
IN THE
Supreme Court of Virginia

RECORD NO. 121582

WILLIAM SCHUILING,

Appellant,

v.

SAMANTHA HARRIS,

Appellee.

REPLY BRIEF OF APPELLANT

John D. McGavin (VSB No. 21794)
Michelle P. Bell (VSB No. 81337)
BANCROFT, McGAVIN, HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030
(703) 385-1000
(703) 385-1555 (Facsimile)
jmcgavin@bmhjlaw.com
mbell@bmhjlaw.com

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ASSIGNMENTS OF ERROR.....	1
STANDARD OF REVIEW	1
ARGUMENT IN REPLY	2
A. Virginia Code Ann. §8.01-581.03 mandates the appointment of a substitute arbitrator	2
B. Virginia case law on contract interpretation supports the argument for a substitute arbitral forum.....	2
C. The <i>Riley v. Extendicare Health Facilities, Inc.</i> decision, relied upon by Harris, is readily distinguishable from the case at bar.	5
CONCLUSION.....	8
CERTIFICATE	9

TABLE OF AUTHORITIES

CASES

<i>AT&T Techs., Inc. v. Communications Works of Arn.</i> , 475 U.S. 643, 106 S. Ct. 1415 (1986)	3
<i>Adler v. Dell, Inc.</i> , 2009 U.S. Dist. LEXIS 112204, Case No. WL 4580739 (E.D. Mich. Dec. 3, 2009).....	3, 6, 7
<i>Bank of the Committee v. Hudspeth</i> , 282 Va. 216, 714 S.E.2d 566 (2011).....	3
<i>Gullermina Vega v. Chattan Associates, Inc.</i> , 246 Va. 196, 435 S.E.2d 142 (1993)	4
<i>Hilton v. Martin</i> , 275 Va. 176, 654 S.E.2d 572 (2008)	1
<i>Janvier v. Arminio</i> , 272 Va. 353, 634 S.E.2d 754 (2006).....	1
<i>Pocahontas Mining LLC v. CNX Gas Co., LLC</i> , 276 VA. 346, 666 S.E.2d 527 (2008)	2, 3
<i>Riley v. Extendicare Health Facilities, Inc.</i> , 2013 WE App 9, 2012 Wisc. App. LEXIS 1029 (2012)	5, 6

STATUTES

Va. Code Ann. §8.01-581.03	1, 2, 4
----------------------------------	---------

I. ASSIGNMENTS OF ERROR

- A. The trial court erred by holding that the statutory power to appoint an arbitrator whenever an arbitration agreement's method of arbitration "fails or for any reason cannot be followed," Va. Code Ann. §8.01-581.03, is inapplicable when the agreement identifies a specific arbitration forum that subsequently becomes unavailable. See, Appellant Brief, pg. 2.

- B. The trial court erred in holding (based only on the language of the parties' arbitration agreement, without presentation of any other evidence, and contrary to the established doctrine that ambiguities should be construed in favor of arbitration) that the arbitration agreement's identification of the "National Arbitration Forum" (NAF) as the arbitration forum was an "integral" contract term, such that the parties' arbitration agreement became unenforceable upon NAF's inability to serve in that capacity. See, Appellant Brief, pg. 2.

II. STANDARD OF REVIEW

An agreement to arbitrate is a matter of contract. The interpretation of a contract involves a question of law which an appellate court reviews *de novo*. Here, the trial court applied law to the undisputed language of the arbitration agreement executed between the parties. Therefore, a *de novo* standard of review applies. *Hilton v. Martin*, 275 Va. 176, 179-80, 654 S.E.2d 572, 574 (2008); *citing*, *Janvier v. Arminio*, 272 Va. 353, 363, 634 S.E.2d 754, 759 (2006).

III. ARGUMENT IN REPLY

A. Virginia Code Ann. §8.01-581.03 mandates the appointment of a substitute arbitrator. _____

Harris devotes very little attention in her brief to Virginia Code Ann. §8.01-581.03. That statute is dispositive and mandates the appointment of a substitute arbitrator. See Brief of Appellee, pgs. 8-13. The clear intent of the legislation is to require disputes to be resolved by arbitration when the parties are confronted with a situation (such as exists here) where the agreed method of arbitration fails or can not be followed. To rule otherwise would be to frustrate the clear public policy expressed by the Virginia legislature of requiring arbitration in this type of situation.

B. Virginia case law on contract interpretation supports the argument for a substitute arbitral forum. _____

While Schuiling asserts that by virtue of Virginia Code Ann. §8.01-581.03 the Court need not concern itself whether the choice of NAF was ancillary or integral to the arbitration agreement, the arguments of Harris do not support the conclusion that the use of NAF was integral to the arbitration agreement. Harris cites to *Pocahontas Mining LLC v. CNX Gas Co., LLC*, 276 VA. 346, 666 S.E.2d 527 (2008), for support that the parties' use of the word "exclusively" shows the parties' intent that the selection of

NAF was integral to the agreement. See Brief of Appellee, pgs. 29-33. In *Pocahontas Mining*, this Court noted that the word “exclusively” was used in some areas of the contract with respect to certain leasing rights, but not in other areas of the contract for other types of leasing rights. *Id.* at 276 VA, 346, 355 and 666 S.E.2d 527, 531. This Court found the alternate use and non-use of the word “exclusively” significant in defining the lease terms. *Id.*

In contrast, here, the word “exclusively” (App. 88), is subject to dual interpretations and could refer to the exclusivity of arbitration as the vehicle for dispute resolution or to the exclusivity of NAF as the arbitral forum. See, *Adler*, discussion *infra*. In the case of conflicting interpretations, a resolution in favor of arbitration should be followed. *Bank of the Comm. v. Hudspeth*, 282 Va. 216, 222, 714 S.E.2d 566, 570 (2011) (“[An] order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” (quoting *AT&T Techs., Inc. v. Communications Works of Arn.*, 475 U.S. 643, 650, 106 S.Ct. 1415 (1986))).

