rel: February 7, 2020

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1170943

Warner W. Wiggins

v.

Warren Averett, LLC

Appeal from Baldwin Circuit Court
(CV-17-901246)

SHAW, Justice.[1]

The plaintiff below, Warner W. Wiggins, appeals from the Baldwin Circuit Court's order compelling him to arbitrate his

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[1]This case was originally assigned to another Justice. It was reassigned to Justice Shaw on October 17, 2019.

claims against the defendant, Warren Averett, LLC ("Warren Averett"). We affirm.

Facts and Procedural History

Warren Averett is an accounting firm. Eastern Shore Children's Clinic, P.C. ("Eastern Shore"), a pediatric medical practice, was a client of Warren Averett. Specifically, in September 2010, while Wiggins, who is a medical doctor, was a shareholder and employee of Eastern Shore, Warren Averett and Eastern Shore entered an agreement pursuant to which Warren Averett was to provide accounting services to Eastern Shore ("the contract"). The contract provided, among other things, for the preparation of individual income-tax returns for the five physicians employed there, including Wiggins. The contract included, among other provisions, an arbitration clause that stated:

> "DISPUTE RESOLUTION: By signing this agreement, Eastern Shore Children's Clinic agrees that any controversies, issues, disputes or claims ('Disputes') asserted or brought by or on behalf of Eastern Shore Children's Clinic shall be RESOLVED EXCLUSIVELY BY BINDING ARBITRATION administered by the American Arbitration Association (the 'AAA') in accordance with the Commercial Arbitration Rules of the AAA then in effect...."

(Capitalization in original.)

Thereafter, Wiggins and Warren Averett became involved in a billing dispute related to the preparation of Wiggins's personal income-tax returns. In 2017, Wiggins filed in the trial court a single-count complaint alleging "accounting malpractice" against Warren Averett. More specifically, Wiggins alleged that Warren Averett had breached the applicable standard of care in connection with its preparation of Wiggins's personal tax returns by wrongfully disclosing his "personal confidential financial information" to Eastern Shore, which allegedly resulted in Wiggins's being ousted as a shareholder/employee.

Warren Averett filed an answer to Wiggins's complaint, asserting, among other things, that Wiggins's claims were based on the contract and were thus subject to the arbitration clause. Warren Averett later filed a motion seeking to stay and/or dismiss Wiggins's action and to compel arbitration, arguing that the contract involved interstate commerce and further asserting that Wiggins was a third-party beneficiary to the contract and was, therefore, subject to its terms, including the arbitration clause. The motion was supported by, among other exhibits, an affidavit from an employee of

Warren Averett and by a copy of the contract. In his response, Wiggins conceded that the contract involved interstate commerce but argued that it applied only to claims made by or on behalf of Eastern Shore against Warren Averett and not to personal claims of Eastern Shore's shareholders, individually, against Warren Averett. His response also included, as evidentiary support, a copy of the contract and an amended complaint.

The trial court subsequently granted Warren Averett's motion and compelled the parties to arbitrate; Wiggins appeals.[2]

Standard of Review

> "'"[T]he standard of review of a trial court's ruling on a motion to compel arbitration at the instance of either party is a de novo determination of whether the trial judge erred on a factual or legal issue to the substantial prejudice of the party seeking review." Ex parte Roberson, 749 So. 2d 441, 446 (Ala. 1999). Furthermore:
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> > "'"A motion to compel arbitration is analogous to a motion for

[2]Wiggins filed a petition for a writ of mandamus in this Court seeking review of the trial court's order granting Warren Averett's motion to compel arbitration; however, a majority of the Court voted to treat the petition as a notice of appeal. See Rule 4(d), Ala. R. App. P.

> summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. Id. 'After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.'"
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> "'Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) (quoting Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (emphasis omitted)).'
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> "Vann v. First Cmty. Credit Corp., 834 So. 2d 751, 752-53 (Ala. 2002)."

Elizabeth Homes, L.L.C. v. Cato, 968 So. 2d 1, 3 (Ala. 2007).

Discussion

On appeal, Wiggins concedes that he is a third-party beneficiary to the contract but reasserts his argument that the language of the arbitration clause is narrow and its application is restricted to claims "by or on behalf of Eastern Shore," thus excluding from its scope his own dispute with Warren Averett. Warren Averett argues, on the other

hand, that, because of the incorporation into the arbitration clause of the Commercial Arbitration Rules of the American Arbitration Association ("the AAA rules"), a determination of whether the arbitration clause applies to Wiggins's claims is for an arbitrator--and not the court--to decide. Thus, according to Warren Averett, the trial court properly compelled arbitration.[3] We agree.

Wiggins's argument involves an issue of "substantive arbitrability." Substantive arbitrability, or simply "arbitrability," includes issues regarding the "scope" of an arbitration provision. Regions Bank v. Rice, 209 So. 3d 1108, 1110 (Ala. 2016) ("[D]isputes regarding the ... scope of an arbitration provision ... are issues of substantive arbitrability ...."). The "scope" of an arbitration provision includes whether a particular claim or dispute falls within the language of what the provision requires to be arbitrated. See, e.g., Eickhoff Corp. v. Warrior Met Coal, LLC, 265 So. 3d

[3]Warren Averett did not raise this argument in the trial court. However, this Court will affirm the ruling of a trial court if it is right for any reason. See Ex parte Beverly Enters.-Alabama, Inc., 812 So. 2d 1189, 1195 (Ala. 2001) ("An appellate court will affirm a ruling of a lower court if there is any valid reason to do so, even a reason not presented to--or rejected by--the lower court.").

216, 225 (Ala. 2018) (holding that the issue whether a dispute over defective mining equipment was included under the terms of an arbitration provision was an issue of arbitrability), and Regions Bank, 209 So. 3d at 1109 (holding that whether the plaintiff's slip-and-fall claim was within the scope of an arbitration provision was a question of arbitrability). Additionally, our caselaw holds that whether the scope of an arbitration provision applies to nonparties or nonsignatories to an arbitration provision is also a question of arbitrability. See, e.g., Anderton v. The Practice-Monroeville, P.C., 164 So. 3d 1094, 1101 (Ala. 2014) ("The question whether an arbitration provision may be used to compel arbitration of a dispute between a nonsignatory and a signatory is a question of substantive arbitrability ...."), and MTA, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 114 So. 3d 27, 32 (Ala. 2012) (describing whether the language of an arbitration provision was limited to signatories as an issue of the "scope" of the provision). Thus, we have held, "substantive arbitrability addresses both whether the nonsignatories ... can enforce the agreement to arbitrate and whether the claims at issue are encompassed by the arbitration

provision." Carroll v. Castellanos, 281 So. 3d 365, 370 (Ala. 2019).

A court generally makes the "threshold" or "gateway" determination of arbitrability; however, there is an exception when the arbitration provision itself requires that the arbitrator make the decision:

> "[D]isputes regarding the validity and scope of an arbitration provision ... are issues of substantive arbitrability, and generally such issues are decided by a court. However, there is an important exception to that general rule. Gateway questions of substantive arbitrability may be delegated to the arbitrator if the delegation is clear and unmistakable."

Regions Bank, 209 So. 3d at 1110. Who decides issues of substantive arbitrability--the court or the arbitrator--must necessarily be decided before the actual issue of arbitrability, such as a challenge to the scope of the arbitration provision, is determined.

When an arbitration provision indicates that the AAA rules will apply to the arbitration proceedings, we have held that it is "clear and unmistakable" that substantive-arbitrability decisions are to be made by the arbitrator; this includes the decision whether the arbitration provision may be enforced against a nonsignatory to the contract:

> "[T]he arbitration provision in this case provides that any arbitration proceedings will be conducted 'pursuant to the then-prevailing commercial arbitration rules of the American Arbitration Association.' The relevant commercial arbitration rule, Rule 7(a), expressly provides, in its current form, that '[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.' See Chris Myers Pontiac-GMC, Inc. v. Perot, 991 So. 2d 1281, 1284 (Ala. 2008) (noting that we may take judicial notice of the commercial arbitration rules of the American Arbitration Association even when they do not appear in the record). Thus, pursuant to Rule 7(a), ... the question of whether the arbitration provision may be enforced against a nonsignatory ... ha[s] been delegated to the arbitrators, and the arbitrators, not the trial court, must decide those threshold issues."

Federal Ins. Co. v. Reedstrom, 197 So. 3d 971, 976 (Ala. 2015). See also Eickhoff, 265 So. 3d at 222; Managed Health Care Admin., Inc. v. Blue Cross & Blue Shield of Alabama, 249 So. 3d 486, 493 (Ala. 2017); Bugs "R" Us, LLC v. McCants, 223 So. 3d 913, 919 (Ala. 2016); Anderton, 164 So. 3d at 1102; and CitiFinancial Corp., L.L.C. v. Peoples, 973 So. 2d 332, 340 (Ala. 2007).

Wiggins is undisputedly a third-party beneficiary of the contract. A third-party beneficiary, like the parties to the contract, is bound by the terms and conditions of the

contract, including any arbitration provisions; the beneficiary cannot accept the benefits of the contract but avoid its burdens or limitations. Dannelly Enters., LLC v. Palm Beach Grading, Inc., 200 So. 3d 1157, 1169 (Ala. 2016), and Georgia Power Co. v. Partin, 727 So. 2d 2, 5 (Ala. 1998). It is true that the claims of a third-party beneficiary might not be subject to an arbitration provision if the scope of the provision is too narrow to encompass nonsignatories to the agreement containing the provision. MTA, 114 So. 3d at 32–33. But, as noted above, that issue--whether a nonsignatory is included within the scope of an arbitration provision--is an issue of arbitrability that may be delegated to the arbitrator to decide in the first place. See Reedstrom, 197 So. 3d at 976 ("[T]he question of whether the arbitration provision may be enforced against a nonsignatory ... ha[s] been delegated to the arbitrators, and the arbitrators, not the trial court, must decide those threshold issues."), and Anderton, 164 So. 3d at 1102 ("[A]lthough the question whether an arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability usually decided by the court, here that question

has been delegated to the arbitrator. The arbitrator, not the court, must decide that threshold issue.").

The arbitration clause in this case, like the one in Reedstrom, specifically incorporates the AAA rules. Rule 7(a) states: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim." (Emphasis added.) It is the language of the delegation provision in an agreement to arbitrate, here, by incorporating the AAA rule, that determines whether arbitrability is delegated to the arbitrator, not the language defining the scope of the arbitration provision itself.

Warren Averett, citing Rule 7 of the AAA rules, Reedstrom, Anderton, and numerous other cases, argues that the arbitration clause, by incorporating the AAA rules, has delegated Wiggins's challenge to the scope of the arbitration clause to the arbitrator to decide. Under our caselaw, as discussed above, that argument is correct.

Wiggins cites Eickhoff for the proposition "that[,] before allowing the arbitrator to make the arbitrability

decision[,] the dispute must be 'at least arguably' within the scope of the arbitration clause." However, this Court held that the dispute must be "at least arguably within the scope of [the] contract" containing the arbitration provision and delegation clause for the arbitration provision and delegation clause to be enforced, not that the dispute must fall within the scope of the arbitration provision. 265 So. 3d at 224 (emphasis added). Again, whether a claim falls within the scope of the arbitration provision is an issue of arbitrability that has been delegated to the arbitrator for decision.

Wiggins also contends that our line of cases recognizing the delegation to arbitrators of arbitrability determinations, such as in Managed Health Care, Bugs "R" Us, Reedstrom, and Anderton, should be abandoned and urges the Court to adopt the rationale of the dissenting opinion of Justice Murdock in Anderton. As subsequent caselaw illustrates, we have consistently rejected this position. See Eickhoff, 265 So. 3d at 224 ("Numerous parties on appeal--as well as even dissenting Justices on this Court--have urged this Court to abandon this standard and, instead, to make the arbitrability

determination in such cases itself; however, we have continually declined to do so. See, e.g., Anderton, 164 So. 3d at 1105 (Murdock, J., dissenting) ....."). Finally, Wiggins challenges arbitration as an inferior form of dispute resolution; however, federal law requires enforcement of arbitration agreements. See 9 U.S.C. § 2 ("A written provision ... to settle by arbitration a controversy ... shall be valid, irrevocable, and enforceable ....").

Conclusion

The determination of whether Wiggins's claims are covered under the terms of the arbitration clause has been delegated to an arbitrator to decide. Based on the arguments before us, the trial court's order compelling arbitration is due to be affirmed.

AFFIRMED.

Bolin, Bryan, and Mitchell, JJ., concur.

Shaw, J., and Donaldson, Special Justice,[4] concur specially.

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[4]Judge Scott Donaldson of the Alabama Court of Civil Appeals was appointed to serve as a Special Justice in regard to this appeal. Although he was not present at the oral argument in this case, he has reviewed a recording of that oral argument.

Parker, C.J., and Wise, Sellers, and Mendheim, JJ., dissent.

Stewart, J., recuses herself.

SHAW, Justice (concurring specially)

I concur with the main opinion. "[W]hen we are asked to reverse a lower court's ruling, we address only the issues and arguments the appellant chooses to present." Hart v. Pugh, 878 So. 2d 1150, 1157 (Ala. 2003). Warner W. Wiggins's briefs on appeal do not argue what it means when "the parties" have agreed to delegate claims to an arbitrator, do not cite a United States Supreme Court or other federal court decision regarding that issue, do not discuss what "clear and unmistakable evidence" means, and do not address the validity of the substance of our prior decisions holding that arbitrability issues may be delegated to the arbitrator. All of Wiggins's arguments advanced on appeal are addressed by the main opinion and do not demonstrate reversible error.

Donaldson, Special Justice, concurs.

MENDHEIM, Justice (dissenting).

Because I believe this Court's approach to cases involving nonsignatories to agreements that contain arbitrability clauses has strayed from the arbitration principles enunciated by the United States Supreme Court, and because Warner W. Wiggins is indisputably correct that the arbitration clause at issue does not encompass his claims against Warren Averett, LLC ("Warren Averett"), I respectfully dissent.

The main opinion concludes that whether Wiggins as a nonsignatory is bound by the arbitration clause is a matter to be decided by an arbitrator because the arbitration clause contained in the contract between Eastern Shore Children's Clinic, P.C. ("Eastern Shore"), and Warren Averett incorporates the Rules of the American Arbitration Association ("the AAA rules"), which this Court has interpreted to be shorthand for allowing the arbitrator to decide substantive questions of arbitrability. I concede that several cases from this Court have held that when an arbitration provision incorporates the AAA rules "it is 'clear and unmistakable' that substantive-arbitrability decisions are to be made by the

arbitrator; this includes the decision whether the arbitration provision may be enforced against a nonsignatory to the contract." ___ So. 3d at ___. Indeed, in Eickhoff Corp. v. Warrior Met Coal, LLC, 265 So. 3d 216, 222 (Ala. 2018), the Court observed: "This Court has since [CitiFinancial Corp. v. Peoples, 973 So. 2d 332 (Ala. 2007), was decided] consistently reiterated the holding that questions of arbitrability must be decided by an arbitrator when the parties have executed a contract containing an arbitration provision incorporating the AAA commercial arbitration rules." (Emphasis added.)

However, Wiggins has expressly requested that this Court overrule such cases as Federal Insurance Co. v. Reedstrom, 197 So. 3d 971 (Ala. 2015), Bugs "R" Us, LLC v. McCants, 223 So. 3d 913 (Ala. 2016), and Anderton v. The Practice-Monroeville, P.C., 164 So. 3d 1094 (Ala. 2014), on this point. In his argument for doing so, Wiggins quotes the opening paragraph of Justice Murdock's dissent in Anderton:

> "It is axiomatic that, before a party to a dispute must submit to the views of some arbitrator as to either the merits of the dispute or whether the subject of the dispute falls within the scope of disputes to be decided on the merits by the arbitrator, a court must first determine whether that arbitration agreement is in fact one that governs as between that party and the opposing party

> to the dispute. By logic and of necessity, only a court can play this gate-keeping function. Were it otherwise, then, by logical extension, any party to any dispute could insist on appearing before an arbitrator, and the opposing party, even one who in fact has never signed as a party to an arbitration agreement and who otherwise is not properly governed by any arbitration agreement under applicable legal principles, nonetheless will be subjected to the decision of an arbitrator as to whether this is in fact true or not. Until such a condition is determined to be true, however, no party is, or should be, under any obligation to appear before, or to subject himself or herself to the authority of, some arbitrator, rather than a court."

164 So. 3d at 1103-04 (Murdock, J., dissenting) (footnote omitted).

Justice Murdock -- and by extension Wiggins -- simply posits that it is illogical for two parties to a contract containing an arbitration provision to be able to predetermine that an arbitrator gets to decide whether that provision governs disputes involving a nonsignatory to the contract. I agree, and I believe the United States Supreme Court is of the same opinion.

"'[W]hether the parties have agreed to arbitrate or whether their agreement covers a particular controversy'" are "'"gateway" questions of "arbitrability."'" Henry Schein, Inc. v. Archer & White Sales, Inc., ___ U.S. ___, ___, 139

S.Ct. 524, 529 (2019) (quoting Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 68-69, 130 S.Ct. 2772, 2777 (2010) (emphasis added)). Moreover, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." Henry Schein, Inc., ___ U.S. at ___, 139 S.Ct. at 531 (emphasis added). Henry Schein involved a dispute between two parties to a contract that contained an arbitration provision. Thus, in the context of that case, when the United States Supreme Court spoke about "the parties," it was referring to the parties to the contract. If those parties have clearly contractually agreed that issues of arbitrability are to be decided by an arbitrator, then, according to the Henry Schein Court, even if the claims at issue in the lawsuit appear to plainly fall outside the arbitration provision, that determination about whether the arbitration provision encompasses the claims at issue must be decided by an arbitrator because the contractual agreement between the parties to the contract must be enforced as written.[5]

[5]Notably, the Henry Schein Court expressly declined to decide "whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator," even

However, a question arises about who decides issues of arbitrability -- a court or an arbitrator -- when, unlike in Henry Schein, the parties in the case are not the parties to the contract at issue. In other words, does the same analysis employed in Henry Schein apply when the lawsuit is between a party that signed a contract that includes an arbitration provision that, in turn, contains an arbitrability clause and a party that did not sign the contract? Such is the case here: It is undisputed that Wiggins, who brought this action against Warren Averett, did not sign the contract between Eastern Shore Children's Clinic, P.C., and Warren Averett that contains an arbitration clause that incorporates the AAA rules.

In CitiFinancial Corp. v. Peoples, 973 So. 2d 332 (Ala. 2007), this Court concluded that "an arbitration provision that incorporates rules that provide for the arbitrator to decide issues of arbitrability clearly and unmistakably evidences the parties' intent to arbitrate the scope of the

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though the contract specifically stated that certain disputes "shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association." Henry Schein, ___ U.S. at ___, ___, 139 S. Ct. at 531, 528.

arbitration provision." 973 So. 2d at 340 (emphasis added). "The parties" referred to in CitiFinancial Corp. were the parties to the contract because the parties in the case and the parties to the contract that contained the arbitration provision were the same.[6] Thus, in CitiFinancial Corp., this Court simply determined that incorporation of the AAA rules into the arbitration provision constitutes clear and unmistakable evidence that the parties to the contract intend for arbitrability issues to be decided by an arbitrator. That case did not decide the separate issue whether there is clear and unmistakable evidence that the parties in a case agreed to arbitrate issues of arbitrability when those parties did not execute a contract containing an arbitration provision incorporating the AAA rules. Even so, as I have already mentioned, some subsequent cases decided by this Court employed the conclusion stated in CitiFinancial Corp. to hold that a reference to the AAA rules in an arbitration provision constitutes clear and unmistakable evidence that the parties

[6]This is also true of the case upon which the CitiFinancial Corp. Court primarily relied in reaching its conclusion, Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005).

in that case agreed to arbitrate issues of arbitrability, even when one of those parties did not sign the contract containing the arbitration provision.[7] In other words, in those cases involving nonsignatories, clear and unmistakable evidence of the existence of an arbitrability clause was conflated with clear and unmistakable intent on the part of both parties in a case that an arbitrator should decide arbitrability issues.

However, conflation of those issues does not comport with the United States Supreme Court's explanation in First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920 (1995), of the proper evaluation process when the parties in a case are not the same as the parties to the contract containing the arbitration provision. First Options involved a dispute between a signatory to a contract that contained an arbitration provision -- First Options of Chicago, Inc. -- and two nonsignatories to the contract -- Manuel Kaplan and his wife Carol Kaplan. The contract at issue concerned

[7]Cases such as Anderton, Reedstrom, and Rainbow Cinemas, LLC v. Consolidated Construction Co. of Alabama, 239 So. 3d 569 (Ala. 2017), which involved nonsignatories to the respective arbitration provisions at issue in those cases, focused solely on whether clear and unmistakable evidence of an arbitrability clause existed.

> "the 'working out' of debts to First Options that MKI [MK Investments, Inc.,] and the Kaplans incurred as a result of the October 1987 stock market crash. In 1989, after entering into the agreement, MKI lost an additional $1.5 million. First Options then took control of, and liquidated, certain MKI assets; demanded immediate payment of the entire MKI debt; and insisted that the Kaplans personally pay any deficiency. When its demands went unsatisfied, First Options sought arbitration by a panel of the Philadelphia Stock Exchange."

514 U.S. at 940, 115 S. Ct. at 1922. The Kaplans contended that their dispute with First Options of Chicago was not subject to arbitration because they had not signed the workout agreement.

The Court in First Options decided two issues relevant here. First, it determined that "who -- court or arbitrator -- has the primary authority to decide whether a party has agreed to arbitrate" "turns upon what the parties agreed about that matter." 514 U.S. at 942, 943, 115 S. Ct. at 1923 (first emphasis added). In other words, if the parties to the contract submitted issues of arbitrability to an arbitrator, then "a court must defer to an arbitrator's arbitrability decision" as to those parties. 514 U.S. at 943, 115 S.Ct. at 1924.

> "If, on the other hand, the parties did not agree to submit the arbitrability question itself to

> arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration."

514 U.S. at 943, 115 S. Ct. at 1924 (second and third emphasis added). See also Granite Rock Co. v. International Bhd. of Teamsters, 561 U.S. 287, 297, 130 S. Ct. 2847, 2856 (2010) (explaining that a "court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate that dispute," which includes issues of arbitrability). This first issue matters insofar as the United States Supreme Court clearly emphasized the intentions of the parties to the contract regarding who decides issues of arbitrability.

But the First Options Court did not conclude that the foregoing rule settled the issue whether the court or an arbitrator should decide arbitrability issues for First Options of Chicago and the Kaplans because the parties in the case were not identical to the parties to the contract. "[A] fair and complete answer to the standard-of-review question

requires a word about how a court should decide whether the parties have agreed to submit the arbitrability issue to arbitration. And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here." First Options, 514 U.S. at 944, 115 S. Ct. at 1924. The Court explained:

> "When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state-law principles that govern the formation of contracts. ...
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> "This Court ... has (as we just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so. AT&T Technologies, [Inc. v. Communications Workers of America, 475 U.S. 643] at 649[, 106 S.Ct. 1415 at 1418-19 (1986)]; see [United Steelworkers of America v.] Warrior & Gulf [Navigation Co.], [363 U.S. 574] at 583, n.7[, 80 S.Ct. 1347 at 1353, n.7 (1960)]. In this manner the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' -- for in respect to this latter question the law reverses the presumption. See Mitsubishi Motors [v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614] at 626[, 105 S.Ct. 3346 at 3353 (1985)] ('"[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"') (quoting Moses H. Cone Memorial

> Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25[, 103 S.Ct. 927, 941, 74 L.Ed.2d 765] (1983)); Warrior & Gulf, supra, at 582-583[, 80 S.Ct. at 1352-53].
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> "... And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. Ibid. See generally Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220[, 105 S.Ct. 1238, 1241-42, 84 L.Ed.2d 158] (1985) (Arbitration Act's basic purpose is to 'ensure judicial enforcement of privately made agreements to arbitrate')."

514 U.S. at 944-45, 115 S. Ct. at 1924-25 (emphasis added).

The First Options Court concluded that, "[o]n the record before us, First Options cannot show that the Kaplans clearly agreed to have the arbitrators decide (i.e., to arbitrate) the question of arbitrability." 514 U.S. at 946, 115 S. Ct. at 1925 (emphasis added). First Options of Chicago's inability to make such a showing resulted directly from the fact that the Kaplans had not signed the workout agreement, and so their intent to arbitrate issues of arbitrability was absent. See BG Grp. PLC v. Republic of Argentina, 572 U.S. 25, 34, 134 S.Ct. 1198, 1207 (2014) (noting that in First Options the

Court held that the "court should decide whether an arbitration clause applied to a party who 'had not personally signed' the document containing it"); Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S. Ct. 588, 592 (2002), (summarizing First Options as "holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement"). As the Court noted:

> "[T]he basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, Dean Witter Reynolds[v. Byrd], [470 U.S. 213,] 219–220[, 105 S.Ct. 1238, 1241–42 (1985)], but to ensure that commercial arbitration agreements, like other contracts, '"are enforced according to their terms,"' Mastrobuono[v. Shearson Lehman Hutton, Inc.], 514 U.S. [52,] 54[, 115 S. Ct. 1212, 1214 (1995)] (quoting Volt Information Sciences, [Inc. v. Board of Trustees of Leland Stanford Junior Univ.], 489 U.S. [468,] 479[, 109 S. Ct. 1248, 1256 (1989)]), and according to the intentions of the parties, Mitsubishi Motors [Corp. v. Soler Chrysler-Plymouth, Inc.], 473 U.S. [614,] 626[, 105 S. Ct. 3346, 3353 (1985)]. See Allied-Bruce Terminix [Cos. v. Dobson], 513 U.S. [265,] 271[, 115 S. Ct. 834, 838 (1995)]. That policy favors the Kaplans, not First Options."

