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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
Case No. 2012-CP-32-3496
Opinion No. 2015-UP-107 (S.C. Ct. App. Filed March 4, 2015)

Roger R. Riemann .....Petitioner.

v.

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

BRIEF OF RESPONDENTS

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INTRODUCTION

The question at the heart of this appeal is fairly simple: in the event of a dispute as to the arbitrability of particular claims, *who decides* which claims are subject to arbitration: the court, or the arbitrator? Based on longstanding precedent of the United States Supreme Court, the answer to this question is also fairly simple: *who decides* disputes as to arbitrability is determined by the express language of the arbitration agreement. If the parties "clearly and unmistakably" agreed to arbitrate disputes as to the arbitrability of particular claims, the court must honor that agreement, just as it honors any other valid arbitration agreement, and compel the arbitrability dispute to the arbitrator. Absent such a "clear and unmistakable" agreement, the court must resolve any arbitrability dispute before compelling arbitration.

The parties "clearly and unmistakably" agreed to arbitrate their dispute as to the arbitrability of Petitioner's claims by expressly agreeing that "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." In light of that "clear and unmistakable" language, the trial court erred by ruling on the parties' arbitrability dispute, and the Court of Appeals correctly reversed the trial court's denial of Respondents' motion to compel arbitration.

By seeking reversal of the Court of Appeals, Petitioner urges this Court to adopt a new standard for enforcing an agreement to arbitrate arbitrability that would effectively invalidate twenty years of U.S. Supreme Court precedent. Petitioner separately urges the Court to adopt a new construction of the S.C. Payment of Wages Act prohibiting arbitration of all wage disputes in a manner unsupported by statutory text, legislative intent, and federal preemption rules regarding state arbitration laws. For these reasons, Respondents respectfully request that the Court of Appeals' decision be affirmed.

COUNTER STATEMENT OF THE ISSUE ON APPEAL

I. **WHETHER THE COURT OF APPEALS CORRECTLY REVERSED THE TRIAL COURT'S ORDER DENYING RESPONDENTS' MOTION TO COMPEL ARBITRATION, WHEN THE PARTIES CLEARLY AND UNMISTAKABLY AGREED THAT ANY DISPUTES REGARDING THE ARBITRABILITY OF PETITIONER'S CLAIMS WERE TO BE DECIDED NOT BY THE COURT, BUT BY THE ARBITRATOR AS PART OF THE ARBITRATION PROCEEDING.**

COUNTER STATEMENT OF THE CASE

On August 24, 2012, Petitioner Roger Riemann ("Petitioner") filed this action against Respondents Palmetto Gems & Gemological Services, Inc. ("Palmetto Gems") and Thomas Shofner ("Shofner") (collectively "Respondents") in the Lexington County Court of Common Pleas. Petitioner's Complaint alleges claims for violation of the South Carolina Payment of Wages Act, wrongful discharge in violation of public policy, and defamation. (R. pp. 21-29.)[1] Petitioner later moved to amend his Complaint to add a claim for intentional infliction of emotional distress. (R. pp. 41-53.)

On October 29, 2012, Respondents filed a Motion to Dismiss, or, Alternatively, to Stay Proceedings and Compel Arbitration ("the Motion"), based on an arbitration provision in the parties' Shareholder Management Agreement (the "Agreement"), in which they agreed to arbitrate any claim or dispute "arising out of or related to" the Agreement or its alleged breach. (R. pp. 30-31; p. 37, ¶ 6.) In a hearing on Respondents' Motion, Petitioner challenged the arbitrability of each of his claims, arguing that claims under the South Carolina Payment of Wages Act were unarbitrable as a matter of law and that each of his tort claims fell outside the scope of the Agreement. (R. pp. 81-85.) In response, Respondents noted, among other arguments, that the Agreement's arbitration provision clearly and unmistakably provided that "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding," such that the arbitrator, and not the court, was the proper authority to resolve the arbitrability dispute. (R. p. 37, ¶ 6.)

[1] Respondents note that the Appendix filed by Petitioner does not include a copy of the Record on Appeal or the briefs of the parties. *See* S.C.A.C.R. 242(e)(1). As a result, Respondents cite the appropriate pages of the Record on Appeal as filed in the Court of Appeals in place of citations to the Appendix as necessary.

