IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Alison R. Lee, Circuit Court Judge

Case No. 12-CP-40-07313

Cynthia Hall; Ronald R. Ballentine, ...Respondents,

v.

Green Tree Servicing, LLC, f/k/a Green Tree Financial Servicing Corp., ...Appellant.

INITIAL BRIEF OF RESPONDENTS

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I. COUNTERSTATEMENT OF THE CASE

This action was commenced with the filing on October 30, 2012, by Cynthia Hall and Ronald R. Ballentine, ("Respondents"), against Green Tree Servicing LLC, f/k/a Green Tree Financial Servicing Corporation ("Appellant"). The Respondents alleged that the Appellant violated statutory provisions pertaining to Claim and Delivery[1] proceedings and Notification Provisions.[2] The Respondents further alleged that Appellant breached the contract between the parties and were unjustly enriched. The Appellant initially filed a motion to dismiss Respondent's claims on the basis that the court lacked subject matter jurisdiction because there was an arbitration agreement clause present in the *Retail Installment Contract, Security Agreement, Waiver of Trial by Jury and Agreement to Arbitration or Reference or Trial by Judge Alone* (the "Contract") to which respondent agreed.

The motion was heard before the Honorable Alison R. Lee, Presiding Judge of the Fith Judicial Circuit, on January 30, 2013. By order dated May 31, 2013, and entered on June 3, 2013, (the "Order"), Judge Lee partially granted appellants Motion to Dismiss but allowed the claims based on statutory violations to be heard by a judge.

The appellants timely served notice of appeal.

II. STATEMENT OF FACTS

On March 12, 1999, Cynthia Hall was granted title to real estate by her father, Ronald Ballentine. [Complaint ¶ 7]. On June 10, 1999, Respondents decided to place a mobile home on their property as co-owners. [Complaint ¶ 9]. On July 6, 1999,

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[1] S.C. Code Ann. 15-60-10, *et seq.* (Thomson Reuters West 2012).

[2] S.C. Code Ann. 36-9-601, *et. seq.* (Thomson Reuters West 2012).

Respondents obtained financing in the amount of $68,000.00, with an adjustable interest rate, with Appellant to purchase their new 1999 Redman Manufactured Home. [Complaint ¶ 11]. Cynthia Hall was the primary obligor and Ronald Ballenine was the secondary obligor. [Complaint ¶ 11]. Respondents initially insured the property themselves and rented the property out to a third party. [Complaint ¶ ¶ 12, 15]. In March 2012, the tenants of the property moved out and Respondents began renovations to prepare the property for a family member to move in. [Complaint ¶ ¶ 15, 16]. Such renovations required Respondents to replace the flooring and water heater. [Complaint ¶ 16].

On May 16, 2012, under the belief that Respondents were in default, Appellant repossessed the manufactured home. [Memo. Supp. Mot. To Dismiss, p.2]. Respondents did not file an affidavit with the court pursuant to S.C. Code Ann. 15-69-30, or follow other pre-seizure conditions set by law. [Complaint ¶ 40–48]. Appellant then sold the home on June 11, 2012. Respondents were never provided notice that their property was going to be sold. [Complaint ¶ 26]. On June 21, 2012, the home was finally physically removed from the property. [Complaint ¶ 27].

Respondents original financing agreement with appellant contained an arbitration clause as follows:

> **ARBITRATION OF DISPUTES AND WAIVER OF JURY TRIAL**
>
> **a. Dispute Resolution.** Any controversy or claim between or among you and me or our assignees arising out of or relating to this Contract or any agreements or instrument relating to or delivered in connection with this Contract, including any claim based on or arising from an alleged tort, shall, if requested by either you or me, be determined by arbitration, reference, or trial by a judge as provided below. A controversy involving only a single

claimant or claimants who are related or asserting claims arising from a single transaction, shall be determined by arbitration as described by below. . . YOU AND I AGREE AND UNDERSTAND THAT WE ARE GIVING UP THE RIGHT TO TRIAL BY JURY , AND THERE SHALL BE NO JURY WHETHER THE CONTROVERSY OR CLAIM IS DECIDED BY ARBITRATION, BY JUDICIAL REFERENCE, OR BY TRIAL BY A JUDGE.

