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**Apr 18 2024**

**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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

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Amanda Leigh Huskins and Jay R. Huskins..... Petitioners,

v.

Mungo Homes, LLC .....Respondent.

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**REPLY BRIEF OF PETITIONERS**

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## ARGUMENT

This case concerns whether the Court should sever unconscionable terms from an arbitration clause included in a new home purchase agreement. The Court of Appeals correctly found that the last two sentences of the four-sentence Mungo Arbitration Agreement contain unconscionable provisions. Respondent Mungo does not challenge that finding. Rather, the sole issue is whether this Court should rescue the more sophisticated party from its own misconduct by severing the unconscionable provisions Mungo inserted in its adhesive Arbitration Agreement to save the remainder, despite the absence of a severance clause in the contract and the strong public policy protections afforded to new home buyers under South Carolina law.

The opinion of the Court of Appeals should be reversed. This Court should find the Mungo arbitration clause unenforceable under these circumstances and remand the case to the circuit court for further proceedings.

**I. Severing the unconscionable provisions of the Mungo Arbitration Agreement to save the remainder does not honor the intent of the parties nor does it further the strong public policy interests of this State to protect new home buyers.**

**A. The Huskins never “agreed” to the arbitration provision or its unconscionable terms because the Mungo Purchase Agreement is a classic adhesion contract.**

In support of the Court of Appeals’ decision to sever the unconscionable provisions of the Mungo Arbitration Agreement and compel Petitioners to arbitrate their claims, Respondent Mungo contends that such decision simply honors the intention of the parties to submit all disputes to resolution through arbitration. Mungo goes even further in its brief by claiming that “there was no dispute that the parties to the Contract intended to resolve all disputes through mutual and binding arbitration.” (Respondent’s Final Brief at p. 9). Just as the Court of Appeals erroneously did, Mungo engages in the fiction that the Huskins “agreed” with all the “take it or leave it” boilerplate terms of Mungo’s adhesion contract. As this Court has correctly recognized, arbitration

agreements embedded in adhesion contracts should be viewed “with ‘considerable skepticism’ as it remains doubtful ‘any true agreement ever existed to submit disputes to arbitration’.” *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 613, 879 S.E.2d 746, 756 (2022). In *Damico*, this Court further recognized that in most instances, terms of an adhesion contract represent only the intent of **the drafter** of the contract who is almost always the more sophisticated party. *Damico*, 437 S.C. at 619 n.11, 879 S.E.2d at 759 n.11. Such is the case here, the Mungo Arbitration Agreement only represents the intent of Mungo, the drafter. Respondent’s arguments that severing the unconscionable provisions of the Mungo Arbitration Agreement would honor the parties’ intent is not only without merit, but also contrary to common sense.<sup>1</sup>

**B. The public policy of this State is best served by refusing to sever the unconscionable provisions of the Mungo Arbitration Agreement and declining to compel Petitioners to arbitrate their claims against Mungo.**

In *Damico*, this Court refused to sever unconscionable provisions of the arbitration agreement to enforce the remainder, even though there was a provision for severance of unconscionable terms, based on important public policy reasons. *Damico*, 437 S.C. at 624, 879 S.E.2d at 761-62. The two key public policy reasons cited by this Court in reaching this decision were that (1) the arbitration agreement (as well as the purchase agreement as a whole) was a contract of adhesion and (2) the transaction involved the purchase of a new home. *Id.* Both important public policy factors are present here and nothing about this matter warrants this Court

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<sup>1</sup> Respondent Mungo suggests that the Huskins expressed their intention to submit disputes to arbitration by initialing a space directly below the Mungo Arbitration Agreement. An examination of the Mungo Purchase Agreement shows that the initials relate to a separate “NON-RELIANCE” clause of the Purchase Contract which contains even more oppressive and one-sided terms. (Mungo Purchase Agreement, R. at p. 30.) Moreover, even if the Arbitration Agreement had a separate line for the Huskins to initial, as with the Nonreliance clause, that would mean nothing other than the Huskins complied with the “sign here” requirements inherent in contracts of adhesion like Mungo’s Purchase Agreement.

departing from consideration of these sound public policies when exercising its discretion to sever unconscionable terms, no doubt with an *in terrorem* effect on new home buyers, to save and enforce the remainder of the Mungo Arbitration Agreement against the Huskins.

