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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge
Trial Court Case No. 2022-CP-10-05916

Appellate Case No. 2024-001248

Marka Danielle Rodgers.....Appellant,

v.

CNT Foundations.....Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENTS OF ISSUES ON APPEAL

I. Did the Circuit Court Judge properly grant Respondent's Motion to Compel Arbitration in light of Appellant claim that an attorney's fees shifting provision renders the entire arbitration provision unconscionable?

II If any Portion of the arbitration provision is unconscionable it should be severed and the remaining arbitration provision enforced.

STATEMENT OF THE CASE

On July 20, 2021, Appellant Marka Rodgers (Appellant") entered into a service contract with Respondent CNT Foundations ("CNT") to perform foundation repairs at Appellant's home ("Contract"). (R.pp.30-34). CNT completed the contracted work per the terms of the Contract and Appellant paid the contracted amount. As with many homeowners with foundations issues, Appellant had many issues with her foundation but could only afford to address certain areas which were the most pressing. She directed CNT to address a portion of her home. CNT bid the work that was requested, and that Appellant could afford. After the work Appellant complained that she had other areas in the home that needed to be addressed. CNT indicated that they addressed the concerns that they were hired to perform and that other areas of the home would need additional work and additional costs. Appellant did not want to pay additional costs. Appellant filed a Summons & Complaint in the Magistrate Court in Charleston County alleging that there were problems "in other areas of the home" (R.pp.11-17), but upon learning of the jurisdictional limits within that forum, Rodgers dismissed that action.

On December 27, 2022, Appellant filed suit in Charleston County Court of Common Pleas alleging Breach of Contract, Breach of Contract Accompanied by

Fraudulent Act Fraud, Negligent Misrepresentation and Negligence. (R.pp19-26). On January 25, 2023, CNT, in lieu of an Answer, filed a Motion to Compel Arbitration pursuant to the arbitration clause in the Contract. (R.pp27-34). On September 8, 2023, the Circuit Court conducted a hearing for CNT's motion, at which Appellant argued that the fee shifting portion of the arbitration clause was unconscionable (R.pp.86-98). On October 18, 2023, the Court granted CNT's motion to compel arbitration, and a subsequent Order was entered on November 2, 2023. (R.pp.3-6). On October 27, 203 Appellant filed her initial Motion to Amend (R.pp79-82) and on November 10, 2023, Appellant filed her second motion to reconsider the Court's order, (R.pp 82-86) and the Circuit Court held a hearing on June 20, 2024 specifically addressing the appellant's argument that the fee shifting provision of the contract was unconscionable and as such invalidates the arbitration provision. (R.pp.98-111). Thereafter, the Circuit Court entered a Form 4 Order denying the motion to amend. (R.pp8-11).

STANDARD OF REVIEW

On appeal, "determinations of arbitrability are subject to de novo review, but a circuit court's factual findings may not be reversed if there is any evidence reasonably supporting the findings." *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (2003). The question of arbitrability is an issue for judicial determination, and when determining whether the parties agreed to submit a particular issue to arbitration, the court "is not to rule on the potential merits of the underlying claims." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E. 2d 110, 118 (2001).

ARGUMENT

I. THE CIRCUIT COURT JUDGE PROPERLY GRANTED RESPONDENT'S MOTION TO COMPEL ARBITRATION BECAUSE THE ARBITRATION CLAUSE IS NOT UNCONSCIONABLE.

Pursuant to the South Carolina Uniform Attribution Act ("UAA"), if one party denies the existence of an arbitration agreement, a court must "immediately determine whether the agreement exists." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). The UAA provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable when notice is provided pursuant to S.C. Code Title 15. *See* S.C. Code Ann. § 15-48-10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (2001).

In addition to S.C. Code Ann. Title 15, The Federal Arbitration Act ("FAA"), 9 U.S.C. § § 1-16, provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Unless the parties have contracted to the contrary, the FAA applies in federal or state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001).

Likewise, the South Carolina Courts have consistently recognized that "arbitration agreements enjoy a strong presumption in favor of validity in federal and state courts." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 731-

32 (2014); *see also Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). In tandem with this presumption, the South Carolina Courts have emphasized the "importance of a case-by-case analysis ... to address the unique circumstances inherent in the various types of consumer transactions." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 62, 791 S.E.2d 286, 292 (Ct. App. 2016) (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 36, 644 S.E. 2d 663, 674 (2007).

