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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. Kimball Jackson, Circuit Court Judge
York County

Case No. 2011-CP-46-00796

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.

RESPONDENTS' BRIEF

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Statement of Issues on Appeal

I. Was the Petition for Writ of Certiorari timely?

II. Did the Trial Court and the Court of Appeals holding that the Respondents' claims do not fall within the scope of the arbitration clause?

III. Did the Trial Court and the Court of Appeals err in holding that the alleged failure to disclose the existence of hazardous waste buried on Respondents' property was not subject to arbitration?

IV. Is the alleged arbitration agreement unconscionable?

Statement of the Case

This dispute concerns the discovery of underground piping and hazardous waste on residential property located in Lancaster County ("Property"). The Appellant/Defendant ("JWH"), owned, developed, and later sold the Property to Respondents/Plaintiffs ("Parsons"). As alleged in their Complaint filed on February 24, 2011, the Parsons contend that JWH was aware of the presence of the pipes and hazardous waste prior to conveying the Property and failed to disclose the condition to the Parsons. The Complaint specifically asserts, among other causes of action, Fraud, Negligent Misrepresentation, and Unfair Trade Practices against JWH.

JWH does not dispute the fact that contamination was discovered on the Property and admits that it has previously assumed responsibility for remediation of the contamination. JWH denies having knowledge of the contamination prior to the sale.

On June 10, 2011, JWH filed a Motion to Dismiss and to Compel Arbitration of all claims asserted in the Parsons' Complaint, based upon the terms of a "Warranty and Arbitration" clause contained in the sales contract. The Parsons submit they never agreed to arbitrate the claims asserted in their Complaint and further assert that the claims

asserted against JWH concern alleged illegal and outrageous tortious conduct, which is not subject to arbitration as a matter of law.

After a full hearing on the matter, the Honorable S. Jackson Kimball of York County, issued an order dated October 10, 2011 ruling that the Parsons claims were not subject to arbitration as a matter of law. Thereafter, JWH filed an Answer to the Complaint, a separate motion requesting dismissal on the basis of improper venue, and a motion for reconsideration of the court's previous ruling denying arbitration. Prior to hearings or rulings on any of the motions including the motion for reconsideration, on October 19, 2011 JWH filed a notice appealing the trial court's October 10, 2011 Order denying arbitration.

Statement of Facts

In or about November 2002, JWH purchased approximately 65 acres of land located in the Indian Land region of Lancaster County for purposes of development (App. p. 10 at ¶7). Prior to JWH's purchase of the property, the property was owned by Springs Industries, Inc., an entity which conducted industrial activities on the property (App. p. 10 at ¶8). Following its purchase of the property in 2002, JWH demolished the former Springs Industries' building located on the property, and removed all visible evidence of the building from the property (App. pp. 10-11 at ¶9). As alleged, JWH also removed some underground pipes, valves and tanks left by Springs' former industrial operations. Id. JWH then subdivided the property and developed The Woods at Bridgemill Subdivision (the "Subdivision"), which consisted primarily of single family "spec" homes (App. p. 11 at ¶10).

After removing all visible evidence that the property had once been an industrial site, JWH began selling lots and "spec" homes in the second phase of the Subdivision (App. p. 11 at ¶11). On October 31, 2007, JWH sold a lot and home to the Parsons (App. p. 11 at ¶13). The Parsons paid $621,102 for their home, which is currently financed by Wachovia and South Carolina Bank & Trust (App. p. 11 at ¶14). At the time the Parsons purchased their home they were not aware that any portion of the Subdivision had previously been used as an industrial site, and had no reason to discover that fact through reasonable due diligence (App. p. 12 at ¶16). JWH did not disclose to the Parsons that any portion of the Subdivision had previously been used as an industrial site, and did not disclose to the Parsons that numerous underground pipes, valves and tanks had been located on the property (App. p. 12 at ¶17).

In July 2008, the Parsons were performing maintenance on a suspected sprinkler leak in their backyard when they discovered a metal lined concrete box buried on their property as well as cast iron and PVC piping (App. p. 12 at ¶18). When the box was opened, a black sludge was discovered in the box. Id. The black sludge was determined to be hazardous waste (App. p. 12 at ¶19). The black sludge was also found in the PVC pipe, which pipe was actually located running through the foundation of the Parsons' home, which was also constructed by JWH (App. p. 13 at ¶23; App. p. 51, lines 14-20).

The Parsons contacted South Carolina's Department of Health and Environmental Control (App. p. 12 at ¶20-21). DHEC performed testing and analysis of the sludge. Id. DHEC's testing confirmed that the sludge was hazardous waste. Id. In October 2008, at the suggestion of DHEC, JWH entered a "voluntary clean-up contract". JWH undertook voluntary remediation efforts to remove the hazardous waste and other buried

materials from the Parsons' yard. Despite JWH's remediation efforts, the Plaintiffs contend that the value of their home has been permanently impacted and the home has been stigmatized by the presence of hazardous waste on the property, hence the filing of this action (App. p. 13 at ¶22-23).

