

SUPREME COURT OF NEW JERSEY

DOCKET NO. _____

<p>GERALD FAZIO JR., Plaintiff-Petitioner, v. ALTICE USA, CABLEVISION, OPTIMUM, and OPTIMUM MOBILE, Defendant-Respondents.</p>	<p>A PETITION FOR CERTIFICATION FROM THE JULY 10, 2024, JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-2102-22 Sat Below: Hon. Thomas W. Sumners. Jr., J.A.D Hon. Morris G. Smith, J.A.D. Date: August 9, 2024 CIVIL ACTION</p>
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PETITION FOR CERTIFICATION OF

PLAINTIFF-PETITIONER GERALD FAZIO, JR.

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REASONS WHY CERTIFICATION SHOULD BE ALLOWED

Altice USA and associated entities (collectively “Altice”)¹ provide mobile phone and other services to customers. At its mobile phone stores, its business practice is to require new customers to agree to be bound by an arbitration provision sight unseen when they buy a new phone. JA45. Specifically, Altice’s Retail Installment Contract for a phone requires customers to agree to be bound by an incorporated Customer Service Agreement and an arbitration provision therein. JA18. Altice attests that it is its business practice to discuss the Customer Service Agreement, which contains the arbitration clause, with the customer at the time of sale and then send the arbitration clause and opt-out instructions to the customer by email. JA45. However, in this case there is no evidence that Altice ever actually sent the email with the arbitration agreement and opt-out instructions. The circumstantial evidence, such as the fact that Altice has failed to produce the email and the fact that Mr. Fazio also could not find the email, suggest that it was not sent. JA15. Only Altice could prove it one way or the other. The appellate division held that, regardless of Altice’s inability to show that it actually sent Mr. Fazio the arbitration agreement and opt-out

¹ Altice USA is used herein to refer to all Defendants/Appellees

provision, he was bound by the agreement anyway because he continued using the cell phone services. Pa11. However, this holding seems to contradict the requirement that an agreement to arbitrate constituting a knowing waiver. *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 48 (2020). Under the appellate division's decision, a corporation can compel a customer into arbitration by attesting to business practices that, if performed, would bind the customer, but without having to show that it actually performed the actions.

In addition, the appellate division held that Mr. Fazio assented to the arbitration provision by continuing to use the cell phone service for nearly two years. Pa11. However, knowing waiver has to be present at the time the arbitration provision becomes binding and the provision cannot become binding without knowing waiver. The passage of time and continuation of the business relationship cannot stand in for knowing waiver of rights. The appellate decision creates ambiguity in the case law surrounding arbitration provisions suggesting that waiver can occur from the passage of time and continuation of a business relationship even if there was no knowing waiver at the outset. Certification should be granted to clarify this issue.

Finally, the appellate decision concluded that Mr. Fazio's NJ LAD claim is within the scope of the arbitration provision, which Mr. Fazio respectfully submits was error. Here, this denial of access claims involves a unique set of

circumstances in a pandemic, but the practical implications of this holding extend beyond that. To illustrate, under this holding, two disabled persons, one who is an Altice customer and one who is a potential Altice customer, could enter a store together and both be subjected to a discriminatory practice denying them access, but the one who is an Altice customer would have to arbitrate while the potential customer could access the courts. This incongruity demonstrates that Mr. Fazio's public accommodation claim is outside the scope of Altice's arbitration provision. The cause of action does not arise out of the business relationship between Altice and Mr. Fazio, it arises out of the fact that Altice is a place of public accommodation and Mr. Fazio is a disabled member of the public. Public policy considerations, such as ensuring that places of public accommodation are accessible to disabled persons and that disabled persons are not wrongly dissuaded from or prevented from accessing the courts, require clarity around this question, so certification should be granted.

