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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

Mikell R. Scarborough, Presiding Judge

Appellate Case No. 2024-000369

Ralph Dawkins and Michelle Dawkins,
Marcel Franquelin and Patricia Franquelin,
Michael A. Martin and Adriana S. Iaquinto-Martin,
Louis Glavinos and Kimberly Glavinos,
Daniel J. O'Grady and Kaitlyn E. Grigoleit,
Christopher M. Raybon and LaShonda K. Jones Raybon,
Morris K. White and Rebecca A. White,
Paul A. Banker and April D. Banker,
Patrick K. Daly and Brenda Daly, ... Respondents,

v.

Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes,
Eastwood Construction Partners, LLC f/k/a Eastwood Construction LLC
d/b/a Eastwood Homes, and Eastwood Construction, LLC,..... Appellants.

APPELLANTS' REPLY TO RESPONDENTS' BRIEF

James Edward Bradley, SC Bar #66130
Moore Bradley Myers Law Firm, PA
1700 Sunset Blvd. (29169)
PO Box 5709
West Columbia, SC 29171
803-796-9160
Ward@mbmlawsc.com
Attorney for Appellants

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ARGUMENT

I. THE RESPONDENTS' BRIEF IMPROPERLY STATES THE STANDARD OF REVIEW.

The Respondents claim that because this case involves a contract, the Master-in-Equity's findings are findings of law which cannot be disturbed unless there is no evidence to sustain them. (Respondent Brief, pp. 4-5). This assertion is incorrect.

In fact, the Respondents seek to strike language from a contract they signed knowing that the provisions existed. They seek this equitable remedy through a declaratory judgment finding that the terms of the contract are unconscionable and in violation of public policy.

Unconscionability is an action in equity as it seeks to invalidate a term of a contract which is equitable relief. *See, Doe v. SexSearch.com,* 551 F.3d 412, 419 (6th Cir.2008) ("At common law, unconscionability is a defense against enforcement, not a basis for recovering damages."); *Super Glue Corp. v. Avis Rent A Car Sys., Inc.,* 132 A.D.2d 604, 517 N.Y.S.2d 764, 766 (1987) ("The doctrine of unconscionability is used as a shield, not a sword, and may not be used as a basis for affirmative recovery."); *see, e.g.,* Restatement (Second) of Contracts § 208 (1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result."). *Simpson v. MSA of Myrtle Beach,* 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) ("In determining whether a contract was 'tainted by an absence of meaningful choice,' *courts* should take into account 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.")[1]

This Court determines findings of unconscionability by finding facts in accord with its own view of the preponderance of the evidence. *See, Matter of Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

The Master-in-Equity's finding that the contract violates public policy is reviewed *de novo* by the appellate court. *See, Williams v. Government Employees Ins. Co. (GEICO),* 409 S.C. 586, 598, 762 S.E.2d 705, 713 (2014). The Respondents' suggestion on page four of their brief that the "Court's scope of review extends merely to the correction of errors of law and factual findings which are unsupported by the evidence" is in error.

II. THE RESPONDENTS' RELIANCE ON TESTIMONY FROM DION MATHENEY AND ALLEN NASON REGARDING IMAGINARY SITUATIONS IS IN ERROR.

The Respondents repeatedly reference testimony from Eastwood's divisional president Dion Matheney and its general counsel Allen Nason to support their contention that the contract is unconscionable and in violation of public policy. The testimony referenced throughout the Respondents' brief is responses to counsel's cross examination and deposition questions regarding hypothetical questions of when Eastwood might or might not cancel a contract. For instance, this hypothetical argument occurred at page twenty-one of Respondents' brief: "Incredibly, according to Eastwood, the Contract gives the company the right to terminate even if it simply determines

[1] These citations are taken from *Wells Fargo v. Smith*, 398 S.C. 487, 496, 730 S.E.2d 328, 333 (Ct. App. 2012). Upon further review of this case, counsel for Eastwood discovered that the case has been ordered depublished by the Supreme Court in *Wells Fargo v. Smith*, 2014 WL 2887651 (2014). As a result, the case should not have been cited in Eastwood's brief or, at least, it should have been designated as an unpublished case. Counsel for Eastwood apologizes for citing a case which had been ordered depublished without an indication as to that fact.

that it wants to renegotiate a higher price on the home. " (Respondents' Brief, p. 21). This imaginary scenario created by counsel did not happen and has not happened. As a result, it is not relevant as to whether the Purchase Agreement the Respondents voluntarily and knowingly signed is unconscionable. None of this testimony or Respondents' summary of testimony is relevant to the question of whether the contract is unconscionable. "In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-270 (Ct. App. 2001) (Citing Restatement (Second) of Contracts § 208 (1981)). Thus, Respondents' counsel's imaginary arguments and speculation about what may or may not happen with these contracts is improper.

III. THE AGREEMENT IS NOT PROCEDURALLY UNCONSCIONABLE. THE RESPONDENTS READ IT, UNDERSTOOD IT AND KNOWINGLY SIGNED IT.

Our Supreme Court cautions against finding unconscionability in contracts of adhesion, "[e]ven when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013). The Court stated that contractual terms written in the same font as the other terms with no indication that the drafter intended to obscure the term do not support a finding that a party lacked meaningful choice. *Id.* at 146, 739 S.E.2d at 885.

