THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE R. KNOX McMAHON
CIRCUIT COURT JUDGE

CIVIL ACTION NO. 2012-CP-32-3496

Opinion No. 2015-UP-107 (S.C. Ct. App. filed March 4, 2015)

Roger R. Riemann,

PETITIONER,

versus

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

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

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The Court of Appeals issued its decision on March 4, 2015. App. 1-3. The Petitioner, Roger R. Riemann, filed his Petition for Rehearing on March 19, 2015. App. 4-20. The Court of Appeals denied the Petition for Rehearing by Order filed April 21, 2015. App. 28.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in holding that the arbitration clause of the parties' Shareholder Management Agreement provided "clear and unmistakable" evidence the parties agreed that questions of arbitrability for all disputes between Riemann and the Respondents, including statutory claims not subject to arbitration and those claims legally distinct from the parties' contractual relationship, were to be decided by the arbitrator rather than the court?

A. Whether Riemann's statutory claim for violation of the South Carolina Payment of Wages Act is not arbitrable per the provisions of the statute and whether the mere presence of a delegation provision does not require that the claim be sent to gateway arbitration where there is no plausible argument Riemann could be forced to arbitrate this claim?

B. Whether Riemann's tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress do not arise out of or relate to the Shareholder Management Agreement which only governs the corporate management of Palmetto Gems and whether these claims are therefore not subject to the delegation provision of the Dispute Resolution Clause of the Agreement?

II. Whether the Trial Court correctly determined that Riemann's statutory and tort claims against the Respondents were not subject to arbitration?

A. Whether the South Carolina Payment of Wages Act statutorily bars the Respondents from forcing Riemann to arbitrate his statutory claim under the Act?

B. Whether Riemann's tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress are not claims that "arise out of or are related to" the Shareholder Management Agreement and whether these claims are therefore not subject to the Dispute Resolution Clause of the Agreement?

STATEMENT OF THE CASE

The appeal in this matter stems from a suit originally filed on August 24, 2012 in Lexington County by Petitioner Roger R. Riemann against Respondents Palmetto Gems & Gemological Services, Inc. ("Palmetto Gems") and Thomas Shofner ("Shofner"), in his individual capacity (collectively, the "Respondents") initially asserting claims for (1) 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; and (3) a defamation claim based on false statements Shofner made to Riemann's wife that Riemann was a "thief" and had stolen jewelry. [R.pp. 21-29; Complaint.]

On October 29, 2012, the Respondents filed a Motion to Dismiss, or in the Alternative, Stay Proceedings and Compel Arbitration. [R.pp. 30-31; Motion.] On or about December 26, 2012, Riemann subsequently moved to amend his complaint to add a cause of action for intentional infliction of emotional distress against the Respondents based on the statements Shofner made to Riemann's wife. [R.pp. 41 – 53; Motion to Amend.]

On February 13, 2013, the parties appeared before the Honorable R. Knox McMahon for a hearing on the pending motions. [R.pp. 54-105; Hearing Tr.] On June 24, 2013, the Trial Court issued its Order denying the Respondents' motion to dismiss and compel arbitration and granting Riemann's motion to amend his complaint. [R.pp. 1 – 20; Order.]

The Respondents appealed the denial of their motion to dismiss and compel arbitration to the South Carolina Court of Appeals on August 1, 2013. After argument, the Court of Appeals issued its unpublished decision on March 4, 2015, reversing the

Trial Court's denial of the Respondents' motion to compel arbitration and remanding the case to the Trial Court for an order consistent with its Opinion that the questions of arbitrability in this case were to be decided by the arbitrator rather than the court. *Roger R. Riemann v. Palmetto Gems & Gemological Servs., Inc. et al.*, Op. No. 2015-UP-107 (Ct. App. March 4, 2015); App. 1-3. Riemann filed his Petition for Rehearing on March 19, 2015. App. 4-20. The Respondents filed their Return to the Petition for Rehearing on March 30, 2015. App. 21-27. By Order filed April 21, 2015, the Court of Appeals denied the Petition for Rehearing. App. 28.

This petition for writ of certiorari follows.

STATEMENT OF FACTS

Petitioner Riemann is a gemologist who was employed with the Respondent Palmetto Gems from August 11, 2006 to May 21, 2012. [R.p. 21; Complaint, ¶ 1.] On August 11, 2006, Riemann and Respondent Shofner entered into a Shareholder Management Agreement (the "Shareholder Management Agreement") concerning the corporate management of Palmetto Gems. [R.pp. 36 – 40; Agreement.] The Shareholder Management Agreement identified both Shofner and Riemann as Executive Officers, designating Shofner as President and Treasurer and Riemann as Vice-President and Secretary. [R.p. 36; Agreement, p. 1, ¶ 3.] Exhibit "A" to the Shareholder Management Agreement addressed "Salary and Profit Sharing Distributions" and established that "Co-Executive and Financial Officers shall receive an annual bonus equal to an equal split of 1/3 profits after all salaries and expenses." [R.p. 40.]

While employed with Palmetto Gems, Riemann made known to Shofner his concerns that he was not receiving appropriate bonuses under the Shareholder Management Agreement. [R.p. 23; Complaint, ¶ 14.] Shofner and Palmetto Gems 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 terminated Riemann's employment with Palmetto Gems. [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 Palmetto Gems for numerous violations of

the S.C. Payment of Wages Act, S.C. CODE ANN. § 41-10-10 *et seq.* [R.pp. 112-115; Report and Citation.] LLR cited Palmetto Gems for its failure to pay Riemann his bonus for 2011 in violation of the Payment of Wages Act. [Id.] Palmetto Gems did not appeal the citation to the S.C. Administrative Law Court or otherwise appeal the findings of LLR. Nevertheless, despite the findings of LLR and Riemann's demand for payment, Palmetto Gems and Shofner have continued to refuse to pay Riemann money that is due and owed to him. [R.p. 24; Complaint, ¶¶ 18-20.]

Prior to Riemann's termination, while Riemann's wife was visiting Palmetto Gems, Shofner confronted her and told her that Riemann was a "thief." He further stated that she "was wearing stolen jewelry." Shofner made these statements not only to Riemann's wife directly, but also within earshot of other employees of Palmetto Gems. 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. pp. 24-25; Complaint, ¶¶ 22-25.]

After Riemann filed suit, the Respondents moved to compel arbitration, relying 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. [R.pp. 30-31; 37; Motion; Agreement, p. 2, ¶ 6.]

In denying the Respondents' motion to compel arbitration, the Trial Court initially found that the Shareholder Management Agreement involved interstate commerce and was subject to the Federal Arbitration Act ("FAA"). The Trial Court also found that the

arbitration clause of the Shareholder Management Agreement was not unconscionable. [R.pp. 4 – 14; Order, pp. 4-14.]

Nevertheless, the Trial Court denied the Respondents' motion on several grounds. First, the Trial Court found that Riemann's claim under the South Carolina Payment of Wages Act was not subject to arbitration where the Act provides employees with the right to bring a "civil action" against employers for violations of the Act and the Act also provides that "[n]o provision of this chapter may be contravened or set aside by private agreement." S.C. CODE ANN. §§ 41-10-80(C), -100; [R.pp. 14 -16; Order, pp. 14-16.]

The Trial Court further found that the Respondents failed to provide "clear and unmistakable" evidence that the parties intended for an arbitrator to determine whether the tort claims were arbitrable. [R.pp. 16-18; Order, pp. 16-18.] Finally, the Trial Court determined that the tort claims were not "significantly related" to the Shareholder Management Agreement and that such claims 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). [R.pp. 18-19; Order, pp. 18-19.]

The Court of Appeals reversed the Trial Court's ruling that the court, and not an arbitrator, had the power to determine the arbitrability of Riemann's claims against the Respondents, and Petitioner Riemann now requests this Court to reinstate the Trial Court's Order denying the Respondents' motion to dismiss and compel arbitration.

ARGUMENT

I. The Court of Appeals erred in holding that the arbitration clause of the parties' Shareholder Management Agreement provided "clear and unmistakable" evidence the parties agreed that questions of arbitrability for all disputes between Riemann and the Respondents, including statutory claims not subject to arbitration and those claims legally distinct from the parties' contractual relationship, were to be decided by the arbitrator rather than the court.

