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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2016-000804

Jean P. Derrick, v. Respondent,

Lisa C. Moore. Appellant.

FINAL BRIEF OF APPELLANT

November 10, 2016

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II. DID THE LOWER COURT ERR IN COMPELLING ARBITRATION BEFORE THE RESOLUTION OF FEE DISPUTES BOARD WHEN THE APPELLATE COURT RULES CREATING THE FEE DISPUTES BOARD DO NOT VEST ANY COURT WITH THE JURISDICTION OR AUTHORITY TO COMPEL MANDATORY ARBITRATION BEFORE THE FEE DISPUTES BOARD?

III. DID THE LOWER COURT ERR IN COMPELLING ARBITRATION WHEN THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (S.C. CODE ANN § 15-48-10(b)(3)) EXPRESSLY EXEMPTS "A PRE-AGREEMENT ENTERED INTO WHEN THE RELATIONSHIP OF THE CONTRACTING PARTIES IS SUCH THAT OF LAWYER-CLIENT"?

STATEMENT OF CASE

This appeal arises from the lower court's Orders compelling Appellant to binding arbitration through the Resolution of Fee Disputes Board of the South Carolina Bar.

Respondent is a lawyer who sued her client, Lisa Moore, for additional money and fees she claimed she was owed related to her representation of Ms. Moore in a Family Court action.[1]

[1] The Family Court awarded fees to Respondent and the fees she now seeks to collect from Appellant exceed those awarded by the Family Court.

R. pp. 27-39. Respondent has a long history of suing former clients for additional fees, getting those clients in default and then obtaining default judgments against them. R. pp. 40-47. In this case, Respondent's ploy and scheme did not work because Ms. Moore obtained other legal counsel, answered Respondent's Complaint and filed counterclaims of her own. R. pp. 40-47.

However, when the litigation process no longer suited Respondent, she sought to have the initial action that she filed dismissed and sent to binding arbitration through Fee Disputes Board. R. pp. 95-101. At no point prior to initiating the current lawsuit and, at no point since she has commenced the current lawsuit, has Respondent filed an application with the Fee Disputes Board. Instead, her legal argument to the court below was that a fee agreement which predated the fee dispute in this case and which does not comply with SCRAP, Rule 416, compelled Appellant to participate in forced arbitration before the Fee Disputes Board.

The court below erred in bifurcating the case by mandating that Respondent's initial complaint be referred to the Fee Disputes Board while the Circuit Court maintained jurisdiction over Ms. Moore's counterclaims. R. pp. 24-25. The lower court erred in failing to find that Plaintiff had waived any right she might have to forced arbitration through the Fee Disputes Board by initiating litigation and actively pursuing her case through the Courts. Furthermore, the Circuit Court misapplied the rules governing disputes before the Fee Disputes Board. More specifically, those rules require a client's voluntary consent to the jurisdiction of the Fee Disputes Board *after* a dispute over a fee arises. Finally, the court below erred in finding that the arbitration clause at issue was enforceable under the South Carolina Uniform Arbitration Act. This appeal followed two orders compelling Appellant to mandatory arbitration before the Fee Disputes Board.

ARGUMENT

I. RESPONDENT WAIVED HER RIGHT TO ARBITRATION BY ELECTING TO FILE THIS LAWSUIT.

"Although South Carolina favors arbitration, the right to enforce an arbitration clause may be waived." Wilson v. Willis, (S.C. App. 2016) *citing* Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). A party "bringing a suit based on the contract instead of relying on the arbitration provision constitutes a waiver of the right to arbitrate." Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). In the case now before this Court, that is what Respondent did – she brought "suit based on the contract instead of relying on the arbitration provision" and thereby waived her right to compel arbitration. Hyload *supra.*

To be clear, the issue of waiver was raised in the lower court. At the initial hearing Counsel stated:

> The other point I would say is, she waived it because she filed this lawsuit hoping that she's going to come over here and get my client into default and then when my client gets a lawyer and the lawyer stands up and says 'Huh-uh, we dispute the fee. We think you've committed fraud in the way that you billed her. We think there are other improprieties in this and we want a jury trial, then she says, 'No, no, no. I want a do-over. I want to go to the Fee Dispute Resolution Board even though I'm the one that initiated this lawsuit. There is simply no law for that…"

R. p. 58, *quoting* ll. 3-13. The issue was also raised with Circuit Court at the reconsideration hearing.

> My fourth point that I would make is a fairly obvious point, but I'll make it anyway. And it is this. Ms. Derrick initiated this lawsuit. She filed the original summons and complaint in this action. And she - - this not the first time she has done it. She has done this numerous times where she has sued clients for fees. And so she made her bed.
> She wanted the Court to decide the issues that she brought before the Court. And she can't get a Mulligan or a do-over or a takeaway and file the initial action here and then say, Nope, I don't want - - I take it back. I want to go the Fee Dispute Resolution Board.

R. p. 72-73, *quoting* p. 72, l. 24 – p.73, l. 12.

Despite raising the waiver issue at both hearings before the lower court, the Circuit Court simply did not address waiver in either of its orders. In the first order compelling arbitration before the Fee Disputes Resolutions Board, the lower court's Order provides in total:

> This matter came before the Court on July 14, 2015 as a motion filed by the Plaintiff to compel the Defendant to resolve the fee dispute through the Resolution of Fee Dispute Board of the South Carolina Bar. In the fee agreement signed by Defendant, the agreement directly states that 'any dispute concerning the fee due pursuant to this agreement shall be submitted by the dissatisfied party for a full, final resolution to the Resolution Fee Dispute Board of the South Carolina Bar, pursuant to Rule 416 of the South Carolina Appellate Court Rules." Because the Defendant disputes the fee for numerous alleged reasons, this Court finds that it is proper to take these matters up with the Resolution Fee Disputes Board pursuant to the signed contract. The other counterclaims and potential legal malpractice claim may remain under the Circuit Court jurisdiction. The Plaintiff's motion to compel resolution through the Fee Dispute Board is granted.

R. p. 24.

The lower court also never addressed the waiver issue at the reconsideration hearing. In total, the lower court's Order provides:

> This matter came before the Court on January 27, 2016 as a 59(e) motion to amend the December 4, 2015 Order. Defendant's counsel argues Rule 10 of SCRAP Rule 16 provides that 'consent may be withdrawn' after parties agree to take a fee matter to the Fee Disputes Resolution Board (the Board), however this is an erroneous interpretation of the phrase. The 'consent may be withdrawn' language refers specifically to the email correspondence among the Board, the client and the lawyer. It does not refer to the consent of taking the matter in front of the Board. Furthermore, the South Carolina Uniform Arbitration Act makes clear that the Act does not apply to 'a pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client..." §15-48-10(b)(3). Therefore, the motion for reconsideration is denied.

R. p. 26.

Despite raising the issue of waiver at both motions hearing, the court below never addressed Appellant's waiver issue despite case law holding that a party "bringing a suit based

on the contract instead of relying on the arbitration provision constitutes a waiver of the right to arbitrate." Hyload, Inc. v. Pre-Engineered Prods., Inc., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). This was reversible error that should be corrected by this Court.

II. THE CIRCUIT COURT LACKED THE LEGAL AUTHORITY TO COMPEL BINDING ARBITRATION THROUGH THE FEE DISPUTES BOARD BECAUSE APPELLANT DID NOT CONSENT TO THE JURISDICTION OF THE FEE DISPUTES BOARD AFTER THE DISPUTE AROSE.

Rule 416, SCRAP creates the Resolution of Fee Disputes Board of the South Carolina Bar and the Rule sets forth how parties may have disputes resolved before the Board. In relevant part, Rule 10 of Rule 416, SCRAP states:

> All proceedings hereunder shall be commenced by filing an application in the Office of the Bar, on forms provided by the Bar.

That was simply not done in this case. At no point, did Respondent or Ms. Moore file an "application in the Office of the Bar, on forms provided by the Bar." Nothing in Rule 10 or the other rules that are a part of the SCRAP vests the Circuit Court with the legal authority to compel parties to file such an application or submit fee disputes to the Board despite what might be contained in a written fee agreement that *predates* an actual fee dispute. Yet, that is precisely the effect of the lower court's Orders. In effect, the lower court's orders rewrite the applicable Rules of Appellate Procedure by expanding the application process to include forced arbitration before the Board when ordered by the Circuit Court.

To date, Appellant and her counsel are not aware of any case law or other legal authority taking such an overly expansive reading of Rule 416, SCRAP. In fact, neither Respondent herself, her attorney or the Circuit Court cited a single case or other legal authority that

effectively allows a Circuit Court order to be substituted for "an application in the Office of the Bar, on forms provided by the Bar." In reading other parts of Rule 416, SCRAP it is clear why such case law does not exist: Because Rule 416 contemplates voluntary participation by clients *after* a fee dispute arises. The rules simply do not contemplate that attorneys and lawyers will be able to force clients into mandatory arbitration before the Fee Disputes Board by inserting clauses into their fee agreements before an actual fee dispute arises.

In pertinent part Rule 9 of Rule 416, SCRAP provides:

> RULE EXCLUSIVE UPON CONSENT
> (b) No application will be accepted from an attorney unless accompanied by the client's written consent to jurisdiction and consent to be bound by the final decision of the Board.

If the intent of this Rule were to allow written fee agreements that *predated* actual disputes to be substituted for consent *at the time* an application were filed with the Fee Disputes Board that intent would have been clearly articulated in the Rule itself. It was not but the lower court's orders effectively read this intent into Rule when it was not originally contemplated by the drafters of the Rule. This is reversible error that should be corrected by this Court.

III. THE ARBITRATION CLAUSE AT ISSUE IS UNENFORCEABLE UNDER S.C. CODE ANN. § 15-48-10(b)(3).

The court below erred in enforcing the arbitration clause because pre-agreed arbitration clauses between lawyers and clients are not enforceable under S.C. Code Ann. § 15-48-10(b)(3). While the Courts in South Carolina generally favor arbitration over litigation there are important exceptions to this general rule. One of those exceptions was crafted by the Legislature when they adopted the Uniform Arbitration Act. The Act provides that it "shall not apply to...

> (3) A pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client...

In granting Respondent's Motion to Compel, the court below effectively ignored the legislative directive found in the Code at S.C. Code Ann. § 15-48-10(b)(3). The lower court interpreted this provision as excluding the contract/fee agreement at issue from the ordinary requirements that "it be typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract..." S.C. Code Ann. § 15-48-10(a). Such an interpretation misconstrues the purpose and intent of the Uniform Arbitration Act.

Like the Federal Arbitration Act, the South Carolina Uniform Arbitration Act was drafted as a legislative response to court rulings refusing to enforce arbitration clauses in general. The Legislature sought to correct what it saw as judicial overreach and passed the South Carolina Uniform Arbitration Act which legislatively mandated that arbitration clauses be enforced by the courts. In so doing, however, the Legislature also recognized that certain provisions needed to be in place to safe guard the Constitutional right to trial by jury. It is for this reason that the Legislature requires that "arbitration pursuant to this Chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract." The Legislature also recognized that certain contracts and disputes were not suited for sweeping and binding arbitration clauses. One of those types of contracts is attorney client fee agreements.

The court below erred when it enforced the arbitration clause at issue over the legislative protection and mandate found in S.C. Code Ann. § 15-48-10(b)(3). According to the lower court's interpretation, attorney client fee agreements were afforded none of the protections contemplated by the Legislature. This was reversible error that should be corrected by this Court.

CONCLUSION

For the reasons outlined above, this Court should issue an Order(s) reversing the lower court's orders compelling Appellant to arbitrate through the Fee Disputes Board.

Respectfully submitted,

November 10, 2016

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the final brief of appellant complies with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings,* 407 S.C. 607, 757 S.E. 2d 421 (April 15, 2014).

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