THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2017-CP-40-03697
Appellate Case No. 2018-000889

Amanda Leigh Huskins and Jay R. Huskins,..... Appellants,

v.

Mungo Homes, LLC,.....Respondent.

INITIAL BRIEF OF APPELLANTS

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II. Did the circuit court err in finding that the arbitration provision applied mutually to Mungo Homes and its purchasers when Mungo would have no reason to assert a claim against a purchaser after receiving full payment at closing?

III. When the Purchase Agreement's "Arbitration and Claims" provision is expansive in scope, including claims arising under and related to the Purchase Agreement's "Limited Warranty" provision, and when these two provisions also cross-reference one another, did the circuit court err in failing to consider the one-sided and oppressive terms of the "Limited Warranty" provision as part of the agreement to arbitrate and correspondingly find the agreement to arbitrate one-sided, oppressive, and unconscionable?

IV. If the Purchase Agreement's "Arbitration and Claims" provision does not include claims arising under the "Limited Warranty" provision, did the circuit court err in granting Respondent's motion to dismiss Appellants' action that involves claims falling under the "Limited Warranty" provision?

STATEMENT OF THE CASE

Appellants Amanda Leigh Huskins and Jay R. Huskins ("Huskins") filed this action in the Richland County Court of Common Pleas seeking monetary and declaratory relief based upon certain warranty waivers in Mungo Homes' proprietary "Purchase Agreement" on June 14, 2017. In response, Mungo Homes filed its Motion to Dismiss and to Compel Arbitration on July 17, 2017. The Honorable DeAndrea Gist Benjamin then heard Mungo's Motion to Dismiss and Compel Arbitration on November 8, 2017, and issued an Order granting Mungo's Motion to Dismiss and Compel Arbitration on March 13, 2018. The Huskins filed their Motion to Alter or Amend the Judgment pursuant to Rules 52(b) and 59(e), SCRCP, to which Judge Benjamin issued a Form 4 Order denying the Huskins' Motion for Reconsideration on April 16, 2018. The Huskins

filed and served their Notice of Appeal on May 11, 2018, seeking review of the trial court's grant of Mungo's Motion to Dismiss and Compel Arbitration and the court's denial of the Huskins' Motion for Reconsideration.

STATEMENT OF FACTS

Amanda and Jay Huskins are purchasers of a new home from Mungo Homes, a large builder and seller of homes in South Carolina. (R. at ____ Complaint.) On June 29, 2015, the Huskins executed Mungo Home's proprietary "Purchase Agreement" for the purchase of real property with a new home situated thereon to be built by Mungo in Richland County, South Carolina. (R. at ____ Complaint, Ex. 1.) The Purchase Agreement disclaims fundamental warranty rights implied by law in South Carolina in connection with the sale of a new home. One of the implied warranties that Mungo requires its purchasers waive is the implied warranty of habitability.

Specifically, the Purchase Agreement's "LIMITED WARRANTY" provides:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
>
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSES IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE, OR UTILITIES. PURCAHSER AGREES TO ACCEPT LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES,

WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.

(R. at ____ Complaint, Ex. 1.)

As the Complaint alleges, under well-established law, the "warranty of habitability" is implied in the sale of all new homes in South Carolina. Recognizing the importance of this implied warranty, and the relative sophistication of homebuilders such as Mungo vis-à-vis a new home buyer, the South Carolina Supreme Court pronounced that the warranty of habitability cannot be waived or disclaimed unless the waiver is (1) conspicuous; (2) known to the buyer; and (3) specifically bargained for. *Kirkman v. Parex*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Nevertheless, in contravention to this long-standing precedent, Mungo requires all new home buyers, including the Huskins, to waive the warranty of habitability without providing these homebuyers any compensation or separate consideration for such waiver. (R. at ____ Complaint, Ex. 1 at "Limited Warranty".)[1] In their Complaint, the Huskins ask: (1) the Court to declare as a matter of law that Mungo cannot waive the implied warranty of habitability without paying its customers such as the Huskins adequate consideration for such waiver, and (2) a jury to determine that the Huskins may recover the fair value of the waiver to which Mungo unjustly enriched itself or extracted in breach of the covenant of good faith and fair dealing in contract. (R. at ____ Complaint.)