On June 25, 2013, the trial court issued an order denying Respondents' Motion. (R. pp. 1-20.) The court expressly declined to enforce the parties' agreement to arbitrate any disputes as to the arbitrability of specific claims. (R. pp. 16-18.) Instead, the court ruled that none of Petitioner's claims were arbitrable, on two grounds: first, that claims under the South Carolina Payment of Wages Act cannot be arbitrated as a matter of law, and second, that the remainder of Petitioner's claims did not bear a significant relationship to the Agreement and thus fell outside the scope of the Agreement's arbitration provision. (R. pp. 14-16; pp. 18-19.)

On August 1, 2013, Respondents timely appealed the trial court's ruling, and presented two questions to the Court of Appeals: (1) whether the trial court erred by ruling on the arbitrability of Petitioner's claims, when the parties clearly and unmistakably agreed to submit such a dispute to the arbitrator; and (2) whether the trial court erred by ruling that claims under the Payment of Wages Act were unarbitrable as a matter of law. (App. pp. 1-2.)

On March 4, 2015, the Court of Appeals reversed the trial court's order denying Respondents' motion to compel arbitration, holding that the trial court erred in failing to enforce the parties' clear and unmistakable agreement to arbitrate all disputes regarding the arbitrability of particular claims. (App. p. 2.) The Court of Appeals declined to rule on the Payment of Wages Act issue, on the grounds that its holding was dispositive of all issues on appeal. (*Id.*) Petitioner's Petition for Rehearing was denied. (App. p. 28.)

On May 21, 2015, Petitioner filed a Petition for a Writ of Certioari with this Court. On October 21, 2015, Petitioner's Petition was granted. This appeal follows.

ARGUMENT

I. WELL-ESTABLISHED SUPREME COURT PRECEDENT REQUIRES ENFORCEMENT OF THE PARTIES' AGREEMENT TO ARBITRATE THIS ARBITRABILITY DISPUTE.

Petitioner suggests that the question presented by this appeal requires the Court to determine whether the Agreement's "delegation provision"—in which the parties clearly and unmistakably agreed to submit **any** arbitrability disputes to the arbitrator—applies to certain claims that are, according to Petitioner, "clearly not subject to mandatory arbitration or are unrelated or unconnected to the arbitration agreement." Petitioner's argument focuses *exclusively* on the allegations of his particular claims, adamantly insisting that, regardless of Respondents' position to the contrary, his claims could not possibly be subject to arbitration, and thus the trial court was free to ignore the delegation provision and resolve this arbitrability dispute.

Petitioner's insistence that his claims are unarbitrable serves only to distract from the true issue presented by the parties' arbitrability dispute: *who decides* which of Petitioner's claims are subject to arbitration—the court or the arbitrator? Contrary to Petitioner's argument, the answer to this question has nothing to do with the allegations of his underlying claims, and is far from the unsettled issue that he suggests.

A. *First Options* requires trial courts to enforce "clear and unmistakable" delegation provisions.

Twenty years ago, the United States Supreme Court held that the question of "who decides" arbitrability disputes was a simple matter of contract. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). Parties to an arbitration agreement are permitted to contractually agree who—the court or the arbitrator—has the authority to resolve disputes as to the arbitrability of particular claims. 514 U.S. at 943.

The parties' agreement as to *who decides* arbitrability disputes is separate and distinct from the parties' agreement as to the scope of the arbitration provision—that is, *which claims* are subject to arbitration. *First Options* identified two different standards for answering these two basic questions raised by arbitration agreements. *See First Options*, 514 U.S. at 944-45 ("[T]he law treats silence or ambiguity about the question 'who should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement.'").

For the first question—who decides arbitrability—the *First Options* Court recognized a presumption in favor of courts resolving arbitrability disputes, but held that this presumption may be rebutted by the express language of the parties' arbitration agreement. *Id.* at 944 ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clear and unmistakable' evidence that they did so."). If the arbitration provision includes a "clear and unmistakable" agreement that arbitrability disputes are to be decided by the arbitrator, the court must enforce that agreement and compel any arbitrability disputes for resolution by an arbitrator. *Id.* at 943-45.

