PAYNE V. SAVANNAH COLLEGE OF ART AND DESIGN: ELEVENTH CIRCUIT UPHOLDS HIGH BAR FOR PLAINTIFFS SEEKING TO AVOID ARBITRATION AGREEMENTS

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In *Payne v. Savannah College of Art and Design, Inc.*, the Eleventh Circuit considered a fired employee's claims that an arbitration agreement he entered into with his former employer was unenforceable due to unconscionability and waiver.[1] Affirming the lower court's finding that the agreement was not unconscionable and that the employer had not waived its ability to arbitrate, the appellate court ordered the ex-employee's dispute to be submitted to arbitration.[2] In doing so, the Eleventh Circuit reaffirmed that individuals seeking to avoid arbitration agreements must clear a high bar.[3]

Isaac Payne, former Head Coach of the fishing team at Savannah College of Art and Design ("SCAD"), brought suit against SCAD following his firing for alleged race-based discrimination and retaliation.[4] However, Payne had voluntarily signed a binding Staff Handbook Acknowledgement during the employee onboarding process in 2015, which contained requirements to arbitrate, rather than litigate, any disputes that later arose.[5] The agreement consisted of two documents, the Alternative Dispute Resolution Policy and Agreement ("ADRPA") and a set of electronic links called the Arbitration Procedures—collectively referred to as "the agreement."[6] Regardless of these binding provisions, Payne filed suit against SCAD in the United States District Court

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[1] 81 F.4th 1187, 1193 (11th Cir. 2023).

[2] *Id.* at 1201.

[3] *See id.*

[4] *Id.* at 1190. The details of Payne's allegations related to his firing were not considered on appeal, as the court noted these were "best considered during arbitration." *Id.* at 1191 n.1.

[5] *Id.* at 1191. Payne conceded that he voluntarily signed the agreement but stated that he was "rushed." *Payne*, 81 F.4th at 1191 n.2. The arbitration agreement provided that a dispute "encompasses and includes all legal claims or controversies between SCAD and any employee . . . ." *Id.* at 1191 (internal quotation marks omitted) (alteration in original) (citation omitted).

[6] *Id.* at 1191–92.

for the Northern District of Georgia.[7] After a series of motions from both parties, the district court granted SCAD's Motion to Dismiss and Compel Arbitration ("MTD/MCA") and denied Payne's motion seeking early discovery on issues of arbitrability ("Discovery Motion"), ordering the dispute to be sent to arbitration.[8]

On appeal to the Eleventh Circuit, Payne raised four arguments.[9] He first asserted that the arbitration agreement was unconscionable and that the entire agreement be voided rather than having its unconscionable provisions severed.[10] He also argued that SCAD had waived its right to arbitrate the dispute because of action it had taken in a previous legal proceeding.[11] Lastly, Payne alleged that he should have been permitted to take early discovery on issues of arbitrability at the district court level.[12]

Payne's unconscionability argument can be sorted into two categories: substantive unconscionability in two specific provisions of the arbitration agreement and procedural unconscionability in various allegedly indefinite and non-mutual terms contained therein.[13] In its considerations of both categories, the court emphasized the difficult task that a plaintiff seeking to prove an unconscionable contract faces.[14] The standard requires proof of an agreement that suggests "one of the parties [took] fraudulent advantage of another."[15]

On his substantive unconscionability claim, Payne took issue with the agreement's cost-shifting and arbitrator-selection provisions.[16] The cost-shifting provision required the "loser" of the arbitration proceedings to cover the costs, though SCAD agreed to advance the costs of arbitration by paying upfront.[17] Thus, Payne would only have to pay if he was unsuccessful at arbitration.[18] Payne argued this provision served only to discourage employees from "pursuing their rights under

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[7] *Id.* at 1193.
[8] *Id.*
[9] *Id.* at 1190.
[10] *Payne*, 81 F.4th at 1193.
[11] *Id.* at 1200–01.
[12] *Id.* at 1201.
[13] *Id*. at 1194.
[14] *Id.* The court explained that "[t]he unconscionability standard is hard to satisfy under Georgia law" and described an unconscionable contract as one that "no sane man not acting under a delusion" would make. *Id.* (quoting Innovative Images, LLC v. Summerville, 848 S.E.2d 75, 83 (Ga. 2020)).
[15] *Payne*, 81 F.4th at 1194 (internal quotation marks omitted) (alteration in original) (quoting *Innovative Images*, 848 S.E.2d at 83).
[16] *Id.* at 1194.
[17] *Id*. at 1195.
[18] *Id*.

the law."[19] While the court had previously rejected a similar argument against a cost-shifting provision, Payne argued that decision had been abrogated by a subsequent Supreme Court case.[20] However, the court rejected this argument, stating that its prior rule was still intact and unaffected by the Supreme Court's holding.[21] On the agreement's arbitrator-selection provision, Payne argued that it was substantively unfair because it "effectively limit[ed] the pool of arbitrators to two White men."[22]

