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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Appeal No. 2020-001095

Joseph Abruzzo, Respondent,

v.

Bravo Media Productions LLC, Haymaker Media, Inc., NBC Universal Media, LLC, Comcast Corporation, Craig Conover, Chelsea Meissner, and Madison LeCroy, Appellants.

RESPONDENT'S PETITION FOR WRIT OF CERTIORARI

Aaron E. Edwards
George Sink, P.A. Injury Lawyers
7011 Rivers Ave.
N. Charleston, South Carolina 29406
(843) 569-1700
aedwards@sinklaw.com
ATTORNEY FOR RESPONDENT ABRUZZO

Pursuant to Rule 242, SCACR, Respondent Joseph Abruzzo hereby submits the following Petition for Writ of Certiorari to the Court of Appeals.

Questions Presented for Review

1. Did Petitioner specifically challenge the arbitration provision of the Appearance Release, Voluntary Participation, and Arbitration Agreement?
2. Does the entire Appearance Release, Voluntary Participation, and Arbitration Agreement constitute the agreement to arbitrate?
3. Is the arbitration provision itself unconscionable?

Statement of the Case

Petitioner Joseph Abruzzo commenced this action on January 24, 2020. On June 19, 2020, Plaintiff filed an Amended Complaint.[1] Appellants filed a joint motion to dismiss Plaintiff's Amended Complaint and for Order Compelling Arbitration on June 22, 2020, based upon a three-page document entitled "Appearance Release, Voluntary Participation, and Arbitration Agreement. (Appx. 0207-0209). Paragraph 19 of the Arbitration Agreement reads as follows:

> **MEDIATION & ARBITRATION. WHERE ANY DISPUTE IN CONNECTION WITH THIS AGREEMENT ARISES, THE PARTIES AGREE TO FIRST TRY TO RESOLVE SUCH DISPUTE THROUGH CONFIDENTIAL MEDIATION. IF MEDIATION IS UNSUCCESSFUL, THEN ALL DISPUTES, INCLUDING THE SCOPE OR APPLICABILITY OF THIS AGREEMENT TO ARBITRATE, SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION ADMINISTERED BY JAMS OR ITS SUCCESSOR ("JAMS ") IN ACCORDANCE WITH ITS STREAMLINED ARBITRATION RULES AND PROCEDURES (COLLECTIVELY, "JAMS RULES," HARD COPIES PROVIDED UPON REQUEST). THE JAMS RULES FOR SELECTION OF MEDIATORS AND ARBITRATORS WILL BE FOLLOWED, EXCEPT THAT ANY MEDIATOR WILL BE (I) LICENSED TO PRACTICE LAW IN NEW YORK, OR (II) A RETIRED JUDGE. UPON THE CONCLUSION OF ANY ARBITRATION PROCEEDINGS, THE ARBITRATOR SHALL RENDER FINDINGS OF FACT AND CONCLUSIONS OF LAW AND A WRITTEN OPINION SETTING FORTH THE BASIS AND REASONS FOR ANY DECISION REACHED. ALL SUCH PROCEEDINGS WILL BE CONDUCTED IN THE CITY OF NEW YORK. MY AGREEMENT TO MEDIATE ANY**

[1] In his Amended Complaint, Petitioner alleges seventeen (17) causes of action against the Appellants, fifteen of which (15) allege some form of intentional, willful and/or reckless conduct or some form of fraudulent or otherwise false misrepresentation.

AND ALL DISPUTES SHALL EXTEND TO THE RELEASED PARTIES. I AGREE THAT GIVEN THE UNIQUE NATURE OF THE ENTERTAINMENT INDUSTRY, AND THE IRREPARABLE DAMAGE TO PRODUCER, NETWORK AND THEIR LICENSEES THAT WOULD RESULT FROM DELAYING OR PREVENTING THE EXHIBITION OF ANY PROGRAM PRODUCED HEREUNDER, I MAY NOT SEEK OR OBTAIN INJUNCTIVE RELIEF IN CONNECTION WITH THIS AGREEMENT.

Petitioner filed a memorandum in opposition to the Appellants' motion, arguing the entire document made up the agreement to arbitrate, that the entire agreement was unconscionable, the arbitration provision itself was unconscionable, was procured through fraudulent means, and was unenforceable as a matter of law and public policy. (R. pp. 252-285) (Appx 0256-0290). A hearing on the motion was held on June 30, 2020, before the Honorable Bentley D. Price. After taking the matter under consideration, on July 6, 2020, Judge Price filed a Form 4 Order denying the Defendants' motion to dismiss and motion for order compelling arbitration. (R. pp. 4-6)(Appx. 0007-0009).