JWH seeks an order reversing the lower court's ruling that the Parsons' claims are not subject to arbitration. The alleged arbitration agreement JWH seeks to enforce is contained in Paragraph 21 of the 5 page "Purchase and Sale Agreement" for the Property, which document was drafted entirely by JWH (App. p. 59 at ¶ 21). Specifically, Paragraph 21 of the Agreement provides verbatim and in like font/appearance:

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. THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE PROPERTY AND IMPROVEMENTS (INCLUDING, WIHTOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE),EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY SELLER OTHER THAN AS EXPRESSED IN THE JWH WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY SELLER. THE JWH WARRANTY IS ALSO GIVEN BY SELLER AND ACCEPTED BY PURCHASER IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT PURCHASER HAS OR MAY HAVE AT LAWOR IN EQUITY AGAINST SELLER RELATING TO THE PROPERTY, CONSTRUCTION ON THE PROPERTY, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING ON THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THE JWH WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY PURCHASER. 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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. Certain appliances and other consumer products sold as part of the improvements are covered by manufacturer's warranties. Purchaser is entitled to examine those warranties upon request to the Seller.[1]

Aside from the paragraph heading, "Warranty and Arbitration," the only mention of the term "arbitration" is found at the end of the paragraph and merely provides:

> "purchaser consents to the terms [of the JWH Limited Warranty], including the binding arbitration provision contained therein." Id.

The JWH Limited Warranty is a 27-page booklet. The JWH Extended Warranty was purportedly incorporated by reference into the Purchase Agreement. The Parties dispute when the Parsons were actually provided a copy of the Warranty Booklet. Because the trial Court held that the Parsons' claims were not covered by the terms of

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[1] It is ironic that JWH in its brief had to blow up portions of the Warranty and Arbitration clause so it could by read by the Court.

the arbitration clause or the terms of the Warranty Booklet, it is not necessary to resolve this disputed issue of fact. The only arbitration provision "contained therein" is buried in the middle of the document and is listed as one of sixteen "General Provisions" of the Limited Warranty. (JWH Warranty §V, at ¶O (App. pp. 77-79). By its express terms and context, the JWH Warranty, "including the binding arbitration provision contained therein," only deals with defects or deficiencies in the design and construction of the Home and specifically excludes contamination claims. (JWH Limited Warranty, Paragraph IV (M) (App.p.74).

The entire Agreement, including Paragraph 21, was drafted solely by JWH. Except for the negotiation of the purchase price, the Parsons had no ability to negotiate the terms of the Agreement, the terms of the Warranty or the terms of the Arbitration provision. The Parsons were provided no additional consideration for the Arbitration clause.

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review. MBNA Am. Bank v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Thornton vs. Trident Medical Center, 357 S. C. 91, 592 S. E. 2d 50 (Ct. App. 2003)

ARGUMENT

JWH's motion to dismiss and compel arbitration was properly denied by the trial court. Not only does the arbitration clause at issue not cover the claims asserted in the Plaintiff's Complaint; but the illegal and outrageous acts alleged against JWH are not subject to arbitration as a matter of law pursuant to Aiken v. World Fin. Corp. of S.C.,

373 S.C. 144, 644 S.E. 2d 705 (2007) and Partain v. Upstate Auto Group, 386 S.C. 488, 689 S.E.2d 602, 604 (2010). Furthermore, and as alternative sustaining grounds for the Trial Court's order denying arbitration, the Parsons' submit that the arbitration clause is unconscionable and therefore unenforceable.

I. The Petition for Writ of Certiorari is Not Timely.

In granting the Petition for Writ of Certiorari, the Court requested briefs on the question of whether or not the Petition for Writ of Certiorari was timely filed. This argument is submitted in response to the Court's request.

Appellate Court Rule 242 provides:

> "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 petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of 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 241, Appellate Court Rules emphasis added).

Appellate Court Rule 242 states that a petition for certiorari must be served and filed within thirty (30) days after a petition for rehearing is acted on and is finally decided by the Court of Appeals.

Respondents submit that the Court of Appeals finally decided the issues raised by Appellant's first petition for rehearing and rehearing en banc when the court filed its second opinion. The substance of the court's second opinion as well as the lack of basis for Appellant's second petition for rehearing confirms the first petition for rehearing in the Court of Appeals was finally decided by the Court of Appeals on August 28, 2013. Appellant failed to file a timely Petition for writ of certiorari.

