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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Opinion No. 2013-UP-296 (S.C. Ct. App. filed Aug. 28, 2013)

Ralph Wayne Parsons, Jr. and Louise C. Parsons, Respondents,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and
South Carolina Bank & Trust, N.A., Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the Petitioner.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

I. The Court of Appeals misapplied the applicable standard of review.

The primary basis on which the Court of Appeals affirmed the circuit court's decision is that "although arbitrability determinations are subject to de novo review, the trial court's factual findings will not be reversed if reasonably supported by any evidence." **App. p.288**. Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("Petitioner") asserts that the Court of Appeals misapplied the applicable standard of review because (1) the circuit court refused to find any facts (**App. p.7, note 1**); and (2) well-established case law required the circuit court to compel arbitration unless the arbitration clause "is not susceptible to any interpretation which would cover the asserted dispute." See, e.g., Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118-19 (2001) ("A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.").

Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons ("Respondents") submit no substantive response to this argument, instead simply averring "the cases are clear that a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." (**Ret. to Pet. for Cert., p.5**). Respondents fail to call attention to any fact to which they contend the Court of Appeals owed the circuit court deference; fail to address the circuit court's express refusal to find facts; and fail to address the case law cited by Petitioner. Here, the standard of review is de novo, and the Court of Appeals owed no deference to the circuit court.

Consequently, this Court should respectfully grant certiorari to address the purported deference the Court of Appeals applied to the circuit court's findings.

II. The Court of Appeals overlooked the plain language of the arbitration provision, which specifically covers the claims asserted by Respondents against Petitioner.

The Court of Appeals, like the circuit court, ignored the subject arbitration provision. Similarly, Respondents fail to cite a single word of the arbitration provision in their return.

Respondents mistakenly aver that the “only arbitration provision to which the parties agreed is found in Paragraph 21 of the Agreement.” **Ret to Pet. for Cert., p.6.** However, Paragraph 21 of the Agreement provides, in pertinent part:

21. **Warranty and Arbitration.** Purchaser and Seller hereby agree that, in connection with the sale contemplated by this agreement, Purchaser will be enrolled in the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program, booklet revision date 04/06 (JWH Warranty), *the JWH Warranty being incorporated herein by reference PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. . . .*

App. p.61, ¶21 (emphasis added in italics and double-emphasis added in bold); see First Baptist Church of Timmonsville v. George A. Creed & Son, Inc., 276 S.C. 597, 599, 281 S.E.2d 121, 122 (1981) (“Arbitration of disputes arising under a contract may be provided for by reference to outside documents.” (citation and quotation marks omitted)).

Respondents not only initialed under this Paragraph 21 indicating that they had received *and* read a copy of the JWH Warranty, including the arbitration provisions contained therein, but Respondent Ralph Wayne Parsons, Jr. also executed a separate document acknowledging that he received the JWH Warranty. **App. p.61, ¶21; pp.124-126; p.127; see id.** at 599, 281 S.E.2d at 122 (“[A] party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: ‘But I did not read the whole agreement.’”); York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013) (“Furthermore, a party who signed a contract is deemed to have read and understood “the effect”

of the contract.”).

While Respondents cite to general case law governing the interpretation of arbitration provisions, Respondents omit any application of such case law to the facts of the present case. In a similar vein, as Petitioner more fully explains in its petition for writ of certiorari, the Court of Appeals parenthetically and summarily relied on Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 47-48, 693 S.E.2d 434, 435 (Ct. App. 2010), to conclude that Respondents’ claims were not within the scope of the subject arbitration provision. Despite Petitioner’s repeated contention that the arbitration provision in the present case is completely different from the provision at issue in Faltaous, neither the Court of Appeals nor Respondents ever addressed or even referenced this issue.

The arbitration provision in the present case plainly includes “[a]ny and all unresolved claims or disputes of any kind or nature” between the parties “arising out of or relating in any manner to” the Agreement, the warranty incorporated into the Agreement, the home, *or* the Property. **App. p.77, §V, ¶O.** The arbitration provision “specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.” **App. p.78, §V, ¶O.** Respondents, like the circuit court and the Court of Appeals, advanced no valid reason why this plain language is inapplicable. This Court should grant certiorari to address this error of law by the circuit court and the Court of Appeals. See S.C. Dep’t of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) (“The construction of a clear and unambiguous contract presents a question of law for the court.”).