In addition to the broad disclaimer of warranty rights, Mungo's Purchase Agreement contains other significant limitations on the rights and remedies afforded to the purchaser of a Mungo home. Mungo's Purchase Agreement requires that all claims related to the Purchase

[1] Although not the subject of this action, consistent with its scheme to avoid standing behind its residential homes, Mungo also disclaims and refuses to warrant that its homes are even suitable for a "residential purpose." (R. at _____, Complaint, Exhibit 1 at "Limited Warranty.")

Agreement be sent to arbitration. (R. at ____ Complaint.) Specifically, the "ARBITRATION AND CLAIMS PROVISION" provides:

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. *Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.*

(R. at ____ Complaint, Ex. 1 (emphasis added).)

Pursuant to this "Arbitration and Claims" provision, Mungo Homes filed its motion to dismiss and compel arbitration. The Huskins opposed the motion because the "Arbitration and Claims" provision was unconscionable and therefore unenforceable. Specifically, the Huskins argued the Purchase Agreement was a contract of adhesion and one-sidedly and oppressively limited the scope of remedies and time to assert causes of action otherwise available to the Huskins at law and was not mutually applicable to the parties. However, the trial court granted Mungo Homes' motion, ruling that although the Huskins lacked meaningful choice to arbitrate their claims because they do not possess business judgment, did not have counsel, and were not a substantial business concern, the arbitration agreement was not one-sided and oppressive. (R. at ____ Order.) In concluding that the "Arbitration and Claims" provision was not one-sided and oppressive, the Court found (1) the "Arbitration and Claims" and "Limited Warranty" provisions should be analyzed in isolation from one another and therefore the "Arbitration and Claims" provision does

not limit the Huskins' from asserting warranty claims in a judicial forum, (2) the 90-day limitation set forth in the "Arbitration and Claims" provision applied to Mungo Homes' time to move to dismiss or stay a judicial action and compel arbitration, and not to the time in which a party could bring a claim related to the Purchase Agreement in arbitration, and (3) that the procedures set forth for arbitration of a claim applied equally to both parties. (R. at ___ Order at 10-13.)

STANDARD OF REVIEW

The determination of whether a claim is subject to arbitration is subject to *de novo* review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A circuit court's factual findings, if any, however, will not be reversed on appeal if any evidence reasonably supports the findings. *See Aiken v. World Fin. Corp. of South Carolina,* 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

ARGUMENT

For decades, South Carolina's courts have made clear that protecting the rights of the new home buyer is an important public policy of this State. *See, e.g., Kennedy v. Columbia Lumber Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 49, 229 S.E.2d 728 (1976). Our courts have also recognized "that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Kennedy*, 299 S.C. at 343, 384 S.E.2d at 735-36. The Huskins now come before this Court seeking the same judicial protections that have historically been afforded new home purchasers like themselves when dealing with a sophisticated seller of new homes such as Mungo. In deciding this appeal, this Court should protect the Huskins from the harm that would be suffered by the application of the one-sided and oppressive terms of Mungo's "take it or leave it" Purchase Agreement and reverse the trial court's erroneous ruling allowing enforcement of Mungo's unconscionable arbitration clause.

I. The circuit court erred in construing the plain language of the Purchase Agreement's "Arbitration and Claims" provision as restricting the time for Mungo to move to compel arbitration rather than restricting the statutory time otherwise afforded to the Huskins to assert a claim related to the contract, leading to an erroneous finding that the "Arbitration and Claims" provision itself was not one-sided, oppressive and unconscionable as a matter of law.

The Court mistakenly concluded that the ninety-day "limitations period" set forth in the "Arbitration and Claims" provision related only to the time Mungo had to move to compel arbitration after the Huskins filed their Complaint. (R. at ____ Order at 11.). The plain language of the "Arbitration and Claims" provision does not allow for such interpretation. Clearly, this provision creates a time limit for a party, such as the Huskins, to bring a claim once the claim has arisen. Furthermore, to the extent this provision could be considered ambiguous, it must be construed against its drafter, Mungo Homes, and in favor of the Huskins.

