THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-000030

Thomas and Stacy Lanham, …..……....……Respondents,

v.

Rumsey Construction & Renovation, LLC d/b/a Rumsey Construction & Restoration,…….Appellant.

INITIAL BRIEF OF RESPONDENTS

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II. Alternatively, whether the lower court correctly held the arbitration provision is voidable because Mrs. Lanham signed the contract under duress.

III. Alternatively, whether the lower court correctly held Thomas Lanham is not bound to an arbitration provision that he did not sign.

STATEMENT OF THE CASE

This is an appeal from an order denying a motion to compel arbitration. On January 15, 2021, Respondents Thomas and Stacy Lanham filed a complaint against Appellant Rumsey Construction & Renovation, LLC, based on improper remediation of a black water sewer contamination in the Lanhams' home. (Cmplt.). On May 5, 2021, Rumsey Construction filed a motion to compel arbitration. (Mot.). On January 15, 2021, the Lanhams filed a memorandum in opposition to the motion, along with an affidavit of Stacy Lanham. (Memo. & Aff.). After a hearing on October 27, 2021, the lower court denied the motion to compel arbitration on December 9, 2021. (Order). On January 10, 2022, Rumsey Construction filed a notice of appeal. (Not.).

FACTS

During the night of January 15, 2018, an upstairs toilet in the Lanhams' home flooded the entire upstairs and then spilled downstairs into the kitchen, living room, and several other rooms. (Tr. p. 9; Cmplt. p. 2). The black water contaminant contained feces, urine, and other sewage. *Id.* The Lanhams' severe damage is categorized as a sewer black water category 3[1] loss by the Institute of Inspection, Cleaning and Restoration Certification ("IICRC") protocols. (Cmplt. pp. 2-3).

[1] "'Black Water' contains disease-causing organisms, toxins, and is grossly unsanitary. Typical black water conditions occur from a sewer back flow, a broken toilet bowl containing feces, and rising flood waters." https://www.althousecleaning.com/iicrc-classifications.html (visited on July 25, 2022).

The Lanhams immediately notified their insurance company, which then contacted Rumsey Construction to remediate the property. (Tr. p. 10). Two days after the sewage flood, Rumsey Construction came to the Lanhams' home and made Mrs. Lanham sign an admitted adhesion services contract that contained an arbitration provision. (Tr. pp. 6, 10; Aff. of Lanham; Order p. 1).

Mrs. Lanham submitted an affidavit describing how Rumsey Construction forced her to sign the contract:

> When Rumsey arrived they *demanded* that I sign the papers before they would remediate the black water intrusion to my home.
>
> I was under *extreme duress and stress* as a result of the damage to my home.
>
> I was *not given an opportunity* to review any of the documents Rumsey *made me sign*, and I did not read the documents.
>
> If I was given ample time to read the documents and had read the documents, I *would not have agreed* to the terms therein.
>
> I was *not given the opportunity to negotiate* any of the terms therein or explained the terms of the contract.
>
> Rumsey *knew that I was in a vulnerable position*, as my home was covered in black water.

(Aff. of Lanham ¶¶ 6-11; Tr. p. 10) (emphasis added). These facts are undisputed because Rumsey Construction did not submit any evidence to refute Mrs. Lanham's testimony about the conditions and duress under which she signed the contract.

The contract that Rumsey Construction demanded Mrs. Lanham sign is a two-page services contract. (Aff. of Lanham; Contract). The first page is written in legible, 12-14 point size font and contains choices of the services provided and a signature block for Rumsey Construction and the property owner. (Contract p. 1). The last line of the page—after the signature block—states in bold, capital, and underlined letters that the contract "is subject to arbitration pursuant to state and federal law." *Id.* The second page is written in tiny, likely 8-

point size font. (Contract p. 2). It contains numerous one-sided provisions, including a usurious interest rate of 18% annually on an unpaid account; an attorney's fees provision that allows Rumsey Construction to recover its attorney's fees incurred in collection but does not allow Mrs. Lanham the same; and a limitation on Rumsey Construction's liability "to the cost of the services provided, regardless of the alleged injury or damage or number of claimants," thereby precluding statutorily mandated damages such as those under the South Carolina Unfair Trade Practices Act. (Contract p. 2).