In both its first and second opinions, the Court of Appeals affirmed the trial court's denial of Appellant's motion to compel arbitration. The Court of Appeals' first opinion contained two substantive paragraphs establishing the basis for the court's affirmation of the trial court's order. Upon Appellant's petition for rehearing, the court of appeals issued a shortened second opinion again affirming the trial court's order. The court's ruling as contained in the first paragraph was identical in both orders. (See App. p. 262; p. 288). In the second order, the court removed the additional basis for its decision as stated in paragraph 2 of the first order and, in its place, stated that an Appellate Court need not address remaining issues on appeal when the disposition of a prior issue is dispositive. (App., p. 288).

Admittedly, the Court granted the first petition for rehearing, withdrew its first opinion and substituted another opinion. However, the second opinion is the same as the first with the exception of Paragraph 2. The change made to the Court's first order did not affect the primary basis of the court's order as stated in Paragraph 1.

Appellant relies on Covar vs. Sallat, 22 S.C. 265, 1885 WL 3585 (S.C.) However, in Covar, the appellant had been allowed to amend his argument and did so with an appendix to the original argument. Upon review, the appellate court overlooked the appendix; therefore, it did not consider or address any of the amendments. Id. at 273.

In the present case, there are no amendments. The court had no new issues to address, it simply chose to limit its opinion to one paragraph that was dispositive of the case.

Appellant's second request for rehearing was its fourth audience with the Court of Appeals. (Appellant's Brief, Reply, first Motion for Reconsideration and Plaintiff's

second Motion for Reconsideration). The request contained essentially identical arguments proposed by Appellant in the first request for rehearing. While Respondents have been unable to locate case law on the issue of repetitive petitions for rehearing on appeal, there is authority addressing repetitive motions pursuant to Rule 59(e) of the Rules of Civil Procedure.

Respondents understand that there are distinctions between a motion to alter or amend a judgment pursuant to Rule 59(e) of the rules of Civil Procedure and a motion for rehearing pursuant to Rule 221 of the Appellate Court Rules. Respondents submit that the reasoning of the cases dealing with repetitive Rule 59 motions is applicable to repetitive petitions for rehearing in the Court of Appeals.

In Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 SE2d 772 (2004), the Supreme Court held that a second Rule 59 motion which raises the same arguments and issues made in a previous Rule 59(e) motion does not toll the time to appeal:

> "...allowing subsequent motions to repeatedly toll the filing period for a notice of appeal would encourage frivolous motions and undermine a fundamental cannon of our legal system to promote the finality of judgments..." Id. p.777.

See Quality Trailer Products v. CSL Equipment Co., 349 S.C. 216, 562 SEd 615 (2002). ("The time for filing an appeal is not extended by submitting the same motion under different caption"). Coward Hund Construction Co. v. Ball Corp., 336 S.C. 1, 518 SE2d 56 (Ct. App. 1999).

The Court of Appeals "acted on" the Petition for Rehearing when it issued the second opinion. The Appellant's argument in its second petition for rehearing is essentially identical to the argument in the first petition for rehearing. Under

Law/Analysis, the Appellant makes six (6) arguments in both petitions. Each of the arguments is, for the most part, stated identically. The bodies of the arguments are identical. It does not appear that any new issues or arguments are raised in the second petition which were not raised in the first petition. The Court of Appeals finally decided all arguments with its opinion filed on August 24, 2013. In response to Appellant's second petition for rehearing, the court stated, "... there is no basis for granting a rehearing." (App. p. 311).

Appellate Court Rule 242 provides that a Petition for Writ of Certiorari must be filed within thirty (30) days from the date the Court of Appeals acts on finally decides the Petition for Rehearing. Appellant's fourth and virtually identical argument to the Court of Appeals unnecessarily delayed resolution of this case which began in February 2011. In the present case, the Petition for Rehearing was finally decided on August 28, 2013 when the Court of Appeals affirmed the trial court's ruling for a second time. The Petition for Writ of Certiorari should have been filed on or before September 27, 2013. It was not filed until April 14, 2014.

Respondents acknowledge that the unusual reaction by the Court of Appeals to the first Petition for Rehearing and the semantics involved in the use of the terms "acted on" and "finally decided" in Rule 242 poses difficulty for counsel. However, this case was filed over three years ago. The case was delayed by the filing of the second Petition for Rehearing by approximately six (6) months. Respondent respectfully submits that the timeliness of the Petition should be considered.

II. **The arbitration agreement does not cover the claims asserted by the Plaintiffs.**

The Parsons' Complaint and the causes of action asserted therein, deal with JWH's alleged failure to disclose the presence of underground piping and hazardous waste on the Property of which JWH is alleged to have been aware. (App, p. 9) The purported arbitration agreement JWH seeks to enforce, however, only applies to defects related to the design and construction of the home and is therefore inapplicable to the claims asserted in this case. As such, the trial court's order should be affirmed.

