WIGGINS V. WARREN AVERETT: ALABAMA SUPREME COURT FINDS IN FAVOR OF WARREN AVERETT, HOLDING THAT THIRD-PARTY BENEFICIARIES ARE SUBJECT TO ARBITRATION CLAUSES

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In *Wiggins v. Warrant Averett*,[1] the Alabama Supreme Court addressed whether third-party beneficiaries of a contract are subject to binding arbitration clauses in those contracts.[2] This decision provides needed clarity for Alabama companies on the scope of binding arbitration clauses used in contracts with customers, vendors, and employees. Because *Wiggins* is a 5-4 decision in which two justices concurred specially, companies and their counsel should monitor future decisions regarding this issue.

This case featured a dispute between Warner W. Wiggins, M.D., a shareholder and employee of the pediatric medical practice of Eastern Shore Children's Clinic, P.C. ("Eastern Shore"), and Warren Averett, LLC ("Warren Averett"), one of the largest accounting and advisory firms in the Southeastern United States.[3] Eastern Shore and Warren Averett entered into a contract under which Warren Averett was to provide accounting services to Eastern Shore and prepare individual income-tax returns for the five physicians employed by Eastern Shore, including Wiggins.[4] Included in the contract was a binding arbitration clause that read as follows:

> 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 . . . .[5]

After Warren Averett completed the engagement, Wiggins disputed Warren

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[1] Wiggins v. Warren Averett, LLC, No. 1170943, 2020 Ala. LEXIS 27 (Feb. 7, 2020).

[2] *Id.* at *4–5.

[3] *Id.* at *1.

[4] *Id.*

[5] *Id.* at *1–2 (capitalization in original).

Averett's billing for his return.[6]

In 2017, Wiggins filed a single-count complaint against Warren Averett alleging "accounting malpractice."[7] Wiggens claimed Warren Averett "breached the applicable standard of care in connection with its preparation of personal tax returns by wrongfully disclosing his 'personal confidential financial information' to Eastern Shore, which allegedly resulted in [his] being ousted as a shareholder/employee."[8] Warren Averett filed an answer alleging that Wiggin's claim was subject to the binding arbitration clause because it arose out of the contract between Warren Averett and Eastern Shore.[9] In addition, Warren Averett filed a motion to stay and/or dismiss Wiggins's action and to compel arbitration.[10] Wiggins responded arguing that the arbitration clause applied only to claims made by or on behalf of Eastern Shore and not to personal claims of the physicians who were third-party beneficiaries.[11] The trial court compelled arbitration, and Wiggins appealed to the Alabama Supreme Court.[12]

The Alabama Supreme Court reviewed the trial court's decision *de novo*.[13] The majority affirmed the trial court's decision, holding 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."[14] The majority framed the argument as a question of "substantive arbitrability," meaning the scope of an arbitration provision.[15] "[S]ubstantive arbitrability addresses both whether the nonsignatories . . . can enforce the agreement to arbitrate and whether the claims at issue are encompassed by the arbitration provision.'"[16] While a court typically makes the "threshold" or "gateway" determination on issues of substantive arbitrability, these questions may be delegated to the arbitrator rather than the court if the delegation is "clear and unmistakable."[17] When an arbitration provision indicates that the AAA rules apply to the arbitration proceedings, the Alabama Supreme Court has found that this is "clear and

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[6] *Id.* at *2.
[7] *Wiggins*, 2020 Ala. LEXIS 27, at *2.
[8] *Id.*
[9] *Id.* at *2–3.
[10] *Id.* at *3.
[11] *Id.*
[12] *Id.*
[13] *Wiggins*, 2020 Ala. LEXIS 27, at *3–4.
[14] *Id.* at *4–5.
[15] *Id.* at *5.
[16] *Id.* at *6 (quoting Carroll v. Castellanos, 281 So. 3d 365, 370 (Ala. 2019)) (internal quotation marks omitted).
[17] *Id.* (quoting Regions Bank v. Rice, 209 So. 3d 1108, 1110 (Ala. 2016)) (internal quotation marks omitted).

unmistakable" evidence that substantive arbitrability decisions are to be made by the arbitrator.[18] In past decisions, the Alabama Supreme Court has noted that AAA Rule 7(a) expressly grants the arbitrator jurisdiction to adjudicate these questions.[19] Finally, a third-party would be subject to these rules because "[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.[20] The majority did acknowledge the claim of the third-party beneficiary may 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."[21] However, the court noted the present issue is included within the scope of the arbitration provision and "may be delegated to the arbitrator to decide in the first place."[22]

