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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Robert E. Hood
Circuit Court Judge

Appellate Case No. 2026-000076
Marlboro County Case No. 2025-CP-34-00154

Sharon Covington and Dorothy Douglas, ... Respondents,

v.

1st Better Living 2, LLC; Marlboro County Delinquent Tax Collector; and NewRez, LLC d/b/a Shellpoint Mortgage Servicing, ... Defendants,

of which NewRez, LLC d/b/a Shellpoint Mortgage Servicing, is the .... Appellant.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTER-STATEMENT OF ISSUES ON APPEAL 1

INTRODUCTION 2

COUNTER-STATEMENT OF THE CASE 3

STANDARD OF REVIEW 7

ARGUMENT 8

I. The February 10, 2026, Order is void, leaving Shellpoint's alleged errors unpreserved. 8

II. Shellpoint has not met its burden of proof regarding interstate commerce. 9

III. The arbitration provision at issue is unconscionable. 10

IV. Sharon Covington is not subject to the arbitration provision at issue in this appeal. 12

V. The Circuit Court must be affirmed under the "two issue rule". 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) 10

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012) 7

Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) 14

Cowburn v. Leventis, 366 S.C. 20, 619 S.E.2d 437 (Ct.App. 2005) 8

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022) 10, 11

Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) 15

Fanning v. Fritz's Pont.-Cad.-Buick, 322 S.C. 399, 472 S.E.2d 242 (1996) 10, 11

Flexon v. PHC-Jasper, Inc., 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012)....................... 9

Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct. App. 1997) .. 10

International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000) 13

Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010).. 13

McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004) 12

Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co., 867 F.3d 449 (4th Cir. 2017) 9

Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (1991)... 8, 12

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).. 12

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007)......... 7, 13

State v. Willis, 409 S.C. 183, 762 S.E.2d 3 (2014) 9

Thos & Howard Co. v. T.W.Graham & Co., 318 S.C. 286, 457 S.E.2d 340 (1995)...... 8

Tillman v. Oakes, 398 S.C. 245, 728 S.E.2d 45 (Ct. App. 2012) 8

Statutes

S.C. Code § 39-5-10... 2

Rules

Rule 12, SCRCP... 4

Rule 205, SCACR.. 8

Rule 220, SCACR.. 10

Rule 241, SCACR.. 8

Rule 59, SCRCP.. 9, 12

Regulations

12 C.F.R. § 1024.37 3

COUNTER-STATEMENT OF ISSUES ON APPEAL

I

Are Appellant's alleged errors preserved in light of the Circuit Court's void February 10, 2026, order?

II

Does Appellant's submission of a document at a Rule 12(b)(1), SCRCP, motion hearing without establishing foundation meet its burden to prove that a transaction took place in interstate commerce?

III

Is the relevant arbitration provision unconscionable in light of its lack of mutuality and particularly the lack of mutuality of the right to attorney's fees?

IV

Can, in an argument advanced for the first time on appeal, Respondent Sharon Covington be subject to an arbitration agreement she never agreed to and was previously unaware of?

V

Does the Appellant's failure to appeal all issues and orders before the Circuit Court demand affirmance under the "two issue rule" and/or the doctrine of waiver?

INTRODUCTION

This is the appeal of an order denying Appellant NewRez, LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint")'s motion to dismiss that was based upon, *inter alia*, the existence of a purported arbitration agreement. This purported arbitration agreement was found in a 1998 agreement to sell a mobile home to Respondent Dorothy Douglas. Shellpoint sought to dismiss Respondents' causes of action for negligence and violations of South Carolina's Unfair Trade Practices Act (S.C. Code § 39-5-10 *et seq*. - "SCUPTA"), which were joined at the Circuit Court to Respondents' appeal of a magistrate's writ of ejectment and Respondents' action to set aside tax title. Shellpoint has only appealed the narrow issue of arbitability, but none of its alleged errors are preserved for review.

