

**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

APPELLATE CASE NO. 2015-001100
CIVIL ACTION NO. 2012-CP-32-3496

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S.C. Supreme Court

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.

**REPLY TO RETURN TO THE
PETITION FOR A WRIT OF CERTIORARI**

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ARGUMENT IN REPLY

I. The Trial Court correctly ruled that the court, not an arbitrator, must determine the arbitrability of the claims in this case.

In their Return, the Respondents contend that Petitioner Riemann misinterpreted the holding of First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995). The Respondents also dismissively claim that Riemann confuses the standard for “who decides” arbitrability with the standard for “which claims” are arbitrable. Riemann’s argument to this Court does neither, but on the contrary follows the directives outlined in First Options for determining whether a party agreed that an arbitrator would decide the question of arbitrability for a dispute.

As the First Options court observed, the answer to the “who decides” question is fairly simple: “Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter.” Id. at 943 (emphasis in original). The language of First Options could not be clearer. The question of “who decides” depends on whether the parties agreed to submit the arbitrability question for a dispute to arbitration. Id. The only way to resolve the question is to apply ordinary state-law contract principles. Id. at 944. The United States Supreme Court then added the caveat that it will not be assumed that a party agreed to arbitrate the arbitrability question unless there is “clear and unmistakable” evidence that the party did so. Id.

Using the guidelines set forth in First Options, to determine what Riemann and the Respondents agreed to with respect to “who decides” the arbitrability of Riemann’s

particular claims, the court must look at the language of the Shareholder Management Agreement which governs the corporate management of Palmetto Gems & Gemological Services, Inc. [R.pp. 36-40; Agreement.] In particular, Section 6 of the Agreement controls “Dispute Resolution” and provides in full:

Any controversy or claim arising out of or related to this Agreement or the breach thereof, shall be settled, except as otherwise be provided herein, by binding arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association; and the arbitration award may be entered as a final judgment in any court having jurisdiction thereon. Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding. Legal costs, attorneys’ fees and the fees of expert witnesses may be assessed against any person found to have acted in bad faith. All arbitration proceedings shall be conducted by a panel of three (3) arbitrators. The party requesting arbitration shall have the right to select one (1) arbitrator and the person on the other side of the controversy shall select a second (2nd) arbitrator. The two arbitrators so chosen shall select the third (3rd). To be qualified as an arbitrator, a person must either be a certified public accountant, a lawyer, or a businessman with at least seven (7) years experience as an executive in a closely held corporation, or a person with expertise in the subject matter of the dispute in question, e.g., a professional appraiser of shares of close corporation stock if the dispute concerns the value of the shares of the Corporation.

[R.p. 37; Agreement, p. 2, § 6.]

By its express 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,” and an arbitration proceeding is only held if there is a dispute “arising out of or related to” the Agreement. If there is no such dispute, there is no arbitration proceeding to be held. This is because the Dispute Resolution Clause does not apply if a dispute arises outside of the parties’ contractual relationship.

The delegation provision buried within this Dispute Resolution Clause likewise does not apply to disputes legally distinct from the parties' contractual relationship. This delegation provision only comes into play if an arbitration proceeding is held: "Any dispute as to whether a controversy or claim is subject to arbitration shall be submitted *as part of the arbitration proceeding.*" [R.p. 37; Agreement, p. 2, § 6 (emphasis added).] But if there is no controversy or claim arising out of the Shareholder Management Agreement, there is no arbitration proceeding held in the first instance. The delegation provision therefore does not take effect.

At the very minimum, it is ambiguous as to whether the delegation provision applies to claims not arising out of or related to the Shareholder Agreement, and where it is ambiguous, it cannot be said that the "who decides" question is "clearly and unmistakably" answered by this Dispute Resolution Clause with respect to claims not arising out of the Agreement. See First Options, 514 U.S. at 944-45.

As argued in depth in the Petition, Riemann's claims for wrongful discharge, defamation, and intentional infliction of emotional distress 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.¹ These claims, which do not "arise out of or relate to" the Shareholder Management Agreement, are not subject to the Dispute Resolution Clause by its terms and the delegation provision therefore does not apply.

The Respondents misconstrue Riemann's position when they assert that Riemann is using the standard for "which claims" are arbitrable instead of the standard for "who

¹ Indeed, the Respondents did not separately challenge the Trial Court's ruling that Riemann's tort claims were not significantly related to the Agreement.

decides” arbitrability. Riemann is not confusing the legal standards, but is rather relying upon the contractual language in the Shareholder Management Agreement which provides that the Dispute Resolution Clause applies to those “controvers[ies] or claim[s] arising out of or related to [the] Agreement.” First Options directs parties to examine the contract to determine what the parties agreed to with respect to “who decides” arbitrability. In this case, the contractual provisions of the Shareholder Management Agreement, including the Dispute Resolution Clause and its delegation provision, do not apply to Riemann’s tort claims for wrongful discharge, defamation, and intentional infliction of emotional distress.

Riemann’s remaining claim for violation of the South Carolina Payment of Wages Act, S.C. CODE ANN. §§ 41-10-10, *et seq.*, is also not subject to the delegation provision because, as thoroughly discussed in the Petition, the statutory provisions of the Act prohibit parties from entering into any private agreement which contravenes the requirements of the Act, including the employee’s right to a “civil action.” See §§ 41-10-80(C), -100. By statute, the Dispute Resolution Clause of the Agreement does not control Riemann’s Payment of Wages Act claim. This private agreement is essentially null and void with respect to the claim under the Act such that there is no delegation provision to apply. There is no logical reason to initiate an arbitration proceeding, retain a panel of three arbitrators, and incur associated costs only to be told that the statutory claim cannot be arbitrated.

