THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Charleston COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Bentley Price, Circuit Court Judge

Case No.: 2019-CP-10-00178

J. DANIEL MAHONEY..Plaintiff / Respondent,

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III............ Defendants/Appellants.

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SC Court of Appeals

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ISSUE ON APPEAL

1. When both the Federal Arbitration Act and the South Carolina Arbitration Act provide that the Court must enforce the method of arbitrator selection provided for in an arbitration provision, did the Court err altering the manner in which arbitrators would be selected?

STATEMENT OF THE FACTS

A. The Bylaws

The Muhler Company, Inc. ("Muhler") bylaws require arbitration of all claims by, against, or involving the corporation. As Muhler believed the disputes would largely concern the financial affairs of the corporation, the arbitration clause provided that the corporation's CPA would be one of three arbitrators, with each party to a dispute having the ability to appoint their own arbitrator.

Plaintiff/Respondent J. Daniel Mahoney ("Mahoney") was the CEO of Muhler and, as part of his duties, enforced the corporate bylaws. It is only two years after arbitration was made part of the bylaws and he himself is the plaintiff that he now objects to arbitration as provided in the bylaws. **Bylaws, Article XIII**.

B. Procedural Facts

Mahoney has filed not one but two lawsuits using separate counsel for each. Defendants asserted their right to arbitrate in each suit. **December 17, 2018 Motion to Compel (2018-CP-10-05077); February 15, 2019 Motion to Compel (2019-CP-10-00178)**. In the first suit (2018-CP-10-05077, for wrongful termination of Mahoney as CEO), Judge Price enforced the arbitration clause as provided for in the bylaws and this matter is proceeding in arbitration. **May 17, 2019 Order (2018-CP-10-05077)**. The second lawsuit (2019-10-CP-00178) was a claim by

Mahoney seeking the sale of his stock upon his termination, which occurred September 18, 2018. Judge Price ordered arbitration in the second suit, but:

a. His first order appointed Judge Early to serve as an arbitrator rather than the corporation's CPA and was erroneously entered in the wrongful termination suit. **June 5, 2019 Order (2018-CP-10-05077)**. Realizing the order was filed in the wrong suit, Judge Price vacated that order. **June 14, 2019 Order (2018-CP-10-05077)**;

b. Prior to entry of the June 5 Order in the wrong suit, the Parties had submitted proposed orders. Defendants objected to Plaintiff's proposed order (**see June 5, 2019 Objections**), *inter alia*, on the grounds that the key component of the arbitration was the requirement that the company's CPA serve as an arbitrator;

c. Judge Price rejected Defendants' objections and ordered that the arbitrator selection clause be struck and that the arbitrators be appointed pursuant to S.C. Code Ann. § 15-48-30. **June 24, 2019 Order (2019-CP-10-00178)**. Ironically, it is this very code section that states "[i]f the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed."

This appeal timely follows the entry of this Order, filed and served on June 24, 2019, as it denied Defendants' right to arbitrate pursuant to the terms of the corporate bylaws.

LEGAL STANDARDS

The denial of a party's right to arbitration is immediately appealable. *E.g.*, *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008). Parties are entitled to arbitrate in the manner provided for in the arbitration provision. *See* 9 U.S.C. § 4 (a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" is entitled to an order "directing that such arbitration proceed in the manner provided for in such agreement"); 9 U.S.C. § 3 (a court ordering arbitration must stay the case "until such arbitration has been had in accordance with the terms of the [arbitration] agreement").

The right to select arbitrators in the manner provided for in the arbitration provision is an arbitration right expressly provided in both State and Federal statutes. *See* S.C. Code Ann. § 15-48-30 ("If the arbitration agreement provides a method of appointment of arbitrators, this method

shall be followed."); 9 U.S.C. § 5 ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.");

Additionally, orders affecting the mode of trial are immediately appealable. *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable").

