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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

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

Trial Court Case No. 2017-CP-04-01932
Appellate Case No. 2021-001042

Hicks Unlimited, Inc., ... Petitioner,

v.

UniFirst Corporation, ... Respondent.

PETITIONER'S REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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Petitioner (Hicks) replies to Respondent's (UniFirst) Return in Opposition to Petition for Writ of Certiorari as provided below.

In its Return, UniFirst contends that no reasons for granting the writ of certiorari are present. To the extent it was not clear in Hicks' Petition, Hicks contends that the Court of Appeals Opinion in this case is in conflict with prior Supreme Court precedent. Further, Hicks contends that the Court of Appeals expanded the definition of interstate commerce to now practically involve all commerce.

1. The Court of Appeals expanded the definition of interstate commerce to include tangential activities of one party that did not impact the essential character of the contract.

UniFirst, in its Return, correctly states that the Circuit Court found as follows: 1) the contract contemplated services solely within South Carolina; 2) UniFirst delivered uniforms from its facility in Greenville County to Hicks in Anderson County; and 3) Hicks tendered payment to UniFirst in South Carolina. (R. p. 1-3). These were the essential terms of the contract. More specifically, for a fee, UniFirst delivered uniforms it owns and stores at its warehouse in Greenville County for Hicks's use at its place of business in Anderson County. Every Friday, UniFirst would pick up the uniforms from Hicks in Anderson County, clean the uniforms at its facility in Greenville County, then return the uniforms to Hicks on Monday. (R. 12-13).

The Court of Appeals expanded upon those findings to include tangential factors unrelated to performance of the contract. The additional factors were: 1) UniFirst deposits payments in a bank in Massachusetts; 2) UniFirst purchases its uniforms from a third party in Kentucky; and 3) UniFirst makes board decisions regarding its internal operations in Massachusetts.

Whether or not a contract implicates interstate commerce is determined by the agreement, the complaint, the surrounding facts with a focus on what the contract requires for performance. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 380, 759 S.E.2d 727, 732 (2014) (emphasis added). Hicks recognizes that interstate commerce is broadly construed to include use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce. Cape Romain Contractors Inc. v. Wando E., LLC, 405 S.C. 115, 123, 747 S.E.2d 461, 465. However, interstate commerce does not mean all commerce.

Many of the cases cited by UniFirst deal with the construction of structures where materials come from out-of-state. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594-95, 553 S.E.2d 110, 117 (2001) (interstate commerce implicated in partnership agreement where partnership involved in the development and construction of land); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 535, 542 S.E.2d 360, 362 (2001) (interstate commerce implicated in construction contract where materials come from other states); Episcopal Hous. Corp. v. Federal Ins. Co., 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (interstate commerce implicated in construction of 18 story building because materials would have to come from out-of-state); Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (interstate commerce implicated in architectural agreement for construction of home because materials for construction came from out-of-state); Cape Romain Contractors, at 122-23, 747 S.E.2d at 461, 464-65 (2013) (interstate commerce implicated in construction of marina where materials came from out-of-state and marina constructed on navigable waters).

However, the contract at issue in this case is not a construction contract. It is also not a purchase contract where Hicks was purchasing the uniforms from UniFirst. This was a service

agreement. For a fee paid each month in South Carolina, UniFirst allowed Hicks to use its uniforms it cleaned and stored at its facility in Greenville County. Those services were only contemplated to occur in South Carolina.

In Bradley v. Brentwood Homes, Inc., this Court found that the sale of an already constructed home was a purely intrastate activity. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 317 (2012). While Bradley deals with the residential real estate exception, the analysis is applicable to this case. In Bradley, the plaintiff purchased a home from a real estate developer. The home had already been built, and this Court noted that if the contract dealt with the construction of the home the FAA would apply. Id., at 458, 730 S.E.2d at 318. However, this Court found that the purchase of residential real estate is an intrastate activity as all actions and the legal ramifications of the sale occur in South Carolina. Id. In other words, the essential character of the transaction takes place solely in South Carolina.

In Flexon v. PHC-Jasper, Inc., the Court of Appeals found that interstate commerce was not implicated in a case involving an arbitration provision in an employment contract between a South Carolina doctor and a South Carolina medical facility. Flexon v. PHC-Jasper, Inc., 399 S.C. 83, 89, 731 S.E.2d 1, 4 (Ct. App. 2012).[1]

What is notable about both Bradley and Flexon is that, like most transactions, there was some form of tangential relationship tied to interstate commerce. In Bradley, the purchasers utilized an out-of-state lender for financing to purchase the home. They also had a warranty on the home from an out-of-state company. Bradley, at 318, 730 S.E.2d at 459. In Flexon, the doctor treated out-of-state patients, and the medical facility received payments from out-of-state

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[1] Similarly, the Court of Appeals, *in dicta*, hinted that an employment contract between an attorney and law firm only implicated interstate commerce because it was contemplated at the time of hiring that the attorney would be working on a number of matters involving out-of-state litigation. Lucey v. Meyer, 401 S.C. 122, 137-38 (Ct. App. 2012).

insurance carriers. Flexon, at 88, 731 S.E.2d at 4-5. However, in both cases, those tangential out-of-state relationships did not touch on the essential character of the transaction that was solely contemplated to take place in South Carolina. (i.e. purchase of a home in South Carolina or practice of medicine solely in South Carolina).

