# STATE OF MICHIGAN

# COURT OF APPEALS

YASAR SAIDIZAND,

Plaintiff-Appellee,

v

GOJET AIRLINES, LLC, and WILLIAM CLAY,

Defendants-Appellants.

UNPUBLISHED
September 23, 2021

No. 355063
Wayne Circuit Court
LC No. 20-004106-CD

Before: CAMERON, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Defendants GoJet Airlines, LLC, and William Clay appeal a September 21, 2020 order, which granted in part and denied in part their motion for summary disposition under MCR 2.116(C)(7) and to compel arbitration. We reverse and remand to the trial court for further proceedings consistent with this opinion.

## I. BACKGROUND

In November 2016, plaintiff Yasar Saidizand applied for a maintenance position with GoJet at its Detroit, Michigan facility. Plaintiff was hired to work for GoJet, and Clay was one of plaintiff's supervisors. In March 2020, plaintiff filed a complaint against defendants. Plaintiff alleged multiple violations of the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and that GoJet had failed to pay him overtime wages in violation of the Michigan Improved Workforce Opportunity Wage Act, MCL 408.931 *et seq*. (the "wage claim").

In lieu of filing an answer to the complaint, defendants moved for summary disposition under MCR 2.116(C)(7). Defendants argued that plaintiff agreed "to be bound by GoJet's Mutual Arbitration Agreement," which required claims concerning discrimination, harassment, and "unpaid wages" to be arbitrated. Plaintiff opposed the motion in part. Specifically, plaintiff acknowledged that a binding arbitration agreement existed and that the wage claim was subject to arbitration. However, plaintiff argued that the ELCRA claims were not subject to arbitration

because of the nature of the allegations that were filed against defendants.[1] Plaintiff further argued that the trial court, as opposed to the arbitrator, was required to interpret the applicability of the arbitration agreement. Defendants thereafter filed a reply brief, arguing for the first time that "the arbitrator and not the Court [was required] to decide which of the specific claims [were] arbitrable."

On September 21, 2020, the trial court dispensed with oral argument and entered an order granting defendants' motion in part and denying defendants' motion in part. Specifically, the trial court held that plaintiff's wage claim was "subject to arbitration," but that the ELCRA claims were "not subject to mandatory arbitration." This appeal followed.

## II. PRESERVATION

Generally, for an issue to be preserved for appellate review, it must be raised in and decided by the trial court. *Glasker-Davis v Auvenshine*, 333 Mich App 222, 227; ___ NW2d ___ (2020). Defendants first argue on appeal that the trial court improperly interpreted the arbitration agreement even though "[t]he Agreement clearly and unmistakably evince[s] the parties' mutual agreement to have the arbitrator, not the court, decide on the applicability of the Agreement relative to Plaintiff's claims." Plaintiff argues that this issue is unpreserved because defendants did not raise this argument before the trial court until they filed their reply brief. We disagree.

MCR 2.116(G)(1)(a)(iii) permits moving parties to "file a reply brief in support of" a motion for summary disposition. However, "[r]eply briefs must be confined to rebuttal of the arguments in the nonmoving party['s] . . . response brief[.]" MCR 2.116(G)(1)(a)(iii). In this case, plaintiff argued that it was proper for the trial court to deny defendants' motion for summary disposition because the ELCRA claims were exempt and that the issue of arbitrability was for the trial court to decide. In their reply brief, defendants argued that only the arbitrator was permitted to interpret the plain language of the arbitration agreement. Because this argument was in rebuttal to plaintiff's argument that the trial court was permitted to interpret the agreement, we conclude that the issue was properly before the trial court and is therefore preserved.[2] See *Glasker-Davis*, 333 Mich App at 227. It is inconsequential whether the trial court actually considered defendants'

[1] To support this argument, plaintiff relied on *Lichon v Morse*, 327 Mich App 375; 933 NW2d 506 (2019), which was recently vacated by our Supreme Court in *Lichon v Morse*, ___ Mich ___; ___ NW2d ___ (2021) (Docket Nos. 159492; 159493).

