ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Roger R. Riemann, Plaintiff, vs. Palmetto Gems & Gemological Services, Inc. and Thomas Shofner, in his individual capacity, Defendants	)	C/A No.: 2012-CP-32-3496 **ORDER DENYING DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY PROCEEDINGS AND COMPEL ARBITRATION, AND GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT AND COMPEL DISCOVERY**

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CLERK OF COURT
LEXINGTON, SC

The matter came before this Court on the Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration of Defendants Palmetto Gems & Gemological Services, Inc. (hereinafter "PGGS") and J. Thomas Shofner (hereinafter "Shofner"), in his individual capacity (hereinafter collectively the "Defendants"). Plaintiff Roger R. Riemann (hereinafter "Riemann") also filed a Motion to Amend Complaint to add a cause of action for Intentional Infliction of Emotional Distress and to Compel the Defendants to answer previously filed discovery requests.

For the reasons listed below, this Court DENIES the Defendant's Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration, and GRANTS the motions of the Plaintiff to Amend his Complaint and to Compel Discovery. Further, Plaintiff's Motion to Strike the Affidavit of Defendant Thomas Shofner is DENIED.

SUMMARY OF ALLEGATIONS AND CAUSES OF ACTION

Plaintiff Riemann is a gemologist and a former employee of PGGS. He was hired on August 11, 2006 and was terminated by Shofner on May 21, 2012. (Complaint, ¶ 1).

Riemann alleges that for an extended time prior to his termination, he made known to Shofner his concerns that he was not receiving appropriate bonuses under his written agreement with PGGS. The Defendants failed to address these concerns, and Riemann ultimately filed a wage complaint with the South Carolina Department of Labor, Licensing & Regulation ("LLR") on or about February 7, 2012. LLR officially opened an investigation on or about March 14, 2012, and notified Shofner of the complaint in late March 2012. On May 21, 2012, Shofner fired Riemann. (Complaint, ¶¶ 15-17).

Riemann also alleges on or about June 4, 2012, LLR completed its Investigative Report concerning Riemann's complaint and issued a citation to PGGS for numerous violations of the S.C. Payment of Wages Act, S.C. Code Ann. § 41-10-10 *et seq.* With regard to Riemann, LLR cited PGGS for its failure to pay Riemann his bonus for 2011. PGGS did not appeal the citation to the S.C. Administrative Law Court or otherwise appeal the finding of LLR. Despite the findings of LLR and Riemann's demand for payment, the Defendants continued to refuse to pay Riemann money that is owed and due to him. (Complaint, ¶¶ 18-21).

Finally, Riemann alleges that prior to his termination, while his wife was visiting PGGS, Shofner confronted her and told her that Riemann was a "thief." Shofner also allegedly stated that she "was wearing stolen jewelry," that he made these statements not only to Riemann's wife directly but also within the earshot of other PGGS employees, and that he made these statements with the full knowledge that they were false. Among other things, Shofner allegedly knew that

the items had been placed on either a layaway or house account, and knew that Riemann had made payments on them. (Complaint, ¶ 25).

Based on these allegations, Riemann filed this lawsuit alleging three (3) causes of action:

1. A statutory claim for violation of the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-10, *et seq.*
2. A tort claim for wrongful discharge in violation of South Carolina public policy.
3. A defamation claim based on Shofner's statements to Riemann's wife.

Riemann has also moved this Court to amend his Complaint to add a fourth cause of action against the Defendants for Intentional Infliction of Emotional Distress based on the statement that Shofner made to Riemann's wife.

DEFENDANTS' MOTION TO DISMISS

On October 29, 2012, Defendants filed and served their Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. Defendants made their motion pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 (the "FAA"), requesting that this Court compel Riemann to arbitrate each of his claims. Defendants supported their motion with (1) an affidavit[1] from Defendant Shofner describing the Defendants' alleged connections to interstate commerce, and (2) a copy of the Shareholder Management Agreement.

