SCV: Submitted on 05-30-2018 12:05:36 EDT for filing on 05-30-2018

**In The**

# SUPREME COURT OF VIRGINIA

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**Record No. 171381**

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**GEORGE PRIMOV,**

**Appellant,**

**-v.-**

**SERCO, INC.**

**Appellee.**

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## APPELLANT'S REPLY BRIEF

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COMES NOW, Appellant, GEORGE PRIMOV, by Counsel, pursuant to VA. R. S. Ct. 5:6, 5:26, and 5:29, and files this Reply brief.

## I. The trial court's decision to dismiss Primov's complaint with prejudice failed to apply the appropriate algorithm to its analysis

Primov presumes that this Court's grant of his petition for appeal as to AoE #2 indicates its recognition that the trial court erred by dismissing his case with prejudice and now seeks to redress that error. However, the Court seems to have eschewed the notion of slogging through the weeds to decide the legal issues by applying the appropriate algorithm. That algorithm requires, as a first step, (i) determining whether Primov complied with the mediation provision by requesting mediation at least 60 days prior to filing the lawsuit at issue. *If and only if* the outcome of that determination is that he did not, *then and only then* does the decision-maker proceed to the second step: (ii) determining whether the mediation provision is a condition precedent to initiating a lawsuit. If it is, then proceed to ascertain: (iii) whether the mediation provision is an independent covenant and the Agreement therefore divisible, or whether the Agreement is unitary and indivisible. If and only if it is the latter, then engage in what is arguably the most onerous task—determining the merits of Primov's claims, specifically: (iv) whether SERCO was the first to materially breach the Agreement.

Distilling those steps to their essence, they can be abbreviated as follows:

(i) Primov complied with mediation clause?

(ii) Mediation clause is condition precedent?

(iii) Agreement divisible?

(iv) SERCO first to materially breach?

Mathematically, there are sixteen possible combinations of yes/no answers to that sequence of four questions,[1] as follows:

| | A | B | C | D | E | F | G | H | I | J | K | L | M | N | O | P |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| (i) | Y | Y | Y | Y | Y | Y | Y | Y | N | N | N | N | N | N | N | N |
| (ii) | Y | Y | Y | N | N | Y | N | N | N | N | N | Y | Y | N | Y | Y |
| (iii) | Y | Y | N | N | Y | N | Y | N | N | N | Y | Y | N | Y | N | Y |
| (iv) | Y | N | Y | N | N | N | Y | Y | N | Y | N | Y | Y | Y | N | N |

with A – H and I – P as mirror images of each other. In fact, however, there are only *five* possible combinations of answers to those four inquiries about which the trial court needed to concern itself. Combinations A – H all start with the premise that Primov complied with the mediation provision. But an affirmative answer to that first inquiry obviates the need to answer any of the subsequent questions, because a determination that Primov complied

[1] 2^4 = 16. Those sixteen mathematically possible combinations are designated by the letters A – P—the first sixteen letters of the alphabet. Each of the four questions is designated by its assigned lower-case roman numeral.

with the mediation provision extinguishes SERCO's argument that Primov failed to meet the supposed condition precedent to filing his lawsuit. Thus, combinations A – H can be condensed to combination **I**, below, where "--" indicates the answer to the preceding inquiry is dispositive of the ultimate issue—whether Primov's lawsuit can proceed, either full speed ahead, or, at the discretion of the trial court, after a sixty-day stay to accommodate non-binding mediation between the parties—and therefore obviates the need to proceed to answer the remaining inquiries.[2]

Combinations I – P all start with the premise that Primov *did not* comply with the mediation provision. Of those, Combinations I, J, K, and N also conclude that the mediation provision is *not* a condition precedent to Primov's initiation of litigation against SERCO. The negative answer to the second inquiry obviates the need to answer the remaining two inquiries. Therefore, Combinations I, J, K, and N can be condensed to Combination II, as set forth in fn. 2.