The Supreme Court characterizes this type of agreement as a "delegation provision"—that is, "an agreement to arbitrate threshold issues concerning the arbitration agreement," which is just as enforceable under the Federal Arbitration Act ("FAA") as any other agreement to arbitrate, so long as the delegation provision is "clear and unmistakable." *Rent-a-Center, West, Inc.* v. Jackson, 561 U.S. 63, 130 S. Ct. 2772, 2777-78 (2010). By contrast, if an arbitration agreement is silent or ambiguous as to "who decides" arbitrability, the presumption requires the court to resolve arbitrability

disputes and refer to arbitration only those claims it determines to be within the scope of the arbitration provision. *Id.*

In keeping with the courts' liberal policy favoring arbitration, the law reverses this presumption for the second question—*which* claims are arbitrable—in that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *First Options*, 514 U.S. at 945 (*quoting Moses H. Cone Mem. Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983)); *accord Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001) (holding, under South Carolina law, that arbitration must be ordered unless a court can say with "positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute").

The *First Options* Court reasoned that the difference in these two standards was "understandable" because parties likely consider the *scope* of an arbitration provision before agreeing to it, such that the law must "insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter." 514 U.S. at 945. On the other hand, the Court recognized that the question of *who decides* arbitrability disputes is "rather arcane," such that the law presumes that parties expected the court to resolve arbitrability disputes absent "clear and unmistakable" evidence to the contrary. *Id.*

Both this Court and the Court of Appeals have cited the holding of *First Options*, recognizing that courts generally *presume* that "gateway questions" regarding arbitration agreements, specifically including the question of "whether an arbitration clause applies to a certain type of controversy," are to be resolved by the court, but only "in the absence of 'clear and unmistakable' evidence to the contrary." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 667-68 (2007); *Davis v. KB Home of South*

Carolina, Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) (holding that such "gateway matters" were properly considered by the court because the arbitration agreement did not expressly provide that such matters would be submitted to arbitration); *accord New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003)).

B. The parties' arbitration agreement "clearly and unmistakably" delegated authority to resolve arbitrability disputes to the arbitrator.

In this case, the parties agreed to arbitrate "[a]ny controversy or claim arising out of or related to [the] Agreement or the breach thereof." That provision of the Agreement addresses the *scope* of the claims subject to arbitration.

Immediately after defining the *scope* of the arbitration agreement, the Agreement separately provides, without exception, qualification, or ambiguity of any kind, that "[a]ny dispute as to whether a controversy or claim is subject to arbitration shall be submitted as part of the arbitration proceeding." *First Options* recognizes this delegation provision as a separate, valid agreement to arbitrate a very particular type of dispute: a dispute as to whether specific claims fall within the *scope* of claims subject to arbitration. It is difficult to imagine language the parties could have used to more "clearly and unmistakably" delegate the authority to resolve any arbitrability disputes to the arbitrator.

Based on this language, and citing *First Options*, the Court of Appeals reversed the trial court's order denying Respondent's Motion, and required that the court compel this arbitrability dispute to be resolved by arbitration. If the arbitrator determines that some or all of Petitioner's claims are not subject to arbitration, those claims must be remanded to the trial court for further litigation. The Court of Appeals' holding was not error, but was *First Options*' clear and uncontroversial command.

C. Petitioner misinterprets *First Options* in arguing that a delegation provision only applies to specific claims that are "clearly and unmistakably" within the scope of the arbitration agreement.

Petitioner does not challenge the validity of the parties' delegation provision, nor the fact that the parties "clearly and unmistakably" included this provision as part of their arbitration agreement. Instead, Petitioner misinterprets *First Options* in a manner that would, if true, completely invalidate *First Options*' express endorsement of the parties' right to contractually agree to arbitrate arbitrability disputes.

Petitioner asserts that, under *First Options*, a delegation provision only operates to submit disputes as to the arbitrability of specific claims to the arbitrator if the *trial court* first rules that the specific claims are "clearly and unmistakably" *within the scope* of the arbitration agreement. If the trial court finds that particular claims are not "clearly and unmistakably" *within the scope* of the agreement, Petitioner argues that the court, not the arbitrator, must resolve any disputes as to their arbitrability, even in the face of an indisputably valid delegation provision.

