THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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
Appellate Case No. 2019-001237

J. DANIEL MAHONEY.....Respondent,

v.

THE MUHLER COMPANY, INC. and HENRY M. HAY, III, in his individual capacity, Defendants/Appellants..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that a Petition for Rehearing was made and finally ruled upon by the Court of Appeals on February 5, 2020.

QUESTION PRESENTED

1. Whether the refusal to order arbitration pursuant to the terms of the controlling arbitration provision is immediately appealable

INTRODUCTION

Petitioners, The Muhler Company, Inc. ("Muhler") and Henry M. Hay, III, were denied their arbitration rights provided for in an arbitration agreement and guaranteed by the South Carolina and Federal Arbitration Acts. Petitioners appealed.

The Court of Appeals granted Respondent J. Daniel Mahoney's ("Mahoney's") motion to dismiss the appeal because the order appealed from was styled as an order "*granting*" arbitration, despite denying Petitioners' right to the method of appointment of arbitrators set forth in the arbitration provision. This denial was plain error, as Section 15-48-30 of the South Carolina Code provides, "[i]f the arbitration agreement provides a method of appointment of arbitrators, this *method shall be followed*" (emphasis added). The lower court's authority extended to enforcing the arbitration provision as written,[1] not rewriting it, and rewriting it is a denial of the right to arbitration pursuant to a valid and enforceable arbitration clause.

STATEMENT OF THE CASE

A. The Bylaws

The bylaws of Petitioner Muhler include an arbitration provision stating:

> Any and all disputes, claims, or controversies (i) relating to the Corporation, (ii) brought against the Corporation by or on behalf of

[1] *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002).

> any third party or any shareholder of the Corporation, or (iii) between shareholders of the Corporation (hereinafter "Disputes"), shall, upon the demand of any party to such Dispute, be resolved via binding and final arbitration in accordance with the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10 et seq. (the "UAA").

Bylaws, Article XIII (Appendix 0105).[2] With regard to the selection of arbitrators, the bylaws further state:

> There shall be three arbitrators, each of whom shall be a Certified Public Accountant ("CPA") licensed in the State of South Carolina. The claimant or claimants shall select one arbitrator within fifteen (15) days following notice of the demand for arbitration; provided. that. if there is more than one claimant, such arbitrator shall be selected by the majority vote of the claimants. The respondent or respondents shall select one arbitrator within fifteen (15) days following notice of the demand for arbitration; provided, that, if there is more than one respondent, such arbitrator shall be selected by the majority vote of the respondents. The third arbitrator shall be an employee of the Corporation's accountant. This third arbitrator will be appointed even in the event that the corporation is a claimant or respondent.

Id.

Mahoney was the CEO of Muhler for a decade and, as part of his duties, enforced the corporate bylaws and worked directly with Muhler's CPA. It is only two years after arbitration was made part of the Muhler bylaws and he himself is the plaintiff that he now seeks to alter how the arbitration panel is appointed.

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[2] Anticipating that disputes that would arise would be financial in nature, arbitrators had to be CPAs and one would be the company's CPA, being the person most knowledgeable of the company's history and finances.

B. Procedural Facts

1. In the Trial Court

Mahoney has filed not one but two lawsuits using separate counsel for each. Petitioners 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) (Appendix 0092, 0097).** 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, **May 17, 2019 Order (2018-CP-10-05077)(Appendix 0086)**, and this matter was arbitrated in December 2019, with an order issued by the arbitration panel on December 12, 2019. **Arbitration Order (Appendix 0079).** The second lawsuit (2019-10-CP-00178) was a claim by Mahoney seeking the sale of his stock upon his termination on September 18, 2018. The trial court, pursuant to the exact same provision as was the subject of its Order dated May 17, ordered arbitration in the second suit, but the Court's path to this result was uneven and different:

a. The Court first issued an order appointing Judge Early to serve as the third arbitrator rather than the corporation's CPA. The order was erroneously entered in the wrongful termination suit, **June 5, 2019 Order (2018-CP-10-05077) (Appendix 0087)** and was later vacated. **June 14, 2019 Order (2018-CP-10-05077) (Appendix 0089);**

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)(Appendix 0099)**, *inter alia*, on the grounds that the key component of the arbitration was the requirement that the company's CPA serve as an arbitrator and that all arbitrators be CPAs;

c. Judge Price rejected Petitioners' objections and, withdrawing Judge Early as an arbitrator, instead ordered that the arbitrator selection clause be struck and that the arbitrators be appointed pursuant to S.C. Code Ann. § 15-48-30.[3] **June 24, 2019 Order (2019-CP-10-00178) (Appendix 0090).** This very code section states "[i]f

[3] This section contains a default method of selecting arbitrators that should be followed if the arbitration provision does not specify how the arbitrators will be selected. That method is that each party selects one arbitrator and the two party-appointed arbitrators select the third. This section also requires that an arbitrator selection clause be enforced, however.

the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed."

