

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Apr 27 2023

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

Opinion No. 5916 (S.C. Ct. App. Refiled February 15, 2023)

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

**PETITIONERS' REPLY TO RESPONDENT'S RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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INDEX

Table of Authorities ii

Arguments.....1

I. Respondent Mungo Homes misstates the issue presented to this Court by framing the issue in a broader context than that presented by the Petitioners1

II. Refusing to sever the unconscionable provisions in Mungo’s arbitration clause does not place the arbitration clause at issue on unequal grounds with other contract terms so as to invoke pre-emption by the Federal Arbitration Act.....1

III. S.C. Code Ann. § 15-3-140 has no bearing on the issue of whether unconscionable provisions located within an arbitration clause should be severed to save the remainder of the arbitration clause2

IV. The relevant facts in this case are identical to those found in *Damico v. Lennar* and justify application of the same, sound public policy considerations used by this Court in *Lennar* in refusing to sever unconscionable provisions found within an arbitration clause contained in a proprietary, adhesive purchase contract between a large, sophisticated homebuilder and an ordinary purchaser3

TABLE OF AUTHORITIES

CASES

AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011) 1

Damico v. Lennar Carolinas, 437 S.C. 596, 879 S.E.2d 746 (2022) 1, 2, 3, 4

Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) 2

STATUTES

S.C. Code Ann. § 15-3-140..... 2, 3

ARGUMENT

I. Respondent Mungo Homes misstates the issue presented to this Court by framing the issue in a broader context than that presented by the Petitioners.

Mungo contends that the issue presented in this 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.” (Return at p. 7.) However, this misstates the issue by painting with too broad a brush. The Petitioners have raised the issue in the narrower context of adhesion contracts involving a consumer new home buyer transaction wherein the drafter of the contract failed to include any agreement to sever. Specifically, in this case, our courts have long provided special protection to the innocent purchasers of new home construction. See *Damico v. Lennar Carolinas*, 437 S.C. 596, 621, 879 S.E.2d 746, 760 (2022). As this Court recognized in *Damico v. Lennar*, if a contract is one of adhesion involving a consumer transaction these “are two additional, important considerations . . . that bear on severability.” *Id.*, 437 S.C. at 620, 879 S.E.2d at 759. It is within this more limited context that the Petitioners claim error on the part of the Court of Appeals in severing unconscionable provisions contained within Mungo’s arbitration clause and enforcing the remainder of the clause.

II. Refusing to sever the unconscionable provisions in Mungo’s arbitration clause does not place the arbitration clause at issue on unequal grounds with other contract terms so as to invoke pre-emption by the Federal Arbitration Act.

Respondent Mungo cites the United States Supreme Court decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011), as authority for the proposition that refusing to sever unconscionable provisions in an arbitration clause to enforce the remainder of the clause places arbitration agreements on unequal grounds with other contract terms in violation of the Federal Arbitration Act. (Return at pp. 7-8.) Mungo’s argument is misplaced for a number of

reasons. First, *Concepcion* dealt with a specific rule in California, called the “*Discover Bank rule*”¹, that held that class-action waivers found within certain arbitration clauses are unconscionable. *See Concepcion*, 563 U.S. at 337-38, 131 S.Ct. at 1744-45. In this case, there is no state rule specifically addressing the enforcement of arbitration clauses at issue. Second, in this case whether the arbitration clause at issue is enforceable hinges on applications of state contract law, an area which is not pre-empted by the Federal Arbitration Act. *See id.*, 563 U.S. at 339, 131 S.Ct. at 1746 (Section 2 of the FAA, known as the “saving clause”, permits arbitration agreements to be declared unenforceable by state law contract defenses such as unconscionability). Lastly, the defense of unconscionability clearly is not unique to arbitration clauses as it applies to any contract provision under South Carolina law and is not applied exclusively to arbitration agreements. *Damico v. Lennar Carolinas*, 437 S.C. at 612, 879 S.E.2d at 755 (“[U]nder South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike.”) Accordingly, refusing to sever unconscionable provisions found within an arbitration clause does not run afoul of the Federal Arbitration Act and is clearly an area left to the state courts to decide applying applicable state contract defenses.

III. S.C. Code Ann. § 15-3-140 has no bearing on the issue of whether unconscionable provisions located within an arbitration clause should be severed to save the remainder of the arbitration clause.

While the Court of Appeals erroneously conflates the issue of the legal validity of a provision found within an arbitration clause with severing such provision from the agreement, Respondent Mungo goes further by contending that Section 15-3-140 *requires* severing a contractual provision in conflict with this statute. (Return at p. 8.) Nothing in the plain language

¹ *See Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005).

of Section 15-3-140 speaks to the issue of severing any contractual provisions that conflict with the statute. In this context, the issues of the validity of a contractual limitations period and whether it is unconscionable are distinct issues. One does not necessarily follow the other. Section 15-3-140 renders Mungo's provision shortening the time limit for a purchaser to assert claims against Mungo **unenforceable**. However, this alone does not mean it is unconscionable. Nor would Section 15-3-140 require the offending provision to be judicially severed from the contract to avoid its application. It is the context in which this provision exists—an adhesion contract containing one-sided and oppressive terms—which makes the provision **unconscionable**. It is this finding of unconscionability which bears on the issue of severability. In addition, nothing in Section 15-3-140 suggests that a court should simply ignore a party's attempt to include a contractual provision running afoul of this statute. This is particularly so when that provision is contained within an adhesion contract involving a new home buyer and has been found to be unconscionable. *See Lennar*. Indeed, the very finding that a provision violating Section 15-3-140 is unconscionable demonstrates that it cannot (and should not) be ignored.

IV. The relevant facts in this case are identical to those found in *Damico v. Lennar* and justify application of the same, sound public policy considerations used by this Court in *Lennar* in refusing to sever unconscionable provisions found within an arbitration clause contained in a proprietary, adhesive purchase contract between a large, sophisticated homebuilder and an ordinary purchaser.

Mungo attempts to distinguish the facts of this case from those in *Lennar* by pointing out differences in the various unconscionable terms in *Lennar* from those found in Mungo's arbitration clause. (Return at pp. 9-10.) These are distinctions without meaning. There are no degrees or levels of unconscionability nor does the number of unconscionable terms determine whether a court should sever any or all the unconscionable terms. Rather than on the differences, the focus here should be on the commonalities that exist between the facts of this case and those found in

Lennar. Both cases involved large, sophisticated homebuilders who force contracts of adhesion on their purchasers which contain one-sided and oppressive terms. In addition, both cases involve ordinary purchasers who were not represented by legal counsel in the purchase transaction who were presented with “take it or leave it” contracts to purchase a new home. Lastly, and most importantly, the same public policy reasons exist here, as they did in *Lennar*, not to sever the unconscionable provisions found in Mungo’s arbitration clause and enforce the remainder of the clause.

Respectfully Submitted,

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