

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jan 21 2025

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.....Petitioners.

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW.....	3
ARGUMENT.....	3
I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE LOWER COURT IN THAT PETITIONERS FAILED TO PROVIDE EVIDENCE OF WHAT THE RESPONDENTS SIGNED OTHER THAN THE COPY OF THE RESIDENCE AND SERVICES AGREEMENT ATTACHED TO PETITIONERS’ MOTION TO DISMISS OR ARBITRATE.....	3
II. THE PETITIONERS HAVE FAILED TO MEET THEIR BURDEN ESTABLISHING THAT RESPONDENTS WAIVED THEIR RIGHT TO A JURY TRIAL.....	5
CONCLUSION.....	8

TABLE OF AUTHORITIES

CASES

<i>Allegro, Inc. v. Scully</i> , 418 S.C. 24, 791 S.E.2d 140 (2016).....	5
<i>Ellis v. Taylor</i> , 316 S.C. 245, 449 S.E.2d 487 (1984).....	5
<i>Federal Arbitration Act (FAA)</i> , 9 USC 1, <i>et.seq.</i> (2018)	7
<i>Grant v. Magnolia Manor-Greenwood, Inc.</i> , 383 S.C. 125, 678 S.E.2d 435 (2009).....	4
<i>Johnson v. Heritage Healthcare Estill, LLC</i> , 416 S.C. 508, 788 S.E.2d 216 (2016).....	3
<i>Player v. Chandler</i> , 299 S.C. 101, 382 S.E.2d 891 (1989).....	4
<i>Prima Paint Corp. v. Flood & Conklin Mfg. CA.</i> , 388 U.S. 395 (1967).....	7
<i>Reed v. Boykin</i> , 282 S.C. 614, 320 S.E.2d 68 (Ct. App. 1984).....	4, 5
<i>Simmons v. Benson Hyundai, LLC</i> , 438 S.C. 1, 881 S.E.2d 646 (Ct. App. 2022).....	5, 7
<i>Thornton v. Trident Med. Ctr., L.L.C.</i> , 357 S.C. 91, 592 S.E.2d 50 (Ct.App. 2003).....	3
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).....	7

RULES

Rule 12(b)(1), SCRCP.....	2
Rule 12(b)(6), SCRCP.....	2
Rule 59(e), SCRCP.....	3

INTRODUCTION

Petitioners ask this Court to reverse the Court of Appeals’ decision denying arbitration when the only evidence which exists establishes that the Arbitration Agreement lacked an essential page outlining the terms and conditions of the Arbitration Agreement including, but not limited to, the following language:

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.

This Court should affirm the Court of Appeals’ decision.

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals correctly affirmed the circuit court’s denial of Petitioners’ Motion to Arbitrate on a finding by the circuit court that “Petitioners are unable to produce a copy of the executed contract containing the full arbitration agreement and have no evidence that Respondents are responsible in any way for the full documents being unavailable.”

STATEMENT OF THE CASE

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

The Respondents, 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 Respondents. (*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 Respondents' 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 Respondents' 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), SCRCF, 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 petitioners have not made the necessary showing that this right was waived. Since the petitioners are unable to produce a copy of an executed contract containing **the full arbitration agreement** and have no evidence that respondents 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), SCRPC. 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). Pacifica appealed to the Court of Appeals which in a per curiam decision without argument on September 25, 2024 affirmed the lower court. Thereafter, Pacifica filed a Petition for Rehearing on October 21, 2024 which was also denied on November 21, 2024.

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 Court of Appeals correctly affirmed the lower court in that Petitioners failed to provide evidence of what the Respondents signed other than the copy of the Residence and Services Agreement attached to Petitioners' Motion to Dismiss or Arbitrate.**

Petitioners contend in their Statement of the Case that Ms. Ward executed Respondents' standard Residence and Services Agreement when in fact there is no evidence that in fact she did so and the foregoing is a misrepresentation to this Court. In fact what Petitioners have established is that Ms. Ward executed a portion of a standard Residence and Services Agreement which omitted the key language referenced herein concerning the import of signing

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

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.

Instead Pacifica goes to great lengths to establish what should have been executed but is unable to provide any evidence that in fact what should have been executed was actually executed.

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 Respondents 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 Petitioners have failed to meet their burden establishing that Respondents waived their right to a jury trial.

Petitioners bear the burden for proving that 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). An agreement which 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).

Petitioners 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. (R. pp. 62-63). 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 Respondents which contained the language necessary to form a valid arbitration agreement. (R. p. 62). In her Affidavit, Ms. Kimbrell further states that she investigated the Residence and Services Agreement which were used during the time frame that the Respondents would have signed the Agreement and a copy of an exemplar of that agreement was attached to her Affidavit. (R. pp. 88-121) . 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 Respondents, and she acknowledges that a page containing a portion of the arbitration agreement is omitted from the document signed by Ms. Ward. (R. p. 63). Petitioners suggest that Ms. Kimbrell's Affidavit supports an allegation that the full Residence and Services Agreement was executed, however, a careful reading of that Affidavit establishes otherwise. 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 Respondents 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. Petitioners attempt to argue that extrinsic or parol evidence should be used to establish what in fact Ms. Ward signed. However, that effort fails because such extrinsic or parol evidence only demonstrates what Ms. Ward should have signed but, in fact, did not sign.

The Petitioners 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 Respondents would be waiving their constitutional right to a jury trial. Under these circumstances where there is no contract to

arbitrate, the Court of Appeals correctly affirmed the lower court which denied the motion to compel arbitration.

CONCLUSION

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

Respectfully submitted,

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