IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Appellate Case No. 2014-00782

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.

RETURN OF PETITIONER JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. TO RESPONDENTS PETITION FOR REHEARING

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Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH") respectfully submits this Return to the Petition for Rehearing filed by Respondents Ralph Wayne Parsons, Jr., and Louise C. Parsons ("Respondents" or "Parsons"). For these reasons discussed herein, the Petition should be denied.

STANDARD OF REVIEW

In order to prevail on a petition for rehearing, Respondents must demonstrate the Court overlooked or misapprehended their argument. Rule 221(a), SCACR; Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532-33, 564 S.E.2d 322, 322-23 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfriss, Appellate Practice in South Carolina 309 (1999) (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)).

ARGUMENT

I. This Court did not misapprehend the law or overlook any facts and, thus, correctly found that the subject arbitration provision is not unconscionable.

Respondents incorrectly contend that this Court misapprehended the law or overlooked facts in the record supposedly supporting that the arbitration clause in the JWH Warranty at issue is unconscionable. Respondents' Petition for Rehearing is nothing more than a rehashing of their previously presented arguments and should be denied because Respondents fail to meet their burden of demonstrating "the points supposed to have been overlooked or misapprehended by the Court." See Arnold v. Carolina Power & Light Co., 168 S.C. 163, 172-73; 167 S.E. 234, 238 (1933) (dismissing petition for rehearing for not meeting the petitioner's burden); Checker Yellow Cab Co. v. Checker Cab & Parcel Service, Inc., 287 S.C. 608; 340 S.E.2d 549 (Ct.App.

1986) (dismissing petition for rehearing as lacking requisite merit).

This Court's decision properly stated the law. That is, "unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 2016 S.C. LEXIS 227, *12 (S.C. Aug. 17, 2016) (citing Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999))); Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).

"Unconscionability is characterized by the absence of meaningful choice on the part of one party due to one-sided contract provisions, *together with* terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998) (emphasis in original) (citation omitted).

As they did previously, Respondents incorrectly argue that the arbitration clause found in the JWH Warranty is analogous to the arbitration provisions at issue in the Hooters of America case. In that case, Hooters set up the arbitration forum for resolution of employee claims by promulgating its own arbitration rules and procedures. Hooters of Am. Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1997). The Fourth Circuit found that the company's arbitration terms and procedures were grossly unfair, particularly where Hooters' arbitration rules allowed for the company to select Hooters' management to serve on the arbitral panel and for Hooters to control the arbitral process to the disadvantage of the employee claimant. Id. at 939. The federal court of appeals concluded that Hooters' contractual arbitration clause and rules were so "one-sided that their only possible purpose is to undermine the neutrality of the proceeding." Id. at 939.

Unlike the arbitration terms and rules established by Hooters, the JWH contractual

arbitration provisions require the dispute to be resolved by a neutral, third-party, and the terms are distinguishable from those employed by Hooters for the following reasons:

1. Under the terms of the JWH arbitration clause, Construction Arbitration Associates ("CAA"), a neutral third-party alternative dispute resolution organization, selects the arbitrator, and if it is legally unable to do so due to a conflict or otherwise, then the American Arbitration Association ("AAA") selects the arbitrator. JWH does not control the selection of the arbitrator who will preside over the matter. **App. p. 78, §V, ¶O**;
2. The arbitrator has the discretion and authority to select the rules that govern the rules concerning administration of the arbitration. CAA has its own published arbitration rules as does the AAA. JWH did not author those rules and does not have the right to change them. If procedural matters arise not covered by the arbitration rules, the arbitrator (not JWH) has the discretion and authority to decide the matters;
3. There is mutuality of remedy after the arbitration clause is triggered. Both parties must arbitrate any dispute between them once the certificate of occupancy issues and the closing occurs;
4. The JWH arbitration clause does not contain one-sided provisions which present obstacles for the claimant, such as requiring the claimant to submit a list of witnesses along with its notice of claim; and
5. Additionally, the arbitration provision is conspicuous. The heading of paragraph 21 of the Agreement includes the term "Arbitration" and the arbitration provision is in all capitalized letters. Furthermore, the Parsons initialed at the end of the paragraph and the end of the page, which illustrates that their attention was purposefully drawn

to this specific provision.

