THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

ALEX KINLAW, JR., Circuit Court Judge

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Case No. 2021-001096
Lower Court Case No. 2021-CP-23-02564

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Jeremy Wilson, Respondent,

v.

Jeffrey G. Hedges and
JH3 Consulting, LLC, Appellants.

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# INITIAL BRIEF OF RESPONDENT

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## COUNTER STATEMENT OF THE ISSUES ON APPEAL

WHETHER THE CIRCUIT COURT PROPERLY DETERMINED THAT THE MEDIATION AND ARBITRATION PROVISION OF A TERMINATED AGREEMENT DOES NOT GOVERN RESPONDENT'S CLAIMS AGAINST APPELLANTS, PARTICULARLY WHERE RESPONDENT'S CLAIMS DO NOT "RELATE TO OR ARISE FROM" THE TERMINATED AGREEMENT.

## COUNTER STATEMENT OF THE CASE

On May 27, 2021, Plaintiff Jeremy Wilson (hereinafter "Wilson" or "Respondent") filed a Complaint against Defendants Jeffrey G Hedges and JH3 Consulting, LLC (collectively, "Appellants"). (*See generally* Compl.) In the Complaint, the following causes of action were raised: (1) unjust enrichment; (2) promissory estoppel; (3) violation of the South Carolina Unfair Trade Practices Act; and (4) fraud and misrepresentation. (*Id*.) Importantly, none of the claims are claims in contract. (*Id*.) Appellants were served with the Complaint on July 27, 2021 and August 20, 2021, respectively.

On August 25, 2021, Appellants filed their Motion to Dismiss and/or Stay and Compel Mediation and Arbitration ("MTD") asserting that Respondent's claims were subject to mediation and arbitration under an independent contractor agreement between the parties ("IC Agreement"). (Mot. to Dismiss.) On September 16, 2021, the Circuit Court heard oral arguments on the MTD. (Tr. of Aug. 25, 2021 Hr'g, p. 1.) The Circuit Court issued a Form 4 Order denying the MTD, finding that the claims did not fall within the scope of the Mediation and Arbitration Provision in the IC Agreement. (September 16, 2021 Order.) Appellants then filed and served a Notice of Appeal on Respondent on September 23, 2021. (Notice of Appeal.) Following such notice, Appellants filed and served their Initial Brief on Respondent on January 4, 2022. (Initial Br. of Appellant.)

On February 3, 2022, Respondent filed Motion to Dismiss pursuant to SCACR Rule 240(a) moving this Court for an order dismissing Appellants' appeal (Pl.'s Resp. Mot. to Dismiss.) On May 4, 2022, this Court subsequently requested the Appellants to file a Return to the Motion to Dismiss (Letter from Ct.) Appellants then filed their Return to the Motion to Dismiss on May 26, 2022 (Def.'s Return to Pl.'s Resp. Mot. to Dismiss.) This Court subsequently denied Respondent's

Motion and instructed Respondent to file his Response Brief by October 6, 2022 (Order Denying Mot. to Dismiss.)

## COUNTER STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014). "The admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003); *see also State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted); *see e.g. Berry v. Spang*, 433 S.C. 1 (Ct. App. 2021). This Court may uphold the Circuit Court's ruling on any single ground and is not required to review anything further once one basis is affirmed. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

## COUNTER STATEMENT OF THE FACTS

Respondent alleges that Appellants failed to compensate him for services rendered to Appellants. Specifically, the Complaint includes the following allegations:

- JH3, which is solely owned by Hedges, was formed to provide consulting services to chiropractic clinics. (Pl.'s Compl. at ¶¶ 7—8.)
- Wilson was approached by Hedges to be an independent contractor for JH3, with the promise that he would be compensated for his services. (*Id*. at ¶ 9.)
- In order to formalize the independent contractor relationship, JH3 and Wilson entered into an Independent Contractor Agreement (the "IC Agreement"). (*Id*. at ¶ 10.)
- The IC Agreement was signed by Wilson on November 22, 2017, and, subsequently, by Hedges on behalf of JH3 on November 27, 2017. (*Id*. at ¶¶ 12—13.)
- As part of the IC Agreement, the parties agreed that Wilson would recruit new clients and provide onboarding support and assistance to these clients ("Contractor Services") in exchange for financial compensation to be paid to Wilson. (*Id*. at ¶ 14.)
- The parties also agreed that compensation owed to Wilson would be "paid on a monthly basis in accordance with the Company's standard payroll procedures and cycles." (*Id*. at ¶ 16.)
- After entering into the IC Agreement, Wilson provided the Contractor Services pursuant to the terms agreed to by the parties. (*Id*. at ¶ 17.)
- The Contractor Services that Plaintiff provided significantly increased the revenue of JH3 Consulting, the precise amount of which is currently unknown and unavailable to Wilson (*Id*. at ¶ 18.)

- In or around April of 2019, Appellants began withholding payments owed to Wilson pursuant to the IC Agreement (*Id*. at ¶ 19.)
- On or about April 1, 2019, the parties executed a termination document (the "Termination Document") under the guise that the parties would execute a new contract that would replace the IC Agreement. (*Id*. at ¶ 21.)
- After execution of the Termination Document, Wilson continued to provide the Contractor Services under the belief that he would be compensated for providing Contractor Services. (*Id*. at ¶ 22.)
- Wilson provided Contractor Services without any compensation for a period of sixteen months following the execution of the Termination Document. (*Id*. at ¶ 28.)
- Wilson seeks damages arising out of the nonpayment by Appellants for services rendered by Wilson, as well as damages that may have arisen after the Termination Document was signed. (*Id*. at ¶30-53.)

The issue on appeal centers around Paragraph 13 of the IC Agreement, which includes a mediation and arbitration provision (the "Mediation and Arbitration Provision"). (Independent Contractor Agreement at p. 4). The provision requires mediation and arbitration for: "all disputes that ***relate to or arise from*** the relationship between the Contractor and the Company…" (*Id*.)

The Circuit Court reviewed the IC Agreement, the Termination Document, and all pleadings, motions, and supporting briefs. In light of all this information and the oral arguments presented to it, the Court determined that the Mediation and Arbitration Provision does not apply to Respondent's claims. (Form 4 Order.)

## ARGUMENT

### II. THE CIRCUIT COURT DID NOT ERR BY FINDING THAT RESPONDENT'S CLAIMS DO NOT FALL WITHIN THE SCOPE OF THE MEDIATION AND ARBITRATION PROVISION.

The sole question before the Circuit Court was whether Respondent's claims fall within the language of the Mediation and Arbitration Provision included in the IC Agreement. After substantial briefing and oral argument, the Circuit Court correctly ordered that Respondent's claims of (1) unjust enrichment; (2) promissory estoppel; (3) violation of the South Carolina Unfair Trade Practices Act; and (4) fraud and misrepresentation fall outside the scope of the Mediation and Arbitration Provision contained in the IC Agreement. This Order should be affirmed.

#### a. The Independent Contractor Agreement was voided by the Termination Document; therefore, the mediation and arbitration provision cannot govern.

The Termination Document that the parties executed in or around April 2019 nullified the IC Agreement and altered the nature of the parties' relationship. Appellants drafted the Termination Document and had Respondent sign, indicating to Respondent that it ended the existing IC Agreement and that they would create a new, replacement agreement for business going forward. Respondent was induced into signing this Termination Document by Appellants, and Appellants should be estopped from now claiming the IC Agreement was not terminated as they intended. (Pl.'s Compl.) Appellants then intentionally induced Respondent to continue to provide the Contractor Services by promising to compensate Respondent for services rendered. (*Id*.) Hedges stated that instead of compensating Wilson in accordance with the parties' prior contract, he would compensate Wilson by granting Wilson an ownership interest in JH3 Consulting. (*Id*.) Thus, it is clear by Appellants' own actions that the IC Agreement was terminated. The Circuit Court considered this evidence and, after making findings of fact related

to the same, ruled that the IC Agreement did not govern Respondent's claims. These factual findings of the Circuit Court were not an abuse of discretion and should not be overturned.

