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April 22, 2013

via Federal Express
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1015 Sumter St
Columbia, SC 29201

RE: Parsons v. John Wieland Homes (Case Tracking No. 2011201528)

Dear Ms. Kitchings:

Please be advised that this firm represents Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH") in the above-referenced appeal.

On February 6, 2013, oral arguments in this appeal were held before The Honorable Paul E. Short, The Honorable Paula H. Thomas, and The Honorable Daniel F. Pieper. After the oral arguments were heard, the Supreme Court of South Carolina and the United States Court of Appeals for the Fourth Circuit issued opinions directly bearing on this matter. In addition, on April 17, 2013, the South Carolina Court of Appeals issued an opinion discussing and applying Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).

Pursuant to Rule 208(b)(7), SCACR, please let this letter serve as JWH's supplemental citation of authority. I have enclosed herewith three (3) additional copies of this letter and three (3) additional copies of the relevant decisions, and I would appreciate it if you could forward copies of the letter and decisions to Judges Short, Thomas, and Pieper for their consideration. If I should send copies directly to the Judges, please let me know. A copy of this correspondence, with enclosures, is also being served on other counsel of record.

I. The Supreme Court's decision in Landers v. Fed. Deposit Ins. Corp. clarifies the "significant relationship" or "touch matters" test applicable to broad arbitration clauses.

JWH's first issue on appeal is that the circuit court erred in interpreting the scope of the arbitration clause with respect to the Parsons' claims for breach of contract, rescission, fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence. In JWH's final brief (p.8), JWH explains: "John Wieland Homes also noted that, unlike the precedent cited by the Parsons, the claims asserted by the Parsons in this case have a significant relationship to

both the Purchase and Sale Agreement and the condition of the Property, both of which are covered by the arbitration clause." **R.pp.48:24-51:14.**

In Landers v. Fed. Deposit Ins. Corp., Op. No. 27223 (S.C. Sup. Ct. filed Feb. 27, 2013) (Shearouse Adv. Sh. No. 9 at 65), the Supreme Court of South Carolina reversed the circuit court's alternative rulings that respondents' claims for breach of contract, slander, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion had no "significant relationship" to respondents' contract with his employer and that these claims were unforeseeable under Aiken and Partain.

The Supreme Court initially held that the respondents' "pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement." Id. at 65. The Court also emphasized several times that, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered." Id. at 70. "Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract." Id. at 71. The Court continued: "[U]nder the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." Id. at 72.

The Court summarized its holding: "Landers has essentially pled himself into a corner with respect to each of his claims." Id. at 76. "Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement." Id. "We find the claims are within the scope of the agreement's broad arbitration provision." Id. at 65. "Thus, we reverse the trial court's order and hold that all of Landers' causes of action must be arbitrated." Id.

Finally, the Court explained that the "significant relationship" test is more appropriately concerned with whether the claims "touch matters" covered by the contract or agreement: "We employ the 'significant relationship' term today only because it is in keeping with our jurisprudence. Id. at 78. "We merely observe that the two terms were not intended to differ in any meaningful way." Id. "Nonetheless, we note that if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the 'touch matters' term hues more closely to Congressional intent concerning the FAA." Id.

II. The Fourth Circuit's decision in Muriithi v. Shuttle Express, Inc. states that arbitration clauses should be considered separately from the remaining provisions of the contract.

In JWH's first issue on appeal, JWH also asserts: "The circuit court mistakenly interpreted the exclusions to the warranty instead of the arbitration clause, which is separate and distinct from the warranty." **Final Br., pp.9-16.** JWH also contends: "In determining whether the Parsons' claims were subject to arbitration, the circuit court incorrectly turned to the exclusions from the express warranties instead of the plain, unambiguous language of the arbitration clause, which is separable and distinct from the warranties." **Final Br., p.20.**

In Muriithi v. Shuttle Exp., Inc., Op. No. 11-1445 (4th Cir. filed Apr. 1, 2013), the Fourth Circuit Court of Appeals reversed the district court's refusal to compel arbitration. The district court's ruling in Muriithi rested, in part, on the effect of a one-year statute of limitations provision within the subject contract. Id.

The Fourth Circuit explained: "A party challenging the enforceability of an arbitration clause under Section 2 of the FAA must rely on grounds that relate specifically to the arbitration clause and not just to the contract as a whole." Id. "Thus, a challenge specific to an arbitration clause is considered by the court in a motion to compel, while a challenge relating to the entire contract is heard only after the merits of a case have been referred to an arbitrator or have been retained for decision by the court." Id.

"In view of its gatekeeping function, the scope of a motion to compel arbitration is restricted to consideration of challenges specific to the arbitration clause." Id. "Thus, absent a contrary agreement by the parties, general contract defenses that are applicable to the entire contract, such as the present one-year limitations provision, are reserved for the forum in which the dispute ultimately will be resolved." Id.

III. The Supreme Court's decision in Landers explains that tort claims for slander and intentional infliction of emotional distress are foreseeably subject to arbitration if they have a "significant relationship" to the contract.

The circuit court in the present action relied upon Aiken v. World Fin. Corp., 373 S.C. 144, 644 S.E.2d 705 (2007), and Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602 (2010), to conclude the claims asserted by the Parsons were unforeseeable to a reasonable consumer. **R.p.6.** On appeal, JWH argued that Aiken and Partain were distinguishable, and that the Parsons failed to allege any outrageous torts unforeseeable to the reasonable consumer. **Final Br., pp.16-20.**

In Landers, the Supreme Court of South Carolina held that tort claims such as slander and

intentional infliction of emotional distress were foreseeable if they had a "significant relationship" to the contract: "Landers has essentially pled himself into a corner with respect to each of his claims." Id. at 76. "Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that *all of his causes of action bear a significant relationship to the Agreement.*" Id. (emphasis added). "Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated." Id. "In doing so, *we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.*" Id. (emphasis added).

IV. The Fourth Circuit's decision in Muriithi states that, if there are any issues regarding whether particular terms in a contract containing a broad arbitration clause should be arbitrated, these issues should not be decided by a district court judge on a motion to compel arbitration.

In the present case, the Parsons assert, as an alternative sustaining ground, that the arbitration provision in their purchase contract with JWH is unconscionable. This argument rests upon contractual provisions lying outside the arbitration provision, such as a separate waiver provision in the contract. **Resps.' Final Br., p.17.**

In Muriithi, the Fourth Circuit addressed "the district court's holding that the one-year limitations provision in the Franchise Agreement also rendered the Arbitration Clause unconscionable." As set forth *supra*, the Fourth Circuit explained: "The one-year limitations provision is not referenced in the Arbitration Clause, but is applicable generally to the Franchise Agreement." Id. "By its terms, the one-year limitations provision applies to 'any arbitration, suit, action or other proceeding relating to this agreement.'" Id. "In light of its gatekeeping function, the scope of a motion to compel arbitration is restricted to consideration of challenges specific to the arbitration clause." Id. "Thus, absent a contrary agreement by the parties, general contract defenses that are applicable to the entire contract, such as the present one-year limitations provision, are reserved for the forum in which the dispute will be resolved." Id.

V. The recent decision by the Court of Appeals in Smith v. D.R. Horton, Inc. discusses and applies Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007), which both parties cite in relation to the Parsons' alternative argument regarding unconscionability.

As an alternative sustaining ground in this appeal, the Parsons contended that Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) applied to this case such that JWH's arbitration provision should be held unconscionable. **Resps.' Br. pp.13-19.** The Parsons noted that the circuit court refused to address this issue in his order denying JWH's motion to

compel arbitration. **Resps.' Br. p.13.** JWH distinguished Simpson in its reply brief, explaining that, in this case, unlike Simpson, the circuit court made no finding of unconscionability; that in this case, unlike in Simpson, there are no unconscionable provisions within the arbitration clause; that the arbitration clause in this case, unlike in Simpson, includes a mutuality of remedies; that in this case, unlike in Simpson, the arbitration clause included no limitation on the purchasers' remedies; and that in this case, unlike in Simpson, the purchasers had the opportunity to review the arbitration provision well over a year before it was signed. **JWH Reply Br. pp.15-21.**

In Smith v. D.R. Horton, Inc., Op. No. 5118 (S.C. Ct. App. filed Apr. 17, 2013) (Shearouse Adv. Sh. No. 17 at 60), the Court of Appeals discusses and applies Simpson. To the extent this case reiterates and relies on Simpson, JWH believes the present case is distinguishable from Smith on the same grounds as those set forth in JWH's Reply Brief relating to Simpson. **JWH Reply Br. pp.15-21.**

Please let me know if you need any further information. Thank you for your consideration.

Sincerely,

PRATT-THOMAS/WALKER, P.A.

Daniel S. McQueeney, Jr.

DSM/jas
enclosures

c: Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.

2013 WL 696758
Supreme Court of South Carolina.

Christopher T. LANDERS, Respondent,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for Atlantic Bank and Trust, Atlantic Banc Holdings, Inc., and Neal Arnold, Appellants.

No. 27223. | Heard March 20, 2012. | Decided Feb. 27, 2013.

Synopsis

Background: Executive employee brought action against employer and co-executive, alleging claims including breach of contract, constructive termination, and slander. Employer and co-executive moved to compel arbitration. The Circuit Court, Charleston County, J.C. Nicholson, Jr., J., denied motion in part. Employer and co-executive appealed.

