IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

AMY GUSTAFSON,

Plaintiff/Appellant,

vs.

IAN RUPERT, an individual, and IAN'S ENTERPRISE, LLC,

Defendants/Appellees.

and

AMERICAN AIRLINES FEDERAL CREDIT UNION,

Additional Defendant.

Case No. 121,347

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE DON ANDREWS, TRIAL JUDGE

AFFIRMED

Jacob L. Rowe
FULMER SILL, LLC
Oklahoma City, Oklahoma

For Plaintiff/Appellant

Chad C. Taylor
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS, P.C.
Oklahoma City, Oklahoma

For Defendants/Appellees

OPINION BY STACIE L. HIXON, JUDGE:

Amy Gustafson (Gustafson) appeals the trial court's May 10, 2023 order compelling arbitration. The dispositive issue is whether a mandatory arbitration clause in a public insurance adjuster contract is unenforceable under 12 O.S.2021, § 1855(D) because the contract references insurance. Because the contract does not reference insurance in the manner intended by § 1855(D) and the McCarren-Ferguson Act, the arbitration clause is enforceable. The trial court's order compelling arbitration is therefore affirmed.

BACKGROUND

In March of 2019, Gustafson's home sustained damage from a wind and hailstorm. On September 23, 2019, Gustafson signed a "Public Adjuster Contract" (Contract) with "Ian Rupert dba Ian's Enterprise, LLC's" (collectively Ian's Enterprise) to assist her in acquiring benefits under her homeowners' insurance policy. Pursuant to the Contract, Ian's Enterprise would provide public insurance adjusting services and would receive 10% of insurance settlement claim paid by insurer. The Contract further provides Ian's Enterprise "will be reimbursed from time to time for all reasonable and necessary expenses incurred [] in connection with providing the **Services Scope** hereunder."

In October of 2019, Ian's Enterprise submitted a proof of loss to Gustafson's insurer, asserting she was entitled to $30,109.61 in benefits. Shortly thereafter,

Gustafson's insurer determined the value of the loss to Gustafson's home did not exceed the insurance policy's deductible. On May 14, 2020, Gustafson filed suit against her homeowner's insurance carrier for breach of contract and violation of the duty of good faith and fair dealing. During litigation, Ian's Enterprise received a subpoena for all documents related to its handling of Gustafson's insurance claim. Gustafson's bad faith case was ultimately settled.

Subsequently, Ian's Enterprise mailed Gustafson an invoice in the amount of $5,206.65 for expenses relating to its handling of the insurance claim. Of this amount, $5,071.65 was described as an attorney's fee related to the subpoena. Ian's Enterprise later filed two Mechanic's Liens in the Oklahoma County Assessor's Office, claiming entitlement to $5,206.65 and "10% of recovery."

On July 5, 2022, Gustafson filed a petition against Ian's Enterprise, seeking declaratory relief that Ian's Enterprise was not entitled to payment under the Contract, to quiet title to her home, and for slander of title.[1] Ian's Enterprise filed a motion to compel arbitration, asserting the Contract's alternative dispute resolution clause and the Federal Arbitration Act (FAA) mandated binding arbitration.[2] Gustafson disagreed, asserting, *inter alia*, that the arbitration clause was

[1] Although Gustafson named her mortgagee, American Airlines Federal Credit Union, as a party, she sought no relief against it.

[2] Ian's Enterprise also filed a motion to dismiss, which the court denied.

unenforceable under 12 O.S.2021, § 1855(D) as a contract which "references insurance." After additional briefing and a hearing, the trial court granted the motion to compel arbitration. Gustafson sought reconsideration, which the trial court denied by final order entered on May 10, 2023.

Gustafson appeals.

STANDARD OF REVIEW

"As the party opposing the motion for arbitration, [Gustafson] had the burden to 'show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue; an intention discernible from the statute's text or legislative history or an inherent conflict between arbitration and the statute's underlying purpose.'" *Sparks v. Old Republic Home Protection Co. Inc.*, 2020 OK 42, ¶ 14, 467 P.3d 680 (quoting *Thompson v. Bar-S Foods Co.*, 2007 OK 75, ¶ 8, 174 P.3d 567). A trial court's grant or denial of a motion to compel arbitration is reviewed *de novo*. *Id.*

ANALYSIS

For her first assertion of error, Gustafson asserts the arbitration clause is invalid and unenforceable under Oklahoma's Uniform Arbitration Act (OUAA), 12 O.S.2021, § 1855(D). Ian's Enterprise disagrees, asserting the arbitration clause and the FAA mandate arbitration.