Contrary to Appellants' contention, Petitioner did not oppose the issuance of a written order. Petitioner simply noted specific findings of fact and conclusions of law were not necessary for the denial of a Rule 12 motion and offered to draw an order denying Appellants motion for the reasons set forth in the briefs and oral argument. (R. 335-36)(Appx 0340-0341). The circuit court issued its order before any written order was prepared. On July 16, 2020, Appellants filed a Motion for Reconsideration pursuant to Rule 59(e), SCRCP. Judge Price signed another Form 4 Order denying that motion without a hearing which was filed on July 22, 2020. (R. pp. 1-3)(Appx. 0004). Defendants then filed and served a Notice of Appeal on August 10, 2020.

The issues were fully briefed, and the Court of Appeals heard oral arguments on June 5, 2023. At oral arguments, the discussion between Petitioner and the panel focused initially of the allegations of fraud, then turned to the issue of unconscionability, and finally ended with a

discussion of contract formation, interpretation, and whether a challenge to the arbitration provision was for the court or the for the arbitrator to decide.

Despite the issues argued in the briefs and at oral argument, the Court of Appeals filed an order reversing the circuit court's order and remanding the for an order compelling arbitration on July 26, 2023. (Appx. 0508-0515). The Court's order contains no analysis of fraud, contract interpretation, or unconscionability. There is likewise no discussion of venue, forum, contract formation, or public policy. In fact, it is hard to say the Court's order provided analysis on any of the issues briefed or discussed at oral argument.[2]

Instead, the Court declared "Appellants assert that the arbitrator should decide whether Abruzzo's claims are subject to arbitration because Abruzzo's allegations focus on the agreement as a whole rather than the arbitration clause specifically. We agree." This is remarkable, considering Petitioner's fifteenth cause of action is entitled Fraudulent Inducement of Arbitration Agreement/Unconscionability of Arbitration Agreement. It specifically challenges paragraph 19 of the document entitled Appearance Release, Voluntary Participation and Arbitration Agreement ("Arbitration Agreement") on the grounds that the arbitration provision itself was unconscionable and procured through fraudulent means.[3]

Even if the Court of Appeals' statement that Petitioner's allegations focus on the agreement as a whole were true, [4] the Court's order provided no analysis of the Petitioner's argument that the

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[2] See Appendix 0420 (Petitioner's statement of issues on appeal). Notably, the Court's opinion did not even analyze any of the *Appellants'* stated issues on appeal. *See* Appx. 0354 (Appellants' statement of issues on appeal).

[3] See Petitioner's Amended Complaint, pp. 36-40; (Appx. 0559-0563). Paragraph 19 of the Arbitration Agreement is entitled "Mediation & Arbitration."

[4] This is an overly broad interpretation of even the Appellants' assertions. Appellants asserted "*once this Court has determined that the parties entered into an enforceable agreement*, it need not resolve any other disputes." Appx. 0339 (Appellants' Final Brief, p. 45)(emphasis added).

entire 3-page document entitled "Appearance Release, Voluntary Participation, and *Arbitration Agreement*" (emphasis added) is the agreement to arbitrate, nor did it provide any analysis of Petitioner's contention that paragraph 19 of the Arbitration Agreement is, in and of itself, unconscionable and procured through fraudulent means. Petitioner timely filed a Petition for Rehearing En Banc on August 9, 2023, (Appx. 0526- 0519) which was denied October 11, 2023. (Appx. 0521-0523)

Argument

I. DID PETITIONER CHALLENGE THE ARBITRATION PROVISION ITSELF?

Yes. The Court of Appeals conclusion otherwise was reversible error. Petitioner's fifteenth cause of action is entitled Fraudulent Inducement of Arbitration Agreement/Unconscionability of Arbitration Agreement. (Appx. 0559-0563). It specifically challenges paragraph 19 of the document entitled Appearance Release, Voluntary Participation and Arbitration Agreement ("Arbitration Agreement") on the grounds that the arbitration provision itself was unconscionable and procured through fraudulent means. Id.