Here, the Respondents characterize Paragraphs 25 and 26 of the agreement as "disguised" but point to no instances where the language of the agreement is concealed. In fact, both witnesses testified they read the terms, had concerns regarding the terms and understood the meaning of the

contract provisions. (R. pp. 347 – 353; 432 - 442). Further, each testified to exploring dozens of homes before deciding to enter an agreement with Eastwood. (R. p. 345, l. 20 – 346, l. 9; p. 427, ll. 21-24). The Respondents were not surprised by the terms in the agreement, they entered into the contract assuming the risk in exchange for the remaining terms Eastwood offered. Terms of a home purchase agreement can be procedurally unconscionable if the buyer is left with an *absence* of meaningful choice. The Respondents' argument that the provisions could have been concealed does not support a finding of procedural unconscionability under the circumstances existing at the time of execution because both Ms. Franquelin and Ms. O'Grady admitted reading the terms and the terms are in the same font as the remainder of the agreement.

In general, courts assume that people are competent and capable of handling their own affairs. As a result, courts enforce contracts which people freely, voluntarily and knowingly enter according to their terms. *See, SCDOT v. M & T Enterprises*, 379 S.C. 645, 655, 667 S.E.2d 7 (Ct. App. 2008) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

Both Ms. Franquelin and Ms. O'Grady are educated people who read and write at a high level. Ms. Franquelin has a degree in economics from The State University of New York and has studied at Harvard University and in France. (R. p. 337, l. 7 – p. 338, l. 1). Ms. O'Grady has a degree in accounting from the University of Delaware and is a certified public accountant. (R. p. 420, ll. 16 - 24). Neither of them were pressured into signing a purchase agreement with Eastwood. Both of them had many options to purchase homes in the Charleston area. Ms. Franquelin viewed over eighty homes. (R. p. 345, l. 20 – p. 346, l. 9). Ms. O'Grady viewed a dozen other homes. (R. p. 427, ll. 18 - 24).

Furthermore, the terms limiting damages for a pre-closing termination by Eastwood were fully disclosed and both Ms. Franquelin and Ms. O'Grady knew about the terms. Ms. Franquelin knew the risk the contract could be terminated and admits she understood the contract. (R. p. 362, ll. 5-9; p. 364, 11. 15-21). Ms. O'Grady read the section limiting her damages in the event of termination. She understood her remedies for termination were limited, she did not like the provision, but she signed it anyway. (R. pp. 440 - 442).

The Respondents argue that procedural unconscionability exists in a consumer home purchase agreement with a homebuilder if the homebuilder insists upon using the terms in its contract. (*See*, Respondents' Brief, p. 17). In fact, they argue that "[n]o amount of education, wealth, or other circumstances on the consumer's part alters this analysis given the nature of this transaction." *Id.* This position and the Master-in-Equity's ruling is at odds with contract law and unconscionability analysis. Courts repeatedly hold that unconscionability is analyzed on a case by case basis, considering all relevant factors. "A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." *Holler v. Holler* 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) (Citing 17 A Am.Jur2d Contracts § 279 (2004): *see also* 17 C.J.S. Contracts § 4 (1999) ("The determination of unconscionability is fact specific, and the totality of the circumstances must be assessed."). Courts should not ignore the considerable sophistication of the Respondents. Ms. Franquelin was vice president of a publicly traded international cosmetics company. Ms. O'Grady is a controller for a hedge fund. They both have experience in significantly large contractual agreements. In fact, Ms. Franquelin negotiated agreements of 25 million dollars. (R. p. 340, ll. 5 - 8). They are people of means with significant financial holdings and incomes well above average. They each reviewed the Purchase Agreement. Ms. Franquelin read the agreement, reviewed it with a real estate agent, and called a lawyer. (R.

p. 347, l. 20 – p. 348, l. 3). She signed the contract on their advice knowing that Eastwood had a right to cancel the agreement and refund her deposit. (R. p. 356, ll. 8 - 21). Likewise, Ms. O'Grady read the contract and reviewed it with her real estate agent and her husband who is a professional property manager. (R. p. 432). She knew her remedies were limited in the event of a termination by Eastwood. (R. p. 441, l. 17 – p. 442, l. 16). Thus, both Respondents knew about the language in the contract they now challenge. They signed it anyway after being advised by real estate agents and a lawyer. They signed it with the knowledge Eastwood could return their deposits and cancel which they agreed to.

IV. THE AGREEMENT IS NOT SUBSTANTIVELY UNCONSCIONABLE.

A. Both the Termination and Liquidated Damages Provisions Are Not Unconscionable Because They Are Reasonably Related to Mitigating Business Risk and Return the Respondents to Their Status Before Signing the Agreements.

