

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

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AUG 18 2014

S.C. SUPREME COURT

David Carroll Respondent,

v.

Toyota of Greenville, Inc. Petitioner.

**PETITIONER'S REPLY TO RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

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ARGUMENTS

I. IF RESPONDENT PROCEEDS AS A PRIVATE ATTORNEY GENERAL, THEN HE IS PROCEEDING IN A REPRESENTATIVE CAPACITY, WHICH IS NOT IN ACCORD WITH THE FAA

Throughout his Return, Respondent states that he concedes that he will not attempt to arbitrate in a representative capacity and that he is expressly waiving any right to do so. However, at no point does Respondent state that he will not proceed as a private attorney general. If he did so, then Petitioner would agree that the appeal is unnecessary. However, Respondent has not done so and that is not what has happened throughout this litigation, as it is because of the trial court's order entered after Respondent moved for reconsideration on a finding regarding the private attorney general issue that this appeal is even happening.

Proceeding as a private attorney general is the same thing as proceeding in a representative capacity or on behalf of a class. A private attorney general does not just proceed on his own behalf, but instead, on behalf of all citizens of the State of South Carolina. The Arbitration Agreement expressly shows (1) that each dispute must be arbitrated on an individual basis; (2) that Carroll cannot be a class representative; and (3) that the parties never agreed to private attorney general arbitration. Allowing Respondent to proceed as a private attorney general allows him to proceed in a representative capacity, which violates the Arbitration Agreement, as well as United States Supreme Court precedent in *AT&T Mobility LLC v. Conception*, 563 U.S. 321 (2011) and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010).

II. PETITIONER WILL ONLY HAVE A VERY LIMITED RIGHT OF APPEAL AFTER ARBITRATION

According to Respondent, Petitioner will be entitled to "full judicial review" after the arbitration takes place. Ideally, this would be true. The trial court's order which was entered

outside the arbitration but which may affect the nature of the arbitration, should be subject to full review. However, what goes through the arbitration process is only subject to a very limited appeal standard.

The Arbitration Agreement entered into by the parties is clear and unequivocal that arbitration is binding. (Appendix, p. 61). As this Court has said before, “[g]enerally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will only be vacated under narrow, limited circumstances.” *Pittman Mortgage Co. v. Edwards*, 327 S.C. 72, 76, 488 S.E.2d 335, 337 (1997). In S.C. Code Ann. § 15-48-130 (Supp. 1997), the South Carolina legislature has set forth a very limited number of instances when a court can vacate an arbitration award: (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrator refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection.

It is prejudicial to Petitioner to be subject to the trial court’s order, which may become the law of the case in the arbitration. Review of the arbitration award, if the trial court’s order finding Respondent a private attorney general is adopted, will be incredibly limited. Now is the time for full judicial review of the trial court’s decision prior to arbitration.

III. THE ISSUES IN THIS APPEAL WILL HAVE PRECLUSIVE EFFECT AND BE BINDING ON OTHER DEFENDANTS IN THE *WEST-COX* AND *ADAMS* CASES

With over 300 similar cases awaiting the results of the *Herron* cases, it stands to reason that the result in this matter would have application to those defendants that have now been waiting upwards of seven years to begin their cases. For defendants with arbitration provisions, the same issues that exist in this matter will exist in their cases. Those issues, of course, revolve around the application of United States Supreme Court precedent to their arbitration agreements and the prohibition on parties proceeding to arbitration in a representative manner.

Those cases are also subject to Complex Case Designation, where all cases are assigned to one judge throughout the life of the action, which allows that judge, who is familiar with the case and the issues therein, to address the issues that arise. Throughout the *Herron* cases, the trial court has relied on its prior rulings in addressing similar matters occurring in subsequent cases. To say that the practice will cease is to ignore the long history of this litigation.

IV. PETITIONER HAS PROTECTED ALL OF THE ISSUES IT BRINGS TO THIS COURT

“Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.” Rule 208(b)(1)(B), SCACR. When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant’s arguments. *See Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct.App.2001) (finding the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court). Similarly, a petition for rehearing must “state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR. “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of

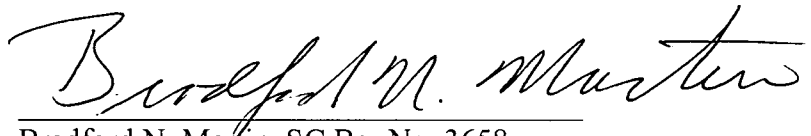
the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)).

The issues presented to review to this Court have been protected throughout this appeal, including in the Petition for Rehearing, contrary to Respondent’s contentions. The issues being raised to this Court for the specific purpose of the grant of certiorari have been constantly raised by Petitioner, including in its Petition for Rehearing to the Court of Appeals (Appendix, pp. 49-50) – that this presents a novel issue involving arbitration, the FAA, and a private attorney general, that judicial economy favors hearing this matter for other defendants in similar situations, and that full judicial review of an arbitration is limited. These issues have been protected and are correctly before this Court.

CONCLUSION

Based on the above arguments and prior Petition, Petitioner requests that this Court grant it a writ of certiorari and hear this appeal.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served Petitioner's Reply to Respondent's Return to Petitioner's Petition for Certiorari and a Proof of Service, by depositing a copy in the U.S. Mail, postage prepaid, on August 13, 2014, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

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