The Court of Appeals cites *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) correctly that "if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the making of the agreement to arbitrate – the…court may proceed to adjudicate it." Clearly, Petitioner made such a claim. However, the Court concluded, without analysis, that the Petitioner did not do so. This was serious error requiring analysis since it and afoul of both *Prima Paint* and this Court's past precedent. *See Damico v. Lennar Carolinas, LLC,* 437 S.C. 596, 879 S.E.2d 746 (2022)(holding that a determination that an arbitration agreement consisted solely of one section was insufficient because further analysis was necessary to determine whether any terms within that section were unconscionable in and of themselves);

Sanders v. Savannah Highway Automotive Company, 440 S.C. 377 (2023)("a challenge to the original formation of the container contract necessarily raises the question of whether the parties ever agreed to arbitrate...because arbitration is strictly a matter of consent, it would be illogical for the arbitrator to resolve such a challenge")(emphasis in original)(*citing Granite Rock*, 561 U.S. at 299-300) 130 S.Ct. 2847)(holding that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement nor its enforceability or applicability to the dispute is in issue..."[w]here a party contests either or both matters, the court must resolve the disagreement")).

Because Petitioner specifically challenges the arbitration provision itself, the Court of Appeals made reversible error by failing to address that challenge.

II. IS THE ENTIRE DOCUMENT THE AGREEMENT TO ARBITRATE?

Yes, and it is patently unconscionable. Petitioner argued the entire document entitled Appearance Release, Voluntary Participation and Arbitration Agreement constitutes the agreement to arbitrate (See Appx. 0450-0452) pursuant to *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016)(holding an entire section – including subparagraphs relating to arbitration and those related to warranties – must be read together to understand the scope of the warranties and how different disputes are to be handled). In conducting an unconscionability inquiry, the Court must define the scope of the arbitration agreement before considering whether that agreement is unconscionable. *Damico v. Lennar*, 437 S.C. at 608(*citing Smith v. D.R. Horton*).

Despite this guidance, the Court of Appeals merely cited *Smith v. D.R. Horton* for the notion that arbitrability determinations are subject to de novo review. No accompanying analysis on the scope of the arbitration agreement was performed. This analysis is required by this Court to address the issues presented by this Arbitration Agreement.

Among the most basic reasons why the entire document constitutes the agreement to arbitrate is precisely because it is designed to enable to the Appellants to publicize and broadcast false and defamatory statements about Abruzzo to the general public throughout the world, even throughout the universe, while paying Abruzzo exactly nothing and prohibiting Abruzzo from seeking public redress or bringing to light publicly the falsehoods spread by the Appellants. This amounts to no effective remedy at all, something that is antithetical to the rule of law and should not be tolerated. *Smith v. D.R. Horton,* 417 S.C. 42, at 50 (disclaimer of implied warranty claims while prohibiting any monetary recovery to be clearly one-sided and oppressive).

The document calls itself an Arbitration Agreement. (Appx. 0207-0209). The terms of the "Arbitration Agreement" are intertwined with the remainder of the document, many of which are unconscionable, illegal, unenforceable, and void ab initio as against public policy and cannot be enforced by the court. Taken as a whole and individually, the "Release" provision (paragraph 17 defining "Released Parties" and exculpating them from willful and intentional torts while penalizing Abruzzo by making him liable for the Released Parties attorney fees and costs)), "Mediation & Arbitration" provision (paragraph 19)(requiring NYC as the forum and prohibiting Abruzzo from seeking injunctive relief), the Confidentiality and Publicity clause (paragraph 12)(authorizing Appellants obtain injunctive relief (without a bond) and a $500,000 penalty per occurrence against Abruzzo for trying to clear his name publicly), the choice of venue (paragraph 20 – New York City), and third party beneficiary designations (paragraph 21) are so intertwined that they cannot be separated much less understood without cross-referencing these and other various provisions in order to give effect the arbitration provision.

The Court of Appeals' failure to analyze whether the entire document constitutes the Arbitration Agreement runs afoul of the principles set out in *Smith v. D.R. Horton* and *Damico v. Lennar* and must be addressed by this Court.

III. IS THE ARBITRATION PROVISION ITSELF UNCONSCIONABLE?

Yes, in more ways than one. Unconscionability was heavily briefed by the parties. See, e.g. Appx. 0452-0462 (Respondent's Final Amended Brief pp. 33-43). The Arbitration Agreement is undoubtedly an adhesion contract that was only partially presented on a take it or leave it basis with terms that were not known or negotiable. Abruzzo, educated as he may be, does not watch reality television and had no reason to suspect the Appellants would purport to grant themselves the illegal and outrageous rights contained therein. Based upon the false representations/omissions, Abruzzo understood the document to authorize only the filming of the dinner with his then girlfriend.[5] He did not have counsel, nor could he have reasonably contemplated the need for counsel to allow the Corporate Appellants to simply film the dinner.

