THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2021-001042

Hicks Unlimited, Inc., ... Petitioner,

v.

UniFirst Corporation, A Massachusetts Corporation, ... Respondent.

BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

On May 17, 2017, Respondent (UniFirst) filed an action with the American Arbitration Association against Petitioner (Hicks) for breach of contract. (R. pp. 8-13). UniFirst is seeking damages from Hicks based on allegations that Hicks did not properly terminate the automatic renewal provision of their contract. (R. p. 60, lines 20-25; pp. 12-13).

On September 14, 2017, Hicks filed its Complaint with the Anderson County Court of Common Pleas seeking declaratory relief related to the contract at issue along with a motion to stay the arbitration. (R. pp. 8-15). UniFirst filed its Answer on October 12, 2017, generally denying the allegations and offering affirmative defenses. (R. pp. 16-21). On the same date, UniFirst also filed a motion to compel arbitration. (R. pp. 23-27). Hicks filed a Return to UniFirst's motion to compel arbitration on November 10, 2017. (R. p. 29).

On November 27, 2017, the parties attended a hearing on the competing motions. This hearing resulted in an Order from the Honorable R. Scott Sprouse filed on January 9, 2018. The Order denied UniFirst's motion to compel arbitration. Further, it stayed arbitration pending a hearing on the merits of declaratory judgment action. (R. pp. 1-4).

On January 18, 2018, UniFirst filed a Motion to Alter or Amend the January 9, 2018 Order. (R. pp. 31-36). Hicks filed a Return to UniFirst's Motion to Alter or Amend on January 31, 2018. (R. pp. 38-43).

On February 14, 2018, Judge Sprouse issued an Order Denying Defendant's Motion for Reconsideration. (R. pp. 5-7). UniFirst then filed this appeal.

On August 4, 2021, The Court of Appeals issued an unpublished opinion reversing the Circuit Court's Order. (App. pp. 119-124). Hicks filed its Petition for Rehearing on August 18,

2021. (App. pp. 123-130). On August 26, 2021, The Court of Appeals denied the Petition for Rehearing. (App. pp. 135). On September 21, 2021, Hicks filed its Petition for a Writ of Certiorari.

SEPARATE STATEMENT OF FACTS

On September 21, 2006, Hicks signed a document entitled "Flame Resistant Garment Agreement." (hereinafter Contract) (R. pp. 12-13). It is a form contract with "fill in the blank" areas regarding pricing and quantity on the first page. (R. p. 12). The second page, which in its original form was on the back of page one, consists of boiler plate fine print provisions. (R. p. 13). The Contract was drafted by UniFirst.

The Contract is an agreement for services. For a fee, UniFirst provides its uniforms from its warehouse in Greenville County to Hicks at its place of business in Anderson County. At the end of the week, UniFirst picks up its uniforms in Anderson County, takes them to its facility in Greenville County to be cleaned, and then returns them to Hicks on Monday. (R. pp. 12-13; p. 33). UniFirst owns the uniforms. This is not a purchase agreement.

As indicated on the Contract, Hicks is a small business with two (2) employees. (R. p. 12). By contrast, UniFirst is a large, national corporation.

The terms included on page two (2) of the Contract are non-negotiable, "take it or leave it", one-sided provisions favoring UniFirst. The Contract is one of adhesion. For instance, the Contract limits Hicks' right to claim for damages as a result of any breach by UniFirst. However, if UniFirst asserts that Hicks breaches the contract, then UniFirst is entitled to liquidated damages in addition to actual damages. (R. p. 13).

Hicks operated under the Contract for five (5) years. At the conclusion of the term, and being dissatisfied with UniFirst's services, Hicks notified UniFirst that it would not renew the Contract. (R. p. 9). UniFirst notified Hicks that its termination notice was not timely, and did not

comply with the provisions of the Contract. Not willing to fight and due to UniFirst's threats of litigation, Hicks paid on the Contract for an additional five (5) years. It notified UniFirst, at that time, and again subsequently that it would not renew the contract at the conclusion of this second five (5) year period. (R. p. 9). At the conclusion of the second five (5) year period, UniFirst again informed Hicks that it did not cancel the Contract properly. (R. pp. 9-10). Hicks informed UniFirst that it did not agree that the Contract was not properly cancelled.

After Hicks returned the uniforms and did not pay, UniFirst filed an action with the American Arbitration Association (AAA) for breach of contract against Hicks. (R. pp. 9-10). UniFirst is seeking to enforce the liquidated damages clause. (R. p. 60, lines 20-25). On multiple occasions, Hicks notified UniFirst its arbitration action was illegal, and that it cease from pursuing arbitration. When those notifications were ignored by UniFirst, Hicks filed an action for declaratory judgment with the Court of Common Pleas. (R. pp. 9-10).

In its Order denying UniFirst's Motion to Compel Arbitration, the Circuit Court found that this rental agreement contemplated all services taking place within South Carolina, and that it did not implicate interstate commerce. (R. p. 2). The Circuit Court additionally raised concerns about the unconscionability of the contract. (R. p. 3).

The Court of Appeals reversed the Circuit Court. In Its opinion, the Court of Appeals substituted Its own findings for that of Circuit Court's findings. The Court of Appeals found the Contract implicated interstate commerce because: a) UniFirst receives its uniforms from Kentucky; b) UniFirst deposits its monies in banks in Massachusetts; and c) UniFirst makes board decisions in Massachusetts. (App. p. 123). Additionally, the Court of Appeals opined that Hicks was attacking the unconscionability of the contract as a whole, and not the unconscionability of the arbitration provision itself. (App. p. 124).

ARUGUMENT

Standard of Review

Arbitrability determinations are subject to de novo review. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016).

1. DID THE COURT OF APPEALS ERR IN FINDING THIS CONTRACT IMPLICATES INTERSTATE COMMERCE WHEN THIS IS A SERVICES AGREEMENT WITH ALL SERVICES TAKING PLACE IN SOUTH CAROLINA?

UniFirst admits that the Contract violates the notice requirements of the South Carolina Uniform Arbitration Act (SCUAA). (App. p. 78). See S.C. Code Ann. § 15-48-10 (2005). Therefore, the threshold issue is whether the Federal Arbitration Act (FAA) applies to the Contract.

Enacted in 1925, the FAA states, in relevant part, "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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.

In order for the FAA to apply, the transaction must implicate interstate commerce. Whether or not a contract implicates interstate commerce is determined by the agreement, the complaint, and the surroundings facts with a focus on what the contract requires for performance. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (emphasis added).

In this case, UniFirst agreed to provide its uniforms from its warehouse in Greenville County for use by Hicks' employees in Anderson County. On Fridays, UniFirst would pick up the uniforms from Hicks. UniFirst would then bring the uniforms to its Greenville County warehouse, clean them, and return them to Hicks on Monday morning. (R. pp. 12-13; p. 33). Payment was made by Hicks to UniFirst in South Carolina. This was an agreement for services where all services

took place with two (2) neighboring counties in South Carolina (R. p. 33). The Circuit Court found that these intrastate services were all the contract required for performance. (R. p. 2).

Hicks recognizes interstate commerce is broadly construed. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001); *Dean*, at 380, 759 S.E.2d at 732 (2014); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 461, 476 S.E.2d 149, 152-153 (1996). It includes consideration of three (3) categories: (1) use of channels of interstate commerce; (2) regulation of the persons, things, or instrumentalities in interstate commerce; and (3) regulation of activities having substantial relationship to interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 637 (1995); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001). While interstate commerce may be broadly construed, it does not, and cannot, encompass all commerce.

Many of the cases cited by UniFirst throughout this litigation deal with construction of structures where materials come from out-of-state. See *Zabinski*, at 594-95, 553 S.E.2d at 117 (interstate commerce implicated in partnership agreement where partnership involved in the development and construction of land); *Munoz*, at 535, 542 S.E.2d at 362 (interstate commerce implicated in construction contract where materials come from other states); *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (interstate commerce implicated in construction of 18 story building because materials would have to come from out-of-state); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (interstate commerce implicated in architectural agreement for construction of home because materials for construction came from out-of-state); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122-23, 747 S.E.2d 461, 464-65 (2013) (interstate commerce implicated in construction of marina where materials came from out-of-state and marina constructed on navigable waters).