In *Damico*, this Court refused to “rescue” Lennar from the unconscionable provisions it drafted and inserted in its adhesive arbitration agreement by severing such provisions to enforce the remainder against the homebuyer. *Id.* This Court recognized that were it to do so, it would be rewarding misconduct by Lennar, and it would not be furthering the important public policy of this State to protect new homebuyers. *Id.* In this case, Mungo is asking the Court to do for it what the Court refused to do for Lennar in *Damico*--save Mungo from its own misconduct (which is strikingly similar to that of Lennar in *Damico*) by severing the unconscionable provisions of its adhesive Arbitration Agreement and compel the Huskins to submit all claims to arbitration. Under the circumstances present here, there is no reason for this Court to treat Mungo any differently than it did Lennar in *Damico*. The same type of one-sided new home buyer contract containing an arbitration agreement with unconscionable terms as well as the same disparity in sophistication and bargaining power between Mungo and the Huskins exists here as it did in *Damico*. Accordingly, this Court should not rescue Mungo from its own misconduct as the Court of Appeals

did by severing the unconscionable provisions of the Arbitration Agreement and enforcing the remainder.<sup>2</sup>

**II. Nothing in S.C. Code Ann. § 15-3-140 requires this Court to ignore the unconscionable provisions contained in Mungo’s Arbitration Agreement for purposes of determining whether such provisions should be severed from the Agreement and the remainder enforced.**

Respondent Mungo contends that S.C. Code § 15-3-140 effectively severs any provision that attempts to shorten a statute’s applicable statute of limitations. Mungo states that the statute renders any offending provisions “void *ab initio*” such that they are considered never to have been a part of the contract. (Respondent’s Final Brief at pp. 12-14.) Respondent interprets this statute far too broadly by supplying terms that are not contained within the statute itself and force a construction to support its position that undermines the statute itself.

The cardinal rule of statutory interpretation is to ascertain and effect the intention of the legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). Words must be given their plain

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<sup>2</sup> Unlike the contract in *Damico* though, the Mungo Purchase Agreement lacks any severability clause. Petitioners have cited *Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016), as controlling precedent for refusing to sever unconscionable terms of an arbitration agreement in the absence of a specific severability clause within the arbitration agreement. Respondent contorts Petitioners’ position on this issue into a nonsensical argument by erroneously conflating the distinct concepts of refusing to enforce an unconscionable contract clause with rescission of an entire contract. (Respondent’s Final Brief at p. 10 n.1.) Petitioners do not seek rescission of the Purchase Agreement in this matter nor do Petitioners suggest that such relief would be appropriate. As set forth in the Complaint, Petitioners recognize that a disclaimer of the implied warranty of habitability is effective provided certain requirements are fulfilled by the seller. (Complaint, R. at pp. 22-24, citing *Kirkman v. Parex*, 369 S.C. 477, 632 S.E.2d 834 (2006). In this action, Petitioners seek monetary compensation as consideration for such disclaimer, or, in the alternative, a declaration that the disclaimer is unenforceable. See Complaint, R. at pp. 26-27.

and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *Bryant v. City of Charleston*, 295 S.C. 408, 369 S.E.2d 899 (1988). !!

Section 15-3-140 does not render any offending provisions void *ab initio*. No such language is found within the statute itself. S.C. Code Ann. § 15-3-140 (“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.”). Respondent’s argument requires a court to impermissibly expand the statute’s operation by supplying additional and unnecessary terms. In fact, the plain language of section 15-3-140 contradicts Respondent’s position because it states that a cause of action may be brought “notwithstanding” any provision in the contract which acts to impermissibly shorten the applicable statute of limitations.<sup>3</sup> By its plain language, section 15-3-140 only bars a party from asserting as a meritorious defense in a contract action that a contractual provision effectively bars another party from initiating a contract action otherwise timely brought under the applicable statute of limitations. The statute renders offending contractual provisions related to shortening the statute of limitations unenforceable against another party who has brought a contract action otherwise timely under the statute of limitations. It does not require, or even suggest, that a court should sever unconscionable terms related to the shortening of a statute of limitations from

