THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE LARRY B. HYMAN, JR.
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2019-001185
CIVIL ACTION NO. 2018-CP-26-06576

Cleo Bertiaux, as Guardian for Kathryn G. Parrish, Appellant,

versus

NHC Healthcare/Garden City, LLC, Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE LOWER COURT ERR IN COMPELLING ARBITRATION WHEN RESPONDENT WAS NOT A PARTY TO THE ARBITRATION AGREEMENT AND APPELLANT NEVER AGREED TO ARBITRATE WITH RESPONDENT?**

II. **DID THE LOWER COURT ERR IN "LOOK[ING] AT WHAT THE PARTIES' INTENSIONS WERE" OUTSIDE THE CONTRACT LANGUAGE WHEN THE ARBITRATION AGREEMENT WAS CLEAR AND UNAMBIGUOUS?**

III. **DID THE LOWER COURT ERR IN RESOLVING ANY PERCEIVED AMBIGUITIES AGAINST APPELLANT WHEN RESPONDENT DRAFTED THE ARBITRATION AGREEMENT?**

STATEMENT OF CASE

Kathryn G. Parrish was seriously injured when Respondent's staff left her alone in the shower and she fell. Respondent's medical records for Ms. Parrish note multiple times that Ms. Parrish should not be left unattended in the shower. However, despite these clear directives in the medical records, Respondent's staff left Ms. Parrish in the shower and that is when she fell and was injured.

Prior to Ms. Parrish's admittance to the Respondent's facility, her daughter, Cleo Bertiaux, was appointed Guardian by the Horry County Probate Court. Upon admission, Ms. Bertiaux signed the arbitration agreement at issue. The arbitration agreement is specific and limited. In relevant part it provides:

"This is an Agreement to arbitrate any dispute that might arise between Kathryn

Parrish ("Patient") [and] National Healthcare Garden City, LLC and ("Center")." (R. p. 066). The Respondent to this action, NHC Healthcare/Garden City, LLC, is not a party to the arbitration agreement it submitted. The rest of the document refers only to National Healthcare Garden City, LLC. Ms. Bertiaux did not sign any documentation agreeing to arbitration with the named Respondent, NHC Healthcare/Garden City, LLC. Ms. Bertiaux never sued National Healthcare Garden City, LLC and has no dispute against it that would trigger the arbitration agreement. National Healthcare Garden City, LLC is not a subsidiary, parent, affiliate or otherwise related to Respondent. As a matter of fact and as a matter of law, there is no legal entity called National Healthcare Garden City, LLC. (R. pp. 127-128). The only Defendant to this action, NHC Healthcare/Garden City, LLC, has no arbitration agreement with Appellant.

In effect, the lower court rewrote a clear and unambiguous arbitration agreement. Instead of enforcing the contract documents that Respondent wrote and submitted to the lower court, the lower court effectively rewrote those documents for Respondent by substituting and/or adding Respondent as a party to the arbitration agreement. After effectively rewriting the arbitration agreement by adding a party to the arbitration agreement, the lower court then enforced the arbitration agreement that it effectively rewrote by dismissing this action and compelling arbitration. This appeal followed.

STANDARD OF REVIEW

"The construction of an unambiguous written contract is a question of law for the court." Edward Pinckney Associates, Ltd. v. Carver, 294 S.C. 351, 364 S.E.2d 473 (Ct. App. 1987)(citation omitted). Thus, review by this court is *de novo*.

ARGUMENT

I. THE LOWER COURT ERRED IN DISMISSING APPELLANT'S ACTION AND COMPELLING ARBITRATION BECAUSE APPELLANT NEVER AGREED TO ARBITRATE WITH ANY PARTY TO THIS ACTION.

Appellant never agreed to arbitrate with Respondent. The arbitration agreement which the lower court relied on to dismiss this action and compel arbitration is not between Appellant and Respondent. In order to reach its decision, the lower court ignored the plain language of the arbitration agreement and effectively rewrote the arbitration agreement to include Respondent as a party. This was clear legal error that should now be reserved by this court.

The party seeking to enforce an arbitration agreement has the burden of establishing the existence of a valid arbitration agreement. *See* Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d. 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid and enforceable arbitration agreement between the parties. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.C 754, 764, 151 L.Ed.2d 755 (2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612 (2003). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007)(internal citation omitted).

Whether a valid arbitration agreement exists is a matter of judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.C. 2d 139, 144 (S.C. Ct. App. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA

of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007)("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). "A court has no authority to rewrite a contract and impose unwanted obligations and under the guise of specific performance or judicial construction." Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 411, 656 S.E.2d 775, 781 (S.C. Ct. App. 2008); *See also* Granite Rock Co. v. International Broth. of Teamsters, 130 S. Ct. 2847 (2010). "Arbitration is 'a matter of contract,' and courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted." Am. Express Co. v. v. Italian Colors Restaurant, 570 U.S. 228, 233, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013).

