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.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the lower court erred in denying Appellant's motion to compel arbitration of Respondent's Payment of Wages Act claim on the grounds that such claims are not arbitrable as a matter of law, when the Payment of Wages Act's prohibition of private agreements setting aside the Act's requirements is not intended to limit parties' ability to contractually agree to a forum to resolve wage disputes, so long as the substantive rights and remedies of the statute are preserved.

II. Whether the lower court erred in denying Appellant's motion to compel arbitration of Respondent's remaining tort claims due to an alleged absence of substantial relationship with the arbitration contract, when the parties clearly and unmistakably agreed that all disputes regarding the arbitrability of claims were to be submitted as part of the arbitration proceeding.

STATEMENT OF THE CASE

Plaintiff/Respondent Roger Riemann ("Respondent") filed this action against Defendants/Appellants Palmetto Gems & Gemological Services, Inc. ("Palmetto Gems") and Thomas Shofner ("Shofner") (collectively "Appellants") in the Lexington County Court of Common Pleas on August 24, 2012. Respondent's Complaint alleged claims for violation of the South Carolina Payment of Wages Act, wrongful discharge in violation of public policy, and defamation. Respondent later moved to amend his Complaint to add a claim for intentional infliction of emotional distress.

On October 29, 2012, Appellants filed, in lieu of an Answer, a Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration ("the Motion"), based on a mandatory arbitration provision in the Shareholder Management Agreement that Respondent and Shofner executed to form Palmetto Gems.

A hearing on Appellants' Motion was held before Judge McMahon on February 13, 2013. On June 25, 2013, Judge McMahon issued an Order denying Appellants' Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration, on two grounds: first, that claims under the South Carolina Payment of Wages Act cannot be arbitrated as a matter of law, and second, that the remainder of Respondent's claims fell outside the scope of the applicable arbitration agreement. On August 1, 2013, Appellants served a Notice of Appeal on the Respondent. This appeal follows.

STATEMENT OF FACTS

A. Parties Execute Agreement to Form Palmetto Gems

On or about August 11, 2006, Respondent and Shofner executed a Shareholder Management Agreement ("the Agreement") to document their respective rights and responsibilities with respect to the creation of a new business, Palmetto Gems, in Chapin, South Carolina. (R. p. 22; R. p. 33, ¶ 2.) The Agreement appointed Shofner and Respondent as the sole Executive Officers of Palmetto Gems and provided the terms by which they would share the management and the income of the business. (R. p. 22; R. p. 108.) More specifically, Shofner was appointed President and Treasurer of Palmetto Gems, and Respondent was appointed Vice-President and Secretary. (R. p. 107.)

The Agreement contains a mandatory arbitration provision encompassing any disputes that may arise among the parties. The provision states, in pertinent part:

> Dispute Resolution. Any controversy or claim arising out of or related to this Agreement or the breach thereof shall be settled, except as may otherwise be provided herein, by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association; and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding.

(R. p. 108.)

B. The Dispute

On May 21, 2012, Shofner terminated Respondent's employment with Palmetto Gems on grounds of insubordination. (R. pp. 23-24.) On August 24, 2012, Respondent filed an action against Appellants in the Lexington County Court of Common Pleas, asserting claims for: (1) unpaid wages under the South Carolina Payment of Wages Act;

(2) wrongful termination in violation of public policy; and (3) defamation. (R. pp. 25-28.)

Respondent's Payment of Wages claim alleged that he was owed certain unpaid bonuses to which he was allegedly entitled pursuant to the terms of the Agreement. (R. pp. 25-26.) Respondent's wrongful termination claim alleged that he was terminated from Palmetto Gems for filing a wage complaint with the Department of Labor, Licensing, and Regulation ("LLR") related to those alleged unpaid bonuses. (R. p. 27.) Respondent's defamation claim alleged that at some point Shofner told Respondent's wife she was "wearing stolen jewelry." (R. p. 28.) Respondent subsequently moved to amend his Complaint to add a claim for intentional infliction of emotional distress related to the same allegedly defamatory statement. (R. pp. 43-44.)

C. Appellants Move to Compel Arbitration Pursuant to the Agreement

On October 29, 2012, Appellants moved to dismiss Respondent's Complaint pursuant to S.C. R. CIV. P. 12(b)(1) or, alternatively, to stay proceedings and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (R. pp. 30-31.) A hearing was held on Appellants' Motion on February 13, 2013 before The Honorable R. Knox McMahon. (R. p. 54.)

D. Appellants' Motion Denied

On June 24, 2013, Judge McMahon entered an Order denying Appellants' Motion. (R. pp. 14-19.) The court found that the parties' Agreement "involved"

interstate commerce and thus its arbitration provision was enforceable against Respondent under the Federal Arbitration Act.[1] (R. pp. 4-9); *see also* 9 U.S.C. § 2.

Nonetheless, the court denied Appellants' Motion on two grounds. First, the court found that claims under the South Carolina Payment of Wages Act cannot be compelled to arbitration as a matter of law, because the statute provides employees with the right to a "civil action" to remedy alleged violations and further provides that "[n]o provision of this chapter may be contravened or set aside by private agreement." (R. pp. 14-16) (*citing* S.C. Code Ann. § 41-10-100). Second, the court found that Respondent's remaining tort claims did not have a sufficiently "substantial relationship" to the Agreement such that those claims could be compelled to arbitration, despite the Agreement's express language that "any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." (R. pp. 16-19.) Appellants timely appealed.

[1] The court also found that the Agreement's arbitration provision was not unconscionable because Respondent had a meaningful choice in agreement to arbitrate and the provision's terms were not oppressive or one sided. (R. pp. 9-14.)

STANDARD OF REVIEW

Appeal from the denial of a motion to compel arbitration is subject to de novo review. *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

ARGUMENT

I. THE LOWER COURT ERRED IN FINDING RESPONDENT'S CLAIM UNDER THE PAYMENT OF WAGES ACT TO BE UNARBITRABLE AS A MATTER OF LAW, BECAUSE ARBITRATION DOES NOT CONTRAVENE OR SET ASIDE THE RIGHTS OR REMEDIES AVAILABLE UNDER THE ACT.

The lower court erred in denying Appellants' Motion to Compel Arbitration of Respondent's claim for unpaid wages under the South Carolina Payment of Wages Act ("SCPWA"), based upon its finding that wage claims under the SCPWA are never arbitrable as a matter of law.[2] (R. pp. 14-16.) The court's finding is in error, because the SCPWA prohibits private contracts which circumvent its substantive requirements, but does not preclude parties from privately setting arbitration as the forum to resolve wage disputes. Respondent's SCPWA claim is arbitrable,[3] and thus Appellant's Motion to Compel Arbitration should have been granted.

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[2] It is undisputed that the parties' Agreement "involves" interstate commerce and is enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. Although Respondent challenged the application of the FAA in the lower court, the court's Order concluded that the Agreement "involved" interstate commerce so as to be enforceable under the FAA, and Respondent failed to appeal that ruling. (R. pp. 5-9.) Therefore, this Court need not address whether the Agreement qualifies as a transaction involving interstate commerce. *See ML–Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (stating that an unchallenged ruling, right or wrong, is the law of the case). The question before the Court is solely which of Respondent's claims may proceed to arbitration.

[3] Respondent concedes the validity of the Agreement containing the arbitration provision and does not appear to contest that his SCPWA claim falls within the scope of the Agreement's arbitration provision, as the SCPWA claim as plead in his Complaint turns on the compensation Respondent was allegedly promised in the Agreement.

As the trial court noted, it is well-settled that the SCPWA—like its predecessor wage payment statutes—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 (Ct. App. 2005); *see also Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) (". . .[T]he purpose of the Wage Payment Act. . . [is] to protect employees from the unjustified and willful retention of wages by the employer."). In accordance with the statute's intended remedial purpose, South Carolina wage payment law historically prohibited employee waiver of statutory wage payment requirements. *See Cato v. Grendel Cotton Mills*, 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925). The prohibition was grounded in the assumption that, if statutory wage payment rights were waivable by private agreement, then all employers would require employees to do so, and the remedial purpose of the statute would be lost.[4] *Id.*

When enacted, the SCPWA codified South Carolina's prohibition of private waivers by providing that "[n]o provision of this chapter may be contravened or set aside by private agreement." S.C. Code Ann. § 41-10-100. As the *Cato* Court found with interpreting the SCPWA's predecessor statute, this Court has interpreted this SCPWA language to mean that employees are incapable of contractually waiving the requirements of the SCPWA, regardless of whether the alleged contract is express, implied, or observed by custom. *See, e.g. Ross v. Ligand Pharms., Inc.*, 371 S.C. 464, 473 n.1, 639 S.E.2d 460, 465 n.1 (Ct. App. 2006) (finding that employee's alleged waiver of the

[4] "Now, if the object of the statute can be thwarted by custom or contract, then the statute might as well be repealed, because it will not be long before the owner of every factory, mill, or other corporation employing labor, subject to the provisions of the statute, will establish customs and enter into contracts that will completely nullify the statute." *Cato*, 132 S.C. at 456-61, 129 S.E. at 205.

SCPWA requirement of notice of the date and time of payment was void and unenforceable).

The trial court's ruling in this case expanded the SCPWA's statutory bar on private waivers of the statute's substantive rights found in § 41-10-100 by applying that section to the SCPWA's provision of a private right of action to recover wages alleged to have been wrongfully withheld. *See* S.C. Code Ann. § 41-10-80(C) ("In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee *may recover in a civil action* an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. . .") (emphasis added).

More specifically, the trial court interpreted the SCPWA's use of the term "civil action" in defining the private remedy for alleged violations, combined with the statute's prohibition on contracts which "contravene or set aside" statutory protections, as rendering unenforceable any agreement to arbitrate matters brought pursuant to the SCPWA, on the theory that an otherwise-valid arbitration agreement would deny an employee a "civil action" to remedy alleged wage payment violations. The court concluded that compelling a SCPWA claim to arbitration would "violate both the Act's clear provisions and its remedial nature," such that SCPWA claims are never arbitrable as a matter of law. (R. p. 16.)

Appellants respectfully submit that the language of the SCPWA need not and does not reach so far as to prohibit arbitration of wage disputes in order to achieve its remedial purpose. It is axiomatic that "[t]he primary rule of statutory construction is 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). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011).

Contrary to the trial court's ruling, arbitrating a SCPWA claim is not inconsistent with the statute's legislative intent. The legislature's well-recognized purpose for enacting the SCPWA was to require the prompt payment of wages and to provide remedies should those wages be wrongfully withheld. The Agreement's arbitration provision does not seek to set aside the substantive requirements of the SCPWA or otherwise limit Plaintiff's civil remedies under the SCPWA or any other law; it simply dictates the forum where disputes must be resolved in a manner that does not alter available substantive remedies. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) ("An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined") (emphasis in original); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that parties who agree to arbitrate a statutory claim "do not forgo the substantive rights afforded by the statute," but rather "submit[ ]to their resolution in an arbitral, rather than a judicial, forum.") (internal citation omitted). The remedial scheme of the SCPWA is not contravened by arbitration, and thus the trial court's sweeping interpretation of the statute is unnecessary to effectuate its purpose.[5]

[5] *See also Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, (2000) ("[E]ven claims arising under a statute designed to further important social policies may be arbitrated because, so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.") (internal citation and quotation marks omitted).

Moreover, the trial court's reading of § 41-10-80(C)'s "civil action" language as requiring claims to be brought exclusively in a judicial forum is inconsistent with the provision's plain language and the other remedial directives of the SCPWA. With the exception of § 41-10-80(C), each and every remedial subsection of the SCPWA is couched in mandatory terms:

- "If the Director of the Department of Labor, Licensing, and Regulation or his designee determines that a [SCPWA] violation exists, he ***shall*** endeavor to resolve all issues by informal methods of mediation and conciliation." S.C. Code Ann. § 41-10-70.

- "Any employer who violates the provisions of Section 41-10-30 ***must*** be given a written warning by the Director of the Department of Labor, Licensing, and Regulation or his designee for the first offense and must be assessed a civil penalty of not more than one hundred dollars for each subsequent offense." S.C. Code Ann. § 41-10-80(A).

- "Any employer who violates the provisions of Section 41-10-40 ***must*** be assessed a civil penalty of not more than one hundred dollars for each violation. Each failure to pay constitutes a separate offense." S.C. Code Ann. § 41-10-80(B).

By contrast, § 41-10-80(C) declares the aggrieved employee's pursuit of a private "civil action" to be permissive, not mandatory:

- "In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee ***may*** recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow." S.C. Code Ann. § 41-10-80(C).

"The use of the word 'may' signifies permission and generally means that the action spoken of is optional or discretionary." *Rice*, 318 S.C. at 98, 456 S.E.2d at 383 (*citing State v. Wilson*, 274 S.C. 352, 356, 264 S.E.2d 414, 416 (1980)). There is no language in § 41-10-80(C)—or elsewhere in the SCPWA—that would require SCPWA claims to be brought *exclusively* in a judicial forum. This subsection is intended to define the remedy that is available for violations of the substantive provisions of the SCPWA, not the forum

in which wage payment claims must be initiated. For that reason, the trial court erred in finding that compelling this matter to arbitration in accordance with the Agreement would "contravene" or "set aside" any mandatory provisions of the SCPWA.

Indeed, South Carolina courts, including this Court, have routinely compelled SCPWA claims to arbitration when such claims were within the scope of a valid arbitration provision. *See, e.g. Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) (holding that plaintiff's claims for violation of the Payment of Wages Act, wrongful discharge, defamation, and breach of contract were subject to mandatory arbitration under the FAA); *see also Ballew v. Cannon's Funeral Home*, 2013 WL 1566658 (D.S.C. March 12, 2013); *Carter v. MasTec Servs. Co., Inc.*, 2010 WL 500421 (D.S.C. Feb. 5, 2010); *Saldanha v. Pediatrix Medical Group of South Carolina, P.A.*, 2008 WL 4542872 (D.S.C. Oct. 3, 2008).

In total, this is not a case in which the arbitration provision at issue limits statutorily-available remedies or seeks to privately negate the effect of legislation so as to "contravene" or "set aside" the requirements of the SCPWA. The trial court's interpretation of the SCPWA in this case erroneously deems all arbitration agreements to be unenforceable with respect to the SCPWA, in a manner inconsistent with both the legislative purpose of the statute and the statute's plain language. Because Respondent is not precluded from asserting a civil claim or obtaining remedies available under the SCPWA, the arbitration provision is not barred by § 41-10-100, and Respondent's SCPWA claim should be compelled to arbitration.

II. THE LOWER COURT ERRED IN FINDING RESPONDENT'S REMAINING CLAIMS TO BE OUTSIDE THE SCOPE OF THE ARBITRATION AGREEMENT BECAUSE THE PARTIES EXPRESSLY AGREED THAT QUESTIONS OF ARBITRABILITY WERE FOR THE ARBITRATOR AND NOT THE COURT TO DECIDE.

The lower court erred in denying Appellants' Motion to Compel Arbitration of Respondent's remaining claims for wrongful discharge in violation of public policy and defamation on the grounds that they do not bear a "significant relationship" to the Agreement. (R. pp. 16-20.) The lower court did not have jurisdiction to determine which of Respondent's claims were within the scope of the Agreement's arbitration provision, because the parties expressly agreed that the issue was to be submitted to the arbitrator. (R. p. 108) ("Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding").