While state and federal policy generally favor arbitration, the initial inquiry is whether the parties actually agreed to arbitrate their dispute. Sydnor v. Conseco Fin. Serv. Corp., 252 F. 3d 302 (4th Cir. 2001)(citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)). In determining whether the parties executed an enforceable arbitration agreement, ordinary state-law principles governing contract formation apply. Id. (citing First Options v. Kaplan, 514 U.S. 938, 944 (1995)); *see also* Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182 (S.C. App. 1993)("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made.").

The question is one of intention to be decided using the same rules of construction that apply to contracts (Marchabge vs. Mead-Morrison Mfg. Co., 252 NY 284, 169 NE 386.

"Generally:

> "a party is never required to submit to arbitration any question which he has not agreed to submit***" Fernandez vs. Richard Rice Mills, 119 F.2d 809 (1st Ct., 1947)

> The policy favoring arbitration simply assists in resolving arbitrability disputes within this general framework. Granite Rock Co. vs. International Brotherhood of Teamsters, 1561 US 287, 303 (2010).

> ***as we have explained this "policy" [favoring arbitration] is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements upon the same footing as other contracts. Volt, 489 U.S. at 478.

> "Accordingly, we have never held that this policy overrides the principle that a court may submit to arbitration only those disputes that the parties have agreed to submit". Granite Rock Co., Supra, p. 303.

Common sense leads to the obvious conclusion that a party to an arbitration agreement could not intend to arbitrate a claim it cannot foresee. That is what Aiken and Partain hold and Aiken and Partain are not affected by Landers.

To determine whether an arbitration clause encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. Zabinski v. Bright Acres Associates, 346, S.C. 580, 597, 553 S.E.2d 110, 118 (2001.) A claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or "if a significant relationship" exists between the claim and the contract. Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602, 604 (2010). Neither of these conditions exists in this case.

As written by JWH, the arbitration clause is expressly part of and inextricably intertwined with the JWH Warranty, which is inapplicable to the Parsons claims. The only mention of arbitration in the Purchase Agreement is found in Paragraph 21 under the heading "Warranty and Arbitration." (App., p. 61) Buried at the end of the paragraph is a single reference to arbitration which merely provides:

> "purchaser consents to the terms [of the JWH Limited Warranty], including the binding arbitration provision contained therein." (Purchase Agreement at ¶21 (App. p. 61).

The JWH Limited Warranty is a 27-page booklet. (The JWH Extended Warranty was purportedly incorporated by reference into the Purchase Agreement. The Parties dispute when the Parsons were actually provided a copy of the warranty booklet. Because this Court finds that Plaintiff's claims are not covered by the terms of the arbitration clause or the terms of the Warranty Booklet, it is not necessary to resolve this disputed issue of fact) The only arbitration provision "contained therein" is buried in the middle of the document and specifically listed as one of sixteen "General Provisions" of the Limited Warranty. (JWH Limited Warranty §V, at ¶O (App. pp. 77-79). By its express terms and context, the JWH Warranty, "including the binding arbitration provision contained therein," only deals with defects or deficiencies in the design and construction of the Home and does not apply to contamination or failure to disclose or fraud. In fact, the express terms of the Limited Warranty containing the arbitration clause clearly states that the Warranty does NOT apply to:

> Loss or damage not caused by a defect or deficiency in the design or construction of the Home by Wieland or Wieland's employees, agents or subcontractors. (JWH Limited Warranty, Paragraph IV(J) (App. p. 73).
>
> Damage to real property that is not part of the Home; (JWH Limited Warranty, Paragraph IV(B) (App. p. 72) The term "Home" is defined in the Warranty as "the dwelling." Paragraph V(B) (App. p. 76), JWH Limited Warranty
>
> Loss of Market value...or any and all consequential loss or damages; (JWH Limited Warranty, Paragraph IV(g) (App. p. 72).

...Pollution or toxic substances of any kind. (JWH Limited Warranty, Paragraph IV (M) (App. p. 74).

Because the Warranty itself does not apply to the claims asserted in the Parsons' lawsuit, by its own terms, the purported arbitration clause contained therein is also inapplicable.

In its brief, the Appellant essentially argues that this Court should completely ignore all context when interpreting the scope of an arbitration clause. Specifically, JWH asks the Court to ignore the fact that the arbitration clause is by its express terms only a general provision of the Limited Warranty. However, when the drafter of the agreement specifically limits the applicability of the arbitration clause to apply only to certain matters--the drafter is bound to the terms it drafted and this Court should not re-write the agreement to find coverage. Faltous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (2010)("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement.") Because the arbitration clause is expressly limited to the warranty issues, the Parsons non-warranty claims are not subject to arbitration.

