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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 18 2021
SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-000468
Trial Court Case No. 2017-CP-04-09132

Hicks Unlimited, Inc., ... Respondent,

v.

UniFirst Corporation, A Massachusetts Corporation, ... Appellant.

PETITION FOR REHEARING

The Respondent, Hicks Unlimited, Inc., respectfully moves and petitions, pursuant to Rules 219 and 221(a) SCACR, as well as all other applicable law, for an Order granting rehearing in this case as to certain issues and submits the below memorandum in support of the same. In an unpublished opinion filed August 4, 2021, this Court may have overlooked or misapprehended certain points of law affecting the disposition of this case.

In the August 4, 2021 Opinion, this Court reversed the trial court's decision to deny Appellant's motion to compel arbitration. In so doing, this Court found the transaction implicated interstate commerce, and that the arbitration provision was not unconscionable.

I. The arbitration agreement is unconscionable.

In Its Opinion, this Court found that Hicks was attacking the enforceability of the contract as a whole, and not the arbitration provision itself. The Court stated, "Hicks's argument links the damages clause of the Contract to the arbitration clause."

It is respectfully submitted that Hicks linked the two (2) provisions because the provisions are linked in the arbitration provision. The arbitration agreement in this case is strikingly similar to that in Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016) (see also this Court's opinion in the same matter; Smith v. D.R. Horton, Inc., 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013)). In Smith, the Supreme Court affirmed this Court's opinion that an agreement to arbitrate was unconscionable when unenforceable and one-sided remedies were contained and intertwined within the arbitration section of the parties' contract. Smith, 417 S.C. at 50, 790 S.E.2d at 5 (2016).

The arbitration provision at issue in this case, is as follows:

> **OBLIGATIONS AND REMEDIES.** If Customer breaches or terminates this Agreement before the expiration date for any reason (other than for UniFirst's failure under the performance guarantee described above), Customer will pay UniFirst, as liquidated damages and not as a penalty (the parties acknowledging that actual damages would be difficult to calculate with reasonable certainty) an amount equal to 50 percent of the average weekly amounts invoiced in the preceding 26 weeks, multiplied by the number of weeks remaining in the current term. These damages will be in addition to all other obligations or amounts owed by Customer to UniFirst, including the return of Merchandise or the payment of replacement charges.
>
> All disputes of whatever kind between the Customer and UniFirst based upon past, present or future acts, whether known or unknown, and arising out of or relating to the negotiation, formation or performance of this Agreement shall be resolved exclusively by final and binding arbitration. The arbitration shall be conducted in the capital city of the state where the Customer has its principal place of business (or some other location mutually agreed to by Customer and UniFirst) pursuant to the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association and shall be governed by the Federal Arbitration Act. The Customer acknowledges that, with respect to all such disputes, it has voluntarily and knowingly waived any right it may have to a jury trial or to participate in a class action as a representative of any other persons or class of persons or as a

member of any class of persons, or to consolidate its claims with those of any other persons or class of persons. This paragraph shall be governed by New York law (exclusive of choice of law).

(R. p. 27)

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id., 417 S.C. at 49, 790 S.E.2d at 8.

An arbitration clause that limits one party's rights to damages may be a reason to find an arbitration clause unenforceable. Id. at 50, 790 S.E.2d at 10; Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 28, 644 S.E.2d 663, 670 (2007). The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Simpson, 373 S.C. at 29-30, 644 S.E.2d at 671.

In Smith, the Supreme Court refused to enforce an agreement to arbitrate when unenforceable language limiting a Plaintiff's right to recover was intertwined and included in the arbitration agreement. Smith, 417 S.C. at 50, 790 S.E.2d at 5. In Smith, Section 14 of the parties' agreement was entitled "Warranties and Dispute Resolution." Smith v. D.R. Horton, Inc., 403 S.C. 10, 13, 742 S.E.2d 37, 39 (Ct. App. 2013). There was a separate section in paragraph 14(g) entitled "Mandatory Binding Arbitration". Id. Two paragraphs later in 14(i) there was a limitation of liability limiting the plaintiff's ability to seek monetary damages. Id. This Court found, and the Supreme Court affirmed, that the arbitration provision and the provisions limiting liability were so intertwined so as to make the arbitration agreement unconscionable and unenforceable. Id., at 16, 742 S.E.2d at 42-41.

In this case, the arbitration agreement is more intertwined with an unlawful damages provision than was the case in Smith. Unlike the facts in Smith, the unlawful damages provision is actually included in the same provision as the arbitration provision. It provides for a liquidated damages provision that serves as a penalty in the event that Hicks breaches the agreement. (R. p. 27). A liquidated damages provision that serves as a penalty is unenforceable in South Carolina. See *Erie Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460-61, 713 S.E.2d 318, 321 (Ct. App. 2011). The provision is a penalty because actual damages are easily ascertainable in this matter in the event of a breach as this is a rental / cleaning services agreement where Hicks pays UniFirst for its services. Additionally, the provision is one sided and only applies against Hicks.

