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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
The Honorable Donald B. Hocker, Circuit Court Judge

Case No.: 2021-CP-40-00206
Appellate Case No.: 2022-000030

Rumsey Construction & Renovation, LLC dba Rumsey Construction & Restoration, ...*Appellant*,

v.

Thomas and Stacy Lanham, ...*Respondents*.

REPLY BRIEF OF APPELLANT RUMSEY CONSTRUCTION & RENOVATION, LLC TO INITIAL BRIEF OF RESPONDENTS THOMAS AND STACY LANHAM

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ARGUMENT IN REPLY

By way of reply, Rumsey would respectfully submit that (I) Respondents' brief fails to show that the arbitration provision is unconscionable; and (II) Respondents' brief fails to show that the arbitration provision is voidable, and fails to show Mrs. Lanham signed the contract under duress; for the reasons discussed *infra*.

I. Respondents' brief fails to show that the arbitration provision is unconscionable.

Respondents contend in their brief that the arbitration provision is unconscionable due to two reasons: (A) that Mrs. Lanham lacked meaningful choice; and (B) that the contract contained oppressive and one-sided terms. Notably, Respondents must establish both points in order to show unconscionability, given that unconscionability is 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. *Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996). Both contentions fail, for the reasons discussed *infra*.

A. Mrs. Lanham did not lack meaningful choice.

As an initial point in response to Respondents' reliance on the argument that Mrs. Lanham lacked meaningful choice due to the contract being one of adhesion, such contracts are not per se unconscionable at law. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). Even where the contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable, "unconscionability [...] requires a greater showing." *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902, *citing Fanning*, 322 S.C. at 402, 472 S.E.2d at 245. In actuality, there is a well-established useful commercial purpose and utility to contracts of adhesion. Quoting *Goodwin v. Ford Motor Credit Co.*, 970 F.Supp. 1007, 1015 (M.D. Ala.1997), this Court summarized that purpose as follows:

> "The contract of adhesion is a part of the fabric of our society. It should neither be praised nor denounced...." That is because there are important advantages to its use despite its potential for abuse. These advantages include the fact that standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.
>
> *Lackey*, 330 S.C. at 395-396, 498 S.E.2d at 902 (citations omitted).

As an additional point, Respondents' repeated contention that Mrs. Lanham did not have the opportunity to negotiate the terms of the contract or did not have the opportunity to read the contract, based upon Mrs. Lanham's Affidavit, fail as a matter of law. No matter what Mrs. Lanham put in her Affidavit, long-standing South Carolina law is clear that a person who can read is bound to read an agreement before signing it. *Hood v. Life & Cas. Ins. Co. of Tennessee*, 173 S.C. 139, 175 S.E. 76 (1934). Given that she signed the contract, Mrs. Lanham cannot allege that she was not afforded the right to read, discuss, or negotiate the contract; and it was error for the trial court to make factual findings that contravene long-standing South Carolina law mandating that a party read before signing.

As it pertains to meaningful choice, the Supreme Court's analysis in *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013), is instructive:

> Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, <u>together with</u> factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract. *See Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965).
>
> *Gladden*, 402 S.C. at 145, 739 S.E.2d at 885-886 (emphasis added).

As previously discussed, there was no attempt made by Rumsey to conceal the terms of the contract, and Mrs. Rumsey has not alleged any lack of basic reading ability. Mrs. Rumsey had the

opportunity to exert meaningful choice, but by her own admission, failed to take the legally-mandated step necessary to apply said meaningful choice, that of reading the contract.

B. The contract did not contain oppressive or one-sided terms.

Respondents contend that there are "numerous" provisions within the contract which are unconscionable, focusing primarily on the limitation of liability provision, and the language of the arbitration provision. As an initial matter, provisions that are not a part of the arbitration provision may be severed from interpretation of the arbitration provision itself, given that arbitration clauses are severable from the contracts in which they are contained. *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 125, 713 S.E.2d 799, 804 (Ct.App. 2011). Even to the extent that the limitation of liability provision were to be interpreted as part of the arbitration provision, the Supreme Court has held, as follows:

> Limitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it. *See Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748–49 (Tex.App.2005) (noting that courts uphold limitations of liability in burglar and fire alarm system contracts and finding limitation of liability clause in home inspection contract commercially legitimate for the same reasons).
>
> *Gladden*, 402 S.C. at 145, 739 S.E.2d at 885.

As for the arbitration provision, the terms are not oppressive or one-sided, nor are they even unreasonable. Repeated in the language of the arbitration provision is the requirement for mutual agreement and fairness between the parties: "the parties agree [...] the arbitrator must be mutually agreeable [...] the cost of arbitration shall be divided evenly [...]." (Contract, p. 2). Nowhere in the language of the arbitration provision is language that is oppressive or one-sided against Respondents.

II. Respondents' brief fails to show that the arbitration provision is voidable, and fails to show Mrs. Lanham signed the contract under duress.

On the subject of duress, Respondents again allege in their brief that Mrs. Lanham was not given the opportunity to read the contract, which she in fact signed. As shown by the very fact that she signed both sides of the contract, Mrs. Lanham was handed a copy of the contract. As further discussed *supra*, Mrs. Lanham's failure to read sad contract before signing contravenes South Carolina law which established a duty for her to read the contract and familiarize herself with its terms; and demonstrates an apathy about the contract terms that must not be conflated for undue coercion by Rumsey.

Additionally, if taken to its logical end, Mrs. Lanham's argument would void an entire category of contracts: those which coincide with emergency repairs, or any form of emergency medical treatment. Respondents contend that Rumsey's imposition of a contract upon Mrs. Lanham prior to conducting the necessary repairs/remediation work is tantamount to coercion due to Mrs. Rumsey's "vulnerable, damaged, and desperate position." (Respondents' Brief, p. 13). It is reasonable to expect that a contractor would require execution of a services contract prior to commencing work within a home. Mrs. Rumsey's personal stressors do not rise to the level of coercion or improper external pressure required by law to void a contract for duress. *Phillips v. Baker*, 284 S.C. 134, 325 S.E.2d 533 (1985).

CONCLUSION

For the foregoing reasons, and for the reasons laid out in Rumsey's initial brief, Rumsey respectfully requests that the Court: (a) reverse the circuit court; (b) hold that both Lanhams must submit to arbitration pursuant to the Service Contract; and (c) remand for an order compelling arbitration as to both Lanhams.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on August 22, 2022, he served the foregoing Reply Brief of Appellant Rumsey Construction & Renovation, LLC to Initial Brief of Respondents Thomas and Stacy Lanham via email (attached hereto as Exhibit A) and via the US Postal Service, containing the above-referenced document to all counsel of record's individual AIS email addresses pursuant to the SC Supreme Court COVID Order 2020-05-29-02. A list of counsel served is as follows:

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August 22, 2022

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Subject:	Lanham v. Rumsey
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Attachments:	Reply Brief of Appellant to Initial Brief of Respondents.pdf

Ms. Barnes and Mr. Cantwell,

Attached is a copy of the Reply Brief of Appellant to Initial Brief of Respondents that will be filed with the Court today.

Thank you,

Sherry

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In light of the April 3, 2020 Order of the South Carolina Supreme Court (Order 2020-04-03-01), we will be serving discovery and motions via email only. If you would like a hard copy, please let us know.