The "Dispute Resolution" provision of the Shareholder Management Agreement purportedly requires settlement of "[a]ny controversy or claim arising out of or related to this Agreement or the breach thereof" by binding arbitration. It also includes a provision demanding

[1] Riemann sought to challenge many of Shofner's statements in his affidavit, stating that they appeared to be false, and timely served his Second Set of Interrogatories and Second Request for Production of Documents to Defendants on December 3, 2012. As detailed in Riemann's Motion to Compel Discovery, Defendants have not answered these requests. Within thirty (30) days of the date if this Order, Defendants must answer all discovery requests previously served by Plaintiff to Defendants.

that the parties engage three (3) arbitrators who must be "a certified public accountant, a lawyer, or a businessman with at least seven (7) years experience as an executive in a closely held corporation." The Dispute Resolution provision is on the middle of the second page of the four page Agreement, is not set out in any way from the other text in the Agreement, and is not entitled as an "Arbitration" provision.

ANALYSIS

A. The Agreement Involves Interstate Commerce and is Subject to the FAA.

Defendants argue that this dispute is subject to arbitration because the Agreement "involves" interstate commerce so as to make the arbitration provision enforceable under the Federal Arbitration Act.

1. The FAA requires that contractual arbitration provisions be honored when the "essential character" of the contract involves interstate commerce.

(a) The inapplicability of the South Carolina Uniform Arbitration Act is not determinative.

The parties agree that the South Carolina Uniform Arbitration Act cannot provide a basis to order arbitration because notice that the Agreement was subject to arbitration was not printed in underlined, capital letters on the first page of the Agreement. *See* S.C. CODE § 15-48-10(a). However, the Agreement is still subject to mandatory arbitration if the Federal Arbitration Act ("FAA") applies to the Plaintiff's claims. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (holding that an agreement with insufficient notice of the arbitration provision to satisfy state law must be analyzed for compliance with the FAA).

(b) The FAA applies to transactions "involving" interstate commerce.

The FAA provides that "a written provision in any. . .contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such

contract. . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. "Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

(c) The FAA embodies a presumption in favor of arbitration.

The analysis begins with the "strong presumption in favor of the validity of arbitration provisions because of the strong policy favoring arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999)). "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (*citing Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 269 (1995)). This "commerce in fact" standard turns on whether the transaction "in fact" involved interstate commerce, "regardless of whether or not the parties contemplated an interstate transaction." *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

Determination of whether a transaction involves interstate commerce is, therefore, a fact-specific inquiry. *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117. "The court must examine the Agreement, the complaint, and the surrounding facts" to determine whether the "essential character" of the transaction implicates interstate commerce. *Thornton v. Trident Med. Ctr.*, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003).

2. The Agreement at issue involves interstate commerce.

In this case, the essential character of the parties' Agreement implicates interstate commerce because the Agreement created a business which required interstate activities.

(a) The Agreement required interstate travel under *Lucey* analysis.

First, the Agreement involved interstate commerce because Shofner and Riemann's performance under the Agreement required interstate travel. *See Lucey v. Meyer*, 736 S.E.2d 274 (S.C. Ct. App. Oct. 24, 2012). The parties did not and could not carry on the profit-making gemstone business created by the Agreement without traveling outside of South Carolina, and thus Shofner and Riemann in fact entered into the stream of interstate commerce.

In *Lucey*, the underlying agreement was an employment agreement between a law firm and new associate attorney in Charleston. 736 S.E.2d at 277. The agreement provided the terms of the associate's salary and bonus structure, referenced several cases she would handle for the firm, and included a mandatory arbitration provision for any matters arising out of the agreement. *Id.* The parties' relationship deteriorated, and the firm filed a complaint against the associate and moved to compel arbitration. *Id.* at 278. The trial court denied the motion, finding that the associate's work on cases involving out-of-state witnesses and travel was insufficient to establish that the employment relationship was interstate in character when the agreement involved a South Carolina lawyer providing services for a South Carolina law firm. *Id.* at 282.

