia, Inc.
> 406 S.C. 67, 75, 749 S.E.2d 139, 143 (2013)
> (emphasis added)

The emphasized words are the part the York court left out because they were irrelevant to its holding.

But Petitioner leaves out that part of the York arbitration provision for a different reason. Leaving out that part of the actual arbitration provision allows Petitioner to claim that York stands for the proposition that in a bilateral arbitration contract, only one party needs to objectively manifest its agreement to arbitrate.

York does not stand for that proposition. In the actual first sentence of the York arbitration provision, the seller explicitly states the consideration it has offered for its bilateral arbitration agreement with the buyer. In South Carolina contract law, consideration is synonymous with mutual agreement. *See* Humble Oil & Refining Co. v. DeLoache, 297 F.Supp. 647, 658 (1969) (internal citation omitted). ("In the law of contract, mutuality, both in definition and application is largely synonymous with consideration.")

Petitioner attempts to contort York's quotation of a fragment of a sentence into precedent for interpreting the words "you agree" as meaning that Petitioner has also promised to submit to arbitration. Petitioner's attempt fails. It fails because it is clear from the part of the sentence that

Petitioner did not cite that the York seller did in fact objectively manifest its intent to be bound to arbitrate.

And Petitioner's attempt to claim York as precedent fails because the York court did not address or rule on the issue Petitioner claims that it did. To contend that York provides precedent for construing "you agree" as meaning "Petitioner also promises" is a misreading of York.

The Court of Appeals reached the correct decision in affirming the Circuit Court in its unpublished *per curiam* opinion. York provides no support for Petitioner's argument.

III. O'Neil v. Hilton Head Hospital Provides No Precedent For Petitioner Because It Was Not A Contract That Required Mutual Promises. This Arbitration Agreement Does Require Mutual Promises.

Petitioner also contends that O'Neil v. Hilton Head Hospital, 115 F.3d 272 (4th Cir. 1997) provides precedent for its argument that in South Carolina contract law, the words "you agree" should be construed as meaning "…Petitioner, as the offeror, also promised to submit…to arbitration." Petition, p.6 (citation omitted).

O'Neil was decided in 1997, nearly 30 years ago. It was decided in an era in which the legal cliché, "a strong federal policy in favor of arbitration", O'Neil, 115 F.3d at 273, served to resolve all manner of contractual infirmities and flawed analysis in favor of arbitration. The O'Neil court both endorsed and applied this cliché to reach its decision.

But South Carolina courts have now recovered and restored the proper meaning to the cliché that the law "favors arbitration". In Simmons v. Benson Hyundai, LLC, 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."

With the cliché's longstanding power to absolve contractual flaws removed, the flaws in O'Neil's reasoning are more apparent.

Petition relies on O'Neil's flawed reasoning for support for its argument that "you agree" must be construed as meaning that Petitioner promised to submit to arbitration.

The O'Neil court's reasoning was flawed because it applied bilateral contract law, which by definition requires at least two reciprocal promises, to a unilateral, one promise employment contract. There are no mutual promises in the arbitration contract that O'Neil construed. "*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 (Ct. App. 2012) (citations omitted) (emphasis added). In contract law, a unilateral employment contract is created when the employer makes an offer and the employee accepts by performing the job she was offered, rather than by making a reciprocal promise. This is what Ms. O'Neil did. She formed a valid arbitration contract, not by offering a reciprocal promise, but by accepting a job which required arbitration as a condition for acceptance. The O'Neil court construed a unilateral employment contract, not a bilateral contract like the one at issue in this case.

In this case, Petitioner's contract required an objectively manifested reciprocal promise from Petitioner to form a valid contract to arbitrate. Petitioner did not make an objectively manifested reciprocal promise to arbitrate its claims against Respondent. Unlike the unilateral

contract in O'Neil, Petitioner's bilateral contract required it to make a reciprocal promise. It did not. O'Neil provides no support for Petitioner's argument.

IV. Petitioner's Contention That The Court Of Appeals Did Not Consider The Arbitration Agreement As A Whole Finds No Support In The Court Of Appeals Opinion. Language In The Whole Of The Agreement Repudiates Petitioner's Contention.

In its unpublished *per curiam* opinion in this case, the Court of Appeals stated that "…the circuit court did not err by denying Appellants' motion to compel arbitration because the language of the Arbitration Agreement does not evince a mutual intent to be bound." Ed Medford v. Deepak Israni, *et al*., Op. No. 2024-UP-316 (S.C. Ct. App., September 25, 2024), *1 (citations omitted).

The Court of Appeals explicitly stated that the "language of the Arbitration Agreement does not evince a mutual intent to be bound." The words the Court chose to express its conclusion encompass the entire Arbitration Agreement at issue in this case. The Court's opinion does not give Petitioner any basis for its claim that the Court of Appeals did not "consider" and construe the entire Arbitration Agreement "as a whole".

Moreover, the "whole" of the Arbitration Agreement repudiates Petitioner's "provision as a whole argument." In the third sentence of the Arbitration Agreement, Petitioner has written in bolded print:

> **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.**
>
> App. 85

The entire purpose of an arbitration agreement is for a party to give up its right to trial in favor of 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, Petitioner had a specific intention in mind when it chose the wording for the agreement. Petitioner specifically intended what it wrote in boldfaced type in this sentence. It intended for just one party to give up its right to trial, and Petitioner named that party in boldfaced type: **You**.

Petitioner knew its intention at the time it drafted this Arbitration Agreement and knows it now. It knows that it intended only one party, "**You**", to give up its right to trial in this Arbitration Agreement. That is why Petitioner has never argued that the "**You**" in this bolded sentence really means " both parties" give up their constitutional right to trial.

In the Arbitration Agreement that Petitioner drafted, it intended only one party, "you" to give up its right to jury trial and agree to arbitrate.

CONCLUSION

The Court of Appeals followed South Carolina precedent and correctly affirmed the Circuit Court's denial of Petitioner's motion to compel arbitration. The Court should deny the petition.

Respectfully submitted,

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