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<sup>3</sup> The primary definition of “notwithstanding” is “despite.” See Merriam-Webster.com Dictionary, Merriam-Webster, available at <https://www.merriam-webster.com/dictionary/notwithstanding> (last visited April 15, 2024).

an arbitration provision in a contract, or a contract generally, much less do so to save the remainder of an arbitration clause in an adhesive home buyer contract.

Respondent also contends that, if this Court were to give effect to, rather than consider “*void ab initio*,” the last two unconscionable sentences of the Mungo Arbitration Agreement and refuse to enforce the entirety of the arbitration clause in this case, section 15-3-140 would be rendered “unnecessary and inapplicable in any circumstance.” (Respondent’s Final Brief at p. 13.) This is simply not the case. Once again, Respondent erroneously conflates two different legal applications and remedies. Here, Petitioners ask the court to refuse to sever unconscionable terms shortening the statute of limitations in an arbitration clause to save the remainder in a home buyer contract because this contract is one of adhesion, lacks a severability clause, and the public policy of South Carolina affords special protection to new home buyers. Section 15-3-140 addresses an entirely different issue, prohibiting parties from using a contractual provision shortening the statute of limitations as a bar to an otherwise timely filed contract action under the applicable statute of limitations.

Further, the court’s refusal to strike the offending provisions to save the remainder in this case is not akin to rescinding the entire contract itself. If an arbitration clause in a contract is found to be unenforceable on the grounds of unconscionability, that does not by itself render the rest of the contract unenforceable or void *ab initio* as Respondent suggests. *See, e.g., Damico*, 437 S.C. 596, 879 S.E.2d 746 (2022); *see also Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016). Likewise, the refusal to enforce a contractual provision that impermissibly shortens the applicable limitations period does not act to rescind the contract itself.

Respondent Mungo’s argument as to the scope and application of Section 15-3-140 is not only wrong, but it also reinforces the reasons for this Court to decline to sever the unconscionable

provisions in Mungo's Arbitration Agreement. To suggest, as Mungo does, that the unconscionable provisions in its Arbitration Agreement should be "ignored entirely" such as if they were never part of the Contract would serve the interest of only one party here—Mungo. It would reward Mungo for its egregious overreach, inserting unconscionable limitations on the time for homebuyers to bring claims against it in its Arbitration Agreement. And it completely overlooks that Mungo, the drafter of the adhesion contract and the far more sophisticated party, either knew or should have known that inserting such a provision in its Arbitration Agreement violated section 15-3-530, providing party to a contract three-years to assert any claims thereunder. As was the case with the Huskins here, few of Mungo's purchasers have the benefit of being represented by legal counsel in connection with the review and execution of Mungo's adhesive Purchase Agreement. So how would the ordinary Mungo purchaser know that the last two sentences of Mungo's Arbitration Agreement were meaningless as Mungo now suggests? And what kind of *in terrorem* effect have these unconscionable provisions had on Mungo's purchasers? See *Damico*, 437 S.C. at 624, 879 S.E.2d at 761 (*citing in terrorem* effect of unchallenged arbitration clauses on unsuspecting homeowners). For this Court to ignore the unconscionable provisions of the Arbitration Agreement and treat them as if they were never part of the contract to begin with would only encourage the inclusion of such unfair and unconscionable provisions in similar contracts of adhesion in conflict with our public policy of protecting new home buyers and the statute of limitations.