The plain language of the "Arbitration and Claims" provision shows it is a time limit for the Huskins to bring their claim. The first sentence of the "Arbitration and Claims" provision defines the expansive scope of any claims, disputes, or other matters to which the mandatory and binding arbitration "shall" apply and the circumstances in which the mandatory and binding arbitration shall take place. Then, the "Arbitration and Claims" provision outlines how the party with the claims, disputes, or other matters in need of resolution subject to mandatory and binding arbitration shall "commence[]" arbitration, noting that such process must be by written demand, specifying the issues and designating an arbitrator. Importantly, the "Arbitration and Claims" provision then sets the deadline for a party to make a claim:

> Each and every demand shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except for any claim, dispute or matter in question arising from either party's termination of this Agreement which shall be made within thirty (30) days of the written notice of termination. *Any*

claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred.

(R. at ____ Complaint, Ex. 1 (emphasis added).) The "Arbitration and Claims" provision thus plainly restricts the time frame in which a party with claims, disputes, or other matters falling within the scope of the mandatory and binding arbitration provision can demand resolution. Depending on the circumstances, those claims, disputes, or other matters must be demanded for resolution through arbitration within 90 or 30 days of the date on which those claims, disputes, or other issues arose, or such claims will be lost forever. The last sentence of the paragraph leaves no room for any other interpretation, noting "[a]ny claim, dispute or other matter not asserted within said time periods shall be deemed waived and forever barred." In other words, the clause operates as a 90 or 30-day limitations period for an aggrieved party to bring a claim once that claim has arisen.

However, the trial court found this clause defined only when Mungo must move to compel arbitration after a case has been filed in court. Specifically, the court construed this clause to mean that Mungo had 90 days to file a motion to dismiss or compel arbitration after the Huskins filed their Complaint. (R. at ___ Order at 11). Contrary to the court's finding, however, this language has nothing to do with the time in which Mungo must move to compel arbitration after being served with a Complaint. Mungo is not "commenc[ing]" any arbitration against the Huskins by moving to dismiss this action and compel arbitration. Mungo seeks only to foreclose this judicial forum to the Huskins and require the Huskins, not Mungo, to "commence" their claims in mandatory and binding arbitration under the "Arbitration and Claims" provision. It is irrelevant how long it took Mungo to file its motion to compel arbitration. The ninety- and thirty-day limitation periods in Mungo's arbitration clause relates solely to the party asserting a claim, which,

in this case, is the Huskins. Accordingly, the arbitration provision, by its plain language, seeks to bar any claim asserted more than 90 or 30 days after the claim arose.

Although the contract language is clear, to the extent there is any ambiguity as to the meaning of the 90- and 30-day limitation periods in the "Arbitration and Claims" provision, the Court must construe any doubts and ambiguities against the drafter. *Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). "This rule applies with particular force in cases involving a contract of adhesion." *S. Atl. Fin. Servs., Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002), *aff'd as modified*, 356 S.C. 444, 590 S.E.2d 27 (2003). Because the plain language of the arbitration provision controls and any ambiguity must be construed against its drafter, this Court should find that the circuit court erred in construing the Purchase Agreement's "Arbitration and Claims" provision as restricting the time for Mungo to move to compel arbitration rather than restricting the statutory time otherwise afforded to the Huskins to assert a claim related to the contract.

Importantly, Mungo's oppressive 90-day limitation period violates South Carolina law. *See* S.C. Code Ann. § 15-3-140. That statute provides that a party may not restrict through contract South Carolina's statute of limitations period for bringing a claim. *See also Scott v. Guardsmark Security,* 874 F. Supp. 117, 121 (D.S.C. 1995) (holding that a contractual provision reducing a statute of limitations is void pursuant to S.C. Code Ann. § 15-3-140 and further finding that the defendant's efforts to shorten a federally mandated time limit for asserting claims was "abhorrent to public policy."). Here, that is exactly what Mungo is trying to do. Mungo, in its form contract, is improperly restricting the limitations period for its customers to bring a claim from three years to 90 days.