These facts demonstrate that the arbitration process under the JWH Warranty is aimed at reaching an unbiased decision by a neutral decision-maker. By contrast, the arbitration process at issue in Hooters was completely controlled and manipulated by the company and, therefore, was found by the Fourth Circuit to be a "sham."

Respondents' Petition also cites to this Court's recent opinion in the case of Smith v. D.R. Horton, Op. No. 27 645 (S.C. July 6, 2016).[1] In Smith v. D.R. Horton, this Court found D.R. Horton's arbitration clause unconscionable where it contained multiple one-sided and oppressive terms, including an express prohibition on the arbitrator awarding "monetary damages." Id. 2016 S.C. LEXIS 155, *10 (citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007)).

The arbitration clause in the JWH contract does not prohibit an arbitrator from awarding money damages or impose any limit on the authority of the arbitrator regarding the type of award issued. It is also worth noting that there is no clause within the arbitration provision in this case similar to the one struck down by this Court in Simpson v. MSA of Myrtle Beach, Inc. which this Court relied upon Smith v. D.R. Horton. "The arbitration clause in Simpson's contract with Addy provides that '[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party.'" Nothing in the JWH arbitration provision contains any limitation on an award of damages—the arbitration provision here simply requires both parties to submit their claims to arbitration.

[1] That decision was filed approximately five weeks before this Court filed the opinion for which Respondents seek a rehearing.

Respondents' chief argument—that the JWH arbitration clause is oppressive—is based on the fact that the third-party neutral, CAA, is based in Atlanta, Georgia, the location of Petitioner's former headquarters. Respondents somehow deduce, and without foundation claim, that CAA cannot be fair when selecting the arbitrator or promulgating arbitration rules based on its Georgia location. This argument is unsupported by anything in the record and is premature.[2] Prematurity aside, Respondents once again fail to show how this would adversely impact the arbitration process, which would occur in the nearest metropolitan area where the Respondents' property is located, not Atlanta, Georgia. There is no adverse inference drawn from these circumstances which is supported by any facts or legal authorities cited by Respondents.[3]

In addition, John Wieland Homes' complete removal of the small quantity of waste solution discovered on or near the Respondents' property to the satisfaction of SCDHEC pursuant to a cleanup contract with the state must be considered when considering the alleged defense of unconscionability. See Chatlos Sys., Inc. v. Nat'l Cash Register Corp., 635 F.2d 1081, 1087 (3d Cir. 1980) ("[A]lthough not determinative, it is worth mentioning that even though unsuccessful in correcting the problems within an appropriate time, NCR continued in its efforts."); Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case."). Petitioner spent more than $500,000 to remediate Respondents' property

[2] "Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance." Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940-41 (4th Cir. 1999) "Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award." Id. (emphasis added).

[3] Notably, the American Arbitration Association, which is also referenced in the JWH arbitration provision, is an Atlanta-based organization that handles arbitrations. Respondent does not argue that the AAA is incapable of selecting or serving as the arbitrator based on its location or alleged ties to Wieland.

to the satisfaction of SCDHEC. Unlike D.R. Horton, where this Court found that the builder was unable to furnish a meaningful warranty repair for the homeowner after many unsuccessful attempts, John Wieland Homes entered a voluntary cleanup contract with the State of South Carolina which it honored. JWH completed the remedial work at the Parsons' property under the supervision of state regulators and to SCDHEC standards.

