THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000889

Case No. 2017-CP-40-03697

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

v.

Mungo Homes, LLC, ...Respondent.

INITIAL REPLY BRIEF OF APPELLANTS

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February 25, 2019

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I. The circuit court's Order granting Mungo's "Motion to Dismiss and Compel Arbitration" is subject to immediate appeal.

An Order dismissing an action and compelling arbitration, such as the circumstance presented here, is subject to immediate appeal under South Carolina law. While this Court has already ruled on this issue and denied Respondent Mungo Homes' Motion to Dismiss this Appeal, the Appellants will set forth the reasons why Mungo's argument is without merit because Mungo raises this issue again in its brief.

In *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), this Court held as a matter of first impression that an order dismissing an action without prejudice and allowing the parties to pursue arbitration was immediately appealable. The exact same situation is present here. The trial court's order was based on Mungo's "Motion to Dismiss and Compel Arbitration." (R. at ____, Motion to Dismiss.) In its motion, Mungo specifically requested that the circuit court "dismiss the Complaint pursuant to Rule 12(b)(6), SCRCP, because Plaintiffs are bound by an arbitration clause requiring them to submit the instant dispute to binding arbitration." (R. at ____, Motion to Dismiss at p.1). As for the relief sought in its motion, Mungo requested that "the Complaint should be dismissed, and the Court should enter an order compelling the parties to arbitrate this dispute." (R. at ____, Motion to Dismiss at p. 5). Rather than seeking a stay of the case, Mungo sought outright dismissal of the Complaint and the trial court granted that requested relief. (R. at ____, Order at p. 14).

Widener makes clear that under these circumstances, where a dismissal of an action was granted rather than a stay, the Huskins may appeal the trial court's order. Further, the jurisdiction of South Carolina's appellate courts clearly extends to an order dismissing a complaint pursuant

to Rule 12(b)(6). *See, e.g., Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001) ("Dismissal of an action pursuant to Rule 12(b)(6) is appealable.")

While Mungo cites cases holding that an appeal may not be taken from an order staying a case and compelling arbitration, such circumstance is not presented here. As set forth above, the trial court's order dismissing the Complaint in its entirety is immediately appealable. Because this Court has jurisdiction of this appeal, this Court should address the issues raised by the Huskins at this time. The parties have now fully briefed the issues and they are ripe for appellate review. The interests of judicial economy would certainly be best served by hearing these issues now rather than, as Mungo seems to suggest, requiring the Huskins to engage in arbitration with Mungo on the merits only to come back to this very same Court at a much later date to argue whether Mungo's arbitration agreement is enforceable.

II. Before this Court can determine whether the arbitration agreement in Mungo's Purchase Agreement is unconscionable, it must first determine what provisions of the Purchase Agreement constitute the arbitration agreement.

Mungo argues that the trial court correctly isolated its "Arbitration and Claims" provision from the rest of the Purchase Agreement's terms in conducting the unconscionability analysis of the arbitration agreement. However, in certain cases, what constitutes the arbitration agreement itself can, and should, be construed broadly for purposes of determining whether the agreement is unconscionable. *See Smith v. D.R. Horton*, 417 S.C. at 48-49, 790 S.E.2d at 3-4.

In this instance, the circuit court erred by applying a very narrow and limited view as to what constituted the collective arbitration agreement contained within Mungo's Purchase Agreement. By refusing to consider any terms outside of the provision with the heading "Arbitration and Claims", the circuit court ignored clauses that our Supreme Court has deemed relevant to the analysis of whether an arbitration agreement contains one-sided and oppressive

terms. The circuit court thus erred by failing to adopt the more expansive view taken by the Supreme Court in cases such as *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), and *Smith v. D.R. Horton,* 417 S.C. 42, 790 S.E2d 1 (2016), when considering what clauses are inextricable from the analysis of whether an arbitration provision is enforceable.

For example, the arbitration agreement at issue in *Simpson* was expansive and contained far more than just a requirement for arbitration of disputes. *Simpson*, 373 S.C. at 28-36, 644 S.E.2d at 670-74. It contained a forum selection clause as well as clauses limiting warranty claims and the arbitrator's authority to award punitive or treble damages. *See id.* at 19-21, 644 S.E.2d at 666. The South Carolina Supreme Court took those clauses into consideration in its analysis of whether the terms of the arbitration agreement were one-sided and oppressive. *See id.* at 28-36, 644 S.E.2d at 670-74. The Court stated: "[W]e find the arbitration clause in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based **on the cumulative effect** of a number of oppressive and one-sided provisions contained within the **entire** clause." *See id.* at 35, 644 S.E.2d at 674 (emphasis added). Likewise, in *Smith v. D.R. Horton*, the South Carolina Supreme Court recognized that limitations on remedies set forth outside a discrete arbitration provision can be an inextricable part of any analysis of whether the terms of the collective arbitration provision are one sided and oppressive. *See Smith v. D.R. Horton*, 417 S.C. at 48-49, 790 S.E.2d at 3-4.