However, the contract at issue in this case is not a construction contract. It is also not a purchase agreement where Hicks is purchasing the uniforms from UniFirst. This was an agreement for services.

South Carolina case law does not have many examples of intrastate activities on the issue of arbitrability. However, there are some examples.

The sale of an already constructed home is a purely intrastate activity. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317 (2012). In *Bradley*, the plaintiff purchased a home from a developer that had already been built. This Court noted that if the contract dealt with the construction of the home the FAA would apply. *Id.*, at 458, 730 S.E.2d at 318. However, this Court found that the purchase of an already built home is an intrastate activity as all actions and the legal ramifications of the sale occur in South Carolina. *Id.* In other words, the essential character of the transaction took place solely in South Carolina.

In *Flexon v. PHC-Jasper, Inc.*, the Court of Appeals found that interstate commerce was not implicated in a case involving an arbitration provision in an employment contract between a South Carolina doctor and a South Carolina medical facility. *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012).

In *Lucey v. Meyer*, the Court of Appeals, *in dicta*, hinted that an employment contract between an attorney and law firm only implicated interstate commerce because it was contemplated at the time of hiring that the attorney would be working on a number of matters involving out-of-state litigation. *Lucey v. Meyer*, 401 S.C. 122, 137-138, (Ct. App. 2012).

What is notable about the above cases is that, like most transactions, there was some form of tangential relationship tied to interstate commerce. In *Bradley*, the purchasers utilized an out-of-state lender for financing to purchase the home. They also had a warranty on the home from an

out-of-state company. *Bradley*, at 318, 730 S.E.2d at 459. In *Flexon*, the doctor treated out-of-state patients, and the medical facility received payments from out-of-state insurance carriers. *Flexon*, at 88, 731 S.E.2d at 4-5. However, in both cases, those tangential out-of-state relationships did not touch on the essential character of the transaction that was solely contemplated to take place in South Carolina. Likewise, as argued below, the factors relied upon by the Court of Appeals did not relate to compliance with the Contract. Rather, those factors dealt with how UniFirst internally operates its business.

In this case, the Circuit Court correctly found that requirements for performance with the Contract was purely intrastate activities. (R. pp. 1-4). Any interstate factors were purely tangential, and had no bearing on compliance with the Contract.

2. DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT WHEN THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE CIRCUIT COURT'S FINDING THAT THIS AGREEMENT DID NOT IMPLICATE INTERSTATE COMMERCE?

In reversing the Circuit Court, the Court of Appeals stated:

> [t]he payment for the uniforms was received and deposited by UniFirst in Massachusetts. The uniforms were purchased by UniFirst in Kentucky and sent from Kentucky to Anderson County. UniFirst's headquarters and board of directors in Massachusetts controlled the decisions of the corporation regarding its business in South Carolina. Therefore, we find the terms of the contract implicate interstate commerce.
>
> (App. p. 123)

While arbitrability determinations are reviewed *de novo*, the circuit court's findings cannot be overruled if there is <u>any</u> evidence to support those findings. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) (emphasis added); *D.R. Horton*, at 48, 790 S.E.2d at 3.

The Court of Appeals' analysis on this issue relates to how UniFirst conducts its internal affairs, and not on what is required for performance of the Contract. Nearly every transaction in today's society has some type of tangential factor involving interstate commerce. That was not the case in 1925 when the FAA was enacted.

As noted above, in both *Bradley* and *Flexon*, there were tangential interstate factors involved in both cases. However, those tangential factors did not impact on what was required for performance under the respective contracts. Similarly, the above factors listed by the Court of Appeals, have nothing to do with what the Contract requires for performance.