[Holding:] The Supreme Court, Kittredge, J., held that employee's tort claims bore significant relationship to employment agreement, and therefore claims fell within scope of agreement's arbitration clause.

Reversed.

West Headnotes (14)

[1] **Alternative Dispute Resolution** ⇐ Arbitrability of Dispute

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk200 Arbitrability of Dispute

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise.

[2] **Alternative Dispute Resolution** ⇐ Scope and Standards of Review

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk213 Review
25Tk213(5) Scope and Standards of Review

The determination of whether a claim is subject to arbitration is subject to de novo review.

[3] **Alternative Dispute Resolution** ⇐ Merits of Controversy

25T Alternative Dispute Resolution
25TII Arbitration

25TII(D) Performance, Breach, Enforcement, and Contest
25Tk197 Matters to Be Determined by Court
25Tk203 Merits of Controversy
In deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.

[4] **Alternative Dispute Resolution** ⇦ Constitutional and Statutory Provisions and Rules of Court

Commerce ⇦ Arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk114 Constitutional and Statutory Provisions and Rules of Court
83 Commerce
83II Application to Particular Subjects and Methods of Regulation
83II(I) Civil Remedies
83k80.5 Arbitration
Generally, any arbitration agreement affecting interstate commerce is subject to the Federal Arbitration Act (FAA). 9 U.S.C.A. §§ 1, 2.

[5] **Alternative Dispute Resolution** ⇦ What Law Governs

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk116 What Law Governs
Once it is determined that the Federal Arbitration Act (FAA) applies to a dispute, federal substantive law regarding arbitrability controls. 9 U.S.C.A. § 1.

[6] **Alternative Dispute Resolution** ⇦ Contractual or Consensual Basis

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk112 Contractual or Consensual Basis
Whether a party has agreed to arbitrate an issue is a matter of contract interpretation, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

[7] **Alternative Dispute Resolution** ⇦ Liberal or Strict Construction

Alternative Dispute Resolution ⇦ Construction in Favor of Arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk138 Liberal or Strict Construction
25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate

25Tk136 Construction
25Tk139 Construction in Favor of Arbitration
Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability.

[8] **Alternative Dispute Resolution** ⇦ Construction in Favor of Arbitration

Alternative Dispute Resolution ⇦ Evidence

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 Construction in Favor of Arbitration
25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 Evidence
The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration; such a presumption is strengthened when an arbitration clause is broadly written.

[9] **Alternative Dispute Resolution** ⇦ Construction in Favor of Arbitration

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk136 Construction
25Tk139 Construction in Favor of Arbitration
Unless it may be said with positive assurance that an arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered.

[10] **Alternative Dispute Resolution** ⇦ Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In General
The scope of an arbitration clause does not limit arbitration to the literal interpretation or performance of the contract but embraces every dispute between the parties having a significant relationship to the contract.

[11] **Alternative Dispute Resolution** ⇦ Disputes and Matters Arbitrable Under Agreement

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk143 In General

In determining whether a dispute has a significant relationship to a contract, as would support arbitrability of dispute under contract's arbitration clause, court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim.

[12] **Alternative Dispute Resolution** ⇦ Employment Disputes

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 Employment Disputes

Under the Federal Arbitration Act (FAA), executive employee's tort claims of slander and intentional infliction of emotional distress bore significant relationship to employment agreement, and therefore claims fell within scope of agreement's arbitration clause, in case in which employee alleged that employer and co-executive acted to interfere with employee's work and to undermine employee's ability to perform job; alleged tortious conduct and defamatory statements directly related to employee's ability to perform his duties, and agreement articulated the duties and obligations of employee. 9 U.S.C.A. § 1.

[13] **Alternative Dispute Resolution** ⇦ Employment Disputes

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 Employment Disputes

Under Federal Arbitration Act (FAA), executive employee's illegal proxy solicitation claim against employer, alleging proxy statement issued by employer was materially misleading as to effect recapitalization could have had on employee as shareholder, bore significant relationship to employment agreement, and therefore claim fell within scope of agreement's arbitration clause; agreement contemplated employee's status as shareholder by requiring employer to grant employee stock purchase option, and employee alleged in pleading a link between being forced out of employment and questioning of proxy statement. 9 U.S.C.A. § 1.

[14] **Alternative Dispute Resolution** ⇦ Employment Disputes

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk142 Disputes and Matters Arbitrable Under Agreement
25Tk146 Employment Disputes

Under Federal Arbitration Act (FAA), executive employee's claim against employer for wrongful expulsion as director bore significant relationship to employment agreement, and therefore claims fell within scope of agreement's arbitration clause, where employee alleged in pleadings that he was wrongfully expelled because he filed suit for breach of agreement. 9 U.S.C.A. § 1.

Attorneys and Law Firms

C. Mitchell Brown and Sue E. Harper, both of Columbia, of Nelson Mullins Riley & Scarborough, LLP, and Amy L. Gaffney of Columbia, of Gaffney Lewis and Edwards, LLC, for Appellants.

Clayton B. McCullough, of McCullough Khan, LLC, of Charleston, for Respondent.

Opinion

Justice KITTREDGE.

*1 This case concerns the scope of an arbitration clause under the Federal Arbitration Act (FAA). Respondent Christopher Landers served as Appellant Atlantic Bank & Trust's executive vice president pursuant to an employment contract. The contract contained a broad arbitration provision, requiring arbitration of "any controversy or claim arising out of or relating to this contract, or breach thereof." In the underlying action, in which Landers alleges five causes of action, Landers claims he was constructively terminated from his employment as a result of Appellant Neal Arnold's tortious conduct towards him. Appellants moved to compel arbitration pursuant to the employment contract. The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause. We disagree.

Landers' pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement. We find the claims are within the scope of the agreement's broad arbitration provision. Thus, we reverse the trial court's order and hold that all of Landers' causes of action must be arbitrated.

I.

In 2005, Landers and two other individuals founded Atlantic Bank & Trust (Bank). [1] Landers purchased 50,000 shares of common stock of Bank's holding company, Atlantic Banc Holdings, Inc. (Holding Company). On February 20, 2007, Landers and Bank entered into a written employment agreement (Agreement). The Agreement contained an arbitration provision which stated: "Except matters contemplated by Section 17 below [Applicable Law and Choice of Forum], *any controversy or claim arising out of relating to this contract, or the breach thereof,* shall be settled by binding arbitration ...." (emphasis added).

The Agreement provided for an initial term of three years' employment for Landers as Executive Vice President and Chief Mortgage Officer and automatic extensions for successive one-year terms unless either party gave written notice of an intent not to extend the contract. The Agreement also stated that after Holding Company established a stock incentive plan, Landers was to receive an option to purchase 65,000 shares of common stock of Holding Company and provided for a lump-sum payment of 2.99 times Landers' base pay in the event his employment was terminated within one year after a change of control. [2]

Pursuant to the Agreement, Landers was to perform his duties "subject to the direction of the [CEO]" and "diligently follow and implement all reasonable and lawful management policies and decisions communicated to him by the [CEO]." Landers was required to "devote substantially all of his time, energy and skill during regular business hours to the performance of the duties of his employment ... and faithfully and industriously perform such duties." Finally, the Agreement expresses what constituted termination for "cause" and Landers was authorized to terminate the Agreement for cause based upon "a material diminution in the powers, responsibilities, duties or compensation of [Landers]" thereunder.

*2 Bank, like most, suffered financial hardship as a result of the economic collapse in the fall of 2008. In May 2009, Bank's Board of Directors (Board) hired Neal Arnold to serve as CEO and Landers voluntarily accepted the position of president. [3] Thereafter, Arnold began soliciting out-of-state investors to recapitalize Bank. Landers claims he was assured by Arnold

that his job was safe despite the impending recapitalization. According to Landers, however, since Arnold's arrival, he was "systematically and deliberately stripped of his authority" as president. Landers contends Arnold began a campaign to "discredit, belittle, demean, and constructively terminate" him. Arnold and other executives stated "Landers had ADD [Attention Deficit Disorder] and was incompetent to perform his job" and "incapable of effectively communicating with anyone in performing his job."

Landers alleges that these and other statements were made in front of numerous coworkers. He also claims Arnold's behavior towards him was verbally abusive, demeaning, and generally unprofessional and improper. According to Landers, Arnold routinely called him offensive names and used unseemly language towards him in front of upper-level management and other co-workers. In one instance, Landers contends Arnold even threatened him in a highly aggressive and volatile manner when Landers came to the defense of a junior co-worker. Beginning in September 2009, Landers alleges he was forced to sign in and out whenever he left the office and was required by Arnold to enlist the help of other management personnel when communicating with a certain client because Arnold asserted he was not capable of handling these discussions.

Additionally, Landers contends Arnold steadily and purposefully provided incorrect information to him about the status of Bank's management. Landers claims he was not permitted to see documentation regarding the recapitalization or takeover despite repeatedly asking for such information. The pertinent documents revealed a new management team and Board, neither of which listed Landers as a member. Landers also asserts Arnold repeatedly assured him that he would be entitled to receive payment for the "Change in Control" pursuant to the Agreement, which Appellants now refuse. According to Landers, Appellants also refuse to offer him stock options to which he is entitled under the Agreement.

