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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

Case No.: 2012-CP-32-03496

Roger R. Riemann..... Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Could the trial court properly rule on the issue of arbitrability of the claims brought by the Respondent in this case?

II. Where the Respondent has brought a civil action against the Appellants under the South Carolina Payment of Wage Act (the "Act") for wrongfully refusing to pay wages due, did the trial court properly rule that the Appellant's attempt to force the Respondent to arbitrate Respondent's claim violated S.C. Code Ann. § 41-10-100, which provides that "[n]o provision of this chapter [the Act] may be contravened or set aside by a private agreement"?

III. Where the Respondent brought claims that do not bear a significant relationship to a Shareholder Management Agreement with an arbitration provision, such as tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress, did the trial court properly rule that the tort claims do not "arise out of or relate to" the Shareholder Management Agreement and are not subject to its arbitration provision?

STATEMENT OF THE CASE

Plaintiff/Respondent Roger R. Riemann (hereinafter "Respondent" or "Riemann") is a gemologist and a former employee of Defendant/Appellant Palmetto Gems & Gemological Services, Inc. (hereinafter "PGGS"). Riemann was hired on August 11, 2006 and was terminated by the owner of PGGS, Defendant/Appellant J. Thomas Shofner (hereinafter "Shofner"), on May 21, 2012. (R. p. 21, Complaint, ¶ 1).

Riemann had, for an extended time prior to his termination, made known to Shofner his concerns that he was not receiving appropriate bonuses under his Shareholder Management Agreement with PGGS. (R. pp. 107-110, Shareholder Management Agreement, attached as Exhibit "A" to the Complaint). Shofner and PGGS 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 the investigation on or about March 14, 2012, and notified Shofner of the complaint in late March 2012. Shortly thereafter, on May 21, 2012, Shofner fired Riemann. (R. pp. 23-24, Complaint, ¶¶ 15-17).

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.* (R. pp. 112-114, LLR Investigative Report, attached as Exhibit "C" to the Complaint). 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. Nevertheless, despite the findings of LLR, and Riemann's demand for

payment, PGGS and Shofner have continued to refuse to pay Riemann money that is owed and due to him. (R. p. 24, Complaint, ¶¶ 18-21).

Prior to Riemann's termination, while Riemann's wife was visiting PGGS, Shofner confronted her and told her that Riemann was a "thief." He further stated that she "was wearing stolen jewelry." Defendant Shofner made these statements not only to Riemann's wife directly, but also within the earshot of other PGGS employees. Defendant Shofner made these statements with the full knowledge that they were false. Among other things, Shofner knew that the items had been placed on either a layaway or house account, and knew that Riemann had made payments on them. (R. p. 25, Complaint, ¶ 25).

Based on these allegations, Riemann filed this lawsuit alleging three causes of action, and a Motion to Amend the Complaint to add a Fourth Cause 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.
4. An Intentional Infliction of Emotional Distress claim based on the statement that Shofner made to Riemann's wife.

On October 29, 2012, Appellants filed and served their Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. In their motion, the Appellants relied on the "Dispute Resolution" provision of the Shareholder Management Agreement that 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, among others, a provision demanding 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." (R. p. 108, Shareholder Management Agreement, ¶ 6).

Riemann opposed the motion. As to the arbitration clause itself, Riemann challenged its enforceability on grounds that (1) the Federal Arbitration Act (FAA) was inapplicable because the underlying contract did not involve interstate commerce, and (2) the arbitration clause was unenforceable because it was unconscionable. With regard to his specific claims, Riemann argued that (1) the claim under the South Carolina Payment of Wages Act was not subject to arbitration, pursuant to S.C. Code Ann. § 41-10-100, and (2) none of his torts claims rely on the outcome of the resolution of any issue specifically related to the Shareholder Management Agreement, and were not subject to arbitration.