More specifically, Petitioner argues that the instant question before the Court is whether the parties' delegation provision provides "clear and unmistakable evidence that [Petitioner] 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 [Agreement]?" (Pet. Br., p. 11) (emphasis in original). According to Petitioner, because his claims are "clearly and unmistakably" outside the *scope* of the arbitration agreement, the parties' delegation provision does not apply, and thus the trial court properly ruled on arbitrability and denied Respondent's Motion to Compel Arbitration.

Petitioner's argument conflates the standard for *who decides* arbitrability with the standard for *which claims* are arbitrable. *First Options*' "clear and unmistakable" standard applies **only** to the threshold question of "who decides" arbitrability: courts presume that the parties intended the court to decide arbitrability, unless the parties' "clearly and unmistakably" agreed to delegate resolution of arbitrability disputes to the arbitrator. 514 U.S. at 943. Contrary to Petitioner's argument, the nature of the disputed claims is totally irrelevant to resolving the issue of "who decides" arbitrability, because that question is resolved solely by the presence or absence of a "clear and unmistakable" delegation provision.

First Options recognizes that, once the question of "who decides" is resolved, the law reverses this presumption for the second question—*which claims* are arbitrable—in that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 945. *First Options* does **not** require that the trial court first determine that the parties "clearly and unmistakably" agreed that *particular claims* are within the scope of the arbitration agreement—and thus arbitrable—before submitting disputes as to the arbitrability of those claims to arbitration. Such a requirement would overrule decades of well-settled federal and state law imposing a presumption of arbitrability and commanding that any doubt regarding arbitrability of particular claims be resolved in favor of arbitration. *First Options*, 514 U.S. 938 at 945 ("[A]ny doubts concerning the *scope* of arbitrable issues should be resolved in favor of arbitration."); *accord Zabinski*, 346 S.C. at 596-97, 553 S.E.2d at 118-19.

The fallacy in Petitioner's circular interpretation of *First Options* is that there would never be an arbitrability dispute to submit to the arbitrator if the court was required

to first determine which claims were within the scope of the arbitration agreement. The parties' 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. Similarly, the trial court would necessarily be ruling that a claim was unarbitrable by ruling that the claim was not "clearly and unmistakably" within the scope of the arbitration agreement. Therefore, Petitioner's theory would overrule *First Options*, because there would *never* be an arbitrability dispute for the arbitrator to resolve, regardless of the presence of an indisputably valid delegation provision.

Petitioner couples this flawed interpretation of *First Options* with the self-serving presumption—stated as an undisputed fact—that his particular claims are not "arising out of or related to" the Agreement and are therefore outside its scope, such that he argues he did not "clearly and unmistakably" agree to submit any disputes as to their arbitrability to the arbitrator. (Pet. Br., p. 17 (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)).

If Petitioner's assessment of the unarbitrability of his claims were an undisputed fact, the parties' delegation provision would be irrelevant. Respondents would not have filed a motion to compel arbitration, because there would be no dispute that Petitioner's claims were unarbitrable. There would be no need for anyone, neither court nor

arbitrator, to resolve this non-existent arbitrability dispute, and this case would not be before the Court.

But Petitioner's presumption that his claims are unarbitrable is **not** an undisputed fact. Respondents assert that *all* of Petitioner's claims "arise out of or relate" to the Agreement, because each claim arises out of the business relationship memorialized by the Agreement and requires resolution of the terms of the Agreement to support Petitioner's claim or Respondents' defenses. Petitioner asserts that *none* of his tort claims are within the scope of the arbitration agreement, because they are allegedly "legally distinct from the parties' contractual relationship." Regardless of how adamantly Petitioner insists that *his* analysis is correct, this is a dispute over arbitrability, and somebody—the court or the arbitrator—must resolve this dispute.

Indeed, *who decides* this arbitrability dispute is the only question truly presented by this appeal. *First Options* holds that the question of *who decides* turns on whether the parties' arbitration provision included a "clear and unmistakable" agreement to resolve arbitrability disputes by arbitration, and there is no dispute that the parties in this case did exactly that: they clearly and unmistakably agreed to submit arbitrability disputes "as part of the arbitration proceeding." The parties' arbitrability dispute is precisely the type of dispute that the delegation provision was designed to address, and the parties' agreement would be meaningless if, as Petitioner suggests, the only disputes referred to the arbitrator were those which the court first decided were "arising out of or related to" the Agreement.