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[2]

| | **I** | **II** | III | **IV** | V |
|---|---|---|---|---|---|
| (i) Primov complied with mediation clause? | Y | N | N | N | N |
| (ii) Mediation clause is a condition precedent? | -- | N | Y | Y | Y |
| (iii) Agreement is divisible? | -- | -- | Y | N | N |
| (iv) SERCO first to materially breach? | -- | -- | -- | Y | N |

Combinations L and P start with the premises that (i) Primov *did not* comply with the mediation provision; (ii) the mediation provision *is* a condition precedent; and (iii) the Agreement *is* divisible. But that third premise obviates the need to answer the fourth inquiry because if the contract is divisible, then whether SERCO was the first to materially breach the Agreement is simply irrelevant. That is, if the Agreement is divisible and its covenants or provisions independent, then a first material breach by SERCO would not abrogate or nullify the mediation provision, rendering it unnecessary to determine whether SERCO had been the first to breach the Agreement because any such prior breach would be irrelevant to the continued enforceability of the mediation provision. If the contract is divisible SERCO is entitled, regardless of whether it was or was not the first breaching party, to enforce the mediation provision, which Combinations L and P both conclude is a condition precedent contained within a divisible contract. Thus, Combinations L and P can be condensed to Combination III, in fn. 2.

Finally, Combinations M and O are stand-alone combinations, represented by Combinations IV and V, respectively, in fn. 2. Combinations **I**, **II** and **IV**, which appear in bold text in fn. 2, compel the ultimate conclusion that Primov's suit can proceed full speed ahead—either

with or without a 60-day stay to accommodate non-binding mediation. In contrast, Combinations III and V, which are not in bold, compel the conclusion that Primov's suit cannot proceed because he failed to meet a condition precedent to filing suit. In short, then, there are only two combinations of answers to the four threshold inquiries that can result in the ultimate conclusion reached by the trial court—that Primov's suit is barred.[3]

Significantly, the trial court answered only the first two inquiries[4] but punted on the remaining two—iii and iv. That is, it declined to determine (iii) whether the mediation provision was an independent covenant, thereby

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[3] It should be stated, however, that under Scenarios III and V, the hypothetical dismissal of Primov's claim should be *without* prejudice, presumably on the theory that the trial court was precluded, by the existence of the mediation provision, from exercising subject matter jurisdiction ("SMJ") over the dispute, until such time as that provision had been complied with (*See, e.g., Tattoo Art, Inc. v. Tat Int'l, LLC*, 711 F.Supp. 2d 645, 650, 655 (E.D. Va. 2010)) and Opening Brief at p. 16). Under no circumstances does either scenario militate in favor of a dismissal of Primov's lawsuit, *with prejudice*.

[4] Primov's petition for appeal argues that the trial court's answers to those two inquiries, as reflected in Combinations III and V, are wrong. That is, (i) Primov *did* comply with the mediation provision, and (ii) the mediation provision is *not* a condition precedent. However, in light of this Court's 2/27/18 order refusing Primov's petition for appeal as to, *inter alia*, his AoEs # 1 and 3, Primov is presumably foreclosed from re-arguing the merits of those positions at this time.

rendering the Agreement divisible,[5] or, as Primov argued, whether it was a unitary and indivisible contract, whose first material breach by SERCO would thereby preclude it from enforcing the mediation provision. Nor did the trial court determine whether (iv) SERCO was the first to materially breach the parties' Agreement. It was dismissive of that argument, reasoning,

> Under [Primov's] view, a court would have to make a finding that one of the parties breached the agreement and then determine whether that party is

[5] The trial court acknowledged the argument raised by Primov's AoE #5—that the Agreement was unitary and indivisible, but declined to address it. Primov raised the issue in his 6/9/17 Brief in Opposition to SERCO's plea in bar at § IV(E), pp. 14-17 (ToC at 155-158). He also raised it at oral argument on the plea in bar. 7/7/17 TR. at 14:6-15:1; 17:24-18:3 (ToC at 258-59, 261-62). Finally, he raised it in his 10/20/17 Petition for Appeal (AoE #5). SERCO declined to respond to the argument anywhere—not in its 6/30/17 Reply Brief filed in response to Primov's opposition to SERCO's plea in bar (ToC at 212-224); not at oral argument; and not in its 11/13/17 Opposition to Primov's Petition for Appeal. The trial court also declined to address the argument, in either its opinion letter or at oral argument. Its opinion letter stated, "Lastly, Defendant [sic]* argues that the Offer Letter and [LoA] presumably form an indivisible contract and unitary agreement." (J.A. at 25). *The trial court meant Plaintiff (Primov). Its opinion letter went on to state that "[t]he Offer Letter and [LoA] . . . should be seen as one integrated employment contract." (J.A. at 26). But despite its conclusion that the two documents constituted a single integrated employment contract, the trial court declined to consider the indivisibility of the Agreement. Thus, both SERCO and the trial court apparently believed that ignoring that fatal flaw in SERCO's argument to enforce the mediation provision would somehow magically make that problem disappear.

