NO. 20-963

IN THE
Supreme Court of the United States

STEPHEN K. WALTON, SR.,
Petitioner,

v.

VIRGINIA INTERNATIONAL TERMINALS, LLC,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

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I. THE STATE COURT JUDGMENT DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

VIT argues that the State court properly applied Virginia law to find that Walton's personal injury action was contractually time-barred. But the fact is that the State court's opinion was not based on an adequate and independent state law ground. The State court did not find that that VIT's Schedule of Rates was an enforceable contract under Virginia law. The lower court specifically found that Walton did not know about VIT's Schedule of Rates. For that reason, a key element necessary to form a contract under Virginia law---mutuality of assent---did not exist, and the court based its finding of an implied contract solely on the Shipping Act of 1984.

The lower court accepted as true the evidence that Walton was not aware of VIT's Schedule of Rates (SOR). (Pet. App. A9). Because of this finding, the court understandably did not hold that a contract between Walton and VIT was formed under Virginia law. Virginia contract law requires that the parties have mutuality of assent---a meeting of the minds---to form an enforceable express or implied contract. Spectra-4, LLP v. Uniwest Commer. Realty, Inc., 290 Va. 36, 45, 772 S.E.2d 290, 295 (2015). 'It is crucial to a determination that a contract exists… that the minds of the parties have met on every material phase of the alleged agreement.' Phillips v. Mazyck, 273 Va. 630, 636, 643 S.E.2d 172, 175 (2007). "Until all understand alike, there can be no assent…." Progressive Constr. Co. v. Thumm, 209 Va. 24, 30, 161 S.E.2d 687, 691(1968). The court could not make a finding that

there was a meeting of the minds between Walton and VIT concerning VIT's 66 page SOR , when it found that Walton did not know about the Schedule of Rates.

There was no evidence of an express contract between Walton and VIT. While there was an express contract between Walton's employer MRS and VIT, Walton was not a party to that contract, so any time limitations therein did not apply to him under Virginia law. Commercial Constr. Specialties, Inc. v. ACM Constr. Maintenance Corp., 242 Va. 102, 106, 405 S.E.2d 852, 854 (1991). VIT does not argue otherwise.

In the absence of the necessary meeting of the minds between Walton and VIT to form a contract under Virginia law, the lower court looked to the Shipping Act of 1984 as the basis of an implied contract between them. (Circuit Court opinion, Pet. App. A2, A7-8). As the court explained:

> The Court finds that VIT's SOR meets all of the requirements of an effective contract. **Specifically, the SOR functions as an implied contract pursuant to 46 U.S.C. § 40501.**
>
> * * *
>
> "Any such schedule [of rates] made available to the public is enforceable by an appropriate court as an implied contract without proof of actual knowledge of its provisions." 46 U.S.C. § 40501(f).

(Pet. App. A8)(Emphasis added).

VIT mentions that Virginia Code § 62.1-132.10(B) permits a **port authority** to compile charges, rules, and practices in effect at Virginia ports, perhaps so that the Court might infer that the Virginia statute authorizes VIT to issue a schedule of

rates. (Brief in Opposition, p. 10). But VIT is not a port authority. It is a private Virginia company. The Virginia statute refers to the Virginia Port Authority, which is a different entity. Virginia Code § 62.1-128. The Virginia statute cited by VIT does not does not enable VIT to do anything, let alone issue a schedule of rates.

In the case of Hudson v. Jarrett, 269 Va. 24, 31, 606 S.E.2d 827, 830 (2005), cited by VIT, the Virginia Supreme Court stated in *dicta* that two stevedoring companies agreed to conditions prescribed by VIT's schedule of rates by using the facility. True enough, but the Court did not indicate whether or not those companies had actual notice of the SOR and agreed to work under its rules; nor did it hold that SOR was a contract under Virginia law. In Hudson, *supra*, and in the later case of Moore v. Va. Int'l Terminals, Inc., 283 Va. 232, 238, 720 S.E.2d 117, 120 (2012) the Court held that VIT's SOR was a **not** a contract within the meaning of the Virginia Workers Compensation Act.

Moreover, the notice-of-injury and shortened time limitation provisions at issue in this case were not in issue in Hudson, *supra*, nor in Moore, *supra*. In fact, those provisions were not in VIT's SOR until VIT published its new SOR on October 1, 2016. (See VIT Schedule of Rates, Pet. App. A66, and Plaintiff's Brief in Opposition, Pet. App. 152).

More to the point, the lower court's opinion does not mention the foregoing Virginia statutory or case law cited by VIT. As the lower court specified in its opinion, it found an enforceable implied contract solely by virtue of the Shipping Act. Because there was no meeting of the minds between Walton and VIT, there

was no ground under Virginia law to find an enforceable contract.

