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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Opinion No. 2021-UP-289 (S.C. Ct. App. Filed August 4, 2021)

Hicks Unlimited, Inc., ... Petitioner,

v.

UniFirst Corporation, A Massachusetts Corporation, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 26, 2021.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in substituting Its own findings when there was evidence in the record to support the circuit court's findings that this transaction was contemplated to only take place in South Carolina and did not implicate interstate commerce?

2. Did the Court of Appeals err in finding this contract implicates interstate commerce when this is a rental / services agreement with all services taking place in South Carolina?

3. Did the Court of Appeals err in reversing the circuit court's order denying Respondent's Motion to Compel Arbitration because the arbitration agreement was unconscionable?

STATEMENT OF THE CASE

On September 26, 2006, the parties executed a "Flame Resistant Garment Agreement" (Contract). In its original form, it was a two (2) sided agreement with "fill in the blank" and signature lines on the front page, and boilerplate, fine print provisions on the back page. It is a rental / cleaning services agreement for uniforms. (R. pp. 12-13). UniFirst Corporation (UniFirst) provides its uniforms from its warehouse in Greenville County to Hicks Unlimited (Hicks) at its place of business in Anderson County.[1] At the end of the week UniFirst picks up the uniforms in Anderson County taking them to their facility in Greenville County to be cleaned. Hicks provides payment for this service in South Carolina. (R. pp. 12-13; p. 33).

The Contract is for a five (5) year term. (R. p 13). However, the Contract provides that unless either party provides written notice at least 90 days prior to the expiration that the contract will automatically renew for another five (5) year term. (R. p. 13).

[1] Hicks is a South Carolina corporation doing business in Anderson County. UniFirst is registered with the Secretary of State and authorized to transact business in South Carolina. Its warehouse is located in Greenville County, South Carolina.

Hicks attempted to terminate the contract at the conclusion of the first five (5) year term. (R. p. 9). UniFirst informed Hicks that it did not timely terminate. As such, Hicks reluctantly honored the contract for an additional five (5) year term, but provided notice at the start of this second five (5) year term that it would not renew again. (R. p. 9). At the conclusion of the second five (5) year term, UniFirst again informed Hicks that it did not properly terminate the Contract. (R. pp. 9-10). This time, Hicks informed UniFirst it had no intention of utilizing its services for a third term. (R. p. 9).

The Contract includes an arbitration provision. (R. p. 13). It is conceded by UniFirst that the arbitration provision does not comply with the notice requirements of the South Carolina Uniform Arbitration Act (UAA), S.C. Code Ann. § 15-48-10(a) (2005).

On May 17, 2017, UniFirst filed an action for breach of contract against Hicks with the American Arbitration Association (AAA). (R. p. 9). At the conclusion of the first two (2) terms, Hicks was current with its obligations to UniFirst. (R. p. 60, lines 16-19). UniFirst filed the arbitration action to enforce the liquidated damages provision provided in the arbitration provision for the alleged third five (5) year term. (R. 60, lines 20-25; pp. 12-13).

When UniFirst continued attempts at forcing arbitration, Hicks filed a declaratory judgment action with the Anderson County Court of Common Pleas. (R. pp. 8-13). Hicks filed a motion to stay arbitration, and UniFirst filed a motion to compel arbitration. (R. pp. 14-15; pp. 23-25).

The circuit court issued an Order denying UniFirst's motion to compel arbitration and granting Hicks' motion to stay arbitration. (R. pp. 1-4). The circuit court found that this rental agreement contemplated all services to take place within South Carolina, and that it did not

implicate interstate commerce. (R. p. 2). The circuit court additionally raised concerns about the unconscionability of the contract. (R. p. 3).

UniFirst filed its motion to alter and amend. (R. p. 31-36). That motion was denied by the circuit court. (R. pp. 5-7).

UniFirst filed its appeal with the Court of Appeals. The Court of Appeals reversed the trial court's order via an Unpublished Opinion filed August 4, 2021.

