

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM JASPER COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2015-CP-27-00209

**RECEIVED**

APR 13 2016

SC Court of Appeals

James Chisolm and  
Beverly Ann Chisolm,

Respondents,

v.

America's Home Place, Inc.; PCF Contracting, LLC;  
Underwood Mechanical, LLC; Blue Mesa  
Construction, Inc.; Palmetto Residential Electric,  
LLC; Palmetto Heating & Air of the Low Country,  
Inc.; and Above the Sky Roofing, Inc.

Defendants,

Of whom America's Home Place, Inc. is the Appellant

Underwood Mechanical, LLC

Third Party Plaintiff,

v.

J&J Plumbing a/k/a J&J Torres Plumbing a/k/a Torres  
Plumbing

Third Party Defendant.

INITIAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in ruling that the Plaintiffs/Respondents' claims for Fraud and Negligent Misrepresentation bore no significant relationship to the Agreement?
2. Did the Circuit Court err in failing to compel arbitration of the Plaintiffs/Respondents' claims for Breach of Contract, Breach of Express and Implied Warranties, and Negligence on the basis that arbitration of said claims will result in duplicative expense and judicial inefficiency?

## STATEMENT OF THE CASE AND RELEVANT FACTS

On November 1, 2011 Plaintiffs James and Beverly Ann Chisolm (collectively, the "Chisolms") entered into an agreement with America's Home Place, Inc. ("AHP") for construction of a brand new home on the Chisolms' property in Jasper County, South Carolina. (Pl.'s Amd. Compl., p. 3). Only the Chisolms and AHP were parties to the Agreement. (Pl.'s Amd. Compl., Ex. A). The subcontractors hired subsequently by AHP, and any subsequent sub-subcontractors, to work on the project were subject to separate contracts, to which the Chisolms were the intended beneficiaries. The applicable building permit was issued on February 8, 2012 and certificate of occupancy issued on or about July 9, 2012. (Pl.'s Amd. Compl., p. 3, Ex. C, Ex. D).

During and subsequent to the construction of their new home, the Chisolms learned of or discovered numerous defects and deviations from the design plans of the home. (Pl.'s Amd. Compl., p. 3-4). As a result, the Chisolms initiated the present action alleging certain construction deficiencies. (Pl.'s Amd. Compl.) In their Amended Complaint, the Chisolms set forth causes of action for Negligence/Gross Negligence, Breach of Contract, Breach of Implied Warranty of Workmanship, and Breach of Express and Implied Warranties, Negligent Misrepresentation, and

Fraud against AHP and each of the subcontractors identified by AHP and named as defendants. (Pl.'s Amd. Compl.). The Chisolms further set forth an additional cause of action for Breach of Third Party Beneficiary Contract against each of the subcontractor defendants. (Pl.'s Amd. Compl.). AHP answered denying the Plaintiffs' claims. (Ans. of America's Home Place, Inc.). In its Answer, AHP asserted numerous defenses, including alleging that any defects were caused by the negligence or actions of the other defendants or unnamed third parties, believed to be the various contractors that performed work on the project. (Ans. of America's Home Place, Inc., p. 8, 11, 12). Several of the other subcontractor Defendants likewise answered the Plaintiffs' complaint and/or asserting third party claims relating to the construction.

By telephone call on June 5, 2015, the attorneys for the Chisolms and AHP discussed proceeding with mediation of this case prior to either party continuing with arbitration or litigation. These discussions were memorialized and discussed more fully in letters from the Chisolms' attorneys on August 5, 2015 and August 11, 2015. (Def's Mot. to Stay and Compel Arbitration, Ex. A). On August 24, 2015, AHP filed its Motion to Stay and to Compel Arbitration (the "Motion"). (Def.'s Mot.). In its Memorandum in Support of its Motion, AHP argued that the arbitration provision in the Paragraph 37 of the Agreement required "that all claims, disputes and other matters or questions arising out of or relating to this agreement, or the breach thereof, shall be settled by binding arbitration." (Def.'s Mem. in Supp. of Def.'s Mot. to Stay and Compel Arbitration, p. 2). AHP argued that a significant relationship exists between the Chisolms' claims and the Agreement. (Def.'s Mem. in Supp.). Plaintiffs' filed a Memorandum in Opposition to AHP's Motion in response. (Pls.' Mem. in Opp'n to Def.'s Mot. to Stay and Compel Arbitration). In Plaintiffs' memorandum, the Chisolms set forth that the Agreement contained a broadly-defined arbitration provision which should be interpreted to apply only to claims in which a significant relationship exists between the

claims and the contract. (Pls.' Mem. in Opp'n, p. 3). Plaintiffs acknowledged the potential that some of the claims, such as Breach of Contract, could be within the scope of the arbitration provision. (Pls.' Mem. in Opp'n, p. 3-4). However, Plaintiffs affirmatively set forth that the claims for Negligent Misrepresentation and Fraud were beyond the scope of the arbitration provision and could not have been contemplated by the Chisolms upon executing the Agreement. (Pls.' Mem. in Opp'n, p. 4).

