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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

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

Civil Action No. 2017-CP-04-01932
Appellate Case No. 2021-001042

Hicks Unlimited, Inc., ... Petitioner,

v.

UniFirst Corporation, ... Respondent.

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. Statement of the Case

On or about September 21, 2006, UniFirst Corporation and Hicks Unlimited entered into a Flame Resistant Garment Agreement, pursuant to which Hicks Unlimited paid UniFirst a weekly service fee for renting from UniFirst flame retardant garments for its business. The initial term of the Agreement was 5 years. Under the terms of the Agreement, the contract automatically renewed for additional 5-year terms unless Hicks Unlimited notified UniFirst in writing at least 90 days before the expiration of the then-current term that it did not intend to renew the contract.

UniFirst is a corporation organized by the laws of the State of Massachusetts, with its principal place of business in Wilmington, Massachusetts. Complaint, paragraph. It serviced Hicks Unlimited through its facility in Simpsonville, South Carolina.

As indicated by the language of the contract the Flame Resistant Garment Agreement is a standard form contract, used by UniFirst and its subsidiaries in numerous locations, including Canada (through UniFirst Canada) and Texas (through UniFirst Holdings, LP).

Consistent with the terms of the Agreement, UniFirst measured and sized the Hicks Unlimited employees, and then ordered flame retardant garments from its facility in Kentucky, and then shipped those garments from Kentucky to South Carolina.

In accordance with the provisions of the contract, UniFirst provided merchandise rental services to Hicks Unlimited from 2006 through 2011. The contract automatically renewed in 2011; UniFirst continued to provide, and Hicks Unlimited continued to pay for merchandise rental services for an additional 5-year period from 2011 through 2016. *Id.*

Hicks Unlimited contends it terminated the Customer Service Agreement before September 21, 2016, which is when it claims the next 5-year term would have taken effect. In response, on May 17, 2017, UniFirst Corporation commenced an arbitration proceeding through

the American Arbitration Association, arising out of Hicks Unlimited, Inc.'s breach of the Customer Service Agreement executed by the parties. That arbitration remains pending.

On or about September 14, 2017, Hicks Unlimited commenced an action in the Court of Common Pleas in Anderson County, South Carolina, attempting to claim the dispute as framed by UniFirst's demand was not subject to arbitration.

More specifically, as alleged in the Complaint, Hicks Unlimited acknowledged it received and paid for service from UniFirst for 10 years, but claimed it properly terminated the contract. Nevertheless, Hicks Unlimited argued the contract was "illegal, unconscionable, and unenforceable," and claimed UniFirst had failed to comply with the mandatory notice provision in S.C. Code Ann. § 15-48-10(a). Hicks Unlimited further argued it had never signed an agreement to arbitrate.

On October 13, 2017, UniFirst Corporation answered the plaintiff's petition, asserted affirmative defenses, and filed its Motion to Compel Arbitration, based on the arbitration provision contained in the Agreement, and because the parties expressly agreed in the contract that the Federal Arbitration Act (FAA) would apply. Consequently, under South Carolina law, the FAA preempted the application of South Carolina's statute concerning the size, type, and location of arbitration clauses in contracts. In response, Hicks Unlimited filed a Motion for Summary Judgment.

On November 27, 2017, the trial court heard argument of counsel regarding UniFirst's Motion to Compel Arbitration, and on Hicks Unlimited's Motion for Summary Judgment. On December 1, 2017, the trial court advised the parties that both motions were denied. On January 9, 2018, the trial court entered its Order denying the relief requested.

On January 18, 2018, UniFirst Corporation filed a 59(e) motion to alter or amend the trial court's January 9, 2018 Order. On February 14, 2018, the trial court denied UniFirst Corporation's motion to alter or amend the January 9, 2018 Order. On March 15, 2018, UniFirst Corporation appealed the trial court's rulings. On August 4, 2021, the appellate court issued an opinion overturning the trial court's decision.

II. ARGUMENT

A. The Applicable Standard Mandates Denial of the Petition.

Nowhere in petitioner's brief does it discuss the standards pertinent to a petition for certiorari. Rule 242 of SCACR provides that certiorari will only be granted if there are "special and important reasons." While not an exhaustive or a definitive list of factors that will be considered, the Court has outlined five standards that "indicate the character of reasons that will be considered." *Id.* They are: 1) where there are novel questions of law; 2) where there is a dissent in the decision of the Court of Appeals; 3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; 4) where substantial constitutional issues are directly involved; and 5) where a federal question is included, and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. *Id.* Stated simply, Rule 242 gives the Court discretionary power to review petitions for certiorari, and it will only grant certiorari when special reasons justify the exercise of that power. *See State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811 (2009). No such reasons exist here.