In this case Appellant never agreed to arbitrate with Respondent. Appellant never signed an arbitration agreement with Respondent. The arbitration agreement at issue states: "This is an Agreement to arbitrate any dispute that might arise between Kathryn Parrish ("Patient") [and] National Healthcare Garden City, LLC and ("Center")." (R. p. 066). Appellant filed this action against NHC Healthcare/Garden City, LLC not against National Healthcare Garden City, LLC. (R. pp. 022-025). NHC Healthcare/Garden City, LLC is the proper legal party in interest because it owns and operates the facility where Respondent was injured. From the outset, including the originally filed Notice of Intent to Suit, NHC Healthcare/Garden City, LLC has been the only named Defendant to this action. (R. pp. 013-025). At no time has NHC Healthcare/Garden City, LLC ever produced an arbitration agreement where Appellant agreed to arbitrate with NHC Healthcare/Garden City, LLC. The only arbitration agreement that exists is between Appellant and National Healthcare Garden City, LLC. But Appellant never sued

National Healthcare Garden City, LLC and has never pursued any claim against National Healthcare Garden City, LLC. The lower court committed reversible error in holding otherwise.

In the Order Granting Defendant's Motion to Dismiss and Compel Arbitration the lower court made a "FACTUAL FINDING" that concluded: "Plaintiff also signed a Preadmission Agreement and Agreement to Arbitrate and Waive Jury Trial with NHC Healthcare/Garden City, LLC (the 'Agreement')." (R. p. 005). As demonstrated from the actual documents before the lower court and which are now before this court, this finding is factually inaccurate and simply wrong. (R. p. 066). The only arbitration agreement Appellant signed was with National Healthcare Garden City, LLC and not the named Defendant/Respondent to this action, NHC Healthcare/Garden City, LLC. (R. p. 066).

To be clear, National Healthcare Garden City, LLC is not related in any shape, fashion or form to NHC Healthcare/Garden City, LLC. NHC Healthcare/Garden City, LLC is not an agent, representative, affiliate, fiduciary, etc. which would trigger the arbitration agreement between National Healthcare Garden City, LLC. As a matter of fact and as a matter of law, National Healthcare Garden City, LLC does not exist. (R. pp. 127-128). It is not a limited liability company as the name suggests. It is not a trade name or the like. In short, National Healthcare Garden City, LLC is a nullity. It simply doesn't exist as a matter of law or as a matter of fact. As a consequence, the arbitration agreement in this case between Appellant and National Healthcare Garden City, LLC is not enforceable because Appellant agreed to arbitrate with an entity that does not exist, National Healthcare Garden City, LLC. Appellant never agreed to arbitrate with NHC Healthcare/Garden City, LLC and she never signed an arbitration agreement with NHC Healthcare/Garden City, LLC.

In effect, the lower court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration rewrote the arbitration agreement. The lower court's Order effectively substituted the parties on the arbitration agreement. Even though the arbitration agreement was between Appellant and National Healthcare Garden City, LLC, the lower court essentially swapped out NHC Healthcare/Garden City, LLC for National Health Care Garden City, LLC. In so doing, the lower court committed reversible error because "Courts 'are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of the wisdom or folly, apparent unreasonableness or the parties' failure to guard their rights carefully." Id. *citing and quoting* S.C. Dep't of Transp. V. M&T Enters. of Mt. Pleasant, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

In this case, the lower court didn't "enforce an unambiguous contract according to its terms" but instead "alter[ed] an unambiguous contract" by changing the parties to the arbitration agreement. *Id.* However, the appellate courts in this state have noted that this is not the proper role of the judiciary. "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." Lee v. Univ. of S.C., 407 S.C. 512, 757 S.E.2d 394, 397 (S.C. 2014)(*citations omitted*). In this case, the arbitration agreement has no force and effect in this dispute because it was with an entity that does not exist and is not a party.

In Weckesser v. Knight Enterprises S.E., LLC, 735 F. App'x 816 (4th Cir. 2018) the Fourth Circuit addressed an almost identical issue on appeal from the South Carolina District Court. In that case, the Fourth Circuit held that under South Carolina law the arbitration clause at issue could not be enforced because it was not signed by the parties to the case. As the Fourth

Circuit explained, the arbitration clause identified one party "as signing not on behalf of Knight Enterprises, but on behalf of its parent company, 'Jeffrey Knight, Inc. d/b/a Knight Enterprises.'" In holding the arbitration agreement was not enforceable, the Fourth Circuit rejected arguments that the misidentified parties was: 1. a "clerical error that had no effect"; 2. that one party was entitled to enforce the arbitration clause as a "third-party beneficiary"; and 3. that "the court should use its powers of equity to force the parties to arbitrate." While an unpublished Fourth Circuit opinion is not binding precedent upon this court, the Fourth Circuit's reasoning affirming the South Carolina District Court's denial of arbitration is sound and the relevant facts are virtually identical to those now before this Court.

