

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Jul 08 2022**

**SC Court of Appeals**

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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

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

v.

Mungo Homes, LLC, .....Respondent.

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**REPLY TO RETURN TO PETITION FOR REHEARING**

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Pursuant to Rule 240, SCACR, Appellants Amanda Leigh Huskins and Jay R. Huskins submit this reply to Respondent’s return in opposition to their petition for rehearing of the above-captioned matter. Tellingly, Respondents fail to refute the issue and errors of law Appellants raised in their Petition for Rehearing.

First, Respondents do not deny that the issue regards this Court’s authority to sever unconscionable and oppressive provisions in an adhesive, take-it-or-leave-it arbitration clause when Respondent Mungo Homes (“Mungo”), the drafter, failed to include any severability provision.

Second, Respondents do not deny that in severing the one-sided and oppressive provisions from the arbitration clause and enforcing the remainder against the Huskins who

lacked any meaningful opportunity to agree to such clause in the first instance, this Court's June 1, 2022 Opinion fails to account for several principles of contract law in its reasoning, including:

- (1) South Carolina common law contract principles give considerable skepticism to adhesive, one-sided and oppressive agreements to arbitrate, and the Court did not afford due skepticism to the adhesive arbitration clause at issue in this matter;
- (2) South Carolina common law contract principles construe contracts against their drafters, and the court impermissibly construed the adhesive arbitration clause at issue in this matter in the drafter's favor by taking the position that, setting the unconscionable sentences aside, the core of the parties' agreement remained intact when in fact the parties did not truly bargain for the paragraph in the first instance;
- (3) South Carolina common law refuses to step in and actively rewrite parties' contracts without any express intent of the parties to do so, and the Court impermissibly rewrote the arbitration clause by striking out two unconscionable sentences within the adhesive arbitration paragraph when there was no authority expressed by the parties in the contract for the court to do so in such circumstances.

"Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016).

Third, remaining faithful to the common law principles of contract stated above, Respondents fail to discuss, much less refute, in any meaningful manner the fact that no South Carolina court has ever struck out (or blue penciled) unconscionable sentences within an adhesive arbitration paragraph to save the remainder, without that arbitration paragraph or the contract as a whole expressing the parties' intent to do so under such circumstances.

To this end, Respondents do not even address the Court's error in relying on section 36-2-302(1) of the South Carolina Code of Laws from the Uniform Commercial Code as providing it the authority to sever the unconscionable sentences from the adhesive arbitration clause in this case. That error in and of itself is grounds to grant Appellants' Petition.

Further, Respondents' discussion of section 15-3-140 of the South Carolina Code of Laws misses the mark. Appellants agree that this statute applies to all contracts. What it does not do is provide authority for the court to strike out or blue pencil two sentences set within an adhesive, one-sided, and oppressive arbitration clause, where the drafter of the contract made no provision for the same. And Respondents provide no authority to refute Appellants' position related to this statute in this regard.

Moreover, Respondents' attempt to disavow the binding authority expressed in *Smith v. D.R. Horton*, is unavailing. There is no canon of construction that allows this court to disavow the opinion of the South Carolina Supreme Court just because it may be expressed in a footnote rather than in the body of an opinion. Whether set forth in the body of the opinion or in a footnote, the South Carolina Supreme Court's decision in *D.R. Horton* is binding authority for any lower court. The Supreme Court in *D.R. Horton* clearly affirmed that a court should not sever offending provisions from an arbitration clause in the absence of a specific severability clause. 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6.

Fatally though too, Respondents fail to resolve, much less mention, the issue raised to this Court regarding *Doe v. TCSC, LLC*, 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2021). The court in *Doe* specifically stated that it could sever the offending provisions at issue in that case because (1) removing unconscionable clauses would not disrupt the core of the parties' bargain, and (2) the parties plainly express the intent to sever in such circumstances in the contract. But

Mungo failed to include a severability clause anywhere in its Purchase Agreement, and this Court does not account for that difference when relying on *Doe* for its authority to sever the unconscionable sentences from the adhesive arbitration paragraph.

Rather, Respondents encourage this Court to make new common law in South Carolina related to contract interpretation and enforceability. Respondents encourage this Court to uphold its decision and go further than the court in *Doe* (and any other court in South Carolina for that matter, including in derogation of the South Carolina Supreme Court in *D.R. Horton*), by striking provisions within a contract without the authority expressed by the parties within the contract for the court to do so, so long as the court finds that doing so will not disturb the core of the parties' bargain. South Carolina courts should not get into the business of determining what is the "core" of the parties' bargain in a contract. Such ruling could easily extend to contractual terms well beyond adhesive arbitration agreements and will be a slippery slope deteriorating long-standing principles of common law contract principles. Contracts are supposed to be interpreted and enforced pursuant to the plain language of the four corners of the contract in any regard. Mungo, the drafter, did not include any provision to sever unconscionable terms from the whole, and accordingly, the court should find that it has no authority to sever the unconscionable sentences from this adhesive arbitration clause, and thus the entire adhesive arbitration paragraph must fail.

Finally, such favoritism for the drafter of a contract of adhesion has no place in South Carolina common law and is unjust when considering that:

- (1) Mungo included this arbitration clause in standard small print on the last page of the Purchase Agreement; and

- (2) Mungo failed to suggest anywhere in the adhesive arbitration provision or elsewhere in the contract that some provisions set forth therein may violate South Carolina law or in such case be considered illegal and inapplicable; and
- (3) Mungo, unlike the Huskins, certainly knew or should have known the unconscionable sentences at issue in this matter violated South Carolina law when it drafted the arbitration provision.

For these reasons and those set forth in the Petition for Rehearing, this Petition should be granted, and the Opinion should be withdrawn and substituted with a new opinion refusing to sever the unconscionable provisions in this adhesive arbitration clause and finding the entire arbitration clause unenforceable.

Respectfully submitted,

*s/Beth B. Richardson*

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Columbia, South Carolina  
July 8, 2022

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**PROOF OF SERVICE**

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Pursuant to Rule 262(c)(3), SCACR, as amended on May 6, 2022, I certify that I have caused the **Appellants' Reply to Return to Petition for Rehearing** to be served on the following counsel of record by AIS email at the following addresses:

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July 8, 2022

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**Subject:** Huskins v. Mungo Homes - Reply to Return to Petition for Rehearing [IMAN-CLIENTS.FID79553]  
**Date:** Friday, July 8, 2022 4:33:58 PM  
**Attachments:** [image001.png](#)  
[FINAL - Reply to Return to Petition for Rehearing.pdf](#)  
[Proof of Service - Reply to Return to Petition for Rehearing.pdf](#)

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Dear Counsel:

Pursuant to [Rule 262\(c\)\(3\), SCACR](#), attached for service upon you via email is Appellants' Reply to Return for Petition for Rehearing and Proof of Service, which is being filed with SC Court of Appeals this afternoon.

A copy of this email will accompany the Proof of Service when filing.

With kindest regards,  
Cyndi Nygord



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