Riemann respectfully submits that the Court of Appeals erred in applying the delegation provision to the particular causes of action brought by Riemann against the Respondents. The Court of Appeals failed to consider that disputes arising outside of the

parties' contractual relationship cannot be covered by a Dispute Resolution Clause contained in the parties' agreement. Accordingly, Riemann requests this Court to 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 Respondents' argument that the South Carolina Payment of Wages Act is preempted by the Federal Arbitration Act is not preserved for appellate review; nevertheless, the Payment of Wages Act's prohibition on private agreements which extinguish an employee's right to a civil action is not preempted by the FAA where the prohibition on private agreements applies generally to any contract affecting wages and not solely to arbitration agreements.

In their Return, the Respondents argue for the first time that any provision of the Payment of Wages Act prohibiting mandatory arbitration is preempted by the Federal Arbitration Act ("FAA"). The Respondents never raised this argument to the Trial Court which ruled against the Respondents and determined that the Payment of Wages Act claim was not subject to the arbitration. In their appeal to the Court of Appeals, the Respondents also did not raise this argument.

A losing party must present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000). The imposition of preservation requirements on the losing party below is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. Id. at 422, 526 S.E.2d at 724. This Court has further stated: "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an

appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Id.

The Respondents were the losing party below and as such were required to present their preemption argument to the Trial Court to preserve such argument for appellate review. While the Respondents may have prevailed at the Court of Appeals, this shift in the posture of the parties does not lift the preservation requirements imposed upon the Respondents as the losing party in the Trial Court. See Wachovia Bank, Nat’l Ass’n v. Blackburn, 407 S.C. 321, 327 n.6, 755 S.E.2d 437, 440 n.6 (2014) (finding respondents who had lost their case at the circuit court but prevailed at the Court of Appeals were precluded from raising to the Supreme Court arguments not ruled upon by the circuit court and therefore not preserved for appellate review).

The Respondents’ argument that the provisions of the Payment of Wages Act are preempted by the FAA is therefore not preserved for this Court’s review. Even if preserved, the Respondents’ preemption argument fails.

The Respondents rely upon AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011) for their contention that the FAA preempts the provisions of the Payment of Wages Act such that this claim remains arbitrable. Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

As explained by the Concepcion court, the final phrase of § 2 permits arbitration agreements to be declared unenforceable “upon such grounds as exist at law or in equity

for the revocation of any contract.” 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2). This saving clause “permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” 131 S. Ct. at 1746 (internal citations omitted).

The provisions of the Payment of Wages Act fall directly within the scope of the FAA’s exception permitting courts to refuse to enforce arbitration agreements on grounds that exist for “the revocation of *any* contract.” 9 U.S.C. § 2 (emphasis added). The provisions of the Payment of Wages Act do not specifically target arbitration agreements. Instead, the Payment of Wages Act mandates that “[n]o provision of this chapter may be contravened or set aside by private agreement.” S.C. CODE ANN. § 41-10-100.

This statutory language does not prohibit only agreements which force an employee to relinquish his right to a “civil action,” but also prohibits an employer from requiring an employee to waive other statutory rights under the Act, such as, among other things, the right to prompt payment of wages, the right to receive notification of the time and place of payment, and the right of an employee to receive payment of wages for work performed within a certain time limit upon discharge. See S.C. CODE ANN. §§ 41-10-10, *et seq.*

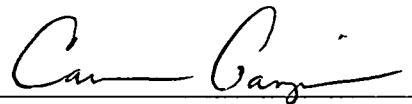
The provisions of Payment of Wages Act, including the prohibition against private agreements which alter the Act’s statutory rights, therefore apply equally to contracts without arbitration agreements as the Act does to contracts with arbitration agreements. The Payment of Wages Act was not designed to “stand as an obstacle to the accomplishment of the FAA’s objectives.” Concepcion, 131 S. Ct. at 1748. Rather, the

Act was created to provide certain protections to employees and to ensure that employees would be vindicated for violations of those protections by their employers. Because this state law is generally applicable, or in other words, applies to any contract and not solely arbitration agreements, the FAA does not preempt the provisions of the Payment of Wages Act. Cf. Concepcion, 131 S. Ct. at 1744-53 (holding FAA preempts the States from conditioning the enforceability of arbitration agreements on the availability of classwide arbitration procedures).

CONCLUSION

The Trial Court correctly determined that it had the power to decide questions of arbitrability and also correctly determined that Petitioner Riemann's statutory and tort claims against the Respondents were not subject to arbitration. The Court of Appeals failed to consider the nature of Riemann's claims against the Respondents and whether they fell beyond the reach of an arbitration agreement containing a delegation provision. For the reasons set forth in the Petition and this Reply, Petitioner Riemann respectfully requests this Court to grant his Petition and issue to 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,



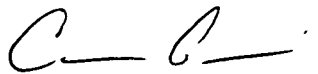
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July 13, 2015.

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Petitioner Roger R. Riemann, do hereby certify that I have this date served the foregoing Reply to the Return to the Petition for Writ of Certiorari, dated July 13, 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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