THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2023-000452
Circuit Court Case No.: 2017-CP-40-03697

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Steven R. Kropski, Esq. (SC Bar 101441)
David W. Overstreet, Esq. (SC Bar 16965)
Earhart Overstreet LLC
P.O. Box 22528
Charleston, SC 29413

Attorneys for Respondent

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that S.C. Code §S15-3-140 and 36-2-302 permit the severing of an alleged attempt to reduce the limitations period in an otherwise enforceable arbitration provision.

COUNTERSTATEMENT OF THE CASE

In this appeal, Appellants Amanda Leigh Huskins and Jay R. Huskins (collectively the "Huskins") appeal the Court of Appeals decision affirming as modified the trial court's order compelling arbitration of their claims alleging that the limited warranty provision in a contract for the sale and construction of a home is unenforceable.

Mungo Homes, LLC ("Mungo") and the Huskins entered into a contract titled "Purchase Agreement" (the "Contract") for the sale and construction of a new home in Richland County, South Carolina. The Contract contains fifteen (15) separately identified paragraphs, including a "Limited Warranty" paragraph, and an "Arbitration and Claims" paragraph.

The "Arbitration and Claims" paragraph states that any "claim dispute, or other matter in question between the parties hereto arising out of this Agreement...shall be resolved by final and binding arbitration."

The "Limited Warranty" paragraph provides that the seller (Mungo), at its expense is to provide a warranty issued by Quality Builders Warranty Corporation. All other warranties, whether express or implied related to the subject property are expressly disclaimed in all capital letters.

The Huskins filed suit alleging that the disclaimer of implied warranties in the Contract is unenforceable. Mungo moved to dismiss the lawsuit and compel arbitration asserting that the enforceability of the waiver of implied warranties is a matter to be decided through binding arbitration. The Huskins averred that their claims arising out of the "Limited Warranty" paragraph of the Contract were not subject to arbitration.

By Order filed on March 13, 2018, the Circuit Court, Hon. DeAndrea Gist Benjamin, granted Mungo's motion. Judge Benjamin held that the Arbitration and Claims paragraph was

clearly separate and distinct from the other paragraphs of the Contract, including the Limited Warranty paragraph, and the Huskins' claims related to the enforceability of certain waivers of implied warranties were to be decided by the arbitrator. The Huskins thereafter filed a motion to reconsider, which was denied by order dated April 16, 2018.

Following denial of their motion to reconsider, the Court of Appeals held in its refiled February 15, 2023 opinion that, while the last two sentences of the arbitration provision were an unconscionable attempt to reduce the statute of limitation, those final two sentences could be severed without leaving a broken and unenforceable arbitration clause. Thus, the Court of Appeals affirmed the Circuit Court's order compelling arbitration.

The Huskins thereafter filed the current petition for certiorari.

COUNTERSTATEMENT OF FACTS

A. The Contract

On June 29, 2015, the Huskins entered into an agreement to purchase a new construction home from Mungo. (R. 28-30) At the top of the first page of the Contract, entitled "Purchase Agreement," and written in all underlined capital letters reads: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 et seq." (R. 28)

The Contract contains fifteen distinct paragraphs, separated by unique headings and written in bold, underlined capital letters reading: (1) **PROPERTY;** (2) **IMPROVEMENTS;** (3) **PRICE;** (4) **FINANCING CONTINGENCY AND TERMINATION;** (5) **CLOSING;** (6) **CLOSING COSTS AND PRO-RATIONS;** (7) **CHANGE ORDERS;** (8) **RESTRICTIVE COVENANTS;** (9)**HOMEOWNERS ASSOCIATION;** (10) **LIMITED WARRANTY;** (11) **TERMITE PROTECTION;** (12) **DEFAULT AND TERMINATION;** (13) **ARBITRATION AND CLAIMS**; (14) **NON-RELIANCE;** and (15) **MISCELLANEOUS**. (R. 28-30)

At issue in this appeal are the thirteenth paragraph of the Contract labeled "Arbitration and Claims" (the "Arbitration Agreement") and the tenth paragraph of the Contract labeled "Limited Warranty." The thirteenth paragraph, a separately labeled Arbitration Agreement, reads in relevant part:

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act.

(R. 30). The Huskins initialed directly below the Arbitration Agreement. (R. 30)

The tenth paragraph, separately labeled "Limited Warranty" reads:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

(R. 29).

B. Appellants File Suit in Circuit Court

On June 14, 2017, Appellants filed a lawsuit alleging four causes of action; (1) breach of contract, (2) unjust enrichment, (3) declaratory relief, and (4) violation of the South Carolina Unfair Trade Practices Act. (R. 21-27). Appellants' four causes of action each arise out of allegations that the Contract disclaims certain implied warranties, substituting in its place a limited warranty from a third-party company. Appellants allege the disclaimer of implied warranties provides "no reduction in price or separate benefit to the purchaser[1]." (R. 25). Appellants seek a

[1] The Huskins do not allege any defective conditions with the home.

declaration that the waiver of implied warranties in the Contract is unenforceable and an award of the "fair value of the waiver of the implied warranty of habitability." (R. 24-26).

C. The Circuit Court compels arbitration

After initiating the lawsuit, Mungo moved for an order enforcing the Arbitration Agreement as all four causes of action arise directly out of the Contract. (R. 65-71). The Circuit Court heard Oral Arguments on November 8, 2017. (R 39-64.). By order filed on March 13, 2018, the Circuit Court granted Mungo's motion. (R. 1-14). The Circuit Court determined that the Arbitration Agreement should be analyzed in isolation from the remainder of the Contract, noting that the Arbitration Agreement is separately labeled, located on a different page from the "Limited Warranty" paragraph, and does not cross-reference other paragraphs of the Contract. (R. 9-10). The Circuit Court then determined that the Arbitration Agreement was not one-sided or oppressive (R. 10-13), and was enforceable.

D. The Court of Appeals affirms, as modified, the Circuit Court's order.

Following the Circuit Court's denial of the Huskins' motion to reconsider, the Appellants appealed the Circuit Court's order. The Court of Appeals, in its initial opinion, affirmed, as modified, the Circuit Court's order compelling arbitration finding that the final two sentences of the arbitration provision were an unconscionable attempt to reduce the statute of limitation. However, the Court of Appeals held that severing the final two sentences pursuant to S.C. Code §§15-3-140 and 36-2-302 did not leave a fragmented and unenforceable arbitration provision and therefore affirmed the Circuit Court's order compelling arbitration.

After the Court of Appeals filed its initial opinion, the Huskins' petitioned for rehearing. During the pendency of the petition for rehearing, this Court issued its decision in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022). The Court of Appeals then issued

a refiled petition directly addressing the differences between *Damico* and the current matter, and again affirmed as modified the Circuit Court's order compelling arbitration.

The current petition for certiorari followed.

ARGUMENT

I. The Court of Appeals correctly affirmed the Circuit Court's order compelling arbitration finding that the final two sentences of the arbitration provision should be severed, leaving an enforceable arbitration provision.

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242 (b), SCACR. Rule 242 (b) lists five (5) circumstances to illustrate when certiorari is appropriate: 1) cases in which there are novel questions of law; 2) cases in which there is a dissent in a Court of Appeals decision; 3) cases where a Court of Appeals decision conflicts with a prior Supreme Court decision; 4) cases where substantial constitutional issue are directly involved; and 5) cases involving a federal question when there is a conflict between a Court of Appeals' decision and a United States Supreme Court opinion."

In their petition, the Huskins suggest the Court of Appeals decision conflicts with this Court's recent opinion in *Lennar,* 437 S.C. 596, 879 S.E.2d 746. Thus, Appellant's petition relates to the narrow question of whether an allegedly unconscionable provision in an arbitration clause can *ever* be severed, even if the severing of the provision does not leave a fragmented and unenforceable arbitration clause.

Consistent with the Court of Appeals decision, this Court's decisions in *Lennar*, and the United States Supreme Court's opinion in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011), the last two sentences of the arbitration provision were properly severed, despite the absence of a severability clause in the arbitration provision. After severing

the allegedly unconscionable term (contained in the last two sentences of the arbitration provision), the arbitration provision does not contain any one-sided and unreasonable terms, and is therefore enforceable.

In their petition for certiorari, the Huskins advocate for a reading of Section 15-3-140 of the South Carolina Code 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[2].

Likewise, the Huskins' reliance on the *Lennar* decision is misplaced. In footnote six (6) of the decision, the Court of Appeals directly addressed this argument stating:

> During the pendency of this case's petition for rehearing, our supreme court issued *Lennar*, 437 S.C. 596, 879 S.E.2d 746. The Huskinses contend Lennar controls this case. We respectfully disagree. The Huskinses claim that here, as there, the agreement with the developer had multiple provisions that were one-sided and unreasonable. We are constrained to look only at the arbitration clause because, as we noted earlier, the warranty provisions are separate from the arbitration clause. Section 15-3-140 was not at issue in Lennar, and that statute essentially instructs us to ignore the developer's attempt to shorten the limitations period. When we do that, we believe we are left with a valid arbitration clause, not a broken and unenforceable one. There are no other one-sided and unreasonable terms in the arbitration clause, as there were in Lennar.

As the Court of Appeals correctly discussed in its opinion, the issue in *Lennar* was not severing a provision of an arbitration agreement that is statutorily required to be severed. *See,* S.C. Code §15-3-140. Here, the allegedly offending provision is required to be severed or ignored by the Court, not only in the context of arbitration clauses, but in the context of any contract entered

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[2] The Court of Appeals did not determine whether the South Carolina Uniform Arbitration Act or the Federal Arbitration Act applied to the subject contract, as it did not affect its analysis (See, February 15, 2023 refiled opinion at fn. 4). However, there is no dispute that the new construction home contract is subject to the FAA. See, *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 594-595, 553 S.E.2d 110, 117-118 (2001)

into in the State of South Carolina. Any alternative conclusion--i.e. the refusal to apply Section 15-3-140 to arbitration agreement--would put an arbitration agreement on unequal footing with all other contracts in South Carolina. This would directly violate the precedent of the United States Supreme Court. *See, Concepcion*, 563 U.S. at 341, 131 S.Ct. at 1747.

Furthermore, the facts of the *Lennar* case were substantially different from the current matter. In *Lennar*, the arbitration clause gave the homebuilder, *but not the homebuyer*, the unilateral right to add third parties into an arbitration proceeding. *Lennar*, 437 S.C. at 615 879 S.E.2d at 757.

Likewise, the *Lennar* arbitration clause stated that finding of the arbitrator(s) were not binding on future proceedings in either court or arbitration, which could result in inconsistent decisions if the homebuilder (in their sole discretion) elected not to add relevant third parties into the arbitration. In other words, the *Lennar* arbitration provision sought to create a purely procedural defense to liability that is unrelated to the merits of the homebuyers' claims and for which the homebuyers have no ability to defeat since the decision to add other relevant parties in an arbitration was solely in the discretion of the homebuilder.

For this reason, this Court held that unconscionable terms in the subject arbitration clause could not be severed stating "[w]ere we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an "ancillary logistical concern." Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration." *Lennar*, 437 S.C. at 619-620, 879 S.E.2d at 760.

Contrary to the Huskins' assertion, this Court did not hold in *Lennar* that unconscionable provisions in an arbitration clause can *never* be severed. Rather, this Court expressly held in *Lennar* that "[b]lue-pencilling an agreement is, of course, within the Court's discretion." *Lennar*,

437 S.C. at 620, 879 S.E.2d at 760. However, this Court also determined that "once we sever the unconscionable terms in the [Lennar] arbitration provision, there is essentially nothing left[3]." *Id*.

Here, no such one-sided terms exist. The only allegedly unconscionable term in the subject arbitration clause was the final two sentences which the Court of Appeals held attempted to shorten the statute of limitations[4]. Once the Court of Appeals removed the single unconscionable term in the subject arbitration provision, rather than an arbitration provision that is "essentially nothing left," the arbitration provision is complete, with no one-sided terms, and is enforceable.

In this respect, there is no daylight between the Court of Appeals decision in this matter, and this Court's *Lennar* decision. The Court of Appeals properly conducted a case-by-case analysis of the allegedly unconscionable term in the arbitration provision and determined that severing the term was proper, particularly in light of S.C. Code §15-3-140, as the remainder of the arbitration provision was not one-sided or unreasonable. Thus, the parties are required to arbitrate claims against one another.

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[3] The Huskins argue that footnote 6 in this Court's decision in *Smith v. D. R. Horton*, 417 S.C. 42, 790 S.E.2d 1 prohibits severability where there is no severability clause. This argument is without merit, as there is no South Carolina authority suggesting the absence of a severability clause prohibits a Court from severing provisions. Indeed, this argument is contradictory to *Lennar* and ignores that S.C. Code §15-3-140 requires the provision to be severed while enforcing the remainder of the contract. Furthermore, from a practical perspective, under the Huskins argument, the entire contract between the parties would then need to be rescinded—despite the Huskins owning title to, and benefitting from, the subject property for the past eight (8) years.

[4] The *Lennar* case also did not concern S.C. Code §15-3-140, which expressly requires that an attempt to shorten the statute of limitations be ignored and severed (void *ab initio*) while enforcing the remainder of the contract.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that the Petition for Certiorari be denied in its entirety.

Respectfully submitted,

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STEVEN R. KROPSKI
DAVID W. OVERSTREET
Earhart Overstreet LLC
P.O. Box 22528
(843) 972-9404

Attorneys for Respondent Mungo Homes, LLC

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