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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

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Appellate Case No.: 2021-001168

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BVW HOLDING AG…….Respondent,

v.

HOOWAKI, LLC,……..…….Appellant.

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# INITIAL REPLY BRIEF OF APPELLANT

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Respectfully submitted,

s/Michael D. Wright

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### I. The Trial Court Applied the Incorrect Standard of Review.

In its responsive brief, BVW argues that the trial court used the correct standard for the initial inquiry whether an arbitration agreement existed between the parties. (Resp. Initial Brief, P. 4). Hoowaki does not contend that a "gateway determination" must be made by the trial court when first presented with the issue as to whether arbitration applies to the instant controversy. On the contrary, Hoowaki respectfully asserts that the trial court applied the wrong standard of review and improperly shifted a burden to Hoowaki. This is reversible error.

Our courts have held that "[t]he party **resisting arbitration bears the burden** of proving that the claims at issue are unsuitable for arbitration." Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (quoting Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000)) (emphasis added). Here, BVW brought suit against Hoowaki and Hoowaki immediately filed its Motion to Dismiss and Compel Arbitration ("Arbitration Motion"). In this matter, BVW does not want to engage in arbitration and is the party resisting this underlying matter being referred to arbitration pursuant to the parties' agreements. Accordingly, BVW is, in fact, "the party resisting arbitration" and therefore bears the burden of proving that the claims are not suitable for arbitration. Id. at 379, 759 S.E.2d at 731. Instead, the trial court erred by applying the wrong standard of review with respect to the enforcement of the arbitration provision by stating that "[t]he party **seeking** to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement." (Order., P. 2)(emphasis added). Although BVW contends that this is not improper burden shifting, our court's jurisprudence dictates otherwise. See Hall v. Green Tree Servicing, LLC, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (2015)("[T]he party resisting arbitration bears the

burden of providing that the claims at issue are unsuitable for arbitration.") citing Dean, 408 S.C. at 379, 759 S.E.2d at 731; see also Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 75, 865 S.E.2d 550, 553 (2021)("The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration.").

Hoowaki properly presented a valid, binding arbitration agreement and therefore it was incumbent upon BVW to prove that the claim was unsuitable for arbitration, which Hoowaki contends they did not. Accordingly, the trial court's use of the improper standard of review is a reversible error of law and this Honorable Court should conclude the same utilizing its de novo review matter and remand this case to the trial court with instructions to dismiss this action and/or compel the parties to arbitrate all issues raised in this case.

## II. A Significant Relationship exists between the Asserted Claims and the Agreement in which the Arbitration Clause is Contained.

In its responsive brief, BVW spends a significant amount of time citing Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007) for the proposition that there must be a "significant relationship [that] exists between the asserted claims and the contract in which the arbitration clause is contained." (Id. and Resp. Initial Brief, P. 5).

Additionally, as discussed more fully herein and in Hoowaki's Initial Brief, the trial court cited Aiken as standing for the proposition that the party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. This is an incorrect statement of the law. It is not simply that Hoowaki disagrees with the underlying court's characterization; instead, Hoowaki submits that language addressing the purported legal proposition is not included in Chief Justice Toal's majority opinion cited by Judge Kinlaw in the

Order. In short, the opinion in the Aiken case does not state what the trial court's order says that it does and its reliance upon it is an error of law.

Notwithstanding the court's erroneous reliance on the Aiken case as it relates to the applicable standard of review in this matter, BVW cites to this case in its responsive brief in an attempt to demonstrate that there is not a significant relationship between their asserted claims and the parties' agreements. Respectfully, this reliance based upon the facts of the underlying matter is misguided. In Aiken, our Supreme Court reviewed whether allegations of outrage and emotional distress, negligence, negligent hiring/supervision, and unfair trade practices were independent of the loan agreements that the Plaintiff had entered into with World Finance. In Aiken, the Plaintiff had paid off all outstanding loans with World Finance when World Finance employees conspired to use Mr. Aiken's personal information to obtain sham loans and embezzle the proceeds for the same. Our Court correctly held a prior loan agreement that had since concluded had zero relationship to the tort claims brought by the Plaintiff. Id. at 150, 644 S.E.2d at 708 ("In our opinion, the 'relationship' asserted by World Finance between Aiken's tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of 'significant.'").

The facts of the present case are completely distinguishable. Hoowaki is not attempting to refer BVW's allegations of intentional infliction of emotional distress to arbitration; instead, it is BVW's allegation of Hoowaki's failure to pay on a current promissory note—not one which was previously satisfied in Aiken—to which Hoowaki contends is a product of the overall business dealings from the active Cooperation and Licensing Agreement ("Agreement") between the parties. The broadly-worded arbitration clause included in the Agreement applies to the dispute over the alleged debt of the promissory note executed between the parties due to Hoowaki's representations that the promissory note was to further the overall business dealings between the

parties. As detailed to Judge Kinlaw, BVW is not in the business of loaning money and the promissory note was not a stand-alone agreement, but was instead executed between the parties because of the Agreement. (Tr., P. 13). The parties have operated under the Agreement for several years and Hoowaki contends the promissory note at issue is related to the original Agreement between the parties as it facilitated the day-to-day operations of Hoowaki to meet obligations under the Agreement. In short, the agreements between the parties are intertwined and the claims asserted have a significant relationship to the performance of the parties under the Agreement. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001) ("[C]ourts generally hold that broadly-worded arbitration agreements apply to disputes in which a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained."). Moreover, this is not a "but-for" causation standard as BVW contends (Resp. Initial Brief, P. 5). As in Aiken, Hoowaki concedes that it would be nonsensical for any disagreement under the sun to be subject to arbitration simply because there may have been an agreement in the past that tangentially relates to a current dispute. To be clear, the facts of the underlying matter are not analogous to the fact pattern in Aiken and Hoowaki contends that the parties in the instant matter should be required to submit to arbitration as a "significant relationship" exists between the original Agreement, the parties' actions, and the subsequent promissory note.

Therefore, under the Agreement, and by extension the promissory note, the trial court should have directed the parties to proceed to arbitration. As a result, this Court should reverse the trial court's denial of Defendant's Motion and remand to the trial court with instructions to dismiss this action and/or compel the parties to arbitrate all issues raised in this case.

## CONCLUSION

For the reasons stated more fully herein, this Court should reverse and vacate the trial court's denial of Hoowaki's Motion to Dismiss and Compel Arbitration. Further, this Court should remand this action with instructions to dismiss this action and/or compel the parties to honor their contractual promises to each other through arbitration.

Respectfully submitted,

s/Michael D. Wright

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Alex Kinlaw, Jr., Circuit Court Judge

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Case No.: 2021-CP-23-01191

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PROOF OF SERVICE

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The undersigned certifies that, on February 7, 2022, a copy of the Initial Reply Brief of Appellant has been served upon counsel of record for the Respondent via electronic mail using the email addresses listed in the Attorney Information System as set forth below:

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