Here, the Appellant does not raise any technical issues associated with the arbitration provision in the contract and does not disagree that the parties mutually assented to arbitration. The Appellant instead conflates the issues associated with the fee shifting provision with the applicability of arbitration as the venue to decide the enforceability of that fee shifting provision. The only question before the court was whether the fee shifting provision within the contract invalidates the arbitration provision.

a. There is no contract of adhesion because Appellant had meaningful choice entering into and negotiating the terms of the Contract. Even if it was a contract of adhesion the contract and the arbitration clause are still valid and enforceable.

Appellant argues that the Contract at issue is an adhesion contract because she lacked meaningful choice in entering the Contract, which renders the arbitration clause unconscionable and unenforceable. This belief directly contradicts South Carolina law.

Adhesion contracts are "contract[s] offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E. 2d 663, 669 (2007) (citation omitted). The Court avoided providing a bright-line rule because of the fact-specific analysis. In *Simpson*, the Court set forth factors to aide in the determination of meaningful choice, including "the nature of the injuries suffered by

the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citation omitted). The Court similarly applied these factors to the facts in *Smith*, which involved a dispute over the arbitration clause of an agreement between a homebuyer and seller. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 46, 790 S.E.2d 1, 2 (2016).

Applying the *Simpson* factors to the facts, Appellant and CNT had equal bargaining power throughout their contracted relationship. Specifically, the Contract clearly contains a provision, executed and acknowledged by Appellant, that states: "I have had the option to negotiate and change this contract." (R.p.57). Appellant not only had the opportunity to negotiate the Contract but had the most meaningful input of either party. In fact, CNT regularly alters the terms of its contracts based on potential customer suggestions. Unlike the multi-state corporate seller in *Smith*, CNT is a Charleston-based small business who has a vested interest in customer satisfaction and maintaining a good business reputation. Even more so, the foundation repair business is a crowded and highly competitive business, and CNT is routinely required to change terms of their contracts to be competitive in getting jobs. It 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. In her brief Appellant admits that not only was this acknowledgement of her rights in the contract but that it was separated out and the Appellant had to specifically initial that term. But rather than acknowledge that fact, Appellant dismisses this term as "clever" rather than an enforceable term of the Contract.

Appellant in her Complaint indicates that she already had quote from competitors when she contacted CNT (R. p.14). This is typical of a foundation repair customer. Because the competition is so fierce customers are usually in possession of multiple bids and estimates which are provided by repair companies free of charge. As appellant had other options available to her and a clear acknowledgement of her right to negotiate and change the contract Appellant's claim that this was an adhesion contract fails.

Appellant did not raise any issue of surprise or inconspicuousness of the arbitration clause to the Circuit Court or in her brief. The Contract was not unduly extensive, the notice of arbitration was placed prominently on the first page of the Contract, and Appellant received quotes from multiple other companies, showing that she was not pressured to complete the Contract without review.

Even if the Contract was deemed to be a contract of adhesion, the South Carolina Supreme Court held in *Munoz* that adhesion contracts are not per se unconscionable. *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365. In *Munoz*, the parties entered into an installment contract and security agreement to finance home improvements secured by a mortgage on their home. *Id.* at 536, 542 S.E.2d at 362. The Munozes brought action against a creditor, and they contended that the arbitration clause was invalid because there was a lack of mutuality by denying the Munozes the opportunity to litigate any counterclaim in a foreclosure action. *Id.* at 541-42, 542 S.E.2d at 365. The Court held that "[a]n agreement providing for arbitration does not determine the remedy for a breach of contract but only the forum in which the remedy for the breach is determined." *Id.* at 542, 542 S.E.2d at 365 (citation omitted). As such, the Munozes were not deprived of a remedy, but merely had to seek such a remedy through arbitration. The Court further noted that the language in the

arbitration clause did not hinder the Munozes from being able to defend any action brought against them by the creditor, and despite determining that the contract in *Munoz* was an adhesion contract, the arbitration provision therein was not invalidated due to that fact. *Id.*

The Court placed similar importance on limiting legal remedies in *Simpson* and *Smith*. In *Simpson*, the Court relied heavily on multiple one-sided provisions found within that agreement, of note was the arbitration clause that provided, "[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." *Simpson,* 373 S.C. at 28, 644 S.E.2d at 670. The Court concluded that by limiting the legal rights available to the arbitrator, the agreement was "oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker." *Id.* at 30, 644 S.E.2d at 671. In *Smith*, the Court held that a contract that prohibits all monetary remedy and only "leaves relief to the whim of the seller" is unconscionable. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5.