2. *In the Court of Appeals*

The Trial Court's Order was timely appealed on July 22, 2019, **Notice of Appeal (Appendix 0063)**, and Petitioners filed their initial brief the same day. **Appellants' Initial Brief (Appendix 0066)** Respondent moved to dismiss the appeal on August 5, 2019, **Motion to Dismiss (Appendix 0023)**, and the motion was granted by a single Court of Appeals Judge on October 25, 2019. **Order Granting Motion to Dismiss (Appendix 0002)** Petitioners sought rehearing, and their petition was received in the Court of Appeals on November 8, 2019. **Petition for Rehearing (Appendix 0004)**. The petition was denied on February 5, 2020. **Order Denying Petition (Appendix 0001)**. This petition for a writ of certiorari timely follows.

ARGUMENT

I. Whether an Order Styled as "Granting" a Motion to Compel Arbitration That Refuses to Compel Arbitration Pursuant to the Terms of the Arbitration Provision is Immediately Appealable

It is a matter of first impression whether, under South Carolina law, an order is immediately appealable that, while styled as "granting" a motion to compel arbitration pursuant to an arbitration provision, actually denies an arbitration right set forth in that provision.[4] This is a significant question at the heart of a policy that is itself significant — the strong state and federal policies in favor of arbitration.[5]

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[4] *See infra* Part I.B. Orders denying a motion to compel arbitration are immediately appealable. S.C. Code Ann. § 15-48-200(a); *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 428 S.C. 261, 266, 834 S.E.2d 204, 206 (Ct. App. 2019), reh'g denied (Nov. 15, 2019) ("an appeal may be taken from '[a]n order denying an application to compel arbitration'" (citing statute)).

[5] *E.g.*, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." (citing *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999)); *Zabinski v. Bright Acres Assocs.*,

A. Form Over Substance

In South Carolina, the substance of an order, rather than its label, determines whether it is immediately appealable. *See Spalt v. S.C. Dep't of Motor Vehicles*, 423 S.C. 576, 816 S.E.2d 579 (2018) ("Whether an order is final depends—as we explained in *Charlotte-Mecklenburg*—on the substance of the order . . . . The label given to the order is not determinative of its immediate appealability." (citing *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010)); *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303 & n.6, 705 S.E.3d 475, 478 (Ct. App. 2011) ("We believe a narrow construction of section 14–3–330(2)(c) requires us to focus on the effect of the order, not the label given to the motion or to the order granting it."); *Wetzel v. Woodside Dev. Ltd. P'ship,* 364 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (holding an order granting a motion to set aside default was immediately appealable because it had "the effect of . . . granting a motion to dismiss under Rule 12(b)(5), SCRCP, since it ends the action as to [one party]"); *cf. Hackworth v. Greywood at Hammett, LLC,* 385 S.C. 110, 114–15, 682 S.E.2d 871, 874 (Ct. App. 2009) (analyzing a motion styled a "motion to strike" but that challenged a theory of recovery as a motion to dismiss under 12(b)(6)).

B. The Trial Court's Order Denies the Right to Arbitrate Pursuant to the Terms of the Governing Arbitration Provision

The trial court order appealed from, though styled an order "granting" the motion to compel arbitration, in reality denies Petitioners an arbitration right expressly set forth in the arbitration provision and guaranteed by both the state and federal arbitration acts; namely, the right to contractually establish the manner in which the arbitrators will be selected. The order

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346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The policy of the United States and South Carolina is to favor arbitration of disputes.").

denies arbitration by ordering arbitration on terms other than what are set forth in the arbitration provision.[6]

To illustrate, if a court ordered arbitration to proceed but changed the arbitration provision so that the arbitration (i) was not binding, (ii) was to be performed pursuant to the South Carolina Rules of Civil Procedure with full discovery, and (iii) was to proceed not in front of arbitrators selected by the parties but in front of an arbitrator the court selected, the effect would be to deny arbitration because the order removes the very benefits of arbitration that cause parties to seek to resolve their disputes in that forum. The ability to define how arbitrators will be selected is an inalienable right within the right to arbitrate.