Appellants now argue that the Arbitration and Mediation Provision of the IC Agreement is severable from the IC Agreement and survives the Termination Document, citing the South Carolina Supreme Court's decision in *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403 (S.C. 1994). However, the Court emphasizes that its holding "does not render arbitration agreements irrevocable under all circumstances." The *Jackson Mills* Court then cites to S.C. Code Ann. § 15–48–10(a), which provides:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This makes clear that the IC Agreement could be revoked like any other contract, which is precisely what the Termination Document does. Appellants argue that because the Termination Document does not specifically include the Mediation and Arbitration Provision by reference that provision has not been revoked. However, this argument is illogical as the Termination Document clearly contemplates the adoption of a new independent contractor agreement and declares the former IC Agreement null and void. It does not carve out any provision as surviving this revocation. Simply put, Appellants cannot pick and choose what provisions of the IC Agreement survive their own Termination Document because it furthers their interests. The mere fact that the Termination Document includes a statement that "if another Client comes on board, Jeremy Wilson will be the IC for the Client and will sign a new IC agreement" contemplates that Appellants' clear intent was to terminate the original IC Agreement to be replaced with a new agreement. (*See* Pl.'s Compl. at ¶ 22.) This allegation goes to the crux of Respondent's claims for

unjust enrichment and promissory estoppel. Accordingly, the Mediation and Arbitration Provision of the IC Agreement is null and void. For this reason alone, the Circuit Court's Form 4 Order should be affirmed. These factual considerations by the Circuit Court cannot be overturned where there is ***any*** evidence to support it; clearly the Termination Document satisfies this evidentiary requirement. *Dean*, 408 S.C. at 379.

**b. Even if the mediation and arbitration provision survived the Termination Document, the provision does not apply to the claims brought by Respondent.**

**i. None of Respondent's claims are asserted under the IC Agreement.**

The Circuit Court appropriately concluded that Respondent's claims should not be subject to the mediation and arbitration provision of the IC Agreement because the claims neither arise out of the IC Agreement nor seek remedies under the same. Respondent has not pled a cause of action for breach of the IC Agreement. (*See generally* Compl.) In fact, by executing the Termination Document, Respondent conceded that "he [had] been paid in full and reports that he [had] been paid pursuant to the terms of the [IC] Agreement..." (*Id*. at ¶ 22.) By the express terms of the Termination Document, which both Appellants and Respondent admit is a valid and enforceable contract, Respondent specifically acknowledges that he is not seeking damages in contract that may have accrued during the IC Agreement contract period. (*Id*.)

At oral argument on the Appellant's MTD, the Circuit Court weighed these arguments appropriately by inquiring to Appellant's counsel, "Show me specific language in the complaint that you can characterize that says a breach of contract action, which would trigger the independent agreement. Show me in the complaint filed language that would support your argument that it's a breach of contract action." (Tr. of Hr'g at 16:17-22.) Appellants' counsel then countered by claiming that "any and all disputes" between Respondent and Appellant would trigger the

mediation and arbitration provision of the IC Agreement (*Id*. at 17:17-22.) The Circuit Court then correctly noted that this was "a little stretch." (*Id*. at 18:5.) The Circuit Court ultimately held that that it was "not inclined to grant your motion to force arbitration," after hearing substantial argument and considering the facts of the case on that specific issue. (*Id*. at 20:17-18.) For the same reasons, this Court should affirm the Circuit Court's Order.