II. BECAUSE ENFORCEABILITY OF THE SCHEDULE OF RATES TO OVERRIDE PROVISIONS OF STATE LAW THAT MAKE WALTON'S SUIT TIMELY DEPENDS ON THE SHIPPING ACT, PRE-EMPTION IS THE ISSUE.

VIT maintains that, under the Shipping Act and Virginia law, its SOR is enforceable as an implied contract to time bar Walton's state law personal injury action, and that pre-emption is not an issue in this case. (Brief in Opposition, p. 16). VIT's argument ignores the fact that the only possible legal basis for finding VIT's Schedule of Rates to be an enforceable implied contract, without the mutuality of assent required by Virginia law, is the Shipping Act. Perhaps because the legality of VIT's SOR derives from the Shipping Act, and because the Shipping Act says nothing about regulation of state law personal injury actions, VIT urged the lower court not to consider federal pre-emption, and it urges this Court to do the same. Notwithstanding that, unless the Shipping Act authorizes the time-bar provisions in VIT's SOR with respect to state law personal injury actions, and thus pre-empts conflicting Virginia law on timeliness of such actions, Walton's suit against VIT is timely.

Because the lower court did not find a meeting of the minds between Walton and VIT, and instead found that Walton did not know about VIT's SOR, there can be no enforceable express or implied contract under Virginia law. (See Part I of the Argument above). That leaves the Shipping Act of 1984 as the remaining possible legal authority to support a finding of an enforceable implied contract that time-

bars Walton's state law personal injury claim. Indeed, when VIT was asking the lower court to grant its plea in bar, it argued "Pursuant to federal statute, VIT's Schedule of Rates is enforceable without proof that Plaintiff had actual knowledge of it provisions." (Brief in Support of Plea in Bar, Pet. App. A53).

Although the legality of VIT's SOR and the time-barring provisions within it depends on the Shipping Act, VIT utterly fails to show how the Shipping Act authorizes its SOR to impose time limitations on a land-based state law personal injury action to override conflicting Virginia law, under which Walton's suit was timely. A case cited by VIT on enforceability of a time-to-sue limitation in a marine terminal tariff, Fed. Commerce & Navigation Co. v. Calumet Harbor Terminals, Inc., 542 F.2d 437 (7th Cir. 1976), held that the Shipping Act of 1916 did **not** authorize notice of claim or shortened time-to-sue limitations. 542 F.2d at 441. (Brief in Opposition, p. 12). VIT makes no attempt to distinguish that holding from the present case. VIT makes no attempt to show how the Shipping Act of 1984, as amended in 1998, now authorizes the notice-of-injury and time-to-sue provisions at issue here to apply to a land-based state law personal injury claim. VIT engages in no textual analysis of the current Shipping Act to show how a statute that authorizes a marine terminal operator to issue a schedule of rates pertaining to receiving, delivering, handling, or storing **property** also authorizes the SOR to impose notice-of-injury and time-to-sue limitations on land-based personal injury actions brought pursuant to Virginia law, so as to time-bar an action which is otherwise timely under Virginia law. (The Virginia common law and statutory

provisions under which Walton's suit is timely are discussed in the Petition for Certiorari, pp. 8-9).

VIT attempts to avoid any inquiry into whether the Shipping Act pre-empts the provisions of Virginia law which make Walton's suit timely, by saying that the time limitations of which the Petitioner complains are in the Schedule of Rates, not the Act. (Brief in Opposition, p. 16). That is a shell game argument. Marine terminal schedules of rates are creatures of the Shipping Act. VIT's Schedule of Rates derives its legal authority, and any power to override conflicting Virginia law, from the Shipping Act and the Supremacy Clause of the U.S. Constitution.

Whether a federal statute overrides or displaces state law concerning the timeliness of a tort action brought under state law is an issue of federal pre-emption. CTS Corp. v. Waldburger, 573 U.S. 1, 3-4 (2014)(holding that 42 U.S.C. § 9658 of CERCLA has a discovery rule that pre-empts state statutes of limitation that conflict with the federal statute). Whether or not the Shipping Act authorizes notice-of-injury and time-to-sue provisions in a marine terminal's schedule of rates to time-bar a state law personal injury tort action that would otherwise be timely under state law, is likewise an issue of federal pre-emption, and it is the deciding issue in this case. Without such pre-emption, the States remain free to regulate land-based personal injury tort actions for their citizens without being subject to the whims of individual marine terminal operators throughout the nation.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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