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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J. C. Nicholson, Jr. Circuit Court Judge

Civil Action No. 2017-CP-10-02148
Court of Appeals Case No. 2018-000171
Supreme Court Case No. 2021-000137

Cleo Sanders..... Respondent

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, Santander Consumer USA Holdings, Inc., Isiah S. White, Danny Anderson and Patrick Bachrodt, Jr. ..... Defendants

Of whom, Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram and Isiah S. White are the..... Petitioners/Appellants

REPLY BRIEF OF PETITIONERS/APPELLANTS

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Reversal is warranted because the Court of Appeals erroneously affirmed the Circuit Court's (1) Arbitration Order denying the motion to stay and compel arbitration of Petitioners Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram ("Hendrick") and Isiah S. White (collectively hereinafter "Petitioners") and (2) Discovery Order compelling discovery and finding Petitioners would waive their right to arbitration by complying with the Discovery Order. (App. pp. 321-25).

In his Return, Respondent Cleo Sanders ("Sanders") contends that this Court should affirm the Court of Appeals because Petitioners have not provided any compelling reason for reversal. Specifically, Sanders argues that the Court of Appeals' Opinion does not concern novel questions of law, the Opinion does not conflict with a prior decision of the Supreme Court, and the decision does not conflict with a decision of the United States Supreme Court.

Unfortunately, however, the Court of Appeals' Opinion does all three. It conflicts with United States Supreme Court precedent dictating the lens through which arbitration challenges must be analyzed, and it conflicts with this Court's precedent by failing to consider the language of the parties' delegation clause that broadly reserves for the arbitrator questions like the effect of an assignment on arbitrability. By diverging from precedent established by the United States Supreme Court and this Court, the Opinion creates a novel, bright-line rule that courts must find assignment of a contract containing an arbitration provision always extinguishes the assignor's right to enforce the arbitration provision, even if the arbitration provision reserves that question for determination by the arbitrator.

I. The Court of Appeals Erred and Diverged From United States Supreme Court Precedent That Dictates The Lens Through Which Sanders' Arbitration Challenge Must Be Viewed.

As noted, the Court of Appeals broke with United States Supreme Court precedent by failing to apply the appropriate lens through which all challenges to arbitration provisions governed by the FAA must be viewed. In his Return, Sanders largely ignores *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) while asserting that Petitioners are analyzing the case backwards and that the Court must determine if a contract exists before the Court sends the matter to the arbitrator. In this vein, Sanders continually asserts the simplistic fallacy that because the contract was assigned, no contract exists. Whether a contract was *assigned* versus whether a contract *exists* are two very different questions.[1] Sanders' argument in this regard is a dilution and distortion of contract law and obfuscation of the law concerning arbitration. They are not mutually exclusive.

Furthermore, Sanders' repetition of such an argument flies in the face of *Prima Paint* and *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70-72, 130 S. Ct. 2772, 2778-79 and their progeny. *See Doe v. TCSC, LLC*, 430 S.C. 602, 607-08, 846 S.E.2d 874, 876-77 (Ct. App. 2020) (holding "the first task of a court is to separate the arbitration provision from the rest of the contract," and noting that "[t]his may seem odd, but it is the law, known as the *Prima Paint* doctrine.") *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 53, 790 S.E.2d 1, 6 (2016) (Kittredge, J. dissenting) ("Simply put, courts—state or federal—may decide only the question of whether the parties validly agreed to arbitrate the dispute that has arisen; controversies as to the enforceability of any other contractual provision(s)—including those which may be so objectionable as to undermine the

[1] There is no dispute that a contract containing an arbitration provision was signed by both parties, and Sanders made no arguments beyond assignment regarding the contract's validity or enforcement.

contract in its entirety—are to be resolved by the arbitrator."); *see also Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)) (stating that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). Sanders has not addressed the *Prima Paint* doctrine in any substantive way, instead merely relying on his legal fiction argument regarding the lack of a contract.

Furthermore, by only focusing on the issue of the assignment of the RSIC, Sanders proves Petitioners' point: If the challenge concerns not the arbitration provision directly but rather "the contract as a whole . . . on a ground that directly affects the entire agreement," it is not "relevant to a court's determination whether the arbitration agreement at issue is enforceable," and is left for the arbitrator to decide. *Rent-A-Ctr.,* 561 U.S. at 70-72, 130 S. Ct. at 2778-79 (ultimately concluding that because the respondent challenged the validity of the contract as a whole, not the specific delegation provision, the decision of whether the entire agreement was unconscionable was for the arbitrator, not the court to decide); *see also Prima Paint*, 388 U.S. at 403–04, 87 S.Ct. 1801 (establishing doctrine that requires court is to separate the arbitration provision from the rest of the contract and then the court must determine if the challenge is to the arbitration provision itself); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (noting that the permissible scope of the initial judicial inquiry is "highly circumscribed" and must relate "specifically to the arbitration clause"). The entire contract was assigned, not just the arbitration provision.