The Court of Appeals reversed and rejected the trial court's finding that the associate's out-of-state activities were merely incidental to the intra-state transaction and could not be said to affect interstate commerce. *Id.* at 280-283. Instead, the Court of Appeals held that the associate's representation of the firm's out-of-state clients served as a basis for the legal partnership memorialized in the employment agreement, and the associate in fact traveled out-of-state to serve those clients and thus to perform under the agreement. *Id.*, 736 S.E.2d at 282-83. "Considering the liberal application of the Commerce Clause, and recognizing the FAA is to be

construed to the full extent of the Commerce Clause," the Court of Appeals held that the associate's out-of-state travel "involved interstate commerce" and implicated the FAA. *Id.*

In this case, the business relationship created by the Agreement required both Defendant Shofner and Plaintiff to physically enter the stream of interstate commerce to carry out the business of Palmetto Gems. Both partners' responsibilities under the Agreement required travel outside South Carolina in order to purchase and sell Palmetto Gems inventory, purchase supplies, and attend conferences. Shofner Aff. ¶¶ 9-10.

Plaintiff argues that this case is more analogous to *Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012) because the Agreement here merely involved the hiring of a South Carolina resident to provide gemologist services inside South Carolina. Pl. Opp. Memo pp. 6-7.

The Defendants' affidavit in support of this Motion reflects that both parties entered the stream of interstate commerce as a result of their contractual obligations under the Agreement. Shofner Aff. ¶¶ 5-10. The Agreement named Defendant Shofner and Plaintiff as the sole Executive Officers of Palmetto Gems, and those roles required interstate travel to purchase and sell inventory and equipment for the store. *Id.* The parties' interstate travel to purchase business-related goods made them "persons or things in interstate commerce," and thus the FAA is implicated.

(b) The Agreement involved interstate transactions.

Besides travel, the Agreement involved interstate commerce because the parties used the instrumentalities of interstate commerce to conduct interstate transactions for PGGS and placed items in the stream of interstate commerce for sale and customization.

The Agreement expressly contemplated that part of PGGS' income would originate from sales outside South Carolina, including sales through PGGS' website. *See* Shofner Aff. ¶¶ 4-5. More specifically, the Agreement indicates that the salary and profit sharing distributions to which Defendant Shofner and Plaintiff would be entitled pursuant to the Agreement would come from two sources: the PGGS store and its website. *See* Exhibit B, p. 5. The website advertises PGGS' products and services and is not limited to South Carolina customers. *See* Shofner Aff. ¶ 5. Because the Agreement provided for sales through PGGS' internet website, performance under the Agreement involved the channels and instrumentalities of interstate commerce, and thus comes within the scope of the FAA.

Moreover, the parties placed items in the stream of interstate commerce. Defendant Shofner testified that PGGS' has one-hundred eighteen (118) out-of-state customers in twenty-nine (29) states that have generated over three hundred (300) sales transactions outside of South Carolina. Shofner Aff. ¶¶ 6-7. But the parties' placement of items into the stream of interstate commerce was not limited to out-of-state sales. PGGS also offered specialization and customization services to customers that were not performed "in house," but were sent out-of-state to contractors who completed the work on PGGS' behalf. Shofner Aff. ¶ 8. This part of PGGS' business affected interstate commerce, as it involved the interstate transport of materials and the provision of services by foreign vendors in order to carry on the profit-making enterprise created by the Agreement. As a result of those interstate transactions, PGGS was affected, the vendors from whom PGGS purchased gems and other products were affected, the vendors from whom PGGS purchased customization services were affected, and the purchasers were affected, none of whom, except PGGS, were limited to South Carolina. Together, these transactions had a substantial effect on interstate commerce. *See, e.g. Towles v. United HealthCare Corp.*, 338 S.C.

29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999) (finding physician's employment agreement implicated interstate commerce when plaintiff participated in teleconferences with out-of-state medical staff, reviewed claims from out-of-state providers, attending out-of-state conferences, participated in out-of-state sales presentations, and worked with national companies to resolve issues).

Because the parties' performance under the Agreement required interstate travel and the placement of goods in the stream of interstate commerce, the Agreement "involved" interstate commerce.

B. The Agreement is Not Unconscionable

Plaintiff argues that the Agreement's arbitration provision is unenforceable because it is unconscionable. Pl. Memo. Opp. pp. 7-10. The Court disagrees.