The arbitration provision is the last provision on page 2. (Contract p. 2). It is entitled "Arbitration after mediation" but contains no explanation of how or when mediation is to occur. *Id.* The entire provision states:

> In the event that the parties are first unable to resolve disputes by themselves, the parties agree that all claims and disputes arising out of or relating to this Contract in any way shall be resolved by arbitration pursuant to Federal and State Law. The venue for the arbitration shall be Richland County, South Carolina. The parties agree that the arbitrator must be mutually agreeable and that the cost of the arbitration will be divided evenly. Should the parties be unable to agree to an arbitrator, then the parties agree that they will apply to the Richland County, South Carolina Circuit Court for the appointment of an arbitrator. This provision does not prohibit the Contractor from filing a Mechanic's Lien action in the County in which the services where [sic] provided in [the] event that the Property Owner does not pay for services rendered.

(Contract p. 2). Notably, nowhere does the contract say that Mrs. Lanham is waiving a right to a trial by jury. (Contract).

Mrs. Lanham signed the first page and initialed the second page. (Contract). Mr. Lanham did not sign the services contract and is not a party to it. *Id.*

Rumsey Construction did not follow IICRC protocols when remediating the Lanhams' home. (Cmplt. p. 2). For example, it moved contaminated contents to uncontaminated areas of the house, causing further damage and contamination. *Id.* The Lanhams hired an industrial hygienist to test the property, and it confirmed that sewage contamination still existed after the

remediation work. (Cmplt. p. 2). Further, Mr. Lanham has an immune deficiency and suffered personal injuries from the improper remediation. (Tr. p. 14).

On January 15, 2021, the Lanhams filed a negligence/gross negligence action against Rumsey Construction and requested a jury trial. (Cmplt.). The Lanhams had no idea an arbitration provision existed because Mrs. Lanham was not provided an opportunity to read the services contract and Rumsey Construction did not give her a copy of the contract. (Tr. p. 12; Memo. in Opp. p 1).

On May 5, 2021, Rumsey Construction filed a motion to compel arbitration. (Mot.). The Lanhams filed a memorandum in opposition to the motion and attached an affidavit from Mrs. Lanham. (Memo. & Aff.). The Lanhams argued that the arbitration provision is not enforceable because it is an unconscionable adhesion contract that Mrs. Lanham signed under duress, it fails to comply with the South Carolina Uniform Arbitration Act, and Mr. Lanham is not a party to it. (Memo. in Opp.; Tr. pp. 10-14).

On October 27, 2021, the Honorable Donald B. Hocker held a hearing on the motion to compel arbitration. (Tr.). Rumsey Construction admitted it is an adhesion contract. (Tr. p. 6).

On December 9, 2021, the lower court entered an order denying Rumsey Construction's motion to compel arbitration. (Order). The court stated that a Rumsey "representative told Plaintiff that the emergency repairs couldn't be completed until she signed the agreement at issue." (Order p. 1). The court held the entire arbitration provision invalid for two separate reasons—it was entered into under duress and it is unconscionable. (Order pp. 2-4). It also held Rumsey Construction could not enforce the arbitration provision (even if enforceable) against Mr. Lanham because he did not sign it and suffered personal injuries that are not arbitrable under the South Carolina Uniform Arbitration Act. (Order pp. 4-5).[2]

[2] The court also found that the arbitration provision satisfies the statutory notice requirements under S.C. Code Ann. § 15-48-10(a). That is not at issue on appeal.

Rumsey Construction did not file a motion to reconsider but, instead, filed a notice of appeal.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* at 48, 790 S.E.2d at 3.

ARGUMENT

The lower court correctly held that the arbitration is not valid based on duress and unconscionability and that, regardless, it is not enforceable as to Mr. Lanham. The evidence and law support these holdings.

