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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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.

RESPONDENT'S FINAL BRIEF

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2. Whether the failure to sever an allegedly unconscionable portion of an arbitration agreements in a new home build contract pursuant to S.C. Code §15-3-140 would place arbitration agreements on unequal footing with all other agreements in South Carolina, and thus would violate the Federal Arbitration Act as set forth by the United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011).

STATEMENT OF THE CASE

In this appeal, Petitioners Amanda Leigh Huskins and Jay R. Huskins (collectively the "Huskins") appeal the Court of Appeals' decision affirming, as modified, the Circuit 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. Appellants filed a motion to reconsider, which was denied by order dated April 16, 2018.

Appellants served a Notice of Appeal on May 11, 2018 seeking to appeal the order of the Circuit Court compelling arbitration.

By a refiled opinion dated June 1, 2022, the Court of Appeals affirmed, as modified, the Circuit Court's decision holding that the final two sentences of the Arbitration Agreement could be severed, and the remainder of the Arbitration Agreement should be enforced.

Thereafter, Petitioner's filed a petition for certiorari to this Court, which was granted by order dated February 7, 2024.

INTRODUCTION

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. p. 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. pp. 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:

> 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. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute, or matter in question arising from either party's termination

> of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

(R. p. 30). The Huskins initialed directly below the Arbitration Agreement. (R. p. 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. p. 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. pp. 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." (R. p. 25). Appellants seek a 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. pp. 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. pp. 65-71). The Circuit Court heard Oral Arguments on November 8, 2017. (R. pp. 39-64.). By order filed on March 13, 2018, the Circuit Court granted Mungo's motion. (R. pp. 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. pp. 9-10). The Circuit Court then determined that the Arbitration Agreement was not one-sided or oppressive (R. pp. 10-13), and was enforceable.

Thereafter, Appellants did not demand arbitration, but appealed the Circuit Court's order to the Court of Appeals. (R. pp. 143-144).

D. The Court of Appeals severs the last two sentences of the arbitration agreement, and affirms the Circuit Court's decision

Following Appellants' notice of appeal, briefing and oral arguments, the Court of Appeals determined that, although it found the final two sentences in the arbitration provision to be an attempt to shorten the statute of limitation, the final sentences could be severed from the arbitration provision as the remainder of the provision was enforceable and would not leave a fragmented agreement. (Appx. pp. 265-277).

After filing of Appellants' petition for rehearing, the Court of Appeals refiled an opinion affirming its decision, directly distinguishing the matter at bar from the circumstances reviewed by this Court in *Damico v. Lennar Carolinas, LLC.* (Appx. pp. 265-277).

Appellants then filed their petition for certiorari, which was granted by this Court.

LEGAL STANDARD

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "It is the policy of this state and federal law to favor arbitration[,] and `any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.,* 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.,* 96 F.3d 88, 92 (4th Cir.1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC,* 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

A State's law cannot place arbitration agreements on unequal grounds with all other contracts in the State. *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011).

ARGUMENT

I. The Court of Appeals correctly determined that the final two sentences of the Arbitration Agreement can be severed, while leaving in-tact the remainder of the Arbitration Agreement.

It is well established that where a contract contains a separate and isolated arbitration agreement, the arbitration agreement is read in isolation of the remainder of the Contract. Only

the arbitration agreement itself is to be analyzed by a court, with all other issues, including the conscionability of the remainder of the Contract, to be decided by the arbitrator.

"An arbitration clause's validity is distinct from the substantive validity of the contract as a whole." *Housing Auth. of the City of Columbia v. Cornerstone Housing.*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)); *see also Parsons v. John Weiland Homes and Neighborhoods of the Carolinas*, 418 S.C. 1, 12, 791 S.E.2d 128 (2016)("Arbitration clauses are separable from the contracts in which they are imbedded"). "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Cornerstone Housing.*, 356 S.C. at 340, 588 S.E.2d at 623.

Here the Arbitration Agreement is separate and distinct from the remainder of the Contract, and the Court of Appeals correctly analyzed only the Arbitration Agreement itself to assess the conscionability of the Arbitration Agreement.

When reading the Arbitration Agreement, the Court of Appeals determined that the final two sentences were an unconscionable effort to reduce the statute of limitation to bring a claim. The full Arbitration Agreement reads as follows:

> 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. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. **Each and every demand for arbitration shall be made within ninety (90) days after the claim,**

> **dispute or other matter in question has arisen, except that any claim, dispute, or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.**

(R. p. 30) (emphasis added to sentences deemed unconscionable).