Accordingly, like the situation in Smith, there exists an illegal and one-sided provision regarding damages favoring the party who drafted the arbitration agreement. In Smith, the provision limited rights of the other party. In this case, the provision expands the rights of the party that drafted the agreement. In both instances, the provisions are unconscionable and are so intertwined with the arbitration provision making the arbitration provision unenforceable.

II. The transaction at issue in this case is a services agreement with the services being performed solely in South Carolina. Accordingly, Respondent respectfully contends it was error for the Court to find the FAA applies as the transaction did not involve interstate commerce.

It is respectfully submitted that the Court of Appeals too broadly interpreted whether this transaction involved interstate commerce thereby making it subject to the FAA. In so finding, the Court relied heavily on things that UniFirst does in operation of its business, but not on the transaction itself.

In its Opinion, the Court found that UniFirst deposited monies it received from Hicks in Massachusetts. It further found that UniFirst purchased the uniforms in Kentucky, and that its board of directors in Massachusetts controlled its decisions. (Opinion, p. 5). These are not facts relative to the transaction. They represent how UniFirst operates its business irrespective of the actual transaction that was only contemplated to take place in South Carolina.

"To ascertain whether an arbitration agreement implicates interstate commerce and the FAA, the court must examine the agreement, the complaint, and the surrounding facts, focusing primarily on what terms the contract specifically requires for performance." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014) (emphasis added).

The transaction itself was a services agreement to be performed solely in South Carolina. (R. p. 12). The uniforms were delivered to Hicks from UniFirst's warehouse in Greenville County to Hicks's place of business at the Michelin plant in Anderson County. UniFirst would then pick up the uniforms in Anderson County and clean them in Greenville County. (R. p. 2). Invoices were sent to Hicks's place of business in Anderson County, and funds were paid to UniFirst's location in Greenville County. (R. p. 2). None of the services took place outside of South Carolina. Further, this was not a purchase agreement where Hicks was purchasing the uniforms from UniFirst. This was a rental and cleaning services agreement to take place solely in South Carolina. Accordingly, Hicks contends it was error for the Court to find that the FAA applied.

The United States Congress enacted the FAA in 1925 "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate commercial disputes." Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1420, 203 L.Ed.2d 636 (2019) (Ginsburg, J., dissenting). In

1983, the U.S. Supreme Court established a liberal federal policy favoring arbitration agreements. Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). Then, in 1984, without any legislative intervention in the preceding 59 years, the U.S. Supreme Court extended the FAA to state courts and by extension to state law governing interpretation of contracts. Southland Corp. v. Keating, 465 U.S. 1, 24, 104 S. Ct. 852, 865, 79 L.Ed.2d 1 (1984).

Nearly 100 years later, we are at a stage in which the FAA may apply to nearly any party, dispute or subject regardless of the bargaining power of the respective parties, the illegality of provisions found in the contract or even the situs of the transaction itself. The FAA was never intended to abrogate the Tenth Amendment to the Constitution by depriving States the power to enact legislation that in no way conflicts with federal power.

Hicks contends that this arbitration provision is similar to the one found in Smith v. D.R. Horton. Accordingly, like this Court did in Smith, Hicks asks this Court to find the arbitration provision unconscionable. Additionally, Hicks contends that interstate commerce is not implicated when the transaction is a services contract and all the services take place in South Carolina. Respondent respectfully asks the Court to reconsider its opinion, grant a rehearing and affirm the decision of the trial court to deny UniFirst's motion to compel arbitration.

Respectfully submitted,

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August 16, 2021

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CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing on Appellant's attorneys of record, Ian D. McVey, Esq., and Jude Cooper, Esq. by mailing a copy of the same to Ian D. McVey, Esq., Turner, Padget, Graham & Laney, PA, Post Office Box 1473, Columbia, South Carolina 29202 and Jude Cooper, Esq., Becker & Poliakoff, 1 East Broward Blvd., Suite 1800, Ft. Lauderdale, Florida 33301. All mailing was via United States mail, postage prepaid this 16th day of August, 2021.

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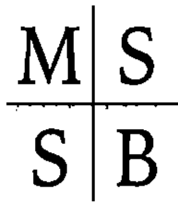

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August 16, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Hicks Unlimited, Inc. v. UniFirst Corporation,
Appellate Case No. 2018-000468

Dear Ms. Kitchings;

Enclosed for filing please find the following:

(1) Respondent's Petition for Rehearing and 6 copies of the same;
(2) A check for $50 for the filing fee; and
(3) Certificate of Service on Appellants.

With kindest regards, I remain

Yours very truly,

David J. Brousseau
Attorney for Respondent

DJB/tlc
Enc.

cc: Ian D. McVey, Esq.
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TO:

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