Further, the Arbitration Agreement here includes a severability provision. When the Arbitration Agreement is viewed as a whole, the

inclusion of the severance clause supports the parties' overriding intent that any disputes be resolved by arbitration (rendering the selection of NAF as the arbitral forum merely ancillary to the Arbitration Agreement). In *Gullermina Vega v. Chattan Associates, Inc.*, 246 Va. 196, 435 S.E.2d 142 (1993), this Court noted that a contract is to be construed as a whole and held that the parties intent in that case was to treat the cost-reimbursement provision as severable. Here, the severability clause demonstrates the parties' intention that the Arbitration Agreement survives attacks on the enforceability of individual clauses within the agreement. The severability clause states, "If any provision of this Agreement or any part of any provision is determined to be invalid or unenforceable in whole or in part for any reason, it shall be severable from the rest of this Agreement and shall not affect any other provision of this Agreement ..." (App. 88, *emphasis added*).

Given NAF's inability to serve as the arbitral forum in this matter, the clause selecting the arbitral forum should be severed pursuant to the terms of the Arbitration Agreement and in accordance with Va. Code Ann. §8.01-581.03, the court shall order a substitute arbitral forum and compel arbitration to proceed.

C. The *Riley v. Extencicare Health Facilities, Inc.* decision, relied upon by Harris, is readily distinguishable from the case at bar.

As discussed at length in briefs by both Appellant and Appellee, the court's integral/ancillary analysis is fact specific to each arbitration agreement.

Harris places significance on the Wisconsin Court of Appeals' decision in *Riley v. Extencicare Health Facilities, Inc.*, 2013 WE App 9, 2012 Wisc. App. LEXIS 1029 (2012). See Brief of Appellee, pgs. 20-21. This case is not controlling and is distinguishable because the arbitration agreement in *Riley* contains language requiring that the parties "**mutually agree in writing**" to any change affecting the use of NAF procedure, regardless of whether NAF conducted the arbitration. Specifically, the *Riley* agreement reads:

The National Arbitration Forum (NAF) shall serve as any arbitrator of any dispute. In the event that NAF is unable or unwilling to serve, the parties shall select an alternative neutral arbitration service within thirty (30) days after receipt of notice by NAF of such. Regardless of the entity chosen to be Administrator, unless the Parties mutually agree otherwise in writing, the Alternative Dispute Resolution process shall be conducted in accordance with the NAF Rules and Code of Procedure (hereinafter, collectively "NAF Rules of Procedure") then in effect. This process shall include but not be limited to the selection of the Arbitrator and location of the Arbitration as set out in the NAF Rules of Procedure.

Riley at *P4.

The Court in *Riley* focused on the fact that even if NAF did not hear the arbitration, the NAF Rules and Procedure must be followed by the new arbitrator absent a subsequent written agreement to the contrary.

In contrast, the arbitral forum selection clause at issue here simply reads, in pertinent part, as follows:

All claims, disputes or controversies ... shall be resolved exclusively by arbitration administered by the National Arbitration Forum under its code of procedure then in effect.

App., 88.

The clause at issue does not require that the Rules and Procedures of the unavailable arbitrator be used or that modifications to the arbitral procedure be made by mutual agreement in writing by the parties. Rather, the language in the present clause is identical to the language of the agreement analyzed in *Adler v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 112204, Case No. WL 4580739 (E.D. Mich. Dec 3, 2009). In analyzing the identical clause presented in this matter, the *Adler* court concluded that the language of clause was open to dual interpretations – “resolved exclusively by arbitration [by NAF]” could refer to the parties’ intent to arbitrate all disputes, or to the intent of the parties to bring arbitration solely before

NAF. *Id.* at *6. The *Adler* court reasoned, “any doubts regarding arbitrability should be resolved in favor of arbitration” and ordered a substitute arbitrator. *Id.* at *12 (citations omitted).

As discussed in Brief of Appellant, pages 20-24, numerous federal and state court decisions prior, and subsequent, to the *Adler* decision have followed a similar approach in ultimately ordering substitute arbitrators. Harris’ characterization of these cases as “outliers” in attempt to accord more weight to her cited cases mischaracterizes the nature of the federal and state court interpretive split.

CONCLUSION

WHEREFORE, the foregoing considered, Schuiling requests this Honorable Court remand this matter to the Circuit Court with an order that the trial court appoint an arbitrator and compel this matter to arbitration.

WILLIAM SCHUILING
By Counsel

BANCROFT, McGAVIN, HORVATH & JUDKINS, P.C.
3920 University Drive
Fairfax, Virginia 22030
(703)385-1000 Telephone
(703)385-1555 Facsimile



John D. McGavin, Esquire
Virginia State Bar No: 21794
jmcgavin@bhmjlaw.com
Michelle P. Bell, Esquire
Virginia State Bar No: 81337
mbell@bhmjlaw.com
Counsel for Appellant, William Schuiling

**CERTIFICATION IN COMPLIANCE WITH RULE 5:26
AND REQUESTING ORAL ARGUMENT**

The Appellant certifies that Rule 5:26 of the Rules of the Supreme Court of Virginia has been complied with and Appellant has provided fifteen copies of this brief to the clerk of this Court and has mailed a copy to Appellee's counsel on this 5th day of March, 2013.

The Appellant does not desire to waive oral argument.


Michelle P. Bell, Esquire