COUNTER-STATEMENT OF THE CASE

On August 14, 1998, Respondent Dorothy Douglas purchased a manufactured home (1998 Pioneer 76 x 27 VIN PH2619GA3943A&B Map # 019-98-57-023) from S&G Enterprises, Inc. of Darlington, South Carolina. (R 4). Eventually, Douglas fell behind on her tax payments, and on November 6, 2023, Defendant Marlboro County Delinquent Tax Collector conducted a tax sale of the 1998 Pioneer, where Defendant 1st Better Living 2, LLC, was the winning bidder. (R 4). On October 4, 2024, Defendant Marlboro County Delinquent Tax Collector issued a Tax Bill of Sale for the 1998 Pioneer to Defendant 1st Better Living 2, LLC. (R 4).

After the tax sale, Shellpoint continued to send billing statements to Respondent Douglas, and Respondent Covington paid Shellpoint. (R 18-19, 63-64, 114-115, 119-120). After the tax sale, Shellpoint also continued to charge Respondent Douglas for force-placed insurance[1] and property inspections on property she no longer owned. (R 53-54, 94-95). Shellpoint continued this conduct even after being served with the Amended Summons and Complaint in this action. (R 53-54, 94-95). Additionally, the billing notices sent to Respondent Douglas disclosed Shellpoint escrowed sums for taxes. (R 114-115).

In April of 2025, Defendant 1st Better Living 2, LLC, sought to evict the occupant of the 1998 Pioneer, who happened to be Respondent Sharon Covington. (R

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[1] "'[F]orce-placed insurance' means hazard insurance obtained by a servicer on behalf of the owner or assignee of a mortgage loan that insures the property securing such loan." 12 C.F.R. § 1024.37(a)(1). The provision of force-placed insurance is a perennial item of abuse by loan servicers. (R 54-55).

4, 14). After Defendant 1st Better Living 2, LLC, obtained a writ of ejectment, Respondent Covington appealed the Magistrate Court to the Circuit Court on May 8, 2025. (R 4-5, 13-14). Respondent Covington amended this action on May 22, 2025, adding Respondent Dorothy Douglas and joining a claim to set aside the Tax Bill of Sale and claims against the servicer for negligence and violation of South Carolina's Unfair Trade Practices Act. (R 5, 15-20).

On September 3, 2025, Shellpoint filed a motion to dismiss Respondents' Amended Complaint under Rules 12(b)(1) & 12(b)(6), SCRCP. (R 24-47). Shellpoint's motion first requested that the Circuit Court dismiss or sever Respondents' causes of action against Shellpoint because they were not raised in the underlying magistrate court action. (R 38-39). Shellpoint's motion then requested the Circuit Court stay or dismiss Respondents' claims due to the presence of the arbitration agreement in the relevant contract of sale. (R 39-40). Finally, the motion requested the Circuit Court dismiss Respondent Sharon Covington's claims for want of a contractual relationship with Shellpoint. (R 40-41).

On November 23, 2025, Respondents filed a motion for partial summary judgment on their claim to set aside the November 6, 2023, tax sale. (R 48-52). The Circuit Court heard Plaintiffs' motion on December 4, 2025, at the Marlboro County Courthouse in Bennettsville, South Carolina, with counsel for all parties present. (R 5). On December 8, 2025, the Circuit Court issued a Form 4 Order denying Shellpoint's motion to dismiss and its alternative motion to sever. (R 1-3). The Circuit Court did not check the box labeled "formal order to follow" on the Form 4. (R 1).

On January 2, 2026, the Circuit Court issued an order granting Respondents' motion for summary judgment and granting Respondents leave to amend their negligence and SCUPTA claims to include new factual allegations[2] Respondents alleged in response to Shellpoint's motion to dismiss. (R 7). These new allegations were the charges to Respondent Douglas (paid by Respondent Covington) for insurance and inspections of a property no longer owned by Douglas, and the misrepresentation of tax escrow in Shellpoint's billing notices. (R 53-57). These facts were only uncovered because Respondents complained to South Carolina's Board of Financial Institutions at the time they filed their Amended Complaint. (R 74).

