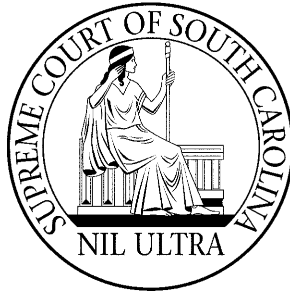

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

FILED DURING THE WEEK ENDING

September 22, 2003

ADVANCE SHEET NO. 35

Daniel E. Shearouse, Clerk
Columbia, South Carolina
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PETITIONS - UNITED STATES SUPREME COURT

None

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Geoffrey R. Payne, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal From McCormick County
Marc H. Westbrook, Trial Judge
Rodney A. Peeples, Post-Conviction Judge

Opinion No. 25719
Submitted March 19, 2003 - Filed September 22, 2003

AFFIRMED

Assistant Appellate Defender Aileen P. Clare, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Chief, Capital & Collateral Litigation Donald J. Zelenka, and Assistant Deputy Attorney General Allen Bullard, all of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Petitioner, Geoffrey Payne ("Payne") asserts that his counsel was ineffective for failing to object to counsel for co-defendant's comment on Payne's right not to testify.

FACTUAL/PROCEDURAL HISTORY

Geoffrey Payne ("Payne") was convicted of murder and criminal conspiracy,[1] and this Court affirmed his convictions on direct appeal. *State v. Payne*, Op. No. 98-MO-008 (S.C. Sup. Ct. filed January 26, 1998). Payne applied for post-conviction ("PCR") relief, which was dismissed. Payne's counsel petitioned for a writ of certiorari requesting to be relieved as counsel. *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). The petition was denied, and the Court ordered rebriefing, and later granted certiorari on the following issue:

> Was Payne's counsel ineffective for failing to object to counsel for the co-defendant's comment on Payne's right to remain silent during the closing argument?

LAW/ANALYSIS

Payne asserts that his counsel was ineffective for failing to object to his co-defendant's counsel's statement about his right to remain silent. We disagree.

In his closing argument, Kelsey's attorney, Douglas S. Strickler ("Strickler"), stated to the jury,

> So I will talk with you a little about what I had to say at the start; and that's that he would go ahead and confess to what he is guilty of, what he has done. What did Mr. Breibart tell you at the start? That's [Payne's] attorney.

---

[1] Payne's co-defendant, Joseph Kelsey ("Kelsey"), was also convicted of murder and criminal conspiracy.

> I've got to bring that up because yesterday you heard nothing but Joe Kelsey because *Joe wanted and was willing to sit right there and look y'all in your eyes and tell you the answer to the only questions that matter*, not whether he remembered seeing blood when he talked about it at one point and didn't remember it another time or whether, you know, there is a two-inch difference in the size of the pipe bomb.
>
> He talked with you about the only questions that matter in this case, and there has never been anything to say from the moment he sat down and gave his statement to the police - - which he brought to your attention and which he testified to and which the State makes no claim that he testified inconsistently with.
>
> He has said consistently that she was killed in the back seat by [Payne] . . . .

(emphasis added). Payne alleges that Strickler's statement concerning Kelsey's willingness to testify, and his indirect reference to the fact that Payne did not testify, infringed on his constitutional right to remain silent. Thus, he alleges that his counsel was ineffective for failing to object to the comment.

In order to prove ineffectiveness of counsel, Payne must prove that his counsel's performance was deficient and that the deficiency prejudiced the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984); *Gallman v. State*, 307 S.C. 273, 414 S.E.2d 780 (1992).

The state may not directly or indirectly comment on the defendant's right to remain silent. *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987). Further, a co-defendant's counsel is held to the same standard because the importance of this protection is the effect an indirect reference may have upon the jury regardless of whose counsel made the reference. *State v. Green*, 269 S.C. 623, 239 S.E.2d 646 (1977).

The PCR judge found that Strickler's comment did not indirectly reflect on Payne's right not to testify. We disagree. In our view, Strickler's comment, "you heard nothing but Joe Kelsey because Joe wanted and was willing to sit right up there and look y'all in your eyes and tell you the answer to the only questions that matter," *does indirectly refer* to the fact that Payne elected to remain silent. Accordingly, we believe that Strickler inappropriately commented on Payne's constitutional right not to testify, and counsel for Payne's failure to object satisfies the deficiency prong of the *Strickland* analysis. *Strickland*, 466 U.S. at 687, 104 S.Ct .at 2064.

But *Strickland's* prejudice prong is not satisfied because there was overwhelming evidence that Payne murdered the victim. *Id; See also Gill v. State*, 346 S.C. 209, 552 S.E.2d 26 (2001) ("improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant.")

Both Kelsey and co-defendant Jammie Lee ("Lee") testified that Payne strangled the victim. Lee testified that Payne hit the victim twice on the head with a wrench. After Payne strangled the victim, Lee testified that the victim was still alive, and Kelsey testified that the victim was dead. Both Lee and Kelsey testified that Payne had sexual intercourse with the victim, attempted to remove the victim from the vehicle and take her into the woods. Lee and Kelsey helped take the victim into the woods. Kelsey testified that he placed the pipe bomb in the victim's mouth and that Payne lit the fuse with a lighter. Lee testified that Payne threw the lighter on the dashboard of his car. Whether the victim died by Payne strangling her to death, or by Payne lighting the fuse of the pipe bomb that exploded in her mouth, the testimony overwhelmingly proves that Payne murdered her. Therefore, we hold that Payne was not prejudiced by his counsel's failure to object to Strickler's reference to Payne's refusal to testify.

CONCLUSION

Based on the reasoning above, we **AFFIRM** the PCR judge's determination that Payne's counsel was not ineffective for failing to object to Strickler's comment on Payne's right to remain silent.

MOORE and WALLER, JJ., concur. PLEICONES, J., concurring in result in a separate opinion in which BURNETT, J., concurs.

JUSTICE PLEICONES: I concur in the result, but write separately because, in my opinion, the PCR judge correctly found that attorney Strickler did not impermissibly comment on petitioner's exercise of his Fifth Amendment privilege to remain silent. He therefore found that petitioner's counsel was not ineffective in failing to object. I agree with the PCR judge's analysis, and agree with the majority that we should affirm.

In State v. Green, 269 S.C. 623, 239 S.E.2d 646 (1977), the Court was faced with the claim that the trial court erred in denying appellants' motion for a severance. At trial, appellants had sought either a severance, or the right to comment on a codefendant's refusal to take the stand. The Court held that the trial court committed no error in refusing to permit the appellants to comment on the codefendant's refusal to take the stand, and cited with approval to a Fifth Circuit decision[2] which held that a comment on an accused's silence is improper whether made by a codefendant, by the prosecutor, or by the judge. Id. The Court acknowledged that in situations where an attorney must, in order to fulfill his duty to his client, call attention to a codefendant's silence, a severance was warranted. In Green, no severance was required because the appellants and the codefendant did not have antagonistic defenses and therefore the appellants were not prejudiced by their inability to comment on the codefendant's refusal to take the stand.

Viewing Green in context as a severance case, I am not as confident as the majority that it should be read to hold that the same, if not stricter, proscriptions on references to a defendant's silence apply to codefendants' attorneys as to judges and prosecutors.[3] In my opinion, we should recognize that an attorney, in the course of zealously representing his client, must emphasize the facts that place his client in the best light. I would adopt a test similar to that used in the Eighth Circuit and in the Eleventh Circuit when reviewing allegedly improper comments made by a codefendant's attorney: whether the attorney manifestly intended to refer to the defendant's silence or whether the comment was of such a nature that the jury would naturally and necessarily take it as a reference to the defendant's silence? See e.g., United

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[2] De Luna v. United States, 308 F.2d 140 (5th Cir. 1962).

[3] I note that federal circuits appear split whether a Fifth Amendment violation even occurs when the comment is made by a codefendant's attorney. Compare, e.g., United States v. Whitley, 734 F.2d 1129 (6th Cir. 1984)(no violation) with United States v. Patterson, 819 F.2d 1495 (9th Cir. 1987).

States v. Jackson, 64 F.3d 1213 (8th Cir. 1995). In other words, we should ask whether the comments actually or implicitly invited the jury to infer the defendant's guilt from his silence. See e.g., United States v. Mena, 863 F.2d 1522 (11th Cir. 1989).

In the present case petitioner and his codefendant (Kelsey) presented antagonistic defenses in which each blamed the other for killing the victim. Petitioner's attorney's (Breibart's) pretrial motion to sever the cases was denied, as were his repeated requests for a severance and/or a mistrial during the proceedings. During opening statements, Strickler acknowledged Kelsey's guilt of two of the charges, possession of a pipe bomb and desecration of human remains, but denied that his client had murdered the victim or conspired with petitioner to commit the murder. During Breibart's opening statement, he criticized Strickler's acknowledgment of Kelsey's culpability, but told the jury that Kelsey had confessed to all the crimes.

Kelsey testified, and admitted his guilt of the charges other than conspiracy and murder: petitioner did not testify. A third youth involved in the crimes testified for the State; he had initially identified Kelsey as the perpetrator, but in later statements and in his trial testimony he identified petitioner as the responsible individual.

During the closing argument, Strickler said:

> So I will talk with you a little bit about what I had to say at the start; and that's that [Kelsey] would go ahead and confess to what he is guilty of, what he has done. What did Mr. Breibart tell you at the start? That's [petitioner's] attorney.
>
> I've got to bring that up because yesterday you heard nothing but [Kelsey] because [he] wanted and was willing to sit right up there and look y'all in your eyes and tell you the answer to the only questions that matter…
>
> He talked with you about only the questions that matter in this case, and there has never been anything to say from the

> moment he sat down and gave his statement to the police – which he brought to your attention and which the State makes no claim that he has testified inconsistently with.
>
> He has said consistently that [the victim] was killed in the back seat by [petitioner]….

There was no objection to this argument.

At the PCR hearing, petitioner complained that Strickler's argument referring to Kelsey's testimony impermissibly singled out petitioner's failure to testify. When Breibart was asked at the hearing why he did not object, he said that he felt highlighting Kelsey's trial testimony was favorable to the petitioner since Kelsey had essentially confessed to murder, just as Breibart had predicted in his opening statement. Breibart testified that he felt Strickler's closing argument was not a comment on petitioner's silence, but was instead intended to emphasize Kelsey's self-damaging trial testimony.

The PCR judge held that Breibart was not ineffective in failing to object to Strickler's closing argument because, viewed in context, the argument was not an improper comment on petitioner's right to remain silent. We must uphold this finding if supported by any probative evidence in the record. Jackson v. State, Op. No. 25678 (S.C. Sup. Ct. filed July 21, 2003). In my opinion, there is evidence to support the finding that Breibart's strategic decision not to object was reasonable since the argument, viewed in context, was helpful to his client's position. See e.g. Legare v. State, 333 S.C. 275, 509 S.E.2d 472 (1998) (where counsel articulates valid reason for strategy he is not ineffective). Further, applying the test outlined above, I would not find the comments objectionable as actually or implicitly inviting the jury to infer petitioner's guilt from his silence, but rather as Strickler's proper attempt to highlight the consistency of Kelsey's story. See e.g. United States v. Jackson, *supra* (attorney may properly argue his testifying client's credibility in closing); United States v. McClure, 734 F.2d 484 (10th Cir. 1984) (testifying codefendant's attorney may properly argue his client's willingness to face questioning on stand).

For these reasons, I would affirm the PCR court's order denying petitioner relief. This case highlights one of the problems that arise when codefendants have antagonistic defenses but the State nevertheless insists upon a joint trial. The codefendants in this case were placed in the unenviable position of having to attack each other while the State played a largely passive role. Had the trial court's decision to deny petitioner's severance motion been before us, I would have been inclined to find reversible error.[4] State v. Green, *supra*.

BURNETT, J., concurs.

[4] Petitioner took no direct appeal.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

John David Rogers, Petitioner,

v.

Norfolk Southern Corporation,
Norfolk Southern Railway
Company, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Fairfield County
Paul E. Short, Jr., Circuit Court Judge

Opinion No. 25720
Reheard June 10, 2003 - Filed September 22, 2003

AFFIRMED AS MODIFIED

Deborah Alley Smith, of Christian & Small, LLP, William Cox Tucker, Jr., of Lucas, Alvis & Wash, PC, both of Birmingham, Alabama; and Robert A. McKenzie, of McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia, for Petitioner.

Henry Dargan McMaster and John Gregg McMaster, both of Tompkins & McMaster, of Columbia, for Respondent.

JUSTICE PLEICONES: We granted certiorari to review the Court of Appeals' decision in Rogers v. Norfolk Southern Corp., 343 S.C. 52, 538 S.E.2d 664 (Ct. App. 2000). We affirm as modified.

FACTS[1]

Norfolk Southern Corporation ("Norfolk Southern"), under contract with U.S. Silica ("Silica"), transports Silica's product over spur tracks owned by Silica. Silica runs slurry[2] through pipes running beneath the spur lines to a storage facility.

A slurry pipe ruptured two days before John David Rogers' ("Rogers") injury. Silica employees temporarily repaired the pipes, intending to replace them at a later date. Silica did not notify Norfolk Southern of the rupture.

On the day of Rogers' injury a Norfolk Southern train entered the Silica complex on a spur track. The Norfolk Southern crew, consisting of a conductor and an engineer, dismounted from the train for a break. They returned to discover a large hole beneath the track estimated to be between four to five feet deep and approximately eight to ten feet wide. The train engineer noticed a small stream of clear water at the bottom of the hole, which flowed outward from the direction of the Silica plant. The train conductor testified that no exposed pipe was visible in the hole. The train conductor asked Norfolk Southern to inspect the track to ensure the train

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[1] A more extensive treatment of the facts can be found in the Court of Appeals' opinion. Rogers v. Norfolk Southern Corp., 343 S.C. 52, 538 S.E.2d 664 (Ct. App. 2000).

[2] Slurry is an abrasive mixture of sand and water that can be pumped through a pipe. The slurry has a sandblasting effect on the pipes causing the pipes to be worn down over time.

could traverse it safely. Norfolk Southern sent Rogers, an assistant track supervisor, to inspect the hole.

Rogers testified that, upon arriving at the site, he could see the hole from 150 feet away but could not tell what caused the hole. Rogers' assistant testified to seeing "wet sand" around the hole. Norfolk Southern's head track inspector testified he knew a hole created by the failure of a water line would cause an inspector to be more cautious "than if it had just been water washed across the track or water leaking from a low pressure pipe, [because] it might cause a concave-type hole under the track rather than one that would go straight down."

As Rogers neared the hole, the ground shifted beneath him. Rogers jerked backwards to avoid falling and immediately felt pain in his back. Rogers sought medical treatment and was diagnosed with a herniated disc, which resulted in pain in his back and his left leg. Rogers attempted to return to work after surgery, but he has work restrictions on lifting, bending, stooping, and twenty percent impairment to his lumbar spine.

Rogers filed suit against Norfolk Southern under FELA, alleging Norfolk Southern was negligent in failing to provide him with a reasonably safe place to work. Rogers also filed suit against Silica for common law negligence. The jury returned a $3,000,000 verdict against Silica and Norfolk Southern, apportioning 30% of the verdict to Norfolk Southern and 70% to Silica. Following the verdict, Norfolk Southern's motion for judgment notwithstanding the verdict (JNOV) was denied. The Court of Appeals reversed.

ISSUES

I. Did the Court of Appeals err in applying a state standard in reviewing a trial court's denial of Norfolk Southern's Motion for JNOV in a case premised on federal law?

II. Did the Court of Appeals err in reversing the trial court's denial of Norfolk Southern's Motion for JNOV?

I

Standard for JNOV

The Court of Appeals issued its opinion in this case before we decided Norton v. Norfolk Southern Ry. Co., 350 S.C. 473, 567 S.E.2d 851 (2002) in which we held state trial courts hearing a federal claim must review motions for a new trial under a federal standard. In Norton, this Court noted state courts have concurrent jurisdiction to hear Federal Employers Liability Act ("FELA") claims. See id; 45 U.S.C. §§ 51, et seq. We further noted a state court trying a FELA action is controlled by federal substantive law and state procedural law. Because a motion for a new trial involves questions of the sufficiency of evidence, we held state courts must apply federal, not state, standards in reviewing such motions. Norton v. Norfolk Southern Ry. Co., supra.

A Motion for JNOV[3] requires a court to determine the sufficiency of the evidence. Therefore, a state court presiding over a FELA action must apply federal rules in deciding a Motion for JNOV. Cf. Norton v. Norfolk Southern Ry. Co., supra.

The Court of Appeals applied the state standard of review and concluded Rogers presented no evidence to support the jury's finding that Norfolk Southern was negligent.[4] The Court of Appeals erred by failing to

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[3] We observe that the federal rules do not provide specifically for a Motion for JNOV. The federal rules do allow for a Motion for Judgment as a Matter of Law. See Rule 50, FRCP. As a practical matter South Carolina's Motion for JNOV and the federal Motion for Judgment as a Matter of Law are the same.

[4] The Court of Appeals wrote the state standard required a trial court to:

> view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the

apply the federal standard, applicable to both trial and appellate courts, which is:

> the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be 'of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party. . . .' a 'mere scintilla of evidence' is not sufficient to withstand the challenge.

Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir. 1988) (internal citations omitted). In other words, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957) (citation omitted). However, before the case may be properly left to the jury there must be more than a scintilla of evidence establishing defendant's liability. Brady v. Southern Ry., 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943) ("the weight of the evidence under ... [FELA] must be more than a scintilla before the case may be properly left to the discretion of the trier of fact....").

Both the state and federal standards require a trial judge to view the evidence in the light most favorable to the non-moving party. However, under the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not

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> evidence yields more than one inference or its inference is in doubt. [Appellate courts] will reverse the trial court only when there is no evidence to support the ruling below.

Rogers, 343 S.C. at 58, 538 S.E.2d at 668 (quoting Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 386, 520 S.E.2d 142,148 (1999)).

overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling.

In contrast, under the federal standard both the trial and appellate courts must ask whether a fair, impartial, and reasonable juror could return a verdict for the non-moving party. To survive the motion the non-moving party must have presented more than a scintilla of evidence to establish his claim. In ruling on a Motion for JNOV in a FELA action, a state court must ask whether more than a scintilla of evidence was presented which "justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Rogers v. Missouri Pac. R. Co., supra.

II

Norfolk Southern's Motion for JNOV

Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party. See Norfolk Southern Ry. Co. v. Trimiew, 480 S.E.2d 104 (Va. 1997); McGraw v. Norfolk & Western Ry. Co., 500 S.E.2d 300 (W. Va. 1997); Schrier v. Indiana Harbor Belt R. Co., 430 N.E.2d 204 (Ill. Ct. App. 1981). Norfolk Southern's duty to provide a safe working environment extends only to foreseeable dangers. Brown v. CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir. 1994) (quoting Atlantic Coast Line R. Co. v. Craven, 185 F.2d 176, 178 (4th Cir. 1950) ("An employer has a duty to provide his employees a safe place to work, but this duty cannot be absolute. Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees.")); Brown, 18 F.3d at 250 (an employer "may not be held liable if it had no reasonable way of knowing that the hazard, which caused [Plaintiff's] injury, existed.").

Congress mandated courts construe FELA provisions liberally in favor of injured railroad workers. Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Although FELA is to be liberally construed, this "does not mean that it is a workers' compensation statute. [The U.S.

Supreme Court has] insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'" Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543, 114 S.Ct. 2396, 2404 (1994). An employee may recover under FELA only upon proving the employer's negligence contributed, in whole or in part, to the worker's injury. See 45 U.S.C. § 51 (a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier"). Plaintiffs, even under FELA, must prove the traditional common law elements of negligence: duty, breach, causation and damages. See Brown, supra. Reasonable foreseeability of harm is essential to a FELA claim. See Brown, 18 F.3d at 249.

Rogers was sent to the track on U.S. Silica's premises to inspect the track and report any problems or damages found, and advise his supervisors of any necessary repairs. On the day Rogers was injured, Rogers was sent to the track specifically to inspect the hole that was discovered by the conductor and engineer. To prevail on a FELA negligence claim, Rogers must prove "duty, breach, foreseeability, and causation." Adams v. CSX Transp. Inc., 899 F.2d 536, 539 (6th Cir. 1990). Norfolk Southern had a duty to provide its employees with a safe workplace. Id. Nevertheless, "[t]he employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated." Isgett v. Seaboard Coast Line R.R. Co., 332 F. Supp. 1127, 1139 (D.S.C. 1971).

We fail to see how, in this instance, Norfolk Southern could have been any more prudent. Rogers was Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site. Rogers' job was to inspect the area around the track and to inform Norfolk Southern of any danger.[5] We agree with the Court of Appeals that Norfolk Southern was

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5 *Cf.* Hurley v. Patapsco & Back Rivers R.R. Co., 888 F.2d 327 (4th Cir. 1989) (Directed verdict was proper when appellant was only employee

not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site. Rogers v. Norfolk Southern Corp., 343 S.C. 52, 61, 538 S.E.2d 664, 669 (Ct. App. 2001). Norfolk Southern was not, therefore, negligent in any particular in dispatching Rogers to inspect the site.

The law does not require that employers be omniscient, only that they exercise reasonable care. Rogers was the agent of Norfolk Southern entrusted with informing the company of dangers in the Norfolk Southern workplace. No more than a mere scintilla of evidence, if that, was adduced at trial from which the negligence of Norfolk Southern could be inferred. We conclude that a fair, impartial and reasonable juror could not have returned a verdict against Norfolk Southern. The Court of Appeals arrived at the correct result as to all allegations of negligence—albeit through application of the incorrect standard.

We therefore **AFFIRM AS MODIFIED** the Court of Appeals' decision.

MOORE, A.C.J., and Acting Justice James C. Williams, Jr., concur. BURNETT, J., dissenting in a separate opinion in which WALLER, J., concurs.

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qualified to operate lathe, and "without notice from appellant as to possibly dangerous conditions not evident to a layperson, appellee had no opportunity to correct these conditions and cannot be found negligent").

JUSTICE BURNETT: I respectfully dissent. The evidence presented by Rogers is more than sufficient to satisfy the federal "more than a mere scintilla" standard.

> Under the federal standard, applied alike at trial and on review, the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be 'of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party. . . .' A 'mere scintilla of evidence' is not sufficient to withstand the challenge.

Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir. 1988) (internal citations omitted).

A scintilla is defined as "a trace" of evidence. Black's Law Dictionary 1347 (7th ed. 1999).

The majority concludes Norfolk Southern was not negligent in dispatching Rogers to inspect the site. I agree. The mere dispatch of Rogers to the site was not negligent.

In my opinion, however, Norfolk Southern was negligent in failing to provide Rogers with a safe place to work. As noted by the majority, Norfolk Southern had a non-delegable duty to provide Rogers a safe place to work, even when Rogers was working on the property of a third party. See Norfolk Southern Ry. Co. v. Trimiew, 480 S.E.2d 104 (Va. 1997); McGraw v. Norfolk & Western Ry. Co., 500 S.E.2d 300 (W. Va. 1997); Schrier v. Indiana Harbor Belt R. Co., 430 N.E.2d 204 (Ill. Ct. App. 1981).

Viewing the testimony and its inferences in the light most favorable to Rogers as we are required to do, Norfolk Southern was negligent in failing to provide a safe place for Rogers to perform his work. Norfolk Southern's non-delegable duty required it inspect the premises within the

area of its responsibility for conditions injurious to its employees. This duty necessarily required it be aware of conditions adjacent to the tracks which posed an immediate potential of danger to its employees. This Norfolk Southern failed to do.

The convex hole created beneath the Norfolk Southern tracks resulted from the rupture of slurry pipes which ran beneath the tracks. The pipes were visible going into the ground adjacent to the track and emerging from the ground on the opposite side of the track. Although the installation of the pipes was not disclosed to Norfolk Southern, the pipes were not concealed from view. Photographs and witness testimony show the entry of the slurry pipes into the ground twenty feet from the spur track. It was clearly foreseeable that a dangerous condition existed adjacent to Norfolk Southern's tracks.

In my opinion, more than a mere scintilla, a trace, of evidence was introduced establishing Norfolk Southern knew or, in the exercise of ordinary care, should have known the conditions at Silica posed a danger to its employees. Accordingly, under FELA standards, Rogers is entitled to prevail. Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506 (1957) (under FELA, an employee prevails if he establishes "that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.").

The majority opines no fair, impartial, and reasonable juror could have returned a verdict against Norfolk Southern. The record, however, is devoid of evidence the jury which returned the verdict against Norfolk Southern was unfair, partial, or unreasonable. Instead, Rogers presented this jury more than a mere scintilla of evidence Norfolk Southern breached its non-delegable duty, resulting in injury to him.

I would **REVERSE** the Court of Appeals' decision.

WALLER, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Housing Authority of the City of Columbia,	Appellant,

v.

Cornerstone Housing, LLC, Cornerstone Columbia, LLC, and The American Arbitration Association, Inc.,	Defendants,
Of Whom	
Cornerstone Housing, LLC, and Cornerstone Columbia, LLC are,	Respondents.

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 3677
Heard June 12, 2003 – Filed September 15, 2003

AFFIRMED

Daniel T. Brailsford, of Columbia, for Appellant.

Thomas M. Kennaday and James C. Gray, Jr. both of Columbia, for Respondents.

HOWARD, J.: The Columbia Housing Authority ("CHA") filed this action seeking to enjoin arbitration of its dispute with Cornerstone Housing and Cornerstone Columbia (collectively, "Cornerstone"). In granting Cornerstone's motion to dismiss, the trial court ordered arbitration to proceed. CHA appeals. We affirm.

FACTS/PROCEDURAL BACKGROUND

On April 6, 1999, Cornerstone and CHA entered an Indefinite Quality/Service Contract ("the first contract") related to the federally funded revitalization of a public-housing project in Columbia known as Celia Saxon Homes. Under the first contract, Cornerstone agreed to perform certain services for CHA. Both parties contracted to use good-faith efforts to agree upon the terms of the Master Development Agreement ("the second contract"). The first contract contained an arbitration provision as follows:

> 16. Resolution of Dispute. In the event that there is a bona fide dispute (i.e., a dispute based upon good faith and sincereness, and without deceit or fraud) between CHA and Consultant/Developer, Consultant/Developer shall nevertheless proceed with performance of the services to be provided and the work to be performed under this Contract, or the Task Order in question, pending the resolution of such dispute. In the event that there is a bona fide dispute between CHA and Consultant/Developer in regard to the payment of monies, then those monies which are not in dispute shall nevertheless be paid. This contract is subject to arbitration under S.C. Code ANN 15-48-10, ET SEQ. Both parties may present written evidence to the Arbiter (a duplicate copy of which written evidence shall concurrently therewith

> be delivered to the other party), and neither party shall consult verbally with the Arbiter without the other party present.

(emphasis as in original).

On July 27, 2000, CHA and Cornerstone entered into the second contract concerning Celia Saxon Homes. The second contract contained the following arbitration provision:

> **11.20 Dispute Resolution.** In the event that there is a bona fide dispute (i.e., a dispute based upon good faith and sincereness, and without deceit or fraud) between The Authority and the Developer, Developer shall nevertheless proceed with performance of the services to be provided and the work to be performed under this Contract, or the Task Order in question, pending the resolution of such dispute. In the event that there is a bona fide dispute between the Authority and the Developer in regard to the payment of monies, then those monies which are not in dispute shall nevertheless be paid. This contract is subject to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association. Both parties may present written evidence to the arbitrators (a duplicate copy of which written evidence shall concurrently therewith be delivered to the other party), and neither party shall consult verbally with the arbitrators without the other party present.

(emphasis as in original).

The second contract also contained the following provision related to the United States Department of Housing and Urban Development ("HUD"):

> **1.2 Role of HUD.** The parties hereto acknowledge that this Agreement and the closings and the consummation of the transactions contemplated by this Agreement are subject to approval by HUD. The Developer and the Authority agree to cooperate in good faith to obtain all necessary approvals from HUD and acknowledge that approvals from HUD must be obtained as a condition precedent to any obligations contained herein.

(emphasis as in original).

The second contract was sent to HUD for approval. HUD did not approve the contract and required extensive modifications for approval. Subsequently, a dispute arose between Cornerstone and CHA resulting in the termination of any further negotiations related to the second contract. Based on the arbitration agreements contained in the two contracts, Cornerstone filed an arbitration demand with the American Arbitration Association. CHA countered by filing this lawsuit to enjoin arbitration. Cornerstone moved to dismiss the complaint pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure. Following a hearing, the circuit court granted Cornerstone's motion to dismiss the lawsuit. CHA appeals.

STANDARD OF REVIEW

"A trial judge may dismiss a claim when the defendant demonstrates the plaintiff's 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct. App. 2002) (quoting Rule 12(b)(6), South Carolina Rules of Civil Procedure). "The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." Brown v. Leverette, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." Id. "All properly pleaded factual allegations are deemed admitted for the

purposes of considering a motion for judgment on the pleadings." Int'l Paper, 352 S.C. at 413, 574 S.E.2d at 230. "Upon review, the appellate tribunal applies the same standard of review that was implemented by the trial court." Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

LAW/ANALYSIS

I. Agreement to Arbitrate Dispute at Issue

CHA argues the circuit court erred in granting the motion to dismiss and ordering the parties to proceed with arbitration. We disagree.

A. Existence of Arbitration Agreement

"There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999).

The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties. Towles, 338 S.C. at 37, 524 S.E.2d at 844-45 ("Arbitration is available only when the parties involved contractually agree to arbitrate."); see Hooters of America v. Phillips, 39 F. Supp. 2d 582, 609 (D.S.C. 1998) (holding issues of "substantive arbitrability" are properly before the trial court and these issues are whether "a valid arbitration agreement exists between the parties and . . . [whether] the specific dispute falls within the substantive scope of the agreement" (quoting Glass v. Kidder Peabody & Co., 114 F.3d 446, 453 (4th Cir. 1997))).

The determination of whether an arbitration agreement exists is "a matter to be forthwith and summarily tried by the Court."[1] Jackson Mills, Inc.

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[1] Neither party asserts the arbitration clause contained "clear and unmistakable evidence" that the parties agreed to have an arbitrator decide the threshold issue of whether an arbitration agreement existed between the

v. BT Capital Corp., 312 S.C. 400, 404, 440 S.E.2d 877, 879 (1994) (internal punctuation omitted); see Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402, 2407 (2003) (holding that in the absence of clear and unmistakable evidence to the contrary, "courts assume that the parties intended courts, not arbitrators, to decide . . . certain gateway matters, such as whether the parties have a valid arbitration agreement at all"); see also S.C. Code Ann. § 15-48-20(a) (Supp. 2002) (stating if a "party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue" of the existence of the arbitration agreement).

Courts "should apply ordinary state-law principles that govern the formation of contracts" in determining whether an agreement to arbitrate exists. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995); Towles, 338 S.C. at 37, 524 S.E.2d at 844 (adopting the reasoning of First Options).

In this case, the parties signed two contracts regarding the revitalization of the public-housing project. Each contract contained an arbitration provision that covered disputes arising between Cornerstone and CHA. See Jaffe v. Gibbons, 290 S.C. 468, 472, 351 S.E.2d 343, 345 (Ct. App. 1986) ("[W]here both parties have signed a contract, the signing by the first party is in effect his proposal or offer and the signing by the second party is his

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parties. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995) ("Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so." (quoting AT&T Tech. v. Communications Workers of America, 475 U.S. 643, 649 (1986))). Further, a review of the language in both the first and second contracts does not reveal language indicating clear and convincing evidence that the parties intended for an arbitrator to decide the threshold issue of whether a valid arbitration agreement existed. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Havird, 335 S.C. 642, 646, 518 S.E.2d 48, 50 (Ct. App. 1999) (holding clear evidence exists when the language of the agreement between the parties "clearly evinces an intent for the arbitrator" to decide threshold issues). Thus, the issue was properly before the circuit court.

acceptance thereof; the writing then represents or evidences the bargain between them."). The first contract covered the time period from the contract's signing until the parties entered into the second contract. Specifically, the parties agreed to undertake "good-faith negotiations, with the intention of utilizing each other's best efforts, to enter into [the second contract]." The second contract was to come into full force once HUD approved its provisions.

Under South Carolina law, two contracts executed at different times but which relate to the same subject matter and are entered into by the same parties are to be construed as one contract and considered as a whole. Klutts Resort Realty v. Down' Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Reading the two contracts in this case together, it is evident the parties agreed that any dispute arising after the signing of the first contract was to be arbitrated. See id. Therefore, we agree with the circuit court's conclusion that a valid arbitration agreement existed between the parties. See Jackson Mills, 312 S.C. at 404, 440 S.E.2d at 879 (holding the determination of whether an arbitration agreement exists is a matter to be summarily tried by the trial court).

B. Matters Subject to Arbitration

The second issue for the trial court to determine in this case was whether "the specific dispute falls within the substantive scope of the [arbitration] agreement." Phillips, 39 F. Supp. 2d at 609 (holding issues of "substantive arbitrability" are properly before the trial court, including whether a particular dispute is within the scope of the arbitration agreement) (quoting Glass, 114 F.3d at 453)); see Bazzle, 123 S. Ct. at 2407 (holding that in the absence of clear and unmistakable evidence to the contrary, "courts assume that the parties intended courts, not arbitrators, to decide . . . certain gateway matters, such as whether [an arbitration agreement] applies to a certain type of controversy"); see also Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (holding the question of "whether the parties have agreed to submit a particular grievance to arbitration" is an issue for judicial determination but that in making such a decision the "court is not to rule on the potential merits of the underlying claims").

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause." Id. at 597, 553 S.E.2d at 118.

Even when the dispute does not arise under the governing contract, the dispute is subject to arbitration when the contract contains a broadly worded arbitration clause and "a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Id. at 598, 553 S.E.2d at 119 (quoting Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001)).

Assuming, *arguendo*, there is a gap in the time period explicitly covered by the contracts[2] containing the arbitration agreements and the disagreement at issue in this case arose during this time period, the dispute is still subject to arbitration.

First, both contracts contained broadly worded arbitration agreements. The first contract stated, "This contract is subject to arbitration under S.C. Code ANN 15-48-10, ET SEQ." The second contract stated, "This contract is subject to binding arbitration under the Commercial Arbitration Rules of the American Arbitration Association."

Second, the subject matter of each contract centered on the revitalization of the housing project. The first contract focused on negotiations to enter into a second binding contract concerning the revitalization. The second contract contained the specific terms of the revitalization effort that was to be approved by HUD.

Finally, the disagreement concerning continued negotiations between the parties after HUD initially declined to approve the terms of the second contract was significantly related to the subject matter of the first and second

[2] Arguably, the time between the parties entering into the second contract and that contract coming into full effect was not covered by either contract.

contracts. Thus, even if the contracts failed to specifically include the time period when the dispute arose, the dispute at issue is still subject to arbitration. See Zabinski, 346 S.C. at 597, 553 S.E.2d at 118 ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

II. Lack of Challenge to Arbitration Agreement

CHA argues the first contract was illegal, and thus, unenforceable, and the second contract did not come into legal force. Because CHA does not directly challenge the arbitration agreement with either of these arguments, we hold the determination of the merits of these issues is reserved for the arbitrator.

"Arbitration clauses are separable from the contracts in which they are imbedded." Jackson Mills, 312 S.C. at 403, 440 S.E.2d at 879. "[T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403 (1967)).

"[I]t is only when a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided." Jackson Mills, 312 S.C. at 403-04, 440 S.E.2d at 879; see South Carolina Pub. Serv. Auth. v. Great Western Coal, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (holding "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause").

A. Illegality of the First Contract

CHA contends the first contract was illegal because Cornerstone was not a licensed contractor under South Carolina Code Annotated section 40-

11-370(C) (Supp. 2002).[3] Because CHA's argument fails to attack the validity of the arbitration agreement itself, we hold the legality of the first contract is an issue for the arbitrator to decide.

Our supreme court addressed a similar argument in Munoz. In Munoz, the plaintiff attempted to defeat an arbitration clause in a financing agreement by arguing the South Carolina Consumer Protection Code invalidated the contract and the arbitration clause. In finding the arbitration clause valid, our supreme court stated as follows:

> An arbitration clause may be invalidated under a state law only if that law governs the enforceability of all contracts generally. Perry v. Thomas [482 U.S. 483, 492 n.9 (1987)]. The Consumer Protection Code does not govern contracts generally but applies only to certain consumer transactions. While the requirements of the Consumer Protection Code may be raised on the merits of the contract's enforceability as a consumer credit transaction, these requirements do not apply to determine the validity of the arbitration clause itself.

343 S.C. at 540, 542 S.E.2d at 364.

Similarly, in the present case, section 40-11-370(C) only applies to certain construction contracts and does not govern contracts generally. Thus, the arbitration agreement cannot be invalidated based on the requirements of this statute. See Jackson Mills, 312 S.C. at 404, 440 S.E.2d at 879 (holding valid grounds to challenge the arbitration agreement itself include claiming

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[3] "An entity which does not have a valid license as required by this chapter [relating to licensed contractors] may not bring an action either at law or in equity to enforce the provisions of a contract. An entity that enters into a contract to engage in construction in a name other than the name that appears on its license may not bring an action either at law or in equity to enforce the provisions of the contract." Section 40-11-370(C).

"the controversy arose out of events occurring subsequent to expiration of the arbitration agreement itself" and alleging "the arbitration agreement was never entered into"); see also Zabinski, 346 S.C. at 592, 553 S.E.2d at 116 ("[T]he [Federal Arbitration Act] will preempt any state law that completely invalidates the parties' agreement to arbitrate."). Further, arbitration is the proper place to raise the issue of statutory licensing requirements as a defense to the enforcement of the contract generally. See Bazzle, 123 S. Ct. at 2407 (holding that except for "certain gateway matters, such as whether the parties have a valid arbitration agreement," the parties to an arbitration agreement have agreed that an arbitrator would decide disputes covered by the agreement).

Notwithstanding Munoz, CHA contends Cornerstone's violation of the statute made the first contract illegal. However, even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision. See Jackson Mills, 312 S.C. at 403-04, 440 S.E.2d at 879 (holding arbitration cannot be avoided when a party opposed to arbitration alleges only a problem with the contract as a whole but not with the arbitration agreement itself).

In this case, CHA's claim of illegality goes to the contract generally and not the arbitration provision specifically. Because the defense of illegality relates to the contract as a whole, the arbitration provision is still in force and the illegality defense can be considered at the arbitration itself. See Bazzle, 123 S. Ct. at 2407; Phillips, 39 F. Supp. 2d at 609 (holding all issues raised before a trial court not relating to whether "a valid arbitration agreement exists between the parties" or whether "the specific dispute falls within the substantive scope of the agreement . . . fall within the ambit of 'procedural arbitrability,' and are within the jurisdiction of the arbitrator" (quoting Glass, 114 F.3d at 453)).

B. Legal Force of the Second Contract

CHA contends the second contract was never in legal force. Because CHA's argument does not specifically attack the arbitration agreement, we

hold that the enforceability of the second contract is an issue for the arbitrator to determine.

The United States Supreme Court addressed a similar argument in Prima Paint, 388 U.S. at 403-04. In Prima Paint, the party who opposed arbitration alleged it was fraudulently induced to enter into the contract in which the arbitration agreement was located. No independent challenge to the arbitration agreement was made. In affirming the trial court's decision to dismiss a motion to enjoin arbitration, the Court stated as follows:

> [S]ave for the existence of an arbitration clause, the . . . court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.' Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the . . . court may proceed to adjudicate it. But the . . . court [may not] consider claims of fraud in the inducement of the contract generally.

Id. at 403-04 (internal punctuation marks as in original); see Great Western Coal, 312 S.C. at 562-63, 437 S.E.2d at 24 (adopting the reasoning of Prima Paint).

Similarly, CHA argued a problem existed with the second contract but made no independent argument regarding the arbitration agreement. Because the second contract had a provision requiring HUD approval of the contract prior to its provisions having legal effect, CHA argued the contract was not in force. However, this argument attacked the second contract without specifically attacking the arbitration agreement. See Jackson Mills, 312 S.C. at 404, 440 S.E.2d at 879 (holding valid grounds to challenge the arbitration agreement itself include claiming "the controversy arose out of events occurring subsequent to expiration of the arbitration agreement itself" and alleging "the arbitration agreement was never entered into"). Further, the

language of the HUD-approval clause spoke to the contract generally but did not specifically address the arbitration agreement.

Thus, CHA cannot avoid arbitration with this argument because it failed to allege an independent challenge to the validity of the arbitration agreement. See id. at 403-04, 440 S.E.2d at 879 (holding when a party opposed to arbitration alleges only a problem with the contract as a whole but not with the arbitration agreement itself then arbitration cannot be avoided); see Phillips, 39 F. Supp. 2d at 609 (holding all issues raised before a trial court not relating to whether "a valid arbitration agreement exists between the parties" or whether "the specific dispute falls within the substantive scope of the agreement . . . fall within the ambit of 'procedural arbitrability,' and are within the jurisdiction of the arbitrator" (quoting Glass, 114 F.3d at 453)).

Further, since the failure to obtain HUD approval of the second contract is a defense to the contract generally and not to the arbitration agreement specifically, arbitration is the proper place to raise the defense. See Bazzle, 123 S. Ct. at 2407 (holding that except for "certain gateway matters, such as whether the parties have a valid arbitration agreement," the parties to an arbitration agreement have agreed that an arbitrator would decide disputes covered by the agreement).

CONCLUSION

Based on the foregoing reasons, the decision of the circuit court is

AFFIRMED.

BEATTY and JEFFERSON, Acting Judges, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gay Ellen Coon, Appellant,

v.

James Moore Coon, Respondent.

Appeal From Charleston County
H.E. Bonnoitt, Jr., Family Court Judge

Opinion No. 3678
Heard April 9, 2003 – Filed September 22, 2003

REVERSED AND REMANDED

Ronald L. Richter, Jr., of Charleston, for Appellant.

Alex B. Cash, of Charleston, for Respondent.

HOWARD, J.: This is an action by Gay Ellen Coon (Wife") to enforce the payment of retirement benefits previously ordered by the family court. James Moore Coon ("Husband") moved pursuant to Rule 60(b)(4), South Carolina Rules of Civil Procedure, to vacate the previously entered final order. Husband asserted the family court lacked subject matter jurisdiction to order payment of more than fifty percent of his disposable

military retirement pay to his spouse because to do so violated the Uniformed Services Former Spouse's Protection Act ("USFSPA"), 10 U.S.C.A. § 1408 (1998). The family court agreed and vacated the prior order. Wife appeals. We reverse and reinstate the family court's prior order.

FACTS/PROCEDURAL HISTORY

In July 1999, the family court approved a settlement agreement between Husband and Wife, acknowledging the Husband's military retirement account was a marital asset subject to division. In accordance with the agreement, the order provided that Wife was entitled to one-hundred percent of the proceeds of Husband's military retirement account for nine years, and following the nine-year period, "the plan administrator will be directed to divided the proceeds equally between the parties."

No Qualified Domestic Relations Order ("QDRO") was sent to or approved by the Secretary of Defense in accordance with the USFSPA. Instead, Husband deposited the full amount of his retirement pay into a jointly held bank account, and Wife used the funds.

As a result, Husband was deemed the recipient of the funds and was responsible for the taxes. He did not withhold the proper amount of taxes in 1999 and part of 2000, so he withheld additional taxes in 2000 to cover out-of-pocket expenses he had incurred the previous year.

Wife then filed this enforcement action, arguing Husband violated the final order of July 1999 by increasing the amount of withholding deducted from the retirement benefit. Husband responded by filing a motion to vacate the original order approving the agreement pursuant to Rule 60(b)(4), arguing the order Wife sought to enforce was void for lack of subject matter jurisdiction because it allocated more than fifty percent of his disposable military retirement pay in violation of the USFSPA. The family court heard Husband's Rule 60(b)(4) motion and held Wife's rule to show cause in abeyance. The family court concluded:

> The provisions of the [USFSPA] limit[] this Court's *jurisdiction* as to military retirement pay to a total amount not to exceed fifty percent of the disposable retired pay. For this reason, any order of the Court which attempts to allocate any sum in excess of the said fifty percent is void for lack of this Court's jurisdiction.

(emphasis added).

On April 2, 2001, the family court sent its order to the clerk of court and to the parties' attorneys. Wife served her motion to reconsider on Husband on April 6, 2001, and on the clerk of court on April 9, 2001. However, she waited until she received a "clocked" copy of her motion from the clerk of court, in August 2001, before she served her motion on the presiding judge. On October 3, 2001, the family court issued an order reaffirming its ruling. In its order, the family court also indicated Wife's motion to reconsider was untimely because she did not provide the presiding judge with a copy of the motion within ten days of filing. Wife served and filed her notice of appeal to this Court on November 1, 2001. This appeal follows.

LAW/ANALYSIS

I. Timeliness of Appeal

Initially, Husband asserts Wife's appeal to this Court is untimely because she failed to comply with the requirements of Rule 59(g), South Carolina Rules of Civil Procedure. Husband contends because Wife failed to serve a copy of her motion to reconsider on the family court within ten days of filing it with the clerk of court, the time for her appeal to this Court has expired. We disagree with Husband's reading of Rule 59(g) and find Wife's appeal to be timely.

Rule 59(g) requires "a party filing a written motion under this rule [to] provide a copy of the motion to the judge within ten (10) days after the filing

of the motion." The notes to Rule 59 state the 1998 amendment adding subsection (g) was "intended to help insure that the judge is promptly *notified* that the motion has been filed." (emphasis added). As this Court discussed in Gallagher v. Evert, "[t]here is no indication that the failure to transmit a copy of the motion to the circuit court affects the tolling provision of Rule 203(b)(1), South Carolina Appellate Court Rules.[1] Therefore, the time for filing the notice of appeal did not begin to run until after the circuit court denied the motion." 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002). In accordance with Rule 59(g) and this Court's decision in Gallagher, we hold Wife was not required to file her notice of appeal until after the family court issued its order denying her motion to reconsider. Thus, her appeal to this Court is timely.

II. USFSPA & Jurisdiction

Wife contends the family court erred by vacating its prior order. Wife asserts the family court had subject matter jurisdiction because the retirement account is marital property. We agree and hold the limitation on the percentage of retirement benefits the family court is permitted to allocate speaks to the family court's authority and not its subject matter jurisdiction. Thus, we reinstate the family court's prior order.

A. Definition of Void

Initially, we note the posture of this case. Husband brought this motion pursuant to Rule 60(b)(4), South Carolina Rules of Civil Procedure, asserting the family court's prior final order approving the parties agreement was *void* for lack of subject matter jurisdiction. Thus, our inquiry is limited solely to determining the family court's subject matter jurisdiction in this matter.

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[1] Rule 203(b)(1) provides: "When a timely . . . motion to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

"A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely 'voidable.'" Thomas & Howard Co. v. T.W. Graham and Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (quoting 46 Am. Jur.2d Judgments § 31 (1994)). "The definition of void under the rule . . . encompasses . . . judgments from courts which lacked subject matter jurisdiction." McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996) (internal quotations omitted); see also Ross v. Richland County, 270 S.C. 100, 103, 240 S.E.2d 649, 650 (1978) (holding that if "'a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void'" (quoting Fox v. Board of Regents of Univ. of Mich., 134 N.W.2d 146, 148 (Mich. 1965))).

However, irregularities which do not involve jurisdiction do not render a judgment void. Thomas & Howard Co., 318 S.C. at 291, 457 S.E.2d at 343.

> [Furthermore,] [t]here is a wide difference between a want of jurisdiction in which case the court has no power to adjudicate at all, and *a mistake in the exercise of undoubted jurisdiction in which case the action of the trial court is not void although it may be subject to direct attack on appeal.* A judgment will not be vacated for a mere irregularity which does not affect the justice of the case, and of which the party could have availed himself, but did not do so until judgment was rendered against him.

Id. (emphasis added) (internal citations omitted). Moreover, when a court acts with proper subject matter jurisdiction but takes some action outside of its authority, the party against whom the act is done must object and directly appeal. See Cosgrove v. Butler, 1 S.C. 241, 243 (1869) ("If such departures be not excepted to, the Court may consider objection to them as *waived*. And it may be asserted, as a general rule, that where there is no want of jurisdiction . . . , [the Court's] judgment will be binding, even although affected by irregularity which would have defeated the proceeding if

objection had been timely and properly made." (emphasis added)). Thus, if the family court had jurisdiction over the military retirement account, its original order is not void.

B. Jurisdiction v. Authority

"Subject matter jurisdiction refers to the court's 'power to hear and determine cases of the general class to which the proceedings in question belong.'" Watson v. Watson, 319 S.C. 92, 93, 460 S.E.2d 394, 395 (1995) (quoting Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994)). South Carolina Code Annotated section 20-7-420(2) (Supp. 2003) grants the family court the exclusive jurisdiction "[t]o hear and determine actions: [f]or divorce a vinculo matrimonii . . . and in other marital litigation between the parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and *personal property of the marriage*." (emphasis added); cf. S.C. Code Ann. § 20-7-473 (Supp. 2003) (stating the family court does not have jurisdiction to apportion nonmarital property).

In this case, the disputed property is a military retirement account, and we are required to examine the federal authority creating the property to determine its status. The USFSPA specifically permits state courts "*[s]ubject to the limitations of this section*, . . . [to] treat disposable retired pay . . . either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court." 10 U.S.C. § 1408(c)(1) (1998) (emphasis added). Clearly, Congress has chosen to permit the states to determine independently whether to treat military retirement benefits as marital property.

Thus, we must turn to the applicable South Carolina authority to determine the status of a military retirement account in this State. In Tiffault v. Tiffault, our supreme court held military retirement benefits "constitute an earned property right which, if accrued during the marriage, is subject to equitable distribution." 303 S.C. 391, 392-93, 401 S.E.2d 157, 158 (1991). Therefore, pursuant to Congress' invitation, our state has determined military retirement accounts are marital property. However, were the law as settled as

this concise statement from our supreme court might indicate, the current inquiry would not likely be before us.

Notwithstanding the holding in Tiffault, Husband argues the family court's subject matter jurisdiction is limited by the 1990 amendment to 10 U.S.C. § 1408(e)(1) (1998)[2]. A brief review of the history of the USFSPA is necessary to an understanding of this issue.

In McCarthy v. McCarthy, the United States Supreme Court ruled that the states had no authority to order the equitable distribution of military retirement benefits. 453 U.S. 210, 223 (1981). In direct response to McCarthy, the USFSPA was enacted, and from its inception limited the percentage of disposable military retirement pay that could be allotted to a non-military spouse. The initial language restricted the amount the government administrator could pay to a non-military spouse to fifty percent. In construing this language, some states applied the fifty-percent limitation only to direct payments from the administrator but not to the aggregate amount that could be awarded to the non-military spouse. See, e.g., Grier v. Grier, 731 S.W.2d 931, 932-33 (Tex. 1987) (holding the USFSPA did not limit the amount of retirement benefits that could be apportioned under Texas community property law but did limit the percentage of the military retirement benefit that was subject to direct payment); Deliduka v. Deliduka, 347 N.W.2d 52, 55 (Minn. Ct. App. 1984) (holding "a state court wishing to award a former spouse more than fifty percent of disposable retired pay must order direct government payments and payments by the member of the military to the spouse").

To address the various state court interpretations of the fifty-percent restriction, the 1990 amendment changed the restriction to apply to all court-ordered divisions of disposable military retirement pay pertaining to former

[2] The amendment states "[t]he total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed fifty percent of such disposable retired pay." 10 U.S.C. § 1408(e)(1) (1998). Subsection (c) is entitled, "Authority for [state] court to treat retired pay as property of the member and spouse." 10 U.S.C. § 1408(c) (1998).

spouses. 10 U.S.C. § 1408(e)(1) (1998). The 1990 amendment to the Act changed the manner in which the payment was restricted. After the 1990 amendment, the fifty-percent restriction on payment of disposable military retirement pay was reworded to apply to divisions of retirement benefits made under any court order pertaining to former spouses. See H.R. Rep. No. 101-665, at 3004-05 (1990).

The 1990 House Report stated that the amendment to subsection (e)(1) "reflect[ed] a public policy judgment on the appropriate role of the federal government in limiting state court jurisdiction in divorce cases involving military retired pay [and] is consistent with the balancing of state and federal interests that has been the hallmark of this law since its inception." H.R. Rep. No. 101-665, at 3005 (emphasis supplied by Husband). The report addressed the amendment's language by explaining that the provision stating "the aggregate amount of retired pay that would be payable to [former spouses] would not exceed fifty percent of the service member's disposable retired pay" applied both when a court orders the government administrator to pay the amount directly to the non-military spouse and when the amount is paid indirectly to the non-military spouse through the retired spouse. H.R. Rep. No. 101-665, at 3006; see In re MacMeeken, 117 B.R. 642, 644-45 (Bankr. D. Kan. 1990) (indicating the pre-1990 subsection (e)(1) failed to clearly express that a non-military spouse should never be awarded more than fifty percent of the retired spouse's disposable military retirement pay, but rather, it appeared Congress intended for the fifty percent limit to apply *solely* to awards paid directly by the benefits administrator to the non-military spouse).

Based upon this report, Husband argues the limitation is jurisdictional, and therefore, the order was void. Cf. Bowen v. Bowen, 327 S.C. 561, 566, 490 S.E.2d 271, 273 (Ct. App. 1997) (holding once the family court determined property was not marital property, the family court had no jurisdiction to address the property's ownership or "deal with [the property] in any way"). We disagree with Husband's reading of the 1990 amendment to subsection (e)(1).

It is generally recognized that the presumption of concurrent federal and state jurisdiction over cases involving federal law "can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981); see Hairston v. Travelers Cas. & Sur. Co., 232 F.3d 1348, 1349-50 (11th Cir. 2000) (quoting Gulf Offshore); Resolution Trust Corp. v. Foust, 869 P.2d 183, 188 (Ariz. Ct. App. 1993) (adopting the reasoning of Gulf Offshore). However, there is nothing in the language of the Act, the amendment, or the legislative history indicating an intention to preempt state court subject matter jurisdiction. Having reviewed the entire House Report and in light of the history of the statute, we conclude the portion of the legislative history to which Husband refers does not evince an "unmistakable implication" to limit a state's court *subject matter jurisdiction* with respect to allocating more than fifty percent of a spouse's disposable military retirement pay. Gulf Offshore, 453 U.S. at 478. In light of its context and usage, we conclude the use of the term "jurisdiction" in the report refers to this state's authority to award more than fifty percent of a spouse's disposable military retirement pay.

The USFSPA's savings clause further undermines any argument that Congress explicitly directed that the fifty-percent limitation is jurisdictional, thereby preempting traditional state rules regarding finality of judgments. The savings clause states: "A court order which itself . . . provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in [subsection (e)(1)] . . . shall not be considered to be irregular on its face solely for that reason." 10 U.S.C. § 1408(e)(5) (1998). Congress anticipated state courts would issue orders awarding more than fifty percent of the disposable military retirement pay. However, in light of this prospect, Congress chose not to explicitly state that these orders would be void for lack of subject matter jurisdiction. Instead, this subsection purports to "save" these orders by indicating they should not be deemed irregular.