First Options, 514 U.S. at 947, 115 S. Ct. at 1925 (emphasis added).

In short, how a court settles who decides the issues of arbitrability is approached separately and differently than

how the issues of arbitrability themselves are determined.[8] See, e.g., Belnap v. Iasis Healthcare, 844 F.3d 1272, 1281 (10th Cir. 2017) (observing that "the question of who should decide arbitrability precedes the question of whether a dispute is arbitrable"). With respect to who decides, the default rule is that "[a] court decides issues of substantive arbitrability '[u]nless the parties clearly and unmistakably provide otherwise.'" Anderton, 164 So. 3d at 1101 (quoting AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418 (1986) (emphasis added)). When applying this rule, a court must necessarily keep in mind whether "the parties" in the case are the same as the "the parties" to the contract that contains the arbitration provision. See, e.g. Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 69 n.1, 130 S. Ct. 2772, 2777 n.1 (2010) (noting that "the First Options 'clear and unmistakable' requirement ...

[8]This difference explains why the United States Supreme Court has emphasized that it has "never held that this policy [favoring arbitration of commercial and labor disputes] overrides the principle that a court may submit to arbitration 'only those disputes ... that the parties have agreed to submit.'" Granite Rock Co., 561 U.S. at 302, 130 S. Ct. at 2859 (quoting First Options, 514 U.S. at 943, 115 S.Ct. at 1924).

pertains to the parties' manifestation of intent ...." (emphasis added)). If the parties are the same, then their intentions, whether those be to have the court or an arbitrator decide arbitrability issues, control who decides. If the parties are not the same, however, then the language in the arbitration provision cannot provide clear and unmistakable evidence that the parties in the case agreed to arbitrate arbitrability. See Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 632 (Tex. 2018) (explaining that "[a] contract that is silent on a matter cannot speak to that matter with unmistakable clarity, so an agreement silent about arbitrating claims against non-signatories does not unmistakably mandate arbitration of arbitrability in such cases"); Leshin v. Oliva, No. 04-14-00657-CV, July 29, 2015 (Tex. App.) (not reported in South Western Reporter) (observing, in a case involving an arbitration provision that referenced the AAA rules, that, "[i]n cases involving non-signatories, courts do not consider the terms of the arbitration agreement as any evidence when looking for 'clear and unmistakable evidence' as to whether parties agreed to arbitrate the issue of arbitrability. First Options, 514 U.S.

at 943 (focusing on intent of parties to dispute rather than arbitration agreement) .... To constitute evidence in cases involving non-signatories, we must look at whether the parties to the dispute before the courts ... clearly and unmistakably agreed to arbitrate the issue of arbitrability, rather than whether the parties to the contract containing the arbitration clause ... agreed to arbitrate the issue of arbitrability.").

Once the issue of who decides issues of arbitrability is settled, then the issues of arbitrability themselves -- whether the parties in the case are bound by the arbitration provision or whether the arbitration provision covers a particular controversy -- are determined by whichever forum was dictated under the evaluation of the first issue. For example, it may be determined that a court rather than an arbitrator must decide the issues of arbitrability because there is a lack of clear and unmistakable evidence that the parties in the case intended that arbitrability issues should be decided by the arbitrator because one party in the case did not sign the contract containing the arbitration provision, but a court may nonetheless conclude that the nonsignatory is bound by the arbitration provision based on the wording of the

arbitration provision or the particular circumstances of the case. In other words, settling who decides arbitrability issues, even if that conclusion turns on the presence of a nonsignatory as a party in the case, does not determine whether the nonsignatory is bound to arbitrate the claims in the action. Indeed, ambiguities with regard to the issues of arbitrability themselves are construed in favor of arbitration. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S. Ct. 3346, 3353-54 (1985) (observing that "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability'" (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941 (1983))).

Returning to this case, there is no question that the arbitration provision incorporates the AAA rules. Therefore, based on CitiFinancial Corp. and other cases, there is clear and unmistakable evidence that Eastern Shore and Warren Averett -- the parties to the contract -- agreed to arbitrate

issues of arbitrability. However, the fact that the parties to the contract agreed to arbitrate arbitrability has no bearing on whether the parties in this case -- Wiggins and Warren Averett -- clearly and unmistakably agreed to arbitrate arbitrability. Wiggins did not sign the contract, and Warren Averett presented no other evidence indicating that Wiggins intended to arbitrate issues of arbitrability. Therefore, there is no clear and unmistakable evidence that Wiggins agreed with Warren Averett to arbitrate issues of arbitrability.[9] See, e.g., Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1127 (9th Cir. 2013) (concluding that, "[h]ere, the

