THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. 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.: 2020-000370

J. DANIEL MAHONEY..... Respondent,

v.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR APPELLANTS

Petitioners The Muhler Company, Inc. and Henry M. Hay, III (collectively "Muhler") provide this reply in support of their Petition for a Writ of Certiorari (the "Petition") pursuant to Rule 242(g), of the South Carolina Appellate Court Rules.

I. The Order is Immediately Appealable

Respondent contends that, because the trial court's order "grants" the motion to compel arbitration, it is not immediately appealable. As noted in the Petition however, the substance of an order governs over the label it is given. Petition at 5. The order, in declining to enforce the arbitrator selection clause, is hostile to arbitration; such orders are immediately appealable.

The strong state and federal policies in favor of arbitration have been repeatedly remarked upon by the courts. The immediate appealability of orders hostile to arbitration is a manifestation of that policy. *See Gilmer v. Interstate / Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (noting that the Federal Arbitration Act "ensure[s] that district court orders hostile to arbitration agreements can be immediately appealed"). The appealability of an order denying an arbitration right must not be limited to those orders with specific titles or that use specified words; otherwise, artful styling of an order that "grants" arbitration while removing the benefits thereof would not be appealable, contrary to the purpose of the State and Federal acts.

That immediate appealability should extend to an order declining to enforce an arbitrator selection clause is evidenced by the inclusion of the provision in both the State and Federal Acts requiring the enforcement of such clauses. S.C. Code Ann. § 15-48-30; 9 U.S.C. § 5. The alternative is the denial of an arbitration right and the mandating of a void proceeding that must be completed before appellate review may be had.

II. The Trial Court Erred

Respondent argues that arbitrator selection clauses need not be enforced where grounds "exist at law or in equity for the revocation of any contract." Opposition at 3 (quoting S.C. Code Ann. § 15-48-10). Respondent has provided no authority to support the contention that a finding of "inequity" is sufficient to invalidate an unambiguous arbitrator selection provision; indeed there is no basis here for declining to enforce the provision.

A. "Inequity" Is Not a Basis for Declining to Enforce a Provision

The trial court found that the provision was "inequitable," meaning unfair toward one party. But it is not within a court's purview to substitute its own judgment regarding parties' agreements and rewrite them. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167,171,568 S.E.2d361, 363 (2002) ("It is not the function of the court to rewrite contracts for parties.") Rather, courts are bound to enforce unambiguous provisions "regardless of [their] wisdom or folly, or the parties' failure to guard their rights carefully." *Lindsay v. Lindsay*, 328 S.C. 329, 340, 491, S.E.2d 583, 589 (Ct. App. 1997); *Texcon, Inc. v. Anderson Aviation, Inc.*, 284 S.C. 307, 308, 326 S.E.2d 168, 169 (Ct. App. 1985) ("courts cannot rule on [a provision's] wisdom").

Respondent argues that portions of the arbitration provision may be revoked "upon such grounds as exist at law or in equity for the revocation of any contract." Return at 2–3 (citing S.C. Code § 15-48-10). But, no authority is cited in support of the proposition that "inequity" is such a ground. This Court has previously noted that these grounds include fraud, duress, and unconscionability. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24 (2007). None of these was found by the trial court; none was alleged by Respondent.

B. There Was No Basis for the Trial Court's Finding of Inequity

Even were a finding of inequity a valid basis for declining to enforce the arbitrator selection clause, the trial court had no evidence before it on which to base such a finding. Respondent's counsel argued during oral argument before the trial court that the company's CPA—who would serve as an arbitrator pursuant to the arbitrator selection provision—has a close personal connection with Petitioner Hay, and his inclusion as an arbitrator would therefore be inequitable. Respondent advances the same argument in opposition to the Petition. Opposition at 3.

No evidence whatsoever was presented to the trial court to substantiate this claim. In contrast, Petitioner Hay produced an affidavit noting that it was *Respondent* and not Hay who had worked most closely with the CPA during Respondent's tenure as CEO of the company, which lasted for two years following the adoption of the arbitration provision. The trial court erred in finding inequity without evidence supporting such a finding.

III. Conclusion

Petitioners renew their request that the Court of Appeals' decision be reversed and enter an order remanding the case to the trial court with instruction to compel arbitration pursuant to the terms of the arbitration provision.

[signature on following page]

Respectfully submitted:

This 5th day of May, 2020
Charleston, S.C.

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