STATEMENT OF THE MATTER INVOLVED

Twenty-two years ago, Mr. Fazio suffered an accident in which he broke his neck. JA10 at ¶6. He survived, but became a quadriplegic. *Id.* Through hard work and rehabilitation, Mr. Fazio recovered the ability to walk and use his arms, but he still carries physical effects and limitations from having broken his neck. *Id.* He cannot bend over, his walking is severely impaired, and he loses

balance easily, sometimes with no warning. *Id.* His breathing is severely impaired. *Id.* He has to do breathing exercises and is unable to do any cardio exercise or other activities that will raise his heart rate because of his limitations. *Id.* As a result of his physical limitations, Mr. Fazio is physically unable to wear a mask or cover his face in any way. *Id.*

On November 2019, Mr. Fazio visited the retail store operated by Altice. He bought a new phone (financed) and signed up for mobile service. As a result of those transactions, Mr. Fazio received many documents.

The documents Mr. Fazio received when he bought his phone

Mr. Fazio was given and signed a document called a “Retail Installment Contract/Retail Installment Sale Agreement/Retail Installment Obligation/Credit Sale Contract.” JA17. There is no arbitration clause or waiver of rights in this document. There is a *notice* of arbitration provision in this document, but no actual arbitration clause. This signed document was produced by Altice.

Mr. Fazio was given three receipts for his purchase. JA21-22, 48. There is no arbitration agreement or waiver of rights on those receipts. An unknown number of other documents were emailed to Mr. Fazio. *See* JA48 (receipt stating, “A copy of all documents and agreements including Terms & Conditions AutoPay, handset insurance, etc. will be sent electronically to the email address

you provided during account creation”). It is notable that no “Service Agreement” or arbitration clause is listed here as the documents that would be sent to Mr. Fazio.

The document Mr. Fazio did not receive

It is undisputed that Mr. Fazio was not given a paper copy of the document with the arbitration clause or the Service Agreement. Altice represents that it is its business practice to require prospective customers to agree to the arbitration clause and waiver of rights, and then send the actual language to them after by email. JA45 at ¶4. The Service Agreement is the only document with an actual arbitration clause, and there is no evidence that it was ever provided to Mr. Fazio by email or otherwise. Mr. Fazio searched his email for “Altice,” “Optimum” and “Service Agreement,” and did not find any such email. JA15.

The facts giving rise to this litigation

In June 2021, Mr. Fazio visited the Oakland Altice store in June 2021 to get a new SIM card for his phone. JA11 at ¶11. Defendants’ employees immediately told him that he had to leave the store. Mr. Fazio told the employees that he cannot cover his face for medical reasons. Id. at ¶12. The employees called the police to have him removed from the store. Id. at ¶¶14-15.

QUESTIONS PRESENTED

- 1) Does a broadly drafted arbitration clause between a cell phone carrier and disabled customer include within its scope claims brought pursuant to the NJ Law Against Discrimination alleging denial of access to a place of public accommodation?
- 2) Can a cell phone company compel a person to arbitrate claims against it by attesting to the fact that it has put business practices in place intended to bind the person to arbitration, but not showing that it actually followed the business practice?

ERRORS COMPLAINED OF

- 1) It was error to hold that a person knowingly waives his or her constitutional rights and becomes bound by an arbitration provision when the party proffering the arbitration provision represented that it would send the full text and opt-out provisions by separate email, but there is no evidence that it ever did.

- 2) It was error to hold that a NJ LAD claim concerning access to a place of public accommodation is within the scope of an arbitration provision concerning a cellular phone and service.
- 3) It was error to find as a matter of fact that Mr. Fazio could have gone to another cell phone store when there is no evidence in the record concerning how prevalent such arbitration clauses are. Pa13. This finding of fact was material in the court's determination that the arbitration clause was not an unconscionable contract of adhesion.

COMMENTS WITH RESPECT TO APPELLATE DIVISION DECISION

The appellate division decision stated that "the record shows...that defendants emailed a 'Customer Service Agreement' to him." Pa10. This was an error or misstatement of fact. The record contains no evidence that Altice emailed Mr. Fazio the Customer Service Agreement. The email is the only document that could have shown this and Altice did not produce it despite Mr. Fazio raising this issue below. Mr. Fazio's inability to find the email is further circumstantial evidence that the email was never sent.

CONCLUSION

For the foregoing reasons, Certification should be granted.

Respectfully Submitted,

/s/ Dana Wefer

Dana Wefer, Attorney for Appellant Gerald Fazio