

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2018-CP-10-03588
Appellate Case No. 2019-001419

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SC Court of Appeals

Nancy Callaghan, Respondent,

v.

Five Star Quality Care, Inc., Five Star Quality Care-OBX
Operator, LLC d/b/a Sweetgrass Court Senior Living Com-
munity, Sweetgrass Village Assisted Living Community,
Lisa McLeod, and Derrick Defino, Appellants.

INITIAL BRIEF OF APPELLANT

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

G. Mark Phillips
SC Bar No. 7945
E-Mail: mark.phillips@nelsonmullins.com
Robert W. Whelan
SC Bar No. 71174
E-Mail: robert.whelan@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellants

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Statement of the Issues on Appeal

- 1. Did the Circuit Court err by expanding and misapplying the outrageous torts exception to arbitration instead of giving effect to the plain language in an arbitration agreement manifesting the parties' intent to arbitrate "any claims, controversies, or disputes arising between them," particularly when the law requires that all doubts concerning the parties' intent be resolved in favor of arbitration?**

- 2. Did the Circuit Court err in disregarding the parties' express intent that the Arbitration Agreement bind related parties and holding instead that intended beneficiaries may not enforce their rights under the Agreement?**

Statement of the Case

This is an appeal from the Circuit Court's denial of Defendants' Motion to Dismiss and to Compel Arbitration. Plaintiff filed this suit against Defendants on July 18, 2018, asserting claims for negligence, negligence *per se*, fraud and misrepresentation, and violations of the South Carolina Unfair Trade Practices Act. Plaintiff alleges that a third-party unaffiliated with Defendants assaulted her while she resided at Defendants' assisted living facility. Defendants filed an Answer and a Motion to Dismiss and to Compel Arbitration on September 5, 2018. (*See* Answer; Motion to Dismiss and Compel Arbitration).

On March 14, 2019, the Circuit Court heard oral arguments on Defendants' Motion. (*See* Transcript). The Circuit Court denied Defendants' Motion by Order entered on July 30, 2019. (Order). In denying arbitration, the Circuit Court applied the "'outrageous tort' exception to arbitration" to preclude arbitrating Plaintiff's claims "despite the Arbitration Agreement's broad scope." (Order, pp. 2-3). The Circuit Court additionally found that "the Defendants who were not named as parties to the Arbitration Agreement" could not compel arbitration under the Agreement based on its conclusion that "the Arbitration Agreement expresses an intent that its terms apply only to the named parties." *Id.* at p. 3. Defendants served their notice of appeal on August 20, 2019.

Statement of the Facts

This case arises out of Plaintiff Nancy Callaghan's residency in Defendants' senior living facility, Sweetgrass Court, in Charleston, South Carolina. That single fact may be dispositive of this issue. Plaintiff alleges that another Sweetgrass Court resident, a man who Plaintiff did not include as a party to this case, sexually assaulted her. (Compl., ¶ 41). Plaintiff does not claim that any Defendant participated in her assault. Nor does Plaintiff claim that her assailant was acting on Defendants' behalf. Nor does Plaintiff claim that Defendants intended to harm Plaintiff. And even though Plaintiff's claims all arise from that single incident, she did not sue her alleged assailant. Instead, Plaintiff sued Defendants for allegedly not ensuring a safe environment at Sweetgrass Court.

The parties' relationship dates back to October 2016 when Plaintiff moved into Sweetgrass Court. (Pl. Brief in Opp. to Mot. to Compel Arbitration, "Pl. Opp." at p. 2). Plaintiff sought an assisted living facility due to her "dementia and other health issues that prevented [her] from continuing to live at home." *Id.* Plaintiff contracted with Defendants to provide the assisted living services she needed. (*Id.* at pp. 2, 5). Specifically, Plaintiff contracted with Defendants to "provide the care and services she needed in an environment that allowed her to maintain her privacy and dignity." (*Id.* at p. 2). According to Plaintiff, the parties' relationship was founded on Defendants' promises to:

- (1) provide sufficient staff to care for Plaintiff;
- (2) keep Plaintiff safe;
- (3) protect Plaintiff from abuse; and
- (4) respect and protect Plaintiff's dignity.

(Compl., ¶ 22).

Plaintiff alleges that the unrelated party assaulted her a month after she moved in. *Id.* Less than two years after that, Plaintiff filed her suit against Defendants seeking money damages. Plaintiff alleges generally that Defendants did not adequately protect her while she resided at Sweetgrass Court. Specifically, Plaintiff alleges that Defendants did not:

- (1) Keep Plaintiff free from abuse and neglect;
- (2) Keep Plaintiff free from sexual assault;
- (3) Protect Plaintiff's dignity; and
- (4) Have proper policies in place to care, treat, and protect Plaintiff.¹

Id. at ¶ 61.

In short, Plaintiff alleges that Defendants did not do what they said they would do, and what Plaintiff expected them to do, when Plaintiff entered into her relationship with Defendants.

After Plaintiff filed suit, Defendants moved to compel arbitration pursuant to an Agreement the parties entered into when Plaintiff moved into Sweetgrass Court (the "Agreement").² The Agreement states:

- Plaintiff and Five Star³ "agree that *any claims, controversies, or disputes arising between them involving a potential monetary amount in excess of \$25,000 shall be resolved exclusively by binding arbitration.*" This bolded language appears in Paragraph 1 on the first page of the Arbitration Agreement. (Agreement, ¶ 1) (emphasis in original).

¹ Plaintiff goes on to allege a handful of other similar duties she contends Defendants breached related to protecting Plaintiff's dignity, keeping adequate records, training its staff, providing adequate staffing, and complying with federal and state regulations. (Compl., ¶ 61).

² The Agreement was signed by the Plaintiff's husband as her attorney in fact. (Agreement, p. 1; Power of Attorney, p. 1)

³ The Agreement defines "Sweetgrass Court ('Facility,' an affiliate of Five Star Quality Care, Inc., collectively [as] 'Five Star')[.]" (Agreement, p. 1).

- **“Both the Resident and Five Star waive their right to a trial by jury.”** *Id.* at ¶ 5. (emphasis in original). This bolded provision appeared in the first paragraph on the top of page 2 of the Agreement. *See id.*
- Plaintiff further agreed that she had:
 - “carefully read” the Agreement;
 - “asked any questions necessary to understand the terms, consequences, and bind effect” of the Agreement;
 - was “executing this Agreement voluntarily;” and
 - was “provided an opportunity to seek the advice of an attorney of their choice before signing this Agreement.” *Id.* at ¶ 10.
- **“THIS CONTRACT CONTAINS BOTH AN ARBITRATION PROVISION AND A WAIVER OF JURY TRIAL, WHICH MAY BE ENFORCED BY THE PARTIES.”** This bolded, underlined provision in all capital letters appeared on a separate page just inches above the parties’ signatures. *Id.* at p. 3. (emphasis in original).

After Defendants filed a Motion to Dismiss and Compel Arbitration, the Circuit Court entered an Order denying the Motion. (Order). Defendants contest that Order through this appeal.

Standard of Review

“The question of arbitrability” is a judicial determination and it is “reviewed *de novo*” on appeal. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 107, 739 S.E.2d 209, 213 (2013). The reviewing court must resolve “any doubts concerning the scope of arbitrable issues ... in favor of arbitration.” *Id.* at 109, 739 S.E.2d 213. And the “party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014).

Argument

The Circuit Court erred in disregarding the plain language of the Arbitration Agreement with respect to both bases for its decision. First, it disregarded the parties’ expressed intent to arbitrate “any claims, controversies, or disputes arising between them,” and instead applied the outrageous torts exception, despite that it has never been applied to facts like these. Second, the

Circuit Court disregarded the parties' expressed intent for the Agreement to "inure to the benefit of" their related parties.

- I. **The Circuit Court erred by expanding and misapplying the outrageous torts exception instead of giving effect to the unambiguous language in an arbitration agreement manifesting the parties' intent to arbitrate "any claims, controversies, or disputes arising between them," particularly when the law requires that all doubts concerning the parties' intent be resolved in favor of arbitration.**

A court's "first task" on a motion to compel arbitration is to "determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The answer is yes if the "factual allegations underlying the claim are within the scope of the broad arbitration clause." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This may be true in one of two ways. First, a claim is arbitrable if the agreement "specifically encompasses the asserted claims." *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008), *aff'd*, 389 S.C. 375, 698 S.E.2d 809 (2010) (citations omitted). Second, a claim is arbitrable if "there exists a significant relationship between the asserted claims and the parties' contract." *Id.*; *see also J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988).

In short, a court's central role in assessing arbitrability is to effectuate the intent of the parties by assessing whether they intended to arbitrate the claim at issue. In doing this, South Carolina courts have adopted something they call the outrageous torts exception to establish a definite rule regarding arbitration of claims arising outside of an underlying contract. South Carolina's outrageous torts exception cannot change this core role without violating federal law. However, that is just what the Circuit Court did here. It expanded and misapplied the outrageous torts exception, failed to give effect to the parties' unambiguous intent to arbitrate all disputes arising

between them, and did not apply binding federal substantive law. For those reasons, the Order cannot stand.

a. The Circuit Court erred by applying the outrageous torts exception beyond its limited application.

The Supreme Court of South Carolina first named the “outrageous torts exception to arbitration” in 2007 to establish “a more definitive rule” to determine “whether a significant relationship exists” between a claim and an underlying contract. *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).⁴ The Court announced that courts will not “interpret any arbitration agreement” to apply to “outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” *Id.*⁵ Since then, courts have applied the outrageous torts exception “sparingly” and have been “reluctant” to find that “conduct underlying the lawsuit” is “unrelated to the contract containing the arbitration agreement.” *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 20, 791 S.E.2d 128, 138 (2016) (Toal, A.J., dissenting).

⁴ Two years earlier, this Court forecasted that “tortious behavior” that the parties could not have “reasonably foreseen” falls outside the significant relationship test. *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 635, 611 S.E.2d 305, 308 (2005). This principle, which the Supreme Court of South Carolina ultimately named the outrageous torts exception, was born as a natural limitation on prior common law expansion of the substantial relationship test from tort-based claims “interwoven” in the underlying contract to tort-based claims that merely related to the underlying contract. While certain appellate opinions since *Chassereau* have shaded over that history, Justice Hearn, in a concurrence, recently indicated that the purpose announced in *Chassereau* still stands. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 14, 791 S.E.2d 128, 135 (2016) (Hern, J., concurring).

⁵ See *infra* § I.c. for an explanation of the Federal Arbitration Act’s (“FAA”) application to this case. This initial iteration of the outrageous torts exception violates the FAA’s “equal-treatment principle,” which prohibits courts from invalidating arbitration agreements based on “legal rules that ‘apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

In the face of *AT&T Mobility LLC v. Concepcion*, the South Carolina Supreme Court delivered a fractured opinion attempting to clarify the outrageous torts exception in light of the FAA's now clear meaning.⁶ In separate opinions, three Justices sought to clarify that despite its new name, the outrageous torts exception was not a new legal doctrine, but instead the application of the long-standing contract interpretation maximum to effectuate the intent of the parties. *Parsons*, 418 S.C. at 13-14, 791 S.E.2d at 134-135 (Hern, J., concurring) (opining that the outrageous torts doctrine "embodies a generally applicable contract principle: effectuating the intent of the parties"); *id.* at 17, 791 S.E.2d at 136 (Toal, A.J., dissenting) (opining that "the so-called 'outrageous and unforeseeable tort exception to arbitration' is merely a label for this Court's application of a longstanding contract principle – effectuating the parties' contractual intent.").⁷

Stated differently, the otherwise fractured Court agreed that the outrageous torts exception simply ensures parties are not required to "arbitrate behavior that they clearly did not contemplate upon entering the contract, or arbitration agreement." *Id.* at 14, 791 S.E.2d at 135. (Hern, J., concurring).⁸ To that end, under the umbrella of the outrageous torts exception, courts will continue to refuse arbitration where an "outrageous tort is legally distinct from the contractual relationship

⁶ Justices Pleicones and Justice Kittredge opined that the outrageous torts exception violates the FAA and must be overruled. *Parsons*, 418 S.C. at 12, 791 S.E.2d at 133-34.

⁷ Acting Justice Toal further opined that the outrageous torts exception to arbitration is nothing more than a "formal label" that is, in fact, a "misnomer." *Parsons*, 418 S.C. at 19, 791 S.E.2d at 137.

⁸ This iteration of the outrageous torts exception also likely violates the FAA because instead of applying the general contract principle which requires a court to give effect to the parties' intentions as evidenced in the contract, it requires a judicial determination, not present elsewhere in contract law, of what a reasonable consumer may foresee in the future. However, Defendants recognize that this Court is bound by the Supreme Court of South Carolina's opinions and must apply the law as it exists.

between the parties” and based on “wholly unexpected tortious conduct.” *Aiken*, 373 S.C. at 151, 644 S.E.2d at 709. That is not the case here for at least two reasons.

First, Plaintiff’s claims against Defendants are not legally distinct from their relationship. Plaintiff alleges that she entered into a relationship with Defendants to receive “assisted living services.” (Pl. Opp., p. 5). One of, if not the most central of the services is to provide a reasonably safe environment for residents. (Compl., ¶ 22). Defendants’ alleged duty to protect Plaintiff, therefore, stems exclusively from her residency at Sweetgrass Court. And Plaintiff alleges Defendants did not provide a safe environment. (*See, e.g.*, Compl., ¶ 61). Nothing could be more central to these parties’ relationship. And it is not “wholly unexpected” behavior or “legally distinct” from the parties’ underlying relationship. Allegedly failing to provide a reasonably safe environment in an assisted living facility is not a claim that the parties “clearly did not contemplate upon entering the contract or arbitration agreement.” *Parsons*, 418 S.C. at 14, 791 S.E.2d at 135 (Hern, J., concurring). Instead, these allegations are the very essence of arbitrable claims in this context.

The two South Carolina cases the Circuit Court cites in support show the erroneousness of its holding. In both, the defendants committed intentional torts that the defendants intended to harm the plaintiff. In one, the defendant stole the plaintiff’s identity. *Aiken*, 373 S.C. at 147, 644 S.E.2d at 707. In the other, the defendant defamed the plaintiff. *Chassereau*, 373 S.C. at 170, 644 S.E.2d at 719. Here, Plaintiff alleges that a third-party, not Defendants, assaulted her. Plaintiff instead alleges Defendants negligently admitted and failed to discharge another resident at Sweetgrass Court. There are no allegations that Defendants intended to harm Plaintiff through those traditional business decisions. As a result, the claims against Defendants do not allege outrageous and wholly unexpected conduct. Instead, these are “rather commonplace” tort claims against senior

living and medical facilities.⁹ See *Wilson v. Willis*, 416 S.C. 395, 419, 786 S.E.2d 571, 584 (2016) (holding that claims centering on “alleged failure to sufficiently investigate, train, supervise, and audit” are “rather commonplace” and do not “include intentional or otherwise outrageous conduct).

Second, the Circuit Court’s decision to broadly “apply[] this exception to torts arising out of sexual assault” is not supported by the cases it cites. It also plainly violates the FAA. The Supreme Court has held that a “law prohibit[ing] outright arbitration of a particular type of claim” violates the FAA. *Concepcion*, 563 U.S. at 339. Instead, the handful of cases the Circuit Court cites show that the Circuit Court conflated the allegations against the non-party assailant with the allegations against Defendants. This is because every one of these cases analyzes whether a person who commits sexual assault or his employer, may force the victim to arbitrate claims almost exclusively in the employment context.¹⁰

To be sure, these cases do not hold that torts “arising out of sexual assaults” are generally not subject to arbitration. Instead, they assess whether sexual assault falls within the scope of employment. Indeed, none of the cited cases even address whether failing to stop an unrelated third-party attacker constitutes outrageous and unforeseeable behavior that parties “clearly did not

⁹ *Victoria v. Superior Court*, also cited in the Court’s Order, involved a hospital’s attempt to compel arbitration of a patient’s claim that she was sexually assaulted by the hospital’s employee. 40 Cal.3d 734 (1985). There, the court did not order arbitration because the agreement was ambiguous over whether it covered the employee’s actions because the alleged assault was outside the scope of his employment, and construed the ambiguity against the drafter, the hospital. See *id.*

¹⁰ See, e.g., *Arnold v. Burger King*, 38 N.E. 3d 69 (Ohio App. 2015) (employee’s allegation that her supervisor assaulted her in the men’s room at employer’s restaurant was independent of employment relationship); *Doe v. Princess Line Cruise Lines, Ltd.*, 657 F.3d 1204 (11th Cir. 2011) (declining to compel arbitration of employee’s claims that she was drugged and sexually assaulted by co-employee while off-duty because claims did not relate to her employment); *Jones v. Haliburton Co.*, 583 F.3d 228 (5th Cir. 2009) (employee’s claim that she was assaulted by a co-employees after hours while employee was off-duty in her bedroom did not relate to her employment); *Smith v. Captain D’s, LLC*, 963 So.2d 1116 (Miss. 2007) (finding that employee’s claim that manager raped her at work during work hours was not within the scope of the arbitration agreement in employee’s contract).

contemplate upon entering the contract or arbitration agreement” – the relevant inquiry under the outrageous torts exception. *See Parsons*, 418 S.C. at 14, 791 S.E.2d at 135 (Hern, J., concurring). For the Circuit Court to find these foreign cases relevant, it would have to conflate the alleged conduct of non-parties with the alleged conduct of Defendants since only Defendants’ conduct is relevant here. The Circuit Court’s reliance on those cases was, therefore, in error.

- b. The Circuit Court erred in looking beyond the plain and unambiguous language in the Agreement, which manifests the parties’ clear intent to arbitrate all claims arising between them.**

Instead of relying exclusively on the outrageous torts exception, the Circuit Court should have applied traditional contract principles to determine whether the parties intended to arbitrate these disputes under the Agreement. Even though federal substantive law governs, the arbitrability determination remains “a matter of contract interpretation.” *Landers*, 402 S.C. at 108, 739 S.E.2d at 213. So, courts “apply ordinary state-law principles that govern the formation of contracts” to determine whether “the parties agreed to arbitrate a certain matter.” *Id.* (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)).

The “primary objective” in contract interpretation is to “give effect to the intention of the parties.” *Southern Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 80-81, 562 S.E.2d 482, 484-85 (Ct. App. 2002). Stated differently, the parties’ intent establishes the scope of an arbitration agreement. Those intentions “must” derive from “the language of the contract” unless it is ambiguous. *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007). That is, where contract language “is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Id.* Despite these legal axioms, the Circuit Court did not evaluate the language in the Agreement to ascertain the parties’ intent.

Because the question is whether the parties intended to arbitrate Plaintiff's claims for negligence, misrepresentation, and unfair conduct, the Circuit Court should have analyzed the Agreement and this Court should do so now. The operative language in the Agreement is:

Resident and Five Star agree that any claims, controversies, or disputes arising between them involving a potential monetary amount in excess of \$25,000 shall be resolved exclusively by binding arbitration."

(Agreement, ¶ 1) (emphasis modified).

Courts in South Carolina have already applied our state law principles to nearly identical arbitration agreements. These courts have correctly held that a broad relationship-based arbitration provision, like the one in the Agreement, "manifest[s] an intention to arbitrate all of [the parties'] disputes arising from their business relations, not just those arising under a particular contract." *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 208, 588 S.E.2d 136, 139 (Ct. App. 2003). Indeed, the "breadth of the language" in these relationship-based arbitration clauses "clearly establishes that the arbitration clause was intended to apply to all conflicts between the parties and not only to conflicts regarding [one contract] in particular." *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 568 (4th Cir. 1998) (analyzing an agreement that applied to "[a]ny controversy or claim arising out of or relating to ... any aspect of the relationship between [the parties].").

And where an agreement governs "any dispute arising out of the relationship of the parties," as is the case here, "it does not matter whether the particular claim relates to the contract containing the clause." *Vestry & Church Wardens of Church of Holy Cross*, 356 S.C. at 209-210, 588 S.E.2d at 140. It, instead, "matters only that the claim concerns the relationship of the parties." *Id.* The central factual allegation underlying Plaintiff's claims is that a third-party assaulted Plaintiff while she resided in Defendants' assisted living facility because Defendants did not maintain

a reasonably safe environment. This allegation strikes at the core of the “relationship of the parties” with Plaintiff as a resident and Defendants as owners and operators of an assisted living facility.¹¹

c. The Circuit Court erred by not applying federal law.

The FAA “creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This “federal substantive law of arbitrability” governs the Court’s “first task” to determine “whether the parties agreed to arbitrate that dispute.” *Mitsubishi*, 473 U.S. at 626.

So while state law principles determine the parties’ intent, federal law dictates how courts apply those principles. For starters, courts must undertake their analysis “with a healthy regard for the federal policy favoring arbitration.” *Id.* The starting place is then a “heavy presumption of arbitrability.” *Landers*, 402 S.C. at 108-109, 739 S.E.2d at 213 (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). This is a heavy presumption that is “strengthened when an arbitration clause is broadly written.” *Id.* (quotation omitted).

In practice, the federal presumption requires “arbitration agreements [to be] liberally construed in favor of arbitrability” and “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.* (quoting *Am. Recovery Corp.*, 96 F.3d at 94). So, while the parties’ intentions control “as with any other contract” under state law, those intentions must be “generously construed as to issues of arbitrability.” *Mitsubishi*, 473 U.S. at 626. And courts deny arbitration only where it “may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Landers*, 402 S.C. at 108, 739 S.E.2d at 213. The Circuit Court below did not apply this body of law at all.

¹¹ This is even clearer when considered in light of the federal presumption discussed in the next section.

This means that even if the Court determines the Agreement is ambiguous as to whether the parties intended to arbitrate all disputes between them, then arbitration must still be compelled. The incredibly broad language in the Agreement compels at least some doubt that the parties did not “clearly” intend to arbitrate these kinds of disputes. And if that is true, then the Court must “generously construe[]” the parties’ intentions in favor of arbitration and resolve that doubt “in favor of arbitration.” *See id.*

II. The Circuit Court erred in disregarding the parties’ express intent that the Agreement would be binding upon related parties and holding instead that non-signatories were not bound by the Agreement.

The Circuit Court held that “the Arbitration Agreement does not apply to the Defendants who were not named as parties ... because, in the aggregate, the Arbitration Agreement expresses an intent that its terms apply only to the named parties.” (Order, p. 3).¹² The Circuit Court based this finding on six words from a single sentence in the Agreement that simply stated that it “may be enforced by the parties.”¹³ *Id.* at pp. 3-4. Critically, in determining whether the Agreement should apply to related parties, the Order completely disregarded the section of the Agreement that dealt with the Agreement’s applicability to related parties. One of the ten paragraphs in the contract dealt precisely with that subject. Titled “Applicability to Related Parties,” it specifically stated that it would “be binding upon and inure to the benefit” of the Resident, his family, administrator and

¹² Because the only Defendants not specifically named in the Agreement were Sweetgrass Village, Lisa McLeod, and Derrick Defino, this portion to the appeal only applies to those Defendants. Both Five Star Quality Care Inc. and Five Star Quality Care-OBX Operator, LLC d/b/a Sweetgrass Court Senior Living Community were unaffected by this portion of the Circuit Court’s ruling.

¹³ The full sentence from which this phrase was taken reads: “This contract contains both an arbitration provision and a waiver of jury trial, which may be enforced by the parties.” (Agreement, p. 3).

assigns, as well as to Five Star and its “affiliates and subsidiaries, directors, officers, employees, representatives, or agents.” (Agreement, ¶ 8).

8. APPLICABILITY TO RELATED PARTIES. Resident and Resident’s Authorized Representative agree that this Agreement shall be binding upon them personally. This agreement shall be binding upon and inure to the benefit of all persons whose claim is derived through or on behalf of the Resident, including that of the Resident’s family, heirs, guardian, executor, administrator and assigns. This agreement shall be binding upon and inure to the benefit of Five Star’s affiliates and subsidiaries and their respective directors, officers, employees, representatives, or agents.

a. The plain language of the contract expressed the intent that it should be binding upon related parties.

The cardinal rule of contractual interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language. “If the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Palmetto Mortuary v. Knight Systems*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (citations omitted). Here, paragraph eight of the Agreement clearly explained the parties’ intent with respect to its “applicability to related parties.” The Agreement was to “inure to the benefit of ... Five Star’s affiliates and subsidiaries and their respective directors, officers, employees, representatives, or agents.” (Agreement, ¶ 8). The Circuit Court did not find that this language was ambiguous, nor did it find it was inapplicable; rather it simply omitted the language from its analysis of the parties’ intent with respect to the Agreement’s applicability to related parties.

b. The phrase “may be enforced by the parties” does not override the parties’ intent as expressed in the “Applicability to Related Parties” paragraph.

It was erroneous for the Circuit Court to base its determination of the parties’ intent on a six-word phrase in an unrelated sentence. This finding violated the well-settled rule of contractual construction that “a party may not create an ambiguity by reading a single sentence or clause, but rather the contract and the language used must be considered as a whole.” *Madden v. Bent Palm Investments*, 386 S.C. 459, 465, 688 S.E.2d 597, 600 (Ct. App. 2010) (citing *Schulmeyer v. State*

Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)). Additionally, the quoted phrase was not consistent with the court’s interpretation. A mere statement that the parties “may” enforce the Agreement is equally consistent with the applicability of the Agreement to other parties. South Carolina courts recognize that the word “may” is a permissive term, which does not require enforcement by the parties, any more than it precludes enforcement by related parties. *See, e.g., Waites v. S.C. Windstorm & Hail Underwriting Ass’n*, 279 S.C. 362, 365, 307 S.E.2d 223, 224 (1983).

The fact that the parties “may” enforce the Agreement in no way precludes related parties from also enforcing the Agreement. To read this phrase otherwise would improperly add terms not present in the Agreement.¹⁴ *See Nicholson v. Nicholson*, 378 S.C. 523, 532, 663 S.E.2d 74, 69 (Ct. App. 2008) (“In the enforcement of an agreement, the court does not have the authority to modify terms that are clear and unambiguous on their face.”) (citations omitted). In basing its decision on this partial “may” phrase while ignoring the parties’ expressed intent concerning the Agreement’s applicability to related parties, the Circuit Court improperly altered the intent of the parties.

c. The parties intended for Defendants Sweetgrass Village, Lisa McLeod, and Derrick Defino to be beneficiaries of the Agreement.

It is well settled that a non-signatory to a contract may enforce a contract if he is an intended third-party beneficiary. *See Svenningsen v. Knight*, 286 S.C. 299, 303, 333 S.E.2d 78, 81 (Ct. App.

¹⁴ If it were inconsistent for the Agreement to state that it applied to related parties and also state that it “may be enforced by the parties”—and Defendants believe there is no inconsistency—the Court should construe the contract as a whole and can read different provisions dealing with the same subject matter together. Generally, in the case of incompatible clauses in a contract, the first will prevail over the later. *See Buice v. WMA Securities, Inc.*, 380 S.C. 149, 157, 668 S.E.2d 430, 432 (Ct. App. 2008) (citing *Phipps v. Hardwick*, 273 S.C. 17, 24, 253 S.E.2d 506, 510 (1979)). In the Agreement, paragraph eight should prevail in the case of any inconsistency between the two provisions because it comes before the language that the Agreement “may be enforced by the parties.” (Agreement, pp. 1, 3).

1985) (“Although a contract between two persons for the benefit of a third can be enforced by the third person, even if he is not named in the contract.”). In determining whether “a contract is made for the benefit of a third person,” a court should review the language of the contract to ascertain whether “the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.” *Fabian v. Lindsay*, 410 S.C. 475, 488, 765 S.E.2d 132, 139 (2014) (citations omitted).

Thus, under the “Applicability to Related Parties” paragraph of the Agreement, if Sweetgrass Village is an affiliate and subsidiary of Five Star and if Lisa McLeod and Derrick Defino are “directors, officers, employees, representatives, or agents” then the Agreement, by its own terms, “inure[s] to the[ir] benefit.” This is an unambiguous statement of the parties’ intent to “create a direct ...benefit” to them. *See id.* And one need look no further than Plaintiff’s Complaint to see that these defendants are “affiliates and subsidiaries and their respective directors, officers, employees, representatives, or agents.” Of the three corporate defendants listed, Plaintiff alleges that all have the same principal place of business at 1010 Anna Knapp Drive, in Mount Pleasant, South Carolina. (Compl. ¶ 2, 3, 4). Similarly, she alleges that both of the individual defendants are “directors” at Sweetgrass Village. (Compl. ¶ 5, 6). Finally, her substantive allegations are made against Defendants collectively, and her allegations all arise from the residential services Defendants agreed to provide Plaintiff and from which the subject Agreement arose. Indeed, Plaintiff did not dispute below that Defendants were all related parties under the Agreement. (*Compare* Transcript p. 8 where Defendants’ counsel noted “...there’s no allegation that these aren’t related – these aren’t even subsidiaries, affiliates, or employees of Five Star” *with* Transcript p. 14-17, where that fact was not contested by plaintiff’s counsel).

For these reasons, the Circuit Court erred in disregarding the “Applicability of Related Parties” portion of the Agreement, and in doing so failed to enforce the intent of the parties and the plain meaning of the Agreement.

Conclusion

This Court should reverse the circuit court’s denial of Appellant’s Motion to Dismiss and Compel Arbitration.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Mark Phillips (SC Bar No. 7945)
E-Mail mark.phillips@nelsonmullins.com
Robert W. Whelan (SC Bar No. 71174)
E-Mail: robert.whelan@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Attorneys for Appellant

Charleston, South Carolina

November 20, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2018-CP-10-03588
Appellate Case No. 2019-001419

RECEIVED
NOV 20 2019
SC Court of Appeals

Nancy Callaghan,

Respondent,

v.

Five Star Quality Care, Inc., Five Star Quality Care-OBX
Operator, LLC d/b/a Sweetgrass Court Senior Living
Community, Sweetgrass Village Assisted Living
Community, Lisa McLeod, and Derrick Defino

Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on Nancy Callaghan, by depositing a copy of it in the United States Mail, postage prepaid, on November 20, 2019, addressed to her counsel of record, John G. Felder, Jr. and Richard A. "Trey" Jones, III, McGowan, Hood, & Felder, LLC, 1517 Hampton Street, Columbia, South Carolina, 29201 and Rose Mary Parham, Parham Law Firm, LLC, Post Office Box 1514, Florence, South Carolina, 29503.

[SIGNATURE ON FOLLOWING PAGE]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

G. Mark Phillips
SC Bar No. 7945
E-Mail: charles.norris@nelsonmullins.com
Robert W. Whelan
SC Bar No. 71174
E-Mail: robert.whelan@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

Counsel for Appellants

Charleston, South Carolina

November 20, 2019



NELSON MULLINS

NELSON MULLINS RILEY & SCARBOROUGH LLP
ATTORNEYS AND COUNSELORS AT LAW

Robert W. Whelan
T 843.534.4113 F 843.534.4392
robert.whelan@nelsonmullins.com

151 Meeting Street | Sixth Floor
Charleston, SC 29401-2239
T 843.853.5200 F 843.722.8700
nelsonmullins.com

November 20, 2019

Via Hand Delivery

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
NOV 20 2019
SC Court of Appeals

RE: Nancy Callaghan v. Five Star Quality Care, Inc., Five Star Quality Care-OBX Operator, LLC dba Sweetgrass Court Senior Living Community, Sweetgrass Village Assisted Living Community, Lisa McLeod and Derrick Defino
Appellate Case No. 2019-001419
Case No. 2018-CP-10-3588
Our File No. 041123/01560

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the following documents:

- (1) Appellant's Initial Brief;
- (2) Proof of Service of Appellant's Initial Brief;
- (3) Designation of Matter to be Included in the Record on Appeal; and
- (4) Proof of Service of Designation of Matter to be Included in the Record on Appeal.

Please file the originals and return a clocked-in copy to me with the bearer of this letter. By copy of this letter and the enclosures to all counsel of record, we are serving them with a copy of the same. Please do not hesitate to contact me should you require anything further.

Very truly yours,

Robert W. Whelan

RWW:gh
Enclosures

cc: John G. Felder, Jr., Esquire
Richard A. "Trey" Jones, III, Esquire
Rose Mary Parham, Esquire