

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2013-001906
Circuit Court Case No. 2012-CP-40-8540

Stewart Title Guaranty Company Appellant,

v.

Matthew G. Powell Respondent.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Where it is undisputed that (1) Powell's employment relationship with Stewart was one "involving commerce" within the meaning of section 2 of the Federal Arbitration Act ("FAA"), and (2) the parties entered into written agreements to resolve "[a]ll disputes" between them "by mandatory and binding arbitration administered by the American Arbitration Association (the 'AAA') pursuant to the Federal Arbitration Act (Title 9 of the United States Code)," did the circuit court err in refusing to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*?

STATEMENT OF THE CASE

Respondent Matthew Powell (“Powell”), a former employee of Stewart Title Guaranty Company (“Stewart”), filed this action on December 27, 2012, seeking payment for alleged unpaid wages. [Complaint] The Complaint asserts two causes of action: (1) breach of contract and (2) a claim under the South Carolina Payment of Wages Act, S.C. Code § 41-10-40. [Complaint, pp. 1-2] On March 28, 2013, within 30 days of service of the Complaint, Stewart timely filed Defendant’s Motion to Dismiss and to Compel Arbitration with supporting affidavits that include the parties’ agreements to arbitrate “[a]ll disputes” pursuant to the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) and documentation showing Powell’s employment with Stewart affected interstate commerce. [Motion and affidavits]

On June 17, 2013, the parties argued the motion before The Honorable Alison Renee Lee. [Hearing Tr.] On August 15, 2013, Judge Lee signed an order denying Stewart’s motion. [Order] Stewart timely filed a Notice of Appeal on September 6, 2013. [Notice of Appeal]

STATEMENT OF FACTS

Stewart, a business that provides title insurance and other real estate services, is a corporation headquartered and incorporated in Texas. It has offices, corporate subsidiaries, and other affiliates located in forty-eight states and internationally. Stewart’s central payroll, human resources, and other corporate management functions are conducted in Texas. [Jensen Affidavit]

Stewart employed Powell from 2005 until his voluntary resignation in May 2012. Stewart has at all times maintained Powell’s personnel files and pay records at Stewart’s

corporate headquarters in Texas. All terms and conditions of Powell's employment, including calculations of his pay, bonuses, and commissions, were determined by Stewart's corporate personnel in Texas. [Jensen Affidavit]

While employed by Stewart, Powell traveled to Texas, Florida, and North Carolina for business meetings and training conferences. [Johnson Aff., p. 1] All business generated by Powell, and all premiums and commissions from such business, were processed through Stewart's offices in Texas. [Jensen Affidavit] Powell submitted business expense reports to Stewart's offices in Texas, North Carolina, and Florida. [Johnson Aff.] Powell routinely relied on personnel in Texas, Florida, Illinois, and New York to support his role in South Carolina. [Jensen Aff., p. 2]

In the spring of 2009, Stewart promoted Powell to Agency Services Manager. [Jensen Affidavit] On April 1, 2009, Powell contemporaneously signed three documents: (1) a memorandum outlining his new compensation and responsibilities [memo], (2) an incorporated "Agreement" containing a mandatory arbitration provision ("2009 Agreement") [Agreement], and (3) a Job Description for his new position of Agency Services Manager [job description] (collectively referred to as "the 2009 documents"). In pertinent part, the 2009 Agreement states:

AGREEMENT

The agreement, made as of the 1st day of April, 2009, by *Matthew G. Powell* (hereinafter "Matt") and Stewart Information Services Corporation, whose principal offices are located in Houston, Harris County, Texas, a Delaware Corporation, on behalf of it and its subsidiary and affiliated corporations (hereinafter collectively referred to as "Stewart").

* * *

WHEREAS, Stewart desiring to recognize and encourage Matt's continued interest in the success of Stewart's business has accordingly restructured Matt's employment responsibilities and remuneration.

NOW THEREFORE, for and in consideration of the covenants and agreements herein set forth, Matt expressly covenants and agrees as follows:

* * *

4. All disputes between [Powell] and Stewart shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association (the "AAA") pursuant to the Federal Arbitration Act (Title 9 of the United States Code) in accordance with this Agreement and the Model Employment Arbitration Procedures of the AAA. Any arbitration proceeding under this Agreement shall be conducted in South Carolina.

