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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Circuit Court Judge

Case No. 2012-CP-32-3496

Roger R. Riemann ....Respondent.

v.

Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual capacity..............Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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REPLY ARGUMENTS

I. THE LOWER COURT ERRED BY FAILING TO ENFORCE THE PARTIES' AGREEMENT TO ARBITRATE ALL DISPUTES REGARDING THE ARBITRABILITY OF PARTICULAR CLAIMS.

The lower court ruled that the parties' Agreement is a valid and binding contract with an arbitration provision enforceable under the FAA. Respondent does not challenge the validity of the arbitration provision or that he is bound by its terms. The sole question before the lower court, and now before this Court, is who—the court or the arbitrator—is to decide which of Respondent's claims are subject to arbitration.

Respondent argues that the lower court properly denied Appellants' Motion to Compel Arbitration based on its finding that there was not "clear and unmistakable evidence" that Respondents' particular claims were within the scope of the arbitration agreement. (Resp. Brief, pp. 6-8.) In reaching this conclusion, both Respondent and the lower court misapprehend the purpose of the "clear and unmistakable" standard by mistakenly applying that standard to determine *whether* Respondent's particular claims are arbitrable and not to determine *who* decides questions of arbitrability.

The United States Supreme Court has long held that parties are permitted to contractually agree who—the court or the arbitrator—has the authority to determine the arbitrability of a particular claim. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The parties' agreement as to *who decides* arbitrability is separate and distinct from the parties' agreement as to the *scope* of the arbitration provision—that is, which claims are subject to arbitration. *See id.* The Court further held that there are two different standards for answering these two basic questions raised by arbitration agreements. *See First Options*, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently

from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'").

For the first question—who decides arbitrability—"[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so." *Id.* at 944. In keeping with the liberal federal policy favoring arbitration, the law reverses this presumption for the second question—which claims are arbitrable—in that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 945 (*quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983)); *accord Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001) (holding, under South Carolina law, that arbitration must be ordered unless a court can say with "positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute").

The lower court's ruling and the Respondent's argument ignore the distinction in the standard between these two questions. The lower court refused to compel arbitration because Appellants allegedly failed to provide "clear and unmistakable evidence" that Respondent's tort claims were within the scope of the arbitration provision. (*See* Order, p. 17.) Similarly, Respondent mistakenly argues that "[t]he court must find that there must be a 'clear and unmistakable' evidence that the arbitration provision is valid *and that it applies to a certain type of controversy*." (*See* Resp. Brief, p. 6 (emphasis added)). As stated in Appellants' Initial Brief, this conflates the standard for determining *who* decides the question of arbitrability of specific claims with the standard for *which claims* are subject to arbitration. (*See* App. Brief, pp. 15-16.)

Contrary to the lower court's ruling and Respondent's argument, the "clear and unmistakable" standard is not used to determine whether the parties intended specific claims to be covered by an arbitration provision,[1] but is instead used to determine the presence of a "delegation provision"—that is, "an agreement to arbitrate threshold issues concerning the arbitration agreement." *See Rent-a-Center, West, Inc.* v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 2777 (2010). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Id.* at 2777-78. Where, as in this case, the delegation provision consists of the parties' agreement to arbitrate the arbitrability of particular claims, the purpose of requiring "clear and unmistakable evidence" of that agreement is simply to ensure that parties are not forced to arbitrate matters they assumed a judge would decide. *See First Options*, 514 U.S. at 945. Because the parties clearly and unmistakably agreed to arbitrate any disputes as to the arbitrability of particular claims, the court must enforce that agreement.

Despite this clear precedent, the Respondent cites two different United States Supreme Court cases—both predating *First Options*—which allegedly stand for the proposition that a court must always decide the issue of whether an arbitration clause applies to a particular claim. See *AT&T Techs., Inc. v. Comms. Workers of America*, 475 U.S. 643 (1986); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). Neither case is as broad as Respondent suggests or is applicable to the resolution of the issue before the

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[1] By applying the "clear and unmistakable" standard to the question of which claims are arbitrable, the lower court essentially applied a presumption *against* arbitrability, when both federal and state law require a presumption *in favor* of arbitrability unless the court can determine with "positive assurance" that the particular claim falls outside the agreement. *See First Options*, 514 U.S. at 945; *Zabinski*, 346 S.C. at 596-97, 553 S.E.2d at 118-19.

Court. Both decisions involved arbitration provisions within collective bargaining agreements, and their holdings were expressly based on policy considerations under the Labor Management Relations Act, which is plainly not at issue in this case. *See AT&T*, 475 U.S. at 650-51; *Atkinson*, 370 U.S. at 241-42. Moreover, contrary to the parenthetical included by Respondent suggesting that arbitrability is *always* a decision for the court (*see* Resp. Brief, p. 7), the *AT&T* Court held that the court and not the arbitrator decides arbitrability, "[u]nless the parties clearly and unmistakably provide otherwise." 475 U.S. at 649. In fact, *First Options* cited *AT&T* for this proposition, reiterating that the question of who decides arbitrability is a matter of contract. 514 U.S. at 944.

In this case, there is "clear and unmistakable" evidence leaving no question that Respondent agreed to arbitrate the "gateway matter" of the arbitrability of particular claims. The arbitration provision expressly states that "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." Shofner Aff. ¶ 2, Exhibit A, p. 2. Because Respondent now argues that SCPWA claims are not arbitrable as a matter of law and that Respondent's other claims are outside the scope of the arbitration agreement, this is precisely the sort of "dispute as to whether a controversy or claim is subject to arbitration" that the parties expressly agreed was to be resolved by the arbitrator.

The lower court erred by refusing to enforce the arbitration provision's plain language and by failing to forward all claims to the arbitrator to determine which were arbitrable. For these reasons, the lower court should be reversed, and this Court should grant Appellants' Motion and compel all of Respondent's claims to arbitration.

II. THE LOWER COURT ERRED BY FINDING WAGE CLAIMS TO BE UNARBITRABLE AS A MATTER OF LAW.

Respondent argues that the lower court correctly interpreted the South Carolina Payment of Wages Act's ("SCPWA") statutory bar on private waivers[2] to render unenforceable as a matter of law any agreement to arbitrate wage disputes.[3] *See* S.C. Code Ann. § 41-10-100. Respondent notes that no South Carolina case compelling a SCPWA claim to arbitration has ever addressed this argument (*see* Resp. Brief, p. 11 n.3); indeed, in the near-century that South Carolina law has prohibited employee waiver of the right to prompt payment of wages, no South Carolina case has ever held that parties are prohibited from contractually agreeing to arbitrate wage disputes.

Appellants agree with Respondent that, in the absence of existing case law interpretation, this Court is bound to apply "[t]he primary rule of statutory construction. . . to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget and Control Bd.*, 310 S.C. 210, 213, 423 S.E.2d 101 (1992). Therefore, the precise question before the Court is whether the legislative intent of the SCPWA's bar on private waivers would be effectuated by prohibiting parties from agreeing to resolve wage disputes in an arbitration forum.

As discussed more fully in Appellants' Initial Brief, the SCPWA and its predecessor statute historically prohibited private waivers of statutory wage payment requirements on the theory that, if such waivers were permitted, employers would require

[2] "No provision of this chapter may be contravened or set aside by private agreement." S.C. Code Ann. § 41-10-100.

[3] Because the parties expressly agreed that the arbitrator and not the court was to determine the arbitrability of Respondent's particular claims, this Court need not reach the question of whether the lower court erred in refusing to compel the South Carolina Payment of Wages Act claim to arbitration on the grounds that it was unarbitrable as a matter of law. Similarly, this Court need not address Respondent's third argument, regarding whether Respondent's remaining tort claims bear a "significant relationship" to the Agreement, as that too is an issue for the arbitrator.

them of employees as a condition of employment, thus negating the remedial purpose of the statute. (*See* App. Brief, p. 7.) There is no legislative history to suggest that the legislature intended to prohibit parties from contractually choosing to resolve disputes in an arbitration forum if the SCPWA's substantive protections were still served.

Moreover, in determining legislative intent, the Court can be further guided by the fact that the South Carolina legislature has approved of the arbitration of employment-related disputes when certain conditions are met, and has not excluded wage payment claims from the scope of arbitrable matters. The South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10 *et seq.*, expressly renders enforceable arbitration agreements between employers and employees, so long as the arbitration agreement expressly references the SCUAA. *Id.* § 15-48-10(b)(2). The SCUAA identifies several specific types of employment disputes which are *not* subject to arbitration under any circumstances, regardless of whether the agreement references the SCUAA; the statute provides that any arbitration agreement pertaining to "workmen's compensation claims, unemployment compensation claims and collective bargaining disputes" shall be "null and void." *Id.*

The SCUAA does not apply in this case; the FAA does. However, the SCUAA reflects legislative priorities in the context of arbitration of employment disputes. If the legislature intended for claims under the SCPWA to be unarbitrable as a matter of law, it would have included wage disputes in the list of employment-related disputes that are *not* subject to the SCUAA. The legislature chose not to do so, and this Court has held that *any* claims which are *not* expressly excluded by the SCUAA are properly arbitrable. *Swentor v. Swentor*, 336 S.C. 472, 477-78, 520 S.E.2d 330, 333 (Ct. App. 1999) (holding

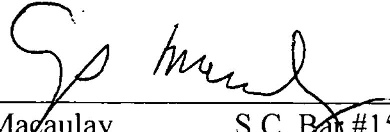
that equitable apportionment claims are arbitrable because they are not expressly excluded by the SCUAA). Therefore, this Court should conclude that the SCPWA's statutory prohibition on private waivers need not be read so broadly as to render unenforceable an arbitration agreement under the FAA, when the legislature expressly *permitted* the arbitration of wage disputes under the SCUAA.

As argued in Appellants' Initial Brief, the Payment of Wages Act does not and need not reach so far as to prohibit arbitration of wage disputes to effectuate the Act's remedial purpose. (*See* App. Brief, pp. 8-11.) The lower court's ruling to the contrary was in error and should be reversed.

CONCLUSION

For the reasons stated herein, Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner respectfully renew their request that the Court reverse the trial court's June 24, 2013 order denying Appellants' Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration and order that this case be stayed in the lower court pending arbitration of all Respondent Roger Riemann's claims.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I have served the foregoing Initial Brief of Appellants on the Respondent by hand-delivering a copy of the same, on April 14, 2014, addressed to Respondent's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street, Columbia, South Carolina 29201.

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