IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-CA-01263-COA

BANK OF HOLLY SPRINGS **APPELLANT**

v.

BARBARA PURYEAR FOR AND ON BEHALF OF THE ESTATE OF JOHN DABNEY BROWN **APPELLEE**

DATE OF JUDGMENT:	07/19/2019
TRIAL JUDGE:	HON. LAWRENCE LEE LITTLE
COURT FROM WHICH APPEALED:	MARSHALL COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	LISA ANDERSON REPPETO ANDREW SCOTT HARRIS
ATTORNEY FOR APPELLEE:	J. HALE FREELAND
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	REVERSED AND REMANDED - 12/15/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE WILSON, P.J., LAWRENCE AND McCARTY, JJ.

WILSON, P.J., FOR THE COURT:

¶1. This is an appeal from a chancery court's ruling denying a motion to stay litigation and compel arbitration. Barbara Puryear, in her capacity as the administrator of the Estate of John Dabney Brown, alleges that an employee of the Bank of Holly Springs ("the Bank") used undue influence to obtain money from Brown at a time when Brown was vulnerable and incapable of managing his own affairs. On behalf of Brown's estate, Puryear has asserted claims against the Bank based on the employee's alleged misconduct. Puryear seeks to recover, inter alia, compensatory damages, punitive damages, and treble damages. The Bank filed a motion to stay litigation and compel arbitration of Puryear's claims against the Bank

pursuant to an arbitration agreement that Brown signed several years prior to his death. However, the chancery court denied the Bank's motion, ruling that the claims were outside the scope of the arbitration agreement.

¶2. We agree with the Bank that the chancery court erred by denying the motion to compel arbitration. Brown's arbitration agreement, which is binding on his estate, provides that an arbitrator, not a court, must determine issues of arbitrability, including whether certain claims are within the scope of the agreement. Therefore, we reverse and remand for entry of an order compelling arbitration and further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶3. In 1997, the Bank's board of directors adopted a policy that all new customers would be required to sign an arbitration agreement covering all transactions and agreements with the Bank. At the time, Brown was the Bank's largest shareholder and a member of the board.

¶4. In March 2013, Brown opened a new checking account at the Bank, naming his daughter, Barbara Puryear, as a joint owner of the account. When he opened the account, Brown signed an arbitration agreement that requires him and the Bank to arbitrate any "controversy or claim aris[ing] out of or relat[ing] to any agreement or transaction between [them]." The agreement further provides that "[a]ny controversy concerning whether an issue is arbitral shall be determined by the arbitrator." The agreement also provides that it "shall be binding upon . . . the parties and their respective successors and assigns."

¶5. In 2017 and 2018, Brown signed a series of checks payable to Crystal Morgan, an employee of the Bank. These included a check for $600,000 written to Morgan in August

2018. Brown was ninety-eight years old at the time.

¶6. In September 2018, Puryear commenced this action in the Marshall County Chancery Court by filing a petition to establish a conservatorship for Brown, for a restraining order, and for other relief. Puryear named Morgan and the Bank as defendants. She alleged that Brown was a vulnerable person and incapable of managing his own affairs, that Morgan had abused her position at the Bank and her knowledge of Brown's assets to take advantage of him, that Brown's payments to Morgan were the product of undue influence, and that the Bank had notice of Morgan's actions. Puryear also alleged that Morgan and the Bank had breached fiduciary duties to Brown. Puryear asked the court to freeze the $600,000 that Morgan had received from Brown, to impose a constructive trust on all assets that Morgan had obtained from Brown, and to set aside transactions between Brown and Morgan. Puryear also sought compensatory damages, punitive damages, treble damages pursuant to Mississippi Code Annotated section 11-7-165 (Rev. 2019),[1] attorney's fees, and costs.

¶7. The chancery court appointed Puryear to serve as Brown's conservator. The court also granted a temporary restraining order freezing the $600,000 and barring Morgan from accessing any of Brown's accounts. Morgan deposited the $600,000 in the court registry in the form of a certificate of deposit, and the parties later agreed that the restraining order would remain in effect as a preliminary injunction.

¶8. The Bank answered and asserted that Brown's claims against it were all subject to

[1] Section 11-7-165 provides for an award of treble damages against a party who obtains property with a value of $250 or more from a "vulnerable adult" by, among other means, "undue influence." Miss. Code Ann. § 11-7-165(1).

arbitration. The Bank asked the court "to sever all claims against it so that [those] claims [could] be arbitrated pursuant to the applicable arbitration agreement." The Bank then filed a motion to compel arbitration of all claims against the Bank and to stay litigation of those claims pending arbitration. The Bank's motion also noted that Brown's arbitration agreement provided that the arbitrator would decide any issues of arbitrability. In response, Puryear argued that she was not bound by Brown's arbitration agreement and that her claims were beyond the scope of the arbitration agreement.

¶9. Brown died on December 23, 2018. Brown's estate was opened, and Puryear was appointed to serve as the administrator. Brown's claims against Morgan and the Bank were transferred into the estate proceedings for Puryear to pursue on behalf of the estate.