The first time there is any mention in the record of where UniFirst purchases its uniforms is in its Motion to Alter or Amend. (R. p. 33). There is no mention of this in the contract. (R. pp. 12-13). More importantly, where UniFirst purchases its uniforms has no bearing on whether UniFirst will provide the uniforms in the first instance, and clean the uniforms each week in South Carolina. Hicks concedes that if this was a purchase agreement the analysis may be different. In such an instance, where the uniforms were manufactured or where UniFirst is headquartered may have more relevancy on this issue. However, this was not a purchase agreement. This was an agreement for services that were only contemplated to occur within two (2) neighboring counties in South Carolina.

Additionally, where UniFirst deposits its money has little to do with the nature of this transaction. If such was the case, nearly all transactions would implicate interstate commerce as nearly all banks have a presence in other states and are FDIC insured.

The Circuit Court correctly found that the Contract only affected intrastate commerce. There is evidence in the record to support this finding. Accordingly, it was error for the Court of Appeals to reverse the Circuit Court on this issue.

3. DID THE COURT OF APPEALS ERR IN REVERSING THE CIRCUIT COURT'S ORDER DENYING RESPONDENT'S MOTION TO COMPEL ARBITRATION WHEN THE ARBITRATION AGREEMENT IS UNCONSCIONABLE?

While Hicks disputes that interstate commerce is implicated thereby invoking the FAA, the arbitration agreement itself is unconscionable. Pursuant to the FAA, general applicable defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements. *Dr's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996).

"[U]nconscionability is defined 'as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms where are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico v. Lennar Carolinas, LLC*, Howard Advance Sheet No. 33, 98 (filed September 14, 2002) (citing *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996).

The *Prima Paint* doctrine requires the courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded. *Munoz*, at 540, 542 S.E.2d at 364; see also generally *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-06 (1967).

At issue in this case is the following provision of the Contract:

> **OBLIGATIONS AND REMEDIES.** If Customer breaches or terminates this Agreement before the expiration date for any reason (other than for UniFirst's failure under the performance guarantee described above), Customer will pay UniFirst, as liquidated damages and not as a penalty (the parties acknowledging that actual damages would be difficult to calculate with reasonable certainty) an amount equal to 50 percent of the average weekly amounts invoiced in the preceding 26 weeks, multiplied by the number of weeks remaining in the current term. These damages will be in addition to all other obligations or amounts owed by Customer to UniFirst, including the return of Merchandise or the payment of replacement charges.
>
> All disputes of whatever kind between the Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where the Customer has its principal place of business

> (or some other location mutually agreed to by Customer and UniFirst) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act. The Customer acknowledges that, with respect to all such disputes, it has voluntarily and knowingly waived any right it may have to a jury trial or to participate in a class action as a representative of any other persons or class of persons or as a member of any class of persons, or to consolidate its claims with those of any other persons or class of persons. This paragraph shall be governed by New York law (exclusive of choice of law).

In reviewing whether an arbitration provision is unconscionable, the courts focus on whether such clause is geared towards achieving an unbiased decision by a neutral decision-maker. *Simpson*, at 25, 644 S.E.2d at 669; see also *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). Unlawful provisions that are intertwined within an arbitration provision, may be a reason to find an arbitration agreement unconscionable. *Simpson*, at 28-29, 644 S.E.2d at 670-71; *Damico*, at 102-03; *D.R. Horton*, at 50, 790 S.E.2d at 5.

The Contract at issue in this case is an adhesion contract. "[A]n adhesion contract is a standard form contact offered on a 'take-it-or-leave-it' basis with terms that are not negotiable. *Simpson*, at 26-27, 644 S.E.2d at 669. An adhesion contract may not necessarily be unconscionable. "However, given that one party to an adhesion contract 'has virtually no voice in the formulation of the[] terms and language' used in the contract, courts tend to view adhesive arbitration agreements with 'considerable skepticism,' as it remains doubtful 'any true agreement ever existed to submit disputes to arbitration." *Damico*, at 100. "[A]dhesive contracts are not unconscionable in and of themselves ***so long as the terms are even-handed.***" *Id.*, at 101 (emphasis in original opinion).