III. The Court of Appeals overlooked that the circuit court erroneously interpreted the warranty provisions instead of the arbitration clause.

Respondents fail to even mention this argument in their return. Instead of turning to the arbitration clause contained in Section V, Paragraph O of the JWH Warranty to determine the claims subject to arbitration, the circuit court mistakenly looked to the exclusions from the warranty, contained in Section IV of the JWH Warranty. Neither the Agreement nor the JWH Warranty states that the exclusions from the warranty also constitute exclusions from mandatory arbitration. The interpretation invoked by the circuit court and affirmed by the Court of Appeals is not only contrary to the express terms of the parties' agreement but also results in a nonsensical meaning. Cf. Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist., 319 S.C. 488, 497, 462 S.E.2d 296, 301 (Ct. App. 1995) (explaining that the court will not adopt nonsensical interpretation of provision in contract); see also Stevens Aviation, Inc. v. DynCorp Int'l LLC, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) ("Additionally, an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.") (citation and quotation marks omitted).

The arbitration clause itself plainly provides that it applies to more expansive claims than the warranty, as it specifically includes tort claims, claims for personal injury, and claims for implied warranties, all of which are expressly excluded from the warranty. This misinterpretation of the Agreement is an error of law, warranting certiorari review. See So. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009) ("The construction of a clear and unambiguous contract presents a question of law for the court.").

IV. This Court should address the impact of Landers on Aiken and Partain because, as previously discussed, the Court of Appeals committed an error of law in deferring to the circuit court's purported findings of fact and in applying the arbitration provision to the Respondents' claims.

With respect to the issue of whether the circuit court erred in holding that Respondents

alleged outrageous torts which would be unforeseeable to a reasonable consumer, Respondents, like the Court of Appeals, rely on Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), for the proposition that this Court need not address the issue. As discussed *supra*, the Court of Appeals erred in affirming the circuit court's determination that the arbitration provision incorporated into the Agreement excludes the claims asserted by Respondents. Futch is inapplicable.

While Respondents further advocate for a three-step process to determine whether claims are subject to arbitration, this Court's decision in Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 214 (2013), collapses the process into a single step: "Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." Thus, Respondents' proposed framework—like that employed by the circuit court—is erroneous as a matter of law.

As Petitioner establishes in section 2 of its petition for writ of certiorari, each of Respondents' claims in the present case bears a significant relationship to the Agreement. Under Landers, Respondents' claims were therefore foreseeable to Respondents at the time of the Agreement's execution and subject to arbitration. The Court of Appeals refused to address this issue, warranting certiorari review.

V. Special and important reasons support certiorari review under Rule 242, SCACR.

In addressing this issue, Respondents summarily state that "the issues raised by the Respondent [sic] are not 'Special or Important' so as to justify discretionary review by this Court." **Ret. to Pet. for Cert. p.1.**

The Court of Appeals misapplied the applicable standard of review, ignored the plain language of the arbitration provision at issue, and misinterpreted Landers. Each of these errors directly conflict with prior decisions of this Court and, with respect to issues of federal law, the decisions of the Supreme Court of the United States. These errors therefore support certiorari review under Rule 242(b)(3) and (5), SCACR.

Additionally, the apparent confusion of the Court of Appeals in applying the appropriate standard of review and the Landers framework constitute independent “special and important reasons” for certiorari.

Finally, the implication of Landers on the framework for review of arbitrability determinations appears to be a novel question of law, also supporting certiorari under Rule 242(b)(1), SCACR.

For each of these reasons, Respondents respectfully request that this Court grant the petition.

VI. Petitioner timely served and filed the petition for writ of certiorari.

Respondents’ challenge to the timeliness of the petition for writ of certiorari is misplaced because the appellate court rules, when read as a whole, clearly permit a petition for writ of certiorari under Rule 242 only after the Court of Appeals *denies* a petition for rehearing.

“In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes.” Green By & Through Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). “In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006).

Rule 221(b), SCACR, which governs the procedure for the sending the remittitur, provides, in pertinent part: “If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court.” Id. “**Where a petition for rehearing has been denied**, the Court of Appeals shall not send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 242(c) has expired.” Id. (emphasis added). Rule 242(c), SCACR, states, in relevant part: “A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is finally decided by the Court of Appeals.” Rule 242(c), SCACR.

Read together, these rules require the clerk of court to send the remittitur, after receipt of a petition for rehearing, only when the petition for rehearing has been denied and, even then, only when the time to serve and file a petition for writ of certiorari lapses.¹

Petitions for rehearing are also not post-trial motions, as Respondents contend. A petition for rehearing *must* be served, filed and denied before a party may seek certiorari review under Rule 242, SCACR. It is a procedural prerequisite to certiorari review. See Rule 242(c), SCACR (“A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals.”). A post-trial motion or motion to reconsider, on the other hand, is optional filing usually employed

¹ To the extent a petition for rehearing is granted, the Court of Appeals would withdraw its previous opinion and re-file a new one, as it did in the present case. The clerk would then issue the remittitur once fifteen days have elapsed without the petitioner seeking a petition for rehearing of the re-filed opinion. See Rule 221(b), SCACR (“The remittitur . . . unless otherwise ordered by the court shall not be sent to the lower court . . . until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal.”).

to preserve issues when the circuit court fails to rule on an issue raised by the appellant. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”). In many situations, a party should file a post-trial motion, but it is not a procedural prerequisite.

Likewise, even accepting Respondents’ misplaced analogy, the cases on which Respondents rely are distinguishable where, as here, the Court of Appeals issued a new decision. See Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 2, 518 S.E.2d 56, 57 (Ct. App. 1999) (recognizing second motion for reconsideration did not toll time to appeal where circuit court denied first motion); Quality Trailer Products, Inc. v. CSL Equip. Co., Inc., 349 S.C. 216, 220, 562 S.E.2d 615, 618 (2002) (recognizing motion to reconsider which includes identical grounds as previous motion for judgment notwithstanding the verdict did not toll time to appeal where circuit court denied JNOV motion).

In the present matter, the Court of Appeals *granted* Petitioner’s first petition for rehearing (**App. pp.285-286**), *withdrew* its previous decision (**App. p.285, pp.287-288**), and re-filed a substituted opinion (**App. pp.287-288**). Further, while the Court of Appeals initially affirmed the circuit court on three grounds (**App. pp.261-263**), the substituted opinion changed the reasoning behind its decision with respect to the third ground by refusing to address the issue (**App. pp.287-288**; see Covar v. Sallat, 22 S.C. 265, 272 (1885) (recognizing that, when the appellate court fails to address some of the arguments raised in the appeal, “a *prima facie* case for

rehearing has been made.”); see also Elam, 361 S.C. at 20, 602 S.E.2d at 778 (successive Rule 59(e) motion permissible when first motion results in “substantial alteration of the original judgment.”).

For the foregoing reasons, Petitioner timely served and filed the petition for certiorari.

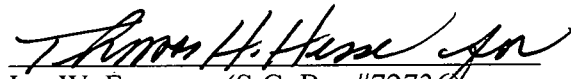
CONCLUSION

As Petitioner established in its petition for certiorari, the Court of Appeals misapplied the standard of review, ignored the arbitration provision, and refused to address the Landers framework. As a result, the unpublished opinion by the Court of Appeals conflicts with this Court’s precedent, precedent of the Supreme Court of the United States with respect to issue of federal law, and raises the novel issue of how the Landers framework impacts Aiken and Partain.

For the foregoing reasons, Petitioner respectfully requests that this Court GRANT its petition for writ of certiorari.

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that true and correct copies of John Wieland Homes and Neighborhoods of the Carolinas, Inc.'s Reply in Support of Petition for Writ of Certiorari was served on this 6th day of June 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

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