We have found no reported case in this or any other jurisdiction ruling that when a court awards more than fifty percent of a spouse's disposable

military retirement pay that court lacks *subject matter jurisdiction*. Instead, the cases addressing this issue have held that an award of more than fifty percent of disposable military retirement pay is subject to direct attack on appeal and is reversible error. See, e.g., In re Marriage of Bowman, 972 S.W.2d 635, 637-39 (Mo. Ct. App. 1998) (*reversing, on direct appeal*, an award of more than fifty percent of a spouse's disposable military pay because it violated section 1408(e)(1), reasoning "'the USFSPA permits a state court to consider the *gross* value of retirement benefits in computing the value of the marital estate. However, the USFSPA prohibits a state court from awarding the non-military spouse the right to collect more than fifty percent of the *net* monthly retirement payment.'") (quoting Beesley v. Beesley, 758 P.2d 695, 699 (Idaho 1988)) (emphasis in Beesley)).

Although we have found no rulings directly on point, this Court's decision concerning military disability pay under the provisions of the USFSPA is instructive. See Price v. Price, 325 S.C. 379, 480 S.E.2d 92 (Ct. App. 1996). In Price, the family court approved a settlement agreement in which the husband agreed to pay to his wife a certain amount of his total military retirement benefits, which included his disability pay – an item not considered to be disposable military retirement pay under the USFSPA. 325 S.C. at 380, 480 S.E.2d at 92. Subsequently, the husband unilaterally reduced his payments to his wife because he had waived an additional amount of his retirement pay in favor of disability pay. The wife sought to compel the husband to make monthly payments according to the settlement agreement. Id. at 381, 480 S.E.2d at 92-93. Relying on Mansell v. Mansell, husband sought a reduction in the payments to his wife. 490 U.S. 581, 589-95 (1989) (holding the USFSPA does not give state courts the authority to treat total military retirement benefits as property subject to equitable distribution). The family court granted the wife's motion to compel and this Court affirmed.

Although this Court acknowledged federal authority limiting the family court's consideration of disability benefits as marital property subject to equitable distribution, this Court held husband should not be permitted to complain the family court erred in enforcing the terms of the agreement he willingly entered into with his wife. Price, 325 S.C. at 383, 480 S.E.2d at 94.

Notably, this Court concluded the federal limitation did not divest the family court of subject matter jurisdiction. Id. Thus, this Court affirmed the settlement agreement. See McLellan v. McLellan, 533 S.E.2d 635, 637-39 (Va. Ct. App. 2000) (affirming the denial of the husband's motion to vacate a prior court order because it approved a settlement agreement awarding the wife a portion of the husband's military disability pay in violation of section 1408); Forney v. Minard, 849 P.2d 724, 729 (Wyo. 1993) (refusing to vacate the trial court's order awarding wife one-hundred percent of her husband's military retirement pay even though the trial court ordered the benefits administrator to pay wife directly, finding the USFSPA's limitations do not restrict state jurisdiction to only fifty percent of the disposable retirement pay).

For the foregoing reasons, we conclude the family court erred in vacating its prior order for lack of subject matter jurisdiction.

CONCLUSION

The family court's order vacating its prior order is **REVERSED,** and the original family court order approving the settlement agreement, which awarded Wife one-hundred percent of the proceeds of Husband's military retirement account for a nine-year period, is reinstated. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STILWELL, J., and STROM, Acting Judge, concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Vestry and Church Wardens
of the Church of the Holy Cross, Respondent,

v.

Orkin Exterminating Company, Inc., Terminix Service Company, Inc., Terminix International, Inc. d/b/a Terminix of Delaware Corporation, Cuttino Builders, Inc. and Henry D. Boykin, A.I.A., architect, Defendants,

of whom Orkin Exterminating Company, Inc. and Terminix Service Company, Inc. and Terminix International, Inc., d/b/a Terminix of Delaware Corporation are the Appellants.

Appeal From Sumter County
L. Henry McKellar, Circuit Court Judge

Published Opinion 3679
Heard June 10, 2003 – Filed September 22, 2003

AFFIRMED in Part and REVERSED in Part

Clinch H. Belser, Jr., of Columbia; for Appellant Terminix Service Co.;

J. Rutledge Young, III and Tom Wills, of Charleston; R. Wade Marionneaux and Voris E. Johnson, Jr., of Atlanta; all for Appellant Orkin Exterminating, Co.

Thomas S. Tisdale, Stephen Brown, and Stephen P. Groves, of Charleston; for Respondent.

HEARN, C.J.: Orkin Exterminating Company and Terminix Service Company both appeal from the trial court's order denying their motions to compel arbitration. We affirm with respect to Orkin and reverse with respect Terminix.

FACTS

This case arises from a lawsuit filed by the Church of the Holy Cross after it discovered termite damage within the church building.[1] In 1975, the church contracted with Terminix for the installation of a termite protection system within the church building. To this end, Terminix drilled holes through the church's interior concrete floor and installed pipes into which pesticide could be injected. This contract did not contain an arbitration clause. In June 2000, after the church discovered termite damage, the church entered into a new contract with Terminix for a baiting system to be used outside of the church building. This 2000 contract contained an arbitration clause.

[1] There are two buildings on the Church property: the church building and a separate parish hall.

From 1976 until 1985, the church contracted with Orkin for the inspection and treatment of termites within the church building.[2] When treating for termites, Orkin utilized the system installed by Terminix. Orkin terminated this service contract in 1985, after the church inadvertently failed to make two annual payments. In 1987, the church entered into a new contract with Orkin for the continued inspection and treatment of the church building. This contract also did not contain an arbitration clause. In 1998, the Church and Orkin entered into a separate contract for the inspection and treatment of the parish hall.[3] This contract contained an arbitration clause; however, it did not incorporate or reference the 1987 contract for Orkin's treatment of the church building.

After termites were discovered in the church building, the church sued both Orkin and Terminix for damages.[4] Orkin and Terminix each filed a motion to compel arbitration. Orkin argued that the arbitration clause in its 1998 contract with the church is broad enough to compel arbitration of disputes arising from the prior contracts. Terminix raised the same argument with respect to its 2000 contract with the church.

The trial court denied both Orkin's and Terminix's motions to compel arbitration. The trial court held there was nothing in the 1998 Orkin contract or the 2000 Terminix contract signifying a retroactive effect. Thus, the trial court held arbitration was not required for causes of action arising out of the prior contracts.

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[2] None of the parties can locate a copy of this first contract between the Church and Orkin, although its existence is not contested.

[3] The parish hall is referred to as the "parsonage" in the 1998 Orkin contract.

[4] The Church also filed suit against both the architect and the contractor responsible for the restoration of the church building. However, the circuit court granted these defendants' motions to compel arbitration, and they are not involved in this appeal.

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination, unless the parties have agreed otherwise. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002). "Determinations of arbitrability are subject to de novo review." Id.

LAW/ANALYSIS

In South Carolina, the test for determining whether a particular issue is subject to arbitration is articulated in Zabinski v. Bright Acres Assocs., 346 S.C 580, 553 S.E.2d 110 (2001). "The policy of the United States and South Carolina is to favor arbitration of disputes." Id. at 596, 553 S.E.2d at 118. "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." Id. at 596-97, 553 S.E.2d at 118. "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Id. at 597, 553 S.E.2d 118. To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, irrespective of the label given to the cause of action. Id. When interpreting arbitration agreements within the scope of the FAA,[5] due regard must be given to the federal policy in favor of arbitration, and any ambiguity in the scope of the arbitration clause must be resolved in favor of arbitration. Stokes, 351 S.C. at 512, 571 S.E.2d at 714. "[U]nless the court can say with positive assurance that arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. See also Towles v. United HealthCare Corp., 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999) (stating a motion to compel arbitration should be denied only where the arbitration clause is not susceptible of any interpretation that would cover the asserted claim).

[5] The applicability of the Federal Arbitration Act, 9 U.S.C. §1 et. seq., is not in dispute.

The issue before this court is whether the church's claims against Orkin and Terminix fall within the scope of each party's arbitration clause. In this case, the claims asserted by the church arose prior to the execution of the contracts which contain the arbitration clause. It is therefore necessary for this court to determine whether the arbitration clauses in Orkin's and Terminix's contracts were sufficiently broad so as to embrace disputes arising under prior contracts. Because this issue has received little discussion in South Carolina, we look to the federal courts for instruction as to the scope of the clauses at issue in this case. It is necessary to understand fully the scope of the clauses in order to effectively determine whether either is capable of an interpretation which covers the claims asserted by the church.

Courts have retroactively applied arbitration clauses to disputes arising under prior contracts, but in doing so, the courts have generally found the existence of a broadly worded clause which governed the overall relationship between the parties.[6] See, e.g., Cara's Notions, Inc. v. Hallmark Cards, Inc., 140 F.3d 566, 568-71 (4th Cir. 1998) (finding a broad arbitration clause which called for arbitration of "[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship" established that the clause was intended to apply to all conflicts between the parties and not only to conflicts arising under the specific contract containing the arbitration clause); Zink v. Merrill Lynch Pierce Fenner & Smith, Inc., 13 F.3d 330, 331-33 (10th Cir. 1993) (holding the parties were required to submit their claims to arbitration where the dispute predated the execution of the arbitration clause because the clause provided for the arbitration of "any controversy . . . arising out of your business or this agreement"); Rand Bond

[6] An arbitration provision will also cover disputes arising under prior contracts where the clause contains retroactive, time-specific language mandating its application to previously executed contracts. See Merrill Lynch, Pierce, Fenner, & Smith, Inc. v. Kirton, 719 So.2d 201, 203 (Ala. 1998) (holding an "arbitration agreement expressly extended to all controversies relating to the parties' transactions and agreements, 'whether entered into prior [to], on, or subsequent to the date hereof' clearly indicated that disputes related to prior transactions were to be arbitrated"). Here, neither contract contains retroactive language.

of N. Am., Inc. v. Saul Stone & Co., 726 F. Supp. 684, 687-88 (N.D. Ill. 1989) (finding arbitrable a dispute arising prior to the execution of the arbitration agreement where the arbitration clause provided that the agreement extended to "[a]ny controversy or claim arising out of or relating to your accounts"); B.G. Balmer & Co. v. United States Fid. & Guar. Co., 1998 WL 764669 (E.D. Pa. 1998) (noting that where an arbitration clause speaks in terms of relationships and not timing, it applies to disputes even if the claim arose before the agreement was executed). The common theme underlying these cases is that the parties expressly agreed that all controversies between them, not just those appurtenant to the contract containing the clause, were to be submitted to arbitration. That being the case, the source of the claim or injury is not dispositive, for the parties have manifested an intention to arbitrate all of their disputes arising from their business relations, not just those arising under a particular contract.

