THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2013-002599 (S.C. Ct. App. Filed March 24, 2014)

David Carroll . . . . . .

Respondent,

v.

Toyota of Greenville, Inc. . . . . .

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

I. There is no novel issue presented regarding Respondent's ability to proceed in a representative capacity. The court of appeals specifically, and correctly, found that the scope of the arbitration is to be determined by the arbitration agreement. Moreover, Respondent has agreed to proceed to arbitration solely in his personal capacity.

II. Both the lower court's decision and the court of appeals' decision grant Petitioner's motion to compel arbitration. Thus, there is no decision that "undermines the goals and policies of the Federal Arbitration Act."

III. The decision below are in harmony with United States Supreme Court precedent and Petitioner's argument to the contrary is wholly without merit.

IV. Petitioner will have a full and fair opportunity to appeal any decision made by the arbitrator after arbitration and Petitioner's Fourth Issue Presented misconstrues the trial court's and the court of appeals' decisions.

V. Nothing in either the trial court's decision or the court of appeals' dismissal of the appeal binds any party in any of the alleged "300 pending cases" as Petitioner argues.

VI. The majority of Petitioner's "Issues Presented" are not preserved for review because the issues were not raised in the Petition for Rehearing to the court of appeals.

COUNTERSTATEMENT OF THE CASE

Respondent does not disagree with the majority of the Petitioner's Statement of the Case, with one substantial exception: Petitioner asserts that after the trial court ordered arbitration and stayed the case pending the outcome of arbitration, the trial court, in response to Respondent's Rule 59(e), SCRCP, motion "reversed itself and on the ruling that [Respondent] could not act in a representative capacity . . . by order filed October 10, 2013." See Petition for Writ of Certiorari, page 4. The trial court's order on the Rule 59(e) motion does no such thing. In fact, the order explicitly says the arbitration agreement is to be enforced as written, and therefore forbids Respondent from proceeding in a

representative capacity. The trial court's order on Respondent's Rule 59(e) motion concludes that the court is "required by the Supremacy Clause of the United States Constitution to find that the South Carolina public policy of no class actions waivers in Dealers Act cases is preempted by the FAA." (App. P. 14). Contrary to all the arguments Petitioner raised to the court of appeals and those additional arguments it seeks to raise for the first time in this Petition, the trial court order (and the court of appeals' dismissal of the appeal) grant Petitioner the very relief it requested: the case is stayed pending arbitration; arbitration is bilateral and respondent can proceed only in his individual capacity, and not on behalf of a class.

To the extent the trial court's order could somehow be construed to allow respondent to proceed in a representative capacity – an impossibility in light of the plain language of the order – the court of appeals cleared up any ambiguity or uncertainty in its order dismissing the appeal: ". . . the scope of arbitration is determined by the arbitration agreement, and . . . the United States Supreme Court recently determined enforceability of arbitration agreements cannot be conditioned upon the availability of classwide arbitration procedures . . . ." (App. P. 48). Notwithstanding Petitioner's claims to the contrary, no court has held that Petitioner can proceed to arbitration in anything but his individual capacity. Respondent has no intent to proceed to arbitration in anything other than his individual capacity (and this intent has been communicated to Petitioner's counsel a number of times previously).

Moreover, as the court of appeals correctly recognized, this appeal is from an interlocutory order. The order is not subject to any exceptions to the law prohibiting

interlocutory appeals. The South Carolina Uniform Arbitration provides, in relevant part, that appeals may be taken from the following orders:

> (1) An order denying an application to compel arbitration made under Section 15-48-20;
> (2) An order granting an application to stay arbitration made under Section 15-48-20(b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) An order vacating an award without directing a rehearing; or
> (6) A judgment or decree entered pursuant to the provisions of this chapter.

S.C. Code § 15-48-200.

The trial court's order stays the case and compels arbitration. This is the exact relief Petitioner sought in the trial court. Once arbitration is concluded, Petitioner will have the right to appeal the award should Petitioner be aggrieved with the results of arbitration. All of Petitioner's arguments arise out of dictum in the trial court's order addressing Respondent's status as a private attorney general. Both the trial court and the court of appeals held that Respondent cannot arbitrate on behalf of a class unless the arbitration agreement so permits. The agreement admittedly does not and Respondent does not seek to arbitrate on behalf of a class, as he admitted in his Motion to Dismiss filed in the court of appeals. There are no valid grounds for granting the petition for writ of certiorari to review an interlocutory decision that grants Petitioner the relief it requested at trial.