[2009 Agreement (original emphasis)] The Agreement is signed by Powell and Stewart.

On January 22, 2010, Powell contemporaneously signed four more documents:

(1) a Non-Solicitation Agreement [agreement], (2) a memorandum re: 2010 Strategic Business Objective Incentive Bonus [memo], (3) a memorandum outlining Powell's areas of responsibility and compensation effective January 1, 2010 [memo], and (4) a Job Description for the position of Agency Services Manager [job description] (collectively referred to as "the 2010 documents") [Jensen Affidavit Exhibit 2] The Non-Solicitation Agreement includes an arbitration provision substantially the same as the arbitration provision in the 2009 Agreement, as follows:

4. All disputes between [Powell] and Stewart shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association (the "AAA") pursuant to the Federal Arbitration Act (Title 9 of the United States Code) in accordance with this Agreement and the Model Employment Arbitration Procedures of the AAA. Any arbitration proceeding under this Agreement shall be conducted in Texas.¹

[Non-Solicitation Agreement]

¹An arbitration agreement with a choice of venue provision is enforceable under the FAA. *Tritech Electric v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2001). The 2009 "Agreement" calls for arbitration in South Carolina, and the 2010 "Non-Solicitation Agreement" calls for arbitration in Texas. Stewart concedes arbitration would be appropriately conducted in either state. [Motion p. 1, fn. 1]

On or about May 4, 2012, Powell voluntarily resigned his employment with Stewart. [Complaint ¶ 5] On December 27, 2012, Powell filed suit, claiming he is entitled to unpaid wages under his employment agreement with Stewart. [Complaint]

STANDARD OF REVIEW

An order that favors litigation over arbitration is immediately appealable, even if interlocutory. *Towles v. United Healthcare Corporation*, 338 S.C. 29, 35, 524 S.E.2d 839, 842 (Ct. App. 1999). Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Landers v. Fed'l Deposit Ins. Corp., Inc.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). The circuit court was required to, and this appellate court on review must, “evaluate (1) whether the Federal Arbitration Act applies, (2) whether [the parties] formed a valid and binding arbitration agreement, and (3) whether the agreement covers [Powell’s] claims.” *Towles v. United Healthcare Corp.*, 338 S.C. at 35, 524 S.E.2d at 843.

It is the policy of this state and federal law to favor arbitration and “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” . . . “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.’ “. . . Such a presumption is strengthened when an arbitration clause is broadly written. . . . Therefore, “ ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]’ “ arbitration must generally be ordered.”

Landers, 402 S.C. at 109, 739 S.E.2d at 213 (internal citations omitted). *See also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 119 (2001); *Towles*, 338 S.C. at 41-42, 524 S.E.2d at 846.

ARGUMENT

The circuit court erred in refusing to compel arbitration because the parties' agreement to arbitrate "[a]ll disputes" is subject to and enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

The sole issue in this case is whether the circuit court erred in refusing to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA").

Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable save upon such grounds as exist at common law or in equity for the revocation of any contract.

9 U.S.C. § 2. As the South Carolina Supreme Court explained in *Osteen v. T.E. Cuttino Construction Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993), "Section 2 [of the FAA] reflects a national policy favoring arbitration and withdrawing the power of the States to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." 434 S.E.2d at 283. The FAA is "an Act that seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995).

Section 3 of the FAA requires that federal and state courts alike, upon application of a party, stay or dismiss judicial proceedings and compel arbitration of any agreement that falls within the scope of that Act. 9 U.S.C. § 3; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

The fundamental purpose of the FAA is "to overcome courts' refusals to enforce agreements to arbitrate." *Allied-Bruce Terminix*, 513 U.S. at 270. The FAA was enacted specifically "to reverse the longstanding judicial hostility to arbitration agreements that

had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The FAA applies in state as well as federal courts, and, under the Supremacy Clause of the United States Constitution, preempts and supersedes inconsistent statutory and common law. *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 476 S.E.2d 149, 151-152 (1996).

- a. **It is undisputed that Powell’s employment relationship with Stewart was one “involving commerce” within the meaning of section 2 of the FAA, and therefore the parties’ agreement to arbitrate “[a]ll disputes” is subject to the FAA.**

“For the FAA to apply, an agreement must evidence a transaction involving commerce, specifically interstate commerce.” *Towles*, 338 S.C. at 35, 524 S.E.2d at 843 (quotations and citations removed). “To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” *Towles*, 338 S.C. at 36, 524 S.E.2d at 843.