Following the Supreme Court's holding in Zabinski v. Bright Acres Associates, 346, S.C. 580, 597, 553 S.E.2d 110, 118 (2001), the Parsons submit that their nondisclosure and fraud claims also do not bear a "special relationship" to the Warranty and/or the Purchase Agreement so as to compel arbitration. In Zabinski, the Court was confronted with an arbitration clause in a partnership agreement that required "any controversy or claim arising out of the partnership agreement" to be submitted to

arbitration. Despite the broad wording of the clause, the Court refused to compel arbitration of certain claims asserted by the partners, including: 1) legal malpractice claims against the attorney drafting the partnership agreement; and 2) contract claims concerning certain partner's individual ownership interest in the partnership. Although acknowledging that the excluded claims were indirectly related to the partnership agreement, the Court concluded that the facts underlying the claims were "not encompassed by the arbitration agreement" and required proof of matters independent of the partnership agreement. Id. at 598, 119.

Like Zabinski, the Parsons' fraud and nondisclosure claims, such claims are not encompassed by the terms of the arbitration clause and bear no "special relationship" to the Purchase Agreement or Limited Warranty. The Parsons allege that JWH knew hazardous waste existed on the property and intentionally concealed the hazardous waste by constructing a home on top of and around the waste. The underlying facts of the Parsons claims are completely independent of the purchase contract and involve JWH's conduct and knowledge prior to the execution of the purchase contract. More fundamentally, the underlying claims concern matters not covered by the arbitration clause, Limited Warranty or Purchase contract and concern conduct and knowledge that could not have even been contemplated by the Parsons when negotiating the purchase contract. Because the facts underlying the Parsons claims bear no special relationship to the arbitration clause or the purchase contract, the Parsons claims should not be forced into an arbitration forum.

III. <u>The Parsons' claims alleging outrageous and illegal actions of JWH are not subject to arbitration as a matter of law.</u>

The claims asserted against JWH involve alleged outrageous tortious conduct (i.e. intentional/fraudulent failure to disclose contamination on the Property) which is unanticipated and unforeseeable to reasonable consumers purchasing a residential property. Consequently, the Parsons' claims are excluded from arbitration pursuant to Aiken and Partain.

In Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007), our Supreme Court held that "this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." In Aiken, the plaintiff/consumer sued defendant/finance company for alleged theft of the plaintiff's personal information by employees of a consumer finance company. The company sought to enforce a broadly-worded arbitration clause to which plaintiff had agreed in applying for a loan. Although the plaintiff voluntarily submitted the personal information to the finance company in applying for a loan, and although the plaintiff knew the information would be used by defendant's employees, the Court found that the theft of the personal information was "outrageous conduct that [plaintiff] could not possibly have foreseen when he agreed to do business with [finance company]." Id. at 151, 644 S.E.2d at 709. As a result, the Court held that the plaintiff could not have intended to submit the dispute to arbitration.

The tortious conduct alleged against JWH is just as outrageous, if not more so, than the conduct described in Aiken. The Parsons have alleged that JWH knew the Property was contaminated prior to the execution of the sale agreement. JWH knew the property was previously an industrial site prior to the transfer, yet it never disclosed such

condition to the Parsons. Furthermore, the underground pipes leading to the container holding the bulk of the hazardous waste was discovered during the construction process. In fact, as alleged by the Parsons and as determined by the trial court, intentional efforts were made by JWH to build the house "around" the underground pipes. Based upon these allegations and as guided by Aiken, this Court concludes that neither the Parsons, nor reasonable consumers in the same posture, would have expected or should be expected to arbitrate a claim of this nature.

Even if the alleged arbitration clause is arguably "broad enough" in scope to cover the causes of action asserted in the Complaint, the Parsons' claims are still not subject to arbitration as a matter of law, pursuant to Partain v. Upstate Automotive Group, Inc., 386 S.C. 488, 689 S.E.2d 602 (2010). In Partain, the plaintiff/consumer filed a lawsuit against the defendant/truck dealership, alleging that the dealership violated the S.C. Unfair Trade Practices Act by selling purchaser a different truck than the one he had negotiated to purchase. The defendant/dealership filed a motion to dismiss and to compel arbitration pursuant to a broad arbitration clause contained in the purchase agreement. Reaffirming its decision in Aiken, the Supreme Court held that the arbitration clause was not applicable the Plaintiff's claims involving "illegal and outrageous acts unforeseeable to a reasonable consumer." Furthermore and more importantly, the Court went a step further to agree that such illegal and outrageous acts are not subject to arbitration *even when the claim is arguably encompassed by the broad language of the arbitration clause*. Id. at 604-605.