**III. Petitioners do not seek special application of S.C. Code Ann. § 15-3-140 to arbitration agreements nor do they seek to place arbitration agreements on uneven or unequal grounds as other contracts.**

Respondent erroneously contends that Petitioners "seek to create a carve out to S.C. Code Ann. § 15-3-140 solely applicable to arbitration agreements in new home build contracts" and that

to do so would “inherently put arbitration agreements on unequal grounds with other contracts” in violation of the United States Supreme Court holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2011). (Respondent’s Final Brief at pp. 12-14). Once again, Respondent mischaracterizes Petitioners’ arguments. First, Petitioners do not seek any special application of Section 15-3-140 that is unique to arbitration agreements. As explained above, the Court of Appeals inexplicably expanded the scope of section 15-3-140 by erroneously concluding that this statute “essentially instructs [the Court] to ignore the developer’s attempt to shorten the limitations period” for purposes of its severability analysis. *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 371 n.6, 887 S.E.2d 534, 542, n.6 (Ct. App. 2023). And Respondent Mungo, not Petitioners, now seeks a contorted application of Section 15-3-140 in the court’s analysis of whether to sever the unconscionable provisions found in the Mungo Arbitration Agreement.

Second, and contrary to Respondent’s assertion, Petitioners do not seek to treat arbitration agreements differently from other contracts in South Carolina. Petitioners seek only to have the Mungo Arbitration Agreement declared unenforceable due to its unconscionability and violation of important public policy protections afforded new home buyers and persons bringing contractual claims in South Carolina. These bases apply to all contracts in South Carolina and are valid bases for courts to refuse to sever unconscionable terms in an arbitration clause to save the remainder, even for those arbitration agreements falling under the Federal Arbitration Act.<sup>4</sup> *See Concepcion*,

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<sup>4</sup> Respondent Mungo in fact waived this argument related to the application of the Federal Arbitration Act for purposes of appeal. The Circuit Court determined that the South Carolina Uniform Arbitration Act governed this dispute and Mungo did not appeal that determination. In any case though, as Petitioners also argue here, the Court of Appeals’ Opinion noted that application of the SCUAA, as opposed to the FAA, did not affect the analysis, as “even in cases where the FAA otherwise applies, general contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.” (R. p. 272 n.4 (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22 n.1, 644 S.E.2d 663, 667 n.1 (2007))).

563 U.S. at 339, 131 S.Ct at 1746 (stating that the Federal Arbitration Act “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or **unconscionability**’” (emphasis added); *Damico*, 437 S.C. at 611, 621-22, 879 S.E.2d at 754, 750 (providing the same, and adding that “[g]enerally, courts will not enforce contracts that violate public policy”)).<sup>5</sup> “Arbitration is a matter of contract law and general contract principles of state law apply to a court’s evaluation of the enforceability of an arbitration clause.” *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)).<sup>6</sup> Petitioners challenge the enforcement of the Mungo Arbitration Agreement based on unconscionability and for public policy reasons which have long been recognized as a proper state law contract principles that would support a finding that an arbitration clause is not enforceable.

### CONCLUSION

For the reasons set forth above and in Petitioners’ brief, the Court should reverse the Court of Appeals, find that the arbitration clause is unenforceable, and remand this case to the circuit court.

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<sup>5</sup> *Concepcion* involved a challenge to a California judicial rule that class arbitration waivers in consumer contracts were unconscionable and unenforceable. *See Concepcion*, 563 U.S.333, 131 S.Ct. 1740 (2011). Accordingly, Respondent’s reliance on *Concepcion* is misplaced as it is not applicable to the unconscionability and public policy analyses in this matter. The refusal to sever unconscionable provisions in an arbitration agreement on public policy grounds is clearly a permissible basis on which a court may refuse to sever unconscionable terms to enforce the remainder of an arbitration clause. *Damico*, 437 S.C. at 624, 879 S.E.2d at 761-62. In addition, in this case, the Mungo Contract contains no provision for severability.

<sup>6</sup> Respondent mischaracterizes the import of this Court’s comments in footnote 6 of the opinion in *Parsons*. (Respondent’s Final Br. at pp. 13-14). The issue in *Parsons* was whether the “Outrageous Tort Exception” was a general contract law principle that can be used to decline to enforce an arbitration clause. *See Parsons*, 418 S.C. at 11-12, 791 S.E.2d at 133-34. Therefore, the comments of this Court in footnote 6 must be read within this limited context.

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