In refusing to compel arbitration of Powell’s claims against Stewart, the circuit judge erroneously concluded that “whether the arbitration provision is subject to the FAA is irrelevant.” [Order p. 3] To the contrary, it is both the thrust of Stewart’s motion and an undisputed and conceded fact that Powell’s employment with Stewart involved interstate commerce and the FAA applies. In support of its motion, Stewart set forth substantial affidavit testimony establishing that the parties entered into two arbitration agreements and that Powell’s employment relationship with Stewart involved interstate commerce. [Johnson and Jensen Affidavits] Powell presented no evidence whatsoever to challenge application of the FAA. Rather, Powell explicitly conceded at the hearing

before the circuit judge that Powell's employment affected interstate commerce and the FAA applies. Specifically, Powell's counsel stated:

We – we agree that the Federal Arbitration Act applies in this case. There was sufficient nexus of his – his – of Mr. Powell's employment duties in interstate commerce to make the Federal act apply.

[Hearing Tr., p. 8:6-10]

The undisputed record supports Powell's concession: Powell's employment relationship with Stewart included traveling and working in interstate commerce.

[Johnson Affidavit; Jensen Affidavit] Thus, Powell's position with Stewart involved interstate commerce as defined in the context of the FAA. *See Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App 2012) (attorney's work in Florida, Georgia, Minnesota, North Carolina, and Tennessee constituted interstate commerce under the FAA); *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (interstate commerce where builder domiciled in South Carolina and contract assigned to Delaware creditor); *Walden v. Harrelson Nissan, Inc.*, 399 S.C. 205, 208 n.2, 731 S.E.2d 324, 325 n.2 (Ct. App. 2012) (interstate commerce where South Carolina resident contracted with North Carolina corporation, involving car manufactured in Tennessee and financed in California); *Towles*, 338 S.C. at 36, 524 S.E.2d at 843 (Georgia, Minnesota, and North Carolina work involved interstate commerce).

The undisputed record shows Powell and Stewart contracted in 2009, and again in 2010, to resolve “[a]ll disputes” between them “by mandatory and binding arbitration administered by the American Arbitration Association (the ‘AAA’) pursuant to the Federal Arbitration Act (Title 9 of the United States Code)” [Agreements] Further, Powell has explicitly conceded that his employment relationship with Stewart involved interstate

commerce and the FAA applies. [Hearing Tr p. 8] Thus, the circuit court should have concluded, and the appellate court must conclude, that the FAA applies. *See Munoz*, 343 S.C. at 539, 542 S.E.2d at 364-65 (“[T]he arbitration agreement, which applies to this contract and the relationships which result from this contract, provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.”) (internal quotations removed); *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44.

- b. **The parties’ agreement to resolve “[a]ll disputes” by “mandatory and binding arbitration administered by the American Arbitration Association (the ‘AAA’) pursuant to the Federal Arbitration Act (Title 9 of the United States Code)” is enforceable under the FAA.**

1. **The parties have a clear agreement to arbitrate “[a]ll disputes.”**

The Supreme Court of South Carolina and the South Carolina Court of Appeals have repeatedly and consistently acknowledged deference to arbitration agreements and the need to interpret them liberally. In *Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), the South Carolina Supreme Court stated:

South Carolina law generally favors arbitration. *McMillan v. Gold Kist, Inc.*, 353 S.C. 353, 359, 577 S.E.2d 482, 485 (Ct. App. 2003). In interpreting agreements within the scope of the FAA, “due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.” *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 714 (Ct. App. 2002) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Further, unless 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. *Id.* at 597, 553 S.E.2d at 118.

361 S.C. at 550, 606 S.E.2d at 755. *See also Landers v. Fed'l Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013), *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 119 (2001); *Towles v. United Healthcare Corporation*, 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999).

In 2009, and again in 2010, Powell and Stewart executed contemporaneous documents – all aimed at defining Powell’s employment duties, responsibilities, and terms of employment – that included their agreement that “[a]ll disputes” between the parties “shall be resolved by mandatory and binding arbitration.” [agreements] At oral argument before the circuit judge, Powell argued the Court should disregard the parties’ arbitration agreements and focus exclusively on the 2010 compensation memorandum which does not, standing alone, contain its own arbitration clause.