Following the rationale and holding announced in Partain, the intentional transfer of contaminated property to innocent consumers is the type of "illegal and outrageous

conduct" the Supreme Court has held to be outside the scope of arbitration—regardless of the breadth of the arbitration clause itself. Just as in Partain, the Parsons have asserted a claim for violation of the S.C. Unfair Trade Practices Act in connection with alleged tortious and outrageous conduct by the seller in connection with a consumer transaction. Like the Plaintiff in Partain, the Parsons had no way of knowing that the property was contaminated; that pipes were buried on the property, and that JWH knew or should have known of this condition. Consequently, and as Partain directs, the Parsons "cannot be held to have contemplated that in signing the arbitration clause, they were agreeing to arbitrate claims for allegedly fraudulent conduct."

Although the Aiken and Partain cases are not mentioned, JWH argues that this Court's opinion in Landers v. Federal Deposit Insurance Corporation, 402 S.C. 100, 739 SE 2d 209 (S. Ct. 2013) substantially modifies, if not reverses, the Aiken and Partain cases. Parsons submits that the reliance on Landers is misplaced and represents a misreading of the case.

Landers involved a lawsuit arising out of the termination of Landers' employment. The Complaint asserted five causes of action. The Defendant moved to compel arbitration pursuant to an arbitration clause in Landers' employment contract. The Court denied the motion to compel arbitration as to several of the causes of action. In doing so, the trial court found that there was not a significant relationship between the claims and the employment agreement. Alternatively, the Court found that the allegations underlying the claim were not foreseeable at the time the parties entered into the agreement.

On appeal, this Court reversed the trial court. The first sentence of the opinion clearly states that the case involved the "scope of an arbitration clause". (Id; p.103). The Court found that the allegations of the Complaint established a significant relationship between the allegations and the employment agreement.

> "We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the agreement and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims." Id. p. 115

The Court also rejected the conclusion that the claims were not foreseeable. In doing so, the Court did not mention Aiken and Partain.

The ruling in Landers as to the scope of the arbitration clause is limited to the facts of that case. The ruling on foreseeability is simply a disagreement as to facts. The argument by Weiland, that Landers "collapses" the Aiken and Partain decisions into a "significant relationship" test and is not supported by a reasonable reading of the decision.

The Petitioner's reliance on York v. Dodgeland of Columbia, Inc. ,406 S.C. 67, 749 SE2d 139 (2013) and Carlson v. South Carolina State Plastering, LLC, 404 S.C. 750, 743 SE2d 868 (2013) is also misplaced. Neither case purports to modify Partain. In fact, both cases are consistent with the two part test established by Partain.

Carlson involved a defective exterior stucco work on residential homes in a subdivision. York involved allegations that car dealerships charged illegal administration fees.

It is certainly foreseeable that there may be problems with the construction of a house which would be subject to arbitration. It is also foreseeable that there may be

improper charges when a car is purchased. The facts of York and Carlson are a long way from the circumstances of this case.

IV. As alternative sustaining grounds, JWH's alleged arbitration agreement is unconscionable and therefore unenforceable as a matter of law.

The Plaintiffs also argued that the arbitration clause at issue was unconscionable and unenforceable as a matter of law and further requested that the trial court grant discovery on the issue of unconscionability, specifically as it relates to the selection of the arbitrator and the procedures under the purported arbitration forum. Because the trial court concluded the claims were not subject to arbitration on other grounds, the Court rendered no decision on these issues. The Parsons assert herein, as alternative sustaining grounds, that the arbitration clause is unconscionable and in violation of public policy.

South Carolina law provides that "[i]f the court as a matter of law finds [a] contract or any clause of the contract to have been unconscionable at the time it was made[,] the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (S.C. 2007), referencing S.C. Code Ann. § 36-2-302(1) 2003). In South Carolina, 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 or honest person would accept them." Simpson, 644 S.E.2d at 668. In determining whether a contract lacks meaningful choice, our Courts are directed to look at several factors: 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, 644 S.E. 2d at 669. A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." Id., *quoting,* Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (2005).

Nature of the Injuries

It is hard to conceive of an injury which does not involve personal injury or death as severe as those suffered by the Parsons in this case. They have lost the value their single most important financial investment—their home. Although they contracted to buy a home, they actually received a hazardous waste site.