First Options required that the trial court honor the parties' delegation provision and submit the entire case to arbitration, where the arbitrator will resolve this arbitrability

dispute. The Court of Appeals' correctly reversed the trial court because the trial court misinterpreted *First Options* in the same manner the Petitioner advocates to this Court: by requiring that specific claims be "clearly and unmistakably" within the scope of the arbitration provision before enforcing an indisputably valid delegation provision. The Court of Appeals' decision was *First Options*' clear mandate, and thus Respondents respectfully request that the Court of Appeals' decision be affirmed.

II. PETITIONER'S PAYMENT OF WAGES ACT CLAIM IS NOT UNARBITRABLE AS A MATTER OF LAW.

Petitioner separately urges the Court to rule that the S.C. Payment of Wages Act ("SCPWA" or "the Act") expressly *prohibits* arbitration of claims under the Act as a matter of law. More specifically, Petitioner alleges that a private agreement to arbitrate wage disputes under the Act conflicts with the statutory entitlement to a "civil action" to resolve such disputes, running afoul of the SCPWA's prohibition on private agreements which "contravene" or "set aside" provisions of the Act. Because Petitioner's theory would require a trial court to rule on the arbitrability of his SCPWA claim *regardless* of an indisputably valid delegation provision, Respondents separately address Petitioner's SCPWA argument.[2]

[2] In the Court of Appeals, Respondents separately appealed the trial court's erroneous ruling that Petitioner's wage claim under the SCPWA was unarbitrable as a matter of law. (App., p. 2.) The Court of Appeals determined that it need not rule on this issue, because its holding that the parties "clearly and unmistakably" agreed to submit **all** arbitrability disputes to the arbitrator necessarily included the arbitrability dispute regarding Petitioner's SCPWA claim, such that its holding is dispositive of both issues. (*Id.*) Because resolution of the SCPWA arbitrability dispute is among the issues the parties reserved for the arbitrator, Respondents respectfully submit that the same analysis justifies this Court declining to rule on this issue. *See Futch v. McAllister Towing Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive of the appeal).

A. The SCPWA prohibits private agreements that "set aside" the Act's requirements or remedies, but does not prohibit parties from setting arbitration as the forum to resolve wage disputes.

It is well-settled that the SCPWA—like its predecessor wage payment statutes—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. 2005); *see also Rice v. Multimedia, Inc.*, 318 S.C. 95, 98, 456 S.E.2d 381, 383 (1995) (". . .[T]he purpose of the Wage Payment Act. . . [is] to protect employees from the unjustified and willful retention of wages by the employer."). In accordance with this remedial purpose, South Carolina wage payment law historically prohibited employee waiver of statutory wage payment requirements. *See Cato v. Grendel Cotton Mills*, 132 S.C. 454, 456-61, 129 S.E. 203, 205 (1925). The prohibition was grounded in the assumption that, if statutory wage payment rights were waivable by private agreement, then all employers would require employees to do so, and the remedial purpose of the statute would be lost.[3] *Id.*

When enacted, the SCPWA codified South Carolina's prohibition of private waivers by providing that "[n]o provision of this chapter may be contravened or set aside by private agreement." S.C. Code Ann. § 41-10-100. South Carolina courts have consistently interpreted this SCPWA language to mean that employees are incapable of contractually waiving the requirements of the SCPWA, regardless of whether the alleged contract is express, implied, or observed by custom. *See, e.g. Ross v. Ligand Pharms., Inc.*, 371 S.C. 464, 473 n.1, 639 S.E.2d 460, 465 n.1 (Ct. App. 2006) (finding that

[3] "Now, if the object of the statute can be thwarted by custom or contract, then the statute might as well be repealed, because it will not be long before the owner of every factory, mill, or other corporation employing labor, subject to the provisions of the statute, will establish customs and enter into contracts that will completely nullify the statute." *Cato*, 132 S.C. at 456-61, 129 S.E. at 205.

employee's alleged waiver of the SCPWA requirement of notice of the date and time of payment was void and unenforceable).

The trial court's ruling in this case purported to extend the SCPWA's statutory bar on private waivers of the statute's substantive rights by applying that section to the SCPWA's provision of a private right of action to recover wages alleged to have been wrongfully withheld. *See* S.C. Code Ann. § 41-10-80(C) ("In case of any failure to pay wages due to an employee as required by Section 41-10-40 or 41-10-50 the employee *may recover in a civil action* an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney's fees as the court may allow. . .").

