THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Appellate Case No. 2013-001906
Circuit Court Case No. 2012-CP-40-8540

Matthew G. Powell.....Plaintiff/Respondent

v.

Stewart Title Guaranty Company.....Defendant/Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **DOES THE FEDERAL ARBITRATION ACT (FAA) APPLY TO THE ARBITRATION CLAUSES IN THE AGREEMENT AND THE NON-SOLICITATION AGREEMENT?**

II. **SHOULD THE TRIAL COURT HAVE REFFERED THE ISSUE OF WHETHER THE ARBITRATION CLAUSES IN THE AGREEMENT AND THE NON-SOLICITATION AGREEMENT COVER POWELL'S CLAIMS TO AN ARBITRATOR?**

III. **DO THE ARBITRATION CLAUSES IN THE AGREEMENT AND THE NON-SOLICITATION AGREEMENT COVER POWELL'S CLAIMS?**

STATEMENT OF THE CASE

This is an employment case in which the Respondent, Matthew Powell (Powell) alleges that the Appellant, Stewart Title Guaranty Company (STGC), which is his former employee, owes him back wages in the form of performance bonuses. (Complaint) The claims in Powell's Complaint rest on two legal theories – 1) that STGC breached the employment contract between the parties and 2) that STGC violated certain provisions of the South Carolina Payment of Wages Act (SCPWA) S.C. Code §§ 41-10-10 et seq. (Complaint)

In response to the Complaint, STGC filed a Motion to Dismiss and to Compel Arbitration (Motion) in which it cited for support Rule 12(b)(1) SCRCP and the FAA 9 U.S.C. §§ 1 et seq. (Motion) The parties had a hearing on the Motion on June 17, 2013 during which the trial judge heard oral argument. (Transcript of Hearing) At the conclusion of the June 17, 2013 hearing, the trial judge took the Motion under advisement. (Transcript of Hearing)

On August 19, 2013, the trial judge entered a four (4) page formal Order, which concluded with a denial of STGC's Motion. (Order) STGC filed a Notice of Appeal on September 6, 2014 and filed its Initial Brief on February 18, 2014. Powell received two (2)

extensions totaling forty-two (42) days to file his initial brief. Powell submits what follows as his initial brief.

STATEMENT OF THE FACTS

Powell worked for STGC from September of 2005 to May 4, 2012. (Complaint) In the last few years of his employment with STGC, Powell worked as an Agency Service Manager for STGC. (Letter Agreements) On April 1, 2009, Powell and STGC entered into a letter agreement that set forth Powell's job duties and his compensation including his performance bonus structure. (April 1, 2009 Letter Agreement) Powell also signed on that same day a contract styled simply AGREEMENT in which he agreed not to compete with STGC for one (1) year, agreed not to solicit STGC employees to work for a competing firm and agreed not to disclose to any person or entity the names and addresses of other STGC employees for two (2) years. (AGREEMENT)

The AGREEMENT includes an arbitration clause. The arbitration clause states that:

> All disputes between "name" and Stewart shall be resolved by mandatory and binding arbitration administered by the American Arbitration Association (the "AAA") pursuant to the Federal Arbitration Act (Title 9 of the United States Code) in accordance with this Agreement and the Model Employment Arbitration Procedures of the AAA. Any arbitration proceeding under this Agreement shall be conducted in South Carolina. (parentheticals in original).

On January 22, 2010, Powell signed another letter agreement with STGC. (January 22, 2010 Letter Agreement) This new letter agreement also established Powell's job duties as well as his compensation including performance bonuses. (January 22, 2010 Letter Agreement) That same day, Powell also signed an agreement styled NON-SOLICITATION AGREEMENT in which Powell agreed not to solicit STGC agencies and STGC employees for a period of one (1) year. (NON-SOLICITATION AGREEMENT) The NON-SOLICITATION AGREEMENT also includes an arbitration clause. (NON-SOLICITATION AGREEMENT) The language of the

arbitration clause in the NON-SOLICITATION AGREEMENT is identical to the language of the arbitration clause in the AGREEMENT with the exception of the last sentence in which the situs of arbitration is changed from South Carolina to Texas. (NON-SOLICITATION AGREEMENT)

STANDARD OF REVIEW

"The determination of whether a claim is subject to arbitration is subject to de novo review." Partain v. Upstate Automotive Group, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). The appellate court uses the same analysis as the trial court in reviewing decisions on arbitrability. Towles v. United Healthcare Corporation, 338 S.C. 29, 35, 524 S.E.2d 839, 843 (Ct. App. 1999). This analysis requires an evaluation of the following – 1) whether the FAA applies, 2) whether the parties formed a valid and binding arbitration agreement, and 3) whether the arbitration agreement covers the claims alleged in the lawsuit. Towles, 338 S.C. at 35, 524 S.E.2d at 843. This appeal turns on the question of whether the arbitration clauses in the AGREEMENT and the NON-SOLICITATION AGREEMENT cover the claims alleged in Powell's lawsuit.

ARGUMENT

I. THE FAA APPLIES TO THE ARBITRATION CLAUSES IN THE AGREEMENT AND THE NON-SOLICITATION AGREEMENT.

[T]he FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Greentree Financial Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). The AGREEMENT and the NON-SOLICITATION AGREEMENT relate to Powell's employment. Powell's employment had a clear nexus with interstate commerce, a fact which Powell conceded at the hearing on the subject

Motion. (Transcript of Hearing) Powell does not withdraw that concession and, indeed, urges this Court to find the FAA applicable to the arbitration clauses in the AGREEMENT and the NON-SOLICITATION AGREEMENT.

II. THE TRIAL COURT PROPERLY DECIDED THE ISSUE OF WHETHER THE ARBITRATION CLAUSES IN THE AGRREEMENT AND THE NON-SOLICITATION AGREEMENT COVER POWELL'S CLAIMS WITHOUT REFERENCE TO AN ARBITRATOR.

In the absence of an agreement to the contrary, "courts assume that the parties intended courts, not arbitrators, to decide ... certain gateway matters ... such as whether (an arbitration clause) applies to a certain type of controversy." Greentree Financial Corp. v. Bazzle, 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). "Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court not the arbitrator." AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 649, 103 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (citations omitted). There is no language in the various agreements of the parties requiring reference of an issue of arbitrability to an arbitrator; therefore, the trial judge properly made a decision on that issue.

III. THE ARBITRATION CLAUSES DO NOT COVER POWELL'S CLAIMS.

A. INTRODUCTION TO ARGUMENT

Determining whether a party has agreed to arbitrate a particular issue is a matter of contract interpretation, and "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). "An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." Towles, 338 S.C. at 41, 524 S.E.2d at 846 (citing Zandford v. Prudential-Bache Securities, Inc., 112 F.3d 723, 727 (4th Cir. 1997)). These general

rules of contract interpretation have their source in state law. Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 685-687, 116 S.Ct. 1652, 134 L. Ed. 2d 902 (1996).

To decide whether a claim is within the scope of an arbitration clause, the Court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, SA, 863 F. 2d 315, 319 (4th Cir. 1988); Zabinski v. Bright Acres Assoc., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "[I]n deciding whether the parties have agreed to submit a particular (claim) to arbitration, a court is not to rule on the potential merits of the underlying claims. Landers v. Federal Deposit Insurance Corp., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing Zabinski., 346 S.C. at 596, 553 S.E.2d at 118.

The public policies of both South Carolina and the United States favor arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); Zabinski., 346 S.C. at 598, 533 S.E2d at 118. Because of the federal public policy, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." Moses H. Cone Mem'l Hosp., 460 U.S. at 24, 103 S.Ct. 927, 74 L.Ed.2d 765; Towles, 338 S.C. at 41, 524 S.E.2d at 846. "[A]ny doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration." American Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 94 (4th Cir.1996). Indeed, courts must generally order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Warrior & Gulf Navigation Co., 363 U.S. at 582-583; Zabinski, 346 S.C. at 597, 553 S.E.3d at119.

"Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." Simmons v. Lucas & Stubbs Assocs., Ltd.,

283 S.C. 326, 332-333, 322 S.E.2d 467, 470 (Ct. App. 1984). "[T]he FAA does not require the parties to arbitrate when they have not agreed to do so, nor does it prevent the parties who do agree to arbitrate from excluding certain claims form the scope of their arbitration agreement." Zabinski, 346 S.C. at 591-592, 553 S.E.2d at 116 (citing Volt Information Services, Inc. v. Board of Trustees, 489 U. S. 468, 478, 109 S.Ct. 1248, 103 L.E.2d 488 (1989)).

B. VIEWED THROUGH THE LENS OF SOUTH CAROLINA LAW ON CONTRACT INTERPRETATION, THE ARBITRATION CLAUSES IN THE AGREEMENT AND THE NON-SOLICITATION AGREEMENT DO NOT COVER THE CLAIMS ALLEGED BY POWELL.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the intention of the parties as determined by the contract language" Schulmeyer v. State Farm Fire and Casualty Company, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citing, United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992). In ascertaining the intent of the parties, courts "must first look at the language of the contract." C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

When a contract is unambiguous, courts "must construe its provisions according to the terms the parties used as understood in their plain, ordinary and popular sense." Ashley River Properties I, LLC v. Ashley River Properties II, LLC, 374 S.C. 271, 280, 648 S.E.2d 295, 299 (Ct. App. 2007). "Language which is perfectly clear determines the full force and effect of the (contract)." Gilstrap v. Culpepper, 283 S.C. 83, 85, 320 S.E.2d 445, 447 (Ct. App. 1984). "Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001).

"Parties are governed by their outward expressions, and the court is not at liberty to consider their secret intentions." Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976). "[W]ords cannot be read into a contract to impart an intent unexpressed when the contract was executed." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). "Courts are without authority to alter a contract by construction or to make new contracts for the parties." Gilstrap, 283 S.C. at 86, 320 SE.2d at 447. The court's role is limited to interpretation of the contract made by the parties "regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." Blakeley, 266 S.C. at 73, 221 S.E.2d at 769.

"[I]n determining the intent of the contracting parties, the court should construe the contract as whole and read together different provisions with the same subject matter." Buice v. WMA Securities, Inc., 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct. App. 2008). "The purport of a written agreement must be gathered from the contents of the entire agreement, read as a whole, and not from any particular clause or provision thereof." Carr v United Van Lines, Inc. 289 S.C. 194, 196, 345 S.E.2d 734, 735 (Ct. App. 1986) "[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous." Stevens Aviation, Inc. v DynCorp International, LLC, Op. No. 27369 (S.C.Sup.Ct. filed March 26, 2014) (Shearouse Adv.Sh. No. 12 at 24, 31-32) (quoting Crown Laundry & Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 515 (1993)).

"[I]n the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the [c]ourt (should) consider and construe them together." Harris v Ideal Solutions, Inc., 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009). In fact, "two contracts

executed at different times but which relate to the same subject matter and are entered into by the same parties are to be construed as one contract and considered as a whole." The Housing Authority of the City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 336, 588 S.E.2d 617, 621 (Ct. App. 2003) (citing Klutts Resort Realty, Inc. v Down' Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

Under a proper legal interpretation of them, the arbitration clauses in the AGREEMENT and the NON-SOLICITATION AGREEMENT do not cover Powell's claims. The arbitration clauses are unambiguous, so this Court may consider only the language of the letter agreements, the AGREEMENT and the NON-SOLICITATION AGREEMENT in interpreting the arbitration clauses. The words in those agreements must be interpreted according their plain, ordinary and popular sense. The arbitration clauses include the language "in accordance with this Agreement" and "under this Agreement," and this Court must determine the plain ordinary and popular sense of these phrases.

The phrase "in accordance with" does not have its own definition, but accordance is defined as "Agreement; harmony; concord; conformity." Henry Campbell Black, *Black's Law Dictionary* 16 (5th ed. St. Paul Minn.: W. Publ'g Co. 1979). The language of "in accordance with this Agreement" means, therefore, in agreement, harmony, concord or conformity with the AGREEMENT and the NON-SOLICITATION AGREEMENT between Powell and STGC. The phrase "in accordance with this Agreement" limits the coverage of the arbitration clauses to disputes arising out of the AGREEMENT and the NON-SOLICITATION AGREEMENT., and the arbitration clauses cannot be interpreted so that they cover Powell's claims.

The word "under" has various definitions, but the ones most applicable in the context of the arbitration clauses in the AGREEMENT and the NON-SOLICITATION AGREEMENT are

"according to" and "as." Henry Campbell Black, *Black's Law Dictionary* 1368 (5th ed. St. Paul Minn.: W. Publ'g Co. 1979). These definitions leave the arbitration clauses meaning according to or as the AGREEMENT and the NON-SOLICITATION AGREEMENT. Under this construction of the arbitration clauses the phrase "under this Agreement" limits the coverage of the arbitration clauses to disputes arising out of the AGREEMENT and the NON-SOLICITATION AGREEMENT. It is not possible to interpret the arbitration clauses in such a way that they cover Powell's claims.

This Court must also determine what to make of STGC's capitalization of the first letter of "Agreement" in the arbitration clauses. In legal drafting, the capitalization of the first letter of this word typically refers to the entirety of the specific agreement of the parties in which it appears. This use of "Agreement" further bolsters the conclusion that the arbitration clauses cover only claims arising out of the AGREEMENT and the NON-SOLICITATION AGREEMENT. There is no reasonable interpretation of the arbitration clauses that would extend them to cover Powell's claims.

STGC grounds it arguments on an interpretation of only the "[a]ll disputes" language in the arbitration clauses. This method of interpretation violates the contract interpretation rules that a written contract must be read as a whole and that courts should favor interpretations that give meaning to all parts of the contract. Any proper interpretation of the arbitration clauses must include an interpretation of the "in accordance with this Agreement" and the "under this Agreement" language in those clauses, and the only reasonable interpretation of those clauses places Powell's claims beyond the scope of the arbitration clauses.

The rule that multiple contracts entered into by the parties on the same day or with the same subject matter must be construed together does not change the conclusion that the scope of

arbitrable disputes is limited to disputes arising out of the AGREEMENT and the NON-SOLICITATION AGREEMENT. The two letter agreements say nothing about arbitration, and the construction of the letter agreements, the AGREEMENT and the NON-SOLICITATION AGREEMENTS together as limiting the scope of arbitrable disputes renders no provisions of those agreements meaningless or superfluous.

Perhaps STGC intended the arbitration clauses to cover all disputes between it and Powell. Unfortunately for STGC this is irrelevant to this appeal. Since the arbitration clauses are unambiguous, this Court cannot read into the arbitration clauses words consistent with an intent that is not expressed by the existing words of the arbitration clauses. This Court cannot by construction make new arbitration clauses for STGC, and it must confine its analysis to the words in the arbitration clauses regardless of whether the arbitration clauses as interpreted appear unwise or unreasonable. This Court cannot rescue STGC from the errors of its draftsman.

CONCLUSION

No sustainable interpretation of the arbitration clauses in the AGREEMENT and the NON-SOLICTATION AGREEMENT places Powell's claim within their scope. For this reason, this Court should affirm the trial court's decision denying STGC's Motion to Dismiss and to Compel Arbitration.

Respectfully Submitted,

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v.

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PROOF OF SERVICE- INITIAL BRIEF OF RESPONDENT

I hereby certify that I served the **INITIAL BRIEF OF RESPONDENT** on Appellant by depositing a copy of it in the U.S. Mail, postage prepaid, on May 1, 2014, addressed to its attorney of record, Kathryn Thomas, at the following address:

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