entitled to enforce the dispute resolution clause. J.A. at 23.[6]

## II. This Court's refusal of Primov's petition for appeal, as to AoEs # 1, and #3-5 is procedurally untenable and hamstrings its ability to correct the trial court's errors, absent its overruling *Sheets v. Castle*

Thus, the trial court left unanswered the questions whether the Agreement at issue is unitary and indivisible, and whether SERCO was the first party to materially breach the Agreement. It thereby left unfinished the work of completing the analysis dictated by the algorithm. And instead of answering those two remaining questions and completing the trial court's

[6] As bass-ackwards as it sounds for a court to engage in a determination of the merits of the case—whether SERCO breached the Agreement at issue—before deciding whether Primov was bound by a condition precedent such that his alleged failure to fulfill that condition precedent precluded the trial court from deciding those merits, there is precedent for reaching the merits of a case in order to determine, as here, whether the court can reach the merits of the case. For example, there are times when a trial court must reach the merits of a decision in order to ascertain whether it can properly exercise SMJ over the dispute and thereby reach the merits. Obviously, SMJ is a weightier subject than fulfillment of a contractually-created condition precedent. Nevertheless, this inefficient approach is dictated here by the structure of the Agreement that was drafted by SERCO. Therefore, SERCO should not be heard to complain about the inefficiency of that process. (See, *e.g.,* SERCO's Opposition to Petition for Appeal at 19, wherein it states, "According to Primov, a court would need to make a preliminary determination that one of the parties breached the Employment Agreement and then determine whether that party is entitled to insist that the other comply with the ADR provision. Such a position is nonsensical, as it would completely frustrate the entire purpose of including a dispute resolution provision in an agreement.").

unfinished work,[7] this Court appears poised to decide this case on alternative, possibly narrower, and certainly simpler grounds. The Court apparently seeks to bypass the questions raised by AoEs # 1 and 3-5, all of which it refused, and instead has zeroed in on the simpler question raised by AoE #2—whether the trial court should have either dismissed Primov's case *without* prejudice, or else merely stayed the litigation for 60 days to encourage (or possibly require) the parties to engage in non-binding mediation, as a nod to honoring the spirit of the mediation provision, even if, as a result of applying the algorithm described above, the mediation provision turns out to be unenforceable, and therefore, not technically binding on Primov.

It is understandable why the Court might want to conserve its resources and decide no more than it absolutely must. But while the goal is laudable, it is unattainable here because there are only two procedural paths that will reach the correct outcome, and this Court has foreclosed one of them—following the algorithm described, *supra.* That leaves only one other legitimate path to get there from here—by crashing through the

[7] as well as reviewing the trial court's decisions concerning the first two questions—the *only* threshold questions it reached—whether Primov complied with the mediation provision, and whether that provision is properly characterized as a condition precedent to filing a lawsuit

brick wall that is this Court's decision in *Sheets v. Castle*, 559 S.E.2d 616 (2002).