Unlike in *Simpson*, the arbitration clause at question does not limit any remedy afforded to Appellant under South Carolina law. Nor does it limit what powers the arbitrator has to rule on the enforceability of contractual terms. The only concern of damages within the arbitration clause refers to the attorney's fees clause, which parties are permitted to contract under South Carolina law. *See Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001). In finding the arbitration clause in the Contract valid and enforceable, the Circuit Court merely changed the venue of receiving remedy. Should an arbitrator determine that CNT acted in breach of the Contract, Appellant will be permitted to recover any contractual remedy, available under

South Carolina law, that the arbitrator deem necessary. The Arbitrator can also rule on the enforceability of the fee shifting provisions of the contract.

Appellant had meaningful choice in choosing her repair contractor and in negotiating the contract. Appellant possessed substantial and equal bargaining power to CNT, the arbitration clause was conspicuous and obvious in the Contract, and as a local business, Appellant has a significant impact on CNT's business and reputation. Simply not wanting to go to arbitration, despite their contracted for and mutual agreement, does not constitute a lack of meaningful choice. Further, should there be evidence that a contract of adhesion is present, this would not immediately reach a threshold of unconscionability.

b. The arbitration clause is not so one-sided or oppressive that no reasonable person would accept them.

"Unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Appellant argues that because the attorney's fees provision lacks mutuality, the arbitration clause, as a whole, is unconscionable, but the Court must also consider the quantity and objective language of the provisions within a contract.

In *Munoz*, the Court specifically addressed a lack of mutuality claim in a contract's provisions and held that lack of mutuality does not, on its own, invalidate a contract. *Munoz*, 342 S.C. at 542, 542 S.E.2d at 365. Specifically, the Court noted that the arbitration clause in the contract did not limit the Munozes claims or deprive them of any remedy. *Id.* In *Simpson*, the Court refused to overrule *Munoz* but found that the provisions in an arbitration agreement were so one-sided and oppressive because of the limitations on

statutory remedies, limitations on warranty causes of action, and the lack of limitations on the seller. *Simpson*, 373 S.C. at 28-33, 644 S.E.2d at 670-73. The Court distinguished *Simpson* from *Munoz* by citing the differences in the provisional language, specifically noting that allowing the seller's "judicial remedies [to] supersede the consumer's arbitral remedies is one-sided and oppressive." Id. at 32, 644 S.E.2d at 672. The Court further specified that it "will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. at 33, 644 S.E.2d at 673.

Appellant argues that the attorney's fees provision in the arbitration clause is one-sided and oppressive, specifically referring to its lack of mutuality; however, lacking mutuality does not, on its face, render an arbitration clause so oppressive and one-sided that no reasonable person would accept them. Appellant's argument specifically lacks quantity and objective language consideration. First, Appellant has neglected to present any other objectionable provisions within the arbitration clause. Second, Appellant only claims that the provision will prevent full monetary relief for the alleged damages. Unlike the consumer in *Simpson*, Appellant has not argued that the provision prohibits all or substantial remedies, merely a limitation on the damages she may receive, and there is no evidence that CNT's remedies supersede those of Appellant. Like *Munoz*, this provision merely changes the venue of which Appellant may receive remedy, and the limitation to damages would be a consideration for the arbitrator.

There is also no violation of statutory law, public policy, or provisions of the Constitution. Parties are permitted to contract attorney's fees provisions under South Carolina law, and in doing so, there has been no egregious violation of Appellant's right to remedy. *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710

(Ct. App. 2001). Appellant cites multiple out-of-state cases that have held one-sided attorney's fees are unconscionable; however, these cases involve disputes over medical malpractice and the California Civil Code, both of which are irrelevant to the facts and issues before the Court. While the provision may be one-sided, it is not oppressive or such that a reasonable person would not agree to the terms, and the arbitration clause, as a whole, should not be held unconscionable.

II. IF ANY PORTION OF THE ARBITRATION PROVISON IS UNCONSCIONABLE, IT SHOULD BE SEVERED AND REMAINING ARBITRATION AGREEMENT ENFORCED.