In reversing the Trial Court's denial of the Respondents' motion to compel arbitration, the Court of Appeals held "the arbitration clause of the parties' agreement clearly and unmistakably provided that questions of arbitrability were to be decided by the arbitrator." App. 2. In so holding, the Court of Appeals relied upon the opinion of the Supreme Court of the United States in First Options of Chicago., Inc. v. Kaplan, 514 U.S. 938 (1995).

The Kaplan case, however, does not mandate that the arbitrator, rather than the court, decide whether Riemann's claims against the Respondents are subject to the arbitration clause in the Shareholder Management Agreement where those claims involve statutory rights not subject to arbitration and claims that do not relate to or arise out of such Agreement. This case presents a question not yet decided by this Court – whether a clause in an arbitration agreement delegating the question of a dispute's arbitrability to an arbitrator (the "delegation provision") binds a party to arbitrate gateway questions of arbitrability with respect to disputes that are clearly not subject to mandatory arbitration or are unrelated or unconnected to the arbitration agreement.

In Kaplan, a clearing firm had a dispute with the Kaplans and their investment company and pursuant to the term of a workout agreement sought arbitration of the dispute by a panel of the Philadelphia stock exchange. Id. at 940-41. The Kaplans

denied that their disagreement with the clearing firm was arbitrable, and they filed written objections to that effect with the arbitration panel. The arbitrators determined that they had the power to rule on the merits of the parties' dispute and ruled in favor of the clearing firm. The Kaplans requested the federal district court to vacate the arbitration award, but upon motion of the clearing firm to confirm, the district court confirmed the award. The United States Court of Appeals for the Third Circuit agreed with the Kaplans that their dispute was not arbitrable and reversed the district court's confirmation of the award. Id. at 941.

The Supreme Court of the United States granted certiorari to address who should have the primary power to decide whether the parties agreed to arbitrate a certain dispute. The question considered was a very narrow one with respect to the standard of review applied to an arbitrator's decision about arbitrability because in this case it was the arbitrators who made the decision that the parties' dispute was arbitrable [unlike the instant case where the question was before the Trial Court]. The Court was therefore determining what standard of review by the district court applied to the arbitrators' decision that they had the power to rule on the merits of the suit. Thus, did the power to decide arbitrability belong primarily to the arbitrators because the courts have to review their arbitrability decision deferentially or did the power belong to the court because the court determines arbitrability independently without any deference to the arbitrators' decision? Id. at 941-42.

The Court determined that the answer to the question was fairly simple. The question of who has the power to decide arbitrability "turns upon what the parties agreed about that matter:"

> Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. . . That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. . . If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently.

Id. at 943. The two answers to these questions, the Court observed, flowed "inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes-but ***only*** those disputes-that the parties have agreed to submit to arbitration." Id. (emphasis added).

The Court then provided brief guidance on how a court should decide whether the parties agreed to submit the arbitrability issue to arbitration, first recognizing that courts should apply ordinary state-law principles that govern the formation of contracts. Id. at 944. The Court also directed that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is ***clear*** and ***unmistakable*** evidence that they did so." Id. (internal citations omitted) (emphasis added).

The Court of Appeals relied upon this language in Kaplan in presumably determining that the following language in the Shareholder Management Agreement provided the clear and unmistakable evidence that the parties agreed the question of whether Riemann's claims were arbitrable should be decided by the arbitrator: "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as a part of the arbitration proceeding." [R.p. 37; Agreement, p. 2, ¶ 6.]

This analysis stops short, however, in resolving the question required to be answered by the Supreme Court in Kaplan – whether the parties contractually agreed to

submit the question of arbitrability of a particular dispute to arbitration. Id. at 943. In other words, is there clear and unmistakable evidence that Riemann agreed to submit to the arbitrator the question of arbitrability of **all** potential disputes between him and the Respondents, including claims clearly not subject to mandatory arbitration and/or claims not arising out of or related to the Shareholder Management Agreement? Based upon the language of the Shareholder Management Agreement, the Kaplan opinion, and upon the precedent of this Court, the answer to this question is no.

By its terms, the Dispute Resolution Clause of the Shareholder Management Agreement only applies to any "controversy or claim arising out of or related to [the Shareholder Management Agreement] or the breach thereof." [R.p. 37; Agreement, p. 2, ¶ 6.] Therefore, by its terms, the Shareholder Management Agreement does not apply to disputes between the parties which arise outside of their contractual relationship.