This case illustrates the procedural purgatory to which the parties have been relegated as a consequence of the *Castle* decision, and demonstrates its untenability and the necessity of overruling it. The *Castle* court held that, with few exceptions (*e.g.,* death penalty cases), this Court's decision to grant or deny appellate review is a decision subject to the exercise of its "discretion,"[8] and its decision denying "discretionary" appellate review, *i.e.*, refusing a petition for appeal, is a decision "on the merits" of the case, and constitutes a tacit affirmance of the lower court's—in this case, the trial court's—ruling(s) at issue. *Id.* at 559 S.E.2d at 619.[9]

By virtue of this Court's decision granting his Petition for Appeal with respect to AoE #2, Primov presumes this Court has (correctly) concluded that the trial court's dismissal of his complaint with prejudice was improper. Indeed, it shocks the conscience that a trial court would conclude that the appropriate remedy for Primov's timely expression of his willingness to

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[8] Primov places quotation marks around "discretion/ary" because he contends that *Castle* precludes this Court's constitutional exercise of discretionary appellate review, *except for* the narrow circumstance in which this Court determines that there was not likely reversible error below, but grants the appeal anyway, so that it can employ its opinion as a vehicle by which to underscore, clarify, or amplify a particular legal principle.

[9] The *Castle* court recognized a few exceptions to that general rule, such as dismissals on purely procedural grounds, none of which is relevant here.

participate in non-binding mediation, even if he "failed" to make an express *request* that SERCO engage in such mediation, was dismissal of his claim, *with prejudice.* The disproportionality between the alleged transgression and the "penalty" imposed on Primov for that alleged transgression is manifest.

Yet, by virtue of its refusal of Primov's petition for appeal as to AoEs #1 and 3-5, *Castle* dictates that this Court has decided the merits of those AoEs, and has done so in a manner adverse to Primov. Specifically, it has tacitly affirmed the trial court's determination that Primov did not comply with the mediation provision, as well as its characterization of that mediation provision as a "condition precedent" to his filing the lawsuit that is the subject of this appeal. Primov contends those decisions are wrong, for all of the reasons argued in his Petition for Appeal—reasons he is precluded from re-arguing in light of the Court's refusal of those AoEs and the express language of its 2/27/18 order, which states,

> . . . it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to [AoE #2] and the briefs to be filed shall be limited to such discussion as is relevant to that [AoE]. The petition for appeal is refused as to the remaining [AoEs]. *Id.*

But even if this Court leaves undisturbed the trial court's erroneous finding of fact that Primov did not comply with the mediation provision, and

its mischaracterization of that mediation provision as a "condition precedent" to Primov's filing his lawsuit that is the subject of this appeal that would not necessarily prevent this Court from reaching the correct decision. Had it granted AoEs # 4 and 5, it could have determined that the Agreement at issue is unitary and indivisible and that SERCO was the first party to materially breach the Agreement. Those determinations would have led to the correct outcome—that Primov's lawsuit may proceed.

The question, then, is what is the procedural posture of this case, in light of this Court's refusal of AoE's #4 and #5? Recall the trial court was completely silent on the issue of the divisibility of the Agreement. But the trial court's decision to dismiss Primov's complaint, with prejudice, compels the inference that it rejected Primov's argument that the Agreement is unitary and indivisible. And although the trial court made it clear that it declined to address whether SERCO was the first party to materially breach the Agreement, it can be inferred that the trial court disagreed with that conclusion, in light of its decision to dismiss Primov's complaint with prejudice. Thus, we have a decision by the trial court to dismiss Primov's complaint with prejudice—a decision that compels the inferences that the trial court concluded that either the Agreement at issue is divisible or that SERCO was not the first party to materially breach that Agreement—

*despite* the absence of any overt decision on those issues, let alone, any meaningful discussion or analyses of them in the trial court's opinion letter, and with respect to the issue raised by AoE #5, an overt statement that the trial court declined to reach that issue.

Under *Castle*, this Court's refusal of AoEs #4 and #5 constitutes its tacit affirmance of the trial court's "decisions"—albeit, implicit decisions—concerning those issues. Thus, both the trial court and this Court have declined to overtly address those two issues that are critical to the decision on the ultimate question presented by this appeal—whether Primov's lawsuit can proceed to final judgment on the merits. However, the rejection of Primov's arguments are implicit in the trial court's decision to dismiss Primov's complaint with prejudice, and this Court's refusal of AoEs #4 and #5. Coupled with this Court's refusal of AoEs #1 and #2, it necessarily follows, then, that this Court has made a decision *on the merits* that (i) Primov did not comply with the mediation provision; (ii) the mediation provision is a condition precedent to Primov's right to file the lawsuit underlying this appeal; and (iii) the Agreement at issue is divisible.[10]

[10] The trial court's implicit (and erroneous) ruling that the Agreement is divisible, rendered it unnecessary to reach issue (iv)—whether SERCO first materially breached the Agreement.

