South Carolina Bar
Continuing Legal Education Division

2026 SC BAR CONVENTION

Construction Law Section

"From Demand to Decision"

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South Carolina Bar

Continuing Legal Education Division

Trial v. Arbitration: Perspectives from a Judge and Arbitrator

The Honorable Walton J. McLeod, IV

&

Henry "Hank" Wall

2026 Bar Convention

Construction Section

Trial v. Arbitration:
Perspectives from a Judge and Arbitrator

CLE Materials

Federal Arbitration Act (FAA)

9 U.S.C.A. § 1: "Maritime transactions" and "commerce" defined; exceptions to operation of title.

""Commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."

9 U.S.C.A. § 2: Validity, irrevocability, and enforcement of agreements to arbitrate.

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable…"

9 U.S.C.A. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

"A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. "Five days' notice of application in writing is required to be served upon the party in default.

"The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and

proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue."

9 U.S.C.A § 5: Appointment of arbitrators or umpire.

"If a provision for appointing or naming an arbitrator or arbitrators or an umpire, the parties should follow it. "If no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire."

9 U.S.C.A. § 7: Witnesses before arbitrators; fees; compelling attendance.

"The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case... Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

9 U.S.C.A. § 9: Award of arbitrators; confirmation; jurisdiction; procedure.

"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order

confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."

9 U.S.C.A. § 10: Same; vacation; grounds; rehearing.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

9 U.S.C.A. § 11: Same; modification or correction; grounds; order.

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C.A. § 12: Notice of motions to vacate or modify; service; stay of proceedings.

"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

9 U.S.C.A. § 16: Appeals.

"(a) An appeal may be taken from--

(1) an order--

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order--

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title."

South Carolina Uniform Arbitration Act

S.C. Code § 15-48-10. Validity of arbitration agreement; exceptions from operation of chapter.

(a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

(b) This chapter however shall not apply to:

(1) Any agreement or provision to arbitrate in which it is stipulated that this chapter shall not apply or to any arbitration or award thereunder;

(2) Arbitration agreements between employers and employees or between their respective representatives unless the agreement provides that this chapter shall apply; *provided,* however, that notwithstanding any other provision of law, employers and employees or their respective representatives may not agree that workmen's compensation claims, unemployment compensation claims and collective bargaining disputes shall be subject to the provisions of this chapter and any such provision so agreed upon shall be null and void. An agreement to apply this chapter shall not be made a condition of employment.

(3) A pre-agreement entered into when the relationship of the contracting parties is such that of lawyer-client or doctor-patient and the term “doctor” shall include all those persons licensed to practice medicine pursuant to Chapters 9, 15, 31, 37, 47, 51, 55, 67 and 69 of Title 40 of the 1976 Code.

(4) Any claim arising out of personal injury, based on contract or tort, or to any insured or beneficiary under any insurance policy or annuity contract.

S.C. Code 1976 § 15-48-20: Proceedings to compel or stay arbitration.

(a) On application of a party showing an agreement described in § 15-48-10, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this section, the application shall be made therein. Otherwise and subject to § 15-48-190, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

S.C. Code 1976 § 15-48-30: Appointment of arbitrators.

"If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, there shall be three arbitrators with one chosen by the party making the demand for arbitration, one chosen by the party against whom demand is made and third being chosen by those two chosen by the parties."

S.C. Code 1976 § 15-48-80: Witnesses; subpoenas; depositions.

"(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable…"

S.C. Code 1976 § 15-48-90: Award.

"(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him."

S.C. Code 1976 § 15-48-100: Change of award by arbitrators.

"On application of a party or, if an application to the court is pending under §§ 15-48-120, 15-48-130, 15-48-140, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of subdivision (a) of § 15-48-140, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten

days from the notice. The award so modified or corrected is subject to the provisions of §§ 15-48-120, 15-48-130 and 15-48-140."

S.C. Code 1976 § 15-48-130: Vacating an award.

"(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection;

But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in item (5) of subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with § 15-48-30, or, if the award is vacated on grounds set forth in items (3) and (4) of subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with § 15-48-30. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award."

S.C. Code 1976 § 15-48-140: Modification or correction of award.

"(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award."

Code 1976 § 15-48-200: Appeals.

"(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under § 15-48-20;

(2) An order granting an application to stay arbitration made under § 15-48-20(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this chapter.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action."

S.C. Code 1976 § 15-48-220: Mechanics liens not precluded.

"Nothing in this chapter shall preclude the filing and perfecting of a mechanics lien by any party to an arbitration agreement."

Cases:

1. *Wilson v. Willis,* 426 S.C. 326, 827 S.E.2d 167 (2019)

Petitioners, consisting of insured individuals and insurance agents, brought claims against an insurance agent, broker, and agency (Respondents) for violations of the Unfair Trade Practices Act (UTPA), common law unfair trade practices, fraud, and conversion, conspiracy, and tortious interference with existing and prospective contractual relations. The court considered whether Petitioners, as nonsignatories to a contract (Agency Agreement) containing an arbitration clause, between Respondents and Southern Risk could be equitably estopped from denying their nonparty status.

South Carolina law recognizes several theories that may bind nonsignatories to arbitration agreements under general principles of contract and agency law, the theory of estoppel being the one at issue here. Under a direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory "knowingly exploits" the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement ...." (citing *Belzberg v. Verus Invs. Holdings Inc*., 21 N.Y.3d 626, 977 N.Y.S2d 685, 999 N.E.2d 1130, 1134 (2013)). The court found that Petitioners were unaware of the contract's existence until litigation began and did not knowingly receive any direct benefit from it.

The court further distinguished between direct and indirect benefits, stating that arbitration cannot be compelled where the benefits are indirect. The court held Petitioners did not knowingly exploit and receive a direct benefit from the agreement in the case. The contract was intended to solely govern the business relationship between Southern Risk and the Insurers, and Petitioners neither relied on nor sought benefits under it. In addition, Respondents did not argue that the Agency Agreement, by its express terms, was applicable to other parties or exhibited customers' awareness that claims for fraud, unfair trade practices, etc. would be subject to arbitration. Accordingly, the motion to compel arbitration was denied.

426 S.C. 326
Supreme Court of South Carolina.

Richard WILSON, Michael J. Antoniak, Jr., Marsha L. Antoniak, Anita L. Belton, Prescott Darren Bosler, Johnny Calhoun, Sallie Calhoun, Cynthia Gary, Robert Wayne Gary, Eugene P. Lawton, Jr., Jeanette Norman, James Robert Shirley, Robert W. Spires, Crystal Spires Wiley, Lewis S. Williams, Janie Wiltshire, Benjamin Franklin Wofford, Jr., and Rebecca Hammond Wofford, Petitioners,

v.

Laura B. WILLIS and Jesse A. Dantice, individually and as agents and/or brokers for Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Company, Peerless Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, and Foremost Insurance Company, Southern Risk Insurance Services, LLC, Travelers Casualty Insurance Company of America, Allied Property and Casualty Insurance Company, Peerless Insurance Company, Montgomery Mutual Insurance Company, Safeco Insurance Company of America, Foremost Insurance Company, and Laurie Williams, Defendants,

Of Whom Peerless Insurance Company, Montgomery Mutual Insurance Company, and Safeco Insurance Company of America are the Respondents,

and

Of Whom Laurie Williams is Petitioner.

Appellate Case No. 2016-001512

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Opinion No. 27879

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Heard December 13, 2018

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Filed April 10, 2019

Synopsis

Background: Insureds and competing insurance agents brought actions against agents and their agency for violation of the Unfair Trade Practices Act, common law unfair trade practices, fraud, and conversion, alleging that insurers were liable under respondeat superior for failure to investigate, supervise, or audit agents. The Circuit Court, Abbeville County, Eugene C. Griffith, Jr., J., denied insurers' motion to compel arbitration and the Court of Appeals, Williams, J., 416 S.C. 395, reversed and remand. Certiorari was granted.

[Holding:] The Supreme Court, Chief Justice Beatty, held that compelling insureds and competing agents to arbitrate under to direct benefits estoppel doctrine was not warranted.

Reversed and remanded.

West Headnotes (23)

[1] **Alternative Dispute Resolution** Scope and standards of review

Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court.

18 Cases that cite this headnote

[2] **Appeal and Error** De novo review

Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings.

2 Cases that cite this headnote

[3] **Alternative Dispute Resolution** What law governs

Commerce Arbitration

The Federal Arbitration Act (FAA) applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise. 9 U.S.C.A. § 1 et seq.

2 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Constitutional and statutory provisions and rules of court

The purpose of the Federal Arbitration Act (FAA) is to make arbitration agreements as enforceable as other contracts, but not more so. 9 U.S.C.A. § 1 et seq.

1 Case that cites this headnote

[5] **Alternative Dispute Resolution** Validity

Alternative Dispute Resolution Disputes and Matters Arbitrable Under Agreement

A party seeking to compel arbitration under the Federal Arbitration Act (FAA) must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement. 9 U.S.C.A. § 1 et seq.

10 Cases that cite this headnote

[6] **Alternative Dispute Resolution** What law governs

In seeking to compel arbitration under the Federal Arbitration Act (FAA), the consideration of contract validity is normally addressed applying general principles of state law governing the formation of contracts. 9 U.S.C.A. § 1 et seq.

5 Cases that cite this headnote

[7] **Alternative Dispute Resolution** What law governs

Under the Federal Arbitration Act (FAA), state contract law remains applicable on a motion to compel arbitration if that law, whether legislative or judicial, arose to govern issues concerning the validity, recoverability, and enforceability of all contracts generally. 9 U.S.C.A. § 2.

[8] **Alternative Dispute Resolution** Preemption

Federal Preemption Alternative dispute resolution

A state law that places arbitration clauses on an unequal footing with contracts generally is preempted if the Federal Arbitration Act (FAA) applies. 9 U.S.C.A. § 2.

[9] **Alternative Dispute Resolution** Contractual or consensual basis

Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts.

3 Cases that cite this headnote

[10] **Alternative Dispute Resolution** What law governs

The consideration of scope on arbitration agreement is evaluated under the federal substantive law of arbitrability. 9 U.S.C.A. § 2.

1 Case that cites this headnote

[11] **Alternative Dispute Resolution** Evidence

The presumption under the Federal Arbitration Act (FAA) in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement. 9 U.S.C.A. § 2.

11 Cases that cite this headnote

[12] **Alternative Dispute Resolution** Contractual or consensual basis

Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so.

1 Case that cites this headnote

[13] **Alternative Dispute Resolution** ⇐ Evidence

Because arbitration, while favored, exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.

24 Cases that cite this headnote

[14] **Alternative Dispute Resolution** ⇐ What law governs

Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law.

17 Cases that cite this headnote

[15] **Alternative Dispute Resolution** ⇐ Persons affected or bound

Corporations and Business Organizations ⇐ Arbitration

Principal and Agent ⇐ Submission to arbitration

South Carolina recognizes several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.

15 Cases that cite this headnote

[16] **Alternative Dispute Resolution** ⇐ Waiver or Estoppel

Under direct benefits estoppel, a nonsignatory is estopped from refusing to comply with an arbitration clause when it receives a direct benefit from a contract containing an arbitration clause.

7 Cases that cite this headnote

[17] **Alternative Dispute Resolution** ⇐ Waiver or Estoppel

In the arbitration context, the doctrine of direct benefits estoppel recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

5 Cases that cite this headnote

[18] **Alternative Dispute Resolution** ⇐ Waiver or Estoppel

Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement.

7 Cases that cite this headnote

[19] **Alternative Dispute Resolution** ⇐ Waiver or Estoppel

Direct benefits estoppel is not implicated to compel a nonsignatory to arbitrate simply because a claim relates to or would not have arisen "but for" a contract's existence; when a claim depends on the contract's existence and cannot stand independently, that is, the alleged liability arises solely from the contract or must be determined by reference to it, equity prevents a person from avoiding the arbitration clause that was part of that agreement, but when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen "but for" the contract's existence.

2 Cases that cite this headnote

[20] **Alternative Dispute Resolution** ⇐ Persons affected or bound

Alternative Dispute Resolution ⇐ Waiver or Estoppel

It is important to distinguish direct benefits from indirect benefits for estoppel purposes because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled.

[21] **Alternative Dispute Resolution** Waiver or Estoppel

A benefit to a nonsignatory is direct if it flows directly from the agreement, for purposes of compelling arbitration under direct benefits estoppel.

2 Cases that cite this headnote

[22] **Alternative Dispute Resolution** Waiver or Estoppel

For purposes of direct benefits estoppel seeking to compel arbitration of a nonsignatory, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit, and thereby assume, the agreement itself.

3 Cases that cite this headnote

[23] **Alternative Dispute Resolution** Persons affected or bound

Nonsignatory insureds and competing insurance agents had not knowingly exploited and received direct benefit from agreement between insurance agency and insureds' agents, and therefore, compelling insureds and competing agents to arbitrate under direct benefits estoppel doctrine was not warranted as to various claims pursuant to arbitration clause in the agreement; agreement was purely to the benefit of agency and insureds' agents, it outlined their business relationship and rights, and insureds and competing agents did not attempt to procure any direct benefit from the agreement.

****170 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal From Abbeville County, Eugene C. Griffith, Jr., Circuit Court Judge

Attorneys and Law Firms

Thomas E. Hite, Jr. and Anne Marie Hempy, both of Hite and Stone, Attorneys at Law, of Abbeville; Jane H. Merrill, of Hawthorne Merrill Law, LLC, of Greenwood; and Leslie A. Bailey, Public Justice, of Oakland, California, for Petitioners.

C. Mitchell Brown, William C. Wood, Jr., A. Mattison Bogan, all of Nelson Mullins Riley & Scarborough, LLP, of Columbia; and Robert C. Calamari, of Nelson Mullins Riley & Scarborough, LLP, of Myrtle Beach, for Respondents.

Opinion

CHIEF JUSTICE BEATTY:

***331** The question before this Court is whether arbitration should be enforced against nonsignatories to a contract containing an arbitration clause. The circuit court denied the motion to compel arbitration. The court of appeals reversed and remanded, holding equitable estoppel should be applied to enforce arbitration against the nonsignatories. *Wilson v. Willis*, 416 S.C. 395, 786 S.E.2d 571 (Ct. App. 2016). We now reverse and remand for further proceedings, finding the circuit court properly denied the motion to compel arbitration.

I. FACTUAL/PROCEDURAL HISTORY

This appeal arises out of fourteen lawsuits brought by various plaintiffs against (1) Laura Willis, an insurance agent; (2) Jesse Dantice, the insurance broker who hired Willis and made her the agent in charge of the insurance office; (3) their insurance agency, Southern Risk Insurance Services, LLC (Southern Risk), and (4) six insurance companies for which their office sold policies (the Insurers). The plaintiffs in the lawsuits were Willis's customers (the Insureds) and other insurance agents (the Agents) in competition with Willis and Southern Risk.

The Insureds filed twelve of the lawsuits, asserting claims against Willis, Dantice, and Southern Risk for, *inter alia*, violations of the Unfair Trade Practices Act (UTPA), common law unfair trade practices, fraud, and conversion. They also named the Insurers as defendants on a respondeat superior ***332** theory of liability for failing to adequately supervise or audit Willis and Southern Risk.

In general, the Insureds alleged (1) Willis engaged in fraudulent conduct, including forging insurance documents, taking cash payments, and converting the payments to her own use, resulting in the Insureds having either no coverage or reduced coverage; (2) Willis and the other defendants engaged in unfair and illegal tactics in an effort to "corner the retail insurance market" in Abbeville County; and (3) the defendants had a duty to investigate, train, and supervise Willis, "especially after she was fined, publicly reprimanded, and placed on probation for dishonesty by the South Carolina Insurance Commission in October 2011," or, in the alternative, Willis and/or Dantice acted with the express or implied permission of the other defendants.

The Agents—Richard Wilson and James Robert Shirley—filed the two remaining lawsuits. The Agents alleged Willis engaged in illegal business practices that effectively blocked them from the local market, resulting in a substantial loss of clients and revenue. They further asserted that Dantice, Southern Risk, and the Insurers had a duty to properly investigate, train, and supervise Willis, and also alleged the defendants either engaged in a civil conspiracy with Willis to destroy the businesses of other agents or failed to detect and stop Willis's wrongdoing. The Agents' claims included statutory and common law unfair trade practices, conspiracy, and tortious interference with existing and prospective contractual relations.

In their answers, the Insurers denied the majority of the substantive claims. None of the Insurers asserted the actions were subject to arbitration. Subsequently, however, ****171** three of the Insurers—Peerless Insurance Co., Montgomery Insurance Co., and Safeco Insurance Co. (hereinafter, Respondents)—filed motions to compel arbitration and dismiss the lawsuits. In support of their motions, Respondents asserted an arbitration clause contained in a 2010 agency contract (the Agency Agreement)[1] entered into by Respondents with Southern Risk ***333** should be enforced against the nonsignatory Insureds and Agents (collectively, Petitioners) on the theories that Petitioners were third-party beneficiaries to the contract or were equitably estopped from asserting their nonparty status. Respondents indicated the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1–16 (2009), applied to the Agency Agreement and enforcement of its arbitration clause, as well as state law.

Respondents asserted equitable estoppel should preclude Petitioners' assertion of their nonsignatory status because Petitioners' claims were premised on duties that would not exist but for the Agency Agreement Respondents had with Southern Risk. Respondents maintained the Agency Agreement contained a broad provision requiring the parties to arbitrate any claims arising "in connection with the interpretation of th[e] Agreement, its performance or nonperformance." Based on the foregoing, they argued the nonsignatory Petitioners were bound by the arbitration clause contained in the Agency Agreement between Respondents and Southern Risk.

The circuit court denied the motions to compel arbitration. In concluding Respondents were not entitled to arbitration, the circuit court made the following findings: (1) there was no evidence of a valid contract requiring arbitration because the Agency Agreement was never signed by Southern Risk or, alternatively, the unsigned agreement was invalid because it violated the Statute of Frauds; (2) the arbitration clause was narrow in scope and inapplicable on its face to Petitioners' claims because the claims had no relation to and were not "in connection with the performance of the Agency Agreement," which, instead, controlled only the business relationship between Southern Risk and the Insurers, not the relationship between the Insureds and the Insurers; (3) the doctrine of equitable estoppel should not be used to enforce the arbitration clause against nonsignatories (i.e., Petitioners), as there ***334** was "absolutely no evidence whatsoever" they had consistently maintained the provisions of the Agency Agreement between Southern Risk and Respondents should be enforced to benefit them, they never sought any direct benefits from the Agency Agreement, and their claims against Respondents did not hinge on any rights found in the Agency Agreement but instead were grounded in principles recognized under South Carolina law; (4) South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers; and (5) Respondents waived any right to arbitration by delaying the assertion of their motion. The circuit court denied Respondents' joint motion for reconsideration, which, *inter alia*, argued Petitioners were seeking to invoke the provisions of the Agency Agreement for Petitioners' direct benefit, contrary to the circuit court's finding, so Petitioners should be subject to the arbitration clause in the Agency Agreement, despite their status as nonsignatories.

The court of appeals reversed and remanded, concluding the circuit court erred in failing to grant Respondents' motions to compel arbitration. The court of appeals held, in relevant

part, that (1) the Agency Agreement (as well as its arbitration clause) was enforceable, despite the lack of Southern Risk's signature on the contract, because a contract **172 accepted and acted on by the other party is enforceable, and the Agency Agreement did not violate the Statute of Frauds because the contract was for an indefinite term and, thus, could be performed within one year; (2) the arbitration provision was sufficiently broad to encompass the claims alleged; (3) Petitioners were equitably estopped from arguing that their status as nonsignatories to the Agency Agreement precluded enforcement of the arbitration provision because their "complaints seek to benefit from enforcement of other provisions in the 2010 Agency Agreement"; (4) claims such as fraudulent conduct and misrepresentation were not the types of illegal and outrageous acts that were considered unforeseeable to a reasonable consumer in the context of normal business dealings; and (5) Respondents did not waive their right to compel arbitration.

This Court has granted (1) a joint petition for a writ of certiorari filed by Petitioners (the Insureds and Agents), and *335 (2) a separate petition filed by Laurie Williams (individually, Petitioner Williams).[2]

II. STANDARD OF REVIEW

[1] [2] Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to de novo review by an appellate court. *See Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (stating a determination of whether a claim is subject to arbitration is reviewed de novo); *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012) (applying the de novo standard to a nonsignatory). Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings. *Aiken*, 373 S.C. at 148, 644 S.E.2d at 707; *accord Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

III. LAW/ANALYSIS

Petitioners herein[3] contend the court of appeals erred in enforcing the arbitration clause in the Agency Agreement between Southern Risk and Respondents, where they were neither parties nor signatories to the contract and seek no benefits under the contract, and the claims are not within the scope of the Agency Agreement's arbitration clause and bear no significant relationship to the Agency Agreement.

[3] Petitioners assert the court of appeals applied the presumption in favor of arbitration to the threshold question of whether the arbitration clause binds them as nonsignatories, and this was inappropriate because arbitration is strictly a matter of consent, and the presumption applies only to an *336 analysis of the scope of an agreement. Petitioners further assert the court of appeals erroneously concluded the arbitration provision could be enforced against them based solely on an equitable estoppel theory, where Petitioners were unaware of the Agency Agreement, have never sought to obtain any direct benefit under that contract, and seek only to vindicate their rights under South Carolina law.[4]

[4] [5] The FAA applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise.[5] **173 *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The purpose of the FAA is "to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967). A party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement. *Carr v. Main Carr Dev., LLC*, 337 S.W.3d 489, 494 (Tex. App. 2011).

[6] [7] [8] The consideration of contract validity is normally addressed applying general principles of state law governing the formation of contracts. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("General contract principles of state law apply to arbitration clauses governed by the FAA."). "State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, recoverability, and enforceability of all contracts generally." *Id.*; *see also* 9 U.S.C.A. § 2 (stating a written provision for arbitration in any contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"). "A state law *337 that places arbitration clauses on an unequal footing with contracts generally, however, is preempted if the FAA applies." *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

[9] Although arbitration is viewed favorably by the courts, it is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts. *See E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (recognizing that arbitration under the FAA "is a matter of consent, not coercion" (citation omitted)); *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir. 1997) ("Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate."); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

[10] The consideration of scope is evaluated under the "federal substantive law of arbitrability." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (stating section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary," and noting "[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act").

[11] **[12]** "[T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement." *Carr*, 337 S.W.3d at 496 (emphasis added). "Even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Id.*

[13] Moreover, because arbitration, while favored, exists solely by agreement of the parties, a presumption *against* arbitration arises where the party resisting arbitration is a ***338** nonsignatory to the written agreement to arbitrate. *Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ("Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises."); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103–04 (9th Cir. 2006) (noting "the general rule that a nonsignatory is not bound by an arbitration clause").

[14] In the current matter, it is undisputed that Petitioners are nonsignatories to the arbitration agreement. Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is ****174** an issue controlled by state law.[6] *See Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31, 630 n.5, 129 S.Ct. 1896, 173 L.Ed.2d 832 (2009) (observing state law is applicable to determine which contracts are binding under section 2 of the FAA, and traditional principles of state law may permit a contract to be enforced by or against nonparties to a contract through theories of assumption, piercing the corporate veil, and estoppel, among others); *Kroma Makeup EU, LLC v. Boldface Licensing + Branding, Inc.*, 845 F.3d 1351, 1355 n.1 (11th Cir. 2017) (citing *Arthur Andersen LLP* and noting state, not federal, law controls the analysis of equitable estoppel issues in the arbitration context); *Walker v. Collyer*, 85 Mass.App.Ct. 311, 9 N.E.3d 854, 858–59 (Mass. App. Ct. 2014) (relying on *Arthur Andersen LLP* and stating traditional principles of state contract law determine whether nonsignatories can be compelled to arbitrate).

[15] South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. *Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014);[7] *see also* ***339** *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 289, 733 S.E.2d 597, 601 (Ct. App. 2012) (discussing federal decisions setting forth five theories that could provide a basis to bind nonsignatories to arbitration agreements). These theories have also been applied extensively in the federal courts. *See, e.g.*, *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) (enumerating five traditional theories for binding nonsignatories to arbitration clauses).

The court of appeals held the theory of equitable estoppel precluded Petitioners from asserting their nonsignatory status here and compelled them to submit their claims to arbitration. *Wilson v. Willis*, 416 S.C. 395, 418, 786 S.E.2d 571, 583 (Ct. App. 2016). In doing so, the court of appeals cited the framework for invoking equitable estoppel that has been utilized in the arbitration context by the federal courts and adopted by some state courts. *Id.* at 417, 786 S.E.2d at 582. This framework, often referred to as the direct benefits test, was utilized in a prior court of appeals decision, *Pearson*, which applied the federal test as set forth in *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*,

206 F.3d 411 (4th Cir. 2000).[8] Both *Pearson* and the Fourth Circuit decision ***340** were cited for guidance by the court of appeals in the current matter, ****175** which was necessitated by the scarcity of state precedent in this regard. *See generally Wilson*, 416 S.C. at 416–18, 786 S.E.2d at 582–83.

[16] **[17]** Under direct benefits estoppel, "[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.' " *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co.*, 206 F.3d at 418). "In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has *consistently maintained that other provisions of the same contract should be enforced to benefit him*."[9] *Id.* (quoting *Int'l Paper Co.*, 206 F.3d at 418).

[18] Stated another way, "[u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory 'knowingly exploits' the benefits of an agreement containing an arbitration clause, and receives benefits ***341** flowing directly from the agreement ...."[10] *Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1134 (2013).

The court of appeals found the prior South Carolina decision applying the direct benefits estoppel framework, *Pearson*, was analogous. In *Pearson*, an anesthesiologist (Dr. Pearson) was equitably estopped from asserting that, as a nonsignatory, he was not bound by an arbitration clause contained in a contract between a hospital and a medical professional placement company (Locum). *Pearson*, 400 S.C. at 296–97, 733 S.E.2d at 605. The court of appeals found Dr. Pearson received a benefit from the hospital's contract with Locum and should not be able to disclaim the arbitration agreement contained therein, where he was able to work at the hospital and receive payment for his work and, if not for the contract, Dr. Pearson would have had to make separate arrangements with the hospital to work there. *Id.* The court of appeals further noted that Dr. Pearson raised a claim for breach of contract against the defendants, not just Locum. *Id.* at 297, 733 S.E.2d at 605. Consequently, the court observed, Dr. Pearson was "seeking either to receive damages under Locum and the Hospital's contract, or to hold the Hospital accountable under his and Locum's contract." *Id.*

Citing the analysis in *Pearson*, the court of appeals reasoned here that, "although the Insureds and Agents [Petitioners] admittedly did not see the 2010 Agency Agreement prior to bringing this action, this does not control our inquiry because the allegations in the complaints necessarily depend upon the terms, authority, and duties created and imposed by that agreement." *Wilson*, 416 S.C. at 417, 786 S.E.2d at 582. In other words, the court stated, while Petitioners "do not expressly rely upon other provisions in the 2010 Agency Agreement," they rely upon the relationship the contract established ***342** between Respondents and Southern Risk to assert ****176** their claims. *Id.* at 417–18, 786 S.E.2d at 582–83. The court stated the duties Petitioners contend Respondents allegedly breached arose from the Agency Agreement, so Petitioners received a "direct benefit" from that contract. *Id.* at 418, 786 S.E.2d at 583. As a result, the court of appeals held, Petitioners were "equitably estopped from arguing their status as nonsignatories precludes enforcement of the arbitration provision where their complaints seek to benefit from the enforcement of other provisions in the 2010 Agency Agreement." *Id.*

Petitioners contend the Agency Agreement, by its own terms, applied only to the individual Insurers and to Southern Risk, the parties to the contract. Petitioners point out that they have not alleged a claim for breach of contract, and they were not even aware of the existence of the contract between Respondents and Southern Risk until Respondents decided to seek arbitration nearly a year into the litigation. Petitioners maintain the "sole basis" of the court of appeals' ruling that they could be subject to the arbitration clause as nonsignatories was the court of appeals' reliance on the doctrine of equitable estoppel and its finding they were seeking direct benefits under the contract.

We agree with Petitioners that the circumstances in *Pearson* are distinguishable. Unlike Dr. Pearson, Petitioners did not embrace the Agency Agreement during the life of the contract and then, during litigation, attempt to repudiate the arbitration clause in the contract. It is undisputed that Petitioners were never aware of the existence of the contract until they brought their tort actions against Respondents. General principles of South Carolina law form the basis for most of Petitioners' claims. For example, Petitioners' allegation that Respondents possibly conspired with Willis and others to commit fraud is misconduct that does not arise from the contract. To hold otherwise would arguably allow Respondents to commit unfair trade practices and conspire to destroy the businesses of other insurance agencies while shielding themselves from

while attempting to avoid its arbitration provision. Moreover, Respondents have not argued that the Agency Agreement, by its express terms, was applicable to other parties, or that customers of Southern Risk knew when they purchased their insurance policies that any claims of fraud, unfair trade practices, etc., would be subjected to an arbitration provision in an agreement between other parties.

Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. *See Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 71 A.3d 849, 852 (2013) (observing equitable estoppel should be used sparingly to compel arbitration and noting it "is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration"); 28 Am. Jur. 2d *Estoppel and Waiver* § 29 (2011) (stating equitable estoppel should be used with restraint and only in exceptional circumstances). We decline to impose it on Petitioners, a group that includes not only customers of Southern Risk, but also competing agents and an individual injured by a customer who purchased a policy from Southern Risk. Considerations of equity do not warrant estopping such attenuated individuals from asserting their nonsignatory status.

Having found Petitioners should not be compelled to arbitrate their claims based on equitable estoppel, we need not address the parties' remaining questions. *See* ****178** *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010) (holding an appellate court need not address remaining issues on appeal when disposition of a prior issue is dispositive).

IV. CONCLUSION

We conclude equitable estoppel should not be applied to compel the nonsignatory Petitioners to arbitrate their claims. Accordingly, we reverse the decision of the court of appeals ***346** and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

All Citations

426 S.C. 326, 827 S.E.2d 167

Footnotes

1 The arbitration provision relied on by Respondents is located in paragraph 12.A of the Agency Agreement between Southern Risk and Respondents:

> If any dispute or disagreement arises in connection with the interpretation of this Agreement, its performance or nonperformance, its termination, the figures and calculations used or any nonpayment of accounts, the parties will make efforts to meet and settle their dispute in good faith informally. If the parties cannot agree on a written settlement to the dispute within 30 days after it arises, or within a longer period agreed upon by the parties in writing, then the matter in controversy, upon request of either party, will be settled by arbitration ....

2 Petitioner Williams became involved in this case after she was in an accident with one of the Insureds (Cynthia Gary).

3 Petitioner Williams has filed a brief that joins in the issues presented by the remaining Petitioners, but also asserts two distinct questions of her own regarding a statutory arbitration exemption found in S.C. Code Ann. § 15-48-10(b)(4) (2005) and waiver. For simplicity, any references to "Petitioners" shall include Petitioner Williams to the extent she has incorporated their arguments.

4 Petitioners have effectively abandoned any challenge to the findings by the court of appeals that the contract between Southern Risk and Respondents was not invalid due to either (a) the lack of Southern Risk's signature or (b) the Statute of Frauds, and that Petitioners' claims do not involve outrageous conduct that would not be subject to arbitration. In addition, Petitioners (with the exception of Petitioner Williams) do not contest the court of appeals' finding that Respondents' delay in seeking arbitration did not constitute waiver.

5 Application of the FAA has not been disputed in the appeal before this Court.

6 The parties acknowledged during oral arguments before this Court that state law governs whether nonsignatories may be bound by arbitration agreements.

7 In *Malloy*, this Court noted that, in addition to the five theories enumerated above, some federal courts have also recognized that a third-party beneficiary of a contract containing an arbitration clause may be compelled into arbitration as a nonsignatory. *Malloy*, 409 S.C. at 562, 762 S.E.2d at 692 (citing *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003)). *But see Comer*, 436 F.3d at 1102 ("A third party beneficiary might in certain circumstances have the power to sue under a contract; it certainly cannot be *bound* to a contract it did not sign or otherwise assent to.").

8 To the extent the decision in *Pearson* indicates federal, rather than state, law is controlling on whether equitable estoppel can bind nonsignatories, we take this opportunity to clarify that state law controls, per *Andersen*. Some jurisdictions have elected, as a matter of state law, to expressly adopt the federal test for equitable estoppel to promote consistency among state and federal courts in cases subject to the FAA. *See In re Kellogg Brown & Root*, 166 S.W.3d 732, 739 (Tex. 2005) (recognizing it is important for federal and state law to be as consistent as possible because federal and state courts have concurrent jurisdiction to enforce the FAA; the court stated its decision to apply the direct benefits test for equitable estoppel "rests on state law, but [ ] is informed by persuasive and well-reasoned federal precedent"); *see also Belzberg v. Verus Invs. Holdings Inc.*, 21 N.Y.3d 626, 977 N.Y.S.2d 685, 999 N.E.2d 1130, 1133 (2013) (observing "[s]ome New York courts have relied on the direct benefits estoppel theory, derived from federal case law, to abrogate the general rule against binding nonsignatories"). Although some jurisdictions have adopted the federal test, discrepancies among jurisdictions remain on the subject of equitable estoppel. *See generally* Matthew Berg, *Equitable Estoppel to Compel Arbitration in New York: A Doctrine to Prevent Inequity*, 13 Cardozo J. of Conflict Resol. 169, 174 (2011) (observing "there are considerable disagreements over equitable estoppel theory within each particular state, among the states, and between the states and the federal government").

9 Petitioners assert, as an alternative argument on appeal, that the traditional state test for equitable estoppel enumerates six factors for consideration, and they further argue the traditional state test has not been met here because they have not engaged in false or misleading conduct that caused injury to Respondents, nor have Respondents claimed they lacked knowledge of the facts in question, relied upon the conduct of Petitioners, and suffered a prejudicial change of position. The traditional test referenced by Petitioners has been analyzed most often in non-arbitration cases. *See, e.g.*, *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 799 S.E.2d 912 (2017); *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465 (2007); *but see Zabinski*, 346 S.C. at 589, 553 S.E.2d at 114 (citing the six-part test in an arbitration case). We find this assertion is not properly before the Court, as the parties and both courts below focused their discussions on whether the direct benefits test for estoppel had been met. Consequently, we also apply the direct benefits test and express no opinion on Petitioner's alternative argument. *See Malloy*, 409 S.C. at 561, 762 S.E.2d at 692 (stating it is axiomatic that an issue cannot be raised for the first time on appeal).

10 Direct benefits estoppel is distinguishable from a second theory of estoppel that has been discussed in some federal decisions and which applies when a nonsignatory is attempting to compel arbitration *against a signatory* to the contract containing the arbitration clause. *See generally Thomson-CSF*, 64 F.3d at 779. The theory compels a signatory to arbitrate with a nonsignatory due to the close relationship of the parties and the fact that the claims were founded in and intertwined with the underlying contractual obligations. *Id.*

2. *Doe v TCSC, LLC*., 430 S.C. 602, 846 S.E.2d 874 (Ct. App. 2020)

Doe signed several documents, including an arbitration agreement, when she purchased a new car from TCSC in 2011. Doe returned to the dealership four years later to discuss a trade-in but decided to buy from another dealership. In retaliation, the salesman she spoke with posted an ad posing as Doe on a sexually explicit website with her contact information listed.

The Agreement stated that any claim or dispute—whether in contract, tort, statute-or otherwise—arising out of or relating to the vehicle purchase or resulting relationships would be resolved through binding arbitration.

A central issue was the Agreement's delegation clause. The court first examined whether the parties intended for the court or an arbitrator to decide the issue of whether the Agreement is valid and enforceable. The court held the parties intended for the arbitrator to resolve the limited issue of interpretation and scope of the Arbitration Agreement, and the arbitrability of the claim or dispute, pursuant to the delegation clause in the Agreement. However, the parties did not clearly and unmistakably delegate the question of the Agreement's validity and enforcement. The term "arbitrability" was found ambiguous and undefined under the Agreement or the FAA. Therefore, the question of enforcement and validity remained within the court's purview.

The court found the Agreement was valid because neither party provided notice of termination. The court then examined unconscionability of the Agreement, where it found Doe had no meaningful choice of accepting the contract terns as the Agreement was an adhesion contract foisted on Doe on a "take it or leave it basis," and she was not represented by counsel. It also found the terms substantively unconscionable due to their overreaching nature as the Agreement bars Doe and TCSC from suing ever each other in court for any reason. The court noted the FAA was not intended to encompass "every conceivable dispute" between the parties that could ever arise.

Despite these unconscionable provisions, the entire Agreement did not fail due to the presence of a severability clause. The court remanded so the motion to compel arbitration could be granted and the arbitrator could rule on Doe's claims, honoring the parties' intent.

430 S.C. 602
Court of Appeals of South Carolina.

Jane DOE, an adult woman over the age of 18, Respondent,

v.

TCSC, LLC, d/b/a Hendrick Toyota of North Charleston, Appellant.

Appellate Case No. 2017-001216

Opinion No. 5733

Heard November 13, 2019

Filed July 1, 2020

Synopsis

Background: Customer brought action against car dealer which alleged multiple torts based on respondeat superior, after salesman for dealer posted ad posing as customer on a sexually explicit website. The Circuit Court, Charleston County, R. Markley Dennis, J., denied dealer's motion to compel arbitration. Dealer appealed.

Holdings: The Court of Appeals, Hill, J., held that:

[1] trial court could determine issue of validity and enforceability of parties' arbitration agreement

[2] issues of interpretation and scope of agreement and arbitrability of claim or dispute were for arbitrator to determine;

[3] customer had no meaningful choice in accepting arbitration agreement;

[4] terms of arbitration agreement were so harsh and oppressive that no reasonable person would offer or accept them; and

[5] unconscionable portion of arbitration agreement was severable from remainder of agreement.

Affirmed in part, reversed in part, and remanded.

Lockemy, C.J., filed dissenting opinion.

West Headnotes (16)

[1] Alternative Dispute Resolution ← Evidence

Due to the strong state and federal policy favoring arbitration, arbitration agreements are presumed valid.

3 Cases that cite this headnote

[2] Alternative Dispute Resolution ← Scope and standards of review

Court of Appeals reviews circuit court determinations of arbitrability de novo, but will not reverse a circuit court's factual findings reasonably supported by the evidence.

[3] Alternative Dispute Resolution ← Existence and validity of agreement

Alternative Dispute Resolution ← Arbitrability of dispute

The Federal Arbitration Act (FAA) presumes parties intend that the court, rather than an arbitrator, will decide "gateway" issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute, but parties may delegate "gateway" issues to an arbitrator as long as there is clear and unmistakable evidence of such delegation. 9 U. S.C.A. § 1 et seq.

7 Cases that cite this headnote

[4] Alternative Dispute Resolution ← Existence and validity of agreement

If parties delegate "gateway" issues related to arbitration to an arbitrator, the court still retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause

specifically, rather than the arbitration agreement as a whole.

5 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Existence and validity of agreement

Customer and car dealer did not expressly delegate issue of validity and enforceability of arbitration agreement entered into at time of car purchase to arbitrator, and thus trial court could determine that issue in customer's action against dealer; in delegation clause of agreement, parties empowered arbitrator to resolve only the limited "gateway" issues of interpretation and scope of agreement and arbitrability of claim or dispute.

3 Cases that cite this headnote

[6] **Alternative Dispute Resolution** Existence and validity of agreement

Alternative Dispute Resolution Arbitrability of dispute

"Gateway" issues of interpretation and scope of agreement and arbitrability of claim or dispute were for arbitrator to determine, in customer's subsequent action against dealer; delegation clause of arbitration agreement entered into by customer and car dealer at time of car purchase clearly and unmistakably committed such issues to arbitrator.

2 Cases that cite this headnote

[7] **Alternative Dispute Resolution** Construction

In deciding whether a valid, enforceable and irrevocable arbitration agreement exists, courts apply general principles of state contract law.

3 Cases that cite this headnote

[8] **Contracts** Necessity of assent

A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement.

[9] **Contracts** Unconscionable Contracts

A contract may be invalid, and courts may properly refuse to enforce it, when it is unconscionable.

2 Cases that cite this headnote

[10] **Alternative Dispute Resolution** Validity

Alternative Dispute Resolution Unconscionability

A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability.

3 Cases that cite this headnote

[11] **Alternative Dispute Resolution** Unconscionability

To prove an arbitration provision of an agreement unconscionable, a party must show that (1) she lacked a meaningful choice as to whether to arbitrate because the agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them.

3 Cases that cite this headnote

[12] **Alternative Dispute Resolution** Unconscionability

In determining whether a plaintiff who is a party to an agreement containing arbitration provision lacked a meaningful choice as to whether to arbitrate, as factor in determining whether provision is unconscionable, 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, the conspicuousness of the clause, and whether the parties were represented by independent counsel.

4 Cases that cite this headnote

[13] **Alternative Dispute Resolution** Unconscionability

Customer had no meaningful choice in accepting arbitration agreement entered into with car dealer at time of car purchase, as factor in determining whether agreement wasunconscionable for purpose of customer's subsequent action against dealer; agreement was an adhesion contract, agreement was foisted on customer hastily amidst transaction by single consumer with international automotive concern, customer had no counsel, and injuries alleged by customer were far removed in time and space from time of entry into agreement.

1 Case that cites this headnote

[14] **Alternative Dispute Resolution** Unconscionability

Terms of arbitration agreement entered into between customer and car dealer at time of car purchase were so harsh and oppressive that no reasonable person would offer or accept them, as factor in determining whether agreement was unconscionable for purpose of customer's subsequent action against dealer; agreement barred each party from suing to other in court for any claim that could ever arise between the parties out of or relating to any resulting transaction or relationship.

1 Case that cites this headnote

[15] **Contracts** Unconscionable Contracts

Contracts Partial Illegality

Courts have discretion to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive; in doing so courts are guided by the parties' intent.

7 Cases that cite this headnote

[16] **Alternative Dispute Resolution** Severability

Unconscionable portion of arbitration agreement entered into between customer and car dealer at time of car purchase was severable from remainder of agreement; inclusion of severability clause in agreement indicated that parties intended remainder of agreement to remain enforceable, and removal of unconscionable clause did not disrupt the core of the parties' bargain.

****875** Appeal From Charleston County, R. Markley Dennis, Jr., Circuit Court Judge

Attorneys and Law Firms

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Mark A. Mason and Anthony Edward Forsberg, both of The Mason Law Firm, PA, of Mount Pleasant, for Respondent.

Opinion

HILL, J.:

****876** ***606** When Jane Doe bought a new car in 2011 from Appellant TCSC, LLC, d/b/a Hendrick Toyota of North Charleston (Dealer), like most every consumer she signed a sheaf of documents to close the sale. One of these documents was a one page Arbitration Agreement. Four and one-half years later, Doe returned to the dealership to have the car serviced. She also spoke with a salesman about trading in her 2011 car for a new one. Despite the salesman's persistent pitches, Doe decided to buy elsewhere. The rebuffed salesman, for reasons known only to him, sought revenge by posting an ad posing as Doe on a sexually explicit website, together with Doe's contact information. Minutes later, Doe began receiving strange telephone calls and text messages, some of which were sexually suggestive. An investigation linked the harassment to the ad the salesman had placed. Doe brought this lawsuit against Dealer, alleging an array of torts based on *respondeat superior.*

Dealer moved to compel arbitration of Doe's claims, based on the Agreement, specifically the following sentence:

> Any claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors, or assigns, which arises out of or relates to your credit application, purchase, lease, or condition of this vehicle, your purchase, lease agreement, or financing contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall at your or our election, be resolved by neutral, binding arbitration and not by a court action.

The circuit court denied the motion, finding the Agreement unconscionable. Dealer appealed. The question now before us *607 is whether the parties intended for the court or an arbitrator to decide the threshold issue of whether the Agreement is valid and enforceable. Based on the parties' intent and the mandate of the Federal Arbitration Act (FAA) requiring courts to honor parties' valid contractual choices, we conclude the issue is for the court. We further affirm the trial court's finding of unconscionability, but on different grounds and only as to a portion of the Agreement. We sever that portion, and hold the issue of whether Doe's dispute is covered by the revised Agreement is for an arbitrator, as the parties clearly and unmistakably delegated the issue of the interpretation and scope of the Agreement to an arbitrator.

I.

A. The FAA

[1] **[2]** Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. *See* *Cape Romain Contractors, Inc. v. Wando E., LLC.* 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability *de novo,* but will not reverse a circuit court's factual findings reasonably supported by the evidence. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.,* 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016). The parties agree the contract is governed by the FAA, the relevant portion of which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2018).

Because an arbitration provision is often one of many provisions in a contract covering many other aspects of the transaction, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (arbitrator rather than court must decide claim that underlying contract ***608** in which arbitration provision was contained **877 was fraudulently induced; but if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement and § 4 requires the court to "order arbitration to proceed once it is satisfied that `the making of the agreement for arbitration ... is not in issue' "). Here, though, the arbitration provision is the entire contract, so we cut to the next question: whether the contract constitutes a valid agreement to arbitrate. Because the FAA does not require parties to arbitrate when they have not agreed to do so, the inquiry at this stage is twofold: whether a valid agreement exists and who the parties have deemed should make the validity determination.

[3] 141 The FAA presumes parties intend that the court, rather than an arbitrator, will decide "gateway" issues related to arbitration, including whether the arbitration agreement is valid and enforceable and whether it covers the parties' dispute. *See* *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The parties may, of course, delegate these gateway issues to an arbitrator as long as there is "clear and unmistakable" evidence of such delegation. *Id.* at 944-45, 115 S.Ct. 1920; *Henry Schein, Inc. v. Archer & White Sales, Inc.,* U.S. , 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019); *AT & T Techs., Inc. v. Commc'ns Workers of Am.,* 475 U.S. 643, 649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). If such a delegation occurred, the court still retains the right and duty to determine whether the delegation is valid and enforceable as long as the party resisting arbitration has made a direct and discrete challenge to the validity and enforceability of the delegation clause specifically, rather than the arbitration agreement as a whole. *See* *Rent -A-Center, West, Inc. v. Jackson,* 561 U.S. 63, 68, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).

151 According to Dealer, the parties clearly and unmistakably agreed to delegate the issue of the validity and enforceability of the arbitration provision to the arbitrator. Therefore, Dealer asserts, the court has no right to rule upon this gateway issue. We disagree. In the delegation clause here, the parties empowered the arbitrator to resolve only the limited *609 gateway issues of "the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute." The parties did not delegate the decision of whether the Agreement was valid and enforceable. After all, one cannot "interpret" an invalid contract. This omission removes the Agreement from the reach of *Rent-A-Center,* which addressed a delegation clause giving the arbitrator the exclusive authority to resolve any dispute relating to the "enforceability" of the agreement "including ... any claim that all or any part of this [a]greement is void or voidable." The Court held that unless a party focused its unconscionability challenge on the delegation clause itself (rather than the arbitration agreement generally), a court must treat the delegation clause "as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator." *Id.* at 72, 130 S.Ct. 2772.

[6] Consistent with *Rent-A-Center,* because it is clear and unmistakable the delegation clause committed disputes over the "interpretation and scope" of the Arbitration Agreement and issues of "arbitrability of the claim or dispute" to the arbitrator, the FAA requires us to honor that agreement and leave resolution of these discrete gateway issues to the arbitrator. But because the parties' delegation clause did not mention who decides the gateway validity and enforceability issues, we must honor the parties' choice to leave these to the court. Without an express delegation of these issues to the arbitrator, there is no delegation of them that § 2 requires the court to carry out. Instead, it remains for the court to decide whether the Agreement is valid. *See Schein,* 139 S. Ct. at 530 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *Davis v. KB Home of S.C., Inc.,* 394 S.C. 116, 126, 713 S.E.2d 799, 804 (Ct. App. 2011) (where arbitration clause did not expressly submit issues relating to validity, existence, and scope of arbitration agreement to arbitrator, FAA reserved such gateway issues to court), *aff'd in part, vacated in part on other grounds,* Op. No. 27386 (S.C. Sup. Ct. filed Jan. 29, 2014) (Shearouse Adv. Sk No. 19 at 18). This is consistent with § 4 **878 of the FAA that a court may only order arbitration to proceed if it is satisfied the "making" of the arbitration agreement is not "in issue."

*610 Arbitration "is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration." *First Options,* 514 U.S. at 943, 115 S.Ct. 1920. *Rent-A-Center* classified delegation clauses as simply miniature arbitration agreements, "and the FAA operates on this additional arbitration agreement just as it does on any other." 561 U.S. at 70, 130 S.Ct. 2772; *see also Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.,* 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (" []he FAA does not require parties to arbitrate when they have not agreed to do so."). Put another way, the FAA does not allow a court to make parties delegate issues they have not agreed to delegate. To read *Rent-A-Center* as Dealer does would mean an arbitration agreement containing any type of delegation clause invariably means the issue of the validity of the arbitration agreement is exclusively for the arbitrator to decide. Such a reading mocks not only §§ 2 and 4, but the choice of the parties to *not* refer that gateway decision to an arbitrator.

Likewise, we cannot accept Dealer's argument that the appearance of the word "arbitrability" in the delegation clause is clear and unmistakable evidence that the parties intended the arbitrator determine the validity of the Agreement. Had the delegation clause stated the arbitrator was to determine the "arbitrability" of the Agreement (rather than the dispute), we might agree the parties had agreed to delegate the issue of the validity and enforceability of the Agreement to the arbitrator. But we would still not be able to find the delegation "clear and unmistakable," in part because the Court has assigned multiple meanings to the term "arbitrability," rendering its meaning ambiguous at best. The term is not defined in the Agreement, nor does it even appear in the FAA. It was defined, in a roundabout manner, in *Howsam v. Dean Witter Reynolds, Inc.,* which identified two gateway questions of "arbitrability" that courts must decide unless the parties have clearly and unmistakably agreed otherwise: whether the parties are bound by a given arbitration clause, and "whether an arbitration clause *in a concededly binding contract* applies to a particular type of controversy." 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (emphasis added); *see also Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003) (noting courts assume parties intend that *611 courts rather than arbitrator will decide "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."). As we have held, the delegation clause here

clearly and unmistakably referred this second arbitrability question to an arbitrator. To conclude the mere presence of the word "arbitrability" referred both questions to the arbitrator would require applying some type of implied delegation principle, rather than the controlling "clear and unmistakable" standard. *Rent-A-Center* did not hold a delegation clause that does not delegate the validity issue removes the court's ability to rule upon validity challenges to the arbitration agreement. 561 U.S. at 71, 130 S.Ct. 2772 ("But that agreements to arbitrate are severable does not mean they are unassailable. If a party challenges the validity under § 2 of the precise agreement to arbitrate at issue, the federal court must consider the challenge before ordering compliance with that agreement under § 4.").

Because we hold the parties did not expressly delegate the gateway issue of the validity of the Agreement to the arbitrator, we will now consider whether the Agreement is valid.

II.

A. Validity of the Agreement under South Carolina contract law

[7] [8] In deciding whether a valid, enforceable and irrevocable arbitration agreement exists, we apply general principles of state contract law. *First Options,* 514 U.S. at 944, 115 S.Ct. 1920. In South Carolina, a "valid and enforceable contract requires a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." **879 *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 578, 762 S.E.2d 696, 701 (2014). We find the parties here had a meeting of the minds as to the essential and material terms of the Arbitration Agreement. Although the Agreement is silent as to the material element of its duration, that merely made the contract terminable at will by either party upon reasonable notice to the other, and Doe gave no notice of termination. *See Childs v. City of Columbia,* 87 S.C. 566, 572, 70 S.E. 296, 298 (1911).

*612 i. Unconscionability

[9] [10] [11] But finding the parties minds met does not end our review because a contract may be invalid—and courts may properly refuse to enforce it—when it is unconscionable. A court may invalidate an arbitration clause based on defenses applicable to contracts generally, including unconscionability. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark,* U.S. 137 S. Ct. 1421, 1426, 197 L.Ed.2d 806 (2017). To prove the arbitration provision unconscionable, Doe must show that (1) she lacked a meaningful choice as to whether to arbitrate because the Agreement's provisions were one-sided, and (2) the terms were so oppressive no reasonable person would make them and no fair and honest person would accept them *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). While we analyze both prongs, they invite similar proof and often overlap, and "if more of one [prong] is present, then less of the other is required." *Farnsworth on Contracts* § 29.4 at 4-212 (2020-1 Supp.); *see Corbin on Contracts* § 29.4 at 388 (2002 ed.) (noting "most cases do not fall neatly" into categorical boxes). Unconscionability is gauged at the time the contract was made.

a. Meaningful choice of accepting contract terms

[12] Determining whether Doe meaningfully chose to arbitrate involves sizing up "the fundamental fairness of the bargaining process." *Smith v. D.R. Horton, Inc.,* 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Accordingly,

> 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, 373 S.C. at 25, 644 S.E.2d at 669. We also consider whether the parties were represented by independent counsel. *Smith,* 417 S.C. at 49, 790 S.E.2d at 4. The distinguished circuit judge made factual findings related to these factors, which we may only upset if they lack reasonable factual ***613** support. *Lackey v. Green Tree Fin. Corp.,* 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998).

"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." *Simpson,* 373 S.C. at 25, 644 S.E.2d at 668–69 (citing *Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 938 (4th Cir. 1999)). The *Hooters* decision struck down an arbitration clause because it incorporated rules so "warped" and void of due process that any arbitration under them would have been a "sham." *Simpson* cannot be interpreted, however, to mean an arbitration clause can never be unconscionable as long as it points to a neutral forum. To do so would be to apply

South Carolina general unconscionability law differently in the arbitration context than in others. Such discrimination would run afoul of one of the prime directives of the FAA: that courts must place arbitration contracts on par with all other contracts. *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 447, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) (noting § 2 is "the FAA's substantive command that arbitration agreements be treated like all other contracts"); *Prima Paint,* 388 U.S. at 404 n.12, 87 S.Ct. 1801 (FAA was passed "to make arbitration agreements as enforceable as other contracts, but not more so").

[13] The circuit court found the Agreement unconscionable based on several aspects: it was an adhesion contract, it was foisted on Doe "hastily" on a "take it or leave it basis" amidst a transaction by a single consumer with an international automotive **880 concern. Doe had no counsel and the injuries she alleges are far removed in time and space from the 2011 car sale. These findings of the circuit court are well anchored by the record. Our supreme court has recognized car sales contracts warrant not just acute scrutiny but "considerable skepticism," given the bargaining disadvantage a consumer faces once he sets foot on the lot, and the reality that car ownership is often a necessity in modern society (unless one wishes to remain on foot). *Simpson,* 373 S.C. at 27, 644 S.E.2d at 670. We are mindful *Herron v. Century BMW,* 395 S.C. 461, 719 S.E.2d 640 (2011), may have tempered *Simpson's* treatment of car sales contracts, but the non-negotiable Agreement here—while *614 conspicuous—was still sprung on Doe along with a flurry of other closing documents. We therefore affirm the circuit court's conclusion that Doe had no meaningful choice in accepting the Agreement.

b. Unreasonable, oppressive, and one-sided terms

[14] We next look at the terms of the Agreement to see if they are so harsh and oppressive no reasonable person would offer or accept them. We find the portion of the contract purporting to require Doe to arbitrate "any claim or dispute" arising out of or relating to "any resulting transaction or relationship (including any such relationship with third parties)" is so overbearing as to be unconscionable. In essence, because the contract deems any future encounter between Doe and Dealer would be a result of their "relationship" created by the 2011 transaction, the Agreement bars each from suing the other in court for anything. Ever. The Agreement does not just memorialize the parties' promise to resolve disputes about the 2011 purchase transaction by arbitration but seeks to resolve all future disputes between them, regardless of its type or description, as well as any disputes with unknown "third parties." This lopsided provision places Doe at a stunning disadvantage—she is now one against many, for an objective reading of the Agreement means it forever immunizes not just Dealer, but Dealer's salesmen, employees, agents, suppliers, wholesalers, and any third party throughout the universe from being brought into the public judicial system by Doe.

This is corroborated by a later clause of the contract that declares "[t]his Arbitration Agreement shall survive any termination, payoff or transfer of your financing contract." This signals Doe's "relationship" with Dealer was inextricable and infinite. The use of the expansive term "relationship" alerts us as to how far the Agreement has wandered outside the bounds of the FAA. Congress passed the FAA to ensure enforcement of provisions contained in "maritime transaction[s]" or "contract[s] evidencing a transaction involving commerce" to arbitrate controversies that arise out of the "contract or transaction." 9 U. S.C.A. § 2. Attempts to stuff every conceivable dispute the parties may ever have into the FAA on the notion that the initial transaction created a permanent "relationship"—regardless *615 of whether the current dispute has any connection to the initial, underlying transaction—runs the risk of a court declaring the contract's reach exceeds the grasp conscionability allows.

[15] [16] We conclude the following language of the Agreement—"or any resulting transaction or relationship (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract)"—is unconscionable. An unconscionable contract is not a valid contract in the eyes of § 2. *See Kindred Nursing Ctrs.,* 137 S. Ct. at 1426; *see also Doctor's Assoc.'s, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (arbitration agreements may be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability"). Courts have discretion though to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive. Once again, we are guided by the parties' intent. *Columbia Architectural Grp., Inc. v. Barker,* 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) ("The entirety or severability of a contract depends primarily upon the intent of the parties ...."); *see also Simpson,* 373 S.C. at 25, 644 S.E.2d at 668 ("If a court as a matter of law finds any clause of a contract to have been unconscionable * *881 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."). The

Agreement here contains a severability clause, reflecting that if any part of the contract is found "unenforceable for any reason, the remainder shall remain enforceable." Given this intent and our belief that removing the unconscionable clause does not disrupt the core of the parties' bargain, we disagree with the circuit court that the entire Agreement must fall.

That brings us back to our earlier ruling that the delegation clause requires the arbitrator to rule on the "interpretation and scope" of the now revised Agreement, to see if it requires arbitration of Doe's claims. Therefore, the arbitrator must decide whether Doe's claims against Dealer based on its employee's 2015 theft of Doe's identity and the posting of Doe's private contact information on a sexually explicit website arise out of or relate to Doe's "credit application, purchase ... or condition of the car she bought from Dealer in 2011. We *616 express no opinion on whether the 2011 arbitration contract covers Doe's claims, or, if so, whether the claims are still subject to arbitration due to the "outrageous and unforeseen torts" exception. *See generally Parsons,* 418 S.C. 1, 791 S.E.2d 128. The dissent argues this exception does apply, but whether the exception applies is a question the parties delegated to the arbitrator, not the court. Because the outrageous and unforeseen torts exception relates to the interpretation and scope of the arbitration contract and the arbitrability of the dispute—rather than whether the arbitration contract was formed or is valid—precedent requires that we honor the parties' choice to leave the issue of the exception to the arbitrator. *See Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007) (treating outrageous and unforeseen torts exception as a question of arbitrability of claim and noting, *"[u]nless the parties provide otherwise,* the question of the arbitrability of a claim is an issue for judicial determination" (emphasis added)). The Supreme Court clarified this point just last term. *Henry Schein, Inc.,* 139 S. Ct. at 527-28 ("Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is `wholly groundless.' The question presented in this case is whether the `wholly groundless' exception is consistent with the Federal Arbitration Act. We conclude that it is not."). The dissent's approach makes good sense and would likely streamline many motions to compel, but the United States Supreme Court has made clear that considerations of common sense and efficiency in this context are incompatible with their interpretations of the FAA.

Accordingly, we remand this matter to the circuit court so the motion to compel arbitration may be granted and the arbitrator can rule upon whether Doe's claims are subject to her 2011 arbitration contract with Dealer.

* * *

The FAA became law in 1925, passed primarily to safeguard the rights of merchants to use arbitration to resolve disputes arising over interstate commercial transactions by reversing the judicial hostility against arbitration. *See generally* *617 *Epic Sys. Corp. v. Lewis,* U.S. , 138 S. Ct. 1612, 1621, 200 L.Ed.2d 889 (2018); Bookman, *The Arbitration-Litigation Paradox,* 72 Vand. L. Rev. 1119, 1134 (2019). The FAA's early use was limited by the then narrow reach of the commerce clause, and the reality that the typical arbitration agreement of the time was between merchants of equal sophistication and bargaining power. *Id.; see also* Horton, *Arbitration About Arbitration,* 70 Stan. L. Rev. 363, 377-78 (2018). Today, arbitration agreements pop up in almost every imaginable transaction, many for basic consumer goods. As more and more transactions are conducted online, arbitration agreements are not presented face to face but digitally, in such forms as "browsewrap," "clickwrap," "scrollwrap," and "sign-on wrap." As lawyers know, the progression of arbitration decisions from the United States Supreme Court has been a march towards greater and greater abstraction, steadily away from the concrete. This has undermined arbitration's laudable goals: to streamline dispute resolution by offering a simpler, faster, and cheaper forum. Some Justices have complained the **882 Supreme Court's interpretations of the FAA are unfaithful to its original intent. *See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 283, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (O'Connor, J., concurring) ("[O]ver the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."). It might also be contended the Supreme Court's arbitration jurisprudence is so removed from everyday understanding and contracting realities that it has created more litigation than it has diverted. Lawyers and businesses have to draft arbitration provisions around complex analytical mazes. Motions to compel arbitration—once simple and straightforward—now require lawyers and judges to navigate one of the most nettlesome thickets of the law. *Rent-A-Center's* strict insistence on pinpoint pleadings revives the stifling formalism of the early 20th century that the FAA was created to avoid. The dissent in *Rent-A-Center*

(a 5-4 decision) noted the counter-intuitive approach, begun by *Prima Paint,* that requires courts to sever arbitration provisions from the rest of an allegedly invalid contract is so artificial that it "may be difficult for any lawyer—or any person—to accept." *618 561 U.S. at 87, 130 S.Ct. 2772 (Stevens, J., dissenting). The dissent likened the majority's extension of *Prima Paint's* severability doctrine to delegation clauses embedded in the arbitration provision to "Russian nesting dolls." *Id.* at 85, 130 S.Ct. 2772.

We wonder whether interpretations of the FAA could be made simpler and clearer, so courts can help rather than hinder the FAA's mission of providing a simpler, faster, and cheaper alternative to litigation. Otherwise, the skirmishing that marks arbitration motion practice will undoubtedly intensify, and parties will be stranded longer and longer in the costly purgatory between the domains of arbitration and court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KONDUROS, J., concurs.

LOCKEMY, C.J., dissenting:
I respectfully dissent and would find, as the circuit court did, that the outrageous and unforeseeable torts exception applies to Doe's claims, and I would therefore affirm the denial of the motion to compel arbitration.

In my view, it is unnecessary for an arbitrator to interpret the Agreement or determine whether the dispute falls within its scope because Doe did not agree to submit outrageous tort claims to arbitration. In *Aiken,* our supreme court held the plaintiffs "claims for unanticipated and unforeseeable tortious conduct by [the defendant's] employees [were] not within the scope of the arbitration agreement with [the defendant]." *Aiken v. World Fin. Corp. of S.C.,* 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). There, the court opined the theft of the plaintiffs personal information by the defendant's employees was "outrageous conduct" the plaintiff could not possibly have foreseen when he agreed to do business with the defendant. *Id.* The court therefore held that "in signing the agreement to arbitrate, the plaintiff] could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct." *Id.* The court stated that to "interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with th[e] goal" of promoting "the procurement of ***619** arbitration in a commercially reasonable manner." *Id.* at 152, 644 S.E.2d at 710.

The case at hand is analogous to that presented in *Aiken.* Here, an employee of the dealership misappropriated Doe's personal information for the employee's own, vengeful purpose. I do not believe a person signing a contract for the purchase of a vehicle from a dealership could have anticipated that the dealership's employee would later use her personal information to solicit unwanted sexual encounters on her behalf. I believe that under general contract principles requiring Doe to arbitrate the question of whether her claims fall within the scope of the Agreement when they plainly do not would be contrary to the effectuation of the parties' contractual expectations. *See id.* at 151, 644 S.E.2d at 709 ("Because even the most broadly-worded arbitration agreements still have limits founded in general principles ****883** of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."); *cf. Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.,* 418 S.C. 1, 13-14, 791 S.E.2d 128, 134-35 (2016) (plurality opinion) (Hearn, J., concurring in part and dissenting in part) (stating "the outrageous and unforeseeable torts exception ... embodies a generally applicable contract principle: effectuating the intent of the parties" and noting that "forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement" would constitute an absurd result). For the foregoing reasons, I respectfully dissent and would affirm the circuit court's denial of the motion to compel arbitration.

All Citations

430 S.C. 602, 846 S.E.2d 874

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3. *Parsons v John Wieland Homes & Neighborhoods of the Carolinas, Inc*., 418 S.C. 1, 791 S.E.2d 128 (2016)

In 2002, JWH purchased a sixty-five acre industrial site to develop a residential subdivision and removed all visible and underground remnants of its prior use. In 2007, The Parsons bought a home from JWH, and their purchase agreement included an arbitration clause, which they acknowledged and signed. In 2008, the Parsons discovered PVC pipes and a concrete box that contained "black sludge" buried on their property, which tested positive as a hazardous substance.

The court examined the scope of the arbitration agreement and found all Parson's claims were subject to arbitration, not just claims related to the Warranty, because the arbitration clause governed the entire agreement regardless of its placement within the warranty.

The court next considered the outrageous tort exception, which allows parties to bypass arbitration when their claims arose out of the opposing party's "outrageous" tortious conduct. The court stated the exception is "unique" and "restricted" to arbitration. Because federal law requires arbitration agreements to be treated like any other contract, the court suggested the exception is inconsistent with federal precedent and should no longer be used. In addition, the court found no evidence the arbitration clause was unconscionable. Accordingly, the court held the Court of Appeals erred in affirming the circuit court's denial of JWG's motion to compel arbitration and reversed the decision.

418 S.C. 1
Supreme Court of South Carolina.

Ralph Wayne PARSONS, Jr., and Louise C. Parsons, Respondents,

v.

JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., Defendants,

Of which John Wieland Homes and Neighborhoods of the Carolinas, Inc. is Petitioner.

Appellate Case No. 2014–000782
|
Opinion No. 27655
|
Heard May 7, 2015
|
Filed August 17, 2016
|
Rehearing Denied October 24, 2016

Synopsis

Background: Homeowners brought action against builder for breach of the purchase agreement, breach of contract, negligent misrepresentation, and fraud, alleging that builder failed to disclose defects with the property and sold property that was contaminated and with known underground pipes. Builder moved to compel arbitration. The Circuit Court, York County, Jackson Kimball, III, J., denied motion. The Court of Appeals, 2013 WL 8538740, affirmed. Builder petitioned for certiorari, which was granted.

Holdings: The Supreme Court, Pleicones, C.J., held that:

[1] scope of arbitration clause in warranty for the purchase of a new home was not limited to claims covered by the warranty, and thus scope was broad enough to encompass all of homeowners' claims, and

[2] claims did not fall within any exception to arbitration for outrageous and unforeseeable torts, and thus claims were arbitrable.

Reversed.

Hearn, J., concurred in part and dissented in part and filed opinion in which Beatty, J., concurred.

Jean H. Toal, Acting J., dissented and filed opinion.

West Headnotes (9)

[1] **Alternative Dispute Resolution** Scope and standards of review

The determination whether a claim is subject to arbitration is reviewed de novo on appeal. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

[2] **Alternative Dispute Resolution** Scope and standards of review

A circuit court's factual findings in connection with a motion to compel arbitration will not be reversed on appeal if any evidence reasonably supports the findings. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

1 Case that cites this headnote

[3] **Alternative Dispute Resolution** Arbitration favored; public policy

The policy of the United States and of South Carolina is to favor arbitration of disputes. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

2 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Construction

Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

3 Cases that cite this headnote

[5] **Alternative Dispute Resolution** ⇐ Sales contracts disputes

Scope of arbitration clause in warranty for new home purchase was not limited to claims covered by warranty, even though clause was located within warranty, and thus scope of clause was broad enough to encompass homeowners' claims for breach of purchase agreement alleging that builder failed to disclose property defects and sold property that was contaminated and with known underground pipes; purchase agreement contained acknowledgement that homeowners received and read a copy of warranty and consented to its terms, including binding arbitration provisions, and arbitration clause provided that all claims, including ones based in warranty, were subject to arbitration. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

[6] **Alternative Dispute Resolution** ⇐ Disputes and Matters Arbitrable Under Agreement

To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

1 Case that cites this headnote

[7] **Alternative Dispute Resolution** ⇐ Evidence

The heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. (Per Pleicones, C.J., with one justice concurring and two justices concurring separately.)

2 Cases that cite this headnote

[8] **Alternative Dispute Resolution** ⇐ Sales contracts disputes

Homeowners' claims against builder alleging that builder failed to disclose property defects and sold property that was contaminated and with known underground pipes, including claims for breach of contract, negligent misrepresentation, and fraud, did not fall within any exception to arbitration for outrageous and unforeseeable torts, and thus claims were arbitrable under arbitration clause contained in warranty for new home purchase. (Per Pleicones, C.J., with one justice concurring and two justices concurring in result.)

1 Case that cites this headnote

[9] **Alternative Dispute Resolution** ⇐ Right to Enforcement and Defenses in General

Outrageous and unforeseeable torts exception, which embodies the generally applicable contract principle of effectuating the intent of the parties, is a viable exception to arbitration enforcement, allowing parties whose claims arose out of an opponent's outrageous tortious conduct to avoid arbitration. (Per concurring opinion of Hearn, J., for a majority of the court.)

2 Cases that cite this headnote

****129 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal from York County, Jackson Kimball, III, Special Circuit Court Judge

Attorneys and Law Firms

G. Trenholm Walker and Ian W. Freeman, both of Pratt–Thomas Walker, PA, of Charleston, for Petitioner.

Herbert W. Hamilton, of Hamilton Martens Ballou & Carroll, LLC, of Rock Hill, for Respondents.

Opinion

CHIEF JUSTICE PLEICONES:

***4** We granted certiorari to review a Court of Appeals' decision affirming a circuit court order which denied petitioner's ("JWH") motion to compel arbitration. *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, Op. No. 2013–UP–296 (S.C. Ct. App. refiled August 28, 2013). We reverse.

FACTS

In 2002, JWH purchased approximately sixty-five acres of land for the development of a residential subdivision. The land was previously utilized as a textile-related industrial site. Following the purchase, JWH demolished and removed all visible evidence of the industrial site and removed various underground pipes, valves, and tanks remaining from the industrial operations.

JWH then began selling lots and "spec" homes on the sixty-five acres. In 2007, respondents ("the Parsons") executed a purchase agreement to buy a home built and sold by JWH ("the Property").[1] Paragraph 21 of the purchase agreement for the Property states the purchaser has received and read a copy of the JWH warranty ("Warranty") and consented to the terms thereof, including, without limitation, the terms of the arbitration clause. The Parsons initialed below the paragraph. Upon executing the purchase agreement, the Parsons were provided a "Homeowner Handbook" containing the Warranty. The arbitration clause is set forth in paragraph O of the Warranty's General Provisions. The Parsons signed an acknowledgment of receipt of the handbook dated the same date as the purchase agreement.

****130** In 2008, the Parsons discovered PVC pipes and a metal lined concrete box buried on their Property. The PVC pipes and box contained "black sludge," which tested positive as a hazardous substance. JWH entered a cleanup contract with the South Carolina Department of Health and Environmental ***5** Control. JWH completed and paid for the cleanup per the cleanup contract.[2]

The Parsons claim they were unaware the Property was previously an industrial site and contained hazardous substances. In 2011, the Parsons filed the present lawsuit alleging JWH breached the purchase agreement by failing to disclose defects with the Property, selling property that was contaminated, and selling property with known underground pipes. The Parsons further alleged breach of contract, breach of implied warranties, unfair trade practices, negligent misrepresentation, negligence and gross negligence, and fraud.

JWH moved to compel arbitration and dismiss the complaint. The motion asserted that all of the Parsons' claims arose out of the purchase agreement, and the Parsons clearly agreed that all such disputes would be decided by arbitration. The circuit court denied the motion and found the arbitration clause was unenforceable for two reasons.

First, the circuit court found that because the arbitration clause was located within the Warranty booklet, its scope was limited to claims under the Warranty. The circuit court further found that because the Warranty was limited to claims caused by a defect or deficiency in the design or construction of the home, the Parsons' claims fell outside the scope of the arbitration clause, and, thus, the arbitration clause was unenforceable.

Second, the circuit court applied the outrageous torts exception to arbitration enforcement[3] and found that because the ***6** Parsons alleged outrageous tortious conduct, namely, the intentional and unforeseeable conduct of JWH in failing to disclose concealed contamination on the Property, the arbitration clause was unenforceable.[4]

The Court of Appeals affirmed the circuit court's finding that the scope of the arbitration clause was restricted to Warranty claims and declined to address the circuit court's application of the outrageous torts exception doctrine.

We granted JWH's petition for a writ of certiorari to review the Court of Appeals' decision.

ISSUE

Did the Court of Appeals err in affirming the circuit court's ruling that the arbitration clause was unenforceable?

LAW/ANALYSIS

The Court of Appeals found the circuit court correctly determined the arbitration clause was unenforceable. We disagree.

[1] **[2]** The determination whether a claim is subject to arbitration is reviewed *de novo*. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)).

****131** **[3]** **[4]** The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. (citations omitted).

***7 I. Scope**

[5] The Court of Appeals affirmed the trial court's finding that because the arbitration clause was located within the Warranty, the scope of the arbitration clause was limited to claims covered by the Warranty. We hold the Court of Appeals erred in affirming this finding.

[6] **[7]** To determine whether an arbitration clause applies to a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (citing *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C. 1994); *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993)). The heavy presumption in favor of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 94 (4th Cir. 1996) (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989))).

Paragraph 21 of the purchase agreement provides, in pertinent part:

> 21. **Warranty and Arbitration**. Purchaser and Seller hereby agree that, in connection with the sale contemplated by this agreement, Purchaser will be enrolled in the John Wieland Home and Neighborhoods 5–20 Extended Warranty program, booklet revision date 04/06 (JWH Warranty), the JWH Warranty being incorporated herein by reference .... PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE BINDING ARBITRATION PROVISIONS CONTAINED THEREIN....

(Capitalization, bold, and underline in original).

Paragraph O of the Warranty provides, in pertinent part:

> **Mandatory Binding Arbitration**. Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them....
>
> ***8** Any and all unresolved claims or disputes of any kind or nature between [petitioner] and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. This applies only to claims or disputes that arise after the later of: (a) the issuance of the final certificate of the occupancy for the home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.
>
> ....
>
> WIELAND AND HOMEBUYER(S) HEREBY ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSING OF THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUYER(S). WIELAND AND HOMEBUYERS HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN EQUITY OR OTHERWISE ****132** WHICH MIGHT

> OTHERWISE HAVE BEEN AVAILABLE TO THEM IN CONNECTION WITH ANY SUCH DISPUTES.

(Capitalization, bold, and underline in original).

The plain and unambiguous language of the arbitration clause provides that all claims, including ones based in warranty, be subject to arbitration. Accordingly, we find the Court of Appeals erred in affirming the circuit court's finding that because the arbitration clause was located within the Warranty, its scope was limited to claims covered by the Warranty. *See Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994) ("Arbitration clauses are separable from the contracts in which they are imbedded." (quoting *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395, 402, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967))); ***9** *see also Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 (finding that like other contracts, arbitration clauses will be enforced in accordance with their terms (citing *Volt Info. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989))).

II. Outrageous Torts Exception

[8] In 2007, this Court created the outrageous torts exception doctrine permitting parties whose claims arose out of an opponent's "outrageous" tortious conduct to avoid arbitration. *See generally Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007) (establishing, in South Carolina, the outrageous torts exception to arbitration enforcement). The exception established that outrageous torts, which were unforeseeable to the reasonable consumer and legally distinct from the contractual relationship between the parties, were not subject to arbitration. *See Aiken*, 373 S.C. at 151–52, 644 S.E.2d at 709. While this Court has continued to apply this standalone exception to arbitration enforcement, recent United States Supreme Court precedent requires us to reexamine its viability.

In *AT&T Mobility, L.L.C. v. Concepcion*, the Supreme Court reiterated its position that "courts must place arbitration agreements on equal footing with other contracts, ... and enforce them according to their terms[.]" 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *Volt Info. Scis, Inc.*, 489 U.S. at 478, 109 S.Ct. 1248). The *Concepcion* decision further explained that the Federal Arbitration Act ("FAA") permits arbitration agreements to be invalidated by "generally applicable contract defenses," such as fraud, duress, or unconscionability, but not by defenses that apply solely to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.[5] *See* 131 S.Ct. at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (finding courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions); ***10** *Perry v. Thomas*, 482 U.S. 483, 492–93, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (finding state law, whether of legislative or judicial origin, is applicable only if it arose to govern issues concerning contract validity, revocability, and enforceability, and state-law principles that take their meaning from the fact that an arbitration agreement is at issue does not comport with the requirements of the FAA) (citation omitted)); *see also Nitro–Lift Techs., L.L.C. v. Howard*, —— U.S. ——, 133 S.Ct. 500, 502, 184 L.Ed.2d 328 (2012) (reiterating that state supreme courts must adhere to United States Supreme Court's interpretations of the FAA).

The Supreme Court recently reconfirmed the obligation state courts have to apply *Concepcion*, and ensure arbitration agreements are "on equal footing with all other contracts." *See DIRECTV, Inc. v. Imburgia*, —— U.S. ——, 136 S.Ct. 463, 468, 193 L.Ed.2d 365 (2015) ("No one denies that lower courts must follow this Court's holding in *Concepcion*.... Lower court judges are certainly free to note their disagreement with a decision of this Court... But the Supremacy Clause forbids state courts to dissociate themselves from federal law... The Federal Arbitration Act is a law of the United States, ****133** and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." (citing U.S. Const., Art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 371, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990); *Khan v. State Oil Co.*, 93 F.3d 1358, 1363–1364 (C.A.7 1996), *vacated*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997))). In finding California state courts failed to meet the requirements set forth in *Concepcion*, and, therefore, the arbitration agreement at issue was enforceable, the Supreme Court found, in relevant part:

> [S]everal considerations lead us to conclude that the court's interpretation of this arbitration contract is unique, restricted to that field.... The language used by the Court of Appeal focused only on arbitration.... Framing that question in such terms, rather than in generally applicable terms, suggests that the Court of Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration.... [T]here is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation

> of [the phrase at issue] in other contexts.... The fact that we ***11** can find no similar case interpreting [the phrase at issue] ... indicates, at the least, that the antidrafter canon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.

DIRECTV, 136 S.Ct. at 469–71 (citing 9 U.S.C. § 2; *Buckeye Check Cashing, Inc.*, 546 U.S. at 443, 126 S.Ct. 1204; *Volt Info. Scis, Inc.*, 489 U.S. at 476, 109 S.Ct. 1248; *Perry*, 482 U.S. at 493, n.9, 107 S.Ct. 2520).

Analogous to *DIRECTV*, the application of the outrageous torts exception in South Carolina is "unique," and "restricted" to the field of arbitration. Comparable to the analysis provided in *DIRECTV* in finding California courts failed to place arbitration on equal footing with other contracts, the language of every outrageous torts exception case published by this Court has focused explicitly on arbitration. Further, comparable to the analysis in *DIRECTV*, this Court has never used the terminology associated with, or applied the principle of, the outrageous torts exception outside the context of arbitration enforcement.[6] Because the outrageous torts exception is not a ***12** general contract principle, but instead one that has been applied only to arbitration clauses, I find the exception inconsistent with *Concepcion* and its supporting federal jurisprudence. Accordingly, to the extent South Carolina cases apply the outrageous torts exception, I would now overrule ****134** those cases and find the trial court erred by determining the exception precluded enforcement of the arbitration clause.[7]

III. Unconscionability

As an additional sustaining ground, the Parsons ask this Court to find the arbitration clause is unconscionable. *Cf. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000) (noting the decision to review an additional sustaining ground is discretionary). We find the Parsons' arguments as to unconscionability are without merit. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–69 (explaining unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999))); *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) ***13** (citation omitted) ("Unconscionability has been recognized 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.").

CONCLUSION

We reverse the Court of Appeals' decision upholding the circuit court's finding that because the arbitration clause was located within the Warranty, its scope was limited to the terms of the Warranty. Further, while the majority of this Court finds the outrageous torts exception to arbitration remains viable, I would hold the exception cannot survive in light of *Concepcion*, 563 U.S. 333, 131 S.Ct. 1740. Finally, we find the Parsons' unconscionability argument is without merit. Accordingly, we find the Court of Appeals erred in affirming the circuit court's refusal to enforce the arbitration clause.

The Court of Appeals' decision is therefore

REVERSED.

KITTREDGE, J., concurs. HEARN, J., concurring in part and dissenting in part in a separate opinion in which BEATTY, J., concurs. Acting Justice Jean H. Toal, dissenting in a separate opinion.

JUSTICE HEARN:

With great respect, I concur in result with the majority. However, I write separately to concur in part and dissent in part from both the majority opinion and the dissent.

[9] I agree with the majority that the scope of the arbitration clause covers the claims against JWH. However, I also agree with the dissent that the outrageous and unforeseeable torts exception remains a viable principle of law after *Concepcion*,[8] because it embodies a generally applicable contract principle: effectuating the intent of the parties. In my opinion, abolishing the "exception"—allegedly applicable only to arbitration[9] ***14** —could lead to absurd results, such as ****135** forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement. *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) ("Even though there is [a] presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties." (citation omitted) (internal quotation and alteration

marks omitted)); *see also, e.g.*, *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (explaining a contract "interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided"); *cf. Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008) (stating the Court will refuse to interpret statutory language in a manner that would lead to an absurd, and clearly uncontemplated, result (citation omitted)).

Nonetheless, I disagree with the dissent that the outrageous and unforeseeable torts exception applies here to bar JWH's demand for arbitration. In a residential purchase agreement, it is entirely foreseeable that a seller would fail to disclose defects with the property.[10]

***15** More importantly, in examining the scope of arbitration agreements, this Court has traditionally considered whether a "significant relationship" exists between the claims asserted and the contract in which the arbitration clause is contained. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 598, 553 S.E.2d 110, 119 (2001); *see also Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 150, 644 S.E.2d 705, 708 (2007) (stating the significant relationship test is not a mere "but-for" causation standard). Thus, the Court must determine "whether the particular tort claim is so interwoven with the contract that it could not stand alone." *Zabinski*, 346 S.C. at 597 n.4, 553 S.E.2d at 119 n.4. In fact, the Court has specifically stated the outrageous and unforeseeable torts exception sought only "to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." *Aiken*, 373 S.C. at 152, 644 S.E.2d at 709.

Accordingly, in this instance, I believe the correct inquiry is whether JWH's alleged fraud in failing to disclose the presence of hazardous waste on the property is essentially a freestanding tort that is not significantly related to the sales contract and arbitration agreement between JWH and the Parsons. I would find there is a significant relationship between the claim and ****136** the contract in which the arbitration agreement is contained. The Parsons could not bring their claim against JWH absent the sales contract, as the claim is entirely reliant on the parties' statuses under the contract. In other words, absent the sales contract, JWH would be under no duty to disclose these particular defects with the property to the Parsons or any other third-party.

***16** Therefore, I would find the outrageous and unforeseeable torts exception, while a viable principle of law, does not apply to bar JWH's demand for arbitration here due to the significant relationship between the claims and the contract in which the arbitration agreement is contained. Accordingly, I concur in result with the majority to reverse the denial of JWH's motion to compel arbitration.

BEATTY, J., concurs.

ACTING JUSTICE TOAL:

I respectfully dissent. I disagree that the outrageous and unforeseeable tort exception is not a general contract principle. Accordingly, I believe the majority errs in overruling previous South Carolina cases that apply the exception. Moreover, the majority's opinion undermines the protections the Court has previously extended to homebuyers in *Kennedy v. Columbia Lumber & Manufacturing Co.*[11] and its progeny. *See, e.g.*, *Smith v. Breedlove*, 377 S.C. 415, 422–24, 661 S.E.2d 67, 71–72 (2008). Therefore, I dissent.

I. General Contract Principles

In "overrul[ing] the judiciary's long-standing refusal to enforce agreements to arbitrate," the United States Supreme Court has held numerous times that arbitration agreements must be placed "upon the same footing as [all] other contracts." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) (citations omitted) (internal quotation marks omitted). Accordingly, the Federal Arbitration Act (FAA)[12] "imposes certain rules of fundamental importance, including the basic [contract] precept that arbitration 'is a matter of consent, not coercion.' " *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010) (quoting *Volt*, 489 U.S. at 479, 109 S.Ct. 1248); *see also Volt*, 489 U.S. at 478, 109 S.Ct. 1248 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding ***17** certain claims from the scope of their arbitration agreement." (internal citations omitted)).[13] Similarly, as with all other contracts, when a court interprets an arbitration agreement, " 'the parties' intentions control' " such that the court's interpretation merely " 'give[s] effect to the contractual rights and expectations of the parties.' " *Stolt–Nielsen*, 559 U.S. at 681–82, 130

S.Ct. 1758 (quoting *Volt*, 489 U.S. at 479, 109 S.Ct. 1248; *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

As I read our precedents, the so-called "outrageous and unforeseeable tort exception to arbitration" is merely a label for this Court's application of a longstanding contract principle—effectuating the parties' contractual expectations. In the past, when the Court invoked the exception, it merely recognized that upon executing the arbitration agreement, the parties did not intend to arbitrate claims arising out of the other party's extreme and unforeseeable conduct. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) ("Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."); *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 115, 739 S.E.2d 209, 217 (2013) ("[E]ven the broadest of [arbitration] clauses have their limitations."); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 492, 689 S.E.2d 602, 604 (2010). In other words, absent evidence to the contrary, parties do not intend to arbitrate wholly unexpected, outrageous behavior. *Timmons v. Starkey*, 389 S.C. 375, 379, 698 S.E.2d 809, 811 (2010) (Toal, C.J., dissenting) ("An arbitration clause does not cover every potential suit between the signing parties; instead, it only applies to those claims foreseeably arising from the contractual relationship.").[14] Forcing the ***18** parties to ****137** arbitrate claims based on such behavior would be contrary to their intent in entering the arbitration agreement, and would impose the *court's* will upon the parties.

Accordingly, I disagree with the majority's assertions that the outrageous and unforeseeable tort exception to arbitration is not a general contract principle. In my view, the exception treats arbitration agreements and contracts precisely equally. Specifically, the exception ensures that a court will consider the parties' intentions when it determines the scope of the agreement at issue, be it contract or arbitration agreement. *See Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007) ("Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that [the plaintiff] did not intend to agree to arbitrate the claims she asserts in the instant case [because those claims are based on the defendant's allegedly outrageous and unforeseeable behavior]."); *cf. Volt*, 489 U.S. at 478, 109 S.Ct. 1248 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so ...." (citations omitted)).

In fact, many courts have recognized that outrageous and unforeseeable conduct is generally not arbitrable. *See, e.g.*, *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204 (11th Cir. 2011) (holding that claims of false imprisonment, intentional infliction of emotional distress, spoliation of evidence, invasion of privacy, and fraudulent misrepresentation were outside the scope of an arbitration clause in an employment agreement between the cruise line and a crewmember who claimed she was drugged and raped by fellow crewmembers); *cf. Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) ***19** ("Whether a party has agreed to arbitrate an issue is *a matter of contract interpretation* and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." (emphasis added) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960))) (internal marks omitted)). The majority suggests that considering the scope of the arbitration agreement is a new concept "created in 2007," and that South Carolina disproportionately invalidates arbitration agreements based on conduct falling outside the scope of the contract. I strongly disagree with this contention. *Cf. Stolt–Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758 (rejecting the view that once an entitlement to arbitration is established, any claim may be arbitrated). Merely because this Court attributed a formal label to the concept of considering the scope of an arbitration agreement is no reason to invalidate the rationale underlying the label.

It appears that the majority approves of considering the parties' intentions in determining the scope of the agreement, but takes issue with the exception because of its label—the outrageous and unforeseeable tort exception *to arbitration*. However, this label is a misnomer. The analysis underlying the exception—defining the scope of the agreement by effectuating the parties' contractual expectations—is equally applicable to contracts and arbitration agreements.

Accordingly, I disagree that the Court should abolish this analytical process in future cases. Abolishing the outrageous and unforeseeable tort exception effectively places arbitration

agreements in a position of vast superiority to all other contracts. In essence, arbitration agreements now become "super contracts," in which the parties' intentions in outlining the scope of their agreement are irrelevant, and courts must now **138 indiscriminately send parties to arbitration regardless of their intentions. As stated previously, this blind imposition of judicial might on the parties not only lacks a legal foundation, but takes the Supreme Court's directives to enforce arbitration agreements to irrational lengths. *See Stolt–Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758 ("It falls to courts and arbitrators to give effect to the[ ] contractual limitations, and when doing *20 so, courts and arbitrators must not lose sight of the purpose of the exercise: *to give effect to the intent of the parties*." (emphasis added)).[15]

II. Application

South Carolina courts have applied the outrageous and unforeseeable tort exception sparingly and are reluctant to declare the tortious conduct underlying a lawsuit to be unrelated to the contract containing the arbitration agreement.[16] In *21 determining whether the exception applies, a court should focus on the parties' intent, the foreseeability of a particular claim when the parties entered into the agreement, and whether or not the specific claims fall within the scope of the arbitration agreement, either expressly or because they significantly relate to the contract. *See Chassereau*, 373 S.C. at 172–73, 644 S.E.2d at 720–21.

Here, the gravamen of the complaint is that JWH failed to disclose certain defects with the property, including industrial pipes and a concrete box containing a hazardous substance. As explained further, *infra*, it is unreasonable and unforeseeable that JWH would fail to clean up such extreme pollution on a residential construction site. *Cf. Kennedy*, 299 S.C. at 344, 384 S.E.2d at 736 ("We **139 have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce." (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968))). Therefore, it is inconceivable that the parties contemplated claims involving hazardous pollution on the construction site when executing their arbitration agreement. Accordingly, I would not compel arbitration of these particular claims, as doing so would not fulfill the parties' expectations in entering the arbitration agreement.

III. Residential Construction Arbitration Agreements

Although the primary issue in this appeal involves the enforceability of an arbitration agreement, the entire lawsuit *22 arose due to extreme defects concealed during JWH's construction of a home. Because the case involves residential construction, the protections this Court has previously extended to homebuyers in *Kennedy* and the like impose an extra "gloss" on the relevant analysis, one which the majority overlooks.

South Carolina courts have historically been inclined to expand general contract and tort principles to protect innocent homebuyers. *See, e.g.*, *Kennedy*, 299 S.C. at 343–44, 384 S.E.2d at 735–36; *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 501–03, 229 S.E.2d 728, 730–31 (1976) ("Disparity in the law should be founded upon just reason and not the result of adherence to stale principles which do not comport with current social conditions."); *Rogers v. Scyphers*, 251 S.C. 128, 132–34, 135–36, 161 S.E.2d 81, 83, 84–85 (1968). To that end, South Carolina courts embraced the maxim *caveat venditor*, or "seller beware," and abolished the requirement of strict privity between a home purchaser and a homebuilder. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007); *Kennedy*, 299 S.C. at 343, 344–45, 384 S.E.2d at 735, 736; *see also Sapp v. Ford Motor Co.*, 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (discussing *Kennedy* and noting that its holding "followed cases from around the country expanding protections afforded to homebuyers and imposing tort liability on residential homebuilders"). Thus, in cases involving residential construction contracts, general contract and tort principles occasionally give way to the State's dual policies of protecting the homebuyer and making it easier for that buyer to pursue claims against the builder or seller.

Because *Kennedy* and its progeny explicitly apply only to residential construction *contracts*, this Court has not previously had occasion to address how this line of cases applies to residential construction *arbitration agreements*. However, again, the Supreme Court has held numerous times that arbitration agreements must be placed "upon the same footing as [all] other contracts." *Volt*, 489 U.S. at 478, 109 S.Ct. 1248 (citations omitted) (internal quotation marks omitted). Thus, I conclude that South Carolina's longstanding policy of protecting innocent homebuyers extends to arbitration agreements involving residential construction as well. *See Perry v. Thomas*, 482 U.S. 483, 492–93 n.9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) *23 ("Thus state law,

whether of legislative or judicial origin, is applicable [to arbitration agreements] *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.... **A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law**." (bold emphasis added)).[17] Accordingly, as in all other residential construction cases, I would extend this Court's protection to the Parsons, as the innocent homebuyers.[18]

In the arbitration context, I believe this protective "gloss" specifically applies to ****140** whether the homebuilder's conduct is outrageous, unforeseeable, and not contemplated by the parties when entering into the residential construction contract. Thus, as applied here, *Kennedy* and its progeny lead me to find that JWH's failure to disclose the extreme pollution and defects with the property was not only unreasonable, but unforeseeable as well. As stated, *supra*, I would therefore refuse to compel arbitration between the parties, as claims based on such outrageous conduct by a homebuilder surely were not contemplated by the parties.

IV. Conclusion

I believe the outrageous and unforeseeable tort exception to arbitration is merely a label for a general contract principle: effectuating the contractual expectations of the parties. Therefore, I would adhere to the Court's previous holdings that the exception may invalidate an arbitration agreement if certain criteria are met. Further, I would extend the protections of *Kennedy* and its progeny to arbitration agreements involving residential construction. Accordingly, I dissent.

All Citations

418 S.C. 1, 791 S.E.2d 128

Footnotes

1 The Parsons paid $621,102 for the Property, which was financed by the other defendants named in the lawsuit.

2 The cleanup cost JWH approximately $500,000. In addition to the PVC pipes and box, the cleanup revealed a twelve-inch cast iron pipe associated with the prior industrial site running the length of the Property. The cleanup further revealed pipes within the foundation of the Parsons' home, some of which were unable to be removed; therefore, they were capped and remain on the Property.

3 *See, e.g.*, *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Timmons v. Starkey*, 389 S.C. 375, 698 S.E.2d 809 (2010); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010); *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Simpson v. World Fin. Corp. of South Carolina*, 373 S.C. 178, 644 S.E.2d 723 (2007); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 666 S.E.2d 294 (Ct. App. 2008).

4 We note the circuit court did not explain how the outrageous torts doctrine precluded arbitration of the Parsons' non-tort claims.

5 It is undisputed that the arbitration clause at issue is governed by the FAA.

6 The dissent argues the "outrageous and unforeseeable tort exception to arbitration" is a general contract principle but fails to cite any cases outside the realm of arbitration where outrageous and unforeseeable conduct has been applied as an exception to contract enforcement. This exception was created in 2007, and has only been applied not to void a contract itself, but instead to change the forum from arbitration to the courtroom based on the outrageous manner in which the underlying contract was breached. The *Concepcion* Court specifically addressed the issue of state laws that appear to apply to "any" contract, but in practice have a disproportionate impact on arbitration clauses, and held such disproportionate application "stands as an obstacle to the accomplishment of the FAA's objectives." Therefore, if the dissent were correct that the outrageous torts exception is a general contract principle, it is so disproportionately applied in South Carolina that it unquestionably stands as an obstacle to the FAA's cited objectives in violation of *Concepcion*.

Additionally, the dissent contends our opinion "fails to accurately relay the facts and holding of [*DIRECTV*]." To clarify, the second and third sentences of the *DIRECTV* opinion reveal that the question before the Supreme Court in *DIRECTV* was decidedly the same question before this Court: "We here consider a California court's refusal to enforce an arbitration provision in a contract. In our view, that decision does not rest 'upon such grounds as exist ... for the revocation of any contract,' and we consequently set that judgment aside." *See DIRECTV*, 136 S.Ct. at 464. Contrary to the dissent's reliance on one of six grounds provided in *DIRECTV* regarding how the California courts erred, our opinion relies on the grounds which lend general guidance as to determining whether an arbitration clause is being placed on equal footing with all other contracts. Accordingly, because the *DIRECTV* analysis we rely upon is not contingent upon the facts, we need not provide a detailed recitation thereof.

In regard to the dissent's proposition that *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 384 S.E.2d 730 (1989), should be extended to arbitration enforcement, nothing in our opinion impacts a homebuyers rights to sue in warranty or in tort, and we refuse to extend the narrow substantive holdings in *Kennedy* to the issue of arbitration enforcement before the Court in this case.

7 We note that JWH argues the Court of Appeals erred by failing to address the trial court's ruling as to the outrageous torts exception doctrine. Because the Court of Appeals affirmed the circuit court on the scope issue, we find JWH's argument is without merit. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (citation omitted) (noting an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive). Further, because we find the circuit court erred in its ruling as to the scope of the arbitration clause, we address the outrageous torts issue without a remand to the Court of Appeals in the interest of judicial economy. *See Furtick v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 352 S.C. 594, 599, 576 S.E.2d 146, 149 (2003) (addressing the merits of a claim in the interest of judicial economy).

8 *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

9 To the extent the majority may consider this exception only applicable to arbitration, I wish to note my disagreement and clarify my understanding of the concept. I believe, despite its name, the legal principles underlying the outrageous and unforeseeable torts exception are equally applicable to contracts and arbitration agreements. Thus, if a litigant files a breach of contract suit for behavior not contemplated by the parties upon entering the contract, I believe this exception would provide the opposing party a defense to the breach of contract claim. Similarly, if a litigant attempts to defend himself by asserting an arbitration defense to a claim that does not fall within the scope of the arbitration agreement (perhaps because it was not contemplated by the parties upon entering the contract), I likewise believe this exception could provide the opposing party a defense to the demand for arbitration.

10 Numerous lawsuits in our state involve a seller's failure to disclose. *See, e.g.*, *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 193 S.E.2d 124 (1972) (involving a homebuyer's complaint that the seller failed to disclose that the residence's lot was filled with unsuitable material and "capped" with clay); *Cohen v. Blessing*, 259 S.C. 400, 192 S.E.2d 204 (1972) (involving a homebuyer's complaint that the seller deliberately failed to disclose that the residence was infested with insects); *Winters v. Fiddie*, 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011) (involving a homebuyer's complaint that the seller failed to disclose the presence of toxic mold in a house prior to closing). As such, it cannot come as a complete shock should a particular seller fail to disclose a defect to a particular buyer. In fact, the General Assembly has expressly provided a remedy in such an event, further supporting the idea that a seller's failure to disclose is a foreseeable, albeit regrettable, possibility. *See, e.g.*, S.C. Code Ann. § 27–50–65 (2007) (permitting recovery of actual damages, court costs, and attorneys' fees against a seller who knowingly fails to disclose "any material information on the disclosure statement that he knows to be false, incomplete, or misleading").

11 299 S.C. 335, 384 S.E.2d 730 (1989).

12 9 U.S.C. §§ 1–16 (2006).

13 However, given the strong federal and state policies favoring arbitration, a court should generally compel arbitration "[u]nless [it] can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute." *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603–04 (2010).

14 *Cf. Landers*, 402 S.C. at 115, 739 S.E.2d at 217 (finding claims arbitrable in part because the plaintiff provided a "clear nexus" between the contract, its arbitration clause, and the causes of action, such that they were all significantly related); *Mibbs, Inc. v. S.C. Dep't of Rev.*, 337 S.C. 601, 608, 524 S.E.2d 626, 629 (1999) (finding that contractual duties may be affected by foreseeable actions taken in the future); *S.C. Fed. Sav. Bank v. Thornton–Crosby Dev. Co.*, 303 S.C. 74, 78–79, 399 S.E.2d 8, 11–12 (Ct. App. 1990) (acknowledging that a party could defend itself from a breach of contract suit in part if a consequence of the breach was unforeseeable).

15 In an effort to shore up its analysis, the majority cites to the recent Supreme Court holding in *DIRECTV, Inc. v. Imburgia*, —— U.S. ——, 136 S.Ct. 463, 193 L.Ed.2d 365 (2015). However, despite its use of selective quotes from the opinion, the majority fails to accurately relay the facts and holding of that case. As the *Imburgia* opinion sets forth in detail, in 2005, the California Supreme Court held that a waiver of class arbitration in a consumer contract of adhesion is unconscionable under California law, and thus unenforceable. *Id.* at 466 (quoting *Discover Bank v. Superior Court*, 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005)). However, in *AT&T Mobility L.L.C. v. Concepcion*, the Supreme Court specifically invalidated California's so-called *Discover Bank* rule, holding that it was preempted by the FAA because it stood " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Id.* (quoting *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333, 352, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011)). Nonetheless, in *Imburgia*, the California Court of Appeal held that California law " 'would find the class action waiver unenforceable,' " citing to the *Discover Bank* rule. *Id.* at 467, 30 Cal.Rptr.3d 76, 113 P.3d (quoting *Imburgia v. DIRECTV, Inc.*, 225 Cal.App.4th 338, 170 Cal.Rptr.3d 190, 194 (2014)).

On appeal, the Supreme Court invalidated the decision of the California Court of Appeal, stating, among various other rationale:

> Fifth, the Court of Appeal reasoned that invalid state arbitration law, namely the *Discover Bank* rule, maintained legal force despite this Court's holding in *Concepcion*. The court stated that "[i]f we apply state law alone to the class action waiver, then the waiver is unenforceable." And at the end of its opinion, it reiterated that "[t]he class action waiver is unenforceable under California law, so the entire arbitration agreement is unconscionable." But those statements do not describe California law. *The view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept as a general matter and to apply in other contexts.*

Imburgia, 136 S.Ct. at 470 (emphasis added) (internal citations and alteration marks omitted). Thus, *Imburgia* stands merely for the unsurprising proposition that the Supremacy Clause forbids state courts from ignoring the specific holdings of the Supreme Court.

16 In fact, this Court has cautioned that the exception should not be used as an "end-run" around arbitration clauses. *See Partain*, 386 S.C. at 494, 689 S.E.2d at 605. Only when the parties *truly* and *clearly* did not contemplate arbitrating a particular claim should a court decline to enforce an otherwise proper arbitration agreement on the grounds that the claim is not significantly related to the contract. *Id.* at 494–95, 689 S.E.2d at 605; *compare Landers*, 402 S.C. at 100, 739 S.E.2d at 209 (finding the slander and intentional infliction of emotional distress claims brought by a man who was fired significantly related to his employment contract that specified grounds and remedies for rightful and wrongful termination because the offensive comments related to the man's purported inability to do his job), *with Partain*, 386 S.C. at 488, 689 S.E.2d at 602 (finding that a claim involving a "bait and switch" in relation to a used car purchase was outrageous and unforeseeable and thus was not subject to arbitration), *and Chassereau*, 373 S.C. at 168, 644 S.E.2d at 718 (finding a claim for extensive public harassment of a customer was not significantly related to the contract to pay for a pool, and thus was not subject to arbitration).

17 Were I to conclude that *Kennedy*'s protections did not extend to homebuyers whose contracts involved an arbitration agreement, I would place those arbitration agreements in a position of vast superiority over contracts, rather than treating them equal to contracts.

18 In failing to extend *Kennedy*'s protection to the Parsons here, the majority opinion undermines our extensive precedent in the residential construction context.

End of Document

4. *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 908 S.E.2d 892 (Ct. App. 2024), reh'g denied (Nov. 13, 2024), cert. granted (June 25, 2025)

Palmetto Bluff is a planned residential community in Beaufort, South Carolina. Buyers are required to join the Palmetto Bluff Club (the Club). The Club holds the power to unilaterally change its fees and policies. The Club Membership Agreement includes an arbitration clause, requiring all claims relating to the Agreement to be subject to arbitration. The Club planned to implement changes that would restrict some of the homeowners' short-term tenants' access to and use of the Club's facilities.

The court held it must consider the validity of the arbitration clause when challenged on the grounds of unconscionability rather than an arbitrator, even if the clause delegates the issue to an arbitrator. The court then examined unconscionability relating to the Agreement. It found the Agreement to be unconscionable due to the absence of bargaining power between the Club and its members.

The court then examined the oppressiveness of the terms of the Agreement. It found that although the unilateral modification clause was located outside of the arbitration provision, it applied to the entire document, making it part of the arbitration agreement. The court held the unilateral modification exemplified the one-sidedness of the terms. In addition, the agreement barred awards for "consequential, lost profits, diminution in value, lost opportunity, intangible, emotional, trebled, enhanced[,] or punitive damages," which would strip Plaintiffs of their statutory right to treble damages under SCUPTA. The court found no reasonable person would agree to these terms. Accordingly, the court affirmed the circuit court's order denying the motion to compel arbitration.

KeyCite Yellow Flag
Certiorari Granted June 25, 2025

444 S.C. 521
Court of Appeals of South Carolina.

315 CORLEY CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives, as set forth herein, Respondents/Appellants,

v.

PALMETTO BLUFF DEVELOPMENT, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners, LLC; John Does 1-25, Appellants/Respondents.

Appellate Case No. 2022-001587
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Opinion No. 6074
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Heard June 4, 2024
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Filed July 24, 2024
|
Withdrawn, Substituted, and Refiled November 13, 2024
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Rehearing Denied November 13, 2024
|
Certiorari Granted June 25, 2025

Synopsis

Background: Owners of residential property within a development brought action against developer and various entities engaged in development, management, and sale of property for the development, alleging that arbitration agreement in membership agreement of for-profit club managed by developer and other entities, which required owners to join as a condition of purchasing property in the development, was unconscionable. The Court of Common Pleas, Beaufort County, R. Ferrell Cothran, Jr., J., 2022 WL 20830050, granted owners' motion to stay arbitration, denied developer and other entities' motion to compel arbitration, and denied owners' motion for partial summary judgment. Developer and other entities appealed and owners cross-appealed.

Holdings: The Court of Appeals, Geathers, J., held that:

[1] South Carolina Uniform Arbitration Act (SCUAA), rather than Federal Arbitration Act (FAA), applied;

[2] question of arbitration agreement's existence was properly before the circuit court, rather than an arbitrator; and

[3] arbitration agreement in membership agreement of for-profit club managed by developer and other entities was unconscionable.

Affirmed; cross-appeal dismissed.

West Headnotes (16)

[1] **Alternative Dispute Resolution** Scope and standards of review

Appeal from denial of motion to compel arbitration is subject to de novo review.

1 Case that cites this headnote

[2] **Alternative Dispute Resolution** Scope and standards of review

Circuit court's factual findings on motion to compel arbitration will not be reversed on appeal if any evidence reasonably supports those findings.

1 Case that cites this headnote

[3] **Alternative Dispute Resolution** What law governs

South Carolina Uniform Arbitration Act (SCUAA), rather than Federal Arbitration Act (FAA), applied in action brought by owners of residential property within a development against developer and various entities engaged in development, management, and sale of property for development, alleging that arbitration clause in membership agreement of for-profit club, which was managed by developer and other entities and required owners to join as a condition of purchasing property in the development, was invalid; arbitration agreement explicitly required application of South Carolina law. 9 U.S.C.A. § 1 et seq.; S.C. Code Ann. § 15-48-10 et seq.

[4] **Alternative Dispute Resolution** What law governs

Parties are free to enter into contract providing for arbitration under rules established by state law rather than rules established by Federal Arbitration Act (FAA); the dispositive question is whether the parties intended to be bound by federal or state arbitration law. 9 U.S.C.A. § 1 et seq.

[5] **Alternative Dispute Resolution** Existence and validity of agreement

Question of arbitration agreement's validity was properly before the circuit court, rather than an arbitrator, in action brought by owners of residential property within a development against developer and various entities engaged in development, management, and sale of property for development, alleging that arbitration clause in membership agreement of for-profit club managed by developer and other entities, which required owners to join as a condition of purchasing property in the development, was unconscionable; owners' attack on arbitration agreement as unconscionable challenged formation of the agreement rather than its validity because challenges to an arbitration provision on grounds of unconscionability brought into question whether it even existed in the first place. S.C. Code Ann. § 15-48-20(a).

[6] **Alternative Dispute Resolution** Arbitrability of dispute

Parties can delegate questions of arbitrability, such as question of whether arbitration agreement is valid, to arbitrator.

[7] **Alternative Dispute Resolution** Existence and validity of agreement

If arbitration provision is challenged on grounds of unconscionability, question of clause's validity is for courts to decide, even if clause delegates issues of validity by incorporating American Arbitration Association's commercial arbitration rules.

[8] **Alternative Dispute Resolution** Unconscionability

An arbitration agreement is "unconscionable" if there is (1) an absence of meaningful choice in entering the agreement and (2) oppressive and one-sided terms.

[9] **Alternative Dispute Resolution** Unconscionability

Arbitration agreement in membership agreement of for-profit club managed by developer and various entities engaged in development, management, and sale of property for residential development, which required owners of property in the development to join as a condition of purchasing property, was characterized by an

absence of meaningful choice, as required to support finding that arbitration agreement was unconscionable; agreement was one of adhesion, in that agreement to the terms of the club documents was automatic and mandatory when purchasing a home in the development, and there was no conceivable potential for bargaining power on the part of owners whom provisions purported to bind.

[10] **Alternative Dispute Resolution** Unconscionability

Whether one party lacks meaningful choice in entering arbitration agreement, as required to render agreement unconscionable, typically speaks to fundamental fairness of bargaining process; to this end, courts consider, among other things, relative disparity in parties' bargaining power, parties' relative sophistication, whether parties were represented by independent counsel, and whether plaintiff is substantial business concern.

[11] **Contracts** Adhesion contracts; standardized contracts

"Contracts of adhesion" are standard form contracts offered on take-it-or-leave-it basis with terms that are not negotiable.

1 Case that cites this headnote

[12] **Contracts** Adhesion contracts; standardized contracts

Contracts Unconscionable Contracts

Contracts of adhesion are not per se unconscionable; instead, adhesive contracts are not unconscionable in and of themselves so long as terms are even-handed.

2 Cases that cite this headnote

[13] **Contracts** Procedural unconscionability

In determining whether contract was tainted by absence of meaningful choice, as required to render contract unconscionable, courts should take into account nature of injuries suffered by plaintiff; whether plaintiff is substantial business concern; relative disparity in parties' bargaining power; parties' relative sophistication; whether there is element of surprise in inclusion of challenged clause; and conspicuousness of clause.

[14] **Alternative Dispute Resolution** Unconscionability

Arbitration agreement in membership agreement of for-profit club managed by developer and various entities engaged in development, management, and sale of property for residential development, which required owners of property in the development to join as a condition of purchasing property, was oppressive and one-sided, as required to support finding that arbitration agreement was unconscionable; agreement gave developer and entities sole and absolute discretion to unilaterally modify club documents and membership rules and regulations, although language permitting their unilateral modification was located outside the arbitration clause itself, it was not located in a separate policy, and agreement specifically prohibited award of treble damages, regardless of whether they were construed as compensatory or punitive. S.C. Code Ann. § 39-5-140(a).

[15] **Contracts** Substantive unconscionability

Terms of an agreement are unconscionably oppressive and one-sided when they are such that no reasonable person would make them and no fair and honest person would accept them.

2 Cases that cite this headnote

[16] **Appeal and Error** Determining action and preventing judgment

Order denying summary judgment is never reviewable on appeal.

1 Case that cites this headnote

**894 Appeal From Beaufort County, R. Ferrell Cothran, Jr., Circuit Court Judge

Attorneys and Law Firms

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Ian S. Ford, Ainsley Fisher Tillman, and Hunter H. James, all of Ford Wallace Thomson LLC, of Charleston, for Respondents/Appellants.

Opinion

GEATHERS, J.:

*525 In these cross-appeals, Appellants/Respondents Developers (the Defendants) appeal the circuit court's order refusing to compel arbitration in a dispute arising from several contracts underlying the Defendants' sale of real estate in the Palmetto Bluff Development to Respondents/Appellants Homeowners (the Plaintiffs). The Plaintiffs cross-appeal the circuit court's order denying summary judgment for their declaratory judgment action. We affirm the circuit court's order denying the Defendants' motion to compel arbitration and dismiss the Plaintiffs' cross-appeal.

***526 FACTS**

The Palmetto Bluff Development (Palmetto Bluff) is a planned residential community located in Beaufort. Purchasers of real estate in Palmetto Bluff are required to join the Palmetto Bluff Club (the Club) as a condition of purchasing property in the development; membership in the Club is purportedly automatic upon acceptance of a deed. Club membership is then further memorialized by the execution of a Club Membership Agreement, and the governing terms of the Club are set forth in the Club Membership Plan (collectively, the Club Documents). The Club is for-profit, is managed by the Defendants, and retains the power, according to the parties, to unilaterally change its fees and policies with no input from the Club's members.

The Club Membership Agreement includes the following arbitration clause:

> [A]ny and all controversies, disputes[,] or claims relating directly or indirectly to, or arising directly or indirectly from[,] this Membership Agreement, including, but not limited to, the breach or alleged breach of this Membership Agreement, shall be resolved by mandatory arbitration in accordance with the [rules of the American Arbitration Association (AAA) then in effect], applying the substantive laws of South Carolina.

**895 This provision was added on June 19, 2017, and the Club Membership Plan acknowledges that the provision consequently applies only to those who became Club members on or after this date. The arbitration clause is mirrored in the Club Membership Plan and forms the foundation for this appeal.

In July 2020, several of the Plaintiffs complained to the Defendants about changes the Club was planning to make that the Plaintiffs understood would, in some capacity, limit the ability of their short-term tenants to access and use the Club's facilities. Later, in October 2021, following failed mediation attempts, a larger group that included more of the Plaintiffs in the present action sent a letter disagreeing with the Defendants' assertion that the Defendants possessed the ability to implement such restrictions. After further mediation attempts, the Plaintiffs commenced this suit on April 12, 2022, asserting sixteen causes of action. Two days later, the Plaintiffs sent a *527 demand for arbitration to the AAA that included their complaint.

On May 10, 2022, the Plaintiffs asked the circuit court to stay arbitration and sought summary judgment on the alleged invalidity of the arbitration clause. On May 16, 2022, the Defendants answered the demand and filed a counterdemand with the AAA. The Defendants then asked the court to dismiss the action pursuant to Rule 12(b)(8), SCRCP, or, alternatively, to compel arbitration and stay the action.

Following several hearings, the circuit court issued an order on September 15, 2022, (1) granting the Plaintiffs' motion to stay arbitration, (2) denying the Defendants' motion to compel arbitration—in part because the arbitration agreement was unconscionable—and (3) denying, without prejudice, the Plaintiffs' motion for partial summary judgment. These appeals followed.

THE DEFENDANTS' ISSUES ON APPEAL

1. Did the circuit court err in ruling on the arbitrability of the claims rather than reserving this determination for an arbitrator?

2. Did the circuit court err in determining that an agreement to arbitrate does not exist between many of the parties?

3. Did the circuit court err in finding that any agreements to arbitrate that do exist are invalid, unlawful, and unconscionable?

4. Did the circuit court err in determining that the South Carolina Uniform Arbitration Act applies?

THE PLAINTIFFS' ISSUE ON APPEAL

1. Did the circuit court err in refusing to grant partial summary judgment to the Plaintiffs on their declaratory judgment claim?

STANDARD OF REVIEW

[1] **[2]** "Appeal from the denial of a motion to compel arbitration is subject to de novo review." ***528** *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005), *aff'd as modified on other grounds*, 373 S.C. 168, 644 S.E.2d 718 (2007). Nonetheless, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019); *see also Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664, 521 S.E.2d 749, 753 (Ct. App. 1999) ("[South Carolina] now join[s] the majority of jurisdictions granting deference to a circuit [court]'s factual findings made when deciding a motion to stay an action pending arbitration.").

LAW/ANALYSIS

I. THE DEFENDANTS' APPEAL

The Defendants appeal the circuit court's refusal to compel arbitration and argue that the arbitration agreement contained in the Club Documents requires all of the claims in this case to be arbitrated. We hold that (1) the circuit court was the proper adjudicator to determine whether a valid agreement to arbitrate existed and (2) the arbitration clause contained in the Club Documents is unconscionable and unenforceable.

****896 A. Federal Arbitration Act or the South Carolina Uniform Arbitration Act**

[3] **[4]** As a threshold matter, the Defendants contend that the Federal Arbitration Act (FAA)[1] governs this dispute rather than the South Carolina Uniform Arbitration Act (SCUAA).[2] "Parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001). "[T]he dispositive question is whether the parties intended to be bound by federal or state arbitration law." *Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 426, 434 S.E.2d 281, 283 (1993). Here, there is no ambiguity regarding whether the parties intended to be bound by federal or state arbitration ***529** law. The Membership Agreement contains more than a generic choice of law provision. The front page of the Membership Agreement states, underlined and in all capital letters, that "This membership agreement is subject to arbitration pursuant to South Carolina Code Section 15-48-10, et. seq." Because the Membership Agreement explicitly requires application of South Carolina arbitration law, we need not address any requirements for FAA coverage; instead, we hold that the SCUAA applies. *See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989).

B. Gateway Questions

[5] The parties disagree as to the question of who should resolve their claims—an arbitrator or a court. The Defendants argue that parties can agree to give the determination of an arbitration agreement's validity to an arbitrator and that the incorporation of the AAA rules in the arbitration agreement here did exactly that. We hold that the question of the arbitration agreement's validity was properly before the circuit court because our supreme court held that, under the SCUAA, courts must determine the enforceability of arbitration agreements challenged as unconscionable. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007).

[6] It is true that parties can delegate questions of arbitrability —such as the question of whether an arbitration agreement is valid—to an arbitrator. *See Aiken v. World Fin. Corp. of South Carolina*, 367 S.C. 176, 179, 623 S.E.2d 873, 874 (Ct. App.

2005) ("The question whether a claim is subject to arbitration is a matter [for] judicial determination, unless the parties have provided otherwise." (quoting *Chassereau*, 363 S.C. at 631, 611 S.E.2d at 307)); *see also Carson v. Giant Food, Inc.*, 175 F.3d 325, 329 (4th Cir. 1999) ("[T]he parties can agree to let an arbitrator determine the scope of his own jurisdiction."); *Coinbase, Inc. v. Suski*, 602 U.S. 143, 152, 144 S.Ct. 1186, 218 L.Ed.2d 615 (2024) (Gorsuch, J., concurring) ("[P]arties can agree to send arbitrability questions to an arbitrator ....").

***530** Further, Rule 7(a) of the AAA's Commercial Arbitration Rules—which, again, the parties incorporated into their agreement here—purports to do exactly that: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim, without any need to refer such matters first to a court." AAA, *R-7. Jurisdiction*, Commercial Arbitration Rules and Mediation Procedures, 14 (2022) www.adr.org/sites/default/files/Commercial-Rules_Web.pdf.

[7] However, in South Carolina, if an arbitration provision is challenged on grounds of unconscionability, the question of the clause's validity is for courts to decide, even if the clause delegates issues of validity by incorporating the AAA's Commercial Arbitration Rules. *Simpson*, 373 S.C. at 23–24, 644 S.E.2d at 668. In *Simpson*, the arbitration agreement stated that, in addition to certain disputes between the dealer (or its agents) and the customer, any dispute relating to "the validity and scope of this contract[ ] shall be settled by binding arbitration in accordance with the Commercial Arbitration ****897** Rules of the American Arbitration Association." *Id.* at 20, 644 S.E.2d at 666. But the court held that under S.C. Code Ann. § 15–48–20(a), "the trial court was the proper forum for determining the enforceability of the arbitration clause" because Plaintiffs "challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place."[3] ***531** *Id.* at 23, 644 S.E.2d at 668. The matter was therefore properly before the circuit court rather than an arbitrator.

C. Unconscionability

The circuit court concluded that the arbitration agreement in the Club Documents was unenforceable because it is unconscionable. We agree because the Plaintiffs lacked a meaningful choice in entering the agreement and the agreement—which can be unilaterally modified by the Defendants—improperly limits statutorily-mandated damages.

[8] An arbitration agreement is unconscionable if there is (1) an absence of meaningful choice in entering the agreement and (2) oppressive and one-sided terms. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016).

1. Absence of Meaningful Choice

[9] **[10]** **[11]** **[12]** **[13]** "Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process." *Id.* To this end, courts consider, among other things, "the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether 'the plaintiff is a substantial business concern.' " *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). Contracts of adhesion are "standard form contract[s] offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 373 S.C. at 26–27, 644 S.E.2d at 669 (quoting ***532** *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). However, "[a]dhesion contracts ... are not per se unconscionable." *Id.* at 27, 644 S.E.2d at 669. Instead, "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 614, 879 S.E.2d 746, 756 (2022). In *Simpson*, our supreme court further stated that "[t]he general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution." 373 S.C. at 29–30, 644 S.E.2d at 671.

> 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' ****898** relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Id. at 25, 644 S.E.2d at 669 (citation omitted) (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). Our supreme court has "taken judicial cognizance of the fact that a modern buyer of new residential housing

is normally in an unequal bargaining position as against the seller." *Smith*, 417 S.C. at 50, 790 S.E.2d at 4 (quoting *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989)). Here, the Defendants' reliance on the sophistication of the Plaintiffs as wealthy purchasers of secondary homes is misplaced in light of our supreme court's analysis in *Damico*:

> [T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar[, a real estate developer]. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions.

437 S.C. at 614–15, 879 S.E.2d at 756. The contract here is one of adhesion. Agreement to the terms of the Club Documents is automatic and mandatory when purchasing a home in Palmetto Bluff. As the circuit court aptly put it, "there is no conceivable potential for bargaining power on the part of those whom the provisions purport to bind." We hold that agreement to ***533** the arbitration clause in this case is characterized by an absence of meaningful choice on the Plaintiffs' part.

2. Oppressive and One-Sided Terms

[14] **[15]** Turning to the second prong of unconscionability, terms are unconscionably oppressive and one-sided when they are such that "no reasonable person would make them and no fair and honest person would accept them." *Id.* at 612, 879 S.E.2d at 755. The Club Documents in this case provide, "[The Defendants] reserve[ ] the right in [their] sole and absolute discretion, from time to time, to modify the Membership Plan and Rules and Regulations ... and to make any other changes to the Membership Documents ...." We are not satisfied with the Defendants' contention that the circuit court was forbidden from considering this provision because it is in the container contract rather than the arbitration clause itself. *Cf. Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543–44 (4th Cir. 2005) (applying Maryland law and refusing to invalidate an arbitration agreement for lack of consideration when language permitting one party to unilaterally amend the contract was not contained within the arbitration clause); *id.* at 544 ("[T]he district court simply was not at liberty to go beyond the language of the [a]rbitration [a]greement in determining whether the agreement contained an illusory promise."). Here, although the language permitting unilateral modification to the contract is located outside the arbitration clause itself, it is not located in a separate policy. Furthermore, it specifically states that the documents in which the arbitration agreement is located are subject in their entirety to the Defendants' unilateral ability to make changes. Therefore, it is part of the arbitration agreement. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) ("Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable *specifically relates to the arbitration provision*." (emphasis added) (quoting *Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003))); *see also Hicks v. Brookdale Senior Living Cmtys., Inc.*, No. 617-cv-2462-DCC-KFM, 2018 WL 4560591, at *4 (D.S.C. Mar. 13, 2018) (noting that in other cases before the United States ***534** District Court for the District of South Carolina, arbitration agreements were upheld when reservations of the power to unilaterally modify a contract were "contained in a *separate policy* and [were] not *directed specifically to the arbitration agreement*" (emphases added)); *cf. Coady v. Nationwide Motor Sales Corp.*, 32 F.4th 288, 292–93 (4th Cir. 2022) (concluding that, under Maryland Law, an acknowledgment receipt containing a clause permitting unilateral modification of the contract was part of the ****899** arbitration agreement because the agreement's language incorporated the receipt and the receipt served as the signature page for the agreement); *see generally Marcrum v. Embry*, 291 Ala. 400, 282 So.2d 49, 52 (1973) ("It is quite true that where one party reserves an absolute right to cancel or terminate a contract at any time, mutuality is absent."). As the circuit court recognized, this unilateral ability to modify any part of the contract—including as to the terms of existing contracts—speaks to the one-sidedness of the arbitration agreement.

Furthermore, the arbitration clause provides, "No consequential, lost profits, diminution in value, lost opportunity, intangible, emotional, trebled, enhanced[,] or punitive damages may be awarded in said arbitration." In *Simpson*, our supreme court struck down an arbitration agreement that prohibited the "award [of] punitive, exemplary, double, or treble damages (or any other damages [that] are punitive in nature or effect)" because the South Carolina Unfair Trade Practices Act (SCUTPA) "requires a court to award treble damages for violations of the statute."[4] 373 S.C. at 28–29, 644 S.E.2d at 670; *see also* S.C. Code Ann. § 39-5-140(a) (2023) (stating that on finding that a

violation of the SCUTPA was "willful or knowing[,] ... [a] court shall award three times the actual damages sustained."). Like in *Simpson*, the arbitration agreement in the Club Documents would deprive the Plaintiffs of their statutory right to treble damages for the SCUTPA claim that they bring. *See also* ***535** *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 88, 749 S.E.2d 139, 150 (Ct. App. 2013) (holding that an arbitration provision identical to the one in *Simpson* precluding treble damages was unconscionable).

The Defendants' reliance on *Rowe v. AT&T, Inc.*, a federal District Court case, is misplaced. No. 6:13-cv-01206-GRA, 2014 WL 172510 (D.S.C. Jan. 15, 2014). Citing to the U.S. Supreme Court in *PacifiCare Health System, Inc. v. Book*, the *Rowe* court wrote, "[I]n cases where it is uncertain how the arbitrator will construe remedial limitations, 'the proper course is to compel arbitration.' " *Id.* at *11 (quoting *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401, 407, 123 S.Ct. 1531, 155 L.Ed.2d 578 (2003)). In *PacifiCare*, the Supreme Court refused to invalidate an arbitration clause that potentially restricted the right to treble damages under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. 538 U.S. at 407, 123 S.Ct. 1531. The arbitration agreement in *PacifiCare* provided that (1) "punitive damages shall not be awarded [in arbitration]," (2) "[t]he arbitrators ... shall have no authority to award any punitive or exemplary damages," and (3) "[t]he arbitrators ... shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages." *Id.* at 405, 123 S.Ct. 1531 (alterations in original). The Supreme Court held the issue on appeal was unripe because it was speculative whether an arbitrator would construe treble damages as compensatory or punitive. *Id.* at 406–07, 123 S.Ct. 1531.

Here, there is no such uncertainty. The contract in the instant case specifically prohibits the award of treble damages, regardless of whether they are construed as compensatory or punitive.[5]

***536** In light of this limitation on damages and the Defendants' unilateral ability to modify the arbitration agreement, no reasonable person would make the present terms in this ****900** arbitration agreement, nor would any reasonable person accept them. Consequently, we hold that the arbitration agreement in the Club Documents is unconscionable.[6] As a result, we need not address the Defendants' remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) ("[An] appellate court need not address remaining issues when [resolution] of [a] prior issue is dispositive.").

II. THE PLAINTIFFS' APPEAL

[16] We dismiss the Plaintiffs' appeal of the circuit court's denial of its motion for summary judgment because, in South Carolina, "it is well-settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter County*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010); *see also Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial."); *Holloman v. McAllister*, 289 S.C. 183, 185–86, 345 S.E.2d 728, 729 (1986) ("Appellate review of orders denying motions for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless find himself losing on appeal because he failed to prove his case fully at the time of the motion.").

Although appellate courts have discretion to consider an order that is not immediately appealable if an immediately appealable issue is before the court and a ruling on appeal will ***537** avoid unnecessary litigation,[7] the supreme court did not intend for this exception to apply to orders denying summary judgment motions. *See Skywaves I Corp. v. Branch Banking and Trust Co.*, 423 S.C. 432, 460, 814 S.E.2d 643, 658 (Ct. App. 2018).

CONCLUSION

For the foregoing reasons, we **AFFIRM** the circuit court's order denying the motion to compel arbitration. We also **DISMISS** the Plaintiffs' cross-appeal because the order denying summary judgment is not reviewable.

HEWITT and VINSON, JJ., concur.

All Citations

444 S.C. 521, 908 S.E.2d 892

Footnotes

1 14 U.S.C. §§ 1–16.

2 S.C. Code Ann. § 15-48-10 to -240 (2005).

3 We acknowledge that in *Rent-A-Center, West, Inc. v. Jackson*, the United States Supreme Court held that under the FAA, where an arbitration agreement delegates the question of its enforceability to arbitrators, a court may decide the question if a party specifically challenges the delegation clause as unconscionable, but an arbitrator must decide the question if a party merely challenges the arbitration agreement as a whole as unconscionable. 561 U.S. 63, 71–72, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010); *see also Doe v. TCSC, LLC*, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020). Pursuant to S.C. Const. art. V, § 9, this Court is bound by *Simpson*, which states that, under the SCUAA, specifically, section 15-48-20(a), the question of enforceability is for the court to decide when an arbitration agreement is challenged as unconscionable. 373 S.C. at 23–24, 644 S.E.2d at 668. We query whether, if the supreme court relied on the SCUAA to reach its result in *Simpson*, the FAA would have preempted section 15-48-20(a) to the extent it invalidated the delegation clause, which is essentially "an additional, antecedent agreement" to arbitrate the validity of the arbitration agreement as a whole. *Rent-A-Center,* 561 U.S. at 70, 130 S.Ct. 2772; *see e.g., Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116 ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."). But in *Simpson*, the supreme court disposed of this issue, stating "FAA pre-emption of the UAA is not an issue in this case because the state laws applicable to this case do not operate to completely invalidate the parties' agreement to arbitrate." *Simpson*, 373 S.C. 14, 22 n.1, 644 S.E.2d 663 n.1. As the state law issues in this case are the same as those in *Simpson*—the SCUAA and general contract principles governing unconscionability—we must follow *Simpson* in holding that the SCUAA is not preempted.

4 The court also noted this clause improperly limited the mandatory award of double damages for violations of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act. 373 S.C. at 28–30, 644 S.E.2d at 670–71; *see also* S.C. Code Ann. § 56-15-110 (2018) (providing a person injured by a violation of the statute "shall recover double the actual damages by him sustained").

5 In a similar vein, the Defendants also cite a case from our supreme court, *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, wherein the court enforced an arbitration agreement that prohibited the award of punitive damages even though the plaintiffs advanced the argument that the agreement improperly limited their right to treble damages under the SCUTPA. 361 S.C. 544, 557, 606 S.E.2d 752, 759 (2004). This case is not persuasive for the same reason we stated as to *PacifiCare* (to which *Carolina Care Plan* also cites): regardless of whether an arbitrator were to find that treble damages in the instant case are compensatory or punitive, the arbitration clause specifically purports to prohibit the award of treble damages *altogether.*

6 We decline to analyze whether the unconscionable terms are severable because the parties did not include a severability clause in the arbitration agreement. *See Smith*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 ("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.").

7 *See Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978).

End of Document

5. *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co*., 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016)

During the construction of One Belle Hall, a condominium community in Charleston, South Carolina, a subcontractor installed Tamko's "Elite Glass–Seal AR" asphalt shingles to the roofs of the condominium community's four buildings. Tanko issued a twenty-five-year limited warranty for the shingles, which included repair or replacement for any manufacturing defects. The warranty had a binding arbitration agreement requiring all claims and disputes arising out of the shingles or limited warranty to be resolved through arbitration. The HOA and residents alleged the buildings were defective, citing moisture and termite damage and water intrusion. Additionally, a developer of One Belle Hall claimed the shingles were defective.

The court recognized adhesion contracts are not per se unconscionable, so they focused on the second prong of unconscionability. *See Simpson v. MSA of Myrtle Beach, Inc*., 373 S.C. at 27, 644 S.E.2d at 669. The court held the arbitration agreement was not unconscionable because Tamko consistently acknowledged that any disclaimers or limitations would not be enforceable in states where such provisions are legally prohibited. In addition, the inclusion of provisions regarding limited liability and transferability on a different page than the arbitration agreement does not make the arbitration clause unconscionable. Since those provisions fall outside of the arbitration agreement, they cannot serve as a basis for invalidating it.

Lastly, the court held the arbitration provision, in the event of a dispute, facilitated an unbiased decision by a neutral decision maker. *See Simpson*, 373 S.C. at 25, 644 S.E2d at 668 (2007). The language requiring purchasers to arbitrate any claim related to Tamko's shingles or warranty does not restrict access to legal remedies; rather, it preserves the ability to pursue claims under various legal theories, including warranty, contract, and statutory rights. Therefore, the court reversed the circuit court's decision to deny Tamko's motion to compel arbitration.

KeyCite Yellow Flag
Distinguished by In re Petersen v. DCTCL, L.P., S.C.Com.Pl., June 9, 2022

418 S.C. 51
Court of Appeals of South Carolina.

ONE BELLE HALL PROPERTY OWNERS ASSOCIATION, INC. and Brandy Ramey, individually, and on behalf of all others similarly situated, Respondents,

v.

TRAMMELL CROW RESIDENTIAL COMPANY; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc., a division of Trammell Crow Residential, each individually and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a/ "Halter Companies"; Jane Doe 1–5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation; Budget Mechanical Plumbing, Inc.; Builders First Source–Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Association, P.A. and Gary D. Cline; Coastal Lumber & Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a

Opinion No. 5407
Heard May 4, 2016
Filed June 1, 2016
Withdrawn, Substituted and Refiled September 28, 2016

Synopsis

Background: Condominium association brought class action against roof shingle manufacturer for negligence, breach of warranty, and strict liability, alleging that shingles, which were sold in interstate commerce, were defective. Manufacturer moved to compel arbitration. The Circuit Court, Charleston County, J.C. Nicholson, Jr., J., denied motion. Manufacturer appealed.

Holdings: The Court of Appeals, Williams, J., held that:

[1] arbitration clause in shingle warranty was not unconscionable, and

[2] arbitration clause was separable from warranty's legal-remedies section, and thus legal-remedies section could not be considered in determining whether arbitration clause was unconscionable.

Reversed.

West Headnotes (10)

[1] **Alternative Dispute Resolution** ⇐ Arbitrability of dispute

The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.

[2] **Alternative Dispute Resolution** ⇐ Scope and standards of review

The Court of Appeals reviews an arbitrability determination de novo; nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.

[3] **Alternative Dispute Resolution** ⇐ Arbitration favored; public policy

The policy of the United States and South Carolina is to favor arbitration of disputes.

[4] **Alternative Dispute Resolution** ⇐ What law governs

Commerce ⇐ Arbitration

Unless the parties have contracted otherwise, the Federal Arbitration Act (FAA) applies in federal or state court to any arbitration agreement involving interstate commerce. 9 U.S.C.A. § 1 et seq.

[5] **Alternative Dispute Resolution** ⇐ Severability

Under the Federal Arbitration Act (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. 9 U.S.C.A. § 2.

2 Cases that cite this headnote

[6] **Alternative Dispute Resolution** ⇐ Construction

General contract principles of state law apply to arbitration clauses governed by the Federal Arbitration Act (FAA). 9 U.S.C.A. § 1 et seq.

[7] **Alternative Dispute Resolution** ⇐ Validity of assent

Alternative Dispute Resolution ⇐ Unconscionability

Courts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability.

2 Cases that cite this headnote

[8] **Contracts** Unconscionable Contracts

"Unconscionability" is 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.

3 Cases that cite this headnote

[9] **Alternative Dispute Resolution** Unconscionability

Arbitration clause in warranty for roof shingles, which were sold in interstate commerce, was not unconscionable, and thus condominium association was required to arbitrate, under the Federal Arbitration Act (FAA), purported class action against shingle manufacture alleging that shingles were defective, even though warranty was adhesion contract; clause, which required a purchaser to submit "every claim, controversy, or dispute of any kind whatsoever" relating to shingles or warranty to arbitration in accordance with the rules of the American Arbitration Association (AAA), did not unduly limit a purchaser's right to a meaningful legal proceeding. 9 U.S.C.A. § 2.

[10] **Alternative Dispute Resolution** Unconscionability

Alternative Dispute Resolution Severability

Arbitration clause in warranty for roof shingles was separable from warranty's legal-remedies section, which contained allegedly unconscionable limitations and disclaimers, and thus legal-remedies section could not be considered in determining whether arbitration clause was unconscionable, on shingle manufacturer's motion to compel arbitration, under the Federal Arbitration Act (FAA), of purported class action brought by condominium association alleging that shingles were defective, where legal-remedies section was clearly outside arbitration clause. 9 U.S.C.A. § 2.

2 Cases that cite this headnote

****288** Appeal From Charleston County, J.C. Nicholson, Jr., Circuit Court Judge

Attorneys and Law Firms

Richard Hood Willis, Paula Miles Burlison, and Angela Gilbert Strickland, all of Bowman & Brooke, LLP, of Columbia, for Appellant.

Justin O'Toole Lucey and Dabny Lynn, both of Justin O'Toole Lucey, P.A., of Mount Pleasant, for Respondents.

Opinion

****289** WILLIAMS, J.:

***55** In this civil matter, Tamko Building Products, Inc. (Tamko) appeals the circuit court's denial of its motion to dismiss One Belle Hall Property Owners Association, Inc. (the Association) and Brandy Ramey's (collectively "Respondents") claims and compel them to arbitration. Tamko argues the court erred in finding the arbitration agreement located in its limited warranty was unconscionable and unenforceable. We reverse.

FACTS/PROCEDURAL HISTORY

This appeal arises from a dispute over the construction of One Belle Hall (OBH), an upscale condominium community in ***56** Mount Pleasant, South Carolina. The Association is responsible for the management and administration of the OBH community as well as the investigation, maintenance, and repair of its common elements. Headquartered in Joplin, Missouri, Tamko manufactures and sells residential and commercial roof shingles nationally and internationally.

During the construction of OBH, and prior to the transfer of ownership from its developers to the Association, a roofing subcontractor installed Tamko's "Elite Glass–Seal AR" asphalt shingles to the roofs of the condominium community's four buildings. Tamko covered the installed shingles with a twenty-five-year "repair or replace" limited warranty (Warranty) against manufacturing defects. At issue

in this case is a binding arbitration provision on page five of the Warranty information that provided the following:

> **MANDATORY BINDING ARBITRATION**: EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT www.adr.com OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1–800–778–7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED ***57** MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.
>
> **Legal Remedies: EXCEPT WHERE PROHIBITED BY LAW, THE OBLIGATION CONTAINED IN THIS LIMITED WARRANTY IS EXPRESSLY IN LIEU OF ANY OTHER OBLIGATIONS, GUARANTIES, WARRANTIES, AND CONDITIONS EXPRESSED OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OR CONDITION OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATIONS OR LIABILITY ON THE PART OF TAMKO BUILDING PRODUCTS, INC. IN NO EVENT SHALL TAMKO BE LIABLE FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND.** SOME STATES DO NOT ALLOW EXCLUSION OR LIMITATION OF IMPLIED WARRANTIES OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. NO ACTION FOR BREACH OF THIS LIMITED WARRANTY OR ANY OTHER ACTION AGAINST TAMKO RELATING TO OR ARISING OUT OF THE SHINGLES, THEIR PURCHASE OR THIS TRANSACTION SHALL BE BROUGHT LATER THAN ONE YEAR AFTER ANY CAUSE OF ACTION HAS ACCRUED. IN JURISDICTIONS WHERE STATUTORY CLAIMS OR IMPLIED WARRANTIES AND CONDITIONS CANNOT BE EXCLUDED, ALL SUCH STATUTORY CLAIMS, IMPLIED WARRANTIES ****290** AND CONDITIONS AND ALL RIGHTS TO BRING ACTIONS FOR BREACH THEREOF EXPIRE ONE YEAR (OR SUCH LONGER PERIOD OF TIME IF MANDATED BY APPLICABLE LAWS) AFