IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

FINAL REPLY BRIEF OF APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC. IN REPLY TO RESPONDENTS PETER T. PHILLIPS AND SUMMAR C. PHILLIPS

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I. Respondents Peter T. Phillips and Summar C. Phillips, like the circuit court, mistakenly ignore that where, as here, the subject agreement expressly provides that the relevant transaction involves interstate commerce, the Federal Arbitration Act applies as a matter of law.

Respondents Peter T. Phillips and Summar C. Phillips (the "Phillipses") argue that the Purchase and Sale Agreement (the "Purchase Agreement"), which incorporates the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program (the "Warranty") (collectively, the "Agreement"), is not government by the Federal Arbitration Act ("FAA") because the Agreement purportedly involves the sale of a home and not the construction of a home. As explained in section II. *infra*, the Agreement was not merely for the sale of a completed home, but included numerous elements relating to the construction of the home. However, even if the Phillipses' characterization of the Agreement was correct, clearly established South Carolina law provides that the Agreement is governed by the FAA because it expressly provides that the Purchase Agreement and Warranty are transactions involving interstate commerce and that the Purchase Agreement and Warranty are governed by the FAA: ***"As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act. . . ."*** **(R.p.200, §V, ¶ O)** (double emphasis added).

"The construction of a clear and unambiguous contract presents a question of law for the court." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 379, 684 S.E.2d 199, 207 (Ct. App. 2009). An appellate court may decide questions of law "with no particular deference to the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

The Supreme Court of South Carolina has held that a contractual provision that a particular agreement involves interstate commerce such that it is governed by the FAA—like the

provision quoted above in the Agreement between Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes") and the Phillipses—is enforceable. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Specifically, in Munoz, the Court held that "the arbitration agreement, which applies to this contract and the relationships which result from this contract, ***provides it shall be governed by the FAA . . . [and] . . . [a]rbitration agreements, like other contracts, are enforceable in accordance with their terms***." Id. at 539, 542 S.E.2d at 363-64 (internal quotation marks omitted; double emphasis added) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland, 489 U.S. 468, 478 (1989)). Moreover, the Supreme Court of South Carolina recently reiterated this holding in Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013), by parenthetically citing to this ruling in Munoz.

Nevertheless, the Phillipses, mistakenly relying on Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), argue that the Agreement is *not* governed by the FAA because, according to the Phillipses, the Agreement only involves the sale of a completed home. In addition to ignoring the true nature of the transaction, as set for in section II. *infra*, this argument ignores the impact of Munoz and Cape Romain Contractors, which unequivocally emphasize that the FAA governs an agreement that states that the transaction involves interstate commerce. The Phillipses argue that Munoz is distinguishable, because in that case, after deciding that the agreement that the FAA applied was enforceable on its terms, the Court mentioned some ways in which the contract at issue involved interstate commerce. See Munoz, at 539, 542 S.E.2d at 364 (noting as "further" support for its holding that the contract at issue involved interstate commerce). However, the Court's opinion makes clear that the ways in which the contract actually involved interstate commerce were offered as *further* justification—

an additional affirming ground—for the Court's holding, not as a necessary part of its determination that the express terms of the contract in that case regarding application of the FAA controled:

> Here, the arbitration agreement, which applies to "this contract and the relationships which result from this contract," provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms. Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).
>
> ***Further***, the transaction in this case in fact involves interstate commerce.

Id., at 539, 542 S.E.2d at 363-64 (double emphasis added).

The Phillipses have not cited any precedent holding, contrary to Munoz, that a contract that provides that it shall be governed by the FAA is unenforceable in accordance with its terms. Furthermore, the Phillipses' reliance on Brentwood Homes is misplaced because this issue was not raised or addressed in the Brentwood Homes opinion. In fact, the Court in Brentwood Homes specifically noted that the contract at issue in that case provided that the South Carolina Uniform Arbitration Act governed: "The second page of the Agreement also contained the following statement: 'THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA or NORTH CAROLINA UNIFORM ARBITRATION ACT, WHICHEVER IS APPLICABLE.'" Brentwood Homes, at 451, 730 S.E.2d at 314. This alone makes Brentwood Homes distinguishable from the present case.

Based on the foregoing, the circuit court committed an error of law warranting reversal because the plain, unambiguous language of the Agreement states that the underlying transaction involves interstate commerce and that the FAA governs the transaction.

II. Respondents Peter T. Phillips and Summar C. Phillips, like the circuit court, mistakenly ignore the Addenda to the Purchase Agreement, including the customization specifications applicable to the construction of the Phillipses' house, which unambiguously involve interstate commerce. For this alternative reason, the FAA governs, as a matter of law.

Not only did the Phillipses and John Wieland Homes expressly state that the Agreement would be governed by the FAA, but the Agreement also unambiguously involved the construction and customization of the subject home. Accordingly, as a matter of law, the Agreement includes transactions involving interstate commerce, and the FAA applies.

Appellate courts in South Carolina have consistently held that a contract involving the construction of a residence, by its very nature, involves interstate commerce. For instance, in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (2012), the Supreme Court of South Carolina held that a contract for the mere purchase of real property would not involve interstate commerce, but nevertheless emphasized "that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA." (citations omitted); see also Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project involved interstate commerce where materials, equipment, and supplies were produced and manufactured out-of-state); Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

Relying on Brentwood Homes, the Phillipses argue that the Agreement did not involve interstate commerce because, according to the Phillipses, the Agreement only involved the purchase of a completed residence. This belies both the unambiguous language of the Agreement and the only evidence submitted as to the nature of the transaction, which establishes, as a matter of law, that the subject transaction involved interstate commerce.

In this respect, a comparison of the facts in the present case to those involved in Brentwood Homes is instructive. In Brentwood Homes, 398 S.C. at 458, 730 S.E.2d at 317, the Court held that the sale and purchase of residential real estate was a purely intrastate activity. In reaching its conclusion, the Court specifically noted that the contract in that case did *not* include customizations of the home: "Notably, the provisions of the Agreement providing for . . . 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley." Id.

In this case, on the other hand, the parties contracted for the customizations which were noticeably absent in Brentwood Homes. Specifically, the parties agreed to the following customizations in various Addenda to the Agreement: (1) adding custom paint colors; (2) converting the patio and front walkway to oyster shell; (3) adding phone/cable to the bonus room over garage; (4) adding a dedicated receptacle for a wine cooler in butler's pantry area; (5) reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; (6) constructing an additional parking pad to the drive; (7) adding additional patio space; (8) converting the entire house to 7 ¼ inch baseboards; and (9) several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68).**

These customizations, which are incorporated into the Purchase Agreement, involve interstate commerce, as confirmed by the only evidence submitted to the circuit court on this issue—the affidavit of Dennis A. Black, the one-time Division Quality Control Manager for John

Wieland Homes. In fact, Black specifically states in his affidavit that the construction of the Phillipses' home "implicates interstate commerce." **(R.p.159, ¶¶ 1, 4).** The terms of the Addenda to the Purchase Agreement and Black's affidavit that the construction of the Phillipses' house involved interstate commerce unequivocally establish that the Agreement was governed by the FAA. See e.g., New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("[W]e find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . . [the builder's] affidavit swearing the project will involve businesses and supplies from outside South Carolina.").

In an effort to discount the importance of the Addenda, the Phillipses ask this Court to take judicial notice of two specific terms of the contract at issue in Brentwood Homes, which were not addressed by the Court in the Brentwood Homes opinion. Because these provisions of the contract in Brentwood Homes were not addressed by the Court in that case, a hypothetical interpretation of them has no precedential value. See e.g., Hutto v. S. Farm Bureau Life Ins. Co., 259 S.C. 170, 173, 191 S.E.2d 7, 8-9 (1972) ("It is, of course, settled law that 'a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion.'") (quoting 20 Am.Jur.(2d), Courts, Sec. 190, p. 526 (1965)). Therefore, this Court should reject the Phillipses' argument asking it to review the record in Brentwood Homes and take judicial notice of aspects of the contract in that case that were not addressed anywhere in the Court's opinion.

The Phillipses also argue that under the terms of the Agreement they had no "real decision-making authority." This argument overlooks the numerous decisions they made, which

are memorialized in the Addenda above. Furthermore, this argument overlooks that in determining whether the FAA governs a particular agreement, an evaluation of a party's level of decision making authority under the contract is not dispositive—whether the contract involves interstate commerce is the relevant inquiry. See e.g., 9 U.S.C.A. § 2 ("A written provision in . . . a contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable. . ." (double emphasis added)); see also e.g., Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) ("The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." (citation omitted)). As explained in detail above, the Agreement in this case did in fact involve interstate commerce.

Based on the foregoing, the circuit court's decision that the Agreement did not encompass transactions involving interstate commerce is an error of law, warranting reversal. See Brentwood Homes, at 458, 730 S.E.2d at 318, n. 8 ("We emphasize that had the Agreement *actually encompassed the construction of the residence*, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA." (emphasis added)).

III. Respondents Peter T. Phillips and Summar C. Phillips incorrectly argue that the arbitration clause or the separate warranty provisions is/are unconscionable. In order to set aside an arbitration clause, the clause itself must be unconscionable. As a matter of law, the arbitration clause in this case is not unconscionable.

As an alternative argument, the Phillipses contend that the arbitration clause of the Agreement is unconscionable and unenforceable. The circuit court never ruled on this issue, so the Phillipses' argument enjoys no presumption of correctness and the Phillipses fail to show that

the arbitration clause is unconscionable. "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998). "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.'" Id. at 395, 498 S.E.2d at 902 (emphasis in original) (citations omitted).

"In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Smith v. D.R. Horton, Inc., 403 S.C. 10, 14, 742 S.E.2d 37, 40 (Ct. App. 2013) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). "Our supreme court adopted the Fourth Circuit's view, and noted '[i]t is under this general rubric that we determine whether a contract provision is unconscionable. . . .'" Id. (quoting Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (additional citation omitted)). "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, at 395, 498 S.E.2d at 902 (emphasis in original) (citation omitted). "Thus, unconscionability is due to *both* an absence of meaningful choice and oppressive, one-sided terms." York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 85, 749 S.E.2d 139, 148 (Ct. App. 2013) (citation omitted) (emphasis in original). Here, the Phillipses have failed to show either.

a. The Phillipses fail to point to anything in the record showing that there was an absence of meaningful choice on their part due to one-sided contract provisions.

"In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) (internal citations omitted); York, at 86, 749 S.E.2d at 148-49.

In arguing that they lacked meaningful choice in entering into the Agreement, the Phillipses make the following claims: they lost the right to a jury trial, the purchase price of the home was not a substantial business concern of John Wieland Homes, and there was a significant disparity in the bargaining power between the Phillipses and John Wieland Homes. **Res. Brief at 9**. The Phillipses have not included any citations to the record supporting these assertions. The Phillipses ostensibly ask the Court to make the assumption that the purchase price of the home was not a substantial business concern of John Wieland Homes, and the further assumption that there was a significant disparity in the bargaining power between the Phillipses and John Wieland Homes. Furthermore, they do not even address several other factors that the court would need to consider before it could rule in their favor, such as "the nature of the injuries suffered by the plaintiff;" "the parties' relative sophistication;" "whether there is an element of surprise in the inclusion of the challenged clause"; and "the conspicuousness of the clause." See e.g., York, at 86, 749 S.E.2d at 148-49 (noting that courts should take into account the factors listed above in determining whether a contract was tainted by an absence of meaningful choice).

Therefore, because the Phillipses have failed to point to anything in the record showing that there was an absence of meaningful choice on their part, their argument that the arbitration

clause was unconscionable fails as a matter of law and the Court should reject this alternative sustaining ground argued by the Phillipses.

b. The Phillipses fail to advance any argument showing that the terms of the arbitration clause are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

Assuming *arguendo* that the Phillipses were able to show an absence of meaningful choise, the Phillipses would also have to show that the terms of the arbitration agreement are offensive and one-sided in order to prevail on their defense that the arbitration clause was unconscionable.

