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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No.: 2017-CP-40-03697
Appellate Case No. 2018-000889

Amanda Leigh Huskins and Jay R. Huskins……Appellants,

v.

Mungo Homes, LLC,……..Respondent.

RESPONDENT'S RETURN TO APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Respondent Mungo Homes, LLC ("Respondent") hereby submits this return to Appellants' Petition for Rehearing.

INTRODUCTION

Appellants seek rehearing of this Court's decision on a single issue; this Court's unanimous decision to sever the final two sentences of the parties' arbitration agreement, which this Court determined sought to reduce the statute of limitations for claims under the contract. As explained more fully below, rehearing of this matter is not warranted under Rule 221 because this Court's unanimous opinion is correct under the law, and does not overlook or misapprehend any points of fact or law. Indeed, the single issue that is the subject of the petition for rehearing was "considered and expressly decided against the [appellant] by this Court in the opinion filed." *Clemmons v.*

Nicholson, 188 S.C. 124, 132 198 S.E. 180, 183 (1938). Therefore, Respondent respectfully requests that this Court deny Appellants' petition for rehearing.

STANDARD OF REVIEW

In order to prevail on a petition for rehearing, the petitioner must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Retirement Sys*., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The purpose of a petition for rehearing "is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron* at 466, 719 S.E.2d at 643 (quoting *Kennedy v. S.C. Retirement Sys*., 349 S.C. at 532, 564 S.E.2d at 322). Thus, our appellate courts will deny a petition for rehearing whenever "the points set forth in the petition have all been considered and expressly decided against the respondent by this Court in the opinion filed." *Clemmons* 188 S.C. at 132, 198 S.E. at 183 (1938).

ARGUMENT

In their petition for rehearing, Appellants reassert the same arguments previously made to this Court. Appellants assert, without legal support, that unconscionable terms in arbitration agreements are not severable in the absence of a severability provision contained within the arbitration agreement. (See, App. Final Reply Brief at Sec. III). Accordingly, the petition for rehearing does not identify an issue overlooked or misapprehended by this Court, but simply repeats arguments previously made and rejected by this Court with which the Appellants disagree. For this reason, the petition should be denied.

Furthermore, while the petition for rehearing is procedurally defective, the arguments made by Appellants are likewise without merit.

First, it is indisputable that S.C. Code Section 15-3-140 unambiguously applies to *all* contracts in South Carolina. The statute does not contain a carve out making it inapplicable to arbitration agreements.

Moreover, this Court correctly held that it could sever unconscionable provisions in an arbitration agreement in the absence of a severability provision where the clear intention of the parties to arbitrate would not be disturbed.

Accordingly, this Court's well-reasoned decision should remain and the petition for rehearing should be denied.

I. This Court correctly held that S.C. Code section 15-3-140 applies to *all* contracts in South Carolina, including arbitration agreements.

In its filed decision, this Court relied on S.C. Code section 15-3-140 to sever the final two sentences of the subject arbitration agreement. The statutes states:

> No clause, provision or agreement in *any contract of whatsoever nature*, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

Id. (emphasis added).

Here, the Court determined that the final two sentences of the arbitration agreement attempted to do that which is subject to Section 15-3-140; shorten the statute of limitations. Section 15-3-140 is unambiguous in that it applies equally to "*any contract of whatsoever nature*." An arbitration agreement is unquestionably included in "*any contract of whatsoever nature*."

Nonetheless, Appellants argue, without any legal authority, that arbitration agreement are excluded from Section 15-3-140. This argument is pure conjecture and contrary to the

unambiguous text of the statute. Thus, Appellants' argument that arbitration agreements are not subject to Section 15-3-140 is without merit.

Furthermore, the contract between the parties was for the construction of a new construction home that was not yet built. (R. p. 28). In this respect, it is indisputable that the Federal Arbitration Act ("FAA") applies to the contract. *See*, *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 594-595, 553 S.E.2d 110, 117-118 (2001).

As the United States Supreme Court has held, a state's law cannot place arbitration agreements on unequal grounds with all other contracts in the State. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011). In Appellant's petition for rehearing, they advocate for a reading of Section 15-3-140 that puts arbitration agreement on unequal grounds with all other contracts in South Carolina. This is expressly prohibited by the Federal Arbitration Act and the United States Supreme Court.

Accordingly, this Court correctly held that Section 15-3-140 served to sever the final two sentences of the arbitration agreement and left the remainder of the arbitration agreement intact because it did not "defeat the essential purpose" of the arbitration agreement.

II. The absence of a severability provision within the arbitration agreement does not prohibit severability of unconscionable clauses

In their petition for rehearing, Appellants argue that severing of the final two sentences of the arbitration agreement is "rewriting" the arbitration agreement between the parties. This argument, however, is without merit. Indeed, this Court's filed decision expressly recognizes that severing the final two sentences (as required by section 15-3-140) *does not* rewrite the parties clear and unambiguous agreement to arbitrate all claims arising under the contract between the parties.