In light of those decisions by this Court, implicit in its refusal of Primov's AoEs # 1, 3-5, which together compel the dismissal of Primov's case, how is it possible, procedurally, to now disavow those decisions and determine, instead, that the trial court could or should have stayed the litigation to create an environment amenable to non-binding mediation?

The difficulty lies in this Court's characterization of its decisions denying "discretionary" appellate review as decisions that are "on the merits." Significantly, SCOTUS characterizes its decisions denying discretionary appellate review as decisions that are *not* on the merits. *Boumediene v. Bush*, 550 U.S. 1301 (2007). That characterization provides SCOTUS with a great deal of flexibility in its conduct of appellate review. When it denies discretionary appellate review it signals only that it is staying out of a particular fight without commenting on the merits of that battle. It thus has the flexibility to reject certain assignments of error while granting others, so that it can, as this Court has apparently attempted to do in this case, decide the dispute on narrower grounds. But because this Court characterizes its decisions refusing particular assignments of error as decisions that are "on the merits," it has hamstrung itself.

Of course Primov will be happy to accept victory regardless of how this Court justifies it, but he also contends that the process *matters.* It

would be disingenuous for this Court to rule in his favor while simultaneously retaining its characterization of its refusal of his AoEs #1 and 3-5 as decisions that are "on the merits" of those arguments. On the other hand, it would also be disingenuous for this Court to affirm the trial court's decision which was wrong in every respect. In particular, its distinction without a difference between its characterization of his "expression of his willingness to mediate," which undeniably was conveyed to SERCO by his counsel on 2/1/16—more than 60 days prior to his 12/14/16 re-filing of his Complaint that is the subject of this appeal—and a "request for mediation," as demanded by the mediation clause of the Agreement, was unwarranted.

More significantly, as a matter of law, the mediation provision is *not* properly characterized as a "condition precedent." In fact, a long line of this Court's decisions leads, inexorably, to the conclusion that the mediation provision at issue does not contain the clear and unmistakeable language necessary to the characterization of a contractual provision a "condition precedent."

In addition, the trial court wrongly decided, albeit, implicitly, that the Agreement at issue is divisible—a conclusion unsupported by any controlling legal authority. Finally, although it did not reach the issue

whether SERCO was the first to breach the Agreement, in light of the fact that the Agreement is unitary and indivisible, the trial court's abstention was unwarranted.

In order to maintain a cohesive and coherent jurisprudence, Primov sees no other avenue for this Court to correct the trial court's erroneous decision dismissing Primov's complaint with prejudice, other than to overrule its decision in *Castle*, and hold instead, that its decisions denying discretionary appellate review are *not* decisions on the merits.

WHEREFORE, Appellant, GEORGE PRIMOV, by Counsel, respectfully requests this Court overrule *Castle* (on that point of law), reverse the trial court's 7/19/17 decision dismissing Primov's complaint with prejudice, and remand the case with instructions to the trial court, to either allow the case to proceed, or else, in the sound exercise of the trial court's discretion, stay the proceedings for a period of 60 days and encourage the parties to engage in non-binding mediation.

Respectfully submitted,

GEORGE PRIMOV,

By Counsel

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**CERTIFICATE OF SERVICE AND OF COMPLIANCE WITH VA. R. S. Ct. 5:26(h)**

I hereby certify that I have complied with the requirements of Rule 5:26, and that on this 21st day of May 2018, three copies of **Appellant's Reply Brief** were both emailed to and mailed certified mail, return receipt requested, to Patricia L. Harrington, Clerk of the Supreme Court of Virginia, at 100 N. Ninth Street, 5th floor, Richmond, Virginia 23219-2321.

I hereby further certify that on this date, I emailed and mailed two copies of **Appellant's Reply Brief**, first-class postage pre-paid, to:

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I further certify that, in compliance with Rule 5:26(b), the Reply brief does not exceed the longer of 15 pages or 2,625 words.

/s/ Phillip B. Leiser, Esq.

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