"General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Lucey*, 736 S.E.2d at 283 (*citing Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007)). "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 283-84 (*citing Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668). For an arbitration provision to be unconscionable, the party seeking non-enforcement must demonstrate "both an absence of meaningful choice ***and*** oppressive, one-sided terms." *Id.* at 284 (emphasis in original) (*citing Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

1. Plaintiff had a meaningful choice in agreeing to arbitrate.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Lucey*, 736 S.E.2d at 284 (*citing Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295-96 (4th Cir. 1989)). Factors for courts to consider include "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (*citing Carlson*, 883 F.2d at 293, 295).

The Court finds that Plaintiff had a meaningful choice in deciding whether to enter the Agreement. The purpose of the Agreement was to form a new business with Shofner and Riemann as its sole Executive Officers and to document the parties' respective rights and responsibilities with respect to the creation of that business. *See* Shofner Aff. ¶ 2, Exhibit A, p. 1. As one of only two partners, Plaintiff's assent to the terms of the Agreement was necessary to the creation of PGGS. Plaintiff was free to negotiate the terms of the agreement or to walk away without personal or financial repercussion; this is the hallmark of meaningful choice. *See, e.g. Simpson*, 373 S.C. at 25-27, 644 S.E.2d at 669-70 (finding that consumer lacked meaningful choice in agreeing to arbitration provision in automobile sales contract in part because a car is a critically important necessity in today's society and thus consumer could not walk away, regardless of disagreement).

Plaintiff argues that he lacked meaningful choice because the arbitration provision was "hidden in the middle of page 2 of a 4-page agreement and is not even entitled as an 'Arbitration' provision." Pl. Memo. Opp. p. 8. Plaintiff cites *Kumpf v. United Telephone Co. of Carolinas,*

Inc.,[2] a breach of implied contract case based on an employee handbook, in support of his argument that the Agreement's arbitration provision is inconspicuous as a matter of law because it is not capitalized, bold, underlined, or otherwise distinctive from the other numbered provisions of the Agreement. Pl. Memo. Opp. p. 9. Plaintiff's argument conflates the standard for conspicuous disclaimers of employee handbook contracts with the standard for an arbitration provision enforceable pursuant to the FAA. This is not the law under the FAA or in South Carolina.[3] It is well-settled that a person who can read is bound to the terms of a contract he signs. *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (internal citation omitted) (rejecting plaintiffs' argument that arbitration provision was unconscionable because they were not advised that it was included in the contract).

The arbitration provision in this case was written in the same size type face as every other provision of the Agreement, and, regardless of the section's "Dispute Resolution" title, there is little doubt that the provision clearly requires that arbitrable disputes be resolved by arbitration. *See* Shofner Aff. ¶ 2, Exhibit A. Moreover, there is nothing in the Agreement which would preclude Plaintiff from consulting a lawyer prior to executing the Agreement. *See First Baptist Church of Timmonsville v. George A. Creed & Son, Inc..*, 276 S.C. 597, 600, 281 S.E.2d 121, 123 (1981) (rejecting argument that the plaintiff could evade arbitration agreement based on surprise in part because plaintiff was free to consult an attorney before executing the agreement).

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[2] 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993).

[3] As noted previously, the South Carolina Uniform Arbitration Act imposes similar notice requirements as those suggested by Plaintiff, in that notice of the arbitration provision must be in underlined, capital letters on the first page of the Agreement. *See* S.C. CODE § 15-48-10(a). But both the United States Supreme Court and the South Carolina Supreme Court have expressly held that the FAA displaces heightened state law notice requirements for arbitration provisions, and thus arbitration provisions sought to be enforced under the FAA must be analyzed the same as all other contracts, without specific requirements of notice to enforce the provision. *See Soil Remediation Co. v. Nu-Way Environ., Inc.*, 323 S.C. 454, 459, 476 S.E.2d 149, 151-52 (1996) (*citing Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)). Thus, the Court rejects any argument that the Agreement's arbitration provision is inconspicuous as a matter of law, simply because the format does not comply with the requirements of unrelated state laws.

Under these circumstances, there is no evidence that the format of the arbitration provision deprived Plaintiff of a meaningful choice in deciding whether to enter the Agreement.

Similarly, there is no evidence, affidavit or otherwise, that Plaintiff was less sophisticated than Shofner at the time of entering the Agreement. Because Plaintiff was not deprived of a meaningful choice in agreeing to arbitrate this dispute, the arbitration provision is not unconscionable.