Because the "Arbitration and Claims" provision violates South Carolina law and drastically shortens (from three years to 90 or, in some instances, 30 days) the time in which a party may bring a claim, dispute, or other matter under the contract, the trial court erred in concluding that the "Arbitration and Claims" provision was not one-sided, oppressive, and unconscionable. The Court should recognize that Mungo, a sophisticated entity and one of the nation's largest sellers of new homes, either knows or certainly should know that it cannot legally shorten the applicable statute of limitations in South Carolina. Nevertheless, Mungo includes such a provision in its standard-form Purchase Agreement presented to its numerous customers. Because Mungo's arbitration provision violates South Carolina public policy to safeguard the applicable statutory limitations period for asserting claims as set forth in § 15-3-140, it is not only one-sided and oppressive but unconscionable and unenforceable as a matter of law. *See Scott, supra; see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016) (concluding that oppressive and one-sided terms in arbitration clause could not be severed to save the rest where no severability clause was included therein).

Furthermore, while the trial court correctly concluded that a "clearly identified, mutual arbitration provision that does not limit remedies available by law" is indicative of a non-oppressive arbitration clause, (R. at ___ Order at 11), such is not the case here. Mungo's unlawful restriction on the time limit for bringing a claim for relief is an extreme limitation on **all** remedies available at law. Imposing such a short time frame for a purchaser to make a claim for relief is clearly an intentional (and unconscionable) effort by Mungo to significantly limit its liability at the expense of the new home purchaser. Moreover, the case relied upon by the trial court as support for its finding, *Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), is instructive as to this issue. In *Carlson*, the Court of Appeals refused to

consider whether a contractual provision limiting the statute of limitations for bringing claims to two years was relevant to the determination of whether the arbitration clause at issue was unconscionable on the grounds that such provision was not a part of the contract's arbitration clause. *See Carlson*, 404 S.C. at 260, 743 S.E.2d at 873-74. However, unlike the time restriction at issue in *Carlson*, Mungo's provision shortening the statute of limitations is a prominent part of Mungo's arbitration clause. In addition, the unconscionable nature of Mungo's 90-day (or 30-day) time limitation is made even clearer when contrasting it to the one present in *Carlson* which at least provided a two-year period for bringing a claim against the builder. *See id.*

Lastly, while the issue of whether a limitations period set forth in an arbitration clause renders the clause unconscionable appears to be a matter of first impression in South Carolina's appellate courts, other jurisdictions have squarely addressed this issue. *See Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1137 (Wash. 2013) (finding 30-day limitations period in arbitration clause to be substantively unconscionable); *see also Davis v. OMelveny & Myers*, 485 F.3d 1066 (9th Cir. 2007) (finding one-year notice provision in arbitration clause to be substantively unconscionable). The Supreme Court of Washington's opinion in *Gandee* is particularly instructive and on point. In *Gandee*, the Court rejected the contention that the time limit set forth in the arbitration clause was simply a time frame for a party to seek to compel arbitration. *Gandee*, 293 P.2d at 1201. As this Court should do when construing Mungo's arbitration clause, the *Gandee* court found "no ambiguity in the clause" and further found that "[a] plain language reading of this provision indicates that Gandee supposedly had 30 days within which to bring her claim." *Id.* The *Gandee* court went on to hold that the provision in the arbitration clause at issue shortening the applicable limitations period from the statutorily mandated four years to 30 days was substantively unconscionable. *Id.* Likewise, in *Davis v.*

O'Melveny & Myers, the Ninth Circuit Court of Appeals found that language similar to that used in Mungo's arbitration clause seeking to affect a waiver of a claimant's rights if notice of a claim was not given within a shortened limitations period was substantively unconscionable. *Davis*, 485 F.3d at 1076-78. This Court should follow the well-reasoned opinions of *Gandee* and *Davis* and find that the unreasonably short time limitations set forth in Mungo's arbitration provision renders the entire arbitration clause unconscionable and unenforceable.

II. The circuit court erred in finding that the arbitration provision applied mutually to Mungo and its purchasers when Mungo would have no reason to assert a claim against a purchaser after receiving full payment at closing.

The trial court mistakenly construed Mungo's arbitration provision as applying mutually to Mungo and its purchasers. Because Mungo requires full payment for the home and property at closing and prohibits the withholding of any of the purchase price for any reason, Mungo would have no reason to assert a claim against the purchaser after the closing. (R. at _____ Complaint, Ex. 1 at "Closing"). In addition, as to pre-closing matters, the Purchase Agreement grants Mungo broad rights to terminate the Purchase Agreement for purchaser default or even for its own convenience and defines the exclusive rights and obligations for such actions which do not require arbitration. (R. at _____ Complaint, Ex. 1 at "Default and Termination"). Therefore, any belief that Mungo would assert a claim and demand arbitration against a purchaser is illusory. For all practical effect, the "Arbitration and Claims" provision applies singularly to purchasers who have claims arising under or related to the Purchase Agreement arising after closing. *See Jiminez v. Cintas Corp.*, 475 S.W.3d 679 (Mo. Ct. App. 2015) ("[w]here the practical effect of an arbitration agreement binds only one of the parties to arbitration, it lacks mutuality of promise . . ."). This lack of mutuality is further indicative of the one-sided and oppressive nature of Mungo's "Arbitration and Claims" provision.

III. The circuit court erred in failing to consider the one-sided and oppressive terms of the "Limited Warranty" provision as part of the agreement to arbitrate when the "Arbitration and Claims" provision was expansive in scope, included claims arising under and related to the "Limited Warranty" and cross-referenced the "Limited Warranty."

The "Limited Warranty" and "Arbitration and Claims" provisions must be read together because the "Arbitration and Claims" provision includes warranty claims and because the provisions cross-reference each other and are substantively intertwined. However, the trial court concluded that the arbitration agreement should be analyzed in isolation from the "Limited Warranty" provision because the warranty provision is found outside of the arbitration provision. (R. at _____ Order at 9.) Specifically, the trial court noted that the "Arbitration and Claims" provision and the "Limited Warranty" provision are set apart by different headings in the Purchase Agreement, and the "Arbitration and Claims" provision does not specifically reference the "Limited Warranty" provision. (R. at _____Order at 10.) Because the court concluded the "Limited Warranty" provision "is outside the 'Arbitration and Claims' provision of the contract," moreover, the court found that the "Arbitration and Claims" provision in this case "does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (R. at ___ Order at 12 , n. 2.) The court's analysis elevates form over substance, on the one hand, and fails to apply the plain language of the contractual provisions, on the other hand.

In construing a written contract, if the language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 706 (1993). At the outset, as to the "headings" in the Purchase Agreement, the Court should not give undue weight to manipulative contract drafting by Mungo and its use of mere labels and

"headings" in an adhesion contract at the expense of much less sophisticated purchasers in the residential home context.

Mungo Homes agrees the "Arbitration and Claims" provision in the Purchase Agreement is expansive and broad in scope, and plainly includes warranty claims. (*See also* R. at ____ Mungo Home's Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend the Order Dismissing the Case and Compelling Arbitration at 4 ("The arbitration agreement unambiguously covers 'any claim, dispute or other matter in question between the parties hereto arising out of this Agreement.' As the Limited Warranty provision (and any questions about its enforceability or a breach thereof) arising out of the Purchase Agreement, it is within the scope of the arbitration agreement.").) The "Arbitration and Claims" provision states in pertinent part: "Any claim, dispute or other matter . . . between the parties . . . arising out of this Agreement, related to this Agreement or breach thereof, including without limitation, disputes related to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration." (R. at ___ Complaint, Ex. 1.) The "Arbitration and Claims" provision makes no exception for warranty claims of any kind, and applies to any claim, dispute, or other matter, and need only arise out of or relate to the Purchase Agreement or breach thereof.

By way of example, an implied warranty of habitability claim under the Huskins' Purchase Agreement constitutes a "dispute[] relating to the Property" as referenced in the "Arbitration and Claims" provision. "Property" being defined as "that certain tract of land, together with the dwelling" on the first page of the Purchase Agreement. (R. at ____ Complaint, Ex. 1.) An implied warranty of habitability claim would also constitute a "dispute[] relating to the Property . . . or condition . . . thereof" as referenced in the "Arbitration and Claims" provision.

In addition, the "Limited Warranty" and "Arbitration and Claim" provisions cross-reference one another and are substantively intertwined. The "Limited Warranty" provision states: "This limited warranty will be incorporated in the deed delivered at closing." (R. at ____ Complaint, Ex. 1.) The "Arbitration and Claims" provision applies to "disputes relating to . . . the deed to be delivered" pursuant to the Purchase Agreement. (R. at ____ Complaint, Ex. 1.) Stated another way, the "Limited Warranty" provision is explicitly merged into the deed delivered at closing, and claims, disputes or other matters related to the Deed are specifically referred to in and included as subject to the mandatory and binding arbitration provided under the "Arbitration and Claims" provision. The two provisions are in substance intertwined, and the "Arbitration and Claims" provision cannot be extracted or isolated from the "Limited Warranty" provision in the Purchase Agreement. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (holding that the warranty and dispute resolution provisions "must be read as a whole" and were so intertwined "as to constitute a single provision"). Notably too, the "Arbitration and Claims" provision includes no exception for warranty or warranty-related claims, disputes or other matters. Therefore, it was error for the trial court not to consider the one-sided and oppressive limitation on remedies contained in the "Limited Warranty" provision in construing the unconscionability of the "Arbitration and Claims" provision and for the court to conclude that the "Arbitration and Claims" provision does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (R. at ____ Order at 12.)

As established above, under the "Arbitration and Claims" provision, any warranty claim, dispute or other matter arising out of or related to the Property or Condition thereof is subject to mandatory arbitration under the "Arbitration and Claims" provision. The "Limited Warranty" provision, therefore, cannot be read in isolation from the "Arbitration and Claims" provision, and

the two provisions must be read in harmony with one another. Together, the "Arbitration and Claims" and "Limited Warranty" provisions prohibit any purchaser with any kind of warranty claim, dispute, or other matter from recovering damages, consequential or punitive. These damages would otherwise be recoverable in warranty matters by law. This limitation on remedies is just like the terms found to be one-sided and oppressive in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016), wherein D.R. Horton expressly disclaimed all warranties, including the warranty of habitability, as well as completely absolved itself from ever paying any money damages. Indeed, the trial court acknowledged in its Order that an arbitration provision which limits remedies otherwise available by law indicates a one-sided and oppressive arbitration agreement. (R. at _____ Order at 10 ("An arbitration clause that limits statutory remedies indicates one-sidedness and oppressiveness.").) Further, the court noted in its Order: "An arbitration agreement that limits the consumer's ability to bring a warranty claim in a judicial forum indicates one-sidedness and oppressiveness" too. (R. at ___ Order at 11.) Such a limitation is unenforceable as a matter of public policy as it precludes buyers from filing claims under the Magnuson Moss Warranty Act. (R. at ___ Order at 12.) The parties' agreement to arbitrate thus one-sidedly and oppressively bars all money damages of any kind, which are significant remedies otherwise available to a party at law, and precludes buyers from filing claims under the Magnuson Moss Warranty Act. Taken together, along with the "Arbitration and Claims" provision's unlawful restriction of the statutory time in which a party may assert claims arising under or related to a contract, the circuit court erred in failing to find the "Arbitration and Claims" provision in this contract one-sided, oppressive, and unconscionable. As the South Carolina Supreme Court stated in *Simpson v. MSA of Myrtle Beach, Inc.*, "[W]e find the arbitration clause in the adhesion contract . . . wholly unconscionable and unenforceable based **on the cumulative effect** of a number of

oppressive and one-sided provisions contained within the **entire** clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 674 (2007) (emphasis added). Such is the case here.

IV. Based on the circuit court's finding that the Purchase Agreement's "Arbitration and Claims" provision does not include claims arising under the "Limited Warranty" provision, the circuit court erred in granting Mungo's motion to dismiss the Huskins' claims that fall under the "Limited Warranty" provision.

The circuit court erred in determining the "Limited Warranty" and "Arbitration and Claims" provisions should be read in isolation for the reasons above. However, to the extent the Court of Appeals agrees with the circuit court on this point, then the circuit court also determined pursuant to that analysis that "[t]he 'Arbitration and Claims' provision in the Huskins' case does not specifically limit the Huskins' ability to bring a warranty action in a judicial setting." (Order at 12.) The Court noted: "The Purchase Agreement contains a separate "Limited Warranty" provision where Mungo Homes disclaims any liability for the implied warranty of habitability, consequential damages, and punitive damages." (R. at ____ Order at 12 n. 2.) According to the circuit court, therefore, claims pursuant to the "Limited Warranty" provision fall outside the "Arbitration and Claims" provision and therefore should be allowed to proceed in circuit court. The circuit court, however, erroneously granted Mungo Home's motion to dismiss the claims asserted in the Complaint to this end, as the Complaint asserts claims related to the "Limited Warranty" provision.[2]

