

RECEIVED

DEC - 8 2011

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

Lonnie J. Davis,

Respondent,

v.

KB Home of South Carolina, Inc. and
Jeff Meyer,

Appellants,

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

D. Michael Henthorne
SC Bar No. 6719
William K. Brumbach, III
SC Bar No. 78181
LITTLER MENDELSON, PC
1201 Main Street, Suite 1930
Columbia, South Carolina 29201

I. INTRODUCTION

As set forth in Appellants' Petition for Writ of Certiorari, review of the Court of Appeals' decision is necessary because that decision contained two critical errors. First, the Court of Appeals misapplied precedent from the United States Supreme Court on the issue of which tribunal should determine whether the dispute between the parties is arbitrable. Second, on the waiver issue, the Court of Appeals misapplied well established precedent from South Carolina courts and the Fourth Circuit Court of Appeals on what constitutes waiver under the Federal Arbitration Act. Appellants showed that, for those reasons, this Court should review the Court of Appeals' decision.

Davis' Return did nothing to undercut the points Appellants made in their Petition. With regard to the issue of who should decide arbitrability, Davis' Return actually helps frame the issue that this Court needs to decide—whether the employment application that Davis challenges is a multi-part agreement that contains an arbitration clause or whether the arbitration clause is the only agreement in that document. If the employment application is a multi-part agreement that contains an arbitration clause, then the Court of Appeals misapplied United States Supreme Court precedent on an issue of federal law, and review and correction of that mistake is necessary. With regard to the waiver issue, Davis' return offered no new insight but made several statements that warrant correction.

For the reasons set forth in Appellants' Petition, which are not effectively refuted in Davis' Return, Appellants request that this Court grant the petition for a writ of certiorari and review the Court of Appeals' July 13 decision.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Davis' Return Does Not Refute And, In Fact, Underscores The Need For Review Of The Court Of Appeals' Decision Regarding Which Tribunal Decides Arbitrability.

With regard to the issue of which tribunal, a court or an arbitrator, should determine whether this dispute is arbitrable, Davis' Return, along with the parties' other briefs, and the Court of Appeal's Opinion, reveals three undisputed points demonstrating the arbitrability of this matter.

The three undisputed points are as follows:

(a) Davis signed an employment application that contained an arbitration clause. R. 266 (copy of the employment application); R. 313 (affidavit from Davis where he does not dispute signing the employment application containing the arbitration provision).

(b) "A challenge to the validity of [a] contract as a whole, and not specifically to [an] arbitration clause [in that contract], must go to the arbitrator." *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 444, 125 S. Ct. 1204, 1208 (2006); Court of Appeals Opinion at 7-8 (accepting validity of *Buckeye's* holding but not Appellants' proposed application of that holding); Return at 14 (accepting validity of *Buckeye's* holding but not Appellants' proposed application of that holding);

(c) Davis' challenge is directed toward the entire employment application, rather than merely the arbitration clause contained in it. (Return at 12 and Appellants' Brief to Court of Appeals at 12 ("By its terms, the merger clause supersedes *all prior agreements and understandings, not only the arbitration provision at issue.*") (emphasis added)).

Given those three undisputed points, the issue becomes whether Davis' challenge to the entire employment application constitutes a challenge to "the validity of the contract as a whole," which must be heard by an arbitrator, or whether Davis' challenge is one "specifically to the arbitration clause," which would properly be heard by a Court. *Buckeye*, 546 U.S. at 444, 125 S. Ct. at 1208.

The Court of Appeals found that the challenge was directed specifically at the arbitration clause. On that point, the Court of Appeals stated that "[t]he employment application cannot be considered the entire employment agreement," so the challenge to that application is merely a challenge to the arbitration clause contained in it. Court of Appeals Opinion at 8. In other words, the Court of Appeals at least implied that the employment application contained no agreements other than the arbitration clause, so a challenge to the entire employment application was, in fact, only a challenge to the arbitration clause. Appellants contend that this ruling is incorrect and should be reversed.

The employment application contained at least two agreements in addition to the arbitration agreement. First, Davis authorized KB Home to communicate with his "references . . . concerning [his] previous employment and any pertinent information they may have regarding [his] work performance and character." R. 266. Second, Davis agreed to release "all persons and entities from all liability with respect to furnishing such information."¹ Since the employment application does, in fact, contain agreements other

¹ Davis' Return questions whether these agreements and, possibly, the arbitration clause itself, are supported by consideration, and Davis cites a West Virginia opinion addressing that issue. (Return at 7 n.2.) Appellants contend that the arbitration clause is supported by consideration since it begins with the words "if employed," which indicate that Davis' agreement to arbitrate disputes was conditioned upon and exchanged for his employment with KB Home. Since at-will employment can serve as consideration for agreements in South Carolina, *Small v. Springs Indus.* 292 S.C. 481, 357 S.E. 2d 452, 454

than the arbitration clause, Davis' challenge to the entire employment application is not simply a challenge to the arbitration provision itself; it is a challenge to a larger agreement containing an arbitration clause. Therefore, under *Buckeye*, an arbitrator must hear those challenges, and the Court of Appeals misapplied *Buckeye* by ruling to the contrary. *Buckeye*, 546 U.S. at 444 ("A challenge to the validity of [a] contract as a whole, and not specifically to [an] arbitration clause [in that contract], must go to the arbitrator.").

The South Carolina Rules of Appellate Procedure state that the South Carolina Supreme Court will typically grant certiorari where "a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court." S.C.R.A.P. 242(b)(5). As explained above, the Court of Appeals' Decision misapplied a recent holding of the United States Supreme Court. Thus, this Court should grant certiorari to review that decision.

B. Davis' Return Misstates Several Points With Regard To The Waiver Issue.

With regard to the waiver issue, Appellants submit that the need for the Supreme Court to review the decision of the Court of Appeals is adequately explained in the Petition for Writ of Certiorari, but Appellants are compelled to point out two misstatements in Davis' Return with regard to Respondents' reliance on *Microstrategy v. Laurica*, 268 F. 3d 244 (4th Cir. 2001).

n.1 (1987), KB Home submits that the arbitration provision is supported by consideration. However, South Carolina Courts appear not to have considered the precise question Davis raises in his Return of whether promises or agreements in employment applications are supported by consideration. To the extent that question of first impression is necessary to resolve whether Davis is bound by the arbitration provision (and has been properly preserved throughout the appeals process), this case is even more deserving of consideration from the South Carolina Supreme Court.

First, Davis contends that the *Microstrategy* holding is “of no precedential value” since it comes from a federal court. Return at 22. But, the South Carolina Court of Appeals obviously disagrees since it cited *Microstrategy* in *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 510 (S.C. Ct. App. 2004). And, the Court of Appeals’ reliance on the Fourth Circuit’s application of the Federal Arbitration Act is appropriate since “state courts have a constitutional duty to [apply federal law in order to] protect all the substantial rights of the parties under controlling federal law.” *Drew v. Waffle House, Inc.*, 351 S.C. 544, 549, 571 S.E. 2d 89, 91 (2002) (summarizing *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302 (1988) and then applying federal law in state court).

Second, Davis contends that “the *Microstrategy* court rested its decision on the fact that any extensive discovery that had taken place was related to separate causes of action for which *Microstrategy* was not seeking to compel arbitration, and therefore the discovery that it had engaged in did not unfairly prejudice the other party.” Return at 23. Actually, the portion of the *Microstrategy* opinion to which Davis refers addresses the issue of whether *Microstrategy* had been permitted to conduct discovery in litigation that would have been unavailable in arbitration. On that point, the court noted that, although most depositions were prohibited under the arbitration agreement at issue, and *Microstrategy* had deposed the party resisting arbitration, the deposition had occurred in a different litigation between the same parties and covered topics mostly unrelated to the litigation before that court. Since no depositions had occurred in the matter before the court at the time, the party resisting arbitration could not show that *Microstrategy* had conducted more extensive discovery than would have been available in arbitration. *Microstrategy*, 268 F. 3d at 254. Thus, the party resisting the arbitration in

Microstrategy, like Davis here, was unable to do anything more than “simply assert[] [without any support] that discovery is unavailable in arbitration and that [he] was therefore prejudiced.” This approach fails to satisfy the “heavy burden of proving waiver.” *Id.*, at 251 (internal quotation marks and citations omitted.)

Upon clarifying those misstatements, Appellants rely upon the arguments made in their Petition with regard to the need for review of the Court of Appeals’ decision on the waiver issue.

III. CONCLUSION

For all of the reasons set forth in Appellants’ Petition, which, as explained above, are not effectively refuted in Davis’ Return, Appellants request that this Court grant the petition for a writ of certiorari and review the Court of Appeals’ July 13 decision.

December 8, 2011

By: _____



D. Michael Henthorne
SC Bar No. 6719
William K. Brumbach, III
SC Bar No. 78181
LITTLER MENDELSON, P.C.
1201 Main Street, Suite 1930
Columbia, South Carolina 29201
Telephone: 803.231.2500
Facsimile: 803.799.9837
Email: mhenthorne@littler.com

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Jr., Circuit Court Judge

Lonnie J. Davis,

Respondent,

v.

KB Home of South Carolina, Inc. and
Jeff Meyer,

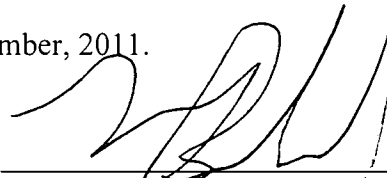
Appellants,

PROOF OF SERVICE

I hereby certify that the foregoing Reply in Support of Petition for Writ of Certiorari has been served on Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record as follows:

Allan R. Holmes, Esq.
Gibbs & Holmes
P.O. Box 938
171 Church Street, Suite 110
Charleston, South Carolina 29402

This 8th day of December, 2011.



D. Michael Henthorne
SC Bar No. 6719
William K. Brumbach, III
SC Bar No. 78181
LITTLER MENDELSON, PC
1201 Main Street, Suite 1930
Columbia, South Carolina 29201