Disparity of Bargaining Power

In terms of disparity in bargaining power, it is clear that JWH has the decisive upper hand. The Parsons are consumers. JWH is a large, sophisticated commercial entity which has teams of lawyers drafting its standard form purchase agreements and warranty booklets. The Purchase Agreement which contains the purported arbitration clause is a contract of adhesion. Lackey v. Green Tree Financial Corp. , 330 S.C. 388, 498 S.E.2d 898 (1998)("A contract of adhesion is...a standard form contract offered on a take it or leave it basis."); *see also* Simpson, 644 S.E.2d at 668. Like the contracts in Green Tree and in Simpson, the contract in this case is a standard form contract created by JWH and offered to its customers on a take-it-or-leave-it basis. Except for the sales price and determination of the particular lot and house plan, the Parsons had no ability to negotiate the terms of the contract. In fact, the Agreement utilizes "check-the-box" provisions to provide choice on items such as flooring and insulation; however, nowhere does it provide the option of eliminating the

arbitration provision. The Parsons had no opportunity to pay additional money for input into the contract terms, especially in terms of the "warranty and arbitration" provision. Both the existence and the terms of the arbitration provisions were determined solely by JWH on a take it or leave it basis. The bargaining power lay exclusively with JWH in this transaction and the Parsons were completely without ability to affect the inclusion or the substance of the arbitration provisions.

Conspicuousness of Arbitration Clause

Far from conspicuous, the alleged arbitration agreement JWH seeks to enforce is buried in the middle of a 5 page document written entirely in miniature font (less than 8 pt.) and drafted solely by JWH and its attorneys. Specifically, Paragraph 21 of the Agreement provides verbatim and in like font/appearance:

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. THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE PROPERTY AND IMPROVEMENTS (INCLUDING, WIHTOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE),EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY SELLER OTHER THAN AS EXPRESSED IN THE JWH WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY SELLER. THE JWH WARRANTY IS ALSO GIVEN BY SELLER AND ACCEPTED BY PURCHASER IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT PURCHASER HAS OR MAY HAVE AT LAWOR IN EQUITY AGAINST SELLER RELATING TO THE PROPERTY, CONSTRUCTION ON THE PROPERTY, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING ON THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THE JWH WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY PURCHASER. 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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. Certain appliances and other consumer products sold as part of the improvements are covered by manufacturer's warranties. Purchaser is entitled to examine those warranties upon request to the Seller.

(App. p. 61 ¶21) Aside from the heading, the only mention of arbitration in the purchase agreement is found at the end of the paragraph where it states that the purchaser "consents to the terms [of the JWH Limited Warranty], including the binding arbitration provision contained therein."

The JWH Extended Warranty is a 27 page booklet, which was not provided to the Parsons at the time of the signing of the contract. The "arbitration provisions" in the JWH Extended Warranty are buried the middle of the booklet under the heading "General

Provisions" as item "O." Although expressly limited as a "general term" of the Limited Warranty, JWH contends the arbitration clause should be read to extend to anything related to the Property—including matters outside the scope of the Limited Warranty. However, there is absolutely no indication that the arbitration clause is intended to deal with anything other than the construction defects covered by the Warranty in which it is contained. There is certainly no evidence that the Parsons intended, by signing the Purchase Agreement to arbitrate claims that JWH intentionally sold them a waste site, versus a home.

Oppressive/One-Sided Terms

The terms of the arbitration clause are oppressive, one-sided, and intentionally crafted to favor JWH. As an initial matter, the terms of the arbitration clause specifically preserve JWH's right to litigate any and all claims it may have while it retains ownership in the Property, but denies that same right to the Parsons. Specifically, the arbitration clause in the Limited Warranty provides:

> Any and all claims that that arise out of or relate in any manner to the purchase agreement with Wieland, this warranty, the Home and/or the property on which it is constructed, or otherwise shall be conducted by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. **<u>This applies only to claims or disputes that arise the later of (a) the issuance of the final certificate of occupancy for the Home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s)</u> (App. p. 77).** This 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.

As written, only after the final closing occurs does the arbitration clause (and the Limited Warranty obligations) spring into effect (App. p. 68). Consequently, the arbitration provision specifically preserves JWH's right to litigate any claims against the Parsons

while it is the owner of the Property. The Parsons, however, lose the right to litigate ANY claims once they become the owner. Furthermore, because the Limited Warranty is not effective until the sale is complete, JWH's primary obligations to the Parsons (those created by the Limited Warranty) can never be litigated, as they are only triggered when the arbitration clause is in effect. The end result is that the consumer is the only party truly affected by the arbitration clause.

Numerous other oppressive and one sided terms are also present in the arbitration clause, including but not limited to the following:

- Paragraph 3 of the arbitration provision provides that before the Parsons can mediate or arbitrate any Limited Warranty claims, they must first have complied with all of the procedures set forth in the Limited Warranty within the prescribed time limits. (JWH Warranty, App. p. 78, at ¶2) In fact, the Parsons failure to do so "shall bar any claims against JWH." Id. Nowhere in the arbitration provision is any similar restriction placed on JWH's ability to bring a claim, or, for that matter, any adverse consequences imposed for JWH's failure to promptly respond to its warranty obligation.