Several of the "character of reasons" can be summarily eliminated. There was no dissent in the Court of Appeals' decision. The Court of Appeals' decision is not in conflict with a prior decision of this Court, nor is it in conflict with a decision of the United States Supreme Court.

As for the last two, the petitioner makes one reference to the Tenth Amendment in its concluding paragraph. But nowhere in its arguments does it claim that substantial constitutional issues are involved. They are not. This case involves little more than construing a contract, and evaluating the facts pertinent to the contracting parties. Determining whether the Federal Arbitration Act applies to a dispute is a matter courts in this state are routinely asked to do; this matter is no different.

Finally, while the petitioner casts its arguments with different titles, the matters raised in the petition are the same as those raised in the courts below. Petitioner is using this process to reargue the same facts and law that the trial court accepted, but the appellate court did not. Petitioner falls far short of providing facts and argument consistent with the "character of reasons" this Court applies to granting certiorari. Accordingly, the Court should deny the petition.

B. The Court of Appeals Acted as Required.

Petitioner's first argument is that the Court should not have included certain facts in rendering its decision. Further, petitioner identified three facts the Circuit Court cited: 1) the contract contemplated services solely within South Carolina; 2) UniFirst delivered uniforms from its facility in Greenville County to petitioner in Anderson County; and 3) Hicks tendered payment to UniFirst in South Carolina. Petitioner then seems to be claiming that the Court of Appeals' decision disturbs the trial court's findings on those three points.

But when comparing petitioner's three cited facts with the Court of Appeals' decision, the court did not disturb those three facts. Rather, the court performed its duly-authorized function, in that it is fundamental an appellate court, when, as here, considering a summary judgment decision, views "all facts" in favor of the nonmoving party. *South Carolina Dept. of Transportation v. Powell*, 424 S.C. 206, 210, 818 S.E.2d 433 (2018).

Ultimately, as demonstrated *infra*, the Court of Appeals viewed all of the facts, including those identified by petitioner, and determined that under all of the facts, the transaction involved interstate commerce. In reality, as further demonstrated *infra*, what petitioner claims was a purely intrastate transaction – as the three facts it cited would imply – courts in South Carolina have routinely found that interstate commerce is implicated. Thus, petitioner has cited no error, and certainly no special circumstances warranting the granting of certiorari.

C. When Considering All Facts, the Transaction Involved Interstate Commerce.

Petitioner next cites error in the Court of Appeals' decision to find that the relationship between petitioner and UniFirst involved interstate commerce such that it was appropriate to apply the FAA to preempt South Carolina law. In making this argument, petitioner contends that the facts the Court of Appeals utilized in finding interstate commerce were insufficient. In doing so, petitioner has negated whatever claim it was making in its initial argument citing error by the Court of Appeals in using facts other than those cited by the trial court. If, as petitioner argues, the facts utilized by the Court of Appeals were insufficient to change the final decision, then it follows it was not error to use them in the first place. Regardless, when viewing all facts pertinent to this case, the transaction between the parties in this case involved interstate commerce.

While petitioner discusses the law pertinent to interstate commerce, petitioner then summarily pronounces, with no legal analysis, that the following facts do not implicate interstate commerce: 1) UniFirst deposited petitioner's payments in its account in Massachusetts; 2) UniFirst purchased the garments it then rented to petitioner from a facility in Kentucky and shipped them from Kentucky to South Carolina; and 3) UniFirst's board of directors in Massachusetts controlled the operation of UniFirst's business in South Carolina. Petitioner is wrong.

This Court has previously stated the factors it reviews when determining whether a transaction involves interstate commerce. It will review whether the transaction involves: the use of channels of interstate commerce; the instrumentalities of interstate commerce, or persons or things within interstate commerce; or those activities having a substantial relation to interstate commerce. *Cape Romain Contractors v. Waldo E., LLC*, 405 S.C. 115, 122, 747 S.E.2d 461 (2013). In *Cape Romain Contractors*, two of the three facts the Court utilized to find the marina construction transaction involved interstate commerce were: 1) certain of the raw materials used in constructing in the marina originated in Ohio; and 2) those materials were shipped from Ohio to South Carolina. *Id.* at 122-23. Those same facts are present here: the garments UniFirst used in fulfilling the contract originated in Kentucky; and UniFirst shipped those garments from Kentucky to South Carolina.

