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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

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Case No. 2019-CP-10-00178

App. No. 2020-000925

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J. Daniel Mahoney.....Plaintiff/Respondent,

v.

The Muhler Company, Inc. and Henry Hay III, .....Defendants/Appellants.

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# RESPONDENT'S FINAL BRIEF

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES



## STATUES

Appellants seek review of the denial of a motion to confirm an arbitration award entered for Respondent's lawsuit against Appellants, confirmed by the Honorable Bentley Price in case number 2018-CP-10-05077 on March 27, 2020, as to Respondent's pending lawsuit, case number 2019-CP-10-00178.

## JURISDICTIONAL STATEMENT

This appeal is of an order denying a motion to confirm an arbitration award (June 17, 2020 Order) which is immediately appealable to this Court pursuant to S.C. Code Ann. § 15-48-200(a)(3).

## STATEMENT OF ISSUES ON APPEAL

1. Whether The Trial Court Erred in Denying Appellant's Motion to Confirm an Arbitration Award to a Different Lawsuit.
2. Whether a Prior Arbitration Award Between Parties Can Be Used to Enjoin a Plaintiff from Bringing Unrelated Causes of Action Against the Same Defendant.
3. Whether The Appellant's Arbitration Award Will Have A Preclusive Effect on Respondent's Claims.

## STATEMENT OF THE CASE

On January 15, 2008, Plaintiff/Respondent Mahoney became CEO of Muhler. Later that year Mahoney became a minority shareholder in the Muhler Company, Inc. ("Muhler"). **(ROA Pg. 80, Muhler Company, Inc. Common Stock Ledger).** The President and founder of Muhler, Henry Hay, III ("Hay") is the majority shareholder Company. Together they represent one hundred percent of the shares in Muhler.

Mahoney faced issues as the minority shareholder in Muhler. In a shareholder meeting on October 25, 2016, Mahoney was presented with an amendment to the Muhler Bylaws that included

an arbitration provision. **(ROA Pg. 205, Amendment to the Muhler Bylaws).** After objecting to the vote for lack of notice and voting against the provision, the meeting was rescheduled to a later date to provide Mahoney time to review the new provision. **(ROA Pg. 0190-0191, November 16, 2016 Shareholder Meeting Transcript Pg. 7, Lns. 11-22).** After reading the proposed provision, Mahoney believed it was unfair and created a biased arbitration panel. He was concerned that in an action against Muhler or its officers, the arbitration panel would be stacked against him. **(ROA Pg. 0190-0191, November 16, 2016 Shareholder Meeting Transcript Pg. 8, Lns. 2-20).** At the rescheduled Special Shareholder Meeting on November 16, 2016, Mahoney stated on the record that he objected to an arbitration provision. Regardless of Respondent's objection and the clear bias in the provision, it was adopted into the Amended Bylaws by a majority vote with Hay voting his 75% in favor of the amendment. **(ROA Pg. 0189 November 16, 2016, Shareholder Meeting Transcript Pg. 6, Ln. 6).**

Mahoney was ultimately terminated from his position as CEO of Muhler on September 18, 2018. **(ROA Pg. 0018, March 19, 2020, Defendants' Motion to Confirm Arbitration Award)**. After his termination, Mahoney filed a lawsuit against Muhler pursuant to the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-80-10 for his salary and benefits, or in the alternative, under a breach of contract theory ("Employment Lawsuit").

Subsequently, Mahoney hired this law firm to represent him to determine his rights as a minority shareholder and the available remedies under South Carolina Law or under the buy/sell provision of the Muhler Shareholder Agreement. A lawsuit was filed on January 14, 2019 asserting causes of action for 1) Breach of Contract (the parties' Shareholder Agreement); 2) Breach of Fiduciary Duty; 3) Specific Performance; 4) Court Action to Protect Shareholders pursuant to the

South Carolina Statutory Close Corporation Act; and 5) Court Action to Dissolve the Muhler Corporation pursuant to the *Id.* § 33-14-300.

On May 15, 2019, Muhler moved to stay the Employment Lawsuit and compel arbitration before the Hon. Bentley Price, which was ordered on May 17, 2019. Mahoney's Employment Lawsuit went to arbitration in December 2019. The arbitration panel found in favor of Muhler. **(ROA Pg. 0037, December 12, 2019 Arbitration Award)**.