ARGUMENTS

I. Petitioner's argument misconstrues the trial court's order which held that Respondent must proceed to arbitration in accordance with the arbitration agreement.

Petitioner argues that the lower court's order permits Respondent to proceed to arbitration in a representative capacity. However, as set forth in the Counterstatement of the Case, the order does not permit Respondent to proceed in a representative capacity and

Respondent has made an on-the-record concession that he will not attempt to arbitrate in a representative capacity. (App. p. 42). Even if the trial court's order could be so construed, the court of appeals clarified that the scope of arbitration will be determined by the arbitration agreement, and any prohibition against classwide arbitration is unenforceable under the Federal Arbitration Act.

Petitioner's argument is not only in conflict with the trial court's ruling, but it is rendered moot by the court of appeals' order of dismissal. Furthermore, Petitioner did not make the argument raised in its First Issue Presented for Review in its Petition for Rehearing to the court of appeals and therefore the Court should deny the petition as to Question I. See Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for certiorari....").

II. Both the trial court's and the court of appeals' decisions are in full accord with the FAA.

Petitioner argues the decision below undermines the goals and policies of the FAA. Again, this argument ignores the orders Petitioner seeks to appeal further. Both orders cite and rely upon the FAA. They give full force and effect to the parties' agreement and compel arbitration while staying the case in the interim. Contrary to petitioner's argument, the "lower court's order" in no way provides that Respondent "can act in a representative capacity on behalf of all citizens of the State of South Carolina." See Petition for Writ of Certiorari, page 9. Both the trial court order and the court of appeals' dismissal conclude the arbitration agreement will be enforced as written – to prevent classwide arbitration. The trial court conclude that "the Supreme Court ... has instructed me to find that the FAA preempts all laws that do not enforce the intent of the parties .... [T]he South Carolina public policy of no class action waivers in Dealers Act cases **is preempted by the FAA**. I

therefore grant [Petitioner's] Motion, and order this case be stayed and compel the parties to **enter bilateral arbitration**." (App. p. 21) (emphasis added).

The court of appeals, while dismissing Petitioner's interlocutory appeal, reaffirmed the trial court's conclusion: "[T]he United States Supreme Court recently determined the enforceability of arbitration agreements cannot be conditioned upon the availability of classwide arbitration procedures ...." (App. p. 47 (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 321, 131 S. Ct. 1740 (2011))).

Both courts applied the FAA and ruled in accordance with the mandates of the federal act. Respondent does not seek to arbitrate his claims on behalf of a class and expressly waives any right he might have to do so. He made this same concession in the court of appeals. Petitioner continues to misinterpret or to misrepresent the trial court's order and continues to insist that it somehow permits classwide arbitration where it clearly does not. The argument that the decisions below are counter to the FAA is wholly without merit. Finally, like Issue I, Petitioner failed to raise Issue II in its Petition for Rehearing to the court of appeals (App. pp. 49-54) and this failure provides an additional reason to deny the petition for writ of certiorari as to this question.

III. The decisions below compel bilateral arbitration between only the parties to the arbitration agreement; the orders have no impact on any other defendants. There exists no compelling reason for issuing a writ of certiorari to review this interlocutory order.[1]

[1] In its Petition for a Writ of Certiorari, Petitioner separately presents five "Issues Presented for Review." (See Petition for Writ of Certiorari, page 2). However, in the body of the petition, Petitioner only separately presents three arguments. (See Petition for Writ of Certiorari, pages 6-12). Respondent's Argument III is in response to Petitioner's Argument III presented in the Petition for Writ of Certiorari. Respondent submits that any "issues" raised but not supported by argument are waived and provide no basis for granting the writ. See Rule 242(d)(4), SCACR ("Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to ready and adequate

Petitioner's third argument, like its first two, is based on a misinterpretation of the trial court's order. Petitioner argues that an important reason for granting the petition for a writ of certiorari is "because not only will [Petitioner] be subjected to [Respondent] serving in a representative capacity of behalf of the public, but hundreds of other Defendants also would be subjected to the lower court's erroneous ruling in the two companion cases ...." Petition for Writ of Certiorari, pages 9-10. Even assuming *arguendo*, the trial court somehow compelled classwide arbitration in this case (it did just the opposite and compelled bilateral arbitration), Petitioner fails to explain or cite any authority for how this decision would be binding on other defendants who are not parties to this action. Petitioner cites no authority because no such authority exists. The law is to the contrary. Those who are not parties to an action are not bound by a judgment in that action. See, e.g., Wilkins v. Mulkey, 252 S.C. 615, 167 S.E.2d 619 (1969). The doctrines of res judicata and collateral estoppel do not apply to non-parties. See, e.g., Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 580 S.E.2d 171 (2003) (discussing the doctrines of res judicata and collateral estoppel).

Even if the trial court's order or the court of appeals' dismissal could somehow be interpreted to allow Respondent to proceed to arbitration in a representative capacity – and they clearly cannot – defendants in other pending actions are in no way bound by these decisions where they are not parties to this suit.

Petitioner fails to present any cogent argument for how the trial court's order can be interpreted to permit Respondent to proceed in a representative capacity and it fails to

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understanding of the points requiring consideration will be sufficient reason for denying the petition.")

explain how such an interpretation could ever bind other defendants who are not parties to this action. In short, this argument is based on an erroneous reading of the order and a misapplication of the law. Finally, Petitioner did not raise this issue in its Petition for Rehearing to the court of appeals. For all these reasons, the petition should be denied as to this issue.

IV. Petitioner will have an opportunity to appeal any arbitration award at the conclusion of arbitration where Petitioner will be entitled to "full judicial review."

In its Fourth "Issue Presented For Review" Petitioner appears to argue it should be entitled to pursue an interlocutory appeal because it would otherwise be denied a right of appeal. As set forth in S.C. Code § 15-48-200, above, appeal may be taken from "an order confirming or denying confirmation of an [arbitration] award." Thus, any award made by the arbitrator is subject to appeal at the conclusion of the arbitration process.

It bears noting that it is the Petitioner who sought to compel arbitration. After having its motion granted, Petitioner then sought an immediate appeal from a non-appealable order. After the court of appeals (correctly) dismissed the appeal, Petitioner continues to misconstrue the trial court's order which ruled in Petitioner's favor and persists in pursuing hypothetical arguments that will never occur based on the trial court's order, the court of appeals' order, and the Respondent's concession to proceed to arbitration in an individual, non-representative, capacity. The Court should deny the petition for writ of certiorari for all these reasons and for the additional reason that it was neither argued in the Petition for Writ of Certiorari nor in the Petition for Rehearing to the court of appeals.

V. The issues presented in this appeal have no preclusive effect and are not binding on other defendant in other pending litigation.

As set forth in Respondent's Argument III, above, the trial court's order in no way binds any litigants who are not parties to this action. It is of no moment that there are a number of pending cases involving the same fact pattern and a number of other litigants. Petitioner's argument that "the issues are capable of repetition" does not provide support for issuing a writ of certiorari when the order is considered for what it is: an interlocutory order compelling arbitration, issued at the urging of the Petitioner, won by the Petitioner, and directing the parties to proceed to bilateral – as opposed to classwide – arbitration. Assuming Petitioner is aggrieved at the conclusion of arbitration, all the arguments it seeks to now make at this intermediate stage of litigation can be made at the appropriate time.

CONCLUSION

The order compelling arbitration is not immediately appealable under the plain language of § 15-48-200. Virtually none of the issues Petitioner now seeks to raise were set forth in the Petition for Rehearing to the court of appeals. Further, Petitioner was the prevailing party in the trial court and received the very relief for which it asked. For these reason and the others set forth above, Respondent respectfully asks the Court to deny the Petition for a Writ of Certiorari on all issues presented.

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PROOF OF SERVICE

I, Heather Hardy, Paralegal to RICHARD A. HARPOOTLIAN, P.A., attorney for the Respondent David Carroll, do hereby certify that I have served the below listed document, Via U.S. Mail, on August 6, 2014, to the individuals listed below:

Document: 1) Corrected Cover Page regarding the Return to Writ of Certiorari.

Served: Bradford N. Martin
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