The Respondents allege that the terms of Paragraphs 25 and 26 are one-sided but offer no argument to support a finding that the terms are oppressive. Lack of mutuality does not make an agreement unconscionable. *See*, *Simpson v. M.S.A. of Myrtle Beach Inc.*, 373 S.C. at 32, 644 S.E.2d at 672. ("Lack of mutuality of remedy will not invalidate an arbitration agreement.") *Simpson* discussed gross limitations on the remedies available to a consumer in arbitration. Our Supreme Court has more directly examined limitation clauses in *Gladden* as follows:

> Limitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it.

Gladden, at 144–45, 739 S.E.2d at 885.

Further, the *Simpson* court relied on whether the arbitration clause "bore a reasonable relationship to the business risks" to decide whether the provision was unconscionable. *Simpson*, at 31, 644 S.E.2d at 672. Only after finding the "clause dictating that the dealer's judicial remedies

supersede the consumer's arbitral remedies" did the court conclude that it was not reasonably related to business risk and therefore unconscionable. *Id.*

Here, the provisions of the contract mitigate unforeseen risks like the neighborhood not being unincorporated into the subdivision. (Appellants' Initial Br. p. 17). The Respondents' unconscionability argument would force companies like Eastwood to fully assume this risk and increase the up-front cost on potential homebuyers. The Respondents were not damaged in that their deposits were returned to them in full. And they are not left with a defective home without a remedy as in other home purchasing cases. Instead, they have been returned to the position they were in before entering the agreement. *Cf. Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022); *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016). (Homeowners left with homes and limited remedies for defects.) Because the contractual provisions are reasonably related to mitigating Eastwood's business risk and the Respondents have been returned to their prior position, the provisions are not substantively unconscionable.

B. The Terms Are Not Substantively Unconscionable Because the Reasonable Respondents Voluntarily and Knowingly Accepted Terms That Returned Them to the Status They Held Before Entering the Agreements.

The common test of substantive unconscionability asks whether provisions are so "onesided and oppressive that any reasonable homebuyer would agree to them and that no honest residential home builder would insist on them." (Respondents' Brief, p. 19). Yet, Eastwood was honest in disclosing the terms - they were not hidden. Both Ms. Franquelin and Ms. O'Grady knew about the terms, and both Ms. Franquelin and Ms. O'Grady signed the contract after reviewing the terms even though they had multiple options to purchase homes. Ms. Franquelin and Ms. O'Grady are highly sophisticated, educated and reasonable people who entered a purchase agreement knowing it could be cancelled. Now that the agreement has been cancelled according

to the terms upon which they knowingly agreed, this Court should not strike the terms on the basis that no reasonable homebuyer would agree to them since both reasonable Respondents already did so.

The Respondents argue the purchase agreement they entered is unconscionable because it allows Eastwood to cancel the contract before the sale and return their money to them. They state that "[n]o reasonable, honest, or fair person would accept a term where the party with superior bargaining has the power to terminate the agreement at its exclusive election … ." (Respondents' Brief, p. 22). In fact, both the reasonable Respondents did knowingly accept those terms. And, the terms assure the Respondents that they have no risk of loss in the agreement. They are refunded every bit of their investment in the sale of the home with the ability to buy another home on the market. Such a result is not unconscionable. Rather it is a fair agreement which the reasonable Respondents voluntarily and knowingly entered.

CONCLUSION

The Master-in-Equity erred by finding Paragraphs 25 and 26 of the Purchase Agreements unconscionable and striking them from the agreements. In fact, the sophisticated and wealthy Respondents read these provisions, understood these provisions, reviewed these provisions with their real estate agents and a lawyer, objected to these provisions, were told the provisions would not be changed, agreed to these provisions, were returned their deposits subject to the provisions, and sued anyway arguing that these provision should be removed.

> "The law in this state regarding the construction and interpretation of contracts is well settled." *Progressive Max Ins. Co. v. Floating Caps, Inc*., 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013) (quoting *ERIE Ins. Co. v. Winter Constr. Co*., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Id*. at 46, 747 S.E.2d at 184 (quoting *D.A. Davis Constr. Co. v. Palmetto Props., Inc*., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "Parties are governed by their outward expressions and the court is not at liberty to consider their secret

intentions." *Id.* (quoting *Blakeley v. Rabon,* 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976).

> "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." *Id.* (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Courts "are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully."

S.C. Dep't. of Transp. v. M & T Enters. of Mt. Pleasant, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (citations omitted).

The Respondents entered the agreements knowing their deposits could be returned and the sales cancelled. When the sales were cancelled, and they were returned their deposits, as agreed, they sued and asked the court to invalidate the terms they knowingly agreed upon. The termination and refund clauses are not unconscionable or in violation of public policy as they are a reasonable allocation of risk and return the Respondents to the position they held before entering the agreements. And, this court should overturn the Master-in-Equity's decision.

Respectfully submitted,

s/James Edward Bradley
James Edward Bradley, SC Bar #66130
Moore Bradley Myers Law Firm, PA
1700 Sunset Blvd. (29169)
PO Box 5709
West Columbia, SC 29171
803-796-9160
Ward@mbmlawsc.com
Attorney for Appellants

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