This Court has also found interstate commerce when there were out-of-state investors in a purely intrastate project. *See Zabinski v. Bright Acres Associates, Inc.*, 346 S.C. 580, 595, 553 S.E.2d 110 (2001). In addition, in *Munoz v. Green Tree Financial Corp.*, two of the facts the Court utilized in finding interstate commerce were that one of the parties to the contract had assigned all of its rights under the agreement to a Delaware corporation with its principal place of business in Minnesota, and that the monies for the project had been disbursed from a bank in Minnesota to South Carolina. 343 S.C. 531, 539, 542 S.E.2d 360 (2001).

Here, UniFirst's rights under the contract were held by a Massachusetts corporation with its principal place of business in Massachusetts. Just as in *Zabinski* and *Munoz*, out-of-state interests were directing the decision-making of people within South Carolina. And if monies coming into South Carolina from Minnesota evidence interstate commerce, then monies going from South Carolina to Massachusetts do as well. Therefore, under the facts presented, the Court

of Appeals rendered the appropriate decision, and moreover, the petitioner's request amounts to little more than this Court being asked to render a decision it has previously made numerous times utilizing similar facts. Accordingly, the petition should be denied.

D. The Placement of the Arbitration Clause Does Not Confer Unconscionability.

In its brief, petitioner devotes nearly all of its unconscionability argument to discussing *where* the arbitration clause is, rather than *what* the arbitration clause is. With regard to unconscionability, this Court has definitively stated as follows:

> c]ourts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882 (2013). No such facts exist in this case. This was a business-to-business, arm's-length transaction. If petitioner did not sign with UniFirst, it could have signed with any number of other merchandise rental providers for the same or similar terms. An arbitration clause under which the parties agree to a third-party trier of fact is not remotely unconscionable; to the contrary, this Court has previously held that one fact was determinative in finding no unconscionability. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663 (2007). At no point in this entire proceeding has petitioner asserted facts that could give any court sufficient cause to find either procedural or substantive unconscionability to the arbitration clause, and nothing has changed in its most recent submission.

Moreover, petitioner realizes that under precedent binding in this Court, any attack petitioner makes of unconscionability must go to the arbitration clause itself; an attack on the arbitration clause as a whole requires that such a dispute be resolved by arbitration. *Buckeye Check Cashing, Inc. v. Cartegena*, 546 U.S. 440, 449 (2006). As a result, petitioner has focused on the

fact that the arbitration clause is found in one of two paragraphs under the heading "Obligations and Remedies," and since the liquidated damages clause found in the other paragraph is somehow unconscionable (it is not), the Court should graft unconscionability onto the arbitration clause.

To support this argument, petitioner sites to *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016). But in *Smith*, this Court found that it was appropriate to consider multiple subparagraphs within one paragraphs as a single provision where "the subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." 417 S.C. at 48.

In this case, as petitioner has demonstrated through citing the relevant clauses, no such cross-references exist here. Each of the two paragraphs discusses only those matters pertinent to itself. There is no reference to arbitration in the liquidated damages clause; there is no reference to liquidated damages in the arbitration clause. Thus, its reliance on *Smith* is misplaced.

Ultimately, this Court has recognized that a party signing a contract is presumed to have read the document before doing so, and that a party cannot complain about misrepresentations in a contract if the truth can be revealed by reading the document. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786 (1986). In this case, the contract at issue is a single-paged document. The arbitration clause is located on the same page as the term and renewal clauses, of which petitioner knew and has alleged it attempted to enforce on two separate occasions. Accepting for the moment petitioner's facts as true, petitioner further knew that its failure to properly notify UniFirst of its intent not to renew served to renew the contract for an additional 5-year period. The arbitration clause is only 8 paragraphs away from the tern and renewal clauses, and is in the same type and font size as the term and renewal clauses. Ultimately, petitioner's

argument concerning unconscionability simply falls apart at the slightest nudge, and is certainly not a basis for this Court to grant certiorari. Therefore, the Court should deny the petition.

CONCLUSION

Based on the foregoing points and authorities, the respondent respectfully requests the Court deny the petition for writ of certiorari, and require the parties to complete the arbitration proceeding that was commenced and has been pending since 2017.

November 12, 2021 By: s/ Ian D. McVey

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