The Motion was heard on October 29, 2015 by the Honorable Eugene C. Griffith, Jr., who ruled against the Motion and denied arbitration in the present case. Judge Griffith, Jr. filed his Order denying AHP's Motion on January 14, 2016. (Order Den. Def's Mot. to Stay and Compel Arbitration). In its Order, the Circuit Court found that the Chisolms' claims for Negligent Misrepresentation and Fraud were unforeseeable and beyond the scope of the arbitration provision. (Order, p. 3). The Circuit Court further found that the remaining claims "are so interrelated that they could not be tried separately without duplicative expense and the potential of conflicting results in different forums, particularly in light of the fact that all of the various subcontractors could not be compelled into arbitration." (Order, p. 4). On February 12, 2016, AHP served its Notice of Appeal and on February 17, 2016, AHP served the Amended Notice of Appeal on the Chisolms.

## ARGUMENTS

### I. *STANDARD OF REVIEW*

The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise. *AT&T Techs, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1989). Determinations of arbitrability are subject to *de novo* review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731

(2014). "Nevertheless; a circuit court's factual findings will not be reversed on appeal if *any* evidence reasonably supports the findings." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009) (emphasis added); *Davis v. KB Home of S. Carolina, Inc.*, 394 S.C. 116, 173 S.E.2d 799 (S.C. App. 2011). This "accords with the standard of review employed by South Carolina courts when reviewing other preliminary trial motions." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749, fn. 8 (S.C. App. 1999).

**II. BECAUSE THE ALLEGED CONDUCT WAS UNANTICIPATED BY THE PARTIES WHEN THEY EXECUTED THE CONSTRUCTION AGREEMENT, THE CIRCUIT COURT DID NOT ERR IN RULING THAT THE PLAINTIFFS' CLAIMS FOR FRAUD AND NEGLIGENT MISREPRESENTATION WERE BEYOND THE SCOPE OF THE ARBITRATION CLAUSE.**

Federal and South Carolina courts favor arbitration of disputes except where the arbitration clause cannot be interpreted to cover the dispute. However, "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." *Faltaous v. Anderson Ocean Club Dev., LLC*, 338 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct.App. 2010) ("The range of issues that can be arbitrated is restricted by terms of the agreement."). South Carolina courts generally hold that broadly-worded arbitration clauses or agreements apply to disputes only in which a "significant relationship" exists between the claims and the contract. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001).

The Supreme Court of South Carolina, established a definitive rule for determining whether a significant relationship exists, holding 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." *Aiken v. World Fin. Corp. of S. Carolina*, 373, S.C. 144, \_\_\_,

644 S.E.2d 705, 709 (2007). Although the Court pointed out that not all torts are excluded from arbitration, it did create an exclusion for "those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." *Id.* at 708 ("Applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. Such a result is illogical and unconscionable.").

The *Aiken* Court held that the plaintiff in that matter could not possibly have been agreeing to provide a particular forum for settling claims arising from the tortious conduct of the defendant at the time of signing the arbitration agreement. "To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with" the goal of commercially reasonable arbitration. *Id.* at 710, *see Partain v. Upstate Automotive Group*, 689 S.E.2d 602, 386 S.C. 488 (SC 2010) ("[Plaintiff] cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct.").

In the present case, the Chisolms and AHP entered into the Agreement on November 1, 2011 for the construction of a new home on the Chisolms' property. The Agreement contains an arbitration provision which purports to cover "all claims, disputes, and other matters or questions arising out of or related to this agreement, or the breach thereof..." (Agreement). The generic, broad wording of the arbitration provision attempts to cover all potential disagreements which might relate in some way to the Agreement. As such, under South Carolina law the broadly-defined arbitration provision should be interpreted to apply only to those claims which hold a significant relationship to the Agreement.

Each of the various causes of action would likely not have occurred but-for the Agreement between the Chisolms and AHP. However, the causes of action for Fraud and Negligent Misrepresentation are legally distinct from the contractual relationship of the parties. AHP attempts to argue that the alleged conduct was something that the Chisolms, when hiring AHP to build a brand-new home, should have anticipated and expected that a licensed homebuilder such as AHP would ignore design plans, applicable building codes, and standard industry practices. Applying a "but-for" standard in this case would be contrary to public policy and subject South Carolina citizens to undue risk. The AHP's position that a party that contracts with a licensed homebuilder must not only anticipate but expect the homebuilder to commit fraudulent conduct is overbroad and would "lead to the potential result of every imaginable dispute related to the construction being subject to arbitration, thereby forcing the citizen to participate in arbitration when he could not possibly have contemplated such a result." (Order, p. 4). Therefore, the Circuit Court did not err in refusing to compel arbitration on the grounds that the Plaintiffs' claims for Fraud and Negligent Misrepresentation were beyond the scope of the arbitration agreement.