Hicks contends that this agreement is most similar to the ones in Bradley and Flexon. It was a service agreement where all services essential to compliance with the agreement took place in two (2) counties in the Upstate of South Carolina.

Hicks recognizes that this analysis may be different if the contract at issue between the parties was a purchase agreement to buy the uniforms. In such instance, as an example, where the uniforms were manufactured or where UniFirst makes board decisions may be relevant. However, this was not a purchase agreement. It was an agreement for services. UniFirst owned the uniforms and stored the uniforms at its warehouse in Greenville County. For a fee, paid in South Carolina, it allowed Hicks to use those uniforms in Anderson County. The services provided were only contemplated to occur solely within South Carolina. The agreement only affected intrastate commerce.

It was error for the Court of Appeals to expand and place an emphasis on tangential factors when such factors do not affect the essential nature of the contract. The danger in finding that this case implicates interstate commerce is that it practically means all transactions now affect interstate commerce as nearly all transactions have some tangential relationship with out-of-state factors. The FAA can only apply to commerce affecting interstate commerce not all commerce and not commerce that is solely intrastate.

2. The Court of Appeals' Opinion regarding unconscionability is in conflict with this Court's Opinions in Smith v. D.R. Horton, 417 S.C. 42, 790 S.E.2d 1 (2016) and Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (2007).

UniFirst argues that placement of an unenforceable, one-sided damages clause is immaterial to the analysis of whether or not the arbitration agreement is unconscionable. This position is not in line with both Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016) and Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007).

The agreement at issue in this case is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. Simpson, at 26-27, 644 S.E.2d at 669. While adhesion contracts are not per se unconscionable, they form the beginning point of the analysis. Id., at 27, 644 S.E.2d at 669.

Unconscionability is defined as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id., at 25, 644 S.E.2d at 668. Factors the court may consider in determining unconscionability are: a) the nature of damages; b) the relative disparity in the parties' bargaining power; c) the parties' relative sophistication and business acumen; d) whether there is an element of surprise in the challenged clause; and e) the conspicuousness of the clause. Id., at 25, 644 S.E.2d at 669.

In reviewing whether an arbitration provision is unconscionable, the courts focus on whether such a clause is geared towards achieving an unbiased decision by a neutral decision-maker. Id., at 25, 644 S.E.2d at 669; see also Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999). However, unlawful provisions that limit an arbitrator's ability to award damages to one party, but not the other, may be a reason to find an arbitration agreement unconscionable. Id., at 28-29, 644 S.E.2d at 670-71. A liquidated damages provision that serves as a penalty is unenforceable in South Carolina. Erie Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 460-61, 713 S.E.2d 318, 321 (Ct. App. 2011).

In this case, Hicks is a small business owner and is not in the same bargaining position as UniFirst. The arbitration clause and liquidated damages provisions are buried in small print on the back side of a two (2) sided agreement. Those provisions clearly came as a surprise to Hicks as evidenced by the fact that Hicks was surprised to learn of the automatic renewal provision after the first five (5) year term. (R. p. 9). Additionally, the liquidated damages clause, which only applies to UniFirst, is a penalty. This was a rental services agreement, and actual damages would easily be ascertainable. The liquidated damages are in addition to actual damages, and as such are a penalty.

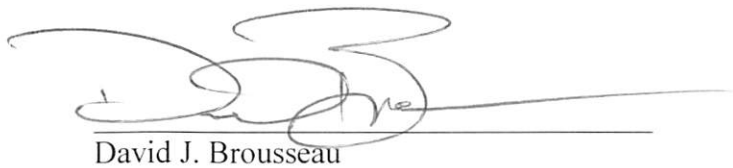
The arbitration provision in this case is more intertwined with an unlawful damages provision than was the case in Smith. In Smith, while the unlawful damage provisions were included in the same overall provision, they were separated by sub-provisions. Smith v. D.R. Horton, Inc., 403 S.C. 10, 13, 742 S.E.2d 37, 39 (Ct. App. 2013). Those one-sided provisions would have impacted the fairness of the arbitration proceeding. As such, this Court affirmed the Court of Appeals in finding that the arbitration provision was unconscionable. Smith v. D.R. Horton, Inc. 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016). In this case, the unlawful liquidated damages provision is included in the same provision as the arbitration provision. More importantly, Hicks was current with its obligations to UniFirst at the end of the second (2^{nd}) term. UniFirst is specifically seeking arbitration to enforce the unlawful liquidated damages clause. (R. p. 60, lines 16-25). The arbitration provision is unconscionable.

CONCLUSION

The arbitration provision is in this case is tied to an unlawful damages provision that UniFirst is seeking to invoke. It is factually similar to the provisions found in Smith v. D.R. Horton and is unconscionable.

Moreover, the FAA does not apply to a contract for services when all services contemplated by the parties take place solely within South Carolina. The approach taken by UniFirst and the Court of Appeals would mean that the FAA applies to all commerce when it can only apply to interstate commerce.

For the reasons stated above as well as reasons previously stated in its Petition, Hicks asks the Supreme Court to grant the Petition for Writ of Certiorari.



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