THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.: 2018-CP-37-00271

Opinion No. 5866 (S.C. Ct. App. Filed October 6, 2021)

Appellate Case No. 2022-000100

Stephanie Underwood, as Personal Representative of the Estate of Betty Herrington, Petitioner,

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, LLC; SavaSeniorCare Administrative Services, LLC; SavaSeniorCare Consulting Services, LLC

Respondents.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this Reply to Respondents' Return to Petition for a Writ of Certiorari. Petitioner reiterates the arguments set forth in her Petition and provides this short Reply to respond to specific arguments made by Respondents and to highlight some recent precedent that has come out since Petitioner's Petition was filed.

ARGUMENT

1. THERE IS NO POLICY FAVORING ARBITRATION

In its Return Brief, Respondents repeatedly reference a heavy presumption in favor of arbitration which requires a court to find in favor of arbitration. (Return to Petition for a Writ of Certiorari, p. 7 and p. 11). However, as this Court recently made clear, there is no state or federal policy favoring arbitration. Specifically, this Court stated "when considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy—federal or state—'favoring' arbitration. Palmetto Constr. Group, LLC v. Restoration Specialists, LLC, 856 S.E.2d 150, 153 (S.C. 2021), reh'g denied (Apr. 20, 2021). This same issue was also recently addressed by the United States Supreme Court which stated:

> "But the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules. *Moses H. Cone*, 460 U.S. at 24, 103 S.Ct. 927. Our frequent use of that phrase connotes something different. 'Th[e] policy,' we have explained, 'is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.' *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 302, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) (internal quotation marks omitted). Or in another formulation: The policy is to make 'arbitration agreements as enforceable as other contracts, but not more so.' *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). Accordingly, a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218–221, 105 S.Ct. 1238,

> 84 L.Ed.2d 158 (1985). If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration. See *ibid.*; *National Foundation for Cancer Research v. A. G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (C.A.D.C. 1987) ('The Supreme Court has made clear' that the FAA's policy 'is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism')." Morgan v. Sundance, Inc., 21-328, 2022 WL 1611788, at *4 (U.S. May 23, 2022).

As set forth in Petitioner's Petition, the Court of Appeals erred in failing to enforce the plain language of the "Dispute Resolution Program" ("DRP") and instead looking to the parties' purported intent. Contrary to Respondents' argument, there is no policy requiring the Court of Appeals or this Court to interpret the DRP in a way that favors arbitration.

2. THE INTERPRETATION ADOPTED BY THE COURT OF APPEALS AND ENCOURAGED BY RESPONDENTS IS BASED ON THE FLAWED ASSUMPTIONS THAT THE MEANING OF THE DRP SHOULD BE INTERPRETED INSTEAD OF ENFORCING ITS PLAIN LANGUAGE, AND THAT THE PLAIN LANGUAGE OF THE DRP IS ABSURD

In their Return Brief, Respondents go into great detail as to the proper interpretation of the DRP, and how the Court of Appeals correctly looked to the entire DRP and the parties purported intent. However, as set forth in greater detail in Petitioner's Petition, the Court of Appeal's Opinion does not properly consider the fact that the DRP was not ambiguous and did not need to have its meaning interpreted. "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,

316 S.C. 245, 248, 449 S.E.2d 487, 488 (S.C. 1994) (internal citations omitted). Respondents cite to Koon v. Fares for the proposition that "[a]n interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided. *Id.*" 379 S.C. 150, 155 (2008)(Return, pp. 10-11). However, Respondents leave out the immediately preceding sentence, which states "[w]here one interpretation of a contract makes it unusual or extraordinary and another interpretation, *equally consistent with the language employed*, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.,* 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975)." Id. (*emphasis* added). Here, the interpretation adopted by the Court of Appeals and encouraged by Respondents is not consistent with the language used by the parties in the DRP. Instead, this interpretation requires the addition of language not used by the parties to the DRP. Because the interpretation adopted by the Court of Appeals and encouraged by Respondent is not "equally consistent with the language employed," the Court should not try to discern the "more reasonable and probable agreement of the parties" as the Court of Appeals did, and should instead apply the plain language of the DRP.

Further, Respondents' Return is also based on the faulty assumption that the plain language of the DRP, which they drafted, is absurd or unreasonable. The Court of Appeal's Opinion, and Respondent's Return, both conclude that the plain language of the DRP- that it applies to disputes of $50,000.00- results in an agreement that is unreasonable. (A. p. 338; Return, p. 11). Leaving aside the fact that a court is required to enforce the plain language of a contract regardless of its wisdom, folly, or apparent unreasonableness, the fact that the plain language of the DRP makes it extremely narrow does not make it absurd or patently unreasonable. The consideration exchanged by the parties in the DRP was a mutual agreement

to submit specific claims to arbitration.[1] (A. p. 90). This is not a situation where the plain language of the contract means that there is a huge disparity in the consideration paid by each party- instead the parties are equally bound by the narrow scope of arbitration. Therefore, the plain language is not unreasonable or absurd, and should be enforced.

CONCLUSION

For reasons stated in her Petition and this Reply, Petitioner asks that the Supreme Court grant Certiorari in this case so as to enforce the plain language of the DRP, and conform with the existing precedent of this Court regarding contractual interpretation.

RESPECTFULLY SUBMITTED,

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[1] At the trial Court, Petitioners argued that there was insufficient consideration to support the DRP, however, that issue was not ruled on by the trial court. Petitioners still contend that there is insufficient consideration to support the DRP, however, that issue is not before this Court.