b. **Arbitration.** Since this Contract touches and concerns interstate commerce, an arbitration under this Contract shall be conducted in accordance with the United States Arbitration Act (Title 9, United States Code), notwithstanding any choice of law provision in this Contract. The Commercial Rules of the American Arbitration Association ("AAA") also shall apply. The arbitrator(s) shall follow the law and shall give effect to statutes of limitation in determining any claim. Any controversy concerning whether an issue is arbitrable shall be determined by the arbitrator(s). The award of the arbitrator(s) shall be in writing and include a statement of reasons for the award. The award shall be final. Judgment upon the wayward may be entered in any court having jurisdiction, and no challenge to entry of judgment upon the award shall be entertained except as provided by Section 10 of the United States Arbitration Act or upon a finding of manifest injustice.

c. **Judicial Reference or Trial by a Judge.** If requested by either you or me, any controversy or claim under subparagraph (a) that is not submitted to arbitration as provided in subparagraph (b) shall be determined by reference to a referee appointed by the court who, sitting alone and without jury, shall decide all questions of law and fact. You and I shall designate to the court a referee selected under the auspices of the AAA in the same manner as arbitrators are selected in AAA-sponsored proceedings. The referee shall be an active attorney or retired judge. If the court where the controversy is venued lacks the power to appoint a referee, the controversy instead shall be decided by trial by a judge without a jury.

d. **Self-Help, Foreclosure, and Provisional Remedies.** The provisions of this paragraph shall not limit any rights that you or I may have to exercise self-help remedies such as set-off or repossession, to foreclosure by power of sale or judicially against or sell any collateral or security, or to obtain any provisional or ancillary remedies from a court of competent jurisdiction before, after or during the pendency of any arbitration under subparagraph (b) above. Neither the obtaining nor exercise of any such remedy shall serve as a waiver fo the right of either you or me ot demand that the related or any other dispute or controversy be determined by arbitration as provided above.

[Contract, pp.4-5] (Emphasis in original).

III. ARGUMENT

A. The Circuit Court was correct in determining that Respondents' statutory claims were not subject to mandatory arbitration.

1. Parties are not required to arbitrate issues that lie outside the scope of the arbitration agreement.

The Circuit Court did not rule that an arbitration agreement must expressly state that it applies to statutory claims, as the Appellant claims; it ruled that there was no indication that these parties agreed to arbitrate statutory claims in this contract. [*Order*, p. 3]. Courts only need to compel arbitration "when the parties have agreed to arbitrate their disputes and the scope of the parties' agreement permits resolution of the dispute at issue." [3] When the parties did not agree to arbitrate, arbitration is not required. [4] "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim."[5]

The Respondents and Appellant agreed to follow the proper statutory and legal procedures if it ever became necessary for the Appellant to seek the seizure of the manufactured home. Such judicial procedures required the matter to be heard through a court of competent jurisdiction, one that regularly hears matters involving foreclosures or claim

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[3] *Muriithi v. Shuttle Exp., Inc.*, 712 F.3d 173 (4th Cir. 2013).

[4] *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012)

[5] *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (*quoting Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001)).

and delivery proceedings. These are functions that are not available to an arbitrator in this state and the arbitration clause was unable to encompass such a remedy.

The State has the exclusive power to dispose of property in this way. Statutes are in place to protect the rights of all parties involved in such proceedings. Violations of these statutes allow for the violated to seek a remedy outside of any arbitration agreement as the remedy stems directly from the statute, not from any contract, so that they cannot be severed. Appellant, by choosing to seek a remedy not within the agreement, ensured that any cause of action created by its choice would not fall within the arbitration language. Granting an arbitrator the power to make determinations in the realm of foreclosure weakens the state and authority of our court system.