Rumsey Construction repeatedly states that there is a presumption in favor of arbitration. (Br. of App. p. 4). It ignores recent precedent to the contrary. "There is [] **no** public policy—federal or state—'favoring' arbitration." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) (emphasis added).

I. The lower court correctly held the arbitration provision is unconscionable.

An unconscionable arbitration provision is invalid and unenforceable. Therefore, the Court should first decide whether the arbitration provision is unconscionable because, if it affirms on this issue, then there is no need to reach either of the other issues.

The law and evidence support the lower court's holding that the arbitration agreement is unconscionable and, therefore, invalid. *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) ("[C]ourts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability.").

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). Mrs. Lanham lacked a meaningful choice when she executed the arbitration agreement, and its terms are oppressive and one-sided.

A. Mrs. Lanham lacked a meaningful choice.

This Court must analyze the agreement with "considerable skepticism" as required by *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. In *Simpson*, this Court adopted a rationale that viewed "automobiles as a necessity and factor[ed] this characterization into a determination of whether a customer had a meaningful choice in negotiating the arbitration agreement." *Id.* (internal quotation marks omitted). Because the Simpson arbitration agreement "involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society", this Court analyzed the contract "with considerable skepticism." *Id.* at 27, 644 S.E.2d at 670. Similarly, this case involves a vulnerable family in need of immediate work to save their home and possessions.

"In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account [1] the nature of the injuries suffered by the plaintiff; [2] whether the plaintiff is a substantial business concern; [3] the relative disparity in the parties' bargaining power; [4] the parties' relative sophistication; [5] whether there is an element of surprise in the inclusion of the challenged clause; and [6] the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (internal quotation marks and citation omitted). The lower court correctly found that the evidence in this case weighs in favor of finding an absence of meaningful choice. (Order p. 4).

Mrs. Lanham suffered and was *continuing* to suffer extreme losses at the time Rumsey Construction "demanded" that she sign the arbitration provision. (Aff. of Lanham).

Mrs. Lanham was not a substantial business concern to Rumsey Construction and she had no sophistication in contracts. Rumsey Construction argues that the Lanhams presented no evidence on these factors. (Br. of App. p. 9). To the contrary, the evidence reasonably supports the lower court's findings. That Rumsey Construction could refuse to do work simply because someone would not arbitrate shows that the Lanhams were not a substantial business concern. That Mrs. Lanham was and felt forced to sign a contract without reading it or receiving a copy of it shows that she was without sophistication in contracts.

Rumsey Construction admitted that Mrs. Lanham had no bargaining power. (Tr. p. 6) ("[T]he contract was, you know, an – an adhesion" contract.).[3] Further, the presence of the arbitration provision was a surprise to her because Rumsey Construction did not allow her to review it before signing and did not give her a copy to keep. (Aff. of Lanham).

Rumsey Construction incorrectly argues that the Lanhams "presented no evidence that they were not given the right of negotiation." (Br. of App. p. 11). Mrs. Lanham's uncontested affidavit states: "I was not given the opportunity to negotiate any of the terms therein or explained the terms of the contract." (Aff. ¶ 10).

Rumsey Construction argues that the lower court erred in finding the contract was hastily presented for Mrs. Lanham's signature because it supposedly did not begin work until two days after she signed it. (Br. of App. p. 11). This is incorrect. The lower court specifically found that the damage occurred on January 15 and Rumsey Construction came to the home on January 17 to get the contract signed. (Order p. 1). Rumsey Construction did not appeal those findings, *see*

[3] To the extent Rumsey Construction is arguing on appeal that this is not an adhesion contract (Br. of App. p. 11), it waived that argument by admitting at the hearing that this is an adhesion contract. (Tr. p. 6). Regardless, that argument is flatly contradicted by the undisputed evidence from Mrs. Lanham's affidavit. (Aff.).

