

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

Appellate Case No. 2014-00782

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SEP 01 2016

S.C. SUPREME COURT

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' PETITION FOR REHEARING

Herbert W. Hamilton
Christi P. Cox
HAMILTON MARTENS, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672
ATTORNEYS FOR RESPONDENTS

OTHER COUNSEL:

Ian W. Freeman
George Trenholm Walker
Pratt-Thomas Walker, P.A.
PO Drawer 22247
Charleston, SC 29413-2247
ATTORNEYS FOR PETITIONER

Respondent hereby petitions the Court for Rehearing pursuant to Rule 221 of the Appellate Court Rules. The Respondent respectfully submits that the Court overlooked or misapprehended the points as set forth herein with particularity.

Unconscionability

From the time the Motion to Compel Arbitration was filed by John Wieland Homes (“JWH”) in the Circuit Court, Parsons has argued that the Arbitration Clause contained in the JWH Warranty Booklet is unconscionable by its own terms. Because the Trial Court and the Court of Appeals found the arbitration clause to be unenforceable on other grounds; the issue was not addressed either at the trial level or in the opinion of the Court of Appeals. Parsons argued that the Arbitration Clause is unconscionable as an additional sustaining ground in the Court of Appeals and this Court. The Court of Appeals affirmed on other grounds so it was not necessary to address the unconscionability argument.

This Court addressed and denied the unconscionability argument in one paragraph with no reference to the specific terms of the arbitration clause itself. The unconscionability argument was not addressed by either the concurring opinion or the dissenting opinion.

As the Court noted in the primary opinion, “unconscionability requires courts to focus generally on whether the Arbitration Clause is geared toward achieving an unbiased decision by a neutral decision maker.” (Citing Hooters of Am. Inc. v. Phillips, 173 F 3d 933 (4th Cir., 1997) and Carolina Care Plan, Inc. v. United Health Care Services, Inc. 361 S.C. 544, 554, 606 SE 2d 752, 757 (2004)). Parsons submits that the provisions of the

JWH Arbitration Clause are not geared toward achieving an unbiased decision by a neutral decision maker.

The Hooters of America case is one of the cases most often cited for the proposition that unfair arbitration rules will not be enforced. The 4th Circuit Court of Appeals found that the arbitration rules promulgated by Hooters were egregiously unfair in the following respects:

1. Employee must provide notice of claim and basis for claim – Hooters not required to file responsive pleadings or notice of defenses.

2. At the time of filing, employee must provide list of witnesses – Hooters not required to reciprocate.

3. Manner of selection of arbitrator gave Hooters control over the entire panel.

4. Manner in which arbitration is administered unfair.

5. Nothing to stop Hooters from changing rules in middle of the arbitration proceeding.

The Court found that the many unfair rules created “a sham system unworthy even of the name arbitration”. Id. at p. 940

This Court considered the issue of unconscionability of arbitration provisions in the recent case of Smith v. D.R. Horton, Op. No. 27 645 (S. Ct. July 16, 2016). The facts of the D.R. Horton case are similar to the facts in this case.

The Smiths purchased a home from D.R. Horton, a national residential developer. The Smiths had problems with the home. When the problems were not corrected to their satisfaction, the Smiths filed a construction defect claim against D. R. Horton.

D. R. Horton filed a motion to compel arbitration. The trial court denied the motion and the Court of Appeals affirmed the Circuit Court. On Petition to this Court for Writ of Certiorari to the Court of Appeals, this Court found that the Arbitration Clause was unconscionable and, thus, unenforceable.

The location of the Arbitration Clause in D. R. Horton, was very similar to this case. The Arbitration Clause was contained in a warranty provision and was one of many sub-paragraphs. This Court found that the provisions of the Arbitration Agreement itself were unconscionable because of attempts to disclaim implied warranty claims and prohibit any monetary damages.

As in D. R. Horton, the Arbitration Agreement is found in the Warranty provisions of the contract. Considering only the Arbitration Clause itself, Parsons submits that the arbitration terms are oppressive and one-sided:

a.) The arbitrator is to be selected by the Construction Arbitration Associates, Inc., (“CAA”) an entity located in Atlanta, Georgia, the home of JWH. No other information is provided about CAA, its pool of arbitrators, the rules it abides by, or its relationship with JWH.

b.) There is no way to know what the rules of the arbitration will be. The rules are to be established by CAA or the arbitrator selected by CAA.

c.) There are no provisions ensuring the neutrality or qualifications of the arbitrator or any way to object to the selected arbitrator or the rules.

These are just a few of the provisions which make this process unfair to the consumer. As the Court noted, in analyzing Arbitration Clauses, courts are required to focus generally on whether the Arbitration Clause is geared towards achieving an

unbiased decision by a neutral decision-maker. Parsons submits that the JWH warranty provision fails the fairness test.