Appellant does not take issue with the arbitration provision in the contract, only the fee shifting provision located within the same paragraph. Once the Circuit Court determined that the arbitration clause was valid and enforceable, the attorney's fees portion of that clause became an issue for the arbitrator to determine because the Contract specifically delegates all claims arising under the Contract to be determined by an arbitrator. The question of the unconscionability of a contractual provision is generally a question of law and thus determined by the Court rather than the jury. An arbitrator would have the same powers as a circuit court judge to determine the legal enforceability of the fee shifting provision in question. The only question is in what forum that legal argument will take place. Appellant, in the initial hearing of September 8, 2023, made a request for the Court to rule on the attorney fee provision. Appellant requests of the Court " Your Honor, we're asking that the Court – even if they find the arbitration agreement is generally acceptable, we'd ask that they reform it to exclude the one-sided attorney fee and cost provisions" (R. p.94). The Court did not address this request in its order and thus the issue is preserved and can be raised to the Arbitrator. Even were this case to remain in the Circuit

Court the issue on the fee shifting provision issue would still need to be ruled upon by the Court. As such the Order enforcing the arbitration provision did not affect any rights of the Appellant other than in what forum the issue could be raised.

Even if the Circuit Court determined that the fee shifting provision was unconscionable, this determination does not impact the substantive validity of the arbitration clause, as a whole, and the rest of the Contract should remain intact under the severability clause in the Contract, which states:

> The parties agree that is a court holds any part, term, or provision of this Agreement to be illegal or in conflict with any law of the state where made, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the parties will be construed and enforced as if the Agreement did not contain the particular part, term or provision held to be invalid.
> (R.p. 57).

In *One Belle Hall*, a residential roof manufacturer's contract contained a mandatory arbitration clause with a legal remedies provision and severability clause. *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 56-59, 791 S.E.2d 286, 289-291 (Ct. App. 2016). The Court found that the manufacturer's contract contained a valid severability clause, thus, any terms that may be oppressive or objectionable "would not apply in the underlying dispute if the arbitrator found they violated South Carolina law." *Id.* at 64, 791 S.E.2d at 293. *One Belle Hall* also differentiated from *Smith* by noting that "unlike the arbitration agreement in [Smith], the legal remedies paragraph contains a severability clause." *Id.* at 64, 791 S.E.2d at 293. In *Simpson*, the Court similarly discussed severability, specifically noting the guidance from the D.C. Circuit which stated, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties, [but] . . . [i]f illegality pervades the arbitration agreement such that only a

disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673. The Court held that attempting to sever the multiple one-sided terms within the arbitration clause would essentially rewrite the contract as a whole. *Simpson*, 373 S.C. at 35-36, 644 S.E.2d at 673.

Like *One Belle Hall*, the Contract at issue contains a severability clause, and the inclusion or exclusion of the attorney's fees provision should be left to the arbitrator's determination because it is a substantive provision that the arbitrator may choose to enforce or prohibit. Even if the fee shifting clause is found to lack meaningful choice, the severability clause would render a determination on the oppressive nature of any provision in the arbitration clause unnecessary. *One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293. Further, Appellant has only raised a concern over the attorney's fees provision, compared to the multiple objectionable provisions in *Simpson*. Severing the singular attorney's fees provision would not violate the parties' intent or necessitate rewriting the Contract. In fact, CNT has already offered to waive the attorney's fee provision prior to arbitration. (R.p.105). The Court has recognized severability as a valid remedy for unconscionability in contracts, both for finding validity and not. If any portion of the arbitration agreement in the Contract is found to be unconscionable, the severability clause should allow such portions to be severed and the remaining arbitration agreement to be enforced.

CONCLUSION

The Circuit Court made a factual determination that the arbitration clause was valid, enforceable, and not unconscionable because Appellant had meaningful choice, and the arbitration clause was not so one-sided and oppressive that no reasonable person would

accept it. Even if there was evidence of unconscionability, the severability clause in the Contract permits those objectionable provisions to be severed. Any further substantive concerns within the Contract should be left to the arbitrator's determination, and as such, the Order granting CNTs' Motion to Compel Arbitration should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCAR.

July 28, 2025

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on their attorney of record Daniel Summa at Summa at Summa Law Firm LLC, 3 Broad Street, #301, Charleston, SC 29401 and by electronic mail, daniel@summalawfirm.com on July 28, 2025.

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July 28, 2025

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RE: Marka Danielle Rodgers v. CNT Foundations
Appellate Case No. 2024-001248

Dear Ms. Harrison:

Enclosed for filing, please find Respondent's Final Brief, along with our Proof of Service and Certificate of Counsel which is bound with the Brief. A copy of same is being served upon Daniel Summa, Esq. by electronic mail and a bound copy by US First Class Mail.

Let me know if you have any questions or need anything further.

Sincerely

Tina Kelly

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