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."), and they are supported by the record. *See* Tr. p. 10 ("So two (2) days later, Rumsey shows up at the – at the behest of – or at the request of [] USAA."). The Complaint states that Rumsey Construction went to the Lanham's home on January 17 "to being the mitigation process" (Cmplt. p. 2)—meaning it started on the same day that it "demanded" Mrs. Lanham sign the contract (Aff.). Further, even if the Court could consider Rumsey Construction's factual argument, its assertion on appeal that "[t]he Lanhams had 48 hours to consider the contract" is completely disingenuous given the uncontested evidence that it did not allow Mrs. Lanham to read the contract and did not leave her with a copy of it. (Br. of App. p. 11).

Finally, Rumsey Construction criticizes the lower court for supposedly not considering the "conspicuousness of the arbitration clause" and "forfeiture of potential remedies." (Br. of App. p. 12). Again, it is incorrect. As Rumsey Construction recognized, the lower court held that the arbitration provision satisfied the statutory notice requirement and that the absence of a mutual circuit court remedy did not invalidate the provision. (Order pp. 2, 4; Br. of App. pp. 3, 7). Further, the conspicuity of an arbitration agreement is not dispositive of whether its terms are unconscionable. This argument is without merit.

On appeal from a motion to compel arbitration, "a circuit court's factual findings will not be reversed . . . if ***any evidence*** reasonably supports the findings." *Smith*, 417 S.C. at 48, 790 S.E.2d at 3 (emphasis added). In this case, ample evidence supports the lower court's findings that Mrs. Lanham lacked a meaningful choice.

B. Oppressive and one-sided terms.

The terms of the arbitration provision, drafted solely by Rumsey Construction, are "so oppressive that no reasonable person would make them and no fair and honest person would

accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. The Court may affirm for any reason appearing in the record. Rule 220(c), SCACR.

"[T]he cumulative effect of a number of oppressive and one-sided provisions contained within the entire" arbitration agreement make it "wholly unconscionable and unenforceable." *Simpson*, 373 S.C. at 34-35, 644 S.E.2d at 674. First, the arbitration provision is labeled in capital letters "arbitration after mediation." (Contract p. 2). However, the first sentence says arbitration applies if the parties are "first unable to resolve disputes *by themselves*." *Id.* (emphasis added). An arbitration after mediation—presumably with a mediator—is inconsistent with arbitration after the parties try to work it out "by themselves." Further, the provision says the parties will evenly divide the costs of arbitration but does not say who pays for mediation (assuming it requires a mediation).

Second, the provision states "the cost of arbitration will be divided evenly" but fails to provide any information as to how much money arbitration costs. This provision is oppressive, one-sided, and not geared towards an unbiased decision by a neutral decision-maker as it omits necessary information such that no person could read the provision and make a meaningful choice as to whether to agree to it. Further, the limitation of liability provision limits Rumsey Construction's liability to "the cost of the services provided" but there is no cost stated in the Contract. That leaves Mrs. Lanham with no way to determine if (assuming the limitation is valid) the costs of arbitration are reasonable in light of the potential damages.

Third, while the Contract uses the word "arbitration", it never actually states that the property owner is giving up the right to a trial by jury.

There are numerous other provisions in the contract that are unconscionable. The annual interest rate on unpaid invoices is 18%, which is over two times the legal rate.[4] Rumsey

[4] The legal interest rate is 8 ¾%. S.C. Code Ann. § 34-31-20(A).

Construction limits its liability to "the cost of the services provided", thereby prohibiting statutorily mandated damages, attorney's fees, and punitive damages. There are no limitations on the damages that Rumsey Construction could receive. The Lanhams argued at the hearing that Rumsey Construction would limit its damages to the costs of the services even if it burned down the house with the Lanhams inside and killed them. (Tr. p. 17). Rumsey Construction did not refute this argument. (Tr.).

Rumsey Construction notes that, under the Federal Arbitration Act, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S 395, 403-04 (1967), requires a challenge to the arbitration provision itself rather than the contract generally. (Br. of App. p. 9). However, Rumsey Construction fails to ever allege or even argue that the FAA applies in this case. "The FAA applies to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (internal quotation marks omitted). Because there is no allegation or finding that the FAA applies and no evidence that this transaction involving a South Carolina home and South Carolina residents involves interstate commerce, *Prima Paint* is inapplicable. Regardless, the arbitration provision alone is unconscionable, as argued above.