SUMMARY OF ARGUMENT

The trial court erred and exceeded its authority in striking the arbitrator selection clause and substituting another mode of selecting arbitrators for the following reasons:

A. Mahoney is collaterally estopped from arguing the mode of appointment provision is not enforceable because the same judge ordered arbitration pursuant to that provision in a prior suit between the same parties;

B. The trial court's order is in error because:

   a. The South Carolina and Federal arbitration acts expressly require that an arbitrator selection provision be enforced;

   b. A court cannot decide issues other than arbitrability when considering a motion to compel arbitration;

   c. A court may not rewrite a valid agreement between parties simply because it finds it or part of it inequitable, especially where the court's rewriting contradicts the court's prior order entered in a suit between the same parties;

   d. The record is devoid of evidence supporting the trial court's finding of inequity, and all evidence in the record supports the reasonableness of including the corporation's CPA as an arbitrator of a financial dispute regarding the corporation.

The trial court's order must be vacated, and arbitration ordered pursuant to and in the manner provided in the corporate bylaws, in keeping with the trial court's order entered pursuant to the arbitration provision in the prior suit between the same parties.

ARGUMENT

The trial court's order improperly denies Defendants a contractual arbitration right and must be vacated for the following reasons.

I. Collateral Estoppel

A party is collaterally estopped from relitigating an issue that was decided in a previous action between the two parties. *E.g.*, *Carolina Renewal, Inc. v. S. C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E. 2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.*

Judge Price's prior order in the employment suit between these same parties compelled arbitration pursuant to the corporate bylaws, necessarily including the enforcement of the arbitrator selection clause. **May 17, 2019 Order (2018-CP-10-05077)**.

Accordingly, Mahoney was and is collaterally estopped from arguing in this case that the arbitrator selection clause should be struck from the corporate bylaws.

II. The Court Erred.

A. State and Federal Law Require Enforcement of Arbitrator Selection Provisions

Under the South Carolina Uniform Arbitration Act, S.C Code Ann. § 15-48-10 *et seq.*, "[i]f the arbitration agreement provides a method of appointment of arbitrators, *this method shall be followed*." S.C. Code Ann. § 15-48-30 (emphasis added). Under the Federal Arbitration Act, "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method *shall be followed*." 9 U.S.C. § 5 (emphasis added). These statutes divest the courts of any discretion with regard to arbitrator selection when an arbitration

provision designates the method of selection. *See also* 9 U.S.C. § 4 (a party "aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" is entitled to an order "directing that such arbitration proceed *in the manner provided for in such agreement*" (emphasis added)).

The Court's order denies Appellants the right to select arbitrators as provided in the arbitration provision and is subject to reversal.

B. When Considering a Motion to Compel Arbitration, the Court's Authority is Limited to Determining Arbitrability

When considering a motion to compel arbitration, the sole issue before the court is whether the parties' contractual agreement renders the dispute arbitrable. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85, 123 S.Ct. 588, 591–92 (2002). All other questions, including "procedural" questions and questions regarding the interpretation of the agreement to arbitrate, are for the arbitrator to decide in the first instance, not the court. *Id.* at 85, 123 S.Ct. at 592; *Dockser v. Schwartzberg*, 433 F.3d 421, 425 (4th Cir. 2006) ("We conclude that the question of the number of arbitrators is one of arbitration procedure, and that the parties' agreement does nothing to overcome the presumption that such questions are for arbitral, rather than judicial, resolution.").

The manner of arbitrator selection is a procedural matter that raises no questions of arbitrability. The trial court therefore exceeded its authority in altering the manner in which the third arbitrator would be selected, and its June 24, 2019 order is subject to reversal on this basis.

C. Courts May Not Rewrite Parties' Agreements

Furthermore, even if the Court had authority to consider questions outside of arbitrability, is well-settled that the Court is not permitted to rewrite an agreement between parties. *E.g.*, *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) ("It is not the

function of the court to rewrite contracts for parties."); *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 236 (Ct. App. 1987) ("Parties to a contract have a right to make their own contracts, and when the contracts they make are capable of clear interpretation, the court's province is confined to the enforcement of the contract as written; the court cannot exercise its discretion as to the contents of the contract or substitute its own construction for an agreement clearly entered into between the parties.").