[2] While parties "may not assign as error on appeal something that [they] deemed proper in the lower court because allowing [them] to do so would permit [parties] to harbor error as an appellate parachute," *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011), defendants' arguments in support of summary disposition can be interpreted as being alternative arguments. Specifically, defendants' arguments can be reconciled to mean that, in the event that the trial court decided that the plain language of the arbitration agreement permitted it to interpret the agreement, summary disposition was nonetheless proper because the ELCRA claims fell within the scope of the arbitration agreement.

argument. See *id*. at 227-228 (noting that an issue is preserved for appeal even if the trial court failed to consider it).

## III. ANALYSIS

"Arbitration is a matter of contract." *Altobelli v Hartmann*, 499 Mich 284, 295; 884 NW2d 537 (2016) (quotation marks and citation omitted). The interpretation of contractual language is reviewed de novo. *VHS Huron Valley Sinai Hosp, Inc v Sentinel Ins Co*, 322 Mich App 707, 715; 916 NW2d 218 (2018).

"An arbitration agreement is a contract by which the parties forgo their rights to proceed in civil court in lieu of submitting their dispute to a panel of arbitrators." *Galea v FCA US LLC*, 323 Mich App 360, 369; 917 NW2d 694 (2018). "Where ordinary contracts are at issue, it is up to the parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *Bienenstock & Assoc, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016) (quotation marks and citation omitted). "[T]he question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator," unless "the parties clearly and unmistakably provide otherwise[.]" *Id*. at 516 (quotation marks and citation omitted).

Contracts are interpreted "in accordance with their ordinary meaning[.]" *VHS Huron Valley Sinai Hosp, Inc*, 322 Mich App at 715. "This Court's main goal in the interpretation of contracts is to honor the intent of the parties." *Id*. (quotation marks and citations omitted). "When contract language is clear, unambiguous, and has a definite meaning, courts do not have the ability to write a different contract for the parties, or to consider extrinsic testimony to determine the parties' intent." *Id*. (quotation marks and citations omitted).

The arbitration agreement in this case provides, in relevant part, as follows:

> Mutual Arbitration Agreement
>
> * * *
>
> Arbitration. The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including without limitation any claim that this Agreement is void or voidable; provided, however, that any question or dispute concerning the interpretation, enforcement, or validity of the prohibition on class, collective, representative, and group actions shall be decided by a court and not the Arbitrator.

Thus, the plain language of the arbitration agreement unambiguously provides that only the arbitrator has the authority to "resolve any dispute relating to the interpretation" or "applicability" of the agreement. Although there is an exception contained within the arbitration agreement, it does not apply in this case. Thus, because plaintiff and GoJet "clearly and unmistakably" agreed that only the arbitrator has authority to determine whether plaintiff's claims are subject to arbitration under the agreement, the trial court erred by interpreting the agreement and deciding whether the ELCRA claims were subject to arbitration. See *Bienenstock & Assoc, Inc*, 314 Mich App at 516.

To the extent that plaintiff argues that the arbitration agreement is void as a whole because of "fraud in the inducement or misrepresentation," this argument was not raised before the trial court, and issues raised for the first time on appeal in a civil case are not ordinarily subject to review. *In re Conservatorship of Murray*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 349068), slip op at 3. Additionally, plaintiff conceded that the arbitration agreement was valid and enforceable in the trial court. A party "may not assign as error on appeal something that [he or she] deemed proper in the lower court because allowing [a party] to do so would permit [the party] to harbor error as an appellate parachute." *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). Moreover, the arbitration agreement unambiguously provides that only the arbitrator is permitted to resolve a dispute concerning whether the agreement "is void or voidable[.]" Therefore, to the extent that plaintiff argues that the agreement is void, he is not entitled to relief on appeal with respect to that argument.

We therefore reverse the trial court's decision to deny defendants' motion for summary disposition with respect to the ELCRA claims and remand the matter to the trial court with instructions to dismiss the matter. Based on this holding, we need not review the remaining arguments on appeal. See *Attorney Gen v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005) (noting that this Court will generally not decide moot issues).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher