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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Donald B. Hocker, Circuit Court Judge

Case No.: 2021-CP-40-00206
Appellate Case No.: 2022-000030

Rumsey Construction & Renovation, LLC dba Rumsey Construction & Restoration, ...*Appellant*,

v.

Thomas and Stacy Lanham, ...*Respondents*.

INITIAL BRIEF OF APPELLANT RUMSEY CONSTRUCTION & RENOVATION, LLC

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN FINDING DURESS VOIDED THE ARBITRATION PROVISION IN THE CONTRACT.

II. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISION UNCONSCIONABLE.

III. WHETHER THE CIRCUIT COURT ERRED IN FINDING THOMAS LANHAM COULD NOT BE BOUND BY HIS WIFE'S SIGNATURE TO THE CONTRACT.

STATEMENT OF THE CASE

This matter involves a dispute arising from remediation work performed by the Defendant/Appellant Rumsey Construction & Restoration, LLC d/b/a Rumsey Construction & Restoration ("Rumsey") at the residence owned by Plaintiffs/Respondents, Thomas and Stacy Lanham ("the Lanhams"). In the late evening hours of January 15, 2018, the Lanhams' residence suffered substantial property damage as a result of a sewer black water category 3 (sewage) loss to the interior of their home. The Lanhams notified their insurance carrier, and the insurance carrier called Rumsey to remediate the damage. On January 15, 2018, a representative from Defendant went to the Lanhams' home at 228 Rosebank Dr. Columbia, SC 29209-1928, and secured Stacy Lanham's signature on a contract containing an arbitration provision. Stacy Lanham has alleged in an Affidavit that representative told Plaintiff that the emergency repairs could not be completed until she signed the agreement at issue. The Lanhams later filed a lawsuit for defective/insufficient remediation work; and Rumsey, in turn, filed its Motion to Compel Arbitration.

FACTS / PROCEDURAL HISTORY

Plaintiffs/Respondents ("the Lanhams") filed suit on January 15, 2021, alleging that they are the owners of residential property located at 228 Rosebank Dr. Columbia, SC 29209-1928. **(Complaint).** According to the Lanhams' Complaint, on or about January 15, 2018, the Lanhams' residence sustained substantial property damage as a result of a sewer black water category 3 loss to the interior of their home, causing significant personal property losses as a result of the incident. The Lanhams allege that on January 17, 2018, Defendant/Appellant Rumsey went out to the subject residence to begin the mitigation process; but Rumsey Construction and Restoration did not follow proper restoration and cleaning protocols, thereby causing further damage and contamination of the residence. **(Complaint).** The Lanhams engaged JWJ Consulting as an industrial hygienist, which performed testing of the residence, and reported sewage / black water

contamination within the residence in February 2018. The Lanhams' Complaint only states a cause of action for Negligence / Gross Negligence, and seeks damages for "substantial financial loss in regards to repairs to return the subject property to its pre-loss condition, loss of use of the residence, loss of personal property, delay in the renovation of the property, and such other further damages as will be presented at trial." **(Complaint).**

Rumsey subsequently filed a Motion to Compel Arbitration (the "Motion") on May 5, 2021, pursuant to S.C. Code Ann. § 15-48-20, and arising out of the terms of the Services Contract, signed by Stacy Lanham on January 15, 2018. **(Motion to Compel; Exhibit A to Motion – Services Contract).** The Services Contract reads as follows on the first of its two pages, in bold, all capital letters, and underlined:

> **THIS CONTRACT IS SUBJECT TO ARBITRATION PURSUANT TO STATE AND FEDERAL LAW.**
>
> **(Exhibit A to Motion – Services Contract).**

Additionally, on its second page, the Services Contract bears the following paragraph:

> **ARBITRATION AFTER MEDIATION.** In the event that the parties are first unable to resolve disputes by themselves, the parties agree that all claims and disputes arising out or relating to this Contract in any way shall be resolved by arbitration pursuant to Federal and State Law. The venue for the arbitration shall be Richland County, South Carolina. The parties agree that the arbitrator must be mutually agreeable and that the cost of the arbitration will be divided evenly. Should the parties be unable to agree to an arbitrator, then the parties agree that they will apply to the Richland County, South Carolina Circuit Court for the appointment of an arbitrator. This provision does not prohibit the Contractor from filing a Mechanic's Lien action in the County in which the services where [sic] provided in event that the Property Owner does not pay for services rendered.
>
> **(Exhibit A to Motion – Services Contract).**

The Services Contract itself bears the names "Stacy & Thomas Lanham" handwritten at the top of the first page. The first page also bears three sets of Stacy Lanham's initials and one full signature on the first page (immediately above the statement that the contract is subject to

arbitration); along with another set of Stacy Lanham's initials at the bottom of the second page (immediately below the arbitration paragraph). **(Exhibit A to Motion – Services Contract).**

The Lanhams filed a Memorandum in Opposition to Rumsey's Motion (the "Memo") on October 25, 2021, which included a purported Affidavit of Stacy Lanham bearing the same date ("Aff. S. Lanham"), which avers as follows, in pertinent part:

> 4. On January 15, 2018, my residence sustained substantial property damage as a result of a sewer black water category 3 loss to the interior of my home.
>
> [...]
>
> 6. When Rumsey arrived they demanded that I sign papers before they would remediate the black water intrusion to my home.
>
> 7. I was under extreme duress and stress as a result of the damage to my home.
>
> 8. I was not given an opportunity to review any of the documents Rumsey made me sign, and I did not read the documents.
>
> 9. If I was given ample time to read the documents and had read the documents, I would not have agreed to the terms therein.
>
> 10. I was not given the opportunity to negotiate any of the terms therein or explained the terms of the contract.
>
> 11. Rumsey knew that I was in a vulnerable position, as my home was covered in black water.
>
> **(Aff. S. Lanham).**

A hearing was held on Rumsey's Motion to Compel Arbitration on October 27, 2021, and the circuit court denied Rumsey's Motion, finding as follows: (a) Rumsey sufficiently complied with the South Carolina notice of arbitration requirement established in S.C. Code § 15-48-10(a); (b) The Lanhams were under duress at the time of signing the agreement; (c) the arbitration provision is unconscionable; and (d) Thomas Lanham is not bound by his wife's signature upon the Services Contract. An Order ("the Order") was filed by the circuit court, stating those holdings, on December 9, 2021. **(Order).**

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination and is subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). A circuit court's factual findings for which there is reasonable evidentiary support should not be reversed on appeal. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016), *reh'g denied* (Sept. 5, 2016) (*citing Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). The South Carolina Uniform Arbitration Act (UAA) provides that in any contract evidencing a transaction involving commerce, a written provision to settle by arbitration shall be valid, irrevocable, and enforceable. S.C. Code Ann. § 15–48–10(a) (2005). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski, v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (*quoting Green Tree Fin Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (internal quotation marks and citation omitted). In other words, there is a presumption in favor of the enforceability and application of arbitration agreements to disputes, and the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013).

ARGUMENT

Rumsey moved the circuit court to compel the Lanhams to arbitrate the claims in their Complaint. This Motion to Compel Arbitration was to be reviewed and decided in the context of the absolutely clear and unquestionable policy, of both South Carolina and the United States, favoring the arbitration of disputes. *See Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118 (2001). The circuit court generally recognized the controlling legal authorities and standards applicable to its review of Rumsey's Motion to Compel Arbitration; however, the circuit court then incorrectly applied that law and erred in denying Rumsey's Motion. In doing so, the circuit court abused its discretion, misapplied the law, and made findings unsupported by the record. While the circuit court correctly held Rumsey sufficiently complied with the South Carolina notice of arbitration requirement established in S.C. Code § 15-48-10(a); the circuit court erred in finding the following: that the Lanhams were under duress at the time of signing the agreement, that the arbitration provision is unconscionable, and that Thomas Lanham is not bound by his wife's signature upon the Services Contract.

Reversal is appropriate as to each of the above-referenced circuit court findings, based upon well-settled South Carolina law applicable to the Services Contract, and Rumsey respectfully requests a reversal as to each finding, for the reasons discussed *infra*.

I. THE CIRCUIT COURT ERRED IN FINDING DURESS VOIDED THE ARBITRATION PROVISION IN THE CONTRACT.

Here, the circuit court errantly found that the nature of the circumstances surrounding execution of the Service Contract (i.e., black water sewage leak within the Lanhams' home) amounted to duress sufficient to void the Contract, and therefore the arbitration provision. This finding is in error because it misinterprets subjective stress for duress, improper threats, or coercion. "Duress" as a principle applicable to contract enforceability is thoroughly discussed in

Senior District Judge Hawkins' Order in *Hyman v. Ford Motor Co.*, 142 F.Supp. 735, 744 (D.S.C. 2001), as follows:

> Under South Carolina law, duress has been defined as coercion that puts a person in such fear that he is "bereft" of the quality of mind essential to the making of a contract and the contract was thereby obtained as a result of this state of mind. *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890, 897 (1937); *Cherry v. Shelby Mut. Plate Glass & Cas. Co.,* 191 S.C. 177, 4 S.E.2d 123 (1939) (duress is defined as "a condition of the mind produced by improper external pressure of influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition"); *Phillips v. Baker*, 284 S.C. 134, 325 S.E.2d 533 (1985). As noted in *Nightingale's Estate*,
>
>> The fear which makes it impossible for a person to exercise his own free will is not so much to be tested by the means employed to accomplish the act, as by the state of mind produced by the means invoked. If one of the parties to an agreement is in a position to dictate its terms to such an extent as to substitute his will for the will of the other party thereto, it is not a mutual voluntary agreement, but becomes an agreement emanating entirely from his own mind.
>
> *Id.* at 898. *See also* Restatement (Second) of Contracts 175(1) (1981) (if a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim).
>
> *Hyman v. Ford Motor Co.*, 142 F.Supp. at 744.

As defined by well-established South Carolina law, duress involves coercion, fear, limitation of free will, or improper threat. Each of these definitions requires improper imposition of external pressure by the party seeking to enforce the contract, upon the party seeking to void the contract. By definition, "duress" is imposed by the party seeking to enforce the contract. In this case, that was not so. The alleged "duress" was the leak which occurred within the Lanhams' home, the damage caused by the leak, and the subjective personal stress which Stacy Lanham alleges she experienced as a result of the leak. There has been no allegation of threats, coercion, or imposition of will on the part of Rumsey. The mere occurrence of this water loss – while certainly personally stressful and upsetting to any reasonable homeowner – does not rise to the level of "duress" sufficient to void the Contract.

Consider the policy that would be created in taking this reasoning to its natural end. If personal stressors serve as grounds to void contracts, then a contract for a replacement car could be voided because a purchaser has to get to work; a contract could be voided due to loss of a family member; and any contract involving damage or loss to a home could be voided on grounds that issues within one's house amount to subjective "stress" for the homeowner. Residential repair contractors would bear the burden of being unable to enforce contracts arising out of emergent situations, such as water leaks, flood damage, fire losses, malfunctioning appliances, or the like.

The Lanhams failed to make any showing of duress, as defined by South Carolina law. There is no allegation that Rumsey engaged in coercion or threats. All that has been alleged is that this situation was subjectively stressful to the Lanhams; which, while understandable, is not sufficient legal grounds to void the contract.

For the reasons discussed above, the circuit court failed to apply the proper definition of duress to the facts of the case at bar, and improperly conflated subjective personal stress in the mind of Stacy Lanham to undue coercion or pressure applied upon her by Rumsey. There has been no such allegation. Thus, this Court should reverse the ruling of the circuit court and compel this matter to arbitration pursuant to the arbitration provision in the Service Contract, given that the Service Contract was not voided by duress.

II. THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISION UNCONSCIONABLE.

The circuit court erred in finding the contract unconscionable under these circumstances. In doing so, the circuit court made two correct findings of fact which are useful to this analysis: (1) Plaintiff's failure to read the agreement does not provide her a basis for relief; and (2) the fact that the agreement allows Rumsey the remedy to file a mechanic's lien is not unfair, given that S.C. Code Ann. § 15-48-220 states that an arbitration clause has no effect on filing and perfecting

a mechanic's lien. **(Order, at 4).** Generally citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the circuit court then cursorily listed four factors as being considered in its decision: "(1) no evidence that [the Lanhams] had a substantial business concern; (2) relative disparity in the bargaining power between the parties; (3) no evidence of [the Lanhams'] business sophistication in contracts; (4) that this contract is an adhesion contract [...]; and (5) that the contract was 'hastily' presented for signing which was suggested by Plaintiff's affidavit which says they 'demanded that I sign papers before they would remediate....'" **(Order, at 4).**

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them, and no fair and honest person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36–2–302(1) (2003).

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *See Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract was "tainted by an absence of meaningful choice," *id. at 295*, 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. *Id.* at 293. *See also 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." (*quoting* 17A AM.JUR.2D *Contracts* § 279 (2004))).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). It is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Additionally, according to the principle of law known as the "*Prima Paint* doctrine," a party contesting the validity of a contract's arbitration provision "must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4 (emphasis in original); *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *see also S.C. Public Service Authority v. Grant W. Coal (Ky.), Inc.*, 312 S.C. 559, 562-563, 437 S.E.2d 22, 24 (1993) (adopting the *Prima Paint* doctrine in South Carolina). According to the *Prima Paint* doctrine, a court may only consider the terms of the arbitration provision itself – not the terms of the whole contract. *Id.*

In considering the factors discussed by the circuit court, it is notable that there has not been any information presented as to the Lanhams' business concerns, or as to their business sophistication in contracts. This is a failure by the Lanhams, given that they bear the burden of proving that the claims at issue are unsuitable for arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. The circuit court erred in making factual findings as to those two factors, where the Lanhams presented no evidence in support of, or in contravention to, those factors. Even assuming *arguendo* little to no sophistication on the part of the Lanhams, the remaining factors listed by the circuit court, when properly considered, are sufficient to reach a different result.

The *Simpson* case is a useful comparison case in discussing unconscionability as applied to this arbitration provision. There, the South Carolina Supreme Court found an arbitration provision in an automobile purchase contract unconscionable, which was located on a back page of the contract, and was designated by a note on the front page wherein the signee was instructed in bold to "SEE ADDITIONAL TERMS AND CONDITIONS ON OPPOSITE PAGE." The tenth paragraph within the additional terms and provisions amounts to an arbitration provision, which reduced the potential remedies available to the signee at law. *Simpson*, 373 S.C. 14, 19-21, 644 S.E.2d 663, 665-666 (2007). There, the Supreme Court found absence of meaningful choice, based upon the following factors: disparity in bargaining power between the parties; contract of adhesion (offered on a "take-it-or-leave-it" basis); and the fact the contract was "hastily" presented to the signee for signature. *Simpson*, 373 S.C. at 25-28, 644 S.E.2d at 669-670. In the instant matter, the circuit court mentioned each of these factors, but failed to provide any discussion as to the facts giving rise to the holding, beyond a restatement of Stacy Lanham's Affidavit, stating that Rumsey "demanded that I sign papers before they would remediate." **(Order, at 4).** Each of these factors will be discussed in turn.

The circuit court made no finding as to bargaining power between the parties. Certainly, Rumsey was offered by the insurance carrier as a potential remediation contractor, but the Lanhams presented no evidence that Rumsey was the only potential remediation contractor. There is no evidence in the case at bar that the Lanhams did not have the opportunity to seek to procure a different remediation contractor other than Rumsey. There is no indication that Rumsey was the only contractor offering remediation services, or that the services offered by Rumsey were so distinctive that there was no viable alternative. While time was certainly of the essence, the Lanhams had the opportunity to seek or request another contractor, if desired. Thus, there is no

reason to believe that Rumsey had unique bargaining power in this scenario giving rise to unconscionability.

As it pertains to the nature of the contract, under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). The only information the Lanhams presented on that issue was that Rumsey "demanded" signature before remediation work could commence. It is totally reasonable for a contractor to request execution of a written contract before performing work – that is a customary process. Importantly, the Lanhams, as the party bearing the burden of proof, presented no evidence that they were not given the right of negotiation. It appears Stacy Lanham signed the contract without argument or negotiation. Her alleged failure to read the contract is not a basis for relief, and she cannot show a refusal to negotiate on the part of Rumsey. Thus, there is insufficient evidence that Rumsey's contract was a contract of adhesion. However, assuming *arguendo* that this contract was one of adhesion, adhesion contracts are not per se unconscionable, so finding an adhesion contract is merely the beginning point of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998). Discussion of the additional factors is necessary.

As it pertains to the hastiness of the contract, the circuit court erred in its factual finding. The Service Contract is dated January 15, 2018, and Rumsey's work did not commence until two days later, on January 17, 2018, as alleged in the Complaint. **(Complaint, at ¶¶ 5-6).** Given that the work did not commence promptly following the execution of the contract, there is no evidence of hasty presentment. The Lanhams had 48 hours to consider the contract, or ask any further questions they may have had. This scenario differs substantially from an automobile purchase transaction, like in *Simpson*, where the contract must be signed contemporaneously with the

purchase transaction. Yet again, the Lanhams had a meaningful choice in execution of this contract.

By way of additional discussion, the circuit court's reasoning falls short in that it failed consider the most crucial portion of the *Simpson* holding. In *Simpson*, the Supreme Court discussed several additional factors pertinent to the meaningful choice analysis, which the circuit court failed to consider, which are laid out in the following quotation:

> [R]egardless of the general legal presumptions that a party to a contract has read and understood the contract's terms, we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute. While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law.
>
> *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670.

Critically, this discussion establishes the following factors as being relevant to the meaningful choice analysis: (1) conspicuousness of the arbitration clause, and (2) forfeiture of potential remedies. Here, there is no question that the arbitration provision was clear and conspicuous. The fact that the agreement is subject to arbitration was noted in bold, capital, underlined letters at the bottom of the first page; and the arbitration provision was clearly designated in a separate paragraph, identified by bold, capital letters, located at the bottom of the second page. Stacy Lanham signed directly above the arbitration notice on the first page, and initialed directly below the arbitration provision on the second page. The fact that the contract was

subject to arbitration could not have been more conspicuous, and it certainly should have been open and obvious to Stacy Lanham when signing.

Furthermore, the arbitration provision does not limit the Lanhams' right of remedy in any way. Unlike the *Simpson* case, there is no limitation on punitive damages treble damages, exemplary damages, or any other form of remedy. In fact, the provision itself promotes fairness and equity in each of its terms. It first requires joint mediation of the issues, then requires arbitration in the mutually acceptable venue of Richland County, using a mutually agreed-upon or court-appointed arbitrator, and evenly dividing arbitration fees. There are no unfair or one-sided terms in the arbitration provision. This arbitration provision was not unconscionable in nature.

For the reasons discussed above, the circuit court failed to apply the proper analysis of unconscionability to the facts of the case at bar, and improperly ignored the longstanding South Carolina and federal policy in favor of encouraging arbitration among contracting parties. Thus, this Court should reverse the ruling of the circuit court, and compel this matter to arbitration pursuant to the arbitration provision in the Service Contract, given that the arbitration provision within the Service Contract was not voided by unconscionability.

III. THE CIRCUIT COURT ERRED IN FINDING THOMAS LANHAM COULD NOT BE BOUND BY HIS WIFE'S SIGNATURE TO THE CONTRACT.

As to Thomas Lanham, the circuit court considered the correct South Carolina law, but reached in errant conclusion based upon an improper consideration of extrinsic evidence which was not properly before the Court. The circuit court correctly acknowledged that South Carolina law recognizes several theories whereby a nonsignatory can be bound by an arbitration agreement; and that "South Carolina Code section 15-48-60 would presumably authorize Plaintiff Thomas Lanham being joined in the arbitration proceeding." **(Order, at 5,** *citing Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014) (listing theories as incorporation by reference,

assumption, agency, veil piercing/alter ego, and estoppel)**)**. However, the circuit court reached the incorrect conclusion that Thomas Lanham should not be joined, based upon flawed reasoning as to the applicability of the arbitration provision as discussed above, and based upon improper consideration of extrinsic evidence presented by way of arguments of the Lanhams' counsel at the hearing.

The Order states, "[the Lanhams'] counsel argued at the hearing that there is a claim for personal injury damages by the husband, Thomas Lanham. Therefore, it would not make sense to try the personal injury claim in court and the remaining claims in arbitration." **(Order, at 5).** This is improper consideration of extrinsic evidence. The Lanhams' Complaint <u>only</u> asserted a negligence / gross negligence claim for construction defects, and no allegation of personal injury was made therein. Moreover, no reference was made to any sort of personal injury claim in the Stacy Lanham Affidavit. The only mention of a personal injury claim arose by way of an argument made by the Lanhams' counsel during the hearing, which was not substantiated by facts properly alleged in the Complaint or sworn in an affidavit.[1] Thus, the circuit court's decision was made based upon improper extrinsic evidence.

Moreover, it was absolutely appropriate for Stacy Lanham's signature on the Service Contract to serve as Thomas Lanham's agent, and thereby bind him to the contract. The South Carolina Supreme Court has stated as follows: "[t]he rule regarding agency between spouses is that while a spouse is not automatically an agent for the other spouse, an implied agency can arise by conduct of the parties." *Johnson v. Arbabi*, 355 S.C. 64, 71, 584 S.E.2d 113, 117 (2003); *citing Barber v. Carolina Auto Sales*, 236 S.C. 594, 115 S.E.2d 291 (1960); *and Hinson v. Roof*, 128 S.C.