On January 8, 2026, Shellpoint filed its Notice of Appeal in this matter, appealing the Circuit Court's December 8, 2025, order, which it characterized as a "final written order". (R 123-124). On January 14, 2026, this Court requested a memorandum on the appealability of this order and Shellpoint provided a memorandum, under extension, on February 3, 2026.

On February 4, 2026, Shellpoint emailed the Circuit Court, bringing to its attention this Court's question of appealability and the Circuit Court's oral request for a proposed order regarding Shellpoint's motion to dismiss. (R 175). Shellpoint also e-filed a proposed order denying its motion to dismiss on this date. (R 175). The

[2] These new allegations were Shellpoint's charges to Respondent Douglas (paid by Respondent Covington) for insurance and inspections of a property she no longer owned, and the misrepresentations of an escrow for taxes in Shellpoint's billing notices. (R 53-57). These facts were only uncovered because Respondents complained to South Carolina's Board of Financial Institutions ("BOFI") at the time they filed their Amended Complaint. (R 74). Shellpoint's responses to this complaint (R 75-111) revealed the existence of this misconduct. (R 112).

Circuit Court requested Respondents' position on the proposed order, and Respondents' counsel responded that he did not recall the Circuit Court requesting an order, and in light of the January 8, 2026, Notice of Appeal he was concerned about the Circuit Court lacking jurisdiction. (R 174). After requesting and receiving a relevant excerpt of the hearing transcript, the Circuit Court issued an order on February 10, 2026. (R 9-12, 172-173). On February 19, 2026, Shellpoint filed what it has styled as an Amended Notice of Appeal. (R 138-139).

On March 10, 2026, Respondents provided their own memorandum on the appealability of both orders, and two days later this Court ordered the parties to proceed with briefing.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citation omitted); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012).

ARGUMENT

I. The February 10, 2026, Order is void, leaving Shellpoint's alleged errors unpreserved.

It is well-settled that the service of a notice of appeal divests the lower court of jurisdiction to consider matters affected by the appeal. *See Tillman v. Oakes*, 398 S.C. 245, 256 n.3, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012); Rule 205, SCACR; Rule 241(a), SCACR. The Circuit Court denied Shellpoint's motion to dismiss on December 9, 2025. (R 1-3). Shellpoint served its first Notice of Appeal on January 8, 2026. (R 123-124). The Circuit Court issued its Amended Order on February 10, 2026. (R 9-12). The Circuit Court lacked jurisdiction to issue an amended order, as the December 9, 2025, order was on appeal. Thus, the Feburary 10, 2026, order is void. *See Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) (A judgment of a court without subject matter jurisdiction is void.).

With the February 10, 2026, order void, the December 9, 2025, order of the Circuit Court is the only order before this Court, and that order does not contain rulings on Shellpoint's appellate arguments. When a trial court does not explicitly rule on an argument raised, and an appellant makes no Rule 59(e) motion to obtain a ruling, the appellate court may not address the issue. *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991); *see also Cowburn v. Leventis*, 366 S.C. 20, 40-41, 619 S.E.2d 437, 448-449 (Ct.App. 2005) (holding that when a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a motion asking the trial court to rule on the issue in order to preserve it for appeal.). Because the December 9, 2025, order does not explicitly rule on any of Shellpoint's arguments on appeal and Shellpoint did not file a Rule 59(e), SCRCP motion, these arguments are not preserved. This Court must affirm.

II. Shellpoint has not met its burden of proof regarding interstate commerce.

The cruelly one-sided arbitration provision of the relevant contract (R 78-79) is asserted under the Federal Arbitration Act. The party seeking to compel arbitration under the FAA "bears the burden of establishing the existence of a binding contract to arbitrate the dispute." *Minnieland Priv. Day Sch., Inc. v. Applied Underwriters Captive Risk Assurance Co.*, 867 F.3d 449, 456 (4th Cir. 2017).