B. The arbitration agreement is unconscionable and unenforceable according to South Carolina precedent.

1. Arbitration provisions that allow for court proceedings to occur concurrently with arbitration are unconscionable.

South Carolina does not approve of arbitration clauses that allow for judicial proceedings to occur independently and concurrently of arbitration. Such clauses are considered "oppressive and one-sided."[6] In *York*, the Court of Appeals discussed *Simpson v. MSA of Myrtle Beach, Inc.*,[7] where a car dealership contracted for an arbitration clause but reserved the ability to seek judicial remedies simultaneously. The clause allowed the dealer to bring a judicial proceeding and disregard any arbitration claim that placed, "an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court

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[6] *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E2d 139, 150 (Ct. App. 2013).

[7] 373 S.C. 14, 644 S.E.2d 663 (2007).

proceeding initiated by the dealer before the adjudication of the consumer's claims in arbitration."[8] "Thus, the dealer's retention of judicial remedies that entirely 'supersede[d] the consumer's arbitral remedies' did not bear a sufficiently reasonable relationship to risks inherent in secured transactions and did not promote a neutral arbitral forum.[9]

The court in *York* found the arbitration clause to be virtually identical to the one in *Simpson* because of contract language stating that claims by the dealer would not be stayed because of arbitration.[10] In this instance, the arbitration clause provides that it will, "not limit any rights that you or I may have to exercise self-help remedies such as set-off or repossession, to foreclose by power of sale or judicially against or sell any collateral or security, or to obtain any provisional or ancillary remedies from a court of competent jurisdiction before, after, or *during the pendency of any arbitration*."[11] This language is effectively identical to language our courts have previously held to be unconscionable and should be determined as such now.

2. <u>Arbitration provisions that include warranty claims are unconscionable.</u>

South Carolina does not approve of arbitration clauses that fail to exclude warranty claims from its language because such clauses would conflict with the Magnuson-Moss Warranty Act (MMWA). The *Simpson* court acknowledged that, "informal dispute resolution

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[8] *Simpson* 373 S.C. at 32, 644 S.E.2d at 672.

[9] *York* 406 S.C. 67, 749 S.E.2d 139, 150–51 (Ct. App. 2013) (citing *Simpson* at 32, 644 S.E.2d at 672).

[10] *York* 406 S.C. 67, 749 S.E.2d at 150–51.

[11] Contract, p. 5 (emphasis added).

procedures set forth in written warranties under the MMWA are not to be legally binding on any person."[12] Furthermore, "the MMWA has been interpreted to supersede the FAA with respect to consumer claims for breach of written warranty."[13] These facts demonstrate that the federal government has forbidden arbitration of MMWA claims.[14] Any arbitration clause with language that envelopes MMWA claims will not be enforced by our Court and such claim does not have to be brought in order to find the provision unconscionable and unenforceable.[15]

Here, the language of the arbitration agreement includes, "[a]ny controversy or claim between or among you and me or our assignees arising out of or relating to this Contract."[16] The agreement contains no limitation to types of claims that should be brought before an arbitrator. Nor is there language within the contract that excludes claims relating to a breach of warranty. Therefore, this provision of the arbitration agreement is invalid.

3. The unconscionable provisions render the entire arbitration agreement unenforceable.

South Carolina courts are reluctant to rewrite contracts when the end result would not be a reflection of the intent of the parties. "'If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable

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[12] *Simpson* 373 S.C. at 33, 644 S.E.2d 663 at 673.

[13] *Id.*

[14] See *Id.*

[15] *Id.*

[16] Contract p. 4.

parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.'"[17] Furthermore, "it is not the function of the court to rewriting contracts for the parties."[18] In both *Simpson* and *York*, there were multiple provisions which would have required the court to intervene to an extent it was not willing to go. Instead, the arbitration clauses were stricken in their entirety.[19] Finally, the *Simpson* court emphasized that there is no "multitude of one-sided terms" to be considered unconscionable and that contracts should be analyzed on a case-by-case basis.[20]

Removing one or both of the unconscionable provisions would effectively rewrite the contract for the parties involved. Their inclusion in the clause is so pervasive that any removal would greatly distort the intent of the parties. As written, the arbitration provisions have a cumulative effect that prevents the respondents from seeking their statutory remedies. These provisions are not severable, thus the entire arbitration agreement is invalid.