Liquidated damage provisions that serve as a penalty are unenforceable in South Carolina. *Erie Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460-61, 713 S.E.2d 318, 321 (Ct. App. 2011). This was a services agreement where UniFirst's actual damages would quite easily be calculated.

For a fee each week, UniFirst provided its uniforms to Hicks and cleaned those uniforms. Actual damages would be the fee minus UniFirst's expenses (i.e. its anticipated profit). The liquidated damages, are in addition to UniFirst's actual damages. As such, this provision serves as a penalty. Additionally, the liquidated damages provision contained in the arbitration agreement can only be claimed by UniFirst.

In this case, Hicks is a small business owner. The contract at issue reflects uniforms for two (2) employees. (R. p. 26). UniFirst is a large, national corporation. The arbitration and liquidated damages provisions are buried in small print on the back side of a two (2) sided agreement. There are provisions that limit Hicks' remedies, and an unlawful liquidated damages provision that only applies to UniFirst. (R. p. 12-13). UniFirst gave no consideration for the liquidated damages clause, the waiver of jury trial, or the waiver to take the case to court.

This is not an argument in the abstract. ***UniFirst is, in fact, seeking arbitration to enforce the unlawful liquidated damages clause***. Hicks was current on its obligation after the first two (2) terms. The action UniFirst filed with the AAA seeks damages, "which includes liquidated damages calculated at 50 percent of the average weekly service amounts, multiplied by the remainder of weeks on the terms of the agreement..." (R. p. 60, lines 20-25). UniFirst is seeking those damages because it alleges that Hicks did not properly terminate the automatic renewal provision.

Accordingly, like the situations in *D.R. Horton* and *Damico*, there exists illegal and one-sided provisions regarding damages relative to the arbitration agreement favoring the party who drafted the agreement. In *D.R. Horton* and *Damico*, the provisions limited rights of the other party. In this case, the provision expands the rights of the party that drafted the agreement in violation of South Carolina law. In all of the above instances, the unconscionable provisions are so intertwined with the arbitration provision making it unconscionable and unenforceable.

CONCLUSION

In 1925, Congress enacted the FAA "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes." *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1420, 203 L.Ed.2d 636, 650-51 (2019) (Ginsburg, J., dissenting). The FAA was not designed to govern contracts in which one of the parties has little bargaining power. *Prima Paint*, at 403, n. 9, 87 S.Ct. at 1805.

In 1983, the U.S. Supreme Court established a liberal federal policy favoring arbitration agreements. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983). Then, in 1984, without any legislative intervention in the preceding 59 years, the U.S. Supreme Court extended the FAA to state courts and by extension to state law governing interpretation of contracts. *Southland Corp. v. Keating*, 465 U.S. 1, 24, 104 S. Ct. 852, 865 (1984).

Nearly 100 years later, we are at a stage in which the FAA may apply to nearly any party, dispute or subject regardless of the bargaining power of the respective parties, the illegality of provisions found in the contract, or even the location of the transaction itself. The FAA was never intended to abrogate the Tenth Amendment to the Constitution by depriving States the power to enact legislation that in no way conflicts with federal power or interpret contracts pursuant to state law.

The circuit court reviewed the Contract, the pleadings and the surrounding facts for compliance with the Contract. It found the Contract related to intrastate activities, and did not implicate interstate commerce. There is sufficient evidence in the record to reasonably support the Circuit Court's findings. Accordingly, pursuant to the applicable standard of review, it was error for the Court of Appeals to disregard the Circuit Court's findings.

It was also error for the Court of Appeals to find that tangential factors related to how UniFirst internally operates its affairs governed whether the Contract implicates interstate commerce. Petitioner contends that under the Court of Appeals' analysis almost every transaction would now implicate interstate commerce.

Additionally, Hicks contends that this arbitration provision is similar to the one found in *D.R. Horton* and recently in *Damico*. Accordingly, just as this Court did in *D.R. Horton* and *Damico*, Hicks asks this Court to find the arbitration provision unconscionable.

For the reasons stated above, Petitioner asks this Court to reverse the Court of Appeals and reinstate the Circuit Court's Order staying arbitration.

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