On May 31, 2019, Appellants moved to stay and compel arbitration in the Shareholder Lawsuit, again before Judge Price. In this lawsuit, Mahoney's counsel highlighted the unfair and biased arbitrator selection method, which selected Muhler's accountant for the panel, and then gave each party their choice of arbitrator. This arbitration selection method stacked the deck two-to-one in Muhler's favor.

On June 17, 2019, Judge Price granted Muhler's motion to compel arbitration, but for purposes of fairness, modified the arbitrator selection method[1] by applying default arbitrator selection method as set forth in South Carolina Arbitration Code.[2] (**ROA Pgs. 0006-0007, June 24, 2019 Order Granting Defendant's Motion to Stay and Compel Arbitration).**

Appellants challenged Judge Price's June 2019 Order claiming that because the parties were the same, and the arbitrator selection method was not challenged in the Employment lawsuit, that Respondent waived the right to challenge the selection method and the Court had to apply the unfair provision contained in the Amended Bylaws. This issue is currently before the South Carolina Supreme Court for review.

[1] While Appellant properly states the rule that judges must enforce arbitration selection methods, the rule S.C. Code Ann. § 15-48-10(a) states that arbitration clauses are subject to the same laws that govern contracts; judges are permitted to revise unconscionable contracts, particularly in instances where there is an absence of a fair choice. As a minority shareholder who essentially had no control over the approval of amendments to the bylaws, the arbitration selection method was biased against him since its adoption.
[2] *Id.* § 15-48-30.

Judge Price confirmed the arbitration award in case number 2018-CP-10-05077 on March 27, 2020. (**ROA Pg. 0004, March 27, 2020 Order Confirming Arbitration Award in Employment Lawsuit).** Muhler then moved to confirm the award in case number 2019-CP-10-00178 as to the subsequent litigation in order to compel arbitration with the same panel used in the Employment Lawsuit and bind the findings of that suit to the Shareholder Lawsuit. That motion was denied. This appeal of the denial was served and filed on June 22, 2020. **(ROA Pg. 0001, June 17, 2020 Order Denying Motion to Confirm Arbitration Award**).

STANDARD OF REVIEW

The Trial Court denied the Appellant's confirmation of the arbitration award entered in the Employment Lawsuit in the Shareholder Lawsuit. Respondent disagrees with Appellant's interpretation of *Id.* § 15-48-120. Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191 (1998). The statute states that if an arbitration award is not appealed, any court in South Carolina can confirm that award through a judicial order. Contrary to Appellant's argument, Respondent asserts that this rule does not require the Court to confirm an arbitration award from a prior lawsuit to a subsequent lawsuit without reviewing the merits of the claims.

## STATEMENT OF ARGUMENTS

### A. The Trial Court Properly Denied the Appellant's Motion To Confirm The Arbitration Award As To This Law Suit.

The Trial Court did not err in denying the Appellants' motion to confirm the arbitration award ordered on March 27, 2020 as to this current lawsuit. Appellants rely on S.C. Code Ann. § 15-48-120 and 9 U.S.C. § 9, which states that "arbitration awards must be confirmed if no valid basis for modifying the award is presented within 90 days of the award's issuance."

Appellants improperly refer to 9 U.S.C. § 9 of the Federal Arbitration Act, which does "not apply to a proceeding in South Carolina state court to confirm an arbitration award; the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240, applie[s] because the confirmation statute, S.C. Code Ann. § 15-48-120, is procedural, not substantive." *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 748 S.E.2d 221, No. 27313, 2013 S.C. LEXIS 231 (Sept. 11, 2013).

Appellants argue that because the same parties were involved in the Employment Lawsuit, the arbitration award from that lawsuit must be confirmed as to the Respondent's current pending lawsuit. Appellants' only reference for this argument is S.C. Code Ann. § 15-48-180, which states that an arbitration award "can be confirmed in any court within the state." There is no indication in that code section or its notes that an award in a prior arbitration should be automatically confirmed in a separate lawsuit involving entirely different issues and causes of action.