On December 18, 2009, Landers sent a letter to Arnold "recognizing his constructive termination." Landers expressed he was writing the letter "as a result of [Arnold's] actions over the past six months, especially those over the last 30 days." In the letter, Landers claims Arnold "acted to effectively destroy [his] authority and ability to perform [his] job." In one section, the letter states:

> You have made a concerted effort to undermine my authority, removed much of my authority, changed my duties, have defamed me in front of co-workers, and generally made it impossible for me to perform as President. You continue to withhold vital information and misrepresent facts. As a result, you have effectively terminated me from my position as President of Atlantic Bank.

*3 Arnold accepted Landers' letter of constructive termination several days later.

In January of 2010, Bank and Holding Company sent a Notice of Special Meeting and Proxy to their shareholders. The Notice contained information regarding new investors and proposed amendments to the Articles of Incorporation. According to Landers, the Notice and Proxy Statement contained incomplete and misleading information concerning the effect the recapitalization would have on shareholders of common stock. [4] Landers alleges he was "forced out" of Bank as a result of the concerns that he expressed regarding Arnold's campaign to provide incorrect information about the recapitalization. In his complaint, Landers states: "As a result of Landers' concerns, and in an effort to eliminate Landers as a potential problem, he was stripped of much of his authority as President, defamed, and then terminated by Atlantic Bank."

Lastly, Landers contends he was excluded from his role as a director on the Board in "an ongoing effort to freeze [him] out and strip him of his authority." According to Landers, when he was not permitted to call in to a special Board meeting in May 2010, he went to the meeting in person and was asked to recuse himself. Landers refused to recuse himself and claims he was ejected from the meeting. Landers alleges he is no longer provided necessary information or authority to serve in his capacity as a director. [5]

Landers commenced this action in January 2010. In his complaint, Landers' asserted five causes of action: (i) breach of contract/ constructive termination; (ii) slander/slander per se; (iii) intentional infliction of emotional distress; (iv) illegal proxy solicitation

pursuant to S.C. Code Ann. § 33–7–220(i) (Supp. 2011);[6] and (v) wrongful expulsion as a director. Appellants moved to compel arbitration pursuant to the arbitration clause contained in the Agreement and to dismiss or stay the action. The trial court ordered arbitration for Landers' breach of contract/constructive termination claim. However, the trial court denied Appellants' motion to compel arbitration as to the remaining causes of action. In doing so, the court found there was not a significant relationship between the claims and the Agreement. Alternatively, the court found the allegations underlying the claims were unforeseeable at the time the parties entered into the Agreement. Thus, the trial court stayed the breach of contract claim and ordered that the remaining four claims proceed to court.

II.

[1] [2] [3] "The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise." *Partain v. Upstate Automotive Group,* 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "The determination of whether a claim is subject to arbitration is subject to de novo review." *Id.* (citing *Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323) (2009). However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

III.

*4 [4] [5] Generally, any arbitration agreement affecting interstate commerce, such as the one at issue, is subject to the FAA. *See Circuit City Stores, Inc. v. Adams,* 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001) (holding that in the employment context, only transportation workers' employment contracts are exempted from the FAA's coverage); *see also* 9 U.S.C. §§ 1, 2. Once it is determined that the FAA applies to a dispute, federal substantive law regarding arbitrability controls. *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) ("[T]he first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute. The court is to make this determination by applying the federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA].").

[6] [7] Whether a party has agreed to arbitrate an issue is a matter of contract interpretation and "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.,* 96 F.3d 88, 92 (4th Cir.1996) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)); *see also First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) ("When deciding whether the parties agreed to arbitrate a certain matter ... courts generally ... should apply ordinary state-law principles that govern the formation of contracts."). Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability. *Am. Recovery,* 96 F.3d at 94.

[8] [9] It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 92 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.,* 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); *accord Zabinski,* 346 S.C. at 598, 553 S.E.2d at 118. " 'The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.' " *Am. Recovery,* 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.,* 867 F.2d 809, 812 (4th Cir.1989)). Such a presumption is strengthened when an arbitration clause is broadly written. *AT & T Tech., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Therefore, " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]' " arbitration must generally be ordered. *Am. Recovery, 96 F.3d at 92* (quoting *Warrior & Gulf Navigation Co.,* 363 U.S. at 582–83, 80 S.Ct. 1347); *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 119.

[10] [11] A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). Courts have held that such broad clauses are "capable of an expansive reach." *Am. Recovery Corp.*, 96 F.3d at 93. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir.1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. Thus, the scope of the clause does "not limit arbitration to the literal interpretation or performance of the contract [, but] embraces every dispute between the parties having a significant relationship to the contract." *J.J. Ryan*, 863 F.2d at 321. In applying this standard, this Court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Id.* at 319; *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

*5 It is within this framework that we must determine whether Landers' claims are within the scope of the Agreement's arbitration clause.

A.

[12] Landers contends that the tort claims of slander and intentional infliction of emotional distress are not within the scope of the arbitration clause. [7] Specifically, Landers asserts they are not subject to arbitration because they do not require reference to or construction of the Agreement. We disagree and find Landers' tort claims bear a significant relationship to the Agreement, such that they must be arbitrated.

In support of his contention, Landers suggests the situation before us is indistinguishable from *McMahon v. RMS Electronics, Inc.*, 618 F.Supp. 189 (S.D.N.Y.1985). In that case, after McMahon's employment was terminated by RMS, he brought a lawsuit alleging eight causes of action, including three defamation claims. McMahon alleged that one week before his termination, the president of RMS stated to another employee that McMahon was the "company drunk" and was "interfering with the president's operation of the company." The New York district court denied RMS's motion to compel arbitration as to this defamation claim. The court stated "although the statements regarding McMahon's drinking habits may be relevant to his claim of wrongful termination, the resolution of the defamation claim does not require reference to the underlying contract" and "does not require an interpretation of the contractual agreement between the two parties." *Id.* at 193. The court further stated "the defamation claim is not arbitrable simply because the statements were made during the term of McMahon's employment." *Id.*

We find *McMahon* unpersuasive. Certainly, arbitration is only required where the parties have contracted for it, and "the exact content of the allegedly defamatory statement must be closely examined to see whether it extends to matters beyond the parties' contractual relationship." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20 (2d Cir.1995); *see also Brown v. Coleman Co.*, 220 F.3d 1180, 1184 (10th Cir.2000) (finding that a defamatory explanation which dealt with the termination of plaintiff's employment and his supposed violation of his employment contract was within the scope of a broad arbitration clause). However, under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause. *See J.J. Ryan*, 863 F.2d at 321 (finding that under the significant relationship test, broad arbitration clause does not limit arbitration to literal interpretation or performance of the contract).

Moreover, the allegedly defamatory statements made in *McMahon* related to the employee's general character, whereas here, Landers asserts that the alleged tortious conduct and defamatory statements of Arnold directly related to Landers' ability to perform his duties with Bank. *Cf. Fleck v. E.F. Hutton Group, Inc.*, 891 F.2d 1047 (2d Cir.1989) (statements that broker had lost his license and was "basically a criminal" were relevant to job performance and within the scope of arbitration clause arising out of employment or termination of employment, but not statement that broker was disbarred by lawyer). Landers alleges outrageous statements and conduct that "generally made it impossible for [him] to perform as President." He asserts the alleged

tortious conduct of Arnold "discredit[ed], belittle[d], demean[ed], and constructively terminate[d]" him. Furthermore, he claims the statements were intended to create an impression he was "incapable of performing his job effectively."

*6 We find Landers' tort claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently follow and implement all policies and decisions of the employer. Furthermore, the Agreement contemplates what constitutes cause for termination, including a "material diminution in [ ] powers, responsibilities, duties or compensation."

Thus, in light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract. [8] Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause. Thus, we reverse the trial court's order denying Appellants' motion to compel the causes of action of slander and intentional infliction of emotional distress.

B.

Landers also contends that his corporate claims of illegal proxy solicitation and wrongful expulsion as director are not within the scope of the arbitration provision. Certainly, the question of whether Landers' corporate claims are within the scope of the arbitration clause is admittedly closer than his tort claims discussed above. However, we find untenable Landers' assertion that these corporate claims do not bear a significant relationship to the terms and conditions of his employment contract or any breach thereof. In any event, we cannot say with positive assurance that such claims are not within the scope of the arbitration clause within the Agreement. Thus, we hold these claims are also subject to arbitration.

Illegal Proxy Solicitation

[13] The essence of Landers' illegal proxy solicitation claim is that the proxy statement issued by Bank was materially misleading as to the effect the recapitalization could have on the common shareholders, including Landers.

Although Landers' status as a shareholder did not originally derive from the Agreement, [9] the Agreement does in fact contemplate his status as a shareholder. By Landers' own allegation, Appellants were required to grant him an option to purchase 65,000 additional shares of common stock pursuant to the Agreement. [10]

Furthermore, the Agreement's arbitration clause mandates arbitration of "any controversy or claim arising out of relating to this contract, or the *breach thereof*." (emphasis added). Landers' allegations provide a direct link between his status as a shareholder and the purported breach of the Agreement. Specifically, Landers claims that "because [he] stated his concerns and sought complete, accurate information regarding the transactions [including recapitalization and amendments to the Articles of Incorporation] and its potentially adverse effects, *he was forced out of Atlantic Bank* causing him further injury." Landers further states, "*But for* the proxy solicitation and other misleading information, [he] would not have questioned the material omissions leading to his termination." (emphasis added).