The FAA affirmatively declares arbitration clauses valid, irrevocable, and enforceable.[3] *See* 9 U.S.C. § 2. Conversely, § 1855(D) of the OUAA renders an arbitration clause in "contracts which reference insurance" unenforceable. Pursuant to the Supremacy Clause, however, the FAA "preempts state law limiting the enforcement of arbitration." *Sparks*, 2020 OK 42, ¶ 15 (citing *Preston v. Ferrer*, 552 U.S. 346, 352-53, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008)). Accordingly, § 2 of the FAA generally preempts § 1855(D) because § 1855(D) limits the enforcement of arbitration.

In 1945, however, the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, was enacted "to restore the supremacy of the states in the realm of insurance

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[3] Contrary to the Dissent's assertion, the record sufficiently shows that the Contract evidences a "transaction involving commerce" as required by the § 2 of the FAA.

The FAA, 9 U.S.C. § 2, states: "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration . . . shall be valid and enforceable. . . ." The US Supreme Court has consistently construed the language "involving commerce" as "broadly as the words affecting commerce," which "normally mean a full exercise of constitutional power." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

In the present case, the subject matter of the Contract provides sufficient evidence of interstate commerce. The Contract is an employment contract between Ian's Enterprise and Gustafson. Gustafson is an Oklahoma resident. The record indicates Ian's Enterprise is an Oklahoma Limited Liability Company located in Oklahoma and Oregon. Notably, its National Support Center and Claims Department is in Oregon. Finally, the Contract contemplates that Ian's Enterprise will provide insurance claims adjusting services, including contacting and negotiating Gustafson's insurance claim with a national insurance company. Accordingly, the record sufficiently shows that the Contract evidences a "transaction involving commerce" as required by § 2 of the FAA.

Furthermore, Ian's Enterprise's motion to compel arbitration specifically asserted the FAA applied. No party challenged the applicability of the FAA, other than as addressed in this Opinion. It is well settled that appellate courts are not free to raise issues *sua sponte*. *Jordan v. Jordan*, 2006 OK 88, ¶ 16, 151 P.3d 117. The exception going to questions of appellate jurisdiction or public law controversies is inapplicable. *Spencer v. Wyrick*, 2017 OK 19, ¶ 1, 392 P.3d 290.

regulation." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 40, 116 S. Ct. 1103, 134 L. Ed. 2d 237 (1996). The Act grants states with plenary authority over the regulation of insurance and, in certain instances, exempts state laws from FAA preemption. The Act provides, in part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any state for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). In effect, the Act creates a reverse preemption in favor of state law when the law regulates or taxes the business of insurance. *Sparks*, 2020 OK 42, ¶ 17 (citations omitted).

In *Sparks*, the Oklahoma Supreme Court held § 1855(D) was enacted for the purpose of regulating the business of insurance within the meaning of the McCarran-Ferguson Act. *Id.* at ¶ 35. Thus, § 1855(D) reverse preempts the FAA.[4]

The Court in *Sparks* then reviewed the contract before it, a home warranty plan, to determine whether it was a contract that references insurance. *Id.* at ¶¶ 26, 30. Specifically, the Court looked at the "nature" of the home warranty plan, i.e., its terms and effect, to determine whether the particular practice was a part of the

[4] For the McCarran-Ferguson Act to reverse preempt a federal law: (1) the state statute must have been enacted for the purpose of regulating the business of insurance, (2) the federal statute in question must not specifically relate to the business of insurance, and (3) the application of the federal law would "invalidate, impair, or supersede" the state statute. *See* § 1012(b); *Humana Inc. v. Forsyth*, 525 U.S. 299, 307, 119 S.Ct. 710, 142 L.Ed.2d 753 (1999).

business of insurance pursuant to § 1855(D) as defined by the Court's extensive jurisprudence, and guidelines from the US Supreme Court, Oklahoma statutes, and the wisdom of other courts. *Id.* The Court noted "the primary elements of an insurance contract are the spreading and underwriting of a policy holder's risk." *Id.* at ¶ 32 (quoting *McMullan v. Enterprise Fin. Group, Inc.*, 2011 OK 7, ¶ 12, 247 P.3d 1173) ("Whether the contract is one of insurance or of indemnity there must be a risk of loss to which one party may be subjected by contingent or future events and an assumption of it by legally binding arrangement by another.").

