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SC Court of Appeals

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.

APPELLANTS' RETURN TO RESPONDENT'S PETITION FOR REHEARING

Pursuant to S.C.A.C.R. 221(a) and 240(e), Appellants respectfully submit the following Return to Respondent's Petition for Rehearing.

Respondent's Petition should be denied because the Court's March 4, 2015 decision neither "overlooked" nor "misapprehended" any issue of law. The Court correctly held that the United States Supreme Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) requires reversal of the trial court's denial of Appellant's motion to compel arbitration, because the parties "clearly and unmistakably" agreed that the arbitrator, and not the court, would resolve any dispute as to whether particular claims were subject to arbitration.

Respondent argues that the Court "misapprehended the holding and application of [*First Options*] to this case." (Petition, p. 9.) More specifically, Respondent asserts that, regardless of whether there is a "clear and unmistakable" agreement to submit arbitrability disputes to the arbitrator, *First Options* still requires the trial court to first determine "whether the parties contractually agreed to submit the question of arbitrability ***of a particular dispute*** to arbitration." (Petition, p. 7.) (emphasis added) Unless the trial court determines that a particular claim is "clearly and unmistakably" within the scope of the arbitration agreement, Respondent believes the arbitrability of that claim must be resolved by the court, and not by the arbitrator.

Respondent's circular interpretation would overrule *First Options*, because it suggests that a contractual delegation provision operates to submit arbitrability disputes to the arbitrator only if the **court** first finds that the **particular claims** are "clearly and unmistakably" within the scope of the arbitration provision. The fallacy in this reasoning is that there would *never* be an arbitrability dispute to submit to the arbitrator if the court has already determined which claims are within the scope of the arbitration agreement. Any agreement to arbitrate disputes as to the arbitrability of particular claims would be meaningless, because the trial court would not honor that agreement unless it first determined that the claims were arbitrable, thus defeating the parties' express contractual intention to have that issue decided by the arbitrator.

Indeed, Respondent's argument is the exact opposite of what *First Options* holds. *First Options* holds that the trial court must honor a "clear and unmistakable" agreement to arbitrate disputes as to the arbitrability of particular claims, just as it honors other valid arbitration agreements. *See First Options*, 514 U.S. at 943 ("Just as the arbitrability of

the merits of a dispute depends upon whether the parties agreed to arbitrate the dispute. . . the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter.") *First Options* does **not** require that the trial court first determine whether the parties "clearly and unmistakably" agreed that *particular claims* are within the scope of the arbitration agreement before submitting those claims to arbitration. Such a requirement would both defeat the purpose of the delegation provision altogether, by requiring the court to resolve arbitrability in all cases, and also conflict with long-established federal policy imposing a presumption of arbitrability. *Id.* at 945 ("[A]ny doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration."). Instead, the "clear and unmistakable" standard applies *only* to the issue of whether the parties agreed to delegate resolution of arbitrability disputes to the arbitrator, not whether particular claims fall within the agreement's scope.

Respondent combines this flawed interpretation of *First Options* with the self-serving presumption that his particular claims are not "arising out of or related to" the Shareholder Management Agreement ("the Agreement"), such that he contends he did not "clearly and unmistakably" agree to submit the question of their arbitrability to the arbitrator. (*See* Petition, p. 8 (stating that the delegation provision at issue "does not clearly and unmistakably establish that the parties contractually agreed to submit claims ***legally distinct from the parties contractual relationship*** to an arbitrator on the question of whether such claims are arbitrable.") (emphasis added)). Because the parties obviously did not agree that disputes falling *outside* the scope of the arbitration agreement would be submitted to the arbitrator, Respondent believes that the lower court properly ruled on arbitrability and denied Appellants' motion to compel arbitration.

Of course, if Respondent's presumption that his claims fall outside the scope of the arbitration agreement were an *undisputed fact* as he suggests, the delegation provision would be irrelevant. Appellants would not have filed a motion to compel arbitration, there would be no need for anyone, neither court nor arbitrator, to resolve any issue of arbitrability, and this case would not be before the Court.

But the parties not only agreed to arbitrate claims "arising out of or related to" the Agreement, they also agreed to arbitrate any gateway "dispute as to whether a controversy or claim is subject to arbitration." (R. p. 108.) The parties' "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-a-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2777-78 (2010) (*citing First Options* 514 U.S. at 943).

And, despite Respondent's presumption to the contrary, there **is** a dispute among the parties as to whether Respondent's claims are "arising out of or related to" the Agreement and subject to arbitration. Appellants assert that all of Respondent's claims are arbitrable because they all "arise out of" the business relationship memorialized by the Agreement, while Respondent asserts that none of his claims are arbitrable because they are "legally distinct from the parties' contractual relationship." Respondent's claims are not outside the scope of the Agreement merely because Respondent says so; this is a dispute, and it must be resolved by someone, either the court or the arbitrator.

The parties clearly and unmistakably agreed to submit any such arbitrability dispute "as part of the arbitration proceeding." (R. p. 108.) This is precisely the type of dispute that the delegation provision was designed to address, and this agreement would

be meaningless if, as Respondent suggests, the only disputes referred to the arbitrator were those which the court decided were "arising out of or related to" the Agreement. *First Options* required that the lower court honor the parties' delegation provision and submit the entire case to arbitration, where the arbitrator will resolve this arbitrability dispute. This clear precedent is the basis of this Court's reversal of the trial court, and the Court did not "overlook" or "misapprehend" anything in reaching this decision.

Because the Court's March 4, 2015 decision did not rule upon the remaining issues raised by Respondent—that Respondent's South Carolina Payment of Wages Act claim is unarbitrable as a matter of law, and that Respondent's remaining claims are outside the scope of the arbitration agreement—those issues are not proper subjects of Respondent's Petition for Rehearing, and need not be addressed by Appellants.

For the reasons stated herein, Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner respectfully request that the Court **DENY** Respondent's Petition for Rehearing and remand this case to the lower court for an order consistent with its March 4, 2015 opinion.

Respectfully submitted,

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Attorneys for Appellants

March 30, 2015

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PROOF OF SERVICE

I hereby certify that I have served the foregoing Appellants' Return to Respondent's Petition for Rehearing on the Respondent by hand-delivering a copy of the same, on March 30, 2015, addressed to Respondent's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street, Columbia, South Carolina 29201.

March 30, 2015

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March 30, 2015

BY HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: ***Riemann v. Palmetto Gems & Gemological Services., Inc. & Thomas Shofner***
Case No. 2012-CP-32-3496; Appellate Case No. 2013-001745

Dear Ms. Kitchings:

On behalf of Appellants Palmetto Gems & Gemological Services, Inc. & Thomas Shofner, please find enclosed for filing one original and seven (7) copies of Appellants' Return to Respondent's Petition for Rehearing. Please return one clocked copy with our courier. By copy of this letter, I am also serving counsel for Respondent with a copy of the same.

Please contact me with any related questions. Thank you.

Sincerely,

Jimmy Byars

JAB/jab
cc: Gene Matthews, Esq.

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