*7 *Oldroyd v. Elmira Sav. Bank, FSB,* 134 F.3d 72 (2d Cir.1998) is instructive here. In *Oldroyd,* the plaintiff, a former vice president of a bank, alleged he was wrongfully discharged because he informed the United States Treasury Department of illegal loan activity occurring at the bank. In finding the plaintiff's retaliatory discharge subject to arbitration, the Second Circuit Court of Appeals stated:

> In alleging retaliatory discharge, Oldroyd asserts that he was unlawfully terminated by his employer because he informed [the Treasury Department] of the illegal loan activity occurring at ESB. Inasmuch as more than half of Oldroyd's employment contract relates to the subject of termination from employment, there can be no doubt that a retaliatory discharge claim touches matters covered by the employment contract. For example, the contract addresses such matters as what constitutes "cause" for termination, benefits to be provided after termination, notice requirements for termination, termination upon change of control, and related matters. Accordingly, we conclude that since Oldroyd alleges that he was terminated under circumstances giving rise to a retaliatory discharge claim, such claim touched matters covered by the employment agreement and therefore is clearly within the scope of the agreement's arbitration clause.

134 F.3d at 77.

Similarly here, Landers' pleadings link the alleged illegal proxy solicitation to his wrongful termination and the resulting breach of the Agreement. Thus, we conclude his illegal proxy solicitation claim is significantly related to the Agreement. Moreover, this Court cannot say with positive assurance that the proxy cause of action is not within the scope of the arbitration clause. Because any doubt must be resolved in favor of arbitration, we reverse the trial court and find Landers' illegal proxy solicitation claim must be arbitrated.

Wrongful Expulsion as Director

[14] With regard to his wrongful expulsion claim, Landers asserts that he was "frozen out" of and improperly excluded from his role as a member of the Board since filing the initial summons and complaint on January 21, 2010. He contends his position has materially changed, such that he has suffered a reduction in duties and authorities in his capacity as director.

Landers' pleadings do not inform the Court how he came to be a director and nothing in the Agreement contemplates Landers' position as a director. Thus, we are compelled to conclude that his status as a director does not derive from the Agreement. Nonetheless, Landers asserts that he was wrongfully expelled because he filed suit for breach of the Agreement. As we previously referenced, the Agreement mandates arbitration of any claim arising out of or relating to the breach of the Agreement. By Landers' own contention, the breach of the Agreement resulted in his expulsion as a director. Similar to Landers' proxy solicitation claim, we find the wrongful expulsion claim bears a significant relationship to the Agreement or breach thereof. *See Oldroyd*, 134 F.3d at 77 (finding that because plaintiff alleged he was terminated under circumstances that gave rise to a retaliatory discharge claim, the claim touched matters covered by the employment contract and thus was within the scope of the contract's arbitration clause). Thus, we reverse the trial court's order denying Appellants' motion to compel arbitration of the wrongful expulsion as director claim.

***8** We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the Agreement, and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement. Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated. [11] In doing so, we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.

C.

We take this occasion to revisit federal jurisprudence regarding the analytical framework to determine whether a broad arbitration clause encompasses certain claims. In the last several decades, two terms—supposedly synonymous—have emerged as leading phraseologies in the analysis. Some jurisdictions, including this Court and the Fourth Circuit, utilize the "significant

relationship" term, which we have employed today. Others have preferred the "touch matters" phrase, holding that broad arbitration clauses encompass all claims that "touch matters" covered by the contract or agreement. *See, e.g., 3M Co. v. Amtex Sec., Inc.*, 542 F.3d 1193, 1199 (8th Cir.2008) (noting the liberal federal policy favoring arbitration requires that a court send a claim to arbitration "when presented with a broad arbitration clause ... as long as the underlying factual allegations simply 'touch matters covered by' the arbitration provision"); *Brayman Constr. Corp. v. Home Ins. Co.*, 319 F.3d 622, 626 (3d Cir.2003) ("[I]f the allegations underlying the claims 'touch matters' covered by an arbitration clause in a contract, then those claims must be arbitrated, whatever the legal labels attached to them.").

In theory, the two terms are interchangeable. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir.1999) (broad clause reaches every dispute having a significant relationship to the contract and all disputes having their genesis in the contract and the allegations only need "touch matters" covered by the contract); *Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061 (5th Cir.1998) (discussing that broad arbitration clauses embrace all disputes between the parties having a significant relationship to the contract and holding it is only necessary that the dispute touch matters covered by the agreement to be arbitrable).

Yet, over time and in the context of certain cases, it appears a tension has developed regarding interpretations of the two terms. The phrase "significant relationship" has arguably evolved to impose an enhanced burden on the party seeking to compel arbitration. Conversely, "touch matters" has been increasingly construed as requiring a lesser showing on the party desiring arbitration. This tension surrounding the tests for arbitrability and the policy favoring arbitration has been candidly acknowledged by the Fourth Circuit Court of Appeals. "We recognize that requiring a *significant* relationship in order to compel arbitration ... appears to be at odds with the language of the [ ] arbitration clause, which only requires that the [ ] claims "*relate to* " the [agreement]. We recognize as well that to require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration." *Wachovia Bank Nat'l Assoc. v. Schmidt*, 445 F.3d 762, 767 n. 5 (4th Cir.2006) (emphasis in original).

***9** We believe that these terms—"significant relationship" and "touch matters"—were never intended to be separate and independent tests for analyzing the scope of a broad arbitration clause. We employ the "significant relationship" term today only because it is in keeping with our jurisprudence. We merely observe that the two terms were not intended to differ in any meaningful way. Nonetheless, we note that if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the "touch matters" term hues more closely to Congressional intent concerning the FAA.

IV.

In conclusion, we reverse the trial court with respect to each of Landers' remaining four causes of action and hold that each is subject to arbitration.

REVERSED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

1 Bank is a federally-chartered savings bank with branches in South Carolina and Georgia. In June 2011, the Office of Thrift Supervision (OTS), a former federal agency under the United States Department of Treasury, took possession of the business and property of Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as its receiver. In April 2012, the FDIC disallowed Landers' claim he submitted pursuant to 12 U.S.C. § 1821(d)(5) (2006). However, subsection (d)(6) permits a claimant, as a matter of right,

to continue an action commenced before the appointment of the receiver. Neither the FDIC nor Appellants oppose the action's continuation before this Court.

2 Under the Agreement, a reorganization that results in current stockholders of Bank or Holding Company immediately prior thereto owning less than fifty percent (50%) of the combined voting power constitutes a change of control.

3 Landers began serving as Bank's Chief Executive Officer (CEO) in October of 2008.

4 Landers contends the proposed transaction and amendments to the Articles of Incorporation would allow the takeover company, through appointed directors, to pay dividends on its preferred stock but not the common stock. It would also allow directors to take other actions detrimental to the common shareholders, including Landers, and force their share values to zero.

5 Appellants admit Landers was asked to recuse himself from the Board meeting due to the ongoing litigation and the potential conflict of interest. Appellants contend Landers tendered his resignation from the Board in June 2010.

6 The text of the statute reads:

> A proxy may not be solicited on the basis of any proxy statement or other communication, written or oral, containing a statement which, at the time and in light of the circumstances under which it was made, was false or misleading with respect to a material fact or which omits to state a material fact necessary to make the statements made not false or misleading.

S.C.Code Ann. § 33–7–220(i).

7 Because Landers expressly states in his complaint that the slanderous statements were encompassed in his claim of intentional infliction of emotional distress, we find it appropriate to analyze the related claims together.

8 *See Gillespie v. Colonial Life & Accident Ins. Co.*, No. 08–689, 2009 WL 890579 (W.D.Pa. March 30, 2009) (finding broad arbitration clause applied to claims of sexual harassment and retaliation because the claims related to employee's business relationship with Colonial, not merely disputes relating to specific provisions of the contract in accordance with South Carolina law); *Smith v. Cato*, No. 3:05CV99, 2006 WL 1285521 (W.D.N.C. May 9, 2006) (finding plaintiff's defamation claim, which was based on allegations of employee's gross negligence and misconduct as the grounds for termination, bore a significant relationship to the employment agreement); *Orcutt v. Kettering Radiologists, Inc.*, 199 F.Supp.2d 746 (S.D.Ohio 2002) (finding claims based on discrimination, harassment, and retaliation that occurred during the course of employment clearly arose out of or related to plaintiff's employment agreement); *Stanton v. Prudential Ins., Co.*, No. 98–4989, 1999 WL 236603 (E.D.Pa. April 20, 1999) (noting that tort claim of intentional infliction of emotional distress was arbitrable since it arose directly from the circumstances leading to plaintiff's termination from employment).

9 According to the Record, Landers purchased 50,000 shares of stock when he founded Bank, not pursuant to any provision in the Agreement.

10 Landers alleges Appellants have refused to grant him such option.

11 We find it unnecessary to address Appellants' remaining argument regarding the propriety of the potential stay of any non-arbitrable claims. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

Parallel Citations

35 IER Cases 213

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United States Court of Appeals,
Fourth Circuit.

Samuel D. MURIITHI, Plaintiff–Appellee,
and
Kevin A. Gadson; Okierieta O. Enajekpo, Plaintiffs,
v.
SHUTTLE EXPRESS, INC., Defendant–Appellant,
and
Supershuttle International, Inc.; Shuttle Express Corporation; Veolia Transportation, Incorporated; Veolia Environment SA, Defendants.