The contract that contains the arbitration provision at issue is between Dorothy Douglas of Bennettsville, S&G Enterprises of Darlington, and Green Tree Financial Servicing Corporation. (R 77). The relevant contract lists the address of Green Tree Financial Servicing Corporation as: "7499 Parklane Road Ste 136, Columbia, SC 29223". (R 77). If the buyer, seller, and the collector of payments all reside in South Carolina, then the activity within the contract is intrastate. The FAA does not apply to intrastate contracts. *See Flexon v. PHC-Jasper, Inc.*, 399 S.C. 83, 731 S.E.2d 1 (Ct. App. 2012). Certainly the relevant contract contains recitations that it implicates interstate commerce, but that language is boilerplate and conflicts with the office location provided by Green Tree Financial Servicing Corporation in the body of the contract. (R 77-78). This provision is therefore ambiguous and is to be construed against the seller (the drafter), and the holder of the contract, by its terms, stands in the shoes of the seller. (R. 79). *E.g. State v. Willis*, 409 S.C. 183, 762 S.E.2d 3 (2014) (*contra proferentem*); *see also Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("A contract is ambiguous when the terms of the contract are inconsistent on their face…").

At hearing, Shellpoint provided a document from the South Carolina Secretary of State relating to a "Green Tree Financial Servicing Corporation" from Delaware. (R 155, 169-171). This document does not contain the Columbia, South Carolina address found in the relevant contract, and Shellpoint did not introduce the necessary foundation to connect the Green Tree Financial Servicing Corporation of the exhibit to the one of the relevant contract.[3] (R 77, 155, 169-171). It was Shellpoint's burden to present evidence[4] establishing use in interstate commerce, and it did not meet this burden; the Circuit Court did not err in denying Shellpoint's motion to dismiss.

III. The arbitration provision at issue is unconscionable.

"'At its core, unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.'" *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (quoting *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996)). Contracts of adhesion, such as the one in

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[3] The fact that Respondents did not object to the lack of foundation is of no moment, as this Court may affirm the Circuit Court for any reason present in the record. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

[4] Arguments of counsel are not evidence. *E.g. Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

this case, are viewed with "considerable skepticism" and such contracts are "strong indicator[s]" of lack of meaningful choice. *Id.*

In addition to the lack of meaningful choice, the contract (and arbitration provision) at issue in this action is oppressively one-sided and lack mutuality. While the buyer loses all access to the courts, the seller/holder of the contract may still, at its option, to enforce a security agreement, sue for breach of contract, or foreclose on a property secured by a mortgage. (R 79). Further, if the seller/holder pursues remedies in court, it still has the right to compel any counterclaim against it to arbitration. (R 79).

While Shellpoint characterizes our Supreme Court's decision in *Munoz* as controlling on the issue of mutuality in this contract (App. Br. arg. II.B.), the *Munoz* court did not consider that arbitration provision in conjunction with an attorney's fees provision that prohibits one party from obtaining attorney's fees as a prevailing party. Here, under section 12 of this contract (which applies to, and is therefore a part of, the arbitration provision), only the seller/holder has a right to pursue reimbursement of attorney's fees. (R 78). The totality of these unmutual provisions, forced upon Respondent Douglas in this contract of adhesion by a sophisticated seller with outsized bargaining power,[5] are sufficiently oppressive and one-sided to warrant finding it unenforceable under the doctrine of unconscionability. The Circuit Court did not err in denying Shellpoint's motion to dismiss and must be affirmed.

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[5] The *Damico* court also provides an exploration of the disparity of bargaining positions and sophistication between a long-standing commercial seller of homes and the usual homebuyer. Much of its analysis applicable to this transaction.