In Its Opinion, the Court of Appeals substituted Its own findings for the findings of the circuit court. The Court of Appeals found the Contract implicated interstate commerce because: a) UniFirst receives its uniforms from Kentucky; b) UniFirst deposits its monies in banks in Massachusetts; and c) UniFirst makes board decisions in Massachusetts.

Additionally, the Court of Appeals opined that Hicks was attacking the unconscionability of the contract as a whole, and not the arbitration provision itself. The Petition for Rehearing was denied on August 26, 2021.

ARGUMENT

Standard of Review

Arbitrability determinations are subject to de novo review. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Smith v. D.R. Horton, Inc., 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016).

1. **Did the Court of Appeals err in substituting Its own findings when there was evidence in the record to support the circuit court's findings that this transaction was contemplated to only take place in South Carolina and did not implicate interstate commerce?**

As stated above, while arbitrability determinations are reviewed de novo, the circuit court's findings of facts cannot be overruled if there is any evidence to support those findings. Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) (emphasis added). The Court of Appeals cited this standard of review in Its Opinion. However, Petitioner contends the Court of Appeals then substituted Its own findings when there was evidence in the record to support the circuit court's findings.

The circuit court found this was a services and rental agreement contemplated to take place solely within South Carolina. (R. p. 2). It found this was a rental agreement where UniFirst delivered for use its uniforms from its facility in Greenville County to Hicks's employees in Anderson County. Payment was made by Hicks to UniFirst in South Carolina. (R. p. 33). The circuit court found the Contract did not implicate interstate commerce. (R. p. 2).

These findings are supported by the evidence and the contract itself. This is a services agreement. (R. pp. 12-13). UniFirst owns the uniforms. Hicks leases the uniforms, and UniFirst cleans the uniforms each weekend at its plant in Greenville County. Nothing in the contract contemplates services being provided outside of South Carolina. (R. pp. 12-13). Accordingly, it was error for the Court of Appeals to substitute Its own findings in place of the circuit court's findings when evidence exists to support the circuit court's findings.

2. Did the Court of Appeals err in finding this contract implicates interstate commerce when this is a rental / services agreement with all services taking 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).

In substituting Its own findings in place of the circuit court's findings, the Court of Appeals concentrated on the manner in which UniFirst conducts its internal affairs rather than the requirements for compliance with the Contract. In Its Opinion, the Court of Appeals stated:

> [t]he payment for the uniforms was received and deposited by UniFirst in Massachusetts. The uniforms were purchased by UniFirst in Kentucky and sent from Kentucky to Anderson County. UniFirst's headquarters and board of directors in Massachusetts controlled the decisions of the corporation regarding its business in South Carolina. Therefore, we find the terms of the contract implicate interstate commerce.

The first time there is any mention in the record of where UniFirst purchases its uniforms is in its Motion to Alter or Amend. (R. p. 33). There is no mention of this in the contract. (R. pp. 12-13). More importantly, this is not a purchase agreement where Hicks is purchasing the uniforms from UniFirst. It is a service agreement where UniFirst allows Hicks to use its uniforms for a fee. Additionally, payment was made by Hicks to UniFirst in South Carolina. UniFirst internally forwarded its received payments to its bank in Massachusetts. (R. p. 33). How UniFirst conducts its internal operations has nothing to do with what the Contract requires for compliance.

Petitioner recognizes interstate commerce is broadly construed. See Id.; Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 461, 476 S.E.2d 149, 152-153 (1996). It includes consideration of three (3) categories: (1) use of channels of interstate commerce; (2) regulation of the persons, things, or instrumentalities in interstate commerce; and (3) regulation of activities having a substantial relationship to interstate commerce. United States v. Lopez, 514 U.S. 549, 558-59, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 637 (1995); Zabinski v. Bright Acres Associates, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001). None of those elements are present in this case. While interstate commerce may be broadly construed, it cannot encompass all commerce.