**III. BECAUSE OF THE NUMEROUS DEFENDANTS, CLAIMS, AND THIRD PARTY CLAIMS, THE CIRCUIT COURT DID NOT ERR IN REFUSING TO COMPEL ARBITRATION OF THE PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT, BREACH OF EXPRESS AND IMPLIED WARRANTIES, AND NEGLIGENCE ON THE BASIS THAT ARBITRATION OF SAID CLAIMS WILL RESULT IN DUPLICATIVE EXPENSE AND JUDICIAL INEFFICIENCY.**

AHP contends that the Circuit Court erred in denying arbitration, in part, in the interests of judicial economy. The Plaintiffs respectfully object to this position. As previously discussed, "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." *Faltaous*, 693 S.E.2d at 435 (Ct.App. 2010) ("The range of

issues that can be arbitrated is restricted by terms of the agreement." ). In their Amended Complaint, the Chisolms assert causes of action against AHP as well as known subcontractors hired by AHP. (Pl.'s Amd. Compl.). These causes of action include Negligent Misrepresentation and Fraud committed by each of the defendants. These negligent misrepresentations and fraudulent conduct are alleged to have occurred in construction of the Chisolms' new home. (Pl.'s Amd. Compl.). The AHP contends that these claims arise under or have a significant relationship to the Agreement. (Pl.'s Initial Brief). Additionally, AHP asserted in its Answer defenses that any alleged damages may have been caused by third parties, including the subcontractor defendants. (Ans. of AHP, p. 8, 11, 12). Although the alleged conduct could not have occurred but-for the existence of the Agreement, these particular causes of action, and the elements set forth, are factually and legally distinct from those relating to breach of the Agreement. In particular, the subcontractors were not party to the Agreement and did not execute or consent to any arbitration agreement with the Chisolms. (Pl.'s Amd. Compl., Ex. A). As such, there exists no grounds for compelling arbitration of the Chisolms' claims against the various subcontractors, nor of the subcontractors defenses against the Chisolms.

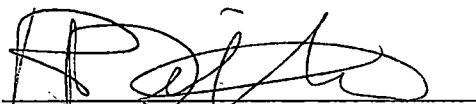
If AHP is to be believed, arbitration would require severance of the claims, an action which has not been requested by any party hereto. If the Chisolms were forced to arbitrate their dispute with AHP, all remaining causes of action would continue to require litigation of the disputes with the subcontractors and any third party claims. Further, the subcontractors may have claims against AHP for indemnification or otherwise. This leads to the potential for divergent judicial determinations, increased litigation expenses for the courts and the parties, and unnecessary complexity of issues. Therefore, the circuit court did not err in denying arbitration, in part, in the interests of judicial economy.

**CONCLUSION**

The arbitration clause in the Agreement is broadly-worded and should therefore be strictly construed. The Plaintiffs could not have reasonably foreseen the potential for AHP to commit the fraudulent conduct and negligent misrepresentations as alleged in the Amended Complaint. Therefore, the Circuit Court properly found the related causes of action to not be subject to arbitration. Further, the various subcontractor defendants were not party to the Agreement between the Plaintiffs and America's Home Place, and therefore all causes of action directed to them would not be subject to arbitration. Bifurcating the trial would be inefficient, cause duplicative expense, and be contrary to public policy. For the reasons set forth above, this Court should affirm the ruling of the Circuit Court in denying America's Home Place's Motion to Compel Arbitration.

Respectfully submitted,

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April 11, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM JASPER COUNTY  
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

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Of whom America's Home Place, Inc. is the Appellant

Underwood Mechanical, LLC

Third Party Plaintiff,

v.

J&J Plumbing a/k/a J&J Torres Plumbing a/k/a Torres  
Plumbing

Third Party Defendant.

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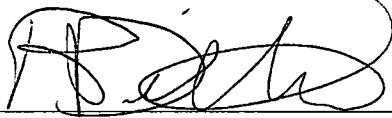
This is to certify that I have this date served Counsel for all parties to this appeal with a copy of the Initial Brief of Respondent, and this Certificate of Service, by placing a copy of same in the properly addressed envelope with sufficient postage thereon and depositing same in the United States

Mail to the below listed party:

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*Appeal from Court of Common Pleas, Jasper County, South Carolina*  
Civil Action No. 2015-CP-27-209

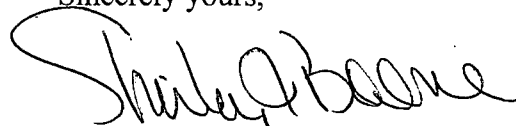
Dear Judge Kitchings:

Please find enclosed an original and one (1) copy of an Respondent's Initial Brief and Certificate of Service regarding the above referenced matter. Please note only one copy of each document is being transmitted via facsimile, and the originals are being placed in today's mail. Please file the originals with the court and return one file-stamped copy of each to our office in the enclosed self-address stamped envelope.

Should you have any questions or need any additional information, please feel free to contact our office.

With kind regards, I am

Sincerely yours,



Shirley J. Boone  
Paralegal to Robert C. Dills

/sjb  
Enclosures

cc: Tawny D. Mack, Esquire (w/encl.)

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