The Appellants misconstrued and expanded the meaning of the arbitration statute. Read together with the preceding sections, S.C. Code Ann. § 15-48-180 simply means that if an arbitration panel enters an award in favor of a party, and if no objection is made to that award within 90 days, then the party can take the award to any court in the state and have it confirmed, which creates a binding order similar to a judgment. Respondent agrees that any court within the state can confirm an arbitration award. However, the statute does not mean that the Appellants can use the arbitration award to enjoin the Respondent from adjudicating separate, unrelated matters from a different lawsuit.

As stated in *Henderson*, a judicial order confirming an arbitration award is procedural, not substantive. Although South Carolina has not ruled on this issue in the context of enjoining a subsequent lawsuit from an order confirming an arbitration award, several district courts have

answered the question. A res judicata objection based on a prior arbitration proceeding is a legal defense that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the court. *Hancock Fabrics, Inc. v. Rowdec, L.L.C.*, 126 F. Supp. 3d 784, 790 (N.D. Miss. 2015). Courts have held that the issue-preclusive effect of a prior arbitration is arbitrable and so must be arbitrated *U.S. Fire Ins. Co. v. Nat'l Gypsum Co.*, 101 F.3d 813, 817 (2d Cir. 1996).

Further, the confirmation of an arbitral award requires no judicial review of the merits of the award or the legal basis on which it was reached, the court stated "a res judicata objection based on a prior arbitration proceeding is a legal defense that, in turn, is a component of the dispute on the merits and must be considered by the arbitrator, not the court. Further, the preclusive effect of the first arbitrator's decision is an issue for a later arbitrator to consider." *Indep. Lift Truck Builders Union v. NACCO Materials Handling Grp., Inc.*, 202 F.3d 965, 968 (7th Cir. 2000).

Judge Price denied the confirmation of the arbitration award because it is not required under the statute, and because the preclusive effect of that award on the subsequent lawsuit must be determined by the arbitration panel. While the two lawsuits involved the same parties, the issues and causes of action are separate.

### B. If the Court Finds that Judge Price Erred in Denying the Appellant's Motion, *Res Judicata* Will Not Preclude All of Mahoney's Claims Against Muhler.

If this Court believes Judge Price's denial of the confirmation of the arbitration award was in error, the arbitration award will only preclude Respondent's from bringing claims under Breach of Contract and Specific Performance theories. The Court still must decide the Respondent's shareholder-related causes of action, including (1) Appellants' Breach of Fiduciary Duty to its Minority Shareholder; (2) Court Action to Protect Shareholders Pursuant to the South Carolina Statutory Close Corporation Act; and (3) Court Action to Dissolve the Muhler Corporation

pursuant to S.C. Code Ann. § 33-14-300 and S.C. Code Ann. § 33-18-430. These claims and issues were not adjudicated, nor were they relevant to the prior lawsuit.

*Res judicata* encompasses "both claim preclusion and issue preclusion." *Crestwood Golf Club v. Potter*, 28 S.C. 201, 493, S.E.2d 826 (1997) (citing *Baum v. Bell*, 28 S.C. 201, 493 (2007). In *Duckett v. Goforth*, 374 S.C. 446 (2007), the South Carolina Court of Appeals articulated the distinctions between the doctrine of Res Judicata, which is identified as claim preclusion, and collateral estoppel, which is also known as issue preclusion.

When substituted for claim preclusion, "*res judicata* precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action." *S.C. Dep't of Soc. Servs. v. Basnight*, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001). The doctrine flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action. *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (1995). A party seeking to preclude litigation on the grounds of res judicata must show: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue on the merits in the former suit by a court of competent jurisdiction. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

Collateral estoppel, or issue preclusion, "prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action." *Stone v. Roadway Express*, 367 S.C. 575, 580, 627 S.E.2d 695, 698 (2006).

Mahoney's lawsuits were brought separately for a reason—they are unrelated and concern entirely different matters. The Employment Lawsuit adjudicated Mahoney's wrongful termination claims, and the Shareholder Lawsuit concerns his rights and remedies as a minority shareholder in a Statutory Close Corporation. For those reasons, the doctrine of *Res Judicata* will not bar

Mahoney from proceeding in the pending litigation. When he was terminated from his position as CEO, Mahoney retained his shareholder status and rights.

Respondent's concluded arbitration was related entirely to his employment termination, not his status as a minority shareholder. To quote from Appellants' brief, "the doctrine [of *res judicata*] requires three essential elements: (1) the judgment must be final, valid and on the merits; (2) the parties in the subsequent action must be identical to those in the first; and (3) the second action must involve a matter properly included in the first action." *Town of Sullivan's Island*, 318 S.C. at 344, 457 S.E.2d at 628. Appellants argue that '[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." *Plum Creek Dev. Co.*, 334 S.C. at 32, 512 S.E.2d 106. While this is true, the dispute in *Plum Creek* arose out of a subsequent claim from the same contract. Here, Mahoney's status as shareholder was separate from his employment. Shareholders in statutory close corporations often serve as employees in the organizations. When that employment relationship is terminated, the former shareholder-employee remains a shareholder. Mahoney's status as a minority shareholder had no impact on his status and duties as CEO.

As previously stated, the issue of Mahoney's rights as a minority shareholder were not relevant to the employment litigation; the disposition of his shares and other available shareholder remedies were not included in the first matter because they were not essential to that litigation.

**C. South Carolina Statutory and Case Law Grants Remedies to Respondent as a Minority Shareholder in a Statutory Close Corporation as to the Disposition of His Shares.**

First, the Respondent asserts that the claims arising out of his status as a minority shareholder in a Statutory Close Corporation cannot be subject to arbitration. According to S.C. Code Ann. § 33-18-400:

(b) A shareholder must commence a proceeding under subsection (a) in the circuit court of the county where the corporation's principal office or, if none in the State, its registered office is located. The jurisdiction of the court in which the proceeding is commenced is plenary and exclusive.

(c) If a shareholder has agreed in writing to pursue a nonjudicial remedy to resolve disputed matters, he may not commence a proceeding under this section with respect to the matters until he has exhausted the nonjudicial remedy.

Here, Respondent **never** agreed to be bound to an arbitration provision for matters related to his shares. Rather, an arbitration clause was presented at a Special Shareholder's Meeting without notice, was objected to by the Respondent, and ultimately forced into the Amended Bylaws by Appellant through his majority voting power. It is clear from the shareholder meeting transcript that Mahoney did not approve of this arbitration provision and had no power to prevent it from being incorporated into Muhler's Amended Bylaws. **(ROA Pg. 0184, November 16, 2016, Shareholder Meeting Transcript, Pgs. 6-8).**

If the court agrees with Appellants that the Employment Lawsuit Arbitration Award enjoins Respondent from re-litigating certain causes of action, it will only preclude the Breach of Contract and Specific Performance claims related to the Shareholder Agreement. The arbitration panel invalidated the Shareholder Agreement, which would bar Respondent from seeking a remedy under the Agreement's buy/sell provision. However, Mahoney still can seek the remedies provided by S.C. Code Ann. § 33-18-420, S.C. Code Ann. S.C. Code Ann. § 33-14-300, as interpreted by the relevant case law. When a minority shareholder-employee is terminated, they retain their rights as a shareholder. The invalidation of the Shareholder Agreement does not impact Mahoney's status as a minority shareholder, which affords him certain rights pertaining to his shares in the company.

Thus, the two statutory causes of action, and the breach of fiduciary duty cause of action, will remain. Causes of action for breach of fiduciary duty can be combined with a suit for relief under. *See* Comments to S.C. Code Ann. § 33-18-400. An individual, rather than derivative, action is also allowed if the alleged wrongdoers owe a fiduciary relationship to the stockholder and full relief to the stockholder cannot be had through a recovery by the corporation." *Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 685, 2001 (2001) S.C. App. LEXIS 153, *25

Controlling shareholders owe a fiduciary duty to minority shareholders. The common law fiduciary duty is codified by S.C. Code Ann. § 33-8-300 and § 33-8-420. *Clearwater Tr. v. Bunting*, 367 S.C. 340, 347, 626 S.E.2d 334, 337 (2006). Hay's actions, which include the adoption of an unfair arbitration at the objection of the minority shareholder and refusing to buy back Mahoney's shares amount to a breach of his duties as an officer.