Nor are Courts permitted to superimpose their opinions on the agreement of the parties. *E.g.*, *Texcon, Inc. v. Anderson Aviation, Inc.*, 284 S.C. 307, 308, 326 S.E.2d 168, 169 (Ct. App. 1985) ("courts cannot rule on [contractual provisions'] wisdom or substitute their interpretation for the agreement clearly entered into between the parties"); *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997) ("The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully."). As these precedents indicate, a finding of inequity is not a valid basis for striking a contractual provision.

D. No Evidence in the Record Supports a Finding of Inequity

Setting aside that the trial court could not reach the question because it is not a question of arbitrability, the Court erred in finding the arbitrator selection provision inequitable. **June 24, 2019 Order (2019-CP-10-00178)**. The argument that the arbitrator selection clause unfairly benefits Appellants was raised at oral argument. There was and is nothing in the record to support the Court's justification. Because inequity had not been raised previously, Appellants submitted an affidavit of Appellant Hay demonstrating that the provision is not inequitable. Respondents did not submit any affidavits, and so there is <u>no</u> evidence in the record to support Respondent's counsel's argument. **Hay Affidavit**.

The affidavit establishes the following facts:

- the arbitration provision was not adopted to disadvantage anyone, but rather to streamline resolution of disputes;
- Mahoney, as CEO of Muhler, had a duty to act in the best interest of the corporation;
- Mahoney remained CEO of Muhler for two years after the arbitration provision was adopted and did not object to it during that time;
- As CEO of Muhler, it was Mahoney, and not Hay, who had a working relationship with the CPA (Mr. Kent) who would serve as an arbitrator in this dispute;
- Because of Mahoney's working relationship with Mr. Kent, Mr. Kent was hired as CPA of a separate company Mahoney and Hay were involved in.

Hay Affidavit at 1–2. There is no evidence to the contrary.

Additionally, the wisdom of the arbitrator selection as set forth in the agreement is evident as most disputes in a closely held corporation will be financial in nature. Included is this dispute, which centers around the calculation of the value of shares based on the corporation's Earnings Before Interest, Tax, Depreciation, and Amortization ("EBITDA"). The corporation's accounting firm (i) is well-acquainted with the accounting concepts involved in valuing the shares and (ii) is the organization most familiar with the corporation's finances for purposes of that valuation. The inclusion of the accounting firm's employee was intended to, and would, ensure a fair and accurate process that streamlines resolution of the dispute. As to the other arbitrators, each party appoints one. This is a logical and fair method for resolving a dispute involving the valuation of a stockholder's shares.

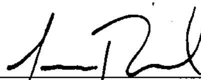
Because the court's finding of inequity is entirely unsupported in the record, this Court should find that the trial court abused its discretion (in addition to exceeding its authority) in striking the Parties' arbitrator selection clause.

CONCLUSION

The Parties to this lawsuit are all bound by the terms of a valid, enforceable arbitration agreement contained within Muhler's coporate bylaws. The trial court's order must be vacated and the case remanded with instructions to enter an order compelling arbitration pursuant to the express terms of the corporate bylaws.

Respectfully submitted,

This 22nd day of July, 2019
Charleston, South Carolina



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PROOF OF SERVICE

I certify that I have served the Notice of Appeal, Appellants' Initial Brief, Appellants' Designation of Matter to be Included in the Record on Appeal on opposing counsel by depositing a copy in the United States Mail, Postage prepaid, on July 22, 2019, addressed to Respondent's attorneys of record as follows:

Clay McCullough, Esq.
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clay@mklawsc.com

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By

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July 22, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *J. Daniel Mahoney v. The Muhler Company, Inc. and Henry M. Hay, III*
Case No.: 2019-CP-10-00178

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the following:

1. Notice of Appeal;
2. Initial Brief of Appellants;
3. Designation of Matter to be Included in the Record on Appeal; and
4. Proof of Service;

I also enclose the $250.00 filing fee. Transcripts were ordered on June 3rd, but have not yet been delivered.

Please file the originals and return the file-stamped copies to me in the self-addressed, stamped envelope provided.

With kind regards,

ANDREW K. EPTING, JR., LLC

Angela Gross
Legal Assistant to Jaan G. Rannik
/agg
Enclosures – as stated
cc: Clay McCullough, Esquire (w/enc.)
The Julie Armstrong (w/enc.)

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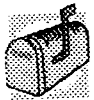
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