2. The terms of the arbitration provision were not oppressive or one-sided.

Plaintiff argues that the Agreement's arbitration provision was oppressive because the provision requires three qualified arbitrators and allegedly the cost "would effectively prevent Riemann from seeking any adjudication of his claims." Pl. Memo. Opp. p. 9. "As stated previously, this prong of the test sets forth that we are to review the terms to see if no reasonable person would make them and no fair and honest person would accept them." *Lucey*, 736 S.E.2d at 283 (*citing Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668).

Plaintiff has the burden of placing evidence on the record that the costs of arbitration would be prohibitively expensive in order to overcome the liberal policy favoring arbitration. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (*citing Green Tree Fin. Corp. v. Randolph*, 531 U.S. 71, 90-91 (2000)) (rejecting plaintiff's argument that the cost of arbitration would preclude her from pursuing claims against the defendant as "speculative" when plaintiff failed to place evidence of her costs on the record). Plaintiff failed to submit an affidavit in opposition to Defendants' motion or otherwise place evidence on the record establishing the costs he would incur in arbitration. Therefore, this Court finds that the costs of arbitration would not be prohibitively expensive.

Moreover, the terms of the arbitration provision are not so oppressive that a reasonable person would not make them and no honest person would accept them. The terms of the provision are not one-sided, as they are equally binding on both Plaintiff and Defendant Shofner. The agreement that disputes will be resolved by a panel of three arbitrators—one selected by each party and the third selected by the other two arbitrators—is not unique and has been enforced by courts previously over unconscionability objections.[4] *See Lucey*, 736 S.E.2d at 285. And, despite Plaintiff's argument to the contrary, the purpose of the three-arbitrator panel provision appears to ensure an "unbiased decision by a neutral decision-maker," the very result that precludes an arbitration provision from being unconscionable. *See Lucey*, 736 S.E.2d at 284 (*citing Simpson*, 373 S.C. at 25, 644 S.E.2d at 668).

Finally, Plaintiff argues that the Agreement violates is oppressive because it provides for the arbitrator's assessment of fees and costs if the parties were found to act in bad faith. Shofner Aff. ¶ 2, Exhibit A, p. 2. Citing *Simpson*, Plaintiff argues that this provision "essentially places [Plaintiff] under a significant financial threat that he would not otherwise face." Pl. Memo. Opp. pp. 9-10. However, the *Simpson* discussion cited by Plaintiff addressed an arbitration provision which precluded the arbitrator's entry of punitive or treble damages that would otherwise be available to the plaintiff for her South Carolina Unfair Trade Practices Act and Dealers' Act claims. 373 S.C. at 28, 644 S.E.2d at 670. The case had nothing to do with the cost of arbitration, but instead invalidated a provision which expressly limited a party's right to pursue

[4] Even if the Court were to find the requirement of three arbitrators to be unconscionable under these circumstances, the arbitration provision would be enforceable, without the three arbitrator requirement. *See* S.C. CODE ANN. § 36-2-302(1) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract. . . or it may so limit the application of any unconscionable clause as to avoid any unconscionable result").

statutory remedies. The arbitration provision in this case makes no such limitation, and thus the mutual imposition of penalties for claims made in bad faith is not oppressive.

As such, the Court finds that the Agreement's arbitration provision was not unconscionable because it neither deprived Plaintiff of a meaningful choice nor included oppressive and one-sided terms, and thus the arbitration provision is enforceable against Plaintiff as to arbitrable claims.

C. PLAINTIFF'S SOUTH CAROLINA PAYMENT OF WAGES ACT CLAIM IS NOT SUBJECT TO ARBITRATION

Although the arbitration provision is enforceable under the FAA, Plaintiff's claim against the Defendants for violating of the South Carolina Payment of Wages Act (the "Act") cannot be arbitrated because the "Dispute Resolution" provision in the Shareholder Management Agreement violates S.C. Code Ann. § 41-10-100, which provides that "No provision of this chapter may be contravened or set aside by a private agreement." This includes, pointedly, the provision in S.C. Code Ann. § 41-10-80(C) which provides employees with the right to bring a "civil action" against employers for violations of the Act.[5]

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue,* 388 S.C. 138, 147–48, 694 S.E.2d 525, 529 (2010) (quoting *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.,* 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993)). Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail,* 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009). *Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trustees*, 400 S.C. 478, 488,

[5] Although not dispositive, it should be noted that paragraph 12 of the Agreement is titled "Governing Law" and states that "The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of South Carolina."