Rumsey Construction relies on the lower court's finding that Mrs. Lanham not reading the contract and the provision allowing it to file a mechanic's lien are not bases for unconscionability. (Br. of App. pp. 7-8). This is incorrect because neither of those findings are dispositive of unconscionability.

Because the arbitration provision is not "geared towards achieving an unbiased decision by a neutral decision-maker," *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668, the Court should affirm the lower court's finding that the arbitration provision is unconscionable and

unenforceable.

II. The lower court correctly held the arbitration provision is voidable because Mrs. Lanham signed the contract under duress.

Even if the Court finds the arbitration provision is not unconscionable, it should affirm the lower court's holding that the provision is void because Mrs. Lanham signed it under duress. *See Holler v. Holler*, 364 S.C. 256, 268, 612 S.E.2d 469, 475 (Ct. App. 2005) ("Duress is a defense to an otherwise valid contract. Duress renders a contract voidable at the option of the oppressed party." (internal citation omitted)). "[C]ourts may invalidate arbitration agreements on general state law contract defenses, such as fraud, *duress*, and unconscionability." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (emphasis added).

The law and evidence support the lower court's holding that Mrs. Lanham signed the contract under duress. "Whether or not duress exists in a particular case is a question of fact to be determined according to the circumstances of each case, such as the age, sex, and capacity of the party influenced." *Willms Trucking Co. v. Jw Constr. Co.*, 314 S.C. 170, 179, 442 S.E.2d 197, 202 (Ct. App. 1994).

"Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition." *Id.* at 178, 442 S.E.2d at 202. "[T]o establish that a contract was procured through duress, three things must be proved: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind." *Holler v. Holler*, 364 S.C. 256, 267, 612 S.E.2d 469, 475 (Ct. App. 2005).

The lower court found, and the evidence supports, that Mrs. Lanham signed the arbitration provision under duress. The lower court held that a Rumsey Construction "representative told Plaintiff that the *emergency* repairs *couldn't* be completed until she signed the agreement at issue." (Order p. 1) (emphasis added). At the time, Mrs. Lanham's home was "covered in black water" and "it is understandable that someone would be under stress and duress if sewage was spewing throughout their home." *Id.* at 3. When Rumsey Construction arrived, almost two entire floors of Mrs. Rumsey's house and personal possessions were covered in feces and sewage. (Cmplt. p. 2; Tr. p. 10; Aff. of Lanham). After properly notifying her insurance carrier of the loss, the relief Mrs. Lanham received was the arrival of Rumsey Construction—the company whom her insurance carrier sent to remediate the damage. (Cmplt.; Aff. of Lanham). With two days' worth of sewage damage to her home, Mrs. Lanham "was under extreme duress and stress." (Aff. of Lanham). Most importantly, Mrs. Lanham attested that "Rumsey *knew* that I was in a vulnerable position"—a fact that Rumsey Construction never disputed. (Aff. of Lanham). With that actual knowledge of the damage, vulnerability, and extreme time-sensitivity of the situation, Rumsey Construction "demanded" that Mrs. Lanham "sign the papers before they would remediate the black water intrusion." *Id.* Even worse, Rumsey Construction did not give Mrs. Lanham "an opportunity to review any of the documents" that it "made" her sign. *Id.*

Under the particular circumstances of this case, the evidence reasonably supports the lower court's finding of duress. "If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual, voluntary agreement, but becomes an agreement emanating entirely from his own mind." *Willms Trucking*, 314 S.C. at 179, 442 S.E.2d at 202.