In fact, this Court's decision does not rewrite anything at all. It simply removed two final sentences that have no relationship to the intention of the parties to arbitrate their claims and were deemed by this Court to be unenforceable in the first place.

Additionally, Appellants argue that South Carolina law prohibits the severing of contract provisions where no severability clause is contained within the contract. Supporting this argument, Appellants rely on a single footnote in *Smith v. D.R. Horton* advising that the Court did not undertake to analyze whether unconscionable provisions in an arbitration agreement should be severed. *See, Smith v. D.R. Horton*, 417 S.C. 42, 50 fn. 6, 790 S.E.2d 1, 5 fn. 6 (2016). However, Appellants' broad sweeping argument is not the holding in *Smith v. D.R. Horton,* nor is it consistent with long standing common law principled relied on by this Court in its filed decision.

The *Smith v. D.R. Horton* Court did not hold that contract provisions are inseverable absent a severability clause. Instead, the Court determined that the unconscionable provisions *in that case* were so intertwined with the agreement to arbitrate that it declined to analyze whether unconscionable provisions were severable. *Id.*

Here, as recognized by this Court's unanimous opinion, the agreement to arbitrate in this case is not intertwined with other provision of the contract, and there are no cross-references. Instead, there is standalone agreement to arbitrate. Thus, the footnote in *Smith v. D.R. Horton*--to the extent a footnote is precedential--is not applicable to this case.

Rather, this Court correctly recognized that it is well established under South Carolina law that a Court may sever unconscionable provisions in a contract where it does not disrupt the intentions of the parties, or where striking the entire contract would lead to an unconscionable result. *See, Doe v. TCSC LLC,* 430 S.C. 602, 615, 846 S.E.2d 874 (Ct. App. 2020)("courts have discretion though to decide whether a contract is so infected with unconscionability that it must be

scrapped entirely, or to sever the offending terms so the remainder may survive.") citing, *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) ("The entirety or severability of a contract depends primarily upon the intent of the parties . . . ."); and *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result.").

In the matter at bar, Appellants cite to no legal authority, other than their broad interpretation of footnote 6 in *Smith v. D.R. Horton*, demonstrating that Courts are unable to strike unconscionable provisions in a contract absent a severability clause. Indeed, Respondent is unaware of any such authority. Striking an entire contract based upon a single unconscionable clause that does not affect the intention of the parties to the contract would lead to unconscionable results[1].

Here, the intention of the parties to arbitrate all claims is clear and unambiguous. Striking the final two sentences of the arbitration agreement does not change this clear and unambiguous intention of the parties. Accordingly, the Court correctly determined that the final two sentences of the arbitration agreement could be severed, as required by S.C. Code section 15-3-140, without disturbing the clear intention of the parties to arbitrate all claims.

[1] Appellants reliance on cases dealing with non-competition provisions is without merit. First, the agreement at issue in this case is an arbitration agreement, not a non-competition agreement. Moreover, the law concerning non-competition agreements does not rely on whether there is a severability provision. Rather, the law concerning non-competition agreements states that a court may not insert its own language into the non-compete agreement to make the provision conscionable. For instance, a court cannot rewrite the geographic restriction of a non-compete where the geographic restriction in the agreement between the parties is overly broad. This is applicable to a non-competition agreement even where the agreement contains a severability provision. Here, the Court need not rewrite any provisions in the contract. Striking the last two sentences of the arbitration agreement does nothing to alter the parties' intention to arbitrate all disputes arising out of the contract.

CONCLUSION

Appellants' petition for rehearing merely restates the same arguments made to this Court previously, which the Court correctly rejected in its filed decision.

Furthermore, this Court correctly determined that it could sever the last two sentences of the arbitration agreement without affecting the intention of the parties' agreement to arbitrate.

Accordingly, this Court did not overlook or misapprehend any facts or issues in its filed opinion, and the petition for rehearing should be denied.

This 4th day of July, 2022.

Respectfully submitted by,

Steven R. Kropski, Esq. (S.C. Bar # 101441)
David W. Overstreet, Esq. (S.C. Bar# 16965)
Earhart Overstreet LLC
P.O. Box 22528
Charleston, South Carolina 29413
(843) 972-9404

Attorneys for Respondent Mungo Homes, LLC

Earhart Overstreet
ATTORNEYS AT LAW

Main: 843.972.9400
www.earhartoverstreet.com
PO Box 22528, Charleston, SC 29413

Steve@earhartoverstreet.com
Direct: 843.972.9404

July 4, 2022

Via Email Filing

V. Claire Allen, Chief Deputy Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Huskins v. Mungo Homes, LLC
Appellate Case No.: 2018-000889

Dear Ms. Allen:

Enclosed please find Respondent Mungo Homes LLC's return to Appellants' Petition for Rehearing. Please do not hesitate to contact me if you have any issues opening the attached document.

Sincerely,

STEVEN R. KROPSKI

cc: Charles H. McDonald, Esq.
Beth B. Richardson, Esq.
Matthew A. Nickles, Esq.