735 S.E.2d 492, 498 (2012). The determination of legislative intent is a matter of law. *Charleston County Parks & Recreation Comm'n v. Somers,* 319 S.C. 65, 459 S.E.2d 841 (1995). *City of Camden v. Brassell,* 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997).

Here, the statute's language is plain, unambiguous, and conveys a clear, definite meaning. S.C. Code Ann. § 41-10-100 makes clear that "No provision of this chapter may be contravened or set aside by a private agreement." This Section, coupled with S.C. Code Ann. § 41-10-80(C) (which provides employees with the right to bring a "civil action" against employers for violations of the Act), makes clear that the Plaintiff's claim against the Defendants for violating the South Carolina Payment of Wages Act (the "Act") cannot be arbitrated.

Further, it is well-established that the South Carolina Payment of Wages Act is "remedial legislation designed to protect working people and assist them in collecting compensation wrongfully withheld." *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 194, 463 S.E.2d 641, 645 (S.C. App. 2005). For that reason, our state "refus[es] to allow employers to ignore the statute by claiming their employees had by contract or custom waived their statutory right to prompt payment of wages." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 504, 518 S.E.2d 591, 594 (1999) (quoting *Cato v. Grendel Cotton Mills,* 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925)). S.C. Code Ann. § 41-10-100 embodies this policy by affirming that "No provision of this chapter may be contravened or set aside by a private agreement."

In this remedial scheme, the General Assembly enshrined an employee's right to bring a "civil action" against an employer for violating the Act. In our state, a "civil action" is defined by Rule 2 of the South Carolina Rules of Civil Procedure in clear and unmistakable terms – "There shall be one form of action to be known as a 'civil action.'" It is unavailing to argue that an arbitration satisfies the Act's unmistakable provision of a "civil action" to an employee in

order to vindicate the employee's rights under the Act. Such a finding would violate both the Act's clear provisions and its remedial nature.

Most recently, an employer attempted to argue that its failure to pay an employee as agreed had been waived by consent and that he was "estopped from challenging the policy" that he was contesting. In rejecting the employer's argument, the appellate court relied on S.C. Code Ann. § 41-10-100, noting that "any agreement Ross may have consented to would be void" under S.C. Code § 41-10-100 and "unenforceable against him by Ligand." *Ross v. Ligand Pharmaceuticals, Inc.*, 371 S.C. 464, 473 n. 1, 639 S.E.2d 460, 465 (S.C. App. 2006).

As stated above, it is also irrelevant that Defendants seek to enforce the contractual arbitration provision under the FAA. Under *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), even where the FAA applies, "State law remains applicable if the law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally."

For this reason, Defendants' motion with regard to Riemann's claim under the South Carolina Payment of Wages Act must be denied.

D. RIEMANN'S OTHER CLAIMS, INCLUDING THE CLAIM HE SEEKS TO ADD TO HIS COMPLAINT, ARE NOT CLAIMS THAT "ARISE OUT OF OR ARE RELATED TO" THE SHAREHOLDER MANAGEMENT AGREEMENT, AND THEREFORE CANNOT BE SUBJECT TO "DISPUTE RESOLUTION" PROVISION CITED BY DEFENDANTS.

1. The Court is to Determine Which Claims are Subject to Arbitration

Defendants argue that the Court is not to determine which of Plaintiff's claims are within the scope of the Agreement's arbitration provision, because the Agreement states that "any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." This Court disagrees.

The question of who decides whether particular claims are subject to arbitration—the court or the arbitrator—is a matter of contract. *First Options of Chicago, Inc. v. Kaplan*, 415 U.S. 938, 943 (1995). This issue is among the "gateway matters" that courts generally "assume" the parties intended the court to resolve, but only absent "clear and unmistakable" evidence that the parties agreed such matters were to be decided as part of the arbitration proceeding. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (*citing Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452 (2003))

This Court finds that the Defendants have not met their burden of providing "clear and unmistakable" evidence that the parties agreed such matters were to be decided as part of the arbitration proceeding. Riemann's causes of action for Wrongful Discharge in Violation of South Carolina Public Policy; Defamation; and Intentional Infliction of Emotional Distress are exactly the types of outrageous and illegal conduct cited in *Aiken* and *Chassereau* that are unforeseeable to the parties at the time the contract was formed. Therefore, the Defendant has failed to establish by "clear and unmistakable" evidence that the parties intended an arbitrator to decide whether they were subject to arbitration.

Further, as discussed above, such a finding would be in direct contravention to the mandates of S.C. Code Ann. § 41-10-100, providing that "No provision of this chapter may be contravened or set aside by a private agreement." This includes, pointedly, the provision in S.C. Code Ann. § 41-10-80(C) which provides employees with the right to bring a "civil action" against employers for violations of the Act.[6] See *Simpson,* 373 S.C. 29-30, 644 S.E.2d at 671 (2007) (Holding the general rule is that courts will not enforce a contract which is violative of

[6] Although not dispositive, it should be noted that paragraph 12 of the Agreement is titled "Governing Law" and states that "The construction and interpretation of this Agreement shall at all times and in all respects be governed by the laws of the State of South Carolina."

public policy, statutory law, or provisions of the Constitution). As such, this Court must decide which of Riemann's claims are subject to arbitration.

2. Riemann's Claims do not bear a Significant Relationship to the Agreement.

In determining whether a dispute between parties is covered under a purported arbitration agreement, our Supreme Court has stated as follows:

> [W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (emphasis added); *see also Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) ("we refuse to interpret an arbitration agreement with similar, though not identical, language to apply to illegal or outrageous acts that no reasonable person would have foreseen at the time the parties executed the agreement to arbitrate"); *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001) ("test is based on a determination of whether the particular tort claim is so interwoven with the contract that it could not stand alone").

Under the tests set forth by our Supreme Court, none of the tort claims alleged by Riemann are arbitrable. None of the claims rely on the outcome of the resolution of any issue significantly related to the Shareholder Management Agreement.

Riemann's claim for wrongful discharge in violation of public policy does not rely on any issue specifically related to the Shareholder Management Agreement. Instead, the claim is based

solely on the allegations that: (1) Riemann filed a wage complaint with LLR, (2) Shofner fired him shortly thereafter, and (3) there is a causal connection between the two, and any attempt by Shofner to justify the termination after the fact is pretextual. The allegations made in this cause of action are not factually related or even contemplated by the Shareholder Management Agreement. See *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 522 S.E.2d 350 (S.C. App. 1999), *overruled on other grounds by Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 713 S.E.2d 634 (2011).

Further, all four of Riemann's claims allege precisely the outrageous and illegal conduct referenced in the Supreme Court's decisions in *Aiken* and *Chassereau, supra.* It is clear from the record before this Court that Riemann's claims are wholly disconnected with any issue related to the Shareholder Management Agreement. For these reasons, Defendants' motion with regard to Riemann's tort claims is denied.

CONCLUSION

WHEREFORE, for the reasons set forth above, this Court DENIES the motion of the Defendants to dismiss the case, or in the alternative, stay proceedings and compel arbitration, and directs that the case proceed without further delay.

Further, this Court GRANTS the Plaintiff's Motion to Amend Complaint, and also grants the Defendants fifteen (15) days to respond to the Amended Complaint following service as provided by Rule 15(a) of the South Carolina Rules of Civil Procedure.

Further, the Court GRANTS the Plaintiff's Motion to Compel Discovery and permits the Defendants thirty (30) days from the date of this Order to respond fully to the Plaintiff's discovery requests.

Further, the Court DENIES the Plaintiff's Motion to Strike Affidavit of Defendant Thomas Shofner.

IT IS SO ORDERED.

Date: 24 June 13

The Honorable R. Knox McMahon
Presiding Judge
Eleventh Judicial Circuit