The Huskins' Complaint asserts claims related to Mungo's unlawful disclaimer of the implied warranty of habitability in the "Limited Warranty" provision. Specifically, the Huskins

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[2] The circuit court did not provide any rationale for the inconsistency in its Order, where, on the one hand, it found the purchase agreement permitted claims relating to the Limited Warranty to be raised in a judicial forum but, on the other hand, those circumstances were presumably lacking in this case. It denied the Huskins' motion to alter or amend the Order raising this point by Form 4 Order only.

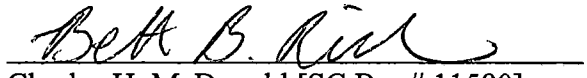
assert breach of contract (the covenant of good faith and fair dealing), unjust enrichment, and request declaratory relief all relating to Mungo's disclaimer of the implied warranty of habitability, without separate and adequate consideration, in the "Limited Warranty" provision. (R. at ____ Complaint.) At a minimum, the Huskins' claims related to breach of the "Limited Warranty" provision, particularly the covenant of good faith and fair dealing; unjust enrichment by the unlawful disclaimer of the implied warranty of habitability without separate and adequate consideration for the same; and finally, for declaratory relief regarding the legality of the "Limited Warranty" provision under such circumstances should not be dismissed and should proceed in this forum. Because the claims asserted in the Complaint are related to the disclaimer of the implied warranty of habitability found in the "Limited Warranty" provision, which the circuit court found falls outside of the "Arbitration and Claims" provision, this matter is appropriately before a judicial forum and the circuit court erred in dismissing the Complaint to compel arbitration of these claims.

CONCLUSION

For the reasons set forth above, the Huskins respectfully request that this Court reverse the circuit court's grant of Mungo Home's motion to dismiss and compel arbitration. This Court should find as a matter of law instead that the "Arbitration and Claims" provision is unconscionable and unenforceable for all the reasons discussed above, and that this matter may proceed in the Circuit Court. In the alternative, the Huskins respectfully request that this Court find the Circuit Court retains jurisdiction over this case because the claims involve matters falling under the "Limited Warranty" provision which are outside the scope of the "Arbitration and Claims" provision in the Purchase Agreement.

[Signature Page Follows]

August 30, 2018



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2017-CP-40-03697
Appellate Case No. 2018-000889

Amanda Leigh Huskins and Jay R. Huskins,..... Appellants,

v.

Mungo Homes, LLC,.....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief on Respondent Mungo Homes, LLC by depositing a copy of it in the United States Mail, postage prepaid, on August 30, 2018, addressed to their attorneys of record, David W. Overstreet, Esquire and Steven R. Kropski, Esquire, Earhart Overstreet, LLC, PO BOX 22528, Charleston, South Carolina 29413.

August 30, 2018

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August 30, 2018

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Calhoun Building
1220 Senate Street
Columbia, South Carolina 29201

Re: Amanda Leigh Huskins and Jay R. Huskins v. Mungo Homes, LLC
Civil Case No.: 2017-CP-40-03697
Appellate Case No. 2018-000889
RGSL File No. 7035/6000

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced case are an original and one copy of the Initial Brief of Appellant and the Designation of Matter to be included in the Record on Appeal. Please file the named documents as appropriate and return a filed-stamped copy of each via our courier.

By copy of this letter and as evidenced by the Proof of Service, the same has been served upon counsel for the Respondents. Thank you for your assistance, and please let me know should you have any questions.

Very truly yours,

Beth Burke Richardson

BBR:cdn
Enclosures
cc: Charles H. McDonald, Esquire (via email)
Terry E. Richardson, Jr., Esquire (via email)
Matthew A. Nickles, Esquire (via email)
Brady R. Thomas, Esquire (via email)
David W. Overstreet, Esquire (via U.S. mail and email)
Steven R. Kropski, Esquire (via U.S. mail and email)

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