A contract's terms are oppressive and one sided when the terms are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." York, at 85, 749 S.E.2d at 148. The Phillipses do not point to anything in the *arbitration clause* as oppressive. Instead, they argue that the terms of the *Warranty* are so oppressive that no reasonable person would make them and no fair and honest person would accept them. See **Res. Brief at 9-10.** Each of the provisions of the Warranty cited by the Phillipses concerns the coverage provided by the Warranty not the arbitration clause. See **(R.p.198, ¶ E; R.p.192, 19, A; R.p.195, ¶ I; R.p.195, ¶ J, R.p.199, ¶ M.).**

The Phillipses argument also fails as a matter of law because they fail to cite to any oppressive or one-sided terms within the arbitration provision. "Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001); see also Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) ("In this case, the challenge goes to the validity of the arbitration agreement itself."). "[A] party cannot avoid arbitration through rescission of the entire

contract when there is no independent challenge to the arbitration clause." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993). "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983).

Furthermore, the Phillipses argument fails as a matter of law because an arbitration clause in a limited warranty is not *per se* unconscionable. The Phillipses compare the terms of the Warranty, which outline the coverage offered under the Warranty, to the terms of the arbitration clause that were found to be oppressive in York. **Res. Brief at 9-10**. The terms of the arbitration clause in York restricted the amount of damages recoverable under any theory in an arbitration proceeding. See York, at 88, 749 S.E.2d at 150 (holing that a provision in an arbitration agreement banning an arbitrator from awarding statutory remedies provided for in the South Carolina Unfair Trade Practices Act and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act was an oppressive term). The Phillipses' argument that the terms of the Warranty limiting its coverage are oppressive is not supported by any case law—the terms the Phillipses point to are neither part of the arbitration clause, nor oppresive.

Respondents Peter T. Phillips and Summar C. Phillips have failed to show either a lack of meaningful choice or oppressive and one-sided terms within the arbitration clause itself. Consequently, to the extent this Court sees it necessary to address Respondents' alternative ground, the ground should be rejected as unsupported by any evidence.

IV. Respondents Peter T. Phillips and Summar C. Phillips' failure to substantively respond to the remaining issues in John Wieland Homes' opening brief should amount to a concession that the circuit court ruled incorrectly as to these issues.

A respondent's failure, in the respondent's brief, to address an issue raised in the appellant's brief may amount to a concession as to that issue. See First Union Nat. Bank v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) rev'd in part on other grounds, 328 S.C. 290, 494 S.E.2d 429 (1997) ("We note initially First Union's failure to respond to this argument in its brief could amount to a concession that the trial court ruled incorrectly.").

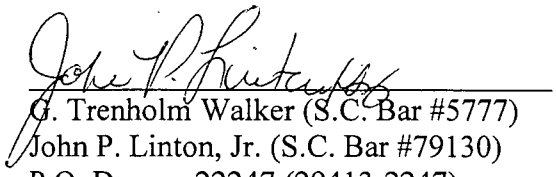
In its brief, the Phillipes assert that (1) the Agreement did not involve interstate commerce and, therefore, the Agreement falls outside the scope of the FAA and (2) the arbitration clause is unconscionable. While John Wieland Homes additionally contends in its opening brief that the scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillipses and that any claims against John Wieland's trade contractors should also be subject to arbitration, the Phillipses advance no arguments in opposition to these contentions, other than to say that the claims should be handled in a consistent manner. Consequently, the Phillipses' failure to respond to these arguments should amount to a concession as to their validity.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the opening brief of John Wieland Homes, the circuit court's orders refusing to compel arbitration should be **REVERSED,** and this Court should remand this case to the circuit court for the entry of an order compelling the parties to arbitrate all claims involved in this case.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply Respondents Peter T. Phillips and Summar C. Phillips enclosed herewith, comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

I hereby certify that true and correct copies of Final Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.; Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply to Respondent Omega Flex, Inc.; and Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply Respondents Peter T. Phillips and Summar C. Phillips were served on this 29th day of September, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

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