However, the Court of Appeals correctly determined that if the final two sentences of the Arbitration Agreement were struck, the first two sentences still created a complete and mutual arbitration provision. After striking the final two-sentences, the Arbitration Agreement reads as follows:

> 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. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator.

(R. p. 30).

By severing the final two sentences of the Arbitration Agreement, the remainder of the Arbitration Agreement is not affected in any manner, and the remainder of the Arbitration Agreement unequivocally provides for an unbiased decision by neutral decision makers, applies mutually to both parties, and does not limit the remedies available by law.

In other words, there was no dispute that the parties to the Contract intended to resolve all disputes through mutual and binding arbitration. The Petitioners initialed directly below the Arbitration Agreement, and the first page of the Contract contains a disclaimer stating "THIS

AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 et seq." (R. p. 28). Thus, by striking the provisions deemed unconscionable, the intent of the parties to arbitrate disputes was honored.

The Court of Appeals decision is correct and consistent with this Court's precedent, and the precedent of the United States Supreme Court.

In prior cases, including those cited by Appellants, Courts have recognized the inherent right of a Court to sever unconscionable terms in an arbitration agreement, provided that after severing such terms there remained a complete and unfragmented arbitration agreement[1]. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 618-619, 879 S.E.2d 746, 758-760 (2022); *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 63-64, 791 S.E.2d. 286, 293 (Ct. App. 2016); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 33-34, 644 S.E.2d 663, 673 (2007)(declining to sever unconscionable terms of an arbitration agreement because only a disintegrated fragment of the agreement would remain).

In *Damico v. Lennar Carolinas, LLC*, this Court explained:

> If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, **or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result**. However, severability is not always appropriate to remedy unconscionable contractual provisions. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement "such that

[1] Petitioners rely on a footnote in *Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016) to suggest that absent an express severability clause, a single unconscionable term in an agreement serves to rescind the entire agreement. This argument is impractical in every respect. For instance, in this case, the Petitioners seek monetary compensation for what Petitioners deem was an unconscionable waiver of certain plied warranties. Petitioners do not seek compensation for any type of construction defect or a breach of warranty. Thus, under Petitioner's argument in this appeal, if the subject waiver of implied warranties is indeed unconscionable, rather than receiving money from Mungo, the entire Contract would be rescinded, and Petitioners would be required to return the home they have owned, and presumably occupied, for nine (9) years. This argument is also rejected by this Court's decision in *Damico, 437 S.C.* at 618, 879 S.E.2d at 758.

> only a disintegrated fragment would remain after hacking away the unenforceable parts." In those cases, judicial severing "look[s] more like rewriting the contract than fulfilling the intent of the parties."
>
> Thus, "[c]ourts have discretion [] to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." In exercising their discretion, courts should be guided by the parties' intent.

Damico 437 S.C. at 618-619, 879 S.E.2d at 758-760 (2022) (internal citations omitted) (emphasis added), *See also* 17A Am. Jur. 2d *Contracts* § 273 ("[t]o assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.").

As the Court of Appeals expressly found, it's decision is consistent with *Damico.* (Appx. p. 276). In *Damico,* this Court held that the arbitration provision in that agreement, declaring the persons or entities that were even allowed to be named in an arbitration proceeding, was a material term of the agreement, and had "implications that may substantially affect the substantive outcome of the resolution." *Id.* at 619-620. This Court then held "[w]ere we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an 'ancillary or logistical concern.' Rather, we would be materially rewriting the contract by controlling who will-or will not-participate in arbitration…Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left." *Id.* at 619-20.

Here, no such concerns exist. Indeed, striking the last two sentences of the Arbitration Agreement has no bearing on the substantive outcome of an arbitration proceeding. Similarly, contrary to Appellants' assertion, no "blue penciling" (i.e., rewriting) of the Arbitration Agreement is necessary nor was any such blue-penciling done by the Court of Appeals. The express terms of

the parties' intent to arbitrate are left wholly in-tact, even when severing the final two sentences, which applied only to the ancillary concern of the time in which a claim can be brought[2].