[1] Additionally, it is worth mentioning that the black water loss occurred on January 15, 2021, as alleged in the Complaint, which was not filed until January 15, 2021. The first mention of any possible personal injury claim did not arise until the hearing, which was conducted on October 27, 2021, well outside of the 3-year statute of limitations applicable to Thomas Lanham's purported personal injury claim.

470, 122 S.E. 488 (1924). Here, based only upon the facts as properly pled or alleged in the case at bar, there is sufficient evidence for a finding of implied agency. The Plaintiffs allege that they are joint "owners of residential property located at 228 Rosebank Dr." **(Complaint, at ¶ 1).** Plaintiff Stacy Lanham, in filling out and executing the Services Contract, wrote "Stacy & Thomas Lanham" on the "Name" line at the top of the contract, and filled out their joint address, denoting that she had implied agency to execute the contract on behalf of the home's co-owner. **(Contract).** Subject to her execution of the contract in that manner, Rumsey performed the work. Stacy Lanham's actions amount to implied agency.

Alternately, by the express language of S.C. Code Ann. §15-48-60, it is appropriate to join Thomas Lanham in the arbitration proceeding. As a Plaintiff in the underlying lawsuit, there is no question that he is "subject to service of process in the underlying subject matter," he has conceded that issue by filing suit. Moreover, as a co-owner of the property and a Plaintiff in the suit, each of the following factors applies to him:

> (1) in his absence complete relief cannot be accorded among those already parties, (2) he claims an interest relating to the subject of the action and is so situate that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) lead any of the persons already parties subject to a substantial risk of incurred double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Id.

Arbitration is proper here, based upon the discussion above. Additionally, joinder of Thomas Lanham is proper, either by way of implied agency at law, or by way of statutory joinder. For these reasons, this Court should reverse the ruling of the circuit court, and compel this matter to arbitration with Thomas Lanham as a party to said arbitration.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Rumsey's Motion to Compel Arbitration. It was error for the circuit court to declare the contract and/or the arbitration provision void by way of duress and unconscionability, because neither the law, nor the facts, support either of those conclusions. Moreover, it was error for the circuit court to declare Thomas Lanham should not be joined as a party to the arbitration, given that said decision was made based upon consideration of improper extrinsic evidence, and was not supported by the law or the facts in the case at bar. Therefore, Rumsey respectfully requests that the Court: (a) reverse the circuit court; (b) hold that both Lanhams must submit to arbitration pursuant to the Service Contract; and (c) remand for an order compelling arbitration as to both Lanhams.

Respectfully submitted,

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April 22, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No.: 2021-CP-40-00206

Rumsey Construction & Renovation, LLC dba Rumsey Construction & Restoration, ...Appellant,

v.

Thomas and Stacy Lanham, ...Respondents,

CERTIFICATE OF COUNSEL

In accordance with Rule 211(b), SCACR, the undersigned certifies that the Initial Brief of Appellant complies with the Supreme Court Order of August 25, 2021.

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v.

Thomas and Stacy Lanham, ... Respondents,

PROOF OF SERVICE

The undersigned hereby certifies that on April 22, 2022, it served the foregoing Initial Brief of Appellant Rumsey Construction & Renovation, LLC dba Rumsey Construction & Restoration via email (attached hereto as Exhibit A) and via the US Postal Service, containing the above-referenced document to all counsel of record's individual AIS email addresses pursuant to the SC Supreme Court COVID Order 2020-05-29-02. A list of counsel served is as follows:

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(SIGNATURE PAGE TO FOLLOW)

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April 22, 2022

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Subject:	Rumsey Construction v. Thomas and Stacy Lanham - Appeal - Initial Brief
Date:	Friday, April 22, 2022 9:06:00 AM
Attachments:	Certificate of Counsel - Initial Brief.pdf Appellant Rumsey"s Initial Brief.pdf Proof of Service of Rumsey"s Initial Brief.pdf

Mr. Cantwell,

Attached please find a copy of the Initial Brief of Appellant Rumsey Construction & Renovation, LLC dba Rumsey Construction & Restoration, a copy of the Proof of Service and a copy of the Certificate of Counsel, pertaining to the above-referenced Appeal. A hard copy of the attached has also been placed in the out-going mail. The attached is being filed today with the Court of Appeals.

Best regards,

Sherry

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In light of the April 3, 2020 Order of the South Carolina Supreme Court (Order 2020-04-03-01), we will be serving discovery and motions via email only. If you would like a hard copy, please let us know.

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