The simple fact is there is no arbitration agreement between Appellant and NHC Healthcare/Garden City, LLC. The lower court erred in concluding there was. The lower court's error was based on the lower court effectively rewriting the arbitration agreement and substituting NHC Healthcare/Garden City, LLC for National Health Care Garden City, LLC. This court should reverse this error of law.

II. THE LOWER COURT ERRED IN "LOOK[ING] AT WHAT THE PARTIES' INTENSIONS WERE" OUTSIDE THE CONTRACT LANGUAGE. MOREOVER, RESPONDENT OFFERED NO EVIDENCE OF INTENT BEYOND THE CLEAR AND UNAMBIGUOUS CONTRACT ITSELF.

The lower court erred in considering the intent of the parties outside the four corners of the contract. As a result of this legal error, the lower court effectively rewrote a clear and unambiguous contract to include Respondent, even though Respondent was not and never has been listed in any arbitration agreement. Moreover, Respondent offered no evidence of intent to the lower court beyond the arguments of Counsel. The record before the lower court and the record before this court is completely devoid of any evidence of the parties' intent beyond what

is contained in the written arbitration agreement. These legal errors should now be corrected by this court.

The lower court's decision to dismiss this action and compel arbitration rested on the lower court's assessment of the intent of the parties outside the four corners of the document. (R. pp. 007 & 056-057). The lower court's order specifically states:

> This Court is compelled to look at what the parties' intentions were when signing this Agreement [arbitration agreement] and clearly the intention was that Defendant would provide nursing services to Ms. Parrish, and in exchange, the Defendant would receive remuneration and the benefits of the Arbitration Agreement should any dispute arise regarding Mr. Parrish's care.

(R. p. 007).

The lower court's reasoning is flawed because if a contract's language is "clear and unambiguous, the language alone determines the contract's force and effect." Weckesser v. Knight Enterprises S.E., LLC, 735 F. App'x 816 (4th Cir. 2018). As noted by this court: "To discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect." Ellie, Inc. v. Miccichi, 358 S.C. 78, 94 (Ct. App. 2004)(*citing* Superior Auto. Ins. Co. v. Manners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973)). Put another way: "The parties intentions must, in the first instance, be derived from the language of the contract." Ellie 358 S.C. at 93 (*citing* Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); Jacobs v. Service Merck. Co., 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988); Thomas-McCain, Inc. v. Siter, 268 S.C. 193, 232 728 (1977). In this case, the contract language was clear and unambiguous.

The arbitration agreement only provides for arbitration between Appellant and National Health Care Garden City, LLC. In relevant part, the arbitration agreement states: "This

is an Agreement to arbitrate any dispute that might arise between Kathryn Parrish ("Patient") [and] **National Healthcare Garden City, LLC** and ("Center")." (R. p. 066). National Health Care Garden City, LLC is not a party to this action and never has been. (R. pp. 013-025). Neither Ms. Parrish nor her guardian have any dispute with National Healthcare Garden City, LLC. NHC Healthcare/Garden City, LLC is the only named Defendant in this action but it is not a party to the arbitration agreement. Only National Healthcare Garden City, LLC is a party to arbitration agreement and it is not a party to this action. There is simply no ambiguity necessitating the lower court's inquiry into the intent of the parties beyond the four corners of the documents themselves.

Only when the court first determines that the language of a contract is ambiguous should it consider the intent of the parties by relying on evidence outside the four corners of the contract. Wallace v. Day, 390 S.C. 69, 75 (Ct. App. 2010). "Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties." *Id.* (*quoting* S.C. Dep't of Natural Res.. v. Town of McClellanville, 345 S.C. 617, 623 (2001). The lower court made no finding that the arbitration agreement was ambiguous. Indeed, the lower court could make no such finding because what is written is crystal clear: The only arbitration clause that exists is with an entity who is not a party to this case. Simply put, there is no ambiguity.

Instead of focusing on the written documents, the lower court rewrote the contract by concluding there was a "scrivener's error in the handwritten portion of the Agreement..." (R. p. 010). However, this conclusion was based on nothing more than Counsel's arguments at the hearing. Respondent and its Counsel submitted nothing to the lower court indicating or evidencing an intent that is different than what is contained in the written arbitration agreement. For example, Respondent submitted nothing to the lower court indicating any kind of error or

mistake in the written documents themselves. Even if such documents were submitted (which they were not) what controls is what is written in the four corners of the contract. In this case, there is no arbitration clause between the parties.