No. 11–1445. | Argued Jan. 29, 2013. | Decided April 1, 2013.

Synopsis

Background: Driver for passenger shuttle service brought putative class action against shuttle service, alleging violations of Fair Labor Standards Act (FLSA) and state law. Shuttle service moved to compel arbitration. The United States District Court for the District of Maryland, Alexander Williams, Jr., J., 2011 WL 1231311, denied motion. Shuttle service appealed.

Holdings: The Court of Appeals, Barbara Milano Keenan, J., held that:

[1] driver's claim that he was improperly classified as an independent contractor or franchisee of airport shuttle service, rather than as an employee, fell within scope of arbitration agreement;

[2] defense of unconscionability could not be applied to invalidate an otherwise valid arbitration agreement provision barring classwide procedures;

[3] fee-splitting provision of arbitration agreement did not impose prohibitive arbitration costs; and

[4] consideration of arbitration agreement's one-year limitation period provision was outside scope of motion to compel arbitration.

Vacated and remanded.

West Headnotes (21)

[1] **Federal Courts**
170B Federal Courts
Court of Appeals reviews de novo a district court's denial of a motion to compel arbitration.

[2] **Federal Courts**

170B Federal Courts

Court of Appeals reviews de novo questions of state contract law concerning the validity of the parties' arbitration agreement.

[3] **Contracts**

95 Contracts

Court of Appeals applies ordinary state law principles governing the formation of contracts, including principles concerning the validity, revocability, or enforceability of contracts generally.

[4] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

In reviewing a district court's denial of a motion to compel arbitration, Court of Appeals applies the federal substantive law of arbitrability, which governs all arbitration agreements encompassed by the FAA. 9 U.S.C.A. § 2 et seq.

[5] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

A court may compel arbitration of a particular dispute only when the parties have agreed to arbitrate their disputes and the scope of the parties' agreement permits resolution of the dispute at issue.

[6] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

The issue whether a dispute is arbitrable presents primarily a question of contract interpretation, requiring that Court of Appeals gives effect to the parties' intentions as expressed in their agreement.

[7] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Any uncertainty regarding the scope of arbitrable issues agreed to by the parties must be resolved in favor of arbitration.

[8] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Driver's claim that he was improperly classified as an independent contractor or franchisee of airport shuttle service, rather than as an employee, fell within the scope of arbitration clause of franchise agreement; parties had agreed that any controversy arising out of agreement would be submitted to arbitration, and driver's claim arose out of provision of agreement that identified driver as "independent contractor," "franchisee," and "independent owner of his business."

[9] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Fact that plaintiff's claims alleged violations of federal and state statutes, rather than breach of contract, did not affect the arbitrability of those claims.

[10] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

General contract defense of unconscionability under Maryland law could not be applied to invalidate an otherwise valid arbitration agreement provision barring classwide procedures.

[11] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

In order to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, party seeking invalidation must present sufficient evidence of: (1) the cost of arbitration; (2) his ability to pay; and (3) the difference in cost between arbitration of his dispute and litigation.

[12] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

A fee-splitting provision can render an arbitration agreement unenforceable if, under the terms of the provision, an aggrieved party must pay arbitration fees and costs that are so prohibitive as to effectively deny the employee access to the arbitral forum.

[13] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Party seeking to invalidate an arbitration agreement on basis of prohibitive arbitration costs bears the substantial burden of showing a likelihood, based on firm proof, of incurring prohibitive arbitration costs.

[14] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Arbitration cannot be compelled when arbitral costs are so high that they effectively preclude a litigant from vindicating his federal statutory rights in an arbitral forum.

[15] **Federal Courts**

170B Federal Courts

Court of Appeals will not readily infer that the Supreme Court impliedly has overruled its own precedent.

[16] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Plaintiff seeking to invalidate arbitration provision in franchise agreement could not meet burden of showing that he would likely incur prohibitive arbitration fees simply by showing the fees that some arbitrators were charging elsewhere; plaintiff was required to offer evidence regarding fees likely to be incurred in resolving his own claims.

[17] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Plaintiff could not establish that fee-splitting provision of arbitration agreement imposed prohibitive arbitration costs on him in absence of evidence about the value of his claim.

[18] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

A party's agreement to pay all arbitration costs, when made in a timely manner such as before a district court has ruled on the enforceability of the arbitration clause, moots the issue of whether arbitration costs are prohibitive.

[19] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

A party challenging the enforceability of an arbitration clause under the Federal Arbitration Act (FAA) must rely on grounds that relate specifically to the arbitration clause and not just to the contract as a whole. 9 U.S.C.A. § 2.

[20] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

A challenge specific to an arbitration clause is considered by the court in a motion to compel arbitration, while a challenge relating to the entire contract is heard only after the merits of a case have been referred to an arbitrator or have been retained for decision by the court.

[21] **Alternative Dispute Resolution**

25T Alternative Dispute Resolution

Consideration of arbitration agreement's one-year limitation period provision was outside scope of motion to compel arbitration in action alleging violation of Fair Labor Standards Act (FLSA); issue of applicability of limitations provision should have been reserved for the forum in which the dispute ultimately would be resolved.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (8:10–cv–01057–AW).

Attorneys and Law Firms

ARGUED: Christopher A. Parlo, Morgan Lewis & Bockius, LLP, New York, New York, for Appellant. John Michael Singleton, Sr., Lutherville, Maryland, for Appellee. **ON BRIEF:**Russell R. Bruch, Morgan Lewis & Bockius, LLP, Washington, D.C.; Melissa C. Rodriguez, Morgan Lewis & Bockius, LLP, New York, New York, for Appellant.

Before DAVIS and KEENAN, Circuit Judges, and John A. GIBNEY, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

Opinion

Vacated and remanded by published opinion. Judge KEENAN wrote the opinion, in which Judge DAVIS and Judge GIBNEY joined.

OPINION

BARBARA MILANO KEENAN, Circuit Judge:

*1 In this appeal, we consider the enforceability of an arbitration clause included in a franchise agreement between the plaintiff, Samuel Muriithi, and the defendant, Shuttle Express, Inc. The district court refused to compel arbitration based on three provisions in the franchise agreement that the court found were unconscionable: (1) a class action waiver; (2) a requirement that the parties "split" arbitration fees; and (3) a one-year limitations period for asserting claims arising under the franchise agreement. Upon our review, we conclude that the Supreme Court's recent decision in *AT & T Mobility LLC v. Concepcion*, —— U.S. ——, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), requires reversal of the district court's holding that the class action waiver was an unconscionable contract provision. We further conclude that the district court erred in holding that the other two challenged provisions also rendered the arbitration clause unconscionable. Accordingly, we vacate the district court's judgment and remand the case for entry of an order compelling arbitration of Muriithi's claims.

I.

Samuel Muriithi was a driver for Shuttle Express, a passenger shuttle service, who provided transportation for passengers to and from the Baltimore—Washington International Thurgood Marshall Airport. Muriithi alleges that Shuttle Express misled him concerning the compensation he would receive, inducing him to sign a Unit Franchise Agreement with Shuttle Express in April 2007 (the Franchise Agreement). Muriithi also alleges that Shuttle Express improperly classified him in the Franchise Agreement as an "independent contractor" or "franchisee," rather than as an "employee," and that, as a result, he is entitled to overtime pay and to compensation of at least the prevailing minimum wage required under federal law.

Asserting these grounds for relief, Muriithi initiated a collective action against Shuttle Express under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 through 219. [1] In his complaint, Muriithi also raised various Maryland state law claims on behalf of all members of a purported class. Shuttle Express moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 4.

The Franchise Agreement contains an arbitration clause, which states in material part:

> Except as provided below, any controversy arising out of this Agreement shall be submitted to the American Arbitration Association at its offices in or nearest to Baltimore, Maryland, for final and binding arbitration in accordance with its commercial rules and procedures which are in effect at the time the arbitration is filed. The parties shall bear their own costs including without limitation attorney's fees, and shall each bear one-half (1/2) of the fees and costs of the arbitrator.
>
> ...
>
> The parties acknowledge that their relationship is unique and that there are and will be differences from the relationships [Shuttle Express] may have with other franchisees or licensees. Therefore, any arbitration, suit, action or other legal proceeding shall be conducted and resolved on an individual basis only and not on a class-wide, multiple plaintiff, consolidated or similar basis.

*2 (individually, the fee-splitting clause and the class action waiver; in its entirety, the Arbitration Clause).

Also relevant to this appeal is the one-year limitations provision included in the Franchise Agreement, which states as follows:

> *STATUTE OF LIMITATIONS*
>
> The parties hereby acknowledge and agree that any arbitration, suit, action or other proceeding relating to this Agreement must be brought within one (1) year after the occurrence of the act or omission that is the subject of the arbitration, suit, action or other legal proceeding.

(the one-year limitations provision). [2]

In considering Shuttle Express' motion to compel arbitration, the district court first addressed the issue whether Muriithi's claims fall within the scope of the Arbitration Clause. The court held that Muriithi's FLSA and Maryland law claims "arise out of" the Franchise Agreement and, thus, fall within the scope of disputes covered by the parties' agreement to arbitrate. The court further concluded, however, that the Arbitration Clause is unenforceable based on three provisions in the Franchise Agreement that the court found were unconscionable.

