

The State of South Carolina
In the Supreme Court

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Dec 18 2020

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

S.C. SUPREME COURT

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 BRIEF OF PETITIONERS

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ARGUMENTS IN REPLY

I. MAHONEY DID NOT CONTEST THE VALIDITY OF THE ARBITRATION PROVISION BEFORE THE TRIAL COURT

Mahoney's brief is replete with statements that the arbitration provision governing the parties' disputes is invalid and unenforceable. For example:

[T]here is a strong claim that the Arbitration Provision within the Muhler Bylaws was never enforceable as to Mahoney's minority shareholder claims.

Respondent's Brief at 7. For another, "Respondent **never** agreed to be bound to an arbitration provision." *Id.* For a third:

There is NO agreement to arbitrate — there is certainly no written agreement.

Respondent's Brief at 8.

These challenges to the validity or enforceability of the arbitration provision are not preserved for appeal, as further discussed in Petitioner's Motion to Strike filed contemporaneously herewith. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

II. THE ARBITRATOR SELECTION PROVISION IS NOT UNFAIR TO MAHONEY, LET ALONE UNCONSCIONABLE OR ILLEGAL

Mahoney repeatedly states that the arbitrator selection clause is "unfair" to him, but there is not one shred of evidence in the record to substantiate this claim. On the contrary, the evidence in the record establishes the opposite — that *Mahoney* had the relationship with the

company's CPA, not Mr. Hay. **Appendix 0107** (HH affidavit).¹ The uncontested evidence before the trial court establishes the following:

- Mahoney was the CEO of Muhler and owed fiduciary duties to the company;
- 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 strong working relationship with Mr. Kent, Mr. Kent was hired by Mahoney as CPA of a separate company Mahoney and Hay had a controlling interest of; and
- Mahoney remained CEO of Muhler for two years after the arbitration provision was adopted.

Appendix 0107 (Hay Affidavit at 1–2). There is no evidence to the contrary.

The provision was not adopted to gain some advantage over Mahoney; it was intended to minimize expense to the company by requiring arbitration of disputes, it was in the company's best interest, and it was adopted two years prior to Mahoney's termination and filing of suit against Muhler and Hay.

Further, a prior arbitration between these parties was conducted with a Panel of arbitrators that was constituted pursuant to the arbitrator selection provision. That Panel ruled *unanimously* against Mahoney. The arbitration result was not the product of the purported bias Mahoney repeatedly refers to; indeed, the allegedly biased Muhler CPA voted with Mr. Mahoney's party-appointed arbitrator.

¹ A minor, but illustrative point: Mahoney states to this Court that no prior notice was provided to him of the amendment of the bylaws to include the arbitration provision. This is likewise untrue, as notice of the meeting to consider the amendment, including the agenda, was provided in advance of the meeting pursuant to the terms of the bylaws. **Appendix 0104** (notice of meeting).

The inclusion of the company's CPA will increase the fairness and economy of the proceedings to the benefit of all parties, especially in this context, where the issue is the valuation of Mahoney's shares of the company.

However, Mahoney does not argue only that the provision is unfair; he also asserts to this Court that it is *unconscionable*. This was not argued to the trial court, as further discussed in Petitioners' Motion to Strike, and is not properly before this Court.

Additionally, the wisdom of the arbitrator selection as set forth in the agreement is evident as most disputes in a closely held corporation are financial in nature. That includes this case, 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.

The provision is not "so oppressive that no reasonable person would make them and no fair and honest person would accept them." On the contrary, it is fair, logical, and sensible.

A. The Trial Court Previously Upheld the Arbitrator Selection Provision

Mahoney refers to Petitioners' "assumption[] . . . that the arbitrator selection method was ever valid to begin with" Respondent's Brief at 6. However, the validity of the arbitrator selection provision is *res judicata*. In case 2018-CP-10-05077, Mahoney's counsel argued that the arbitration provision generally and the arbitrator selection provision specifically were unfair.

The trial court rejected the argument and ordered arbitration with a panel constituted pursuant to the bylaws. The matter was arbitrated between these parties, the panel unanimously ruled against Mahoney, and that award was confirmed by the trial court on March 27, 2020.

The trial court's prior ruling is therefore *res judicata* as to the validity of the arbitrator selection provision. *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) ("Under the doctrine of *res judicata*, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" (quoting *Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987))).

III. **COURTS CANNOT REWRITE PARTIES' CONTRACTS BECAUSE IT FINDS THEM UNFAIR**

Despite Mahoney's assertions to the contrary, it is well settled that courts are *not* empowered to rewrite parties' agreements that it thinks may be unfair to one party. *See, 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."); *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.”).

This is precisely what occurred here. The trial court found the arbitrator selection clause to be “unfair”—despite the absence of any evidence in the record to support this finding—and rewrote the provision. This was error.

A. The Legislature Did Not Grant Courts Discretion to Second Guess Arbitrator Selection Methods

It was doubly error because the South Carolina Uniform Arbitration Act expressly requires Courts to enforce arbitrator selection provisions as written. 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)).

IV. MAHONEY MISSTATES PETITIONER’S CONTENTION REGARDING APPEALABILITY

Mahoney states “Petitioners argue that partially amending or severing the arbitrator selection method invalidates the entire provision and thus their right to arbitrate.” Respondent’s Brief at 5. This is not Petitioners’ contention. Rather, Muhler argues that the Court’s rewriting of the arbitrator selection provision is a ruling that is hostile to Muhler’s right to arbitration and is therefore immediately appealable. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86, 121 S. Ct. 513, 519 (2000) (noting the federal act “generally permits immediate appeal of orders hostile to arbitration, whether the orders are final or interlocutory”); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (noting the federal policy favoring arbitration as expressed in the FAA is binding on state courts and supersedes

inconsistent state law). Muhler has not argued that the trial court invalidated the entire arbitration provision, and the validity of the entire provision was not before the trial court.

CONCLUSION

Petitioners request this Court reverse the Court of Appeals decision, hold that the order declining to enforce the arbitrator selection provision is immediately appealable, and remand 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 18th day of December, 2020
Charleston, S.C.

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