As set out in the Amended Complaint,[6] after finishing Abruzzo's preparation for filming, it was represented to Abruzzo that they were ready to begin filming but could not do so. Abruzzo was then presented a piece of paper with only the signature portion of the page visible. At the time it was presented, it was falsely represented to Abruzzo that it was merely a formality and simply authorized the filming of the dinner. Despite interactions over many hours upon arrival with multiple Appellants, at no time did anyone mention or present a contract or terms of any kind to Abruzzo at any time prior to immediately before filming was to begin. Nor did anyone state,

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[5] Curiously, the Court of Appeals omitted the representation that the document simply authorized filming from its recitation of Petitioner's allegations. This was argued extensively by Petitioner with respect to fraud in the factum. Appx 0445-0447.

[6] Am. Compl. para 44-56, 167-84; (Appx.0523-0573)

suggest, or imply to Abruzzo that he somehow be authorizing anyone to disparage, defame, or commit intentional torts against him, much less that he would be granting them such rights in perpetuity and throughout the universe while also being prohibited from seeking public redress to protect his reputation.

Based upon the false representations made to him, Abruzzo, who does not watch reality television and had no reason to suspect otherwise, signed the partial piece of paper believing only that doing so would enable the dinner to be filmed. Abruzzo was given no time to read it, no time to consult with an attorney regarding its substance, no time verify the accuracy of its contents, no time verify the parties and no explanation of its contents other than the false representation that it simply authorized filming of their dinner. Given the terms contained in of the "Arbitration Agreement," the omission of any representations regarding any waiver of the fundamental right to a jury trial or the release of rights or claims such as those arising out of intentional and illegal conduct, which no reasonable person would contemplate under the circumstances, is glaring.

Here, Petitioner pointed out at least two substantively unconscionable provisions in paragraph 19 of the Arbitration Agreement alone – 1) requiring venue to be in New York City violates S.C. Code 15-7-120 and the public policy of this State[7], and 2) the one-sided injunctive relief provision is so lopsided when compared to paragraph 12 (Confidentiality and Publicity) as to be unconscionable. The Court of Appeals did not discuss either of these issues when reversing and remanding the circuit court's decision.

The JAMS Streamlined Arbitration Rules mandated by paragraph 19 further disadvantage Petitioner. For example, the JAMS rules require all proceedings to be confidential, a $2,000 filing fee for cases involving more than two parties, a 12% case management fee assessed on top of all

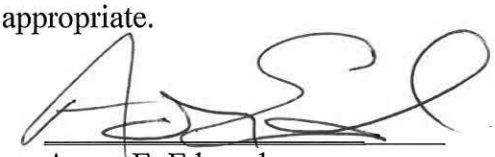
[7] See Appx 0460-0462 discussing S.C. Code 15-7-120

professional fees, professional fees payable to the arbitrator, the court reporter and transcript fees are to be borne by the requesting party, the discovery process relies solely on voluntary information exchange, the rules of evidence are not mandatory, the arbitrator can consider affidavits or other recorded statements even if the other Party has not had the right to cross-examine the witness, and the damages are limited to $250,000 in the absence of an agreement to arbitrate or use those rules. Appx 228-250. A fair and neutral forum for Petitioner it is not.

Finally, because the forum of any arbitration has been held by this Court to be an integral part of the Arbitration Agreement and is neither logistical nor ancillary, the unavailability of the chosen forum in this case renders the arbitration provision unenforceable. *Grant v. Magnolia-Manor Greenwood, Inc.*, 383 S.C. 125, 131-32, 678 S.E.2d 435, 439 (2009). That is precisely what we have here, yet the Court of Appeals completely omitted any discussion of unconscionability. This is reversible error requiring this Court's review.

CONCLUSION

For the reasons set forth herein, the respondent's Petition for a Writ of Certiorari to the Court of Appeals should be granted, the opinion of the Court of Appeals vacated, and the circuit court's order denying Appellant's motion to dismiss and/or compel arbitration should be affirmed with such other relief as the Court deems appropriate.



Aaron E. Edwards
George Sink, P.A. Injury Lawyers
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N. Charleston, South Carolina 29406
(843) 569-1700
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CERTIFICATE OF COUNSEL

I certify that the **Petition for Writ of Certiorari to the Court of Appeals** complies with Rule 242, SCACR.

Aaron E. Edwards
George Sink, P.A. Injury Lawyers
7011 Rivers Ave.
N. Charleston, South Carolina 29406
(843) 569-1700
aedwards@sinklaw.com
ATTORNEY FOR RESPONDENT ABRUZZO

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