First, under the fee-splitting provision, the district court found that the costs of arbitration would be "so prohibitively expensive as to deter arbitration" at Muriithi's request. Second, the district court held that the class action waiver and the fee-splitting provision operate together to "prevent [Muriithi] from fully vindicating [his] statutory rights." The court also found that if "class actions are prohibited by the [Franchise Agreement], the realistic alternative would be that no individual suits are brought given that the costs of each individual arbitration has the potential to exceed any recovery."

Third, the district court concluded that the one-year limitations provision governing all claims arising out of the Franchise Agreement also "operates to prevent [Muriithi] from vindicating [his] statutory rights," because the FLSA affords him at least a two-year period in which to assert his claims. 29 U.S.C. § 255(a). The district court thus determined that because the Arbitration Clause was "so permeated by substantively unconscionable provisions," it could not be remedied by severing the unconscionable parts. Accordingly, the court denied Shuttle Express' motion to compel arbitration. [3] Shuttle Express timely filed a notice of appeal.

II.

We have jurisdiction over this appeal pursuant to 9 U.S.C. § 16(a)(1)(B), which authorizes an appeal from a district court's denial of a petition to compel arbitration brought under Section 4 of the FAA. Shuttle Express challenges the district court's order refusing to compel arbitration, contending that: (1) under the Supreme Court's holding in *AT & T Mobility LLC v. Concepcion,* the class action waiver is not unconscionable; (2) Muriithi failed to establish that he will incur "prohibitive" arbitration costs under the fee-splitting provision; and (3) the district court erred in holding as part of the motion to compel arbitration that the one-year limitations provision is unconscionable. [4]

A.

*3 [1] [2] Upon petition of a party to an arbitration agreement, a district court may compel arbitration to enforce the parties' agreement to arbitrate their disputes. 9 U.S.C. § 4; *RotaMcLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 696 n. 5 (4th Cir.2012). We review de novo a district court's denial of a motion to compel arbitration. *Sydnor v. Conesco Fin. Servicing Corp.*, 252 F.3d 302, 304–05 (4th Cir.2001). We also review de novo questions of state contract law concerning the validity of the parties' arbitration agreement. *Rota–McLarty,* 700 F.3d at 699.

[3] [4] Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[5] 9 U.S.C. § 2. We apply ordinary state law principles governing the formation of contracts, including principles concerning the "validity, revocability, or enforceability of contracts generally." *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir.2005) (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987)). We also apply the federal substantive law of arbitrability, which governs all arbitration agreements encompassed by the FAA. *Id.* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

B.

[5] [6] [7] A court may compel arbitration of a particular dispute only when the parties have agreed to arbitrate their disputes and the scope of the parties' agreement permits resolution of the dispute at issue. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *see also UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 324 n. 2 (4th Cir.2013). The issue whether a dispute is arbitrable presents primarily a question of contract interpretation, requiring that we give effect to the parties' intentions as expressed in their agreement. *Wachovia Bank, N.A. v. Schmidt*, 445 F.3d 762, 767 (4th Cir.2006). Any uncertainty regarding the scope of arbitrable issues agreed to by the parties must be resolved in favor of arbitration. *Moses H. Cone*, 460 U.S. at 24–25; *see also Hill*, 412 F.3d at 543.

[8] [9] In the Franchise Agreement, the parties agreed that "any controversy arising out of this [a]greement shall be submitted to" arbitration. Muriithi's claims under the FLSA and the Maryland Wage and Hour Law, Md. Lab. & Empl.Code §§ 3–401 to 3–431, are based on his allegation that he improperly was classified as an "independent contractor" or "franchisee," rather than as an "employee." This dispute regarding his classification derives from the language of the Franchise Agreement, which in its section defining the "Relationship of Parties" identifies Muriithi as "independent contractor," "franchisee," and "independent owner of [his] business." Additionally, in his claim under the Maryland Franchise Registration and Disclosure Law, Md.Code Bus. Reg. §§ 14–201 to 14–233, Muriithi alleges that Shuttle Express failed to inform him about the numerous costs and fees, which were set forth in the Franchise Agreement. Therefore, although Muriithi's claims are asserted under various provisions of federal and state law, the claims plainly arise out of the Franchise Agreement and fall within the scope of the Arbitration Clause.[6]

C.

*4 We turn to address the enforceability of the class action waiver. In its decision denying Shuttle Express' motion to compel arbitration, the district court identified the class action waiver as one factor preventing Muriithi from fully vindicating his statutory rights. In the district court's view, upon a prohibition of class actions, the only "realistic alternative would be that no individual suits are brought given that the costs of each arbitration has [sic] the potential to exceed any recovery."

Shuttle Express contends, among other things, that the district court's refusal to enforce the class action waiver is "directly at odds" with the Supreme Court's recent decision in *Concepcion*, which held that "[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S.Ct. at 1748. Thus, Shuttle Express argues that the district court erred in holding that the class action waiver rendered the Arbitration Clause unconscionable.

In response, Muriithi argues that the holding in *Concepcion* is inapposite because the law at issue in that case was based on California state law, articulated in *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (Cal.2005), which held that class action waivers in arbitration agreements are unconscionable. Muriithi therefore contends that

the decision in *Concepcion* is limited in scope to the FAA's preemption of state law on this issue. We disagree with Muriithi's arguments.

[10] The Supreme Court's holding in *Concepcion* sweeps more broadly than Muriithi suggests. In *Concepcion,* the Supreme Court cautioned that the generally applicable contract defense of unconscionability may not be applied in a manner that targets the existence of an agreement to arbitrate as the basis for invalidating that agreement. 131 S.Ct. at 1746–47. Applying that principle to the *Discover Bank* "rule" at issue, the Court explained that state law cannot "stand as an obstacle to the accomplishment of the FAA's objectives," by interfering with "the fundamental attributes of arbitration." 131 S.Ct. at 1748.

We recently discussed the holding in *Concepcion* in our decision in *Noohi v. Toll Bros., Inc.,* 708 F.3d 599, 2013 WL 680690, at *6 (4th Cir. Feb.26, 2013).[7] We explained that the holding "prohibited courts from altering otherwise valid arbitration agreements by applying the doctrine of unconscionability to eliminate a term barring classwide procedures." *Id.* (citing *Concepcion,* 131 S.Ct. at 1750–53). Thus, contrary to Muriithi's contention, the Supreme Court's holding was not merely an assertion of federal preemption, but also plainly prohibited application of the general contract defense of unconscionability to invalidate an otherwise valid arbitration agreement under these circumstances. The district court in the present case, deciding the same issue of unconscionability prior to *Concepcion,* reached the opposite conclusion.[8] Accordingly, we conclude that the district court erred in holding that the class action waiver was unconscionable.

D.

*5 [11] We next consider the issue whether the district court erred in holding that the fee-splitting provision imposed prohibitive arbitration costs on Muriithi. Shuttle Express argues that Muriithi did not meet his burden of showing prohibitive costs under *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), because he did not present sufficient evidence of: (1) the cost of arbitration; (2) his ability to pay; and (3) the difference in cost between arbitration of his dispute and litigation. *See id.* at 90–92.

In response, Muriithi contends that the projected costs of arbitrating his dispute render the Franchise Agreement unenforceable, because "it would always cost more to enforce the agreement than to ignore clear violations" when a party's damages do not substantially exceed the expected cost of the proceedings. We disagree with Muriithi's arguments.

In holding that the costs of arbitration in this case would be prohibitive, the district court noted Muriithi's argument that the fees to the arbitrator, administration fees of the AAA, and "various other fees," could reach a total cost of $5,600. Under the fee-splitting provision, Muriithi would be required to bear one-half of these expenses.

The district court observed that Muriithi "project[s] that the total amount of individual recovery will be far below potential fees incurred in arbitration." Relying on information contained in Muriithi's 2009 federal income tax return, the district court found that Muriithi had established that he was unable to pay even the "conservative cost speculations" he had presented regarding projected arbitration costs. Therefore, the district court held that the fee-splitting provision rendered the Arbitration Clause unconscionable.

[12] [13] A fee-splitting provision can render an arbitration agreement unenforceable if, under the terms of the provision, an aggrieved party must pay arbitration fees and costs "that are so prohibitive as to effectively deny the employee access to the arbitral forum." *Bradford v. Rockwell Semiconductor Sys., Inc.,* 238 F.3d 549, 554 (4th Cir.2001) (citing *Green Tree,* 531 U.S. at 90). We analyze issues regarding prohibitive arbitration costs on a case-by-case basis, focusing on a number of factors that include the fees and costs of arbitration, the claimant's ability to pay, the value of the claim, and the difference in cost between arbitration and litigation. *Id.* at 556. However, the party seeking to invalidate an arbitration agreement on this basis bears the "substantial" burden of showing a likelihood of incurring prohibitive arbitration costs. *In re Cotton Yarn Antitrust Litig.,* 505 F.3d 274, 286–87 (4th Cir.2007) (citing *Green Tree,* 531 U.S. at 92).