More specifically, the trial court interpreted the SCPWA's use of the term "civil action" in defining the private right of action for alleged violations, combined with the statute's prohibition on contracts which "contravene or set aside" statutory protections, as rendering unenforceable any agreement to arbitrate matters brought pursuant to the SCPWA, on the theory that an otherwise-valid arbitration agreement would deny an employee a "civil action" to remedy alleged wage payment violations. The court concluded that compelling a SCPWA claim to arbitration would "violate both the Act's clear provisions and its remedial nature," such that SCPWA claims are never arbitrable as a matter of law. Petitioners now urge this Court to adopt the same rationale and hold that the SCPWA prohibits parties from agreeing to arbitrate claims under the Act.

Appellants respectfully submit that the language of the SCPWA need not and does not reach so far as to prohibit arbitration of wage disputes in order to achieve its remedial purpose. It is axiomatic that "[t]he primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Gilstrap v. South Carolina Budget*

and Control Bd., 310 S.C. 210, 213, 423 S.E.2d 101 (1992). "In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). Therefore, the precise question before the Court is whether the legislative intent of the SCPWA's bar on private waivers would be effectuated by prohibiting parties from agreeing to resolve wage disputes in an arbitration forum.

Contrary to the trial court's ruling, a private agreement to arbitrate a SCPWA claim is not inconsistent with the statute's legislative intent. The legislature's well-recognized purpose for enacting the SCPWA was to require the prompt payment of wages and to provide remedies should those wages be wrongfully withheld, and the U.S. Supreme Court has expressly recognized that an agreement to arbitrate disputes does not contravene the purpose of remedial legislation, so long as the arbitration agreement does not limit the remedies available under the applicable statute. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) ("[E]ven claims arising under a statute designed to further important social policies may be arbitrated because, so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions.").

In this case, the Agreement's arbitration provision does not seek to set aside the substantive requirements of the SCPWA or otherwise limit Plaintiff's civil remedies under the SCPWA or any other law; it simply dictates the forum where disputes must be resolved, in a manner that does not alter available substantive remedies. Such an agreement does nothing to contravene the purpose of the SCWPA. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) ("An agreement

providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined") (emphasis in original); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (holding that parties who agree to arbitrate a statutory claim "do not forgo the substantive rights afforded by the statute," but rather "submit[ ]to their resolution in an arbitral, rather than a judicial, forum.") (internal citation omitted).

No South Carolina case compelling a SCPWA claim to arbitration has addressed Petitioner's instant contention that claims under the Act are unarbitrable as a matter of law; indeed, in the near-century that South Carolina law has prohibited employee waiver of wage payment rights, no South Carolina case has ever held that parties are prohibited from contractually agreeing to arbitrate wage disputes. To the contrary, South Carolina courts have routinely compelled SCPWA claims to arbitration when such claims were within the scope of a valid arbitration provision. *See, e.g. Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) (holding that plaintiff's claims for violation of the Payment of Wages Act, wrongful discharge, defamation, and breach of contract were subject to mandatory arbitration under the FAA).

B. The legislature's intent to permit arbitration of wage disputes is reflected in the South Carolina Uniform Arbitration Act.

There is no legislative history of the SCPWA to support Petitioner's contention that the General Assembly intended to prohibit parties from contractually choosing to resolve disputes in an arbitration forum by prohibiting private agreements which "set aside" or "contravene" the Act's requirements. However, in determining legislative intent, the Court can be guided by the fact that the General Assembly has approved of the

arbitration of employment-related disputes when certain conditions are met, and has not excluded wage payment claims from the scope of arbitrable matters.