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*, 514 U.S. 938, 943 (1995). This issue is among the "gateway matters" that courts generally assume the parties intended the court to resolve, unless there is "clear and unmistakable" evidence that the parties agreed that the arbitrability of specific claims was 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)); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 667-68 (2007)[6]; *see, e.g. Davis v. KB Home of*

[6] At the hearing on Appellants' Motion, Respondent's counsel cited the *Simpson* case for the proposition that "it is. . . for you and not the arbitrator to decide whether the arbitration provision is enforceable for the specific claims brought by [Respondent]." (R. p. 73, lns.18-22.) In *Simpson*, the South Carolina Supreme Court held, based on the United States Supreme Court authority cited herein, that the trial court was to determine the application of the arbitration provision to specific claims, but only absent "clear and unmistakable" evidence that the parties agreed that the arbitrator would resolve such issues. 373 S.C. at

South Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (holding that such "gateway matters" were properly considered by court because arbitration agreement did not expressly provide that such matters would be submitted to the arbitrator).

When the parties to an arbitration agreement clearly and unmistakably agree that questions or arbitrability are to be decided by the arbitrator, the court must enforce that agreement and refer all claims to arbitration. *See First Options*, 514 U.S. at 943-45.

In this case, there is "clear and unmistakable" evidence that the parties intended that any dispute regarding the scope of the Agreement's arbitration provision would be submitted to the arbitrator. 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." (R. p. 108.) Any presumption that the parties' intended the trial court to determine which claims are subject to arbitration is overcome by the express language of the Agreement. Therefore, all of Respondent's claims must be compelled to arbitration.

In ruling that Respondent's tort claims did not bear a "significant relationship" to the Agreement's arbitration provision so as to compel them to arbitration, the trial court erred by conflating the standard for determining *who decides* the question of arbitrability of specific claims with the standard for *which claims* are subject to arbitration. The trial court found that Respondent's tort claims were "unforeseeable to the parties at the time

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23-24, 644 S.E.2d at 667-68. With that law in mind, the *Simpson* Court found that the parties had not clearly and unmistakably agreed to submit the question of arbitrability of claims to the arbitrator, despite a provision stating that the arbitration applied to involving "the validity and scope of the contract," because the plaintiff had challenged the validity of the provision itself on the basis of unconscionability. *Id.* In this case, Respondent also argued to the trial court that the Agreement's arbitration provision was unconscionable, but the trial rejected Respondent's claim and held the arbitration provision to be valid and enforceable. (R. pp. 9-14.) Respondent did not appeal that ruling, and thus it is the law of the case. *See supra* note 2. Therefore, *Simpson* supports Appellants' contention that the trial court erred by failing to refer all Respondent's claims to arbitration, as the parties "clearly and unmistakably" agreed to do so.

the contract was formed," such that Appellants failed to establish that the parties "clearly and unmistakably" agreed that those claims were to be decided as part of the arbitration proceeding. (R. p. 17.) Indeed, if the trial court was responsible for determining the arbitrability of specific claims in this case, the "substantial relationship" test would be applicable. *See Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). However, the standard for determining *who decides* the arbitrability of specific claims turns on whether the parties "clearly and unmistakably" agreed to submit arbitrability questions to the arbitrator. The foreseeability of certain claims at the time the parties agreed to arbitrate—or lack thereof—is irrelevant if the parties clearly and unmistakably agreed that the arbitrator was to resolve disputes regarding arbitrability.

In this case, the parties did clearly and unmistakably agree that all disputes regarding arbitrability were to be submitted to the arbitrator, and thus the trial erred by failing to refer all Respondent's claims to arbitration, regardless of their relationship to the Agreement or foreseeability at the time of its execution.

CONCLUSION

For the reasons stated herein, Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner respectfully 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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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that I have served the foregoing Final Brief of Appellants on the Respondent by hand-delivering a copy of the same, on June 4, 2014, addressed to Respondent's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street, Columbia, South Carolina 29201.

June 4, 2014

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