**ii. The Circuit Court properly considered the evidence before it and these factual findings cannot be overturned on appeal where they are supported by *any* evidence.**

When evaluating whether a claim is arbitrable under the Federal Arbitration Act, ("FAA"), courts consider four elements: (1) a dispute; (2) a written agreement with an arbitration provision purporting to cover the dispute; (3) interstate commerce; and (4) a failure to arbitrate. *Galloway v. Santander Consumer USA, Inc*., 819 F.3d 79, 84 (4th Cir. 2016) (citing *Rota-McLarty v. Santander Consumer USA, Inc*., 700 F.3d 690, 696 n.6 (4th Cir. 2012)); *see also* Federal Arbitration Act, 9 U.S.C. §1, et seq.

Here, the second element is the main issue in dispute.[1] When evaluating this issue, South Carolina courts often use the "significant relationship test" to determine whether a dispute falls within the scope of a given arbitration provision. An arbitration clause generally applies to "any claim or controversy arising out of, or relating to" that contract, and the clause "embraces 'every dispute between the parties having a *significant relationship* to the contract regardless of the label attached to the dispute.'" *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762,767 (4th Cir. 2006) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc*., 96 F.3d 88, 93 (4th

[1] As in Appellants' Initial Brief, the existence of (1) a dispute in this case, over (3) a transaction with a relationship to interstate commerce, that (4) Plaintiff has failed to arbitrate will not be meaningfully contested. *Galloway*, 819 F.3d at 84.

Cir. 1996); *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988); *see also Long v. Silver*, 248 F.3d 309, 316-17 (4th Cir. 2001) (holding that "governing standard" is the "significant relationship" test); *Stone v. Wells Fargo Bank, N.A.*, 361 F. Supp. 3d 539, 556 (D. Md., Jan. 17, 2019) (citing "significant relationship" test). Here, even if the Mediation and Arbitration Provision survived the revocation in the Termination Document, the significant relationship test fails as a matter of law.

Respondent's claims arise from services rendered pursuant to a relationship with Appellants that existed independent of the IC Agreement. The significant relationship test hinges on a foreseeability standard that is rooted in the public policy interest of promoting arbitration in a ***commercially reasonable manner***. *Aiken v. World Fin. Corp. of S.C.*, 644 S.E.2d 705, 709 (S.C. 2007) ("To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal [of promoting arbitration in a commercially reasonable manner]"). Opinions cited by Appellants further define this foreseeability standard, stating that "[the Court] refuse[s] to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Id.* at 710. Further, "tort claims [that are] completely independent of the. . .agreement(s) [are] not subject to. . .arbitration agreement(s)." *Id.*

Here, the IC Agreement contemplated a contractual relationship between the parties, which was terminated on or around April of 2019 by the Termination Document. At the time the parties executed the IC Agreement, it was not foreseeable that the parties would later execute a Termination Document and change not only the nature of their relationship, but also void the terms of the IC Agreement, and, importantly, states that Respondent had been paid in full pursuant to the Contract (Pl.'s Compl. at ¶ 22). Accordingly, the resulting claims brought by Respondent were not

foreseeable under the IC Agreement nor the Mediation and Arbitration Provision contained therein.

As correctly identified in Appellants' brief, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 598, 553 S.E.2d 119 (2001) (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir.2001)). In contrast, Respondent expressly and willingly agreed to terminate the IC Agreement. Although Appellants infer in their brief that the presumption of arbitrability sometimes applied by courts takes us outside the well settled framework for deciding arbitrability, the presumption simply assists in resolving arbitrability disputes ***within that same framework***. *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 130 S. Ct. 2847 (2010). This policy has never been held to override the principle that a court may submit to arbitration "only those disputes...that the parties have agreed to submit." *Id.* at 2851 (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920 (1995)). The dispute here falls outside the scope of the Mediation and Arbitration Provision on grounds the presumption favoring arbitration cannot cure. *Id.* at 2862.