Where the language of the arbitration clause is not as broad, courts have refused to mandate the arbitration of disputes unrelated to the contract containing the clause. In Sec. Watch, Inc. v. Sentinel Sys. Inc., 176 F.3d 369, 372 (6th Cir. 1999), the court found that a clause requiring arbitration of "'all disputes, controversies, or claims . . . arising out of or relating to the Products furnished pursuant to this Agreement or acts or omissions of Distributor or AT & T under this Agreement . . . " could not be used to compel arbitration of disputes relating to products shipped under prior agreements. The court noted that while the scope of the clause was very broad and would govern all disputes involving the contract in which it was contained, it did not extend over time to affect disputes arising out of prior contracts. Id.

In In re Hops Antitrust Litig., 655 F. Supp. 169, 172-73 (E.D. Mo. 1987), the court considered whether an arbitration agreement applied to disputes arising out of transactions related to separate agreements previously executed between the parties. The plaintiff asserted claims against the defendant arising out of numerous purchase agreements for the sale of hops. Later contracts between the parties contained an arbitration clause stating that "'any dispute arising out of or relating to this agreement, including its interpretation, validity, scope and enforceability, shall be resolved

exclusively and finally by arbitration . . . .'" Id. at 170. The court held this language did not compel arbitration of disputes arising under prior contracts, finding each contract to be a separate and discreet transaction between the parties for the sale and purchase of hops. Id. at 172. The court stated: "The record reflects no agreement by the parties to amend earlier contracts to provide for arbitration of disputes [arising under those contracts] . . . ." Id. at 173.

We derive from these cases that the mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties. For example, a clause compelling arbitration for any claim "arising out of or relating to this agreement" may cover disputes outside the agreement, but only if those disputes relate to the subject matter of that agreement. See Zabinski, 346 S.C. at 598, 553 S.E.2d at119 ("A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained."). On the other hand, if the clause contains language compelling arbitration of any dispute arising out of the relationship of the parties, it does not matter whether the particular claim relates to the contract containing the clause; it matters only that the claim concerns the relationship of the parties. See, e.g., Cara's Notions, 140 F.3d at 568-71. Under Zabisnki, such a clause would have the broadest scope because it could be interpreted to apply to every dispute between the parties.

A. Orkin's appeal

The pertinent language in the arbitration provision of the 1998 Orkin contract is as follows:

> ANY DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE SERVICES PERFORMED UNDER THIS AGREEMENT OR TORT BASED CLAIMS FOR PERSONAL OR BODILY INJURY OR DAMAGE TO REAL OR

> PERSONAL PROPERTY SHALL BE FINALLY RESOLVED BY ARBITRATION ADMINISTERED UNDER THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION.

Orkin argues the arbitration clause applies to claims for damage to real property, and thus applies to this dispute as a result of the church's allegation of damages to the church building. We disagree.

We do not construe Orkin's arbitration clause so broadly as to encompass any and all disputes arising out of the relationship of the parties. See, e.g., Cara's Notions, 140 F.3d at 568-71; Zink, 13 F.3d at 331-33; Rand Bond, 726 F. Supp. at 687-88. Rather, we interpret this clause as applying only to disputes arising out of or relating to the agreement in which it is contained. Accordingly, if arbitration is to be compelled, it must be found that "a 'significant relationship' exists between the [church's] claims and the contract in which the arbitration clause is contained." Zabinski, 346 S.C. at 598, 553 S.E.2d at119.

At the time the church and Orkin entered into the 1998 contract, the church had not yet discovered the termite damage, which forms the basis of its claims. Accordingly, the church could not have intended to submit to arbitration specific claims for which it had no knowledge, unless the church intended to arbitrate every claim of this nature. We recognize the broad policy in favor of arbitration; however, we do not broadly construe Orkin's arbitration clause as applying to every incident of property damage, irrespective of the time in which the claim arose or the property upon which the damage was suffered. Even assuming, arguendo, that the clause may be construed to apply to property which is not the subject of the 1998 contract, the words chosen by Orkin in no way evince an intention to apply the clause to claims which had accrued at a time prior to the execution of the 1998 contract. Although the arbitration clause does not expressly limit its application to the parish hall, it contains no language expanding its application to other properties either. As was noted in Hendrick v. Brown & Root, Inc., 50 F.Supp. 2d 527, 535 (E.D.Va. 1999):

> [T]he supreme court has never held that an intent to arbitrate can be found from the absence of contractual language evincing an intent to arbitrate a particular kind of dispute. Rather, the court has held that only doubtful interpretations of contractual language respecting the scope of the agreement to arbitrate certain kinds of disputes are to be resolved in favor of arbitration. To convert that principal into a rule that a [party] may insulate itself from pre-existing claims by failing to say so in explicit terms is a fundamental distortion of the principle.

We find no correlation between the factual allegations underlying the church's complaint and the subject matter of the 1998 contract, and thus we hold the church's claims do not fall within the scope of Orkin's arbitration clause. The terms chosen by Orkin to define the scope of its arbitration agreement are wholly ineffective to broaden its application to pre-existing claims involving unrelated real property. Accordingly, we hold the trial judge properly denied Orkin's motion to compel arbitration.

B. Terminix's appeal

Terminix argues that, because the arbitration clause in the 2000 contract required arbitration for all disputes between the parties, the trial court erred in denying its motion to compel arbitration.

The pertinent language in the arbitration provision in the 2000 Terminix contract is as follows:

> The [Church] and Terminix agree that all matters in dispute between them, including but not limited to (i) any controversy or claim between them arising out of or relating to this Agreement, (ii) any wood destroying insect report with respect to the described property or (iii) the described property in any way, in

> any such case whether by virtue of contract, tort or otherwise, shall be settled exclusively by arbitration.

Applying Zabinski, we look to the factual allegations of the church's claim against Terminix to determine whether there is a substantial relationship of the allegations to the subject matter of the 2000 contract. The church contends that there is no relation between the dispute and the 2000 contract because the dispute concerns defective services to the inside of the church building while the 2000 contract was for the installation of a termite baiting system in the ground on the outside of the church building. We are not persuaded by this distinction. Whether the treatment was to the inside of the building or to the earth outside the building, the common purpose was the prevention of termite infestations in the building structure. At the hearing on the motion to compel arbitration, counsel for the church stated the purpose of the 2000 contract was as follows:

> [T]he church called Terminix in the year 2000 and said we have got a grand problem out here. We've got termites that have eaten up the church. We need to get them stopped. So Terminix comes out, enters a separate contract[] . . . to [install] these bait stations . . . . And that was solely for the purpose of mitigating the damage that had been by the termites coming in, inside the church.

It is clear from these statements that the 2000 contract was executed as a direct result of the damage caused by Terminix's alleged failure to perform under its prior contract. Therefore, we find the church's current allegations against Terminix substantially relate to the subject matter of the 2000 contract considering the 2000 contract concerns the treatment (albeit by different methods) of the same building in an effort to mitigate the very damages complained of in the present dispute. The church was aware of the termite damage (and thus the existence of a cause of action against Terminix) at the time the church executed the contract containing the arbitration clause. In light of the purpose for which the 2000 contract was entered, we cannot find that the claims at issue in this case were not within the parties'

contemplation at the time the contract was executed. Moreover, the express terms of the clause provide that "all matters in dispute between [the parties] . . . shall be settled exclusively by arbitration." This language is very broad, and it is more akin to the language generally held to reflect an intention to apply to matters arising out of the relationship of the parties. The fact that the dispute accrued prior to the execution of the 2000 contract is not dispositive where, as here, the terms of the agreement are susceptible to an interpretation which covers any dispute existing between the parties. See Zabinski, 346 S.C. at 597, 553 S.E.2d at 118 (stating that where the clause is capable of an interpretation that covers the dispute, arbitration should be ordered); Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (stating a motion to compel arbitration should be denied only where the arbitration clause is not susceptible to any interpretation that would cover the asserted claim). Because we conclude the arbitration clause is susceptible to an interpretation which brings within its broad scope the claims asserted by the church, we are constrained to find the trial court erred in denying Terminix's motion to compel arbitration of those claims.

CONCLUSION

Because the scope of Orkin's 1998 arbitration clause does not encompass the church's claims, which arose under prior, unrelated contracts, we affirm the trial court's denial of Orkin's motion to compel arbitration. Terminix's arbitration agreement is much broader, however, and we hold its clause is susceptible to an interpretation that covers the claims asserted by the church. Accordingly, we reverse the trial court's decision to deny Terminix's motion to compel arbitration.

AFFIRMED in Part and REVERSED in Part.

CONNOR and STILWELL, JJ., concur.