The parties appeared by the Honorable R. Knox McMahon, Court of Common Pleas for the County of Lexington, on February 13, 2013 for a hearing on the pending motions.[1]

On June 24, 2013, Judge McMahon issued an Order denying the Appellants' Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. Judge McMahon initially found that the Shareholder Management Agreement involved interstate commerce and was subject to the FAA. He also found that the arbitration clause in the contract was not "unconscionable." Nevertheless, he denied the Appellants' motion on grounds that (1) Riemann's claim under the South Carolina Payment of Wages Act was not subject to arbitration, pursuant to S.C. Code Ann. § 41-10-100, and (2) the

[1] Judge McMahon heard Appellants' Motion to Dismiss (R. p. 30), and also heard Respondent's Motion to Amend Complaint (R. p. 41) and Motion to Compel Discovery.

Appellants failed to provide "clear and unmistakable" evidence that the parties intended for an arbitrator to determine whether the tort claims were arbitrable. The trial court found that tort claims were not "substantially related" to the Shareholder Management Agreement, and that they were unforeseeable at the time the contract was formed, relying *inter alia* on *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007), and *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007).

Judge McMahon also granted the Respondent's Motion to Amend Complaint and Respondents' Motion to Compel Discovery.

Appellants filed their Notice of Appeal on August 1, 2013, and their Initial Brief on January 22, 2014. Riemann, as Respondent, now files his Initial Brief.

STANDARD OF REVIEW

The Appellants correctly point out in their brief that an appeal from the denial of a motion to compel arbitration is subject to *de novo* review. *Chassereau,* 373 S.C. at 171, 644 S.E.2d at 720. They did not, however, note that a circuit court's findings on the issue of arbitrability will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C.,* 357 S.C. 91, 94, 592 S.E.2d 50, 51 (S.C. App. 2003).

ARGUMENT

I. AS A THRESHOLD MATTER, THE TRIAL COURT CORRECTLY RULED THAT THE COURT, NOT AN ARBITRATOR, MUST DETERMINE THE ARBITRABILITY OF THE CLAIMS IN THIS CASE.

Appellants argue, in vain, that the trial court had no authority to address whether the claims in this lawsuit are arbitrable. Appellants' argument has already been explicitly rejected by both the South Carolina Supreme Court and by the U.S. Supreme Court.

Under South Carolina law[2], even where the FAA applies, our Supreme Court has explicitly ruled that a court must determine the question of arbitrability of the claims in question, including circumstances involving "gateway matters," such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007) (emphasis added). The court must find that there must be "clear and unmistakable" evidence that the arbitration provision is valid and that it applies to a certain type of controversy. *Id.*

Notably, Riemann raised both of these issues before the trial court. After weighing the evidence and legal arguments before it, the trial court found that the Appellants failed to meet their burden of providing "clear and unmistakable evidence" that the parties agreed that the particular matters before the court were to be decided as part of an arbitration proceeding. (R. pp. 17-20, Order).

The U.S. Supreme Court has also unequivocally and explicitly ruled that a court must decide the "gateway dispute" of whether an arbitration clause applies to a particular

[2] By its own terms, the contract in question stated that it was subject to the law of South Carolina. (R. p. 109, Shareholders' Management Agreement, ¶ 12).

type of controversy or claim. See, *e.g., AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 651-652, 106 S.Ct. 1415, 121 L.R.R.M. (BNA) 3329, 89 L.Ed.2d 648 (1986) (holding that a court should decide whether a labor-management layoff controversy falls within the arbitration clause of a collective-bargaining agreement); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241-243, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962) (holding that a court should decide whether a clause providing for arbitration of various "grievances" covers claims for damages for breach of a no-strike agreement).

The Appellants mistakenly argue in their brief that 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." (Appellants' Initial Brief, p. 13) (emphasis in the original). Such an argument misreads the clear mandate of both the South Carolina Supreme Court and the United State Supreme Court in *Simpson, AT&T*, and their progeny. Indeed, the South Carolina Supreme Court and the United State Supreme Court have each made clear that a court must decide whether the arbitration clause applies to the claims at hand. Indeed, to find as the Appellants argue, this Court must ignore entirely these binding precedents that require trial court to determine arbitrability where the "gateway issues" of the validity of the arbitration clause, or whether the arbitration clause applies to a certain type of claim, are raised.

For these reasons, the trial court did not err in deciding that it, rather than an arbitrator, had to determine whether the arbitration provision is enforceable as to the specific claims brought by Riemann.

II. THE SOUTH CAROLINA PAYMENT OF WAGES ACT STATUTORILY BARS APPELLANTS FROM FORCING PLAINTIFF TO ARBITRATE HIS STATUTORY CLAIM UNDER THE ACT.

The trial court also correctly found that the Appellants cannot force Riemann to arbitrate his claim under the South Carolina Payment of Wages Act (the "Act"). To do so would violate 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, naturally, 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.

The Appellants' argument fails because it ignores the "cardinal rule of statutory construction" that, to ascertain and effectuate the actual intent of the legislature, "statutes which are part of the same Act must be read together." *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Further, sections which are part of the same general statutory law of the state must be construed together, and each provision must be given effect, if it can be done by any reasonable construction. *Smalls v. Weed*, 293 S.C. 364, 370 360 S.E.2d 531, 534 (S.C. App. 1987) (quoting *State v. Fidelity & Deposit Co. of Maryland,* 114 S.C. 511, 104 S.E. 182 (1920)). The Appellants' argument, if accepted, would require the Court to ignore the binding definition of the term "civil action," ignore the remedial nature of the Act, and frustrate the intent of the legislature as expressed in the statutes.

As an initial matter, 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 "[n]o provision of this chapter may be contravened or set aside by a private agreement." (emphasis added).

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, this 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).

In the instant case, the trial court properly found that the language of S.C. Code Ann. § 41-10-100 was plain and unambiguous, and that the statute made clear that "[n]o provision of this chapter may be contravened or set aside by private agreement." That section, read together with S.C. Code Ann. § 41-10-80(C), made it equally clear that Riemann's claim under the Act cannot be arbitrated. (R. p. 15, Order).

This finding is supported by other "plain and unambiguous" language in the South Carolina Code. The definition of a "civil action," found in Rule 2 of the South Carolina Rules of Civil Procedure, declares emphatically that "[t]here shall be one form of action to be known as 'civil action.'" (emphasis added). Moreover, Rule 3, SCRCP, is equally emphatic, defining a "civil action" as commenced only "when the summons and

complaint are filed with the clerk of court within the statute of limitations in any manner prescribed by law, or if actual service is accomplished within one hundred twenty days after filing."

The Appellants incorrectly argue that the trial court "expanded" the Act's statutory bar on private waivers of the Act's provisions. To agree with Appellants' argument, this Court would have to ignore the legislature's clear definition of a "civil action," as well as its equally clear directive in S.C. Code Ann. § 41-10-100, as well as the remedial nature of the Act itself.

The Appellants also wrongly argue that the language of S.C. Code Ann. § 41-10-80(C) – which grants an employee the right to bring a civil action – can be contravened or set aside by private agreement because the legislature stated that private citizens "may" bring a civil action. Appellants compared the grant of this right to other sections of the Act that are directives to LLR, which is the administrative agency in charge of enforcing the Act. These directives are understandably stated in terms mandating that LLR, and its Director, carry out specific bureaucratic duties with regard to the Act, such as investigating claims, assessing penalties, and giving written warnings to violators. See S.C. Code Ann. §§ 41-10-30, 41-10-50 & 41-10-70. By contrast, it would be absurd for the legislature to issue a directive to private citizens "requiring" them to exercise their rights under S.C. Code Ann. § 41-10-80(C). Following this argument to its logical conclusion, the Appellants must presume that the legislature could order private citizens to bring civil actions in the same manner that it can order administrative agencies to carry

out specific duties of state government. Such a distinction is absurd and has no bearing on the issue currently before this Court.[3]

For these reasons, it is clear that the trial court had ample legal and factual grounds to deny the Appellants' attempt to compel arbitration of Riemann's claim under the South Carolina Payment of Wages Act.

III. RIEMANN'S OTHER TORT CLAIMS ARE NOT CLAIMS THAT "ARISE OUT OF OR ARE RELATED TO" THE SHAREHOLDER MANAGEMENT AGREEMENT, AND THEREFORE CANNOT BE SUBJECT TO THE "DISPUTE RESOLUTION" PROVISION CITED BY DEFENDANTS.

In determining that Riemann's three tort claims were not arbitrable, the trial court found that the tort claims did bear a "significant relationship" to the arbitration provision of the Shareholder Management Agreement. The trial court made this determination after examining the Shareholder Management Agreement and the nature of the factual allegations of Riemann's claims for wrongful discharge, defamation, and intentional infliction of emotional distress. Because none of the claims relied on the outcome of the resolution of any issue significantly related to the Shareholder Management Agreement, the trial court reasonably ruled that they were not arbitrable under the Shareholder Management Agreement. (R. p. 18, Order).

In reaching its decision, the trial court relied on the rulings of the South Carolina Supreme Court that were directly on point. In determining whether a dispute between

[3] The Appellants also point to one case from the Court of Appeals in which the arbitration of a Payment of Wages Act claim under the Act is referenced. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (S.C. App. 2012). While the Appellants cite to the case, and three other cases decided in federal courts, for support for the proposition that arbitration of claims under the Act can be compelled in spite of S.C. Code Ann. § 41-10-100, a close reading of *Pearson* and the other cases reveals that none of these cases ever addressed the impact of S.C. Code Ann. § 41-10-100, or even indicate in any way that the issue was raised by any party. As such, the cases have no bearing on the resolution of the issues presented here.

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, 373 S.C. at 151, 644 S.E.2d at 709 (2007); *Chassereau*, 373 S.C. at 172, 644 S.E.2d at 720 ("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").

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 specifically 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. Not one of these allegations relies in any way on any issue related to the Shareholder Management Agreement.

- Riemann's claim for defamation arises wholly outside the Shareholder Management Agreement, and alleges exactly the type of "outrageous conduct" referenced in the Supreme Court's decisions in *Aiken* and *Chassereau, supra.*

- Likewise, Riemann's claim for intentional infliction of emotional distress, or "outrage," arises from conduct that is wholly disconnected with any issue related to the Shareholder Management Agreement.

The trial court also explicitly ruled that it was "clear from the record before this Court that Riemann's claims are wholly disconnected with any issue related to the Shareholder Management Agreement." (R. p. 19, Order). In so holding, the trial court had at its disposal a record that included the Shareholder Management Agreement, which did not articulate Riemann's specific duties or obligations as an employee, or the manner in which Riemann's employment might be terminated. (R. pp. 107-110, *See* Shareholder Management Agreement). Thus, the trial court had ample legal and factual bases to determine that Riemann's claims were "wholly disconnected with any issue related to the Shareholder Management Agreement." (R. p. 19, Order).

Indeed, the Appellants have abandoned any effort to argue that Riemann's three tort claims were "significantly related" to the Shareholder Management Agreement. In their Initial Brief, the Appellants only address their argument that the trial court should not have addressed the issue of arbitrability at all. As discussed in Section I of this brief, *supra*, that argument is baseless. Appellants' Initial Brief is otherwise devoid of any argument that Riemann's three tort claims are within the ambit of the arbitration clause in the Shareholder Management Agreement. In any event, because the issue was not addressed in the Appellants' Initial Brief, it must be deemed abandoned. *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (S.C. App. 1989).

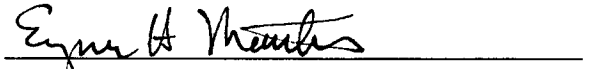
For these reasons, the trial court's ruling that Riemann's three tort claims are not subject to arbitration has ample legal and factual support, and must be upheld.

CONCLUSION

WHEREFORE, for the reasons set forth above, Respondent respectfully request that the Court uphold the trial court's opinion of June 24, 2013, return the case forthwith to the trial court, and grant any other such relief to the Respondent as this Court may deem just and proper.

Dated this the 3rd day of June, 2014.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Dated this 3rd day of June, 2014.

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PROOF OF SERVICE

I certify that I have caused to be served the Final Brief of Respondent on Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, in his individual capacity, by depositing a copy of it in the United States mail, postage prepaid, on this 3rd day of June, 2014, addressed to their counsel of record, Angus H. Macaulay, Esquire, Nexsen Pruet, LLC, PO Drawer 2426, Columbia, South Carolina 29201-2426.

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