"Under South Carolina law, courts must, to whatever extent possible, enforce a contract as written." Weckesser v. Knight Enterprises S.E., *LLC*, 735 F. App'x 816 (4th Cir. 2018). Here, the contract, as written, is enforceable only between Appellant and National Healthcare Garden City, LLC. To enforce it otherwise would require the court to rewrite the terms of the contract, which South Carolina law does not permit. *Id.* A court cannot rewrite the contract and "impose unwanted obligations" on the parties to be bound. *Id.* Here, the lower court did just that; it imposed unwanted obligations on Appellant that she never agreed to.

Even if it was proper for the lower court to consider the parties' intent (and it was not proper), the intent of the parties is demonstrated in the written documents themselves. Nothing before the lower court or in the record before this court show that Appellant intended to be bound to an arbitration agreement with Respondent. She signed nothing evidencing any intent beyond the documents themselves. At the hearing before the lower court, Respondent and its Counsel offered no evidence manifesting any intent by Appellant that was different than or in addition to what is contained in the written arbitration agreement itself. And to be clear, what is contained in that written arbitration is limited to only National Healthcare Garden City, LLC who has never been a party to this dispute.

It was unnecessary and improper for the lower court to consider the intent of the parties because the arbitration agreement itself is clear and unambiguous. The terms of the arbitration agreement do not apply to this case because the parties to this case are different than those to the arbitration agreement. Moreover, Respondent submitted nothing to the lower court as evidence

of any intent beyond the written arbitration agreement itself. The lower court should not have considered intent beyond what is written in the four corners of the arbitration agreement. That error should now be reversed by this court.

III. RESPONDENT DRAFTED THE ARBITRATION AGREEMENT AND THE LOWER COURT ERRED IN RESOLVING ANY PERCEIVED AMBIGUITIES AGAINST APPELLANT AND NOT AGAINST RESPONDENT.

The lower court made no specific finding that the written arbitration agreement was vague or ambiguous. However, in going outside the four corners of the arbitration agreement itself and in relying on the parties' intent, the lower court effectively drew the conclusion that the arbitration agreement was vague and ambiguous. The lower erred in failing to resolve any perceived ambiguities against the drafting party, Respondent.

"Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981)(internal quotation marks omitted). On numerous occasions, this court and the Supreme Court have reiterated and emphasized this black letter principal of law. *See* Lee v. Univ. of S.C., 407, S.C. 512, 757 S.E.2d 394 (S.C. 2014); Duncan v. Little, 384 S.C. 420, 682 S.E.2d 788 (2009); Southern Atl. Fin. Serv. V. Middleton, 356 S.C. 444, 590 S.E.2d 27 (2003); Canal Ins. Co. v. Nat'l House Movers, LLC, 414 S.C. 255, 777 S.E.2d 418 (Ct. App. 2015); Ward v. West Oil Co., Inc., 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008).

The lower court simply ignored this black letter principal of law by effectively rewriting the arbitration agreement at Respondent's request. It is undisputed that Respondent drafted the

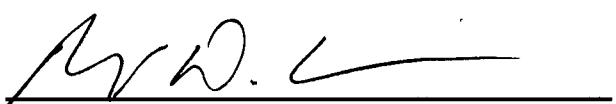
arbitration agreement at issue. It is also undisputed that its employee/agent completed the handwritten portions of the arbitration agreement that is in dispute. However, the lower court ignored these undisputed facts and ignored well settled law in South Carolina by issuing an order that effectively substituted and/or added NHC Healthcare/Garden City, LLC for National Health Care Garden City, LLC. Instead of resolving any perceived ambiguities against the party who drafted the arbitration agreement, the lower court turned a well established principle of law upside down. The lower court did this by resolving any perceived ambiguities against the non-drafting party in direct contradiction to well established law.

It is simple, black letter law in South Carolina that a contract is construed against the drafter. In this case, the lower court turned that principle of law upside down by reading into the contract an ambiguity that did not exist and then construing the contract against the non-drafting party. This court should now reverse this error.

CONCLUSION

The issue before this court is straight forward. The arbitration agreement Respondent relies upon never lists Respondent as a party. Respondent cannot compel arbitration based on an arbitration agreement that it was never a party to. The lower court erred in holding otherwise and in effectively rewriting the arbitration agreement to include Respondent. That error should now be corrected by this court by reversing the lower court's Order Granting Defendant's Motion to Dismiss and Compel Arbitration.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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