The Respondents, however, seek to sweep every interaction and dispute between the parties under this arbitration clause without any regard to whether such disputes are connected to the Shareholder Management Agreement. The Respondents contend that one sentence in the Agreement – "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as a part of the arbitration proceeding" - covers every single interaction between the parties and removes all ability of the courts to decide whether a certain claim is subject to arbitration even when the claim has no relationship to the Shareholder Management Agreement and does not arise out of or relate to the Agreement to be covered by the Dispute Resolution Clause in the first instance.

For example, if Riemann and Shofner were involved in an automobile accident with each other, Riemann should not have to arbitrate a dispute over the accident just

because he happened to have a contract with Shofner on a completely unrelated matter. It would follow that Riemann would not have to send such a claim for "gateway arbitration" merely because there is a delegation provision in a completely unrelated contract. If it were otherwise, then every case involving an arbitration agreement with a delegation provision must, with no exceptions, be submitted for such gateway arbitration, no matter if there was no connection between the dispute and the agreement.

In this case, Riemann's asserted claims are not subject to the Dispute Resolution Clause in the Shareholder Management Agreement where such claims include a statutory claim not subject to arbitration and tort claims unrelated to the Shareholder Management Agreement.

A. Riemann's statutory claim for violation of the South Carolina Payment of Wages Act is not arbitrable per the provisions of the statute and the mere presence of a delegation provision does not require that the claim be sent to gateway arbitration where there is no plausible argument Riemann could be forced to arbitrate this claim.

Riemann's claim against the Respondents for violation of the Payment of Wages Act (the "Act") is a statutory claim separate and distinct from a claim under the Shareholder Management Agreement. Per the terms of the Act, such a statutory claim cannot be subject to arbitration. Under S.C. CODE ANN. § 41-10-80(C), the Act grants employees the right to bring a "civil action" against employers for violations of the Act. The Act further provides that "[n]o provision of this chapter may be contravened or set aside by private agreement." § 41-10-100.

"The cardinal rule of statutory construction is to ascertain the intent to the legislature." Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 147-48, 694 S.E.2d 525, 529 (2010) (internal citations omitted). Where a statute's language is

plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Gay v. Ariail, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009).

Here, the statute's language is plain, unambiguous, and conveys a clear, definite meaning. The Act affirmatively provides employees with the right to bring a "civil action" against employers who violate the Act, and the Act also explicitly mandates that no provision of the Act can be "contravened or set aside by private agreement." See §§ 41-10-80(C), - 100. The provisions of the Act make clear that a claim against an employer for violation of the Act cannot be the subject of a private arbitration agreement. See also infra Section II.A.

Where such a claim cannot be subject to arbitration pursuant to the express terms of the statute, it makes no logical sense to send the question of whether this claim can be arbitrated to an arbitrator who would be required by statute to find that the claim could not be arbitrated and had to be decided in a civil action. Requiring an employee to follow this step would effectively eliminate the protections of the Act because it would oblige an employee to expend monies to pay an arbitrator who would simply tell the employee that he should litigate in civil court after all. Often, claims under the Act are fairly small and requiring an employee to pay an arbitrator to address the question of whether the claim is even arbitrable would many times cause the employee to incur costs greater than the amount of his wages claim. This would have a chilling effect on the pursuit of a Payment of Wages Act claim by an employee. In addition, there is also the possibility that the arbitrator would wrongly decide that such a claim could be arbitrated, and the employee would be stripped of his right to a civil action under the Act.

Where it is mandated by law that an employee cannot be forced to arbitrate a particular dispute, the mere presence of a delegation provision should not require that the claim be sent to gateway arbitration where there is no plausible argument that the claim could be subject to arbitration. Accordingly, Riemann's statutory claim under the Act is not subject to the Dispute Resolution Clause of the Shareholder Management Agreement.

B. Riemann's tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress do not arise out of or relate to the Shareholder Management Agreement which only governs the corporate management of Palmetto Gems, and therefore, these claims are not subject to the delegation provision of the Dispute Resolution Clause of the Agreement.

Riemann's tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress are claims which are legally distinct from the parties' contractual relationship concerning the management of Palmetto Gems and do not depend on the resolution of any issue related to the Shareholder Management Agreement. Therefore, these claims are not subject to a delegation provision contained in an agreement wholly unconnected to the tort disputes.