Outrageous and Unforeseeable Tort

A majority of the Court found that the “outrageous and unforeseeable tort” exception is a label which has been given to a generally applicable principle of contract interpretation. The issue to be determined in the interpretation of any agreement, arbitration or otherwise, is the intent of the parties and their state of mind when the contract was signed. More specifically, as it applies to this case, was it foreseeable at the time of contracting that buried pipes containing hazard waste would be discovered in the lot bought by the Parsons?

While a majority of the Court found that the outrageous and unforeseeable tort exception remains a viable principle of law, only the concurring/dissenting opinion commented on the application of this principle to this case. Parsons respectfully submits that this is an issue which the Court “overlooked or misapprehended”.

In applying the outrageous/unforeseeable tort exception to this case, the concurring/dissenting opinion states “In a residential purchase agreement, it is entirely foreseeable that a seller would fail to disclose defects with the property”. In support of this proposition, the opinion cites cases in which problems with construction and the lot were not disclosed:

a.) residential lot filled with unsuitable material and capped with clay, Cohen v. Blessing, 259 S.C. 400, 192 SE 2d 204 (1972);

b.) presence of toxic mold in house before closing, Winter v Fiddie, 394 S.C. 629, 716 SE 2d 316 (Ct. of App., 2011).

c.) residence infested with insects Cohen v. Blessing, 259 S.C., 400, 192 SE2d 204 (1972).

Each of the cases cited involve a construction issue or the presence of some naturally occurring condition (insects/mold). These issues would certainly be foreseeable.

The issue involved in this case is significantly different. The pipes in the ground containing hazardous waste are not a result of some defect with the property itself or the construction of the house. The pipes in the ground were installed by someone prior to construction, and there is evidence that JWH was aware of the pipes before this house was sold to the Parsons. This is not a circumstance which could have been foreseen by any purchaser.

The concurring/dissenting opinion also cites S.C. Code Ann. §27-50-65 (2007) as support of the proposition that failing to disclose the presence of the pipes was foreseeable. Section 27-50-65 provides a remedy for “any material information on the disclosure statement that he knows to be false, incomplete, or misleading”.

As applied in this case, however, Parsons submits that the mandatory disclosure statement actually supports Parsons’ argument. The house bought by the Parsons was new. The house was built by JWH. They were the first purchasers of the house which had never been inhabited. The mandatory written disclosure statute does not apply to this transaction.

“This article does not apply to transfers:

(10) involving the first sale of a dwelling never inhabited;

S.C. Code Ann. § 27-50-30 (Rev. 2007)

Parsons respectfully submits that the issue is not whether it is entirely foreseeable that a seller of real property would fail to disclose defects with the property. The question is whether a purchaser should foresee that pipes containing hazardous waste would be buried on the lot.

Parsons respectfully submits that the answer to this questions should be “no”. Having concluded that the so called “outrageous and unforeseeable tort” exception is still viable, Parsons submit that the Court of Appeals should be affirmed on that basis. .

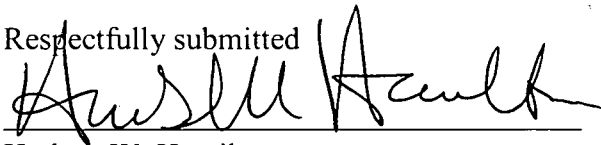
Conclusion

Parsons respectfully requests that the Court grant this Petition for Re-hearing and affirm the Court of Appeals on one or both of the grounds set forth herein.

In the alternative, however, Parsons requests that the case be remanded to the Trial Court to consider the fairness of the specific arbitration provisions promulgated by JWH. The opportunity to have discovery and take evidence on the fairness of the arbitration provisions was requested at the first Circuit Court hearing but has never occurred.

August 30. 2016

Respectfully submitted



Herbert W. Hamilton
of Counsel

HAMILTON MARTENS, LLC
Post Office Box 10940
Rock Hill, South Carolina 29731
803/329-7672

ATTORNEYS FOR THE DEFENDANT

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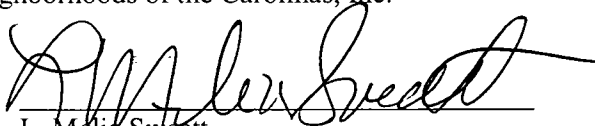
Petitioner.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens, LLC certifies that the Respondents' Petition for Rehearing was served upon other counsel of record by depositing same in the United States Mail and via Federal Express with sufficient postage affixed and addressed as follows:

Ian W. Freeman
George Trenholm Walker
Pratt-Thomas Walker, P.A.
PO Drawer 22247
Charleston, SC 29413-2247
ATTORNEYS FOR APPELLANT
John Wieland Homes and Neighborhoods of the Carolinas, Inc.

August 30, 2016


L. Melia Sweatt
Paralegal