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S.C. SUPREME COURT

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
Supreme Court Case No. 2020-000370

J. Daniel Mahoney.....Respondent,

v.

The Muhler Company, Inc. and Henry Hay III, in his individual capacity..... Petitioners.

RESPONDENT'S RETURN TO PETITION FOR CERTIORARI

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ATTORNEYS FOR RESPONDENT

Respondent, J. Daniel Mahoney, submits this Return to this Court pursuant to Rule 240(e), S.C.A.C.R., opposing Petitioners', The Muhler Company, Inc. and Henry M. Hay, III, Petition for Certiorari of the South Carolina Circuit Court Order dated June 24, 2019 (the "Order"), which was appealed to the South Carolina Court of Appeals and subsequently dismissed on October 25, 2019. The South Carolina Court of Appeals further denied Petitioner's Petition for Rehearing on February 5, 2020. This Petition for Certiorari now follows. The Order appealed from, to compel arbitration, is not an immediately appealable order. The Order was correct, and thus, Appellant's Petition for Certiorari should be denied.

ARGUMENT

I. The South Carolina law is settled—an order compelling arbitration is not one that is immediately appealable and therefore Petitioners' Petition for Rehearing should be denied.

Section 200 of The Uniform Arbitration Act, S.C. Code Ann. § 15-48-200, provides which arbitrable issues may be appealed. An appeal may be taken from:

- (1) An order denying an application to compel arbitration made under Section 15-48-20;
- (2) An order granting an application to stay arbitration made under Section 15-48-20(b);
- (3) An order confirming or denying confirmation of an award;
- (4) An order modifying or correcting an award;
- (5) An order vacating an award without directing a rehearing; or
- (6) A judgment or decree entered pursuant to the provisions.

This list is exhaustive—the statute does not permit any other arbitrable matters that may be immediately appealed. Furthermore, in *Heffner v. Destiny*, this Court held that an order compelling arbitration is not immediately appealable because it is not expressly provided for in S.C. Code Ann. § 15-48-200. 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). This Court stated that “by application of the rule of statutory construction ‘*expressio unius est exclusion alterius*’ (the mention of one is the exclusion of another), all other orders related to arbitration are not

immediately appealable.” *Id.*; see also *Toler’s Cove Homeowners Ass’n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003). Therefore, if it does not appear in the list set forth in the statutory provision, it is not an immediately appealable issue.

Moreover, an interlocutory order that is not governed by a particularized appealability statute is not immediately appealable unless it fits into one of the subsections listed in S.C. Code Ann. § 14-3-330. However, the *Heffner* court held that any argument advanced asking to apply S.C. Code Ann. § 14-3-330 “to determine the appealability of this order [compelling arbitration] is without merit.” *Heffner*, 321 S.C. at 538, 471 S.E.2d at 136. “To apply the general appealability provisions of § 14-3-330 would conflict with the more specific provisions of § 15-48-200 regarding the appealability of orders relating to arbitration.” *Id.* (citing *National Advertising Co. v. Mount Pleasant Board of Adjustment*, 312 S.C. 397, 440 S.E.2d 875 (1994) (specific laws prevail over general laws)). Thus, this Court need only look to the list of appealable arbitration issues that are set forth in S.C. Code Ann. § 15-48-200, and an order compelling arbitration is not one that is immediately appealable.

Here, the trial court’s Order is interlocutory—and most importantly, it does not fall within one of the categories listed in the Uniform Arbitration Act, S.C. Code Ann. § 15-48-200(a). The trial court Order is one compelling arbitration, and thus under *Heffner*, is not an immediately appealable order.

II. Petitioners are incorrect when they state arbitrator selection clauses must be enforced.

Petitioners’ argument that arbitration selection clauses “must be enforced” is incorrect. The South Carolina Uniform Arbitration Act provides that “[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon

such grounds as exist at law or in *equity* for the revocation of any contract.” S.C. Code Ann. § 15-48-10 (emphasis added).

The trial court Order did not deny Petitioners their right to arbitration. It merely ruled that their arbitrator selection clause was inequitable and applied the Uniform Arbitration Act default rule for selecting an arbitrator. The trial court exercised its power under the Uniform Arbitration Act when it ruled the arbitrator selection clause was inequitable and then applied the default provisions for selecting arbitrators under S.C. Code Ann. § 15-48-30. Petitioners are in no way being denied their right to arbitration—quite the opposite, arbitration is being compelled under the trial court’s Order. Petitioners’ right to arbitration is not being denied just because one of the provisions of the arbitration clause was ruled manifestly inequitable. The trial court ordered that arbitration proceed, but the manner in which the arbitrators are selected must be done in an equitable fashion, rather than to stack the deck against Respondent and permit Appellant Henry M. Hay, III’s own personal accountant to serve as arbitrator—which is precisely why the trial court applied the Uniform Arbitration Act’s default provision for the appointment of arbitrators.

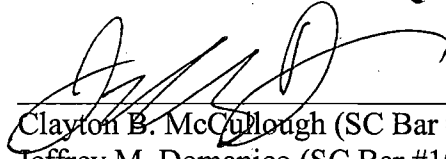
CONCLUSION

Therefore, for the reasons set forth herein, Respondent respectfully requests this Court deny Petitioners’ Petition for Certiorari and this matter referred to arbitration as described in the trial court Order.

[SIGNATURE PAGE TO FOLLOW]

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

March 16, 2020
Charleston, South Carolina

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RESPONDENT'S PROOF OF SERVICE

I hereby certify that a true and correct copy of *Respondent's Return to Petition for Certiorari* has been served upon the following by mailing a copy, properly addressed and with sufficient postage affixed thereto, on this 16th day of March, 2020.

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