In *Willms Trucking*, a construction company signed a change order agreeing to take much less money than it was owed because of "extreme pressure to pay subcontractors and material providers" and threatened litigation. *Id.* at 175-76, 442 S.E.2d at 200-01. This Court affirmed the lower court's finding that the construction company entered the contract under duress because the other party left it "with no reasonable alternative but to sign" the contract. *Id.* at 179, 442 S.E.2d at 202. The same result is warranted in this case. With actual knowledge of worsening sewage damage to the Lanhams' home, Rumsey Construction arrived with a promise to stop and fix the damage but *only if* Mrs. Lanham signed a contract that she was not allowed to read and did not receive a copy of to read later. Mrs. Lanham had no reasonable alternative. While Rumsey Construction argues that she could have tried to find another company, it failed to make that argument below[5] and produced no evidence of the availability of other remediation companies approved by the Lanhams' insurer. That argument is legally and factually meritless and, regardless, ignores the reality and gravity of the situation.

Rumsey Construction incorrectly argues that Mrs. Lanham did not allege it coerced her. (Br. of App. p. 6). Her affidavit plainly says: "When Rumsey arrived they demanded that I sign papers before they would remediate the black water intrusion to my home" and "I was not given an opportunity to review any of the documents Rumsey made me sign." (Aff. of Lanham ¶¶ 6, 8). Demanding someone in a vulnerable, damaged, and desperate position sign a contract that you do not let them read is coercion. *See Holler*, 364 S.C. at 267, 612 S.E.2d at 475 ("A party claiming 'duress' can prevail if he shows that he has been the victim of a wrongful or unlawful act or threat of a kind that deprives the victim of unfettered will, with the result that he was compelled to make a disproportionate exchange of values.").

[5] *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Finally, Rumsey Construction incorrectly argues that the lower court conflated subjective personal stress with duress and its ruling will allow someone to void a contract any time they have a personal stressor. (Br. of App. p. 7). Rumsey Construction misses the point that it had *actual knowledge* of Mrs. Lanham's vulnerable position. The lower court did not hold that anyone with a stressful personal situation may void an arbitration agreement. Instead, it held that, based on the particular circumstances of this case—where it is established that Rumsey Construction knew of Mrs. Lanham's vulnerable situation and forced her to sign a contract it did not let her read—there is sufficient evidence of duress. Significantly, Rumsey Construction *does not deny* that it knew Mrs. Lanham was in an extremely dire and time-sensitive situation but still forced her to sign the agreement before it would begin work that was undoubtedly necessary to salvage her home and personal belongings.

Stated simply, "[u]nder South Carolina law, a contract cannot be formed without a meeting of the minds between the parties as to all essential and material terms." *Simmons v. Benson Hyundai, LLC*, Op. No. 5900, 2022 S.C. App. LEXIS 37, at *7-8 (Shearouse Adv. Sh. No. 10 at 18) (Ct. App. Mar. 16, 2022). The undisputed evidence in this case is that Rumsey Construction did not let Mrs. Lanham review the arbitration provision but, instead, "demanded" that she sign it before beginning work. That is not a meeting of the minds. The evidence reasonably supports the lower court's finding of duress under the particular circumstances of this case, and this Court should affirm.

III. The lower court correctly held Thomas Lanham is not bound to an arbitration provision that he did not sign.

This issue matters only if the Court finds the arbitration agreement enforceable in the first place—*i.e.*, finds that it is not unconscionable and was not signed under duress. If the Court affirms the lower court on either of the first to issues, then it does not need to reach this issue.

The lower court held that Mr. Lanham is not bound to the arbitration provision. (Order p. 5). It gave numerous, independent bases for this holding. First, his personal injury claims are not arbitrable under S.C. Code Ann. § 15-48-10(b)(4). *Id.* Second, he is not bound to a contract that he did not sign. *Id.* Third, there is no evidence of agency. *Id.* Fourth, there is no presumption of agency between a husband and wife. *Id.*

As to the first basis, Rumsey Construction does not disagree with the lower court's legal premise but argues only that Mr. Lanham did not raise his personal injuries until the hearing. (Br. of App. p. 14). As an initial matter, Rumsey Construction did not object at the hearing or file a motion to reconsider.[6] Regardless, the complaint states that the Lanhams suffered "a sewer black water category 3 loss to the interior of their home." (Cmplt. p. 2). Rumsey Construction is in the business of remediating this type of damage. It knows that sewage damage affects personal health. *See infra* fn. 1. Further, the complaint states that the Lanhams suffered financial damages "and such other further damages as will be presented at trial." (Cmplt. p. 3).

As to the second basis, Rumsey Construction does not appeal the finding that Mr. Lanham is not bound to a contract that he did not sign. (Br. of App. pp. 13-15). Therefore, that is the law of the case. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

As to the third basis, Rumsey Construction does not appeal the finding that there is no presumption of agency between a husband and wife. It argues only that an implied agency can arise by conduct. (Br. of App. p. 14). Therefore, that is the law of the case. *Shirley's Iron Works*, 403 S.C. at 573, 743 S.E.2d at 785.

[6] "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party ***must*** move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (emphasis added).

As to the fourth basis, our courts have "recognized that five theories aris[ing] out of common law principles of contract and agency law could provide a basis for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel." *Malloy v. Thompson*, 409 S.C. 557, 561-62, 762 S.E.2d 690, 692 (2014) (internal quotation marks omitted) (alteration in original)). Rumsey Construction argues only that Mrs. Lanham was Mr. Lanham's agent. It argues an implied agency on two bases—(1) the complaint asserts that the Lanhams both own the house and (2) Mrs. Lanham listed both of them when she filled out the "Name" section on the first page of the contract. (Br. of App. p. 15). Neither is sufficient for an implied agency. As to the complaint, that assertion occurred on January 15, 2021, three years after Mrs. Lanham signed the contract. It cannot form the basis of Rumsey Construction's alleged belief of agency three years earlier. As to the Contract, an agent writing someone's name on a document is not conduct that implies agency. The conduct must come from the principal—which would be Thomas Lanham in this case—and not from the agent. "[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Frasier v. Palmetto Homes*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996).

Finally, Rumsey Construction argues that S.C. Code Ann. § 15-48-60 allows an arbitrator to join Mr. Lanham. (Br. of App. p. 15). The lower court stated only that § 15-48-60 "would presumably authorize" joinder of Thomas but did not rule on the merits of it and rejected the argument because his personal injury claims are not arbitrable. (Order p. 5). That a non-party *may* be subject to joinder does not mean he is bound to an arbitration agreement that he did not sign, and Rumsey Construction cites to no such authority. Further, the South Carolina Uniform Arbitration Act expressly states that it does not apply to personal injury actions and, therefore, cannot operate to join Mr. Lanham's personal claims.

CONCLUSION

For any one of reasons, the Court should affirm the decision of the lower court to deny Rumsey Construction's motion to compel arbitration and allow the case to proceed as pled in circuit court.

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Attorneys for the Respondents

July 27, 2022

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2022-000030

Thomas and Stacy Lanham, …..……....…….……Respondents,

v.

Rumsey Construction & Renovation, LLC d/b/a Rumsey Construction & Restoration,……..Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of the (1) Initial Brief of Respondents, and (2) Respondents' Designation of Matter have been served upon counsel for Appellant via electronic mail at the email addresses stated in the Attorney Information System as set forth below on July 27, 2022.

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July 27, 2022

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July 27, 2022

Via E-Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
ctappfilings@sccourts.org

Re: *Thomas and Stacy Lanham v. Rumsey Construction & Renovation, LLC d/b/a Rumsey Construction & Restoration*, Appellate Case. No. 2022-000030

Dear Mrs. Kitchings:

Attached for electronic filing and service please find:

(1) Initial Brief of Respondents,
(2) Respondents' Designation of Matter for the Record on Appeal, and
(3) Proof of Service.

Please file the documents and return one file-stamped copy to me via email. By electronic copy of this letter, I am serving all counsel of record with a copy of the same.

With kind regards, I am,

s/Kathleen C. Barnes

cc: Joshua P. Cantwell (josh@cantwelllawfirm.org)
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