**THE STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEALS**

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Appeal from Oconee County
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

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Case No. 2018-CP-37-00271

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Betty Herrington, Respondent,

v.

SSC Seneca Operating Company, LLC,
d/b/a Seneca Health & Rehabilitation Center;
SavaSeniorCare, LLC; SSC Equity Holdings, LLC;
SavaSeniorCare Administrative Services, LLC;
SavaSeniorCare Consulting Services, LLC, Defendants,

Of whom SSC Seneca Operating Company, LLC,
d/b/a Seneca Health & Rehabilitation Center;
SavaSeniorCare Administrative Services, LLC; and
SavaSeniorCare Consulting Services, LLC, Appellants.

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# FINAL BRIEF OF APPELLANTS

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## INTRODUCTION

Appellants[1] appeal the circuit court's denial of their motions to stay this lawsuit and compel Ms. Herrington's[2] claims to arbitration under the terms of a certain Arbitration Agreement.[3] Seizing upon certain language in the Arbitration Agreement—more precisely, upon part of the language in its definition of the term "dispute," specifically, the part defining that term as "any claim or dispute totaling $50,000.00 individually or in the aggregate . . ."[4]—the circuit court determined that the Arbitration Agreement "*only applies* to claims or disputes of *exactly* $50,000.00"[5] and thus "does not apply to the present case as [Ms. Herrington] is not claiming *exactly* $50,000.00 in damages." (R. p. 9 (emphasis added).) Respectfully, the circuit court denied Appellants' motions to compel arbitration on the basis of an erroneous—indeed absurd—interpretation of the Arbitration Agreement.

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[1] "Appellants" are Defendants/Appellants SSC Seneca Operating Company, LLC, d/b/a Seneca Health & Rehabilitation Center; SavaSeniorCare Administrative Services, LLC; and SavaSeniorCare Consulting, LLC, misidentified as "SavaSeniorCare Consulting Services, LLC."

[2] "Ms. Herrington" is Plaintiff/Appellant Betty Herrington.

[3] As further explained below, the "Arbitration Agreement" refers to the arbitration-related provisions of a contract entitled Dispute Resolution Program (the "DRP"), which covers a broader process for dispute resolution beyond just arbitration. For the purpose of this brief, however, the Arbitration Agreement and the DRP are essentially synonymous.

[4] (R. pp. 7–11 (original emphasis omitted).)

[5] (R. p. 8 (emphasis added).)

## STATEMENT OF THE ISSUE ON APPEAL

I. **Did the circuit court err in denying Appellants' motions to compel arbitration on the basis of its determination that the Arbitration Agreement only applies to claims for exactly $50,000.00—and therefore does not apply to Ms. Herrington's claims in this lawsuit, such claims being not for exactly $50,000.00 and thus, in the circuit court's view, outside the scope of the Arbitration Agreement?**

## STATEMENT OF THE CASE

Seneca Health and Rehabilitation Center (the "Facility") is a skilled nursing facility in Oconee County. (*See* R. pp. 19 at ¶ 2, 20 at ¶ 4, 22 at ¶ 12.) Ms. Herrington was admitted as a resident of the Facility on February 27, 2016. (R. p. 24 at ¶ 23.) Immediately prior to her admission to the Facility, Ms. Herrington had been at Oconee Memorial Hospital (the "Hospital") receiving treatment for a wound on her left foot, among other medical conditions. (R. p. 24 at ¶ 24.) Ms. Herrington resided at the Facility for approximately one month before being transferred back to the Hospital on March 28, 2016. (R. p. 24 at ¶ 26.)

Ms. Herrington commenced this action on April 25, 2018, in the Court of Common Pleas, Oconee County. (*See generally* R. pp. 18–41.) She seeks a money judgment against Appellants, jointly and severally, under various causes of action alleged to have arisen on account of damages and injuries caused by Appellants' wrongful acts/omissions in respect of the nursing and/or custodial care she received while a resident of the Facility. (*See generally* R. pp. 19–41.)

Before being admitted to the Facility, Ms. Herrington had entered into a number of contracts, one of them the DRP, which includes the Arbitration Agreement. (*See generally* R. pp. 84–92.)[6] Based on the Arbitration Agreement, Appellants moved to stay the instant lawsuit and compel Ms. Herrington's claims to arbitration. (*See generally* R. pp. 80–108.)

Appellants made various submissions in favor of their motions to compel arbitration,[7] and Ms. Herrington likewise opposed the motions. (*See generally* R. pp. 109–157, 239–241, 251–259.) The circuit court heard Appellants' motions on September 10, 2018, the Honorable Scott Sprouse presiding,[8] and thereafter denied them by order filed October 11, 2018. (*See generally* R. pp. 7–11.)

The entirety of the circuit court's analysis is brief enough to recite here in full:

> As a threshold issue, the court must determine whether the DRP is a binding contract that applies to the present case. "General contract principles of state law apply to arbitration clauses governed by the FAA." Munoz v. Green Tree Fin. Com., 542 S.E.2d 360, 364 (S.C. 2001).