Payne sought to prove that the agreement would impose significant costs on him if he were unsuccessful at arbitration, but the court noted that its existing standard is not proving that costs would be significant.[23] Rather, it requires proof that plaintiffs "demonstrate that they are *likely* to bear prohibitive costs."[24] This is a two-pronged standard that requires individuals to show evidence of "(1) the amount of fees [they are] likely to incur and (2) [their] inability to pay those fees."[25] Payne did not meet the first prong; because he could not show that he would lose at arbitration, he failed to show that he was "likely to incur" these costs.[26] Therefore, the court upheld the agreement's cost-shifting provision.[27]

The court provided three additional justifications for upholding the cost-shifting provision.[28] Recognizing that an agreement not requiring plaintiffs to front the costs of arbitration is less threatening to their rights, the court first acknowledged that Payne and SCAD's agreement provided for SCAD to advance the costs, not Payne.[29] Second, Payne's argument was even less convincing given the agreement's

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[19] *Id.*

[20] *Id.* Payne sought to prove that the court's precedent upholding a similar cost-shifting provision in *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003), had been abrogated by the Supreme Court's holding in *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). *Payne*, 81 F.4th at 1195. However, the Eleventh Circuit reaffirmed that the "linchpin of *Musnick*," requiring plaintiffs to show their likelihood of bearing prohibitive costs, remains the standard. *Id.* at 1196.

[21] *Id.*

[22] *Id.* at 1198.

[23] *Id.* at 1196.

[24] *Id.*

[25] *Payne*, 81 F.4th at 1196 (internal quotation marks omitted) (alteration in original) (quoting Suazo v. NCL (Bahamas) Ltd., 822 F.3d 543, 554 (11th Cir. 2016)).

[26] *Id.* at 1196–97. "The 'problem' for Payne is that he might win. And if he were to prevail, SCAD would be required to pay for the arbitration. Thus, Payne has not shown that he is 'likely to incur' any costs whatsoever and cannot prevail under the standards we have set forth." *Id.*

[27] *Id.* at 1198.

[28] *Id.* at 1197.

[29] *Id.*

unique provision that allowed for a *second* appeal to a new arbitrator if the first result was unfavorable to Payne.[30] Lastly, while recognizing that Payne's evidence detailing potential costs was generally less speculative than the kinds it had previously rejected, the court noted that Payne conflated the possibility of costs being imposed altogether with the possibility of such costs being imposed *on him*.[31]

As mentioned, Payne also took issue with the arbitrator-selector provision.[32] The arbitrator-selector provision at issue called for mutual agreement between the parties on an arbitrator, requiring that he or she be a retired federal judge with at least five years of experience in dispute resolution unless such an individual was unavailable to "hear the dispute in a timely manner."[33] Payne argued the selection provision "effectively limit[ed] the pool of arbitrators to two White men."[34] However, Payne failed to cite any binding authority for his allegation that the provision was substantively unconscionable.[35] The court thus quickly rejected this argument.[36] Before considering Payne's next claim, the court reiterated that Payne voluntarily entered into the arbitration agreement with SCAD and failed to meet his burden of proving that its terms were substantively unfair.[37]

On procedural unconscionability, Payne argued that various terms within the agreement were indefinite and nonmutual.[38] As it had done with the substantive claims, the court adhered to the requirement under Georgia law that a party seeking to prove procedural unconscionability must show that he was "essentially defrauded in entering the agreement."[39]

Payne's specific allegations of indefiniteness relied on a discrepancy in the arbitration agreement where the ADRPA mentioned the use of an "arbitrator," and the Arbitration Procedures mentioned—though

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[30] *Payne*, 81 F.4th at 1197. The court recognized that this provision in the agreement gave Payne's complaint an "exceptionally speculative nature." *Id.*

[31] *Id.* at 1197–98. The fact that arbitration would bear costs is not a factor under the court's analysis of cost-shifting provisions, and the court declined to adopt it as one here. *Id.*

[32] *Id.* at 1198.

[33] *Id.* at 1191–92.

[34] *Payne*, 81 F.4th at 1194.

[35] *Id.* at 1198.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1199–200. Indefinite terms are those that require the court to "ascertain the intention of the parties by conjecture," whereas non-mutual terms are those that "confer[] certain rights" on one party but not the other. *See id.* at 1198.

[39] *Payne*, 81 F.4th at 1198 (internal quotation marks omitted) (quoting Innovative Images, LLC v. Summerville, 848 S.E.2d 75, 83 (Ga. 2020)).

only once, and not in the alternative—the use of a "mediator."[40] The court concluded this "small discrepancy" could be attributed either to a scrivener's error or an additional provision for a mediator; regardless, it was too scarce to prove indefiniteness worthy of discarding the whole agreement.[41] Payne raised additional indefiniteness arguments where there were differently-worded provisions in the ADRPA and the Arbitration Procedures and an "in effect" provision within the ADRPA.[42] However, the court agreed with the district court's finding that neither of those provisions were so indefinite as to meet the "high bar for proving unconscionability under Georgia law."[43]

The court also concluded that Payne's arguments of mutuality failed.[44] Central to Payne's mutuality claim was a provision of the arbitration agreement permitting SCAD, but not its employees, to bypass certain steps in the dispute resolution process and "fast-forward" to arbitration.[45] Given that like provisions had survived a finding of unconscionability under Georgia law before, the court rejected this claim.[46]

Because he failed to prove that he was "essentially defrauded," all of Payne's unconscionability arguments were rejected.[47]

Payne's next argument was a novel request, asking the court to hold that SCAD had effectively "waive[d] its right to arbitrate based on its actions taken in a previous legal action" involving different

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[40] *Id.* at 1199.