Although Appellants interchangeably use the terms "relate to or arise out of" "any" and "all," in their brief, the terms are not synonymous here. The dispute that brought rise to Respondent's Complaint was not foreseeable under the IC Agreement, and thereby, not subject to the Mediation and Arbitration Provision. Even if this Court chose to apply the significant relationship test despite the Termination Document, the test would fail under these facts presented to the Circuit Court in ruling on the Appellants' MTD. As such, this Court should grant deference to the decision granted by the Circuit Court decision as found in its Form 4 Order (*See* Form 4 Order.)

**c. The mediation and arbitration provision should be null and void as against public policy.**

In their brief, Appellants make many public policy arguments for pursuing mediation and arbitration over a civil trial. However, Appellants are simply attempting to avoid litigating the disputes alleged in the Respondent's Complaint by way of this Appeal. Shortly after this conflict began, Appellants blocked Respondent from all company systems that would allow him to more accurately quantify, (and subsequently plead), his damages. Respondent does not disagree that alternative dispute resolution has multitudinous benefits which could favor both Respondent and Appellants. Appellants are aware that Respondent is not opposed to alternative dispute resolution, but rather has elected to litigate the issues in the underlying action before initiating such proceedings. In fact, counsel for Respondent expressly acknowledged that "we will absolutely mediate this case. And we would be happy to do so after we complete discovery." (Tr. of Hr'g at 15: 4-6). After ruling that the Circuit Court was not inclined to grant Appellants' MTD, the Circuit Court further noted that "I'm not going to order that the parties participate in mediation. I think the two of you are smart enough to know that you should do that." (*Id*. at 20: 18-22). To disallow Respondent his day in Court would be against the strong public policy of this state allowing its citizens to use the Court system as their primary form of justice.

As the South Carolina Supreme Court has recently held, "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. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021. The true purpose of arbitration and mediation is to promote judicial economy and efficiency and prevent the Circuit Courts of this state from being clogged with disputes that could be privately

resolved. Appellants' appeal itself has continued to delay underlying proceedings and is contrary to this objective. Appropriately, affirming the Circuit Court's decision to deny Appellants' MTD would further the purpose so heavily relied upon by the Appellants regarding the FAA: to create a more efficient and just result from the legal system.

## CONCLUSION

This court should grant deference to the Circuit Court's decision denying Appellants' MTD. First, the IC Agreement was voided by the Termination Document; therefore, the mediation and arbitration provision cannot govern. Second, although Appellants attempt to stretch the scope of the Mediation and Arbitration Provision in the IC Agreement, Respondent's equitable claims are not rooted in contract, and therefore, are not subject to those terms. More plainly: "relate to or arise out of" is not "any and all." Equitable claims with no remedies in contract, but rather, in tort, are not the types of claims meant to be governed by this provision. This assertion is supported by the factual findings of the Circuit Court, and these factual findings cannot be overturned on appeal where they are supported by ***any*** evidence. Lastly, Respondent's goal is not to prevent mediation or alternative dispute resolution, and Appellants are aware of that fact. Respondent merely wishes to proceed to litigate the dispute and allow the parties opportunity to participate in discovery prior to mediation so that all parties possess the same evidence necessary to satisfactorily resolve this dispute.

For the reasons stated above, Respondent respectfully request that this Court affirm the decision of the Circuit Court and remand this matter to the Circuit Court for Respondent to proceed.

Respectfully submitted,

*/s Beau B. Brogdon*

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October 6, 2022



THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY

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ALEX KINLAW, JR., Circuit Court Judge

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Jeremy Wilson, Respondent,

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Jeffrey G. Hedges and
JH3 Consulting, LLC, Appellants.

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**PROOF OF SERVICE**

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I certify that I have served a copy of Respondent's Initial Brief by depositing it in the United States Mail, postage prepaid, on October 6, 2022, addressed to Appellants' attorneys of record at Graves & Davis, LLC located at 125E Wappo Drive, Suite 102, Charleston, SC 29412.

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