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[6] Besides, of course, Ms. Herrington herself, the "parties" to the DRP were defined to include, among others, "the facility, any parent or subsidiary of the facility, any company affiliated with the facility, or any of the facility's officers, directors, managers, employees, or agents acting in such capacity or any other person that may have a cause of action arising out of or relating in any way to the resident's stay at the facility." (R. p. 86.)

[7] (*See generally* R. pp. 158–180, 191–238, 260–262, 269–277.)

[8] (*See generally* R. pp.42–75.)

The DRP applies to disputes and defines a dispute as "any claim or dispute *totaling $50.000.00 individually or in the aggregate* that would constitute a cause of action that either party could bring in a court of law[.]" (DRP, pgs. 2-3) (*emphasis added*). Claims for less than $50,000.00 are excluded from the definition of a dispute. (DRP, pgs. 2-3). Claims for greater than $50,000.00 are not included within the definition of a "Dispute." Therefore, by its own unambiguous terms, the DRP only applies to claims or disputes of exactly $50,000.00. At the hearing, [Appellants] argued that the DRP was intended by the parties to apply to claims equal to or greater than $50,000.00. However, to interpret the DRP to apply to claims exceeding $50,000.00, the Court would have to add language to the DRP that is not present. "When the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect. The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." Ellis v. Taylor, 449 S.E.2d 487, 488 (S.C. 1994) (internal citations omitted). "The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores. Inc. v. Doyle, 672 S.E.2d 799, 802 (S.C. App. 2009). By its plain and unambiguous language, the DRP only applies to claims for exactly $50,000.00. The DRP does not apply to the present case as [Ms. Herrington] is not claiming exactly $50,000.00 in damages. [Appellants] are sophisticated entities who drafted the DRP and presented it to [Ms. Herrington], and they are bound by the unambiguous language of the contract that they drafted. The Court cannot read words into the DRP to impart a meaning that was not expressed in the contract when executed. Because the DRP does not apply to the present case by its express terms, the Court does not need to address [Ms.

> Herrington's] other arguments as to whether or not the DRP is a valid and binding contract.

(R. pp. 8–9 (emphasis in original).)

Pursuant to Rule 59(e), SCRCP, Appellants timely moved the circuit court to reconsider, alter, and/or amend its denial of their motions to compel arbitration. (*See generally* R. pp. 242–250.) The circuit court denied those motions by orders filed October 26, 2018. (*See generally* R. pp. 12–17.)

This appeal timely followed via Appellants' notice served November 21, 2018.

## STANDARD OF REVIEW

A lower court's determination of whether a claim is subject to arbitration is reviewed *de novo* on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). And while it is true that factual findings made by the lower court in determining whether a claim is subject to arbitration will not be reversed unless there is no evidence that reasonably supports them,[9] the circuit court made no factual findings here, but rather concluded as a matter of law that Ms. Herrington's claims where not subject to arbitration according to what it regarded as the plain and unambiguous language of the Arbitration Agreement. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299,

[9] *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

302–303 (2001) (providing that the construction of a clear and unambiguous contract is a question of law for the court, as is the question of whether a contract's language is ambiguous).

## ARGUMENT

### I. The circuit court improperly denied Appellants' motions to compel arbitration based on its erroneous—indeed absurd—interpretation of the Arbitration Agreement as only applying to claims for exactly $50,000.00.

The circuit court's denial of Appellants' motions to compel arbitration rests on a single ground: that the Arbitration Agreement, in the court's view, only calls for arbitration of claims for *exactly* $50,000.00—and not a penny more; and since Ms. Herrington is not claiming that exact amount here, her claims against Appellants are outside the scope of the Arbitration Agreement. Respectfully, the circuit court erred in denying Appellants' motions to compel arbitration on this basis.

As the circuit court correctly recognized, the Arbitration Agreement is governed by the FAA.[10] Under the FAA,

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a

[10] The "FAA" is the Federal Arbitration Act, 9 U.S.C. §§ 1–16.

> contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added).

It is "the party resisting arbitration [who] bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.- Ala. v. Randolph*, 531 U.S. 79, 91 (2000). The policy of both the United States and of South Carolina *favors* arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (citations omitted). To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. "The *heavy* presumption in *favor* 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.*" *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 7, 791 S.E.2d 128, 131 (2016) (emphasis added).

Appellants do not take issue with the circuit court's determination that the Arbitration Agreement is unambiguous. Indeed, a contract is unambiguous where

it is—like the Arbitration Agreement here—only susceptible to one *reasonable* interpretation. *See, e.g., Town of McClellanville*, 345 S.C. at 623, 550 S.E.2d at 302 ("We agree with the Court of Appeals the covenant is unambiguous; however, we think the 'only *reasonable* interpretation of the deed,' would not prohibit the town from charging a permit fee. A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added). The problem with the circuit court's decision is that it is based on an interpretation of the Arbitration Agreement that is patently *unreasonable*—and indeed absurd.