[14] Under the holding in *Green Tree,* a party meeting this substantial evidentiary burden has established a basis for invalidation of an arbitration agreement. *See Green Tree,* 531 U .S. at 90–92; *Bradford,* 238 F.3d at 554. Arbitration cannot be compelled when arbitral costs are so high that they effectively preclude a litigant from vindicating his federal statutory rights in an arbitral forum. *See Green Tree,* 531 U.S. at 90 (quoting *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)) (claims arising under a federal statute "may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions' "). Under *Green Tree,* a party seeking to invalidate an arbitration agreement on these grounds will not be permitted merely to allege the likelihood of incurring prohibitive arbitration costs, but must establish the likely existence of such costs with firm proof. *In re Cotton Yarn Antitrust Litig.,* 505 F.3d at 286–87; *Adkins,* 303 F.3d at 503; *Bradford,* 238 F.3d at 556.

***6** The Supreme Court's decision in *Concepcion* does not alter this longstanding principle. The Court's holding there did not mention, much less directly overrule, its prior opinion in *Green Tree.* Moreover, the Court in *Concepcion* was not required to address directly the issue of prohibitive arbitration costs, because the arbitration agreement at issue contained certain financial concessions on the part of AT & T, essentially guaranteeing that aggrieved customers would be "made whole." 131 S.Ct. at 1753.

[15] We will not readily infer that the Supreme Court impliedly has overruled its own precedent. *See Agostini v. Felton,* 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (when Supreme Court precedent has "direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overturning its own decisions" (citation omitted)). Thus, we apply the principles from *Green Tree* to the evidence before us.

We conclude that Muriithi has not met his substantial burden under *Green Tree* of showing prohibitive arbitration costs. Significantly, Muriithi has not established even "the most basic element of this challenge," namely, the costs of arbitration. *Adkins,* 303 F.3d at 503. Muriithi posited to the district court that AAA arbitrator fees could range between $800 and $2,200 per day. However, that estimate bears no relation to the facts of the present case, because Muriithi's proffer regarding those fees apparently was based on rates charged by three arbitrators who had provided fee estimates in a wrongful discharge suit in the Virgin Islands. *See Alexander v. Anthony Int'l, L.P.,* 341 F.3d 256, 261–62 (3d Cir.2003).

[16] Muriithi cannot meet his burden of showing that he likely will incur prohibitive arbitrator fees simply by showing the fees that some arbitrators are charging somewhere. *See Green Tree,* 531 U.S. at 90 n. 6 (list of arbitrators' fees "as reflected in the opinions" of other courts provided an insufficient "basis for concluding that [a claimant] would in fact have incurred substantial costs in the event her claim went to arbitration"). Muriithi plainly did not offer evidence regarding the arbitrator's fees likely to be incurred in the resolution of the present dispute, even though "[i]t was within his power to obtain this information by simply investigating the option of arbitration in the first place." *Adkins,* 303 F.3d at 503.

[17] [18] Muriithi also has not provided evidence or argument about the value of his claim, which is a critical factor in a "prohibitive costs" analysis. *Id.* (rejecting "prohibitive costs" challenge in part because the plaintiff failed to provide a basis permitting "a serious estimation of how much money is at stake for each individual plaintiff"). Evidence regarding the value of Muriithi's claim is necessary to determine the administrative fees of the AAA under the AAA's rules. Therefore, we conclude that Muriithi has not carried his burden of showing that he likely would incur prohibitive costs by participating in bilateral arbitration with Shuttle Express .[9] *See Green Tree,* 531 U.S. at 92. Although we would have reached this conclusion under the guidance of *Green Tree* solely on the basis of the lack of evidence before us, our conclusion further is supported by Shuttle Express' agreement, at oral argument before this Court, to pay all arbitration costs if this case is referred to arbitration.[10]

E.

*7 Finally, we address the district court's holding that the one-year limitations provision in the Franchise Agreement also rendered the Arbitration Clause unconscionable. The court concluded that the one-year limitations provision was unconscionable because it unreasonably restricted Muriithi's ability to arbitrate "employment-related statutory claims," including FLSA claims.

Shuttle Express contends that the district court erred in addressing this issue, because the one-year limitations provision is not included in the Arbitration Clause and, thus, any challenge to this limitations provision must wait until the entire contract is considered by the arbitrator. Muriithi does not offer a response to this argument.

[19] [20] We turn to consider the question whether this issue regarding the one-year limitations provision was properly decided by the district court as part of its resolution of the motion to compel. A party challenging the enforceability of an arbitration clause under Section 2 of the FAA must rely on grounds that "relate specifically to the arbitration clause and not just to the contract as a whole." *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 636 (4th Cir .2002) (citation omitted). Thus, a challenge specific to an arbitration clause is considered by the court in a motion to compel, while a challenge relating to the entire contract is heard only after the merits of a case have been referred to an arbitrator or have been retained for decision by the court. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999) (in ruling on motion to compel, courts consider challenges that "relate specifically to the arbitration clause and not just to the contract as a whole"); *Jeske v. Brooks*, 875 F.2d 71, 75 (4th Cir.1989) ("Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution.").

The one-year limitations provision is not referenced in the Arbitration Clause, but is applicable generally to the Franchise Agreement. By its terms, the one-year limitations provision applies to "any arbitration, suit, action or other proceeding relating to this Agreement...." Moreover, the language of this provision does not overlap in any substantive manner with the language of the Arbitration Clause, such as by directing the parties to a different forum depending on when their claim was raised. Thus, the one-year limitations provision discretely answers the question *when* any claim under the Franchise Agreement must be brought, whereas the Arbitration Clause is silent on that issue and instead addresses the proper forum *where* such claims under the Franchise Agreement must be brought.

[21] In view of its gatekeeping function, the scope of a motion to compel arbitration is restricted to consideration of challenges specific to the arbitration clause. *See Adkins*, 303 F.3d at 502; *Jeske*, 875 F.2d at 75. Thus, absent a contrary agreement by the parties, general contract defenses that are applicable to the entire contract, such as the present one-year limitations provision, are reserved for the forum in which the dispute ultimately will be resolved. *See Adkins*, 303 F.3d at 502; *Jeske*, 875 F.2d at 75; *see also Kristian v. Comcast Corp.*, 446 F.3d 25, 44 (1st Cir .2006) (a "statute of limitations defense is an affirmative defense" that lies "squarely in the purview of the arbitrator"). Accordingly, we hold that because Muriithi's challenge to the one-year limitations provision does not rely on any aspect of the Arbitration Clause, but relates only to the general contract defense itself, the district court erred in holding the one-year limitations period unconscionable as part of the court's resolution of the motion to compel.

III.

*8 In sum, we hold that the district court erred in concluding that the class action waiver was unconscionable and rendered the Arbitration Clause unenforceable on that ground. We further hold that the district court erred in holding that the fee-splitting provision was unconscionable on the ground that its application in Muriithi's case will cause him to incur prohibitive arbitration costs. Finally, we hold that the district court erred in ruling on the enforceability of the one-year limitations provision, because that issue is a question to be decided by the arbitrator as part of the resolution of Muriithi's claim.

For these reasons, we vacate the district court's judgment, and remand the case with instructions that the district court enter an order compelling arbitration of Muriithi's claims with full costs of those arbitration proceedings to be paid by Shuttle Express pursuant to Shuttle Express' agreement, in open court, to pay such costs.

VACATED AND REMANDED

1 Initially, Muriithi's complaint included two other named plaintiffs, who later withdrew from the case. Muriithi named several other corporate entities as defendants, which were dismissed in a ruling not challenged on appeal. Thus, the only remaining parties in the case are Muriithi and Shuttle Express.

2 Pursuant to a choice of law clause, the parties agreed that Delaware law governs all matters relating to the Agreement. There do not appear to be any contested issues of state law in this appeal. Moreover, our analysis in this case is based on controlling principles of federal law.

3 The district court made several other rulings regarding Shuttle Express' Rule 12(b)(6) motion that are not relevant to this appeal.

4 We note that the district court resolved the question regarding the enforceability of the class action waiver without the benefit of *Concepcion,* which was issued after the district court entered its order.

5 Congress enacted the FAA to "reverse the longstanding judicial hostility to arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991); *see also Am. Gen. Life & Acc. Ins. Co. v. Wood,* 429 F.3d 83, 87 (4th Cir.2005) (the FAA was "a response to hostility of American courts to the enforcement of arbitration agreements") (citation omitted). To effectuate that legislative purpose, Section 2 is the "primary substantive provision" of the FAA, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), and "Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

6 The fact that Muriithi's claims allege violations of federal and state statutes, rather than breach of contract, does not affect the arbitrability of those claims. *See Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 89, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (stating that "we have recognized that federal statutory claims can be appropriately resolved through arbitration, and we have enforced agreements to arbitrate that involve such claims"); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir.2002) (FLSA claims "may properly be resolved in mandatory arbitration proceedings").

7 In *Noohi,* we addressed the issue whether a Maryland rule, requiring that an arbitration agreement be supported by mutual consideration irrespective whether the underlying contract was supported by mutual consideration, was preempted by the FAA.2013 WL 680690, at *9, 11–12 (citing *Cheek v. United Healthcare of Mid–Atl ., Inc.,* 378 Md. 139, 835 A.2d 656 (Md.2003)). We held that the Maryland rule did not increase procedural formality or risks to defendants, which were "primary concerns underlying *Concepcion,*" nor did it involve, as in *Concepcion,* a state-law rule requiring class arbitration. *Id.* at *11. We concluded that the Maryland rule was not preempted by the FAA. *Id.* at *12.

