THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2024-001248

Marka Danielle Rodgers .....Appellant,

v.

CNT Foundations.....Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

A. Respondent's Factual Assertions Fail to Distinguish This Case from Simpson

Respondent argues that Appellant had a meaningful choice in entering this contract because CNT is a small, Charleston-based business operating in a competitive industry. This argument is unpersuasive for several reasons.

First, Appellant disputes Respondent's characterization of their company and the lead-up to this contract, but even if they were true, they do not meaningfully distinguish Respondent from the seller in *Simpson*. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). The *Simpson* defendant—a car dealership—was also part of a competitive industry and undoubtedly had an interest in customer satisfaction, yet the contract in that case was considered one of adhesion. *Id.*, at 27. If Respondent's logic were correct, the *Simpson* test would never apply because nearly all businesses could claim they operate in a competitive market and care about their reputation.

Second, Respondent's attempts to show that Appellant had bargaining power also fail to distinguish her from the *Simpson* plaintiff. The mere existence of other contractors in the market is no more relevant than the fact that the *Simpson* plaintiff could have purchased a vehicle from another dealership. The notion that Appellant had "the option to negotiate" was created by Respondent after the fact. Respondent effectively concedes as much, stating: "[I]t is for this reason that they included a specific provision in the contract which *informed* their clients that they *had* the opportunity to negotiate the terms of the contract." (Brief of Respondent, p. 5) R. ____). Initial Brief of Respondent, p. 5 (emphasis added).

Line-item provision or not, the contract was still a standard-form, take-it-or-leave-it agreement, with blanks only for initials, customer name, address, and price. This was exactly the case in *Damico*, which the Court found to be adhesive.[1] *Damico v. Lennar Carolinas*, LLC, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). Informing a party *at the moment of signing* that they could have negotiated does not retroactively transform a non-negotiable contract into a bargained-over agreement. Thus, the Court should consider the contract to be one of adhesion.

B. The Arbitration Clause is One-Sided, Oppressive and Unconscionable

Beyond its adhesive nature, the arbitration clause severely restricts Appellant's remedies. While it doesn't limit a *category* of damages, it essentially requires the customer to foot the bill for something more expensive than the contract price to seek a remedy. It requires Appellant to bear all arbitration fees and costs,[2] including Respondent's attorney's fees—regardless of the outcome. The provision imposes a penalty steeper than the contract price for bringing a claim regardless of its merit. Meanwhile, CNT can take someone's money, fail to uphold their promises, and pay, at most, a refund without any litigation costs and after forcing a customer to go through litigation.

Respondent argues that the enforceability of a provision in an arbitration clause should be decided by an arbitrator, not the Court. (Resp. Brief, p. 9) (R. ____). Courts, not arbitrators, must determine whether an arbitration agreement is unconscionable. *Id*, at 609; *see also 315*

[1] Notably, the Court also noted that the *Damico* contract had "some terms not even applying to specific homebuyers," specifically financing options that were mutually exclusive. *Damico*, at 614. In the agreement at issue, there is similarly a financing agreement section that does not apply to the instant Plaintiff. (Agreement, p. 2) (R. _____).

[2] It should be noted for clarity that while Respondent has referred to Appellant's complaints as the "attorney's fees provision," Appellant is, and has been, arguing that the arbitration agreement is unconscionable both because of the one-sided attorney's fee provision **and** the one-sided arbitration cost provision.

Corley CW LLC v. Palmetto Bluff Dev., LLC, 444 S.C. 521, 529, 908 S.E.2d 892, 896 (Ct. App. 2024), reh'g denied (Nov. 13, 2024). Respondent is incorrect in stating that Appellant doesn't dispute the agreement to arbitrate, as we've argued all along that the arbitration agreement is unconscionable, and challenging the validity of an arbitration provision based on unconscionability "brings into question whether an arbitration agreement even existed in the first place." *Simpson,* at 23.

Respondent criticizes Appellant's citation of out-of-state cases to show how other courts have ruled on this issue, but just because Appellant had to search outside the state of South Carolina for extreme instances such as this doesn't make them irrelevant. *Golini v. Bolton*, 326 S.C. 333, 343, 482 S.E.2d 784, 789 (Ct. App. 1997) (citing *Williams v. Morris*, 320 S.C. 196, 464 S.E.2d 97 (1995)). In contrast, Respondent fails to cite a single instance anywhere where a business forcing an individual to pay everyone's attorney's fees and arbitration fees is permissible.

C. Respondent's Severability Argument conflicts with *Damico* and *Huskins*

The Court in *Damico* made clear that when an adhesion contract is at issue, it is "considerably doubtful both parties truly intended a court to sever an unconscionable provision and enforce the remainder of the agreement." *Damico*, at 624 (internal quotation marks omitted); *see also Huskins v. Mungo Homes, LLC*, Op. No. 28245 (S.C. Sup. Ct. filed Dec. 11, 2024) (Howard Adv. Sh. No. 48 at 12).

Public policy strongly disfavors severing only the one-sided fees/costs provision because doing so "discourages fair, arms-length transactions." *Damico*, 437 S.C. at 604, 879 S.E.2d at

751. The Court in *Damico* refused to enforce a severability clause in similar circumstances, reasoning that allowing sophisticated parties to insert unconscionable provisions with the mere risk of later severance would incentivize overreach. *Id*. This principle was recently reaffirmed in *Huskins*, which held that severance, rather than invalidation, would allow dominant parties to "insert one-sided, unconscionable provisions" with no meaningful downside. *Huskins*, at 12 (quoting *McKee v. AT&T Corp.*, 164 Wash.2d 372, 191 P.3d 845, 861 (2008)). Therefore, the Court shouldn't "reward such conduct" by allowing severance of the offending provisions from the arbitration agreement. *Damico*, at 624.

CONCLUSION

For the reasons set forth above, this Court should reverse the circuit court's order granting Respondent's motion to compel arbitration because the arbitration clause is unconscionable.

Respectfully submitted,

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