Just because Mungo did not include its unfair limitations on remedies under the provision labeled "Arbitration and Claims" does not render those limitations irrelevant for purposes of an unconscionability analysis. For the circuit court to exclude from its analysis the very type of clauses that were relevant to the South Carolina Supreme Court's analysis in *Simpson* and *Smith* simply because such clauses are not contained within Mungo's limited "Arbitration and Claims"

provision is difficult to reconcile. Why are such clauses relevant when included in expansive arbitration clauses like those found in *Simpson* and *Smith*, but not relevant here when located outside of a much more limited arbitration clause? Such a construction unfairly awards clever contract drafting by the sophisticated party at the expense of its much less sophisticated purchasers and elevates form over substance. Rather than following cases with limited application and obvious differences to this matter, this Court should follow the guidance of our Supreme Court in similar cases such as *Simpson* and *Smith* and find that the limitations on remedies set forth in the "Limited Warranty" section of Mungo's Purchase Agreement is part of the **entire** arbitration agreement and must be part of the analysis of whether the arbitration agreement is enforceable. In doing so, this Court should then reach the same conclusion as the South Carolina Supreme Court in *Simpson* and *Smith* and find Mungo's entire arbitration agreement one-sided and oppressive.

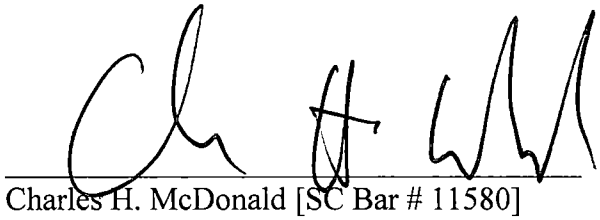
III. In the absence of a severability clause in Mungo's "Arbitration and Claims" provision, this Court cannot sever the offending provisions and enforce the remainder of this provision.

In a Hail Mary effort to save its arbitration provision, Mungo requests that this Court sever the offending portions of Mungo's arbitration provision and enforce the remainder of this provision. However, South Carolina law is clear that courts cannot save offending contract provisions by rewriting the parties' contract for them. *Smith v. D.R. Horton*, 417 S.C. 42, 50 n.6, 790 S.E.2d 1, 5 n.6 (2016); *see also Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 673(2007). In *Smith v. D.R. Horton*, a case similar to this one in terms of the contractual arbitration provisions, the South Carolina Supreme Court refused to sever offending provisions from an arbitration agreement. *Smith* 417 at 50 n.6, 790 at 5 n.6. The Court gave the following sound reasoning for such refusal:

> Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions.

Id. There is no severability clause in Mungo's "Arbitration and Claims" provision. Accordingly, as in *Smith,* this Court should refuse to sever the offending provisions of Mungo's "Arbitration and Claims" provision and find the entire provision unconscionable and unenforceable.

Mungo further argues that because S.C. Code Ann. § 15-3-140 renders any contractual provision shortening the applicable statute of limitations unenforceable, this Court should treat the offending provisions of Mungo's "Arbitration and Claims" provision as if they were never part of the parties' contract. While the provisions drastically shortening the limitations period for bringing a claim against Mungo are indeed unenforceable, Mungo's efforts to further avoid liability to its purchasers by inserting such an unconscionable provision within its arbitration agreement cannot be ignored. As a large, sophisticated seller of new homes, Mungo should not be permitted to absolve itself from any liability arising out of the sale of a new home to its purchaser. This Court should not reward Mungo's unconscionable efforts to shed liability for the sale of a new home by accepting the invitation to pretend the offending provisions of Mungo's "Arbitration and Claims" provision do not exist.



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PROOF OF SERVICE

I certify that I have served the Return to Respondent's Motion to Dismiss by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2019, addressed to its attorneys of record, David W. Overstreet, Steven R. Kropski, Earhart Overstreet LLC, P.O. Box 22528, Charleston, South Carolina, 29413.

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

Dear Madame Clerk:

Enclosed for filing in the above referenced case are an original and one copy of the Initial Reply Brief of Appellant. Please file the named documents and return a filed-stamped copy to us.

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 in this matter.

Very truly yours,

Charles H. McDonald

CHM/rhs
Enclosures
cc: Steven Raymond Kropski, Esq.
David W. Overstreet, Esq.