8 In a case decided several years before *Concepcion,* we addressed a related question whether Congress, in enacting the FLSA, provided a right to class action relief that could not be waived. There, in *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir.2002), a plaintiff tried to avoid arbitration arguing that the arbitration clause, which included a class action waiver, "foreclose[d] redress" of his federal statutory rights under the FLSA. *Id.* at 502. We held that there was no indication "in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute." *Id.* at 503. Thus, we concluded that the inability to pursue an FLSA claim as a member of a class proceeding is by itself insufficient to override "the strong congressional preference for an arbitral forum." *Id.*

9 Thus, we do not face the situation in which it has been shown that enforcing a class action waiver effectively prevents a plaintiff from vindicating his statutory rights. *Contrast In re Am. Express Merchants' Litig.*, 667 F.3d 204, 218 (2d Cir.), *cert. granted,* —— U.S. ——, 133 S.Ct. 594, 184 L.Ed.2d 390 (2012).

10 Shuttle Express' "eleventh hour" agreement to pay all arbitration costs does not render entirely moot the issue of prohibitive costs. A party's agreement to pay all arbitration costs, when made in a timely manner such as before a district court has ruled on the enforceability of the arbitration clause, "moots" the issue and "foreclos [es] the possibility that [the opposing party] could endure

any prohibitive costs in the arbitration process." *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir .2003); *see also Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir.2004); *Large v. Conesco Fin. Servicing Corp.*, 292 F.3d 49, 56–57 (1st Cir.2002).

Here, however, before oral argument in this Court, Shuttle Express at most held out the possibility that it would be willing to pay all arbitration costs. Under these circumstances, it would be an extreme waste of already-expended judicial and litigation resources to foreclose consideration of the prohibitive costs issue as moot now, simply because Shuttle Express, after suffering an adverse ruling in the district court, made a last-minute concession to bolster its position in this Court. *Cf. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191–92, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (cautioning that finding a case moot in later stages of litigation could be "more wasteful than frugal"). While such considerations do not warrant retaining jurisdiction over a case "in which one or both of the parties plainly lack a continuing interest," such is not the case here. *See id.* at 192. Despite Shuttle Express' concession, the merits of the case (whether Muriithi could effectively vindicate his rights under the Arbitration Clause) and the relief sought (whether this case proceeds in arbitration or litigation) are still very much in dispute.

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OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 17
April 17, 2013
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gregory W. Smith and Stephanie Smith, Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., and Myers Landscaping, Inc., Defendants,

Of whom D.R. Horton, Inc. is the Appellant.

Appellate Case No. 2011-204347

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5118
Heard February 14, 2013 – Filed April 17, 2013

AFFIRMED

Matthew Kinard Johnson and W. Kyle Dillard, both of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Appellant.

John T. Chakeris, of Chakeris Law Firm, of Charleston; Phillip Ward Segui, Jr., of Segui Law Firm, of Mount Pleasant; and Michael A. Timbes, of Thurmond Kirchner Timbes & Yelverton, PA, of Charleston, all for Respondents.

SHORT, J.: D.R. Horton, Inc. (Horton) appeals the circuit court's order denying its motion to compel arbitration in this construction defects action filed by Gregory and Stephanie Smith. Horton argues the circuit court erred in finding the arbitration clause unenforceable: (1) under the South Carolina Uniform Arbitration Act (SCUAA); (2) as unconscionable; (3) under an unequal-bargaining-power theory; (4) under a lack-of-consideration theory; (5) under the Federal Arbitration Act (FAA); and (6) under a merger-by-deed theory. We affirm.

I. FACTS

The Smiths purchased a house built by Horton in Summerville, South Carolina. The arbitration clause was included in the purchase agreement in Section 14, entitled "Warranties and Dispute Resolution." Section 14(a) provided for a warranty from Residential Warranty Corporation (RWC), which purported to be the only warranty extended by Horton, except for such warranties as cannot be disclaimed by law. Section 14(b) provided that validation of the RWC warranty was conditioned on Horton's compliance with all RWC's enrollment procedures and upon Horton remaining in good standing in the RWC program. Section 14(c) purported to disclaim all other warranties, express or implied, as to quality, fitness for a particular purpose, merchantability, and habitability. Section 14(c) further provided all disputes under the RWC warranty were subject to binding arbitration. Sections 14(d)-(f) provided exclusions to the warranty for landscaping. Section 14(g) addressed arbitration and provided the following:

> **Mandatory Binding Arbitration:** [The Smiths] and [Horton] each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of [Horton's] construction of the home; (2) [Horton's] performance under any Punch List or Inspection Agreement; (3) [Horton's] performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths and Horton] agree to arbitrate.

Section 14(h) provided that if a dispute arose prior to the closing date, Horton had the right to terminate the agreement, return the earnest money, and "no cause of action shall accrue on behalf of [the Smiths] because of such termination." Section 14(i), prefaced "Limitation of Liability," disclaimed warranties except for those specifically provided or imposed by law, including "as to merchantability or fitness for a particular purpose, either expressed or implied. . . . [Horton] shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." The final clause in the "Warranties and Dispute Resolution" section of the purchase agreement, section 14(j), provided the method of notice for requests of warranty service.

Alleging extensive defects in the home, the Smiths filed this action against Horton and numerous subcontractors, asserting claims for negligence, breach of contract, breach of warranties, and unfair trade practices. Horton moved to compel arbitration. After a hearing, the circuit court denied the motion, finding the following: (1) the arbitration provision was unconscionable; (2) the purchase agreement was merged into the deed, which did not contain an arbitration provision; and (3) the arbitration provision failed to meet the SCUAA. In an order denying Horton's motion for reconsideration, the court also found the parties were not of equal bargaining power, and there was no consideration given in exchange for the Smiths' sacrifice of certain rights. This appeal follows.

II. 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) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)). "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Id.* at 394, 498 S.E.2d at 901 (citation omitted).

III. APPLICABLE LAW

A. Unconscionability

Horton argues the circuit court erred in denying the motion to compel arbitration based on unconscionability. We disagree.

"Arbitration is a matter of contract and controlled by contract law." *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citation omitted). "[A] party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including fraud, duress, and unconscionability." *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (quoting S.C. Code Ann. § 15-48-10(a) (2005)). When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties. *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 610 (D.S.C. 1998), *aff'd and remanded*, 173 F.3d 933, 941 (4th Cir. 1999); *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

"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." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668 (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668. Our supreme court adopted the Fourth Circuit's view, and noted "[i]t is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

In *Simpson*, the plaintiff sued the defendant auto dealer for alleged violations of the South Carolina Unfair Trade Practices Act, among other causes of action. *Id.* at 21, 644 S.E.2d at 666. The plaintiff signed a contract that included an arbitration clause, and the auto dealer sought to stay the court proceeding and compel

arbitration. *Id.* at 19-21, 644 S.E.2d at 666. Our supreme court upheld a denial of the auto dealer's motion to compel arbitration finding, *inter alia*, a lack of mutuality of remedy because the defendant had the right to proceed in court while "completely disregard[ing] any pending consumer claims that require[d] arbitration." *Id.* at 31, 644 S.E.2d at 672. The court emphasized that lack of mutuality of remedy alone does not make an arbitration agreement unconscionable. *Id.* The court noted, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. . . . Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

In this case, the circuit court viewed the Warranties and Dispute Resolution Section 14 as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies . . . ." The court found the attempts to disclaim implied warranty claims were oppressive and unconscionable. The court also found "perhaps even more stark are the provisions in the Limitations of Liability in sub-section [14](i) . . . in addition to the attempted waiver of various important remedies" in which Horton claimed it could not be liable for monetary damages of any kind. The court concluded the relevant arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions."

Relying on the supreme court's analysis in *Simpson*, we affirm the trial court's finding of unconscionability, particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.

B. Severability

Horton next argues the arbitration clause is not made unconscionable by the other allegedly unconscionable provisions in the agreement, and it should be severed from any unconscionable terms of the agreement. We disagree.

"[A]n arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364

(2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). However, "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Great W. Coal (Kentucky), Inc.*, 312 S.C. at 562-63, 437 S.E.2d at 24. Our supreme court acknowledged that "in light of the state and federal policies favoring arbitration, many courts view severing the offending provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause." *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9. However, the court found invalidation of the arbitration clause in its entirety was the appropriate remedy because there were three unconscionable provisions, and two of the provisions were unconscionable because they contravened state and federal consumer protection law. *Id.* The court concluded, "The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but *twice*, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy." *Id.* The supreme court also stated the following:

> [L]egislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).
>
> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int[]'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for

> parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Id. at 34, 644 S.E.2d at 673-74; *see also Hooters of Am., Inc.*, 173 F.3d at 940 (finding rescission to be the appropriate remedy where Hooters promulgated so many biased arbitration rules that the contract created "a sham system unworthy even of the name of arbitration").

We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." Because we affirm the finding of unconscionability and find the provision should not be severed, we need not reach the issue of whether the SCUAA or the FAA applies. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

IV. CONCLUSION

Because we affirm the circuit court's finding of unconscionability and find the arbitration clause should not be severed from the purchase agreement, we decline to address Horton's arguments regarding unequal bargaining power, lack of consideration, and merger-by-deed. *See id.* (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

AFFIRMED.

THOMAS and PIEPER, JJ., concur.