Riemann's claim for wrongful discharge in violation of public policy does not arise out of the Shareholder Management Agreement where this claim is based on allegations that Riemann filed a wage complaint with LLR, Shofner fired him shortly thereafter, and there is a causal connection between the two. The Shareholder Management Agreement governs the executive management of Palmetto Gems, including changes of title and duties of executive officers or the removal of a person from their office. [R.pp. 36-39; Agreement.] What the Shareholder Management Agreement does not articulate are Riemann's specific duties or obligations as an employee or the manner in which Riemann's employment with Palmetto Gems might be terminated. That is a

separate issue from Riemann's executive officer status with Palmetto Gems. [Id.] Riemann's wrongful discharge claim is not subject to a delegation provision in an agreement unconnected to the allegations of the claim.

Likewise, the underlying facts of Riemann's tort claims for defamation and intentional infliction of emotional distress do not arise out of Riemann's contractual relationship with Palmetto Gems and Shofner. Instead, these are claims like the example of the automobile accident which arise outside of the Shareholder Management Agreement and could occur regardless of whether the parties had a contractual relationship. There is no tenable argument that the wrongful discharge, defamation, and intentional infliction of emotional distress claims are connected to the Shareholder Management Agreement which solely addresses the corporate management of Palmetto Gems.

In summary, the delegation provision of the Dispute Resolution Clause of the Shareholder Management Agreement does not provide the "clear and unmistakable" evidence required by the United States Supreme Court in Kaplan that the parties agreed to submit the arbitrability of claims bearing no relationship to the Shareholder Management Agreement to the arbitrator. In fact, in Kaplan, the Court ultimately held that Kaplans did not agree to submit the question of arbitrability to arbitration because the agreement was silent or ambiguous on the issue and therefore, there was no clear and unmistakable evidence that the Kaplans agreed to submit such questions to the arbitration. Kaplan, 514 U.S. at 944-47.

The same can be said for the Dispute Resolution Clause in this case. The clause is silent, or in the very least, ambiguous, as to whether claims not arising out of or not

related to the Shareholder Management Agreement are subject to a delegation clause contained within an agreement between the parties that only governs specific matters. The sentence upon which the Respondents rely 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. The Dispute Resolution Clause is much too vague to clearly and unmistakably provide evidence that Riemann and the Respondents contractually agreed to have an arbitrator decide the arbitrability of every single potential dispute between them regardless of whether the dispute was connected to the Shareholder Management Agreement or not. See Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007) ("[A]rbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate.").

In the absence of clear and unmistakable evidence to the contrary, the question of the arbitrability of a claim is an issue for judicial determination. See Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23, 644 S.E.2d 663, 667-68 (2007) (observing the courts decide certain "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"); see also Chassereau, 373 S.C. at 171, 644 S.E.2d at 720.

Where there was not clear and unmistakable evidence that Riemann agreed otherwise, the question of arbitrability of the claims brought by Riemann against the Respondents was within the power of the Trial Court to decide. Riemann therefore respectfully submits that the Court of Appeals misapprehended the holding and application of the Kaplan opinion to this case. Riemann therefore requests that this Court

reverse the Opinion of the Court of Appeals and reinstate the Order of the Trial Court denying the Respondents' motion to compel arbitration.

II. The Trial Court correctly determined that Riemann's statutory and tort claims against the Respondents were not subject to arbitration.

While the Court of Appeals did not address whether the Trial Court correctly determined that Riemann's claims for violation of the South Carolina Payment of Wages Act, wrongful discharge, defamation, and intention infliction of emotional distress were not subject to arbitration, the record as to whether these claims are arbitrable is complete and developed and in the interest of judicial economy, the merits of this issue can be decided by this Court. In addition, if this Court determines that an arbitrator should have determined the gateway issue of arbitrability, which Riemann does not concede, any error of the Trial Court in making this decision is rendered harmless where under no circumstance are Riemann's claims against the Respondents subject to arbitration.

A. The South Carolina Payment of Wages Act statutorily bars the Respondents from forcing Riemann to arbitrate his statutory claim under the Act.

The Trial Court correctly ruled that the Respondents cannot force Riemann to arbitrate his claim under the South Carolina Payment of Wages Act (the "Act"). As previously discussed above, see supra Section I.A, to do so would violate S.C. CODE ANN. § 41-10-100, which mandates that "No provision of this chapter may be contravened or set aside by a private agreement." This includes, naturally, the provision in § 41-10-80(C) which provides employees with the right to bring a "civil action" against employers for violations of the Act.

In their argument before the Court of Appeals, the Respondents ignored 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 (Ct. App. 1987) (citing State v. Fid. & Deposit Co. of Maryland, 114 S.C. 511, 104 S.E. 182 (1920)). The Respondents' 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.

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 (Ct. App. 1995). 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) (citing 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, the court relied on § 41-10-100, noting that "any agreement Ross may have consented to would be void"

under § 41-10-100 and "unenforceable against him by Ligand." Ross v. Ligand Pharms., Inc., 371 S.C. 464, 473 n. 1, 639 S.E.2d 460, 465 (Ct. App. 2006).

In the instant case, the Trial Court properly found that the language of § 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 § 41-10-80(C), makes it equally clear that Riemann's claim under the Act cannot be arbitrated. [R. p. 15; Order, p.15.]

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 Respondents incorrectly argued below that the Trial Court "expanded" the Act's statutory bar on private waivers of the Act's provisions. To agree with Respondents' argument, this Court would have to ignore the legislature's clear definition of a "civil action," as well as its equally clear directive in § 41-10-100, as well as the remedial nature of the Act itself.

The Respondents also wrongly argued that the language of § 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. The Respondents 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 § 41-10-80(C). Following this argument to its logical conclusion, the Respondents 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 should have no bearing on the issues before this Court.

For these reasons, it is clear that the Trial Court had ample legal and factual grounds to deny the Respondents' attempt to compel arbitration of Riemann's claim under the South Carolina Payment of Wages Act. Therefore, Riemann respectfully requests that this Court grant certiorari to address the important question of whether the Payment of Wages Act shields an employee from being forced into arbitration by his employer where the Act contains protections guaranteeing an employee the right to a "civil action."

B. Riemann's tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress are not claims that "arise out of or are related to" the Shareholder Management Agreement, and therefore, these claims are not subject to the Dispute Resolution Clause of the Agreement.

In determining that Riemann's three tort claims were not arbitrable, the Trial Court found that the tort claims did not 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, p. 18.]

In reaching its decision, the Trial Court relied on the rulings of this Court that were directly on point. In determining whether a dispute between parties is covered under a purported arbitration agreement, this 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 v. World Finance Corp. of South Carolina, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007); Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) ("[W]e 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 this 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 which does not address duties and obligations of employees of Palmetto Gems and the manner of terminating such employees.

- Riemann's claim for defamation arises wholly outside the Shareholder Management Agreement, and alleges exactly the type of "outrageous conduct" referenced in this 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. 36-39; 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, p. 19.]

Indeed, the Respondents abandoned any effort in the Court of Appeals to argue that Riemann's three tort claims were "significantly related" to the Shareholder Management Agreement. Their brief before the Court of Appeals only addressed their argument that the Trial Court should not have addressed the issue of arbitrability at all. Because the issue was not addressed in their appellate brief, it must be deemed

abandoned and is the law of the case. Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151 (2009); Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. 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

The Opinion of the Court of Appeals is erroneous because it requires that every case tangentially involving an arbitration agreement with a delegation provision be submitted for gateway arbitration, with no exceptions, no matter if there was no connection between the dispute and the agreement or regardless of whether the claim is clearly not subject to mandatory arbitration by statute. This case presents an opportunity for this Court to determine the scope and breadth of delegation provisions in arbitration agreements, as well as whether the South Carolina Payment of Wages Act protects an employee from being forced into arbitration by his employer. Petitioner Roger R. Riemann accordingly respectfully requests this Court to grant his Petition and issue a writ of certiorari to the Court of Appeals to review its decision, reverse the Opinion of the Court of Appeals, and reinstate the Trial Court's Order denying the Respondents' motion to dismiss and compel arbitration.

Respectfully submitted,

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May 21, 2015.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Roger R. Riemann, do hereby certify that I have this date served the foregoing Petition for Writ of Certiorari, dated May 21, 2015, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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