¶10. In July 2019, the court denied the Bank's motion to compel arbitration. The court ruled that Brown's arbitration agreement "could be subject to a broad interpretation" but that "allegations of exploitation of a vulnerable adult, breach of fiduciary duty, self dealing and/or undue influence by a Bank employee [were] beyond the scope of the . . . agreement."

¶11. The Bank filed a notice of appeal.[2] On appeal, the Bank argues (1) that pursuant to Brown's arbitration agreement, the issue of arbitrability must be decided by an arbitrator, not a court; and (2) that even if a court may or should decide the issue, Puryear's claims against the Bank are within the scope of the arbitration agreement.

ANALYSIS

[2] An order denying a motion to compel arbitration is immediately appealable as a matter of right. *Tupelo Auto Sales Ltd. v. Scott*, 844 So. 2d 1167, 1170 (¶10) (Miss. 2003). Morgan has never argued that the claims against her are subject to arbitration, and she is not a party to this appeal.

¶12. We review the grant or denial of a motion to compel arbitration de novo. *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1034 (¶20) (Miss. 2010). In determining whether to grant a motion to compel arbitration, a court must determine (1) "whether the parties agreed to arbitrate the dispute" and (2) "whether legal constraints external to the parties' agreement bar arbitration of the claims." *Greater Canton Ford Mercury Inc. v. Ables*, 948 So. 2d 417, 421 (¶8) (Miss. 2007). We "follow[] the federal policy favoring arbitration." *Sawyers*, 26 So. 3d at 1034 (¶20).[3] Therefore, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)).

I. An arbitrator, not a court, must determine whether Puryear's claims are within the scope of the arbitration agreement.

¶13. The threshold inquiry of whether the parties agreed to arbitrate the dispute encompasses two sub-issues: (1) "whether there is a valid arbitration agreement" and (2) "whether the parties' dispute is within the scope of the arbitration agreement." *Ables*, 948 So. 2d at 421 (¶9). In this case, Puryear does not dispute the validity of the arbitration agreement but argues that her claims are not within the scope of the agreement.

¶14. But before we determine whether Puryear's claims are within the scope of the arbitration agreement, we must first determine *who*—a court or an arbitrator—should decide that issue. *Id.* at 421-22 (¶11). Because the parties' agreement is governed by the FAA, "we

[3] The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16, applies to the arbitration agreement at issue because it is a "written provision in . . . a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. In addition, the arbitration agreement specifically stipulates that the "agreements and transactions between [the] Bank and [Brown] involve interstate commerce" and that the FAA applies.

are bound by the decisions of the United States Supreme Court" on this issue. *Id.* at 422 (¶12). The question whether a particular dispute is subject to arbitration "is generally considered an issue for the courts, not the arbitrator, '*unless the parties clearly and unmistakably provide otherwise*.'" *Id.* (brackets omitted) (quoting *AT & T Techs. Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). "In other words, when the parties have explicitly agreed that the question of arbitrability is to be decided by an arbitrator rather than the court, that agreement must be interpreted by an arbitrator." *Id.*

¶15. In such a case, the parties' agreement to arbitrate issues of arbitrability, including the scope of their agreement and its applicability to particular claims, is controlling. *See id.* at 422-23 (¶¶13-16). "The terms of the arbitration provision must be honored in a dispute over arbitrability." *Id.* at 422 (¶13). "Therefore, arbitration of the issue of arbitrability is the mandatory result if those are the terms to which the parties have validly agreed." *Id.* "[P]arties may agree on the scope of arbitration in any way they desire," and we "must give . . . effect" to their agreement "as written." *Id.*

¶16. The Mississippi Supreme Court addressed a similar issue in *Ables*. In that case, an arbitration clause in a contract between a car dealership and its customers required the parties to arbitrate "any [c]laim related to [the] contract," including but not limited to "(1) claims in contract, tort, regulatory, or otherwise; [and] (2) *claims regarding the interpretation, scope or validity of this clause or arbitrability of any issue*." *Id.* at (¶14). The customers argued that their claim against the dealership was beyond the scope of the arbitration clause because it "relate[d] to pre-sale fraudulent representations and not to the . . . contract." *Id.* at 422-23

(¶15). However, the Supreme Court held that the issue had to be determined by an arbitrator, not a court. *Id.* at 423 (¶16). The Court stated, "Clearly, the language of the arbitration agreement directs that disputes regarding interpretation of the agreement, including scope and arbitrability of issues, [must] be decided by an arbitrator." *Id.*

¶17. Similarly, in *Swindle v. Harvey*, 23 So. 3d 562, 570 (¶22) (Miss. Ct. App. 2009), *cert. denied*, 22 So. 3d 1193 (Miss. 2009), this Court held that the parties' arbitration agreement "clearly and unmistakably" provided that the arbitrator would decide all issues of arbitrability, including the scope of the agreement. In *Swindle*, the plaintiffs argued that their claims were beyond the scope of the parties' arbitration agreement, but the agreement provided that "any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator." *Id.* at (¶23) (brackets and emphasis omitted). Citing *Ables*, this Court held that an arbitrator had to determine whether the plaintiffs' claims were subject to arbitration because the plaintiffs "willingly entered into a contract that provided for any dispute resolution related to the contract to be handled through arbitration—even the interpretation of the agreement or the scope of arbitrability." *Id.* at 571 (¶24).[4]

¶18. Likewise in this case, the arbitration agreement between Brown and the Bank clearly provides that "[a]ny controversy concerning whether an issue is arbitral shall be determined

[4] *See also Henry Schein Inc. v. Archer & White Sales Inc.*, 139 S. Ct. 524, 527-28 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." Therefore, a court must compel arbitration of the arbitrability question even if the court thinks that "the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.'").

by the arbitrator."[5] Thus, just as in *Ables* and *Swindle*, the parties clearly and unmistakably agreed that an arbitrator, not a court, would decide any dispute concerning the scope of the arbitration agreement and the arbitrability of any claim. Accordingly, the chancery court erred by ruling that Puryear's claims are not subject to arbitration. In reversing the chancery court's ruling and directing arbitration, we do not address the question of whether Puryear's claims are arbitrable. Rather, we hold only that the question of arbitrability must be decided by an arbitrator, not a court.

II. No external legal constraints bar enforcement of the arbitration agreement.

¶19. As noted above, we also consider whether any "legal constraints external to the parties' agreement bar arbitration of the claims." *Ables*, 948 So. 2d at 421 (¶8). The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). "Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements . . . ." *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also Massey v. Oasis Health & Rehab of Yazoo City LLC*, 269 So. 3d 1242, 1251-52 (¶¶22-23) (Miss. Ct. App. 2018) (explaining that generally applicable state contract law may not be applied in a way that disfavors arbitration agreements).

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[5] The word "arbitrable" probably would have been more precise than "arbitral." "Arbitral" refers generally to anything related to arbitration, e.g., arbitral proceedings, an arbitral forum, or an arbitral award. The term "arbitrable" refers more specifically to the question whether a particular claim or dispute is subject to arbitration under the parties' agreement. Nonetheless, the intent of the provision is clear.

¶20. Puryear makes one argument along these lines. She argues that the chancery court properly denied the Bank's motion to compel arbitration because (a) she originally asserted her claims against the Bank within a petition that also sought to establish a conservatorship and (b) chancery courts have exclusive jurisdiction over conservatorships.

¶21. Puryear's argument is without merit. The Bank never sought to compel arbitration of a "conservatorship." Rather, the Bank sought to arbitrate Puryear's claims against the Bank for damages. Puryear initially asserted those claims on behalf of Brown in her capacity as Brown's conservator, and after Brown died, Puryear continued to prosecute the claims on behalf of Brown's estate. In her role as the administrator of Brown's estate, Puryear stands in Brown's shoes and may commence and prosecute any personal action that Brown could have commenced and prosecuted. Miss. Code Ann. § 91-7-233 (Rev. 2018). Therefore, Brown's arbitration agreement is binding on Puryear to the same extent that it was binding on Brown. *See Cleveland v. Mann*, 942 So. 2d 108, 117-19 (¶¶34-41) (Miss. 2006) (holding that wrongful death beneficiaries were bound by the decedent's arbitration agreement to the same extent that the decedent would have been bound by the agreement); *Smith Barney Inc. v. Henry*, 775 So. 2d 722, 726-27 (¶¶15-20) (Miss. 2001) (holding that an arbitration clause in a securities account agreement survived the account owner's death and bound her heir); *Massey*, 269 So. 3d at 1249 n.3 (holding that a nursing home arbitration agreement bound the resident's executor and wrongful death beneficiaries).[6]

[6] As noted above, the arbitration agreement expressly states that it "shall be binding upon . . . the parties and their respective successors and assigns." Based on this provision and the cases cited above, Puryear's argument that "[t]he [a]greement cannot be binding on her" because she "did not sign the [a]greement" is also without merit.

¶22. In summary, the Bank did not seek to compel arbitration of a conservatorship, nor did the Bank's motion threaten or attempt to interfere with the chancery court's jurisdiction over the conservatorship. The Bank simply sought to compel arbitration of a claim for damages filed on behalf of the ward against the Bank. The mere existence of a conservatorship is not an external legal constraint to an agreement to arbitrate such a claim.

CONCLUSION

¶23. Brown and the Bank clearly and unmistakably agreed that an arbitrator would decide issues of arbitrability, and their agreement is enforceable against Brown's estate. Therefore, an arbitrator must decide the threshold question whether the estate's claims against the Bank are within the scope of the arbitration agreement. For that reason, the chancery court erred by denying the Bank's motion to stay and compel arbitration. We reverse and remand for the chancery court to enter an order compelling arbitration and staying litigation of the estate's claims against the Bank pending arbitration.[7]

¶24. **REVERSED AND REMANDED.**

BARNES, C.J., CARLTON, P.J., GREENLEE, WESTBROOKS, LAWRENCE AND McCARTY, JJ., CONCUR. McDONALD, J., CONCURS IN RESULT ONLY WITHOUT SEPARATE WRITTEN OPINION.

[7] Our ruling has no effect on the estate's claims against Morgan or the $600,000 that Morgan deposited in the registry of the chancery court. *See supra* note 2.