IV. Sharon Covington is not subject to the arbitration provision at issue in this appeal.

Shellpoint's third argument on appeal is that the arbitration provision in question also applies to Respondent Sharon Covington under an estoppel theory. This argument is not preserved, as Shellpoint advances this argument for the first time[6] on appeal. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."). Further, Shellpoint's brief notes: "The circuit court's [February 10, 2026] Arbitration Order broadly denied enforcement of the arbitration clause without separately analyzing Plaintiff Sharon Covington's distinct status as a non-signatory." (App. Br. arg. III). Without a Rule 59(e), SCRCP, motion addressing this issue, it is not preserved for appeal. *E.g. Noisette*, *supra.*

If Shellpoint's argument is preserved, it has not met its burden of proof. Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he or she has not agreed to arbitrate. *E.g. International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d

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[6] Shellpoint did argue orally at hearing that Covington's arguments were "derivative" of Douglas's arguments, but the meaning of this term in this context is unclear. (R 163). Further, the fact that the Respondents mentioned the inapplicability of estoppel in one of its Circuit Court filings does not preserve it for Shellpoint's appeal. *See McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004) (an appellant cannot raise an issue on appeal that was raised by the respondent at trial, but on which appellant advanced no arguments to the trial court; the argument must have been raised by appellant in order for appellant to raise it on appeal).

411, 416 (4th Cir. 2000). Shellpoint admits Respondent Covington is not a party to the purported arbitration agreement: "[Shellpoint] is unaware of any relevant contractual or other relationship it has to Ms. Covington…" (R 40). "She [Respondent Covington] has no connection so far as I can tell to my client [Shellpoint] whatsoever." (R 163).

Rarely, a nonsignatory may be compelled to participate under an estoppel theory; however, the nonsignatory must be aware of the agreement and has benefitted from the agreement. *Id.* at 418. Shellpoint did not present any evidence to support a finding of estoppel, particularly of Covington's awareness of an agreement and any benefit she has received from the agreement. Respondents' response to Shellpoint's motion to dismiss noted this deficiency.[7] (R 39-40). Thus, Shellpoint has not met its burden of proof and the Circuit Court must be affirmed.

V. The Circuit Court must be affirmed under the "two issue rule".

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Shellpoint's original motion to dismiss addresses more than just a purported right to arbitrate. Shellpoint's filings and hearing arguments also argued for the dismissal of Respondent Covington's causes of action on their merits based on the duties set forth in the mobile home sales contract, and it also argued for

[7] To the extent the Circuit Court's February 10, 2026, order is not void (see Argument I), this finding, which was incorporated into that order, must be upheld if it is reasonably supported by the evidence. *Simpson*, *supra*.

the severance of the actions against Shellpoint from the action to set aside the Tax Sale Title. (R 35-42, 155-156). Shellpoint's brief does not appeal these grounds for denial – they are thus the law of the case. *See, e.g., Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-161, 177 S.E.2d 544, 544 (1970) (unappealed ruling, right or wrong, is the law of the case). This adjudication supports affirmance under the "two issue rule".

Additionally, Shellpoint did not appeal the Circuit Court's January 2, 2026, Order. (R 4-8). The January 2, 2026, Order granted Respondents partial summary judgment on their claim to void the relevant tax sale. (R 4-8). It also granted Respondents leave to amend their complaint to include the factual allegations asserted in their memorandum in opposition to Shellpoint's motion to dismiss. (R 7, 53-115). In effect, the Circuit Court has adjudicated that the Respondents have set forth facts sufficient to constitute causes of action for negligence and SCUPTA against Shellpoint. This adjudication is also the law of the case, and it also supports affirmance under the "two issue rule".

VI. As an additional sustaining ground, Shellpoint has waived any purported right to arbitrate.

"The right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011) (citation omitted). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.* (quotation removed). The typical factors considered under a waiver analysis described in *Davis* do not fit the somewhat unusual facts of this case. Instead, this Court must consider whether Shellpoint's failure to appeal the January 2, 2026, Order constituted a waiver of the right to pursue arbitration. Such an analysis would bear a strong similarity to the analysis under the "two-issue rule" above. The necessary prejudice to the Respondents now possess unappealed adjudications that they have set forth facts sufficient to constitute causes of action for negligence and SCUPTA against Shellpoint. Dismissing their causes of actions and referring this matter to arbitration would strip them of these adjudications, which are the law of the case, and prejudice their claims.

CONCLUSION

The Circuit Court should be affirmed.

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