After reviewing the home warranty plan, the Court held it met "all the hallmarks of an insurance policy" because the "plaintiffs paid a premium to be insured that they would not have to pay the full repair costs in the event a covered system [] needed repair or replacing." *Id.* at ¶ 33. In short, the Court found the central and important element of the plan was the transfer of risk, and thus, the plan was a contract referencing insurance for purposes of § 1855(D). *Id.* at ¶ 31. As a result, the McCarran-Ferguson Act and § 1855(D) applied, and the arbitration clause contained in the home warranty plan was unenforceable.

Subsequently, in *Choctaw Nation v. Robins & Morton Corp.*, 2022 OK CIV APP 22, ¶ 13, 513 P.3d 563, the Court of Civil Appeals (COCA) addressed whether a construction management contract containing an arbitration clause was a contract referencing insurance for purposes of § 1855(D). Consistent with *Sparks*,

COCA focused on the nature of the contract at issue and not whether it contained the word "insurance" or a section requiring insurance. *Id.* at ¶ 16 (citing *Sparks*, generally). While COCA noted the contract required the procurement of insurance and bonds that "would ultimately result in risks being shifted, such adjustment of risks was not, under any fair reading, the primary function or nature of the [c]ontract." *Id.* at ¶ 17. Rather, the contract's primary purpose was to govern the relationship between the owner and the construction manager. *Id.* Accordingly, COCA held the contract did not reference insurance for purposes of § 1855(D). Thus, the McCarran-Ferguson Act and § 1855(D) were inapplicable and the arbitration clause was enforceable. *See also McKinney v. Cmty. Health Sys.*, 2020 WL 7082713 (W.D. Okla. Dec. 3, 2020) (finding a managed care agreement did not "effect the transfer or distribution of risk between insurer and insured," but was merely an arrangement for the purchase of good and services. Thus, the McCarran-Ferguson Act was inapplicable, and the FAA controlled, requiring enforcement of the arbitration clause.).

In the present case, the parties dispute whether the Contract is a contract referencing insurance for purposes of § 1855(D). Gustafson asserts it is, noting the Contract is rife with references to insurance, insurer, and insured; that it obligates Ian's Enterprise to provide insurance claims adjusting; it includes a listing of acts a public adjuster is prohibited from engaging in under Oklahoma's Insurance Code;

it includes an "Oklahoma Fraud Warning" that is legally required to be placed on every insurance claim form; the insurance adjuster must obtain licensure from the Oklahoma Insurance Commission; and the adjuster must comply with the Oklahoma Insurance Adjusters Licensing Act. Ian's Enterprise disagrees, asserting it is not an insurer, and the adjusting Contract is not one that regulates or taxes the business of insurance.

Consistent with *Sparks*, the Court must look at the "nature" of the Contract. First, the Contract addresses claims adjusting, an integral part of the policy relationship between the insurer and insured. In addition, the Contract is replete with references to insurance, insured, and insurer. The Contract, however, is essentially an employment agreement that governs the relationship between Gustafson and Ian's Enterprise. The Contract does not transfer or spread any risk between Gustafson and Ian's Enterprise. Accordingly, the Contract does not reference insurance for purposes of § 1855(D). The McCarran-Ferguson Act and § 1855(D) are therefore inapplicable, and the arbitration clause is enforceable under the FAA.

Finally, Gustafson asserts the binding arbitration provision in the Contract is

illegal and void pursuant to 36 O.S.2021, § 6216.2 and/or that the Contract's choice of law provision mandates that Oklahoma law be applied.[5]

A review of the record on appeal reveals Gustafson did not raise either issue before the trial court. Matters not first presented to the trial court for resolution are generally not considered on appeal. *Stonecipher v. Dist. Court of Pittsburg Cnty.*, 1998 OK 122, ¶ 11, 970 P.2d 182. This is particularly true as to affirmative defenses not raised below. As discussed in *Tulsa Ambulatory Procedure Ctr. v. Olmstead*, 2024 OK 57, ¶ 15, __ P.3d __, a party is obliged to raise affirmative defenses promptly. Failure to do so may operate as a waiver of that defense. *Id.* Because these issues were not presented to the trial court, we will not consider them on appeal.[6]

CONCLUSION

The trial court's May 10, 2023 order compelling arbitration is therefore affirmed.

AFFIRMED.

HUBER, P.J., concurs, and BLACKWELL, J., dissents.

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[5] Section 6216.2 provides: "F. A public adjuster contract may not contain any contract term that: . . . 4. Precludes any party from pursuing civil remedies."