Accordingly, the Court of Appeals correctly determined that severing the final two sentences of the Arbitration Agreement left the remaining provisions as a complete, mutual, and enforceable arbitration agreement and its decision should be affirmed.

II. Declining to sever the final two sentences of the Arbitration Agreement pursuant to S.C. Code § 15-3-140 would result in arbitration agreements being placed on uneven footing with other contracts in South Carolina, which directly violates the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011)

In its decision, the Court of Appeals held that S.C. Code §15-3-140 instructs that any attempt to reduce the statute of limitations by contract must be ignored, and is in practice, severed from *any* agreement in South Carolina by statute. S.C. Code §15-3-140 states:

> No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

S.C. Code §15-3-140. In other words, a contractual provision purporting to shorten the statute of limitations is void *ab initio.* Thus, it is treated as if it was never part of the Contract.

[2] Respondent notes, as detailed in Section II, that S.C. Code § 15-3-140 mandates that any attempt to shorten a statute of limitation by a contractual provision shall be ignored entirely, and void *ab initio*. Thus, the Court of Appeals simply did what the South Carolina Code mandates be done to every contract in the State of South Carolina.

Petitioner argues that despite this statute, any such provision can still serve to deem an entire agreement unconscionable. Petitioners' argument, however, would render S.C. Code §15-3-140 unnecessary and inapplicable in any circumstance.

Indeed, if the Legislature intended for a provision attempting to reduce the statute of limitations to render an entire agreement rescinded as unconscionable, the Legislature would have stated as much. The Legislature did not do so. Moreover, if an attempt to reduce the statute of limitations in a contract invalidated the contract in its entirety, there would be no need for the statute, as no enforceable contract would exist on which a party could sue.

Rather, consistent with the Court of Appeals decision, S.C. Code §15-3-140 instructs that an attempt to reduce the statute of limitations should be disregarded and the remainder of the contract shall be enforced according to its terms. To arrive at any other conclusion would contradict the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341, 131 S.Ct. 1740, 1747 (2011) (holding that a State's law cannot place arbitration agreements on unequal grounds with all other contracts in the State); *see also Parsons,* 418 S.C. at 9-10, 791 S.E.2d at 132 (recognizing the applicability of *Concepcion* to new home build contracts in South Carolina)[3].

Petitioners, however, seek to create a carve out to S.C. Code §15-3-140 solely applicable to arbitration agreements in a new build home contracts. Such a result would inherently put arbitration agreements on unequal grounds with other contracts in South Carolina, impermissibly rejecting *Concepcion*, and abrogating *Parsons*. *See Parsons*, 418 S.C. at fn. 6, 791 S.E. 2d at fn.

[3] While Petitioners' initially disputed that this matter falls within the Federal Arbitration Act, there is no question that a contract to build and purchase a new home involves interstate commerce. *Cape Romain Contrs., Inc. v. Wando E., LLC,* 405 S.C. 115, 747 S.E.2d 461 (2013); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("[O]ur appellate courts have consistently recognized that contracts for construction are governed by the FAA[]").

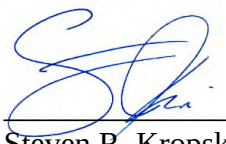
6 (clarifying that a presumption of unequal bargaining power in new home construction contracts is not applicable to arbitration agreements, as an arbitration agreement is separate and distinct from a new home construction contract and has no connection to the actual sale, purchase or build of a home.).

Accordingly, the Court of Appeals correctly determined that S.C. Code §15-3-140 requires that a provision in an arbitration agreement attempting to reduce the statute of limitation must be severed as if it never existed. Once severed, the Arbitration Agreement in this case has no unconscionable terms and is therefore enforceable.

In summary, Petitioners failed to identify facts showing that they will not be able to assert their claims in an unbiased arbitration before unbiased arbitrators. Given South Carolina's presumption in favor of arbitrability when the parties intent to arbitrate is clear and unambiguous in the contract, the Court of Appeals correctly affirmed, as modified, the Circuit Court's decision compelling arbitration. *See*, *Landers* 402 S.C. at 109, 739 S.E.2d at 213 quoting *Am. Recovery Corp.*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.,* 867 F.2d 809, 812 (4th Cir. 1989)).

CONCLUSION

For the reasons stated herein, this Court should affirm the decision of the Court of Appeals and compel the parties to arbitrate this dispute as they agreed to do in the Contract.



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