IV. CONCLUSION

Appellants included an unconscionable arbitration agreement in its contract with Respondents. Appellants now seek to enforce this agreement after further unfair acts by violating state law. Unless this Court of Appeals finds that the agreement is not in violation of South Carolina precedent, the judgment must be affirmed.

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[17] *Simpson* 373 S.C. at 34, 644 S.E.2d at 674 (quoting *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84–85 (D.C. Cir. 2005)).

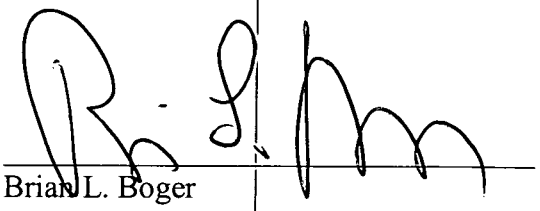
[18] *Id.*

[19] See *York* 406 S.C. 67, 749 S.E.2d at 151; *Simpson* 373 S.C. at 34–35, 644 S.E.2d at 674.

[20] *Simpson* 373 S.C. at 36, 644 S.E.2d at 674.

Since the arbitration agreement is so similar to agreements previously held to be unconscionable and unenforceable, the Respondents urge the Court to affirm the prior judgment.

Respectfully submitted:
LAW OFFICES OF BRIAN L. BOGER



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January 3, 2014
Columbia, SC

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RESPONDENTS' DESIGNATION OF MATTER

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TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

COMES NOW the Respondents, Cynthia Hall and Ronald R. Ballentine ("Respondents"), pursuant to Rule 209 of the South Carolina Appellate Court Rules, and hereby submits their Designation of Matters to be Included in the Record on Appeal which herein designates the parts of the transcripts, orders, pleadings, affidavits, exhibits, and other materials which they propose to include in the Record on Appeal in this matter.

ORDERS

1. "Order" granting in part and denying in part the Appellant's Motion to Dismiss, or, in the Alternative to Stay Pending Mandatory Arbitration issued by the Honorable Allison Renee Lee, Circuit Judge, dated 31 May 2013 and filed 3 June 2013;

PLEADINGS

1. Respondents' Complaint dated 30 October 2012;

2. Appellant's Motion to Dismiss, or, in the Alternative to Stay Pending Mandatory Arbitration dated 29 November 2012;

3. Appellant's Memorandum in Support of Defendant's Motion to Dismiss, or, in the Alternative to Stay Pending Mandatory Arbitration dated 22 January 2013;

4. Respondent's Memorandum in Opposition to Plaintiff's Motion to Dismiss, or, in the Alternative to Stay Pending Mandatory Arbitration dated 22 January 2013;

EXHIBITS

1. Retail Installment Contract, Security Agreement, Waiver of Trial by Jury and Agreement to Arbitration or Reference or Trial by Judge Alone dated 6 July 1999.

I, Brian L. Boger, Esquire, hereby certify pursuant to Rule 209(c) of the South Carolina Appellate Court Rules, this Designation of Matter to be Included in the Record on Appeal submitted by Respondents does not contain any matter and/or items which are not relevant to this appeal.

Respectfully submitted:
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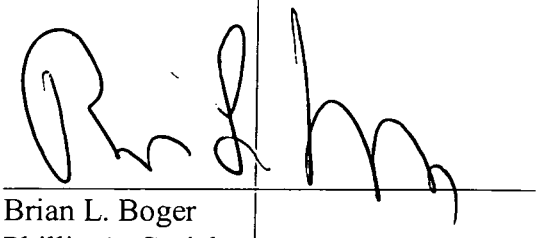

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I, Phillip A. Curiale, Esquire, hereby certify that on 2 December 2013, I served a copy of the **Initial Brief of Respondents and Designation of Matter** submitted by the Respondents Cynthia Hall and Ronald R. Ballentine, on counsel for the Appellants via both e-mail (Vstieglitz@nexsenpruet.com; Sgrigg@nexsenpruet.com; Sgroves@nexsenpruet.com;) and United States Mail, psotage pre-paid, and addressed as follows:

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3 January 2014