Respondent can assert equitable remedies under S.C. Code Ann. § 33-18-420, in which the judge will order a buy-out of his shares or S.C. Code Ann. § 33-18-430, in which the court will order a judicial dissolution of the corporation under S.C. Code Ann. § 33-14-300. S.C. Code Ann. S.C. Code Ann. § 33-18-400 allows shareholders in a statutory close corporation to petition for relief on the grounds of oppressive, fraudulent, or unfairly prejudicial conduct. One of the available remedies allows courts to "order the corporation dissolved under S.C. Code Ann. § 33-18-430 unless the corporation or one or more of its shareholders purchase all the shares of the shareholder for their fair value…" Respondent lacked sufficient voting power to approve and execute the sale of his shares back to Muhler, and thus is entitled to relief under either of these remedies.

The Official Comment to S.C. Code Ann. § 33-18-400 states that "no attempt has been made to define oppression, fraud, or unfairly prejudicial conduct…and it is felt that existing case

law provides sufficient guidelines for courts and litigants." In *Ballard v. Roberson*, 399 S.C. 588, 594, 733 S.E.2d 107, 110 (2012), the South Carolina Supreme Court stated that "the terms 'oppressive' and 'unfairly prejudicial' are elastic terms whose meaning varies with the circumstances presented in a particular case." (quoting *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 602, 541 S.E.2d 257, 266 (2001)). *Kiriakides* states that S.C. Code Ann. § 33-14-300, is an equitable relief… allowing for appropriate alternative relief including a buyout of shareholders by other shareholders or the corporation, are also equitable."

In *Kiriakides*, the court determined that under oppressive conduct typically manifests in the form of a shareholder "squeeze-out" or "freeze-out" of the minority by the majority shareholders.[3] Unlike public companies, there is no market for shares in close corporations. If a majority shareholder engages in oppressive conduct that prevents a minority shareholder from ever receiving a return on that investment, the court will order a purchase of the shares by the closely held company. While evaluated on an ad-hoc basis, The South Carolina Supreme Court has interpreted oppressive conduct to include instances where, short of a buyout of their shares, it is unlikely that Respondent would ever receive any benefit from his ownership interests in Appellant close corporation. When Close Corporations act "oppressively" and "unfairly prejudicially" to the Court has determined that a buyout of the minority shareholder's shares is the appropriate remedy.[4]

Any action presented to a Shareholder Meeting will be voted on by Hay with a majority of the votes and Mahoney with the minority of votes.[5] Between his termination and inability to

[3] *Kiriakides* at 267, citing F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 Clev. St. L. Rev. 121, 125 1986/1987); Anthony and Borass, Betrayed, Belittled . . . *But Triumphant: Claims of Shareholders in Closely Held Corporations*, 22 Wm. Mitchell L. Rev. 1173, 1175 (1996). This standard and definition of oppression has been cited in both *Ballard v. Roberson* and most recently, *Wilson v. Gandis*, 844 S.E.2d 631 (2020).
[4] Paraphrased from *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587 (2001).
[5] Muhler Bylaws specify that shareholders get one vote per share.

receive any return on his investment in the Muhler Corporation, the equitable solution is for the Court to order a purchase of Mahoney's shares or to dissolve Muhler based on Hay's conduct.

## CONCLUSION

Respondent asks that the Court affirms the trial court's denial of the Appellant's motion. Appellants misapplied the law, and there is no requirement in the South Carolina Code that a previous arbitration award be applied to a subsequent lawsuit between the same parties. The prior, confirmed arbitration award should not be applied to Respondent's current lawsuit, because the claims and issues were not actually and decided. The preclusive effect of a judicial order confirming an arbitration award must first be reviewed by a judge or adjudicating body. If the court believes Judge Price erred in denying the motion to confirm the arbitration award, Respondent has other remedies available through his rights as a minority shareholder.

Respectfully Submitted,

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**CERTIFICATE OF RESPONDENT**

The undersigned counsel hereby certifies that Respondent's Final Brief complies with Rule 211(b) SCACR.

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