[9]The main opinion states that Wiggins, as a third-party beneficiary to the contract between Eastern Shore and Warren Averett, "is bound by the terms and conditions of the contract, including any arbitration provisions." ___ So. 3d at ___. Respectfully, this conclusion places the cart before the horse. The effect of Wiggins's third-party-beneficiary status directly implicates whether the arbitration agreement covers Wiggins's claims, an issue of arbitrability, and it therefore must be decided separately from the issue of who decides issues of arbitrability. Again, "the subject of the First Options 'clear and unmistakable' requirement" "pertains to the parties' manifestation of intent, not the agreement's validity" or its scope with respect to the claims at issue. Rent-A-Ctr., West, Inc., 561 U.S. at 70 n.1, 130 S. Ct. at 2778 n.1 (some emphasis added). Wiggins's status as a third-party beneficiary is irrelevant to the question whether there is clear and unmistakable evidence that Wiggins and Warren Averett agreed to arbitrate issues of arbitrability, and the main opinion provides no authority stating otherwise.

arbitration agreements do not contain clear and unmistakable evidence that [plaintiff Toyota car owners] and Toyota agreed to arbitrate arbitrability. While Plaintiffs may have agreed to arbitrate arbitrability in a dispute with the Dealerships, the terms of the arbitration clauses are expressly limited to Plaintiffs and the Dealerships."); Bigge Crane & Rigging Co. v. Entergy Arkansas, Inc., 2015 Ark. 58, 8, 457 S.W.3d 265, 271 (2015) (noting that "[e]vidence of intent to have an arbitrator determine its jurisdiction of disputes submitted by either party to an arbitration agreement does not clearly and unmistakably demonstrate the parties' intent to have the arbitrator determine its jurisdiction with respect to any dispute raised by a nonparty"); Republic of Iraq v. BNP Paribas USA, 472 F. App'x 11, 13 (2d Cir. 2012) (not selected for publication in the Federal Reporter) (same); Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs. Ltd., 902 F. Supp. 2d 87, 97 (D. D.C. 2012) ("A signatory to a contract has clearly and unmistakably agreed to its terms, but that is not necessarily true of a nonsignatory. Here, Ms. Pinchuk did not sign the Agreement incorporating the AAA Construction Rules .... Because Ms. Pinchuk did not clearly and

unmistakably agree to arbitrate arbitrability, the Court will independently decide whether she is bound to arbitrate under the Agreement."). Accordingly, I believe that the issues of arbitrability are to be determined by the court.

Having determined that the court, rather than an arbitrator, must determine arbitrability issues, I now turn to Warren Averett's contention that Wiggins is bound by the arbitration clause even though he did not sign the contract. Warren Averett argues that Wiggins is bound by the arbitration clause because Wiggins concedes that he is a third-party beneficiary to the contract. In making this argument, Warren Averett seeks to travel under one or both of the two exceptions to the general rule that nonsignatories to an arbitration provision cannot be compelled to arbitrate their claims.

> "[T]he third-party-beneficiary exception ... provides that '[a] nonsignatory can be bound to an arbitration agreement if "the contracting parties intended, upon execution of the contract, to bestow a direct, as opposed to incidental[,] benefit upon the third party."' Custom Performance, [Inc. v. Dawson,] 57 So. 3d [90] at 97 [(Ala. 2010)] (quoting Dunning v. New England Life Ins. Co., 890 So. 2d 92, 97 (Ala. 2003)). [Another] exception is closely related and provides that a nonsignatory to a contract having an arbitration agreement will be treated as a third-party beneficiary of the contract

> regardless of whether the nonsignatory meets the legal definition of a third-party beneficiary 'when he or she asserts legal claims to enforce rights or obtain benefits that depend on the existence of the contract that contains the arbitration agreement.' Custom Performance, 57 So. 3d at 98 (emphasis omitted). This exception is referred to as the equitable-estoppel exception because of the inequity that would result if a party were allowed to simultaneously claim the benefits of a contract while repudiating its burdens and conditions."

MTA, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 114 So. 3d 27, 31 (Ala. 2012).

The problem with relying upon either the third-party-beneficiary exception or the equitable-estoppel exception is that the language of this arbitration clause is specifically limited to claims brought by or on behalf of Eastern Shore against Warren Averett. An illustrative case is Daphne Automotive, LLC v. Eastern Shore Neurology Clinic, Inc., 245 So. 3d 599 (Ala. 2017). In Daphne Automotive, a car dealership and one of its employees sought to compel arbitration of claims brought against them by Eastern Shore Neurology Clinic ("the neurology clinic"). Rassan Tarabein, the owner of the neurology clinic, was also the owner of another company, Infotec, Inc. Tarabein hired his nephew, Mohamad Tarbin, as an employee of Infotec, and, as part of the

nephew's compensation, Tarabein agreed to furnish his nephew with a vehicle. The nephew purchased a vehicle from the dealership. Tarabein, the nephew, and the dealership agreed that the dealership would arrange for the vehicle to be titled in the nephew's name but that the neurology clinic would be listed on the title as lienholder. The sales contract for the vehicle contained an arbitration provision that provided:

> "'Buyer/lessee and dealer agree that all claims, demands, disputes or controversies of every kind or nature between them arising from, concerning or relating to any of the negotiations involved in the sale, lease, or financing of the vehicle, the terms and provisions of the sale, lease, or financing agreements, the arrangements for financing ..., the performance or condition of the vehicle, or any other aspects of the vehicle and its sale, lease, or financing shall be settled by binding arbitration in accordance with the procedure set forth on separate Arbitration Agreement form.'"