The Court of Appeals' Opinion, which acknowledges the Circuit Court's finding "the RISC was governed by the Federal Arbitration Act," (App. p. 323), fails to apply the analytical

framework that governs when the FAA is invoked. The Court of Appeals never isolated the arbitration clause nor considered whether Sanders lodged a direct challenge to the arbitration provision. Instead, the Court of Appeals skipped ahead to the question of whether Petitioners can enforce the contract as a whole, finding first "the assignment extinguished [Petitioners/]Appellants' rights under the RSIC," and then extrapolating that Petitioners' arbitration rights were extinguished as well. (App. pp. 323-24).

By circumventing *Prima Paint,* the Court of Appeals created a blanket rule that any assignment of a contract containing an arbitration clause – regardless of the circumstances of the assignment, the language of the arbitration clause, or the details of the lawsuit – extinguishes the assignor's right to compel arbitration. The impact of the Court of Appeals' blanket declaration impacts all types of contracts in the heavily-favored arena of arbitration. The Court of Appeals' failure to apply the proper lens when evaluating Sanders' challenge – which Sanders adamantly admits was addressed to the contract as a whole and not the arbitration provision specifically – was error and warrants review and reversal by this Court to ensure uniformity of decision in the courts of this State.

II. The Court of Appeals Erred In Failing to Interpret the Language of The Arbitration Agreement Itself.

Furthermore and quite astonishingly, Sanders characterizes the interpretation of the arbitration clause as "irrelevant."[2] Indeed, neither Sanders nor the Court of Appeals' Opinion ever mentions the language of the arbitration provision or its delegation clause, much less analyzes what issues were delegated to the arbitrator and whether enforceability and assignment issues were included therein. The language of the arbitration provision itself should have led the

[2] Sanders contends that he is not challenging the validity of the arbitration agreement itself, yet he proceeds to cite a myriad of case law that concern the validity of an arbitration agreement. (Resp. Br. pp. 4-6).

Court of Appeals to defer to the arbitrator, as the parties expressly delegated to the arbitrator gateway questions of arbitrability like post-assignment enforceability. This is even more glaring when the Opinion frames the issue on appeal of post-assignment enforceability as a "determination[] of arbitrability" (App. 322-23; *see also* App. 322 ("discussing the right of Petitioners "to have the issue of arbitrability decided by an arbitrator")), yet never acknowledges the arbitration provision's delegation of arbitrability questions to the arbitrator.

While Sanders asserts that delegation was never argued, delegation is part and parcel of the arguments of arbitrability and standing—they are one and the same. Indeed,

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy. This line of cases merely reflects the principle that arbitration is a matter of contract. An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.

Rent-A-Ctr, 561 U.S. at 68–70, 130 S. Ct. at 2777–78 (internal citations omitted). Many courts have held that a post-assignment enforcement challenge to arbitration is, in fact, a question of arbitrability, while other courts have considered the strong presumption in favor of arbitration when analyzing standing arguments on the basis of arbitrability. Notably, the Court of Appeals never considered these opinions in its decision.

Moreover, Sanders misapprehends the holding of *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). *Pearson* does not limit the ability of a non-signatory to compel arbitration to two different circumstances as asserted by Sanders in his Return. (Resp. Br. p. 10). Sanders' quoted citation of *Pearson* is, in actuality, a citation from a federal district court the *Pearson* court quoted in addition to a host of other districts and cases cited and quoted by the Court as rationale for reaching its conclusion. 400 S.C. at 295, 733 S.E.2d at 604. Beyond

Sanders' misreading of *Pearson*, Sanders fails to recognize that *Pearson* supports Petitioners' position because it recognizes that the right to compel arbitration can exist even when a party lacks the general right to enforce the contract (or other provisions of the contract) containing the arbitration provision. Furthermore, although the Court in *Pearson* substantively addressed the question of arbitrability, it did so because of the absence of an arbitration clause like the one at issue here that *specifically delegates* any determinations about arbitrability *to the arbitrator*.

It is the existence of a delegation clause in this matter, as opposed to the absence of one in *Pearson*, and the failure to adhere to such that is the Court of Appeals Opinion's foundational error when addressing the issue of post-assignment enforceability. Although the Opinion characterizes the issue as an "arbitrability" determination, it proceeds to decide it even though the parties in this case specifically delegated arbitrability determinations to the arbitrator.

The Court of Appeals erred and diverged from this Court's precedent by failing to recognize that parties to an arbitration agreement have the right to craft terms as they wish (just as parties to any other contract are entitled to do) including terms dictating the forum for arbitrability determinations. The Opinion demotes arbitration agreements to a sub-contract class, treats the delegation and arbitrability clause as if it does not exist, and effectively creates a carte-blanche prohibition on the contractual reservation of issues for an arbitrator to decide without court intervention (including the effect of a purported assignment on the right to compel arbitration). It leaves no room for nuance – for analysis of the contractual language chosen, the terms of the assignment, the relationship of the parties to the assignment, or any number of issues which normally would be considered in the context of standing and assignment under a contract.