[41] *Id*. Indefiniteness carries its own strict standard under Georgia law, requiring that the provision(s) be "so extreme as not to present anything upon which the contract may operate in a definite manner" to void the agreement. *Id.* at 1198 (quoting Fay v. Custom One Homes, LLC, 622 S.E.2d 870, 872–73 (Ga. Ct. App. 2005)).

[42] *Id.* at 1199–200. The ADRPA required an employee who sought to begin dispute resolution proceedings to submit a "written request to the vice president for human resources," where the Arbitration Procedures required an employee to "submit a completed Request for Arbitration to the College's Vice President of Human Resources." *Id.* at 1199. Agreeing with the district court, the Eleventh Circuit determined that it was clear the terms were referring to the same step in the initiation of dispute resolution. *Payne*, 81 F.4th at 1199. The ADRPA also contained a provision stating SCAD retained the right to modify the agreement and that "[t]he policy, if any, in effect at the time a request for mediation and/or arbitration is initiated, will govern the process by which the Dispute is resolved." *Id.* at 1200. Payne argued this provision made it unclear which agreement would govern in the event of a dispute, given SCAD's attempt to amend the agreement in 2019. *Id*. However, the court, in agreeing with the district court's determination that SCAD's attempted amendment in 2019 was ineffective for lack of notice, held that the "in effect" provision was "not ambiguous in any way . . . ." *Id.*

[43] *Id.* at 1199–200.

[44] *Id.* at 1200.

[45] *Payne*, 81 F.4th at 1200. The court noted that, though Payne alleged "numerous" provisions lacked mutuality, he only raised this one provision on appeal. *Id.*

[46] *Id*.

[47] *Id.*

parties and claims.[48] Specifically, Payne argued that SCAD's engagement in discussions about a confidentiality agreement with a student athlete in a previous year interfered with Payne's ability to engage in "pre-hearing discovery from third parties," effectively constituting waiver of arbitrability.[49] However, the court refused to apply its waiver doctrine to these claims.[50] Instead, it relied on firmly established principles of waiver under Georgia law, holding that Payne's suggested application was inconsistent with these principles, and, as such, SCAD had not waived its right to arbitrate.[51] In this case, three facts supported the court's refusal to accept Payne's waiver argument: (1) SCAD had not extensively litigated, (2) SCAD informed Payne that the proper course for dispute resolution was arbitration prior to him filing suit, and (3) SCAD was prompt in its filing of the MTD/MCA.[52]

Payne's final argument asked the court to reverse the district court's dismissal of his Discovery Motion.[53] The Eleventh Circuit relied on the district court's finding that, because Payne's underlying substantive arguments failed, early discovery was unwarranted.[54] Thus, the court rejected this request and concluded that the district court did not abuse its discretion in refusing to grant Payne's Discovery Motion.[55]

Given Payne's failure to prove both substantive and procedural unconscionability, the court's finding that SCAD had not waived its right to arbitrate, and its choice to uphold the district court's dismissal of Payne's Discovery Motion, the Eleventh Circuit affirmed the decision of the lower court.[56] It held that Payne was legally bound to the arbitration agreement he voluntarily entered into with SCAD requiring him to submit any disputes against it to arbitration.[57]

The Eleventh Circuit's decision in *Payne v. Savannah College of Art and Design, Inc.* reemphasized that proving unconscionability—

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[48] *Id.* at 1200–01.

[49] *Id.* at 1201.

[50] *Payne*, 81 F.4th at 1201.

[51] *Id.* at 1201–02. The court's jurisprudence provides that the waiver doctrine typically applies when a party has already "invoked the litigation machinery" and later reverses course, seeking instead to arbitrate. *Id.* (quoting Gutierrez v. Wells Fargo Bank, 889 F.3d 1230, 1236 (11th Cir. 2018)).

[52] *Id.* at 1201.

[53] *Id.* The motion sought early discovery of communications between SCAD and potential witnesses as well as details of prior arbitrations between SCAD and former employees. *Id.*

[54] *Payne*, 81 F.4th at 1201.

[55] *Id.*

[56] *Id.*

[57] *Id.*

whether procedural or substantive—is a difficult standard to achieve, and plaintiffs seeking to avoid arbitration agreements on unconscionability grounds will struggle to meet that standard without clear proof that the agreement subjects them to extremely inequitable results.[58] In a broader sense, the decision signaled the Eleventh Circuit's commitment to the idea that individuals who enter into voluntary, binding agreements cannot avoid such agreements by creative unconscionability or waiver arguments and that strong contract principles remain central to considerations of whether the courts will void arbitration agreements.[59]

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58 *See id.* at 1194, 1200.
59 *Id.* at 1201.