Powell argued to the circuit judge that “the 2010 agreement constitutes a novation of the 2009 agreement.” [Hearing Tr. 15:7-8] “A novation is an agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation.” *Wayne Dalton Corp. v. Acme Doors, Inc.*, 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990). “The party alleging a novation has the burden of proving . . . the intention to substitute a new obligation in place of the existing one.” *Superior Automobile Ins. Co. v. Maners.*, 261 S.C. 257, 262, 199 S.E.2d 719, 722 (1973). “In order to effectuate a novation by the substitution of a new obligation, both contracting parties must consent that the new agreement is to replace the old one and their consent must be apparent.” *Moore v. Weinberg*, 373 S.C. 209, 218, 644 S.E.2d 740, 744

(Ct. App. 2008). “There must be an *intention* to create a novation. . . . There can be no novation unless *both parties so intend*.” *Moore*, 373 S.C. at 217-18, 644 S.E.2d at 744 (emphasis added).

Powell’s novation argument is an argument that all of the 2009 documents were nullified by the documents executed in 2010. To the extent Powell challenges interpretations of the parties’ contracts *generally*, as opposed to *the arbitration provisions specifically*, that is a matter to be determined under the jurisdiction of the arbitrator, not by the court. *See The Housing Authority*, 356 S.C. at 340, 588 S.E.2d at 623 (“Because the defense of illegality relates to the contract as a whole, the arbitration provision is still in force and the illegality defense can be considered at the arbitration itself.”) (citations omitted); *see also Carolina Care Plan, Inc. v. United Healthcare Services, Inc.*, 361 S.C. 544, 553, 606 S.E.2d 752, 756-57 (2004) (“the issue of whether the entire contract was fraudulently induced ... must be decided in arbitration”).

Powell has not argued that the parties intended to extinguish the 2009 arbitration provision *specifically*, and the record is devoid of any evidence that the parties intended to extinguish their arbitration agreements. No part of the 2010 documents negates the enforceability of the 2009 arbitration agreement. In fact, the 2010 documents include an arbitration provision substantially identical to the arbitration provision in the 2009 documents. Powell’s novation argument is not supported by evidence or legal precedent, and therefore must fail as a matter of law. *Superior Auto.*, 261 S.C. at 262, 199 S.E.2d at 722.

The circuit judge erred in severing the 2010 compensation memorandum from the parties’ agreements to arbitrate their disputes. Powell’s claims – breach of contract and a

statutory claim for wages – are about the interpretation of his employment agreement with Stewart. The agreements to arbitrate “[a]ll disputes” are an integral part of his employment agreement. There is most definitely a significant relationship between Powell’s claims and his employment agreements with Stewart. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013) (employee’s claims of breach of contract, constructive discharge, and slander bear a significant relationship to employment agreement so as to be covered by a broadly worded arbitration clause).

General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. “If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract’s language determines the instrument’s force and effect.” *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

Further, multiple contracts are to be read together, as this court has explained:

In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole. *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991); *Moshtaghi v. Citadel*, 314 S.C. 316, 321, 443 S.E.2d 915, 918 (Ct. App. 1994) (citing *Klutts Resort Realty, Inc. v. Down’Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 25 (1977)). “The date of the writings constituting the transactions is not material.” *Moshtaghi*, 315 S.C. at 321, 443 S.E.2d at 918 (citing *Café Assocs., Ltd. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991)); *Plaza Dev. Servs. v. Joe Harden Builder, Inc.*, 294 S.C. 430, 433-34, 365 S.E.2d 231, 233 (Ct. App. 1988) (“Where instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties.”). Moreover, where one of the contracts explains, amplifies, or limits the other, those provisions will be given effect between the parties so that the whole agreement, as actually contracted by the parties,

may be effectuated. *Moshtaghi*, 315 S.C. at 321, 443 S.E.2d at 918; *Edward Pinckney Assocs., Ltd. v. Carver*, 294 S.C. 351, 354, 364 S.E.2d 473, 474 (Ct. App. 1987) (“Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.”); *See Wilbur Smith & Assocs. v. Nat’l Bank of South Carolina*, 274 S.C. 296, 299, 263 S.E.2d 643, 645 (1980) (finding two instruments must be read together to determine the whole agreement and intent of the parties).