Respondents also had a meaningful opportunity to consider the terms of the JWH arbitration clause. They were provided a copy of the JWH Warranty, which included the same arbitration provision as that at issue in the present case, on March 22, 2006, well more than a year before they signed the subject Purchase and Sale Agreement incorporating the exact same arbitration provision on June 30, 2007. **App. p. 128, ¶ 3.** During this time, Respondents not only had the opportunity to read through the arbitration provision in detail, but also had the opportunity to consult with their own attorney before signing the Agreement. Respondents not only read and agreed to the terms of the contract once, they did so twice, apparently appreciating the low cost and efficiency of contracting with John Wieland Homes for the purchase of property.

At bottom, the JWH arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker as Smith v. D.R. Horton requires. The plain terms of the arbitration provision, require the arbitration to be conducted "by an ***independent, neutral, third-party arbitrator*** . . . selected by Construction Arbitration Associates, Inc., Atlanta, Georgia (CAA) . . . [and] if CAA is unable or legally precluded from selecting an arbitrator, then the American Arbitration Association (AAA) shall do so . . . ." **App. p. 78, §V, ¶O** (double emphasis added).

For the foregoing reasons, Respondents' Petition for Rehearing should be denied.

II. The Court did not misapprehend the law or overlook any facts and, thus, correctly determined that the outrageous and unforeseeable torts exception does not apply here to bar JWH's demand for arbitration.

Both at oral argument and in the Court's written opinion, the Justices thoroughly examined the allegations in this case, the viability of the outrageous and unforeseeable torts exception as a legal doctrine, and its application to this case, if any. Two Justices—Chief Justice Pleicones and Justice Kittredge—decided that the exception should be overruled as inconsistent with the United States Supreme Court's holding in AT&T Mobility, L.L.C. v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740 (2011). In their Petition for Rehearing, Respondents do not argue that Chief Justice Pleicones's opinion, in which Justice Kittredge concurred, misapprehends the law or overlooks any facts.

Justice Hearn, with whom Justice Beatty concurred, concurred in result, finding that while the outrageous and unforeseeable torts exception to arbitration agreements is still a viable legal doctrine in South Carolina, the exception did not bar JWH's demand for arbitration in this case because "there is a significant relationship between the claim and the contract in which the arbitration agreement is contained" *and* "it is entirely foreseeable that a seller would fail to disclose defects with the property." See Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 2016 S.C. LEXIS 227, *17 (S.C. Aug. 17, 2016).

Respondents argue that the concurring opinion's analysis concerning whether the alleged failure to disclose in this case was foreseeable is incorrect. However, Respondents' Petition does not assert that the concurring opinion overlooked or misapprehended anything with respect to the decision that there is a significant relationship between the Respondents' claims and the contract in which the arbitration agreement is contained. Instead, Respondents sole focus is on one paragraph and an accompanying footnote in the concurring opinion, which notes disagreement

with the dissenting opinion's conclusion that it is unforeseeable that a seller would fail to disclose defects with the property. Significantly, the concurring opinion's decision was not based upon that single point. In fact, immediately after the paragraph concerning foreseeability, the concurring opinion explained the "more important[]" issue—the "significant relationship" test:

> ***More importantly, in examining the scope of arbitration agreements, this Court has traditionally considered whether a "significant relationship" exists between the claims asserted and the contract in which the arbitration clause is contained.*** Zabinski v. Bright Acres Assocs., 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001); see also Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 150, 644 S.E.2d 705, 708 (2007) (stating the significant relationship test is not a mere "but for" causation standard).
>
> * * *
>
> Accordingly, in this instance, I believe the correct inquiry is whether JWH's alleged fraud in failing to disclose the presence of hazardous waste on the property is essentially a freestanding tort that is not significantly related to the sales contract and arbitration agreement between JWH and the Parsons. ***I would find there is a significant relationship between the claim and the contract in which the arbitration agreement is contained.*** The Parsons could not bring their claim against JWH absent the sales contract, as the claim is entirely reliant on the parties' statuses under the contract. In other words, absent the sales contract, JWH would be under no duty to disclose these particular defects with the property to the Parsons or any other third-party.

Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 2016 S.C. LEXIS 227, *17-21 (S.C. Aug. 17, 2016) (double emphasis added). This Court properly applied the "significant relationship" test espoused in the Zabinski case and recognized that the JWH arbitration provision encompasses claims arising in tort, contract, or of any kind. 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001). Respondents have not challenged that holding. Therefore, because the Petition for Rehearing does not even argue that the concurring opinion overlooked or misapprehended any fact with respect to its holding that there is a significant relationship between the claim and the contract in which the arbitration agreement is contained, the Petition

must be denied.

Additionally, it is worth noting that Respondents' argument that that the concurring opinion overlooked or misapprehended their argument with respect to foreseeability fails as well. Respondents attempt to distinguish three cases and one code section cited by in a footnote to the concurring opinion by arguing that the facts of those cases involving the failure to disclose a condition as part of a real property sale are distinguishable from the allegations in this case. Respondents overlook that the footnote in the concurring opinion cited these cases for the proposition that "[n]umerous lawsuits in our state involve a seller's failure to disclose" and explains that the nondisclosure of an issue in the context of a real property sales transaction is common in our case law and recognized by statute, Section 27-50-65 of the South Carolina Code of Laws.[4]

Moreover, Respondents' attempts to distinguish the cited authorities are unavailing; each of these cases involved allegations that the seller of real property did not disclose any issue with the property. See Lawson v. Citizens & S. Nat'l Bank of S.C., 259 S.C. 477, 193 S.E.2d 124 (1972) (allegation that seller failed to disclose that a lot was filled with unsuitable material and "capped" with clay which caused buyer's home to subside); Cohen v. Blessing, 259 S.C. 400, 192 S.E.2d 204 (1972) (allegation that a seller failed to disclose that the residence was infested with insects); Winters v. Fiddie, 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011) (allegation that a seller failed to disclose the presence of toxic mold). Additionally, it is worth nothing that the

[4] The exceptions for requiring a residential property condition disclosure statement have nothing to do with foreseeability, but rather instances when the General Assembly determined that a statutory duty should not be imposed on the seller to prepare a statement, e.g., transfers between spouses in a divorce decree, public auction sales, time-share transfers, etc. See S.C. Code Ann. § 27-50-30 (2007). That statute does not abrogate duties to disclose that may arise under the common law or other statutes.

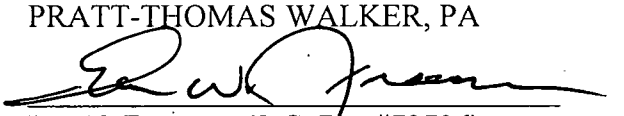
Lawson case involved allegations of undisclosed subsurface problems with real property which are many respects analogous to Respondents' allegations here about subsurface contamination. There, a seller sold lots to a buyer on which seller had filled a gulley with trees and stumps, materials that will decay, and then covered them over with clay without disclosing such facts to the buyer. See Lawson, at 485, 193 S.E.2d at 128. The buyer constructed a home that ultimately suffered damage when the materials and soils underneath the foundation subsided. Id. Therefore, contrary to Respondents' argument, the Lawson case and authorities cited in the concurring opinion support the Court's finding that the "it is entirely foreseeable that a seller would fail to disclose defects with the property." Again, Respondents' Petition fails to articulate points supposed to have been overlooked or misapprehended by the Court and should be denied.

CONCLUSION

For the foregoing reasons, JWH respectfully requests that this Court dismiss Respondents' Petition for Rehearing.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



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PROOF OF SERVICE

I hereby certify that a true and correct copy of the Return of Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. to Respondents' Petition for Rehearing was served on this 19th day of September, 2016 via U.S. mail, postage prepaid, and via Federal Express upon the following counsel of record:

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