If this case implicates interstate commerce, then all cases implicate interstate commerce. As an example, but not by limitation, the Court of Appeals found that UniFirst deposited its funds it received from Hicks in South Carolina to a bank in Massachusetts. Almost all entities deposit funds into banks that have a presence in other states and are FDIC insured. That fact does not implicate interstate commerce. Where UniFirst purchased its uniforms is immaterial because it was not selling the uniforms to Hicks. It was allowing Hicks to use the uniforms for a fee regardless of whether the uniforms came from South Carolina, Kentucky or India. There is no mention in the Contract of where the uniforms are manufactured. Lastly, where UniFirst makes its internal board decisions is immaterial to compliance with the Contract.

The focus of whether or not a contract implicates interstate commerce is what the terms of the contract require for compliance. Dean, at 380, 759 S.E.2d at 732. The service offered by UniFirst is only contemplated to take place in South Carolina. The Contract contemplates that UniFirst will deliver its uniforms from Greenville County to Anderson County and back to Greenville County to be cleaned. The Contract contemplates that Hicks will pay UniFirst for this service. The Contract does not contemplate any other activities by either party. In looking at what the contract requires for compliance, the circuit court correctly found interstate commerce was not implicated. Petitioner contends that it was error for the Court of Appeals to reverse the circuit court's finding on this issue.

3. Did the Court of Appeals err in reversing the circuit court's order denying Respondent's Motion to Compel Arbitration because the arbitration agreement was unconscionable?

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

Petitioner contends that it 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 the Court of Appeals' opinion in Smith v. D.R. Horton, Inc., 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013)). In Smith, this Court affirmed this Court of Appeals' 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, 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, in affirming the Court of Appeals, found 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. It is under the heading "Obligations and Remedies". The unlawful damages provision in the Contract 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. 13).

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 in this Contract is a penalty because actual damages are easily ascertainable in the event of a breach as this is a rental agreement where Hicks pays UniFirst each week for its services. Additionally, the provision is one sided and only applies against Hicks.

This is not just an argument in the abstract. UniFirst is in fact seeking arbitration to enforce the unlawful liquidated damages clause. Hicks was current on its obligation after the first two (2) terms. (R. p. 60, lines 20-25). The action UniFirst filed with the AAA seeks damages, "which includes liquidated damages calculated at 50 percent of the average weekly service amounts, multiplied by the remainder of weeks on the terms of the agreement..." (R. p. 60, lines 20-25). UniFirst is seeking those damages for a third (3rd) five (5) year term because it alleges that Hicks did not terminate the automatic renewal properly.

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 violation of South Carolina law. In both instances, the provisions are one-sided and unconscionable. They are so intertwined with the arbitration provision making the arbitration provision unenforceable.

CONCLUSION

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 location 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 or interpret contracts pursuant to state law.

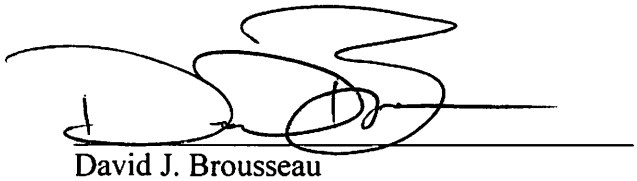
The circuit court reviewed the contract, the pleadings and the surrounding facts for compliance with the contract, and found as fact that this contract did not implicate interstate commerce. It found it was a rental and services agreement with all services being provided in South Carolina. There is evidence in the record to support the circuit court's findings. Accordingly, pursuant to the applicable standard of review, it was error for the Court of Appeals to disregard the circuit court's factual findings and substitute Its own findings.

It was additional error for the Court of Appeals' substituted findings to not be related to the transaction, but rather how one party internally operates its day-to-day operations. Petitioner contends that under the Court of Appeals' analysis all transactions would implicate interstate commerce.

Hicks additionally contends that this arbitration provision is similar to the one found in Smith v. D.R. Horton. This is not an argument in the abstract. UniFirst in fact filed an arbitration action to enforce the unenforceable liquidated damages provision found in the arbitration

provision. Accordingly, like this Court did in Smith, Hicks asks this Court to find the arbitration provision unconscionable.

For the reasons stated above, Petitioner asks the Supreme Court to grant the Petition for Writ of Certiorari.



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