[6] In its brief, Ian's Enterprise also requested appeal-related fees and costs. However, the motion must be made by a separately filed and labeled motion pursuant to Oklahoma Supreme Court Rule 1.14. We therefore decline to address the request. Ian's Enterprise may reassert this request by complying with Rule 1.14.

BLACKWELL, J., dissenting:

I respectfully dissent. First, while no party raises this specific issue, I cannot help but note that it is entirely unclear on this record whether the contract at issue is governed by the FAA *at all* because it appears to lack a sufficient nexus to interstate commerce. While the contract is clearly commercial in nature, both the FAA and our federal Constitution require more. *See* 9 U.S.C. § 2 (governing, among others, "a contract evidencing a transaction involving commerce"); 9 U.S.C. § 1 (defining "commerce" as "commerce among the several States . . . ."); U.S. Const. art. I, § 8, cl. 3 (describing congressional power, as relevant here, as the "Power . . . To regulate Commerce . . . among the several States . . . ."). *See generally*, *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 841 (discussing the foregoing provisions and holding that the language of the FAA "signals an intent to exercise Congress' commerce power to the full"). While the majority cites to the possibility that Ian's Enterprises LLC has some presence in Oregon as significant, it is not clear to me that diversity of citizenship of the parties would be a sufficient factor, in and of itself, to transform an otherwise intrastate contract into one concerning "commerce among the several States." U.S. Const. art. I, § 8, cl. 3. State courts, just as federal courts, must recognize that "[w]hile Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have 'always

recognized that the power to regulate commerce, though broad indeed, has limits.'" *Natl. Fedn. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 554, 132 S. Ct. 2566, 2589 (2012) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 196, 88 S.Ct. 2017 (1968)).

Notably, the Oklahoma Supreme Court has recognized just such a limit in unanimously holding that a "nursing home admission contract d[id] not evidence a transaction involving commerce [or] substantially affect[] interstate commerce" within the FAA's meaning. *Bruner v. Timberlane Manor Ltd. Partnership*, 2006 OK 90, ¶ 42, 155 P.3d 16, 31. While perhaps "an outlier on this issue," *Sutcliffe v. Mercy Clinics, Inc.*, 856 N.W.2d 382 (Iowa Ct. App. 2014), the holding is binding on this Court. If the FAA's preemption principles do not apply to this contract *at all*, we would have no occasion to interpret the OUAA's exceptions to arbitrable contracts in light of either the FAA or the McCarren-Ferguson Act. Unburdened by federal constrictions, we might very well reach a different conclusion as to the legislative intent behind the OUAA's exceedingly broad exception for "contracts which reference insurance." 12 O.S. § 1855(D). At minimum, I would order supplemental briefing on this question.[1]

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[1] As noted, I recognize this precise issue has not been raised or briefed. However, the question of the applicability of the FAA to this contract has been at issue since the inception of the case. Because no party has raised the specific question of whether this contract is one concerning "commerce among the several States," U.S. Const. art. I, § 8, cl. 3, I would order supplemental briefing and consider the issue. In my view, we have the authority to do so. *See Bd. of Cnty. Comm'rs of Muskogee Cnty. v. Lowery*, 2006 OK 31, 136 P.3d 639, 645 (noting a prior order for supplemental briefing); *Keota Mills & Elevator v. Gamble*, 2010 OK 12, ¶ 19, 243 P.3d 1156, 1162 ("When an issue or claim is properly before the court, the court is not

Second, even assuming the contract falls under the FAA, I would reverse. The Oklahoma Supreme Court has directly held that the OUAA's exception for "contracts which reference insurance," *id.*, "is a state law enacted for the purpose of regulating insurance under the McCarran-Ferguson Act . . . ." *Sparks v. Old Republic Home Prot. Co., Inc.*, 2020 OK 42, ¶ 1, 467 P.3d 680, 682. I agree with the majority and other cases that there must be some limit imposed even under this broad rule, as surely just mentioning the word insurance in a contract cannot except the parties from an otherwise binding agreement to arbitrate. However, this contract, while not "an insurance contract," directly concerns "the business of insurance." Indeed, per statute, both "acting as an agent for, or otherwise representing . . . any person . . . in . . . adjustment of claims or losses" and "[a]ny other transactions of business in this state by an . . . adjuster" are "doing the business of insurance in this state." 36 O.S. § 404. Accordingly, I would find that, as to this contract, the McCarran-Ferguson Act shields § 1855(D)'s carve out for "contracts which reference insurance" from FAA preemption and allow the plaintiff's claim to proceed in district court.

August 9, 2024

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limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of the governing law.").