- Paragraph 6 of the arbitration provision provides that if JWH chooses, it may have its suppliers and contractors made parties to the arbitration. However, the Parsons are not permitted the same right.

- The Parsons are purportedly required to waive any and all claims, rights or remedies they may have against JWH including "any tort, violation of code, statute or rule, etc." (JWH Warranty, Section P., App. p. 79) JWH is not obligated to waive any of its statutory rights or claims while it is the owner of the Property.

- JWH limits arbitrator's ability to award certain damages unless authorized by JWH. JWH Limited Warranty at III, ¶ 2. App. p. 71).

The arbitrator selection rules mandated by the arbitration provision are also so fundamentally unfair that no fair and honest person would accept them. Paragraph 4 of JWH's arbitration clause provides that the arbitrator shall be selected by the Construction Arbitration Associates, Inc. ("CAA"), an entity located in Atlanta, Georgia—which also

happens to be the state in which JWH is located and incorporated. No other information is provided about CAA, its pool of arbitrators, the rules it abides by, its track history, or its specific relationship, to JWH. The CAA is authorized to establish all of the rules for the arbitration. There are no provisions ensuring the neutrality or qualifications of the arbitrator. The arbitrator selection procedures of CAA are arbitrary, out of line with industry standards (See the American Arbitration Association's Home Construction Arbitration and Mediation rules; Rule ARB-15 deals with the appointment of arbitrators) and provide no assurances for the selection of an unbiased and competent arbitrator capable of fairly and equitably adjudicating the JWHs' claims. Consequently, the arbitrator selection rules are unconscionable and should not be enforced.

Finally and most importantly, when interpreted in conjunction with the other "general terms" and "general exclusions" in the Limited Warranty, the Parsons are left with no remedy at all for JWH's alleged fraud. Because of the numerous exclusions and waiver provisions contained in the Limited Warranty, the only claims which the Parsons are permitted to even submit to arbitration are those claims specifically covered by the Limited Warranty. The only claims covered by the Limited Warranty are defects in the design and construction of the dwelling.

In Simpson, the Supreme Court of South Carolina found unenforceable an arbitration provision prohibiting the arbitrator from awarding double or triple damages. Simpson 373 S.C. at 29-30, 644 S.E.2d at 671. The Court held that the arbitration clause was unconscionable as it prevented the plaintiff from receiving a mandatory statutory remedy to which she might be entitled, and further held that unconditionally permitting the weaker party to waive such statutory remedies pursuant to an adhesion contract runs counter to the

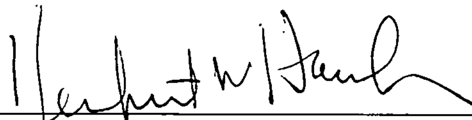
unfair trade practice statute's purpose of punishing acts adversely affecting the public interest. Simpson, 373 S.C. at 30, 644 S.E.2d at 671. Smith v. D.H Horton, 1403 S.C. 10, 742 SE2d 37 (Ct. of App.). ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for monetary damages of any kind ***) Unequal, unfair and oppressive terms pervade the warranty and the arbitration provisions therein. Consequently, the entire arbitration provision should be held invalid on the basis of its unconscionability and on the basis of public policy.

Conclusion

The basic question presented in this case is no different than any other case of contract interpretation; what was the intent of the parties when the contract was signed? Specifically should the Parsons have foreseen that there might be hazardous waste buried in their backyard and knowingly waived their right to a jury trial of claims arising from the presence of hazardous waste? Respondent submits that the question answers itself.

Partain is still viable. There is no way the Parsons could have foreseen the presence of hazardous waste. Respondents respectfully submit that the Trial Court should be affirmed.

October ____, 2014



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball
York County

Case No. 2011-CP-46-00796

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.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Respondents' Brief was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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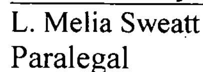

October 31, 2014

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October 31, 2014

RECEIVED
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S.C. Supreme Court

VIA FEDERAL EXPRESS
The Honorable Daniel E. Shearhouse
Clerk of Supreme Court
Supreme Court of South Carolina
PO Box11330
Columbia, South Carolina 29211

RE: *Ralph Wayne Parsons, Jr. and Louise C. Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A. and South Carolina Bank & Trust, N.A.*
Our File No.: 10854-001

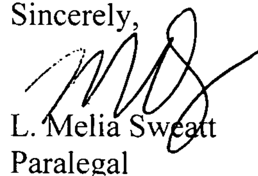
Dear Mr. Shearhouse:

Enclosed are the original and sixteen (16) copies of Respondents' Brief in the above-named matter. Please file the originals and return a clocked of the same to me in the envelope that I have provided.

By copy of this letter to opposing counsel, I am serving the Repondents' Brief I have enclosed a copy of the Respondents' Brief as evidenced by the enclosed Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,



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/lms
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