Daphne Automotive, 245 So. 3d at 601. There was also a stand-alone arbitration agreement signed by the nephew, the wording of which also expressly stated it was between the "buyer/lessee" and the "dealer." Id. Tarabein later terminated his nephew's employment with Infotec and demanded the return of the vehicle. The nephew refused to return the vehicle. After discussions with the dealership, Tarabein discovered that the dealership never made the neurology clinic

a lienholder on the vehicle and that it had actually given title free and clear to the nephew. Tarabein and the neurology clinic sued the dealership and one of its employees, alleging breach of contract and other claims based on the sale of the vehicle to the nephew. The dealership and the employee moved to compel arbitration.

As in this case, the dealership and the employee contended that Tarabein and the neurology clinic were bound by the arbitration provisions because they were third-party beneficiaries to the sales contract and/or they should be equitably estopped from avoiding arbitration because they were claiming benefits under the sales contract. This Court rejected those arguments, explaining:

> "[I]t is ultimately unnecessary for this Court to conduct any inquiry as to whether the plaintiffs are third-party beneficiaries under the sales contract or whether the doctrine of equitable estoppel is applicable because we agree with the plaintiffs that the dealership is seeking to enforce the arbitration agreements beyond the scope of those agreements. Specifically, the arbitration agreements ... are broad insofar as they apply to 'all claims, demands, disputes or controversies of every kind or nature.' However, the agreements are limited to disputes that arise 'between them,' i.e, the 'buyer/lessor' (nephew) and the 'dealer[ship].' Stated differently, the language employed in the arbitration agreements is not broad enough to encompass the plaintiffs, who are nonsignatories to

> those agreements. See MTA[, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.], 114 So. 3d [27] at 32-33 [(Ala. 2012)] ('[R]egardless of whether the third-party-beneficiary or equitable-estoppel exception might otherwise apply, the narrow scope of the arbitration provisions ... precludes this Court from requiring MTA to arbitrate its third-party claims against Merrill Lynch.')."

Daphne Automotive, 245 So. 3d at 604-05 (emphasis added). See, e.g., Cook's Pest Control, Inc. v. Boykin, 807 So. 2d 524, 527 (Ala. 2001) ("The text of the arbitration clause limits its application to disputes arising between Cook's and the 'customer' (Knollwood). ... This Court has held that a nonsignatory cannot require arbitration of a claim by the signatory against the nonsignatory when the scope of the arbitration agreement is limited to the signatories themselves."); Cartwright v. Maitland, 30 So. 3d 405, 412 (Ala. 2009) ("The Court's several decisions on this subject make it clear that estoppel applies in a dispute involving an arbitration agreement when the language of the arbitration agreement is not specifically limited to the signatories of the agreement and is, instead, broad enough to encompass disputed claims between a signatory and a nonsignatory.").

Warren Averett's arguments about Wiggins's being a third-party beneficiary under the contract and whether Wiggins's

claim is related to the contract miss the central point: the arbitration clause is applicable only to claims brought by or on behalf of Eastern Shore against Warren Averett. Warren Averett and Eastern Shore chose to restrict the application of the arbitration clause to claims brought by Eastern Shore only; Wiggins's lawsuit simply is not implicated by the clause. In reaching this conclusion, I merely state the boundaries of the agreement Warren Averett crafted and entered into with Eastern Shore.

> "'Parties are free to contract as they will, provided they contract within the law.' Perkins v. Skates, 220 Ala. 216, 218, 124 So. 514, 515 (1929). 'The [Federal Arbitration Act, 9 U.S.C. § 2] "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms," and "parties are generally free to structure their arbitration agreements as they see fit."' Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000) (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478-79, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)). '[T]he federal policy favoring arbitration does not require this Court to ignore the contractual intentions of the parties.' 776 So. 2d at 746."

Fountain v. Ingram, 926 So. 2d 333, 338 (Ala. 2005).

In sum, in accordance with decisions of the United States Supreme Court, I believe that the arbitration clause does not

provide clear and unmistakable evidence that the two parties to this appeal -- Wiggins and Warren Averett -- agreed to arbitrate issues of arbitrability. Therefore, issues of arbitrability are to be decided by the court. Furthermore, Warren Averett's sole basis for contending that Wiggins is bound by the arbitration clause -- his status as a third-party beneficiary under the contract between Eastern Shore and Warren Averett -- is irrelevant because of the narrow scope of the arbitration clause. That is, the plain language of the arbitration clause does not encompass claims asserted by nonsignatories, and it is undisputed that Wiggins was not a signatory to the contract. Accordingly, I must conclude that the arbitration clause does not require arbitration of Wiggins's dispute with Warren Averett.

For the foregoing reasons, I dissent from the decision to affirm the trial court's order.

Parker, C.J., and Wise and Sellers, JJ., concur.