The circuit court's decision hinges on part of the language in the Arbitration Agreement's definition of the term "dispute." In full, that definition reads as follows:

> "**Dispute**" means (a) any claim or dispute totaling $50,000.00 individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law (b) this agreement does not prevent either party from initiating a grievance proceeding, complaint to survey agencies, appeal proceedings with the appropriate state or federal entity regarding an involuntary transfer or discharge, or any such claim or dispute involving solely a monetary claim in an amount less than $50,000.00. Any such claim shall not be deemed a dispute under this agreement.

(R. pp. 86–87)

The circuit court took a single phrase in the Arbitration Agreement's definition of "disputes" out of context—not only out of its immediate surrounding context in the Arbitration Agreement but out of the context of the Arbitration Agreement altogether—and, viewing that phrase in isolation, declared the Arbitration Agreement's scope to be plainly and unambiguously stated in a way that effectively nullifies its very purpose.

It is well-settled that a contract is to be read as a whole document so that "one may not, by pointing out a single sentence or clause, create an ambiguity." *Yarborough v. Phoenix Mut. Life Ins. Co.*, 266 S.C. 584, 592, 225 S.E.2d 344, 348 (1976). In fact, "[t]he meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the [contract] as a whole and considering the context and subject matter of the . . . contract." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citing *Yarborough*, 266 S.C. at 592). Indeed, again, as noted above, "an unambiguous contract is by definition capable of only one *reasonable* interpretation." *Rodarte v. Univ. of South Carolina,* 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (citation omitted) (emphasis added).

Although the definition of "dispute" does indeed contain the phrase "(a) any claim or dispute totaling $50,000.00 individually or in the aggregate that would

constitute a cause of action that either party could bring in a court of law," importantly, it goes on to state,

> (b) this agreement does not prevent either party from initiating a grievance proceeding, complaint to survey agencies, appeal proceedings with the appropriate state or federal entity regarding an involuntary transfer or discharge, or any such claim or dispute involving solely a monetary claim *in an amount less than $50,000.00. Any such claim shall not be deemed a dispute under this agreement.*

(R. pp. 86–87 (emphasis added).)

Accordingly, the remainder of the definition of "dispute" makes it clear that $50,000.00 is a threshold monetary value where the provisions for alternative dispute resolution, inclusive of arbitration, are triggered, as subpart (b) of "disputes" states that claims or disputes for "less than $50,000.00 . . . shall not be deemed a dispute under this agreement." The only reasonable interpretation of the Arbitration Agreement, when the plain language of the *entire* contract is properly and objectively considered, is that claims or disputes for $50,000.00 *or more* are subject to arbitration.

Moreover, the Arbitration Agreement must be interpreted broadly, with "any doubts concerning scope of arbitrable issues . . . resolved in favor of arbitration, whether the problem at hand is construction of contract language itself or an allegation of waiver, delay, or like defense to arbitrability." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (explaining

that courts will read a narrow arbitration clause to be broader). In *American Recovery*, the Fourth Circuit noted, "we may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Id.* Here, the Arbitration Agreement is only susceptible of one reasonable interpretation—that Ms. Herrington's claims are within its scope—but even if there were some uncertainty in this regard, the circuit court still should have broken that tie in favor of arbitration.

## CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court and stay this lawsuit in favor of arbitration or, alternatively, to remand this case to the circuit court with instructions for it to do so.[11]

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[11] As explained above, the circuit court's sole basis for the decision on appeal is its determination that the Arbitration Agreement does not apply to Ms. Herrington's claims in this lawsuit because it only applies to claims for exactly $50,000.00. As also explained above, the circuit court erred in denying Appellants' motions to compel arbitration on this basis. Thus, in the absence of some other, as yet unadjudicated, reason to affirm the circuit court's ruling, this Court should reverse the circuit court and stay this lawsuit in favor of arbitration or, alternatively, remand this case to the circuit court with instructions for it to do so. *Cf. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000) ("[A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . Of course, a respondent may abandon an additional sustaining ground under the present rules . . . by failing to raise it in the appellate brief.").

Respectfully submitted,

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Dated: 7/17/19

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Appellants recognize that, besides her argument about the Arbitration Agreement only applying to claims for exactly $50,000.00 (with which the circuit court, of course, agreed), Ms. Herrington presented other arguments in opposition to Appellants' motions that the circuit court did not address. To the extent Ms. Herrington deems any of them worthy of this Court's consideration, i.e., actually raises any of them in her respondent's brief, Appellants will address them via reply brief. *See* Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 436 (2016) ("[U]nder the present rules, the appellant received notice of respondent's additional sustaining grounds through the respondent's brief. . . . Thus, the appellant may address those additional grounds in the reply brief.").

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Of whom SSC Seneca Operating Company, LLC,
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SavaSeniorCare Administrative Services, LLC; and
SavaSeniorCare Consulting Services, LLC, Appellants.

# APPELLANTS' CERTIFICATION FOR FINAL BRIEF AND FINAL REPLY BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellants and Final Reply Brief of Appellants comply with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

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