Ellie, Inc., 358 S.C. at 92, 594 S.E.2d at 492-93. *See also The Housing Authority of the City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003) (two contracts, each of which contains an arbitration provision that covers disputes arising between parties, are to be construed as one contract and considered as a whole); *York v. Dodgeland of Columbia*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (citing *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009)) (“[i]n the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together.”); *Buice v. WMA Secs., Inc.*, 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct. App. 2008) (“in determining the intent of the contracting parties, the court should construe the contract as a whole, and read together different provisions dealing with the same subject matter.”).

The 2009 Agreement, contemporaneous with Powell’s promotion to Agency Services Manager, includes covenants based on Powell’s “restructured . . . employment responsibilities and remuneration” and notes the parties’ agreement to arbitrate “[a]ll disputes” between them. [2009 Agreement] The 2010 Non-Solicitation Agreement, contemporaneous with a revised compensation agreement and job description,

incorporates substantially similar language, explicitly stating an “inducement for Stewart to appoint and employ [Powell] as Agency Services Manager,” and reiterating the parties’ agreement to arbitrate “[a]ll disputes” between them. [2010 agreement p. 1] The 2009 and 2010 compensation memoranda and job descriptions describe Powell’s areas of responsibility and compensation as the Agency Services Manager. [memos and job descriptions] The 2010 compensation memorandum identifies itself, just above Powell’s signature, as a “letter . . . meant to be a *memorandum* of areas of responsibility and compensation.” [memo p. 4 (emphasis added)]

The requirement that two or more contracts be read together as one means contracts do not automatically displace preceding contracts without evidence the parties intended that specific result. *Moore v. Weinberg*, 373 S.C. at 217-18, 644 S.E.2d at 744 (abandonment of a previous contract for a new contract must be mutually intended by the parties); *Superior Auto.*, 261 S.C. at 262, 199 S.E.2d at 722 (contract does not displace a previous contract without a showing of mutual intent from both parties).

In construing and determining the effect of a written contract, the intention of the parties and the meaning are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence, words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008) (citation omitted).

The 2009 documents evidence Powell’s promotion to Agency Services Manager, and the parties’ attendant agreement to resolve “[all] disputes” between Powell and Stewart “by mandatory and binding arbitration . . .” [2009 documents, particularly

arbitration provision of the “Agreement”] In 2010, the parties agreed to modify Powell’s compensation while he remained Agency Services Manager. There is no indication in the 2010 compensation memorandum or elsewhere that the parties intended to revoke their agreement to arbitrate. In fact, the 2010 Contemporaneous Documents reiterate the parties’ agreement to resolve “[all] disputes” between them “by mandatory and binding arbitration” [2010 documents, particularly arbitration provision]

If the parties had intended to abandon the 2009 agreement to arbitrate, they might have specifically stated so in a subsequent agreement, or they might have included a “merger clause” in a subsequent agreement (*i. e.*, a provision that the subsequently-executed agreement was the entire agreement of the parties, superseding all prior agreements). “A merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement.” *Davis v. KB Homes of S.C., Inc.*, 394 S.C. 116, 128, 713 S.E.2d 799, 805 (Ct. App. 2011). In *Davis*, for example, the Court of Appeals held a merger clause in an agreement without an arbitration provision nullified a previous agreement that contained an arbitration provision).

In this case, there is no merger clause in any agreement, and none of the documents executed by Powell and Stewart evidences that the parties mutually intended to abandon the 2009 agreement to arbitrate. In fact, *the same day* Powell signed the 2010 compensation memorandum (the document he argues the court should consider to the exclusion of all others), he also signed the Non-Solicitation Agreement that reiterates the parties’ previous agreement to arbitrate “[a]ll disputes” between them. There is simply no evidence within the “four corners” of the documents to suggest the parties intended the 2010 compensation memorandum to extinguish the parties’ agreements to arbitrate their

disputes. To the contrary, the undisputed evidence shows the parties expressly agreed in 2009, and again in 2010, to resolve “[a]ll disputes” between them “by mandatory and binding arbitration.”