Reversal is warranted to correct these errors.[3]

Finally, Sanders contends that "Petitioners have never addressed the assignment issue." (Resp. Br. p. 6). While Petitioners disagree with such characterization, it would nevertheless be appropriate for Petitioners not to address the assignment issue in this appeal: The entirety of Petitioners' point, supported by the *Prima Paint* doctrine and the arbitrability provision, is that the assignment issue is one for the *arbitrator* to decide.

III. The Court of Appeals Erred And Departed From South Carolina Law When It Failed To Enforce Its Exclusive Jurisdiction Over This Dispute And Find The Circuit Court Was Without Jurisdiction to Issue the Discovery Order.

This Court also should reverse the Court of Appeals' Opinion affirming the Circuit Court's order compelling discovery and finding Petitioners would waive their right to arbitration by complying therewith, because the Opinion erred and departed from South Carolina law when it failed to enforce its exclusive jurisdiction over this dispute and find the Circuit Court lacked jurisdiction to issue the Discovery Order. A lower court's discovery rulings must be reversed if there has been "a clear abuse of discretion," which "occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016).

The February 20, 2018 Circuit Court Discovery Order – issued nearly two weeks after the February 6, 2018 filing of Petitioners' Notice of Appeal – was void because the Circuit Court lacked jurisdiction to issue it. The Court of Appeals' Opinion erred by finding the Circuit Court did not lack jurisdiction to issue a post-appeal order affecting matters on appeal. The Opinion

[3] Sanders appears to argue that Petitioners' pursuit of this appeal, which could drastically affect numerous industries and contractual agreements, is a disingenuous attempt to forum shop and "wear [] Sanders out." Despite Sanders' assertion to the contrary, Petitioners are entitled to appeal this order and have done so in an appropriate manner.

further erred by neither citing nor enforcing Rules 205 and 241, SCACR, which mandate a finding the Circuit Court was without power to issue the Discovery Order.

Sanders asserts that the Circuit Court's Discovery Order filed after the Notice of Appeal was just a ministerial act confirming his oral order. However, Sanders fails to acknowledge that the Circuit Court's written order was in *direct contradiction* to its oral ruling. At the hearing, in response to Petitioners' argument that they had not answered discovery because Sanders continually took the position that if Petitioners engaged in discovery they had waived their right to arbitration, the Circuit Court specifically stated to Petitioners' counsel "Well, I don't think you have because you have been participating in it. I will put in the order you haven't waived [arbitration] [sic] . . . "Put in the order that you are not waiving your argument for – any arguments that you may have for arbitration, okay." (App. p. 154). Despite this oral ruling, the Discovery Order which was drafted by Sanders' counsel and filed without jurisdiction, incredibly did an about-face and held "Defendants, except Rick Hendrick, shall not waive its position regarding the right to compel and/or participate in discovery by responding to said discovery." (App. pp. 213-14). This complete contradiction to the Circuit Court's oral ruling was not a ministerial act; it was a calculated, substantive change in the ruling and it was done without jurisdiction.[4]

[4] The Discovery Order compelling discovery responses, while also indicating Petitioner Hendrick waived its position regarding the right to compel arbitration by responding to said discovery places Petitioner in a proverbial "Catch-22," and is contrary to the abundant law on the matter. *Compare Toler's Cove Homeowners Assoc., Inc. v. Trident Constr., Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (holding thirteen month period did not demonstrate waiver of the right to seek arbitration when discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "Respondent had not held any depositions"); *Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding a thirteen month period did not demonstrate waiver when "[l]imited discovery was conducted" and the party requesting arbitration took one deposition lasting fifteen minutes); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.,* 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001) (finding period of less

Furthermore, there can be no question the Discovery Order intruded on the issue on appeal. The Discovery Order did not just inadvertently impact matters on appeal: By ordering compliance and then finding Petitioner Hendrick would waive the very right it was in the process of appealing if it complied, the Discovery Order was ***expressly entered to impact matters*** over which the Court of Appeals had exclusive jurisdiction. This is the case-in-point why lower courts are divested of jurisdiction to adjudicate any matters that might impact the issues on appeal to the Court of Appeals and this Court. *See Wingate v. Wingate*, 289 S.C. 574, 347 S.E.2d 878 (1986) (because alimony was an issue on appeal from the divorce decree, our supreme court had exclusive jurisdiction over the alimony issue, and the family court was without jurisdiction to change the amount of alimony during the pending appeal). For this additional reason, reversal is warranted to protect the jurisdiction of appellate courts.

CONCLUSION

For all of the reasons set forth herein and in the initial Brief of Petitioners/Appellants, this Court should reverse the Court of Appeals' Opinion No. 5779 of October 21, 2020.

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than eight months did not establish waiver where the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories") *with Deloitte & Touche, LLP v. Unisys Corp.,* 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding a five-and-a-half year period where the parties "conducted a significant amount of discovery, resulting in the production of thousands of documents" demonstrated waiver of the right to compel arbitration); *Evans v. Accent Manufactured Homes, Inc*., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding nineteen month period where the parties exchanged written interrogatories, requests to produce, and the party requesting arbitration took two depositions demonstrated waiver); *Liberty Builders v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (finding waiver after two-and-a-half year period when the parties sought assistance from the court on approximately forty occasions).

Respectfully submitted,

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