Having examined the framework for when an arbitrator must decide issues of substantive arbitrability, the majority turned to the current case. Wiggins was "undisputedly" a third-party beneficiary to the contract between Warren Averett and Eastern Shore and therefore subject to the provisions of the contract.[23] Furthermore, "[t]he arbitration clause in this case . . . specifically incorporates the AAA rules," meaning that Rule 7(a) applies.[24] Rule 7(a) states "[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."[25] The court stated that it was this "language of the delegation provision in an agreement to arbitrate . . . that determines whether arbitrability is delegated to the arbitrator, not the language defining the scope of the arbitration provision itself.[26] Therefore, the majority affirmed the trial court and found that an arbitrator must determine the arbitrability of Wiggins's claim.[27]

The dissent framed the issue differently. Where the majority began by looking at the contract, the dissent began by looking at the parties.[28] The dissent conceded that the majority is correct in saying that the parties to the

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[18] *Id.* at *7.
[19] *Wiggins*, 2020 Ala. LEXIS 27, at *7 (citing Federal Ins. Co. v. Reedstrom, 197 So. 3d 971, 976 (Ala. 2015)).
[20] *Id.* at *8 (citing Dannelly Enters., LLC v. Palm Beach Grading, Inc., 200 So. 3d 1157, 1169 (Ala. 2016).
[21] *Id.* at *8
[22] *Id.*
[23] *Id.*
[24] *Id.* at *9.
[25] *Wiggins*, 2020 Ala. LEXIS 27, at *9 .
[26] *Id.*
[27] *Id.*at *11.
[28] *Id.* at *13 (Mendheim, J., dissenting).

contract can delegate questions of arbitrability to an arbitrator. But, reasoned that because a nonsignatory is not a party to that contract it cannot be said to have agreed to arbitrate.[29] The dissent first distinguishes cases in which the plaintiff/appellant was not a party to the contract from the case at bar.[30] Next, the dissent provides an in-depth review of *First Options of Chicago, Inc. v. Kaplan*, in which the Supreme Court held 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."[31] In *Kaplan*, the Court found that nonsignatories had not "clearly agreed to have the arbitrators decide (i.e., to arbitrate) the question of arbitrability" because they had not signed the agreement.[32] Based on this holding, the dissent concludes "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."[33]

Having concluded the court, rather than the arbitrator, should determine arbitrability, the dissent then discussed whether Wiggins's claims would fall within the scope of the arbitration clause in the contract and concluded that they would not.[34] The dissent stated that narrowly constructed arbitration clauses that only mention the parties to the contract do not apply to the claims of third-party beneficiaries.[35] Thus the dissent concluded that

> 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.[36]

Two justices wrote in special concurrence.[37] Justice Shaw stated that "'[w]hen we are asked to reverse a lower court's ruling, we address only the

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[29] *Id.* at *13–15 (Mendheim, J., dissenting).
[30] *Id.* at *16 (Mendheim, J., dissenting).
[31] *Wiggins*, 2020 Ala. LEXIS 27, at *19–20 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 940 (1995)) (internal quotation marks omitted) (Mendheim, J., dissenting).
[32] *Id.* at *22 (quoting *Kaplan*, 514 U.S. at 946) (internal quotation marks omitted) (Mendheim, J., dissenting).
[33] *Id.* at *27 (Mendheim, J., dissenting).
[34] *Id.* at *28–34 (Mendheim, J., dissenting).
[35] *Id.* at *34–35. ' (Mendheim, J., dissenting).
[36] *Id.* at *33–34 (Mendheim, J., dissenting).
[37] *Wiggins*, 2020 Ala. LEXIS 27, at *11–12 (Shaw, J., concurring specially).

issues and arguments the appellant chooses to present.'"[38] Essentially, the concurring justices opined Wiggins did not argue much of what the dissent presented.[39] Justice Shaw stated that

> 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.[40]

The concurring justices' position leaves the door open for a future third-party beneficiary to use the dissent's opinion as a roadmap to avoid the jurisdictional components of AAA Rule 7(a). The *Wiggins* decision may indicate that the Alabama Supreme Court will subject third-party beneficiaries to arbitration clauses if their claims arise from a contract that contains a valid arbitration clause that does not limit itself to only claims between the signatories. It is unclear whether the court will require an arbitrator to determine threshold questions of arbitrability or will leave those decisions in the hands of the courts when the parties to the litigation are not the same as the parties to the contract. For now, if a contract contains a valid arbitration clause that references the AAA rules, all claims arising from the contract, by either the parties to the contract or third-party beneficiaries, will initially be reviewed by an arbitrator. After the close decision, drafting attorneys and litigators should monitor the court's docket for similar issues. In the future, a different argument could result in a different rule of law.

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[38] *Id.* at *12 (quoting Hart v. Pugh, 878 So. 2d 1150, 1157 (Ala. 2003)) (Shaw, J., concurring specially).
[39] *See id.* (Shaw, J., concurring specially).
[40] *Id.* at *11–12 (Shaw, J., concurring specially).