The South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. § 15-48-10 *et seq.*, expressly renders enforceable arbitration agreements between employers and employees, so long as the arbitration agreement expressly references the SCUAA. *Id.* § 15-48-10(b)(2). The SCUAA identifies several exceptions for specific types of employment disputes which may *not* be subject to arbitration under any circumstances, regardless of whether the agreement references the SCUAA. Specifically, the statute provides that any arbitration agreement pertaining to "workmen's compensation claims, unemployment compensation claims and collective bargaining disputes" shall be "null and void." *Id.*

The FAA applies in this case, not the SCUAA. However, the SCUAA reflects legislative priorities in the context of arbitration of employment disputes. If the General Assembly intended for claims under the SCPWA to be unarbitrable as a matter of law, it would have included wage disputes in the list of employment-related disputes that are *not* subject to the SCUAA. The General Assembly chose not to do so, and the law is clear that *any* claims which are *not* expressly excluded by the SCUAA are arbitrable. *Swentor v. Swentor*, 336 S.C. 472, 477-78, 520 S.E.2d 330, 333 (Ct. App. 1999) (holding that equitable apportionment claims are arbitrable because they are not expressly excluded by the SCUAA).

Therefore, this Court should conclude that the SCPWA's statutory prohibition on private waivers need not be read so broadly as to render unenforceable an arbitration agreement under the FAA, when the legislature expressly *permitted* the arbitration of

wage disputes under the SCUAA. Petitioner's suggestion that a claim that is arbitrable under state law would somehow become unarbitrable under the FAA is wholly inconsistent with FAA case law and cannot succeed.

C. Even if the SCPWA did purport to prohibit arbitration of wage disputes, such a limitation would be preempted by the FAA.

Even if Petitioner's interpretation of the SCPWA's bar on private waivers were correct, which it is not, any provision of the Act arguably prohibiting arbitration of wage disputes as a matter of law would be preempted by the FAA, such that the SCPWA claim would remain arbitrable if otherwise within the scope of a valid arbitration agreement. *See AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

In *Concepcion*, the plaintiffs challenged a provision of AT&T's consumer arbitration agreement which prohibited classwide arbitration—a provision which, pursuant to California state law, rendered the arbitration agreement unconscionable. *Id.* at 1745. The U.S. Supreme Court noted that the savings clause in § 2 of the FAA[4] "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." *Id.* at 1746 (internal quotation marks and citations omitted). The Court further referenced settled law that, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: [t]he conflicting rule is displaced by the FAA." *Concepcion*, 131 S. Ct. at 1747 (*citing Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). But the question presented in *Concepcion* was broader: whether a state law thought to be

[4] Section 2 of the FAA provides that arbitration agreements are "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 (emphasis added). The final clause of that sentence, which renders unenforceable any arbitration agreement which is void pursuant to general contract defenses under state law, is referred to as the FAA's "savings clause."

applicable to contracts generally is preempted by the FAA when it is *applied* in a fashion that disfavors arbitration. *Id.*

The Supreme Court answered in the affirmative, holding that the FAA preempts any state law which "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA, which is to "ensur[e] that private arbitration agreements are enforced according to their terms." Although § 2's savings clause recognizes the validity of state contract law to invalidate arbitration agreements on grounds applicable to contracts *generally*, the Court held that § 2 cannot be "construed to include a State's mere preference for procedures that are incompatible with arbitration and `would wholly eviscerate arbitration agreements.'" *Id.* at 1748. As such, the Supreme Court held that California's state law requiring the availability of classwide procedures in dispute resolution agreements—and invalidating those agreements which precluded classwide arbitration—was preempted by the FAA, as the state law "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1749.

Petitioner's interpretation of the SCPWA is precisely the type of state law that the *Concepcion* Court held to outside the scope of § 2's savings clause and thus preempted by the FAA. Petitioner does not argue that his SCPWA claim is unarbitrable based on some state law applicable to the revocation of contracts generally, such as fraud or duress; such an argument could be a valid defense to enforcement under § 2 of the FAA. Instead, Petitioner argues that SCPWA claims can **never** be arbitrated, because the Act allegedly prohibits private agreements which deprive employees of a "civil action," which, according to Petitioner, would include arbitration agreements. Assuming,

arguendo, that Petitioner's flawed interpretation of the SCPWA were accurate, the Act's alleged requirement that wage claims be resolved in court rather than arbitration would reflect the state's "mere preference for procedures that are incompatible with arbitration" and thus "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA. Therefore, under *Concepcion*, the FAA preempts the SCPWA to the extent it could be interpreted to prohibit arbitration of wage disputes.