Courts are not permitted to revise arbitration provisions—*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.")—and so doing it is a denial of the right to arbitration pursuant to a valid and enforceable arbitration clause.

C. An Order Partially Denying a Motion to Compel Arbitration Is Immediately Appealable

In light of the strong state and federal policy in favor of arbitration,[7] and because any order denying a motion to compel arbitration is immediately appealable, an order that denies such a motion in part is immediately appealable. The alternative is to require the parties to engage in an arbitration proceeding that will be void and that will be reversed years hence, only to be arbitrated again. See *infra* Part II.

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[6] This is without regard to the *res judicata* effect of the trial court's grant of Petitioners' motion to compel arbitration pursuant to the same arbitration provision in a separate case. That arbitration was performed pursuant to the provision, was tried in December 2019, and an order was entered on December 12, 2019.

[7] *Supra* note 5.

D. The Trial Court Assumed a Function Properly Left to the Arbitrators

When faced with a motion to compel arbitration, the function of the court is limited to the Boolean determination of arbitrability — *i.e.*, whether the dispute in question is subject to arbitration or not. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–85 (2002). All other questions, including "procedural" questions and questions regarding the appointment of arbitrators, are for the arbitrator to decide in the first instance, not the court. *Id.* at 85; *Dockser v. Schwartzberg*, 433 F.3d 421 (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.").

In reconstituting the panel of arbitrators, the trial court improperly exercised authority beyond that of determining arbitrability. When a court takes action other than ordering arbitration pursuant to the terms of the arbitration provision, the state and federal arbitration acts provide for an immediate appeal. *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 85–86, 121 S. Ct. 513, 519, 148 L. Ed. 2d 373 (2000) ("§ 16 generally permits immediate appeal of orders hostile to arbitration, whether the orders are final or interlocutory").

II. Exceptional Circumstance Warranting Grant of Certiorari

The trial court's order is immediately appealable, as discussed above. In addition to presenting a novel question of law, the circumstances of this appeal warrant a grant of certiorari.

This Court may grant certiorari to review even an order that is not immediately appealable if there are exceptional circumstances. *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009). This Court has found that exceptional circumstances warranting certiorari exist when a decision by this Court "best serves the interests of judicial economy by eliminating the numerous inevitable appeals. . . ." *Id.* at 472, 674 S.E.2d at 160–61.

Here, the trial court committed plain error in refusing to enforce the arbitrator selection clause contrary to express statutory language, guaranteeing that the trial court's order will be reversed. The certainty of reversal presents an exceptional circumstance warranting a decision by this Court.

A. Clear Error — Arbitrator Selection Clauses MUST Be Enforced

Under South Carolina and Federal law, arbitrator selection clauses must be enforced by the court. S.C. Code Ann. § 15-48-30 ("If the arbitration agreement provides a method of appointment of arbitrators, this method *shall be followed*." (emphasis added)); 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*." (emphasis added)). The trial court struck the parties' arbitrator selection provision and then substituted its own arbitrator selection process. In substituting its own method, the trial court cited and quoted as support the very statute that says the substitution is prohibited and that the original method must be enforced. *See* **Order (June 24, 2019)** at ¶ 4 (**Appendix 0090**). There is no interpretation required; the error of the trial court's order is apparent on its face.

As the ancient maxim goes, the law abhors useless acts. If this petition is denied, whatever end-result is reached by the panel appointed by the trial court's substituted method will be reversed, because it will be founded upon the disregard of the law regarding arbitrator selection. Further, reversal will occur only after an arbitration with the improperly constituted panel and second trip to the appellate courts to decree that the arbitration with the Court's substituted panel was void and then remand for arbitration pursuant to the controlling arbitrator selection method. In essence, Petitioners request this Court determine this issue now rather than in three-years' time.

CONCLUSION

Petitioners request this Court reverse the Court of Appeals decision and hold that this case is immediately appealable. Such a ruling would itself amount to a determination of the merits of this appeal and, as a consequence, enter an order remanding the case to the trial court with instruction to compel arbitration with a panel constituted in the manner set forth in the arbitration provision.

Respectfully submitted:

This 28th day of February, 2020
Charleston, S.C.

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PROOF OF SERVICE OF PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

I certify that I have served the Petition for Writ of Certiorari and Appendix on opposing counsel by depositing a copy in the United States Mail, Postage prepaid, on February 28, 2020, addressed to Respondent's attorneys of record as follows:

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