The circuit judge’s explanation for disregarding the parties’ agreements to arbitrate was that, in 2010, “a subsequent document describing compensation and a subsequent non-solicitation agreement were executed, neither of which referenced the other.” [Order p. 3] Thus, the circuit judge erroneously interpreted the 2010 compensation memorandum in a vacuum, and wholly disregarded several facially valid documents comprising Powell’s employment agreement with Stewart. As explained in *Ellie, Inc. and The Housing Authority, both supra*, the parties’ contractual agreements are to be considered together. There is no requirement that the parties’ agreements reference each other in order to be considered together. The inescapable conclusion is that the parties expressly agreed, in 2009 and again in 2010, to arbitrate their disputes. The circuit judge’s decision to apply a legally unsupported theory to circumvent the arbitration provisions of the parties’ agreements does not respect the “plain, unambiguous” language of the parties’ arbitration agreements.

As a matter of law, the compensation memorandum must be read in conjunction with the parties agreements, including their 2009 and 2010 agreements to arbitrate “[a]ll disputes.” [agreements] “To allow [a party] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.” *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012).

2. The broad arbitration provision covers Powell's claims.

The circuit judge erred in concluding that Powell's claims are not covered by the parties' arbitration agreements. The arbitration provision in this case is quite broad. Powell and Stewart agreed to arbitrate "[a]ll disputes" between them. [arbitration agreements] Such a provision is certainly broad enough to cover Powell's employment-related contract and wage claims.

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the United States Supreme Court found a contract claim was covered by a broad arbitration clause that covered "[a]ny controversy or claim arising out of or relating to this Agreement." 388 U.S. at 398. In *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566 (4th Cir. 1998), the Fourth Circuit Court of Appeals found various contract, statutory, and tort claims covered by "an extremely broad arbitration clause: 'Any controversy or claim arising out of or relating to . . . any aspects of the relationship between [the parties] . . . shall be settled by binding arbitration . . .'" 140 F.3d at 569 (original emphasis)

Recently, in *Landers v. Fed'l Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013), the South Carolina Supreme Court reiterated:

It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." . . . "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." ". . . Such a presumption is strengthened when an arbitration clause is broadly written. . . . Therefore, " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,] 'arbitration must generally be ordered."

402 S.C. at 109, 739 S.E.2d at 213 (internal citations omitted). The *Landers* court

continued:

A clause which provides for arbitration of all disputes “arising out of or relating to” the contract is construed broadly. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed. 2d 1270 (1967) (labeling as “broad” a clause that required arbitration of “[a]ny controversy or claim arising out of or relating to this Agreement”). Courts have held that such broad clauses are “capable of an expansive reach.” *Am. Recovery Corp. [v. Computerized Thermal Imaging, Inc.]*, 96 F.3d 88, 93 (4th Cir. 1996)]. 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. *J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. 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.” *J. J. Ryan*, 863 F.2d at 321.

402 S.C. at 109-110, 739 S.E.2d at 213-14. *Landers* dealt with a broad arbitration provision, requiring arbitration of “any controversy or claim arising out of or relating to this contract, or breach thereof.” 402 S.C. at 103, 739 S.E.2d at 210. The *Landers* court determined that arbitration provision was broad enough to cover an executive employee’s claims of breach of contract, constructive termination, and slander.

In *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), the Court of Appeals held an agreement calling for arbitration of “every controversy or claim arising out of or relating to the Agreement, or the breach thereof” was broad enough to cover tort claims. “[T]he 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.” 404 S.C. at 261-62,

743 S.E.2d at 874-75 (citation removed; emphasis added).

In *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 553 S.E.2d 110 (2001), the Supreme Court of South Carolina found that a partnership agreement, which expressly provided for arbitration of all controversies or claims arising out of the partnership agreement, was broad enough to cover disputes regarding distribution of assets as well as tort claims between partners related to the partnership agreement.

In *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999), an employee handbook provided that “Arbitration is the final, exclusive and required forum for the resolution of all employment related disputes which are based on a legal claim.” 338 S.C. at 34, 524 S.E.2d at 842. The Court of Appeals held the broad provision required arbitration of the employee’s claims of defamation, conspiracy, negligent supervision, wrongful discharge, unfair or deceptive trade practices, and reckless or intentional infliction of emotional distress. 338 S.C. at 42, 524 S.E.2d at 846.

In *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2004), an employee signed an application in which he agreed “to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person.” 351 S.C. at 608, 571 S.E.2d at 712. The Court of Appeals held the broad provision required arbitration of the employee’s claims of breach of contract, trespass, and conversion. 351 S.C. at 612, 571 S.E.2d at 714-15.

In *The Vestry and Church Wardens v. Orkin Exterm. Co., Inc.*, 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2004), the Court of Appeals, taking stock of other cases, noted an agreement to arbitrate “all matters in dispute between [the parties]” was broad enough to cover any dispute between the parties. 356 S.C. at 213, 588 S.E.2d at 141-142. “The

common theme underlying these cases is that the parties expressly agreed that *all* controversies between them, not just those appurtenant to the contract containing the clause, were to be submitted to arbitration.” 356 S.C. at 208, 588 S.E.2d at 139 (original emphasis).

At least as broad as the provisions in the foregoing cases is the arbitration provision in Powell’s employment agreement, which documents encompass the terms, conditions, duties, responsibilities, and compensation of Powell’s position. Powell’s agreement with Stewart requires arbitration of “[a]ll disputes” between Powell and Stewart. Certainly, Powell’s claims of breach of contract and unpaid wages are covered by such a broad arbitration provision in his employment agreement.

“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.” *Landers*, 402 S.C. at 109, 739 S.E.2d at 213. “[U]nder the expansive reach of the FAA, a . . . claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause.” *Landers*, 402 S.C. at 111, 739 S.E.2d at 214. “[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.” *Carlson*, 404 S.C. at 261, 743 S.E.2d at 874-75 (citation removed).

The *Landers* court expounded on facts that closely parallel those in this matter.

The court found that the plaintiff’s

claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently

follow and implement all policies and decisions of the employer.
402 S.C. at 111-12, 739 S.E.2d at 215. In this case, the circuit judge did not consider the significantly related clauses in the documents comprising Powell's employment agreement. Rather, the circuit judge found the arbitration agreement inapplicable to Powell's claim because the contract containing the arbitration clause "does not reference salary and bonuses." [Order Aug. 15, 2013] The circuit judge's narrow and exclusive reading of the Non-Solicitation Agreement directly conflicts with established precedent. *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119 ("arbitration clause applies to disputes that do not arise under the governing contract when a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained.").

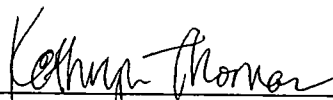
The circuit court did not support its finding with evidence that conclusively placed Powell's claims beyond the scope of the parties' arbitration agreement. Thus, it is legally impossible for the court to have found with "positive assurance" that Powell's claims are not subject to arbitration. To the contrary, it is abundantly clear that Powell's claims have a significant relationship to his employment agreement, and are covered by the parties' agreement to arbitrate "[a]ll disputes."

[Conclusion and signature on next page]

CONCLUSION

Powell and Stewart agreed to arbitrate “[a]ll disputes” between them. That agreement covers Powell’s claims that Stewart breached his employment agreement and denied him wages. For the foregoing reasons, the lower court’s decision to refuse to compel arbitration should be reversed.

Respectfully submitted,



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Columbia, South Carolina
February 18, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2013-001906
Circuit Court Case No. 2012-CP-40-8540

Matthew G. Powell Respondent.

v.

Stewart Title Guaranty Company Appellant,

APPELLANT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

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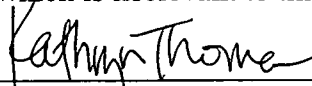
FEB 18 2014

Appellant Stewart Title Guaranty Company designates the following:

SC Court of Appeals

1. Disposition cover form and Order entered August 19, 2013
2. Summons and Complaint
3. Motion to Dismiss, with accompanying affidavits of Mark Jensen and Kayla Johnson, with all exhibits
4. Transcript of hearing held June 17, 2013

I certify this Designation contains no material which is irrelevant to this appeal.



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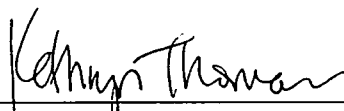
I hereby certify that I have this day served a copy of the Appellant's Designation of
Matter to be Included in the Record on Appeal on Counsel for Respondent by deposit in
the United States mail, postage prepaid, addressed to:

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SC Court of Appeals



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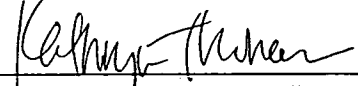
Matthew G. Powell Respondent.

PROOF OF SERVICE

I hereby certify that I have this day served a copy of the Initial Brief of Respondent upon
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