In total, this is not a case in which the arbitration provision at issue limits statutorily-available remedies or seeks to privately negate the effect of legislation so as to "contravene" or "set aside" the requirements of the SCPWA. The trial court's interpretation of the SCPWA in this case erroneously deems all arbitration agreements cover claims under the Act to be unenforceable in a manner inconsistent with the statute's plain language, legislative intent, and FAA preemption rules. Because Petitioner is not precluded from asserting a civil claim or obtaining remedies available under the SCPWA, the arbitration provision is not barred by § 41-10-100, and Petitioner's SCPWA claim must be compelled to arbitration.

III. THE PARTIES' ARBITRABILITY DISPUTE RELATED TO PETITIONER'S TORT CLAIMS IS RESERVED FOR THE ARBITRATOR AND SUBSUMED WITHIN THE PRIMARY ISSUE BEFORE THE COURT.

Petitioner separately sought certiorari to address a question that was never presented to the Court of Appeals: whether his tort claims "arise out of or are related to" the Agreement, and thus within the scope of its arbitration provision.

Respondents did not specifically appeal the trial court's ruling on this issue in the Court of Appeals, because Respondents appealed the threshold issue of the trial court's authority to rule on the arbitrability of *any* of Petitioner's claims, necessarily including both his SCPWA claim and his tort claims, in light of the parties' clear and unmistakable agreement to compel any arbitrability dispute to arbitration.[5] The Court of Appeals agreed, holding that the trial court lacked the authority to issue *any* ruling on arbitrability and remanding to the trial court to compel the entire case to arbitration. (App. p. 2.)

The question as to whether the trial court correctly ruled that Petitioner's tort claims were within the scope of the arbitration agreement is necessarily encompassed within the Court of Appeals' ruling, such that Respondents respectfully submit that the Court need not exercise its discretion to rule on this issue in order to fully resolve this appeal.

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[5] Respondents' decision to appeal the trial court's ruling as to Petitioner's SCPWA claim in the Court of Appeals, but not the court's ruling as to Petitioner's tort claims, was deliberate, but not because Respondents concede that the tort claims are outside the scope of the arbitration agreement. Respondents have separately addressed Petitioner's argument regarding his SCPWA claim throughout this appeal because Petitioner argued not that his SCPWA claim is outside the *scope* of the arbitration agreement, but that claims under the Act are *never* arbitrable as a matter of law. As such, Petitioner asserted that there was never an arbitrability dispute to send to arbitration, regardless of the validity of the parties' delegation provision. By contrast, Petitioner's argument with respect to his tort claims is not that such claims are *never* arbitrable, but that they do not fall within the *scope* of the Agreement's arbitration provision. Therefore, Respondents have consistently treated Petitioner's tort claims differently, because resolution of the *scope* of the arbitration provision is clearly and unmistakably a question for the arbitrator, and thus the arbitrability of those claims is subsumed within the issue of "who decides" arbitrability and need not be separately addressed.

CONCLUSION

In reversing the trial court, the Court of Appeals applied long-settled U.S. Supreme Court case law validating the parties' clear and unmistakable agreement to arbitrate arbitrability disputes, and required that the parties' agreement be enforced. Petitioner's adamant insistence that he did not agree to arbitrate the arbitrability of *his particular claims* is irrelevant to this case, and turns on a fundamental misunderstanding of *First Options* and its progeny that this Court need not correct. Moreover, Petitioner's contention that the S.C. Payment of Wages Act prohibits arbitration of wage disputes as a matter of law is unsupported by the Act's statutory text, legislative intent, and FAA preemption analysis and should not be adopted as the law of this state.

For these reasons, Respondents respectfully request that the decision of the Court of Appeals be affirmed, and that this case be remanded to Lexington County to be compelled to arbitration pursuant to the express terms of the parties' Agreement.

Respectfully submitted,

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December 21, 2015

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S.C. Supreme Court

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
Case No. 2012-CP-32-3496
Opinion No. 2015-UP-107 (S.C. Ct. App. Filed March 4, 2015)

Roger R. Riemann .....Petitioner.

v.

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

PROOF OF SERVICE

I hereby certify that I have served the foregoing Brief of Respondents by hand-delivering a copy of the same, on December 21, 2015, addressed to Petitioner's Counsel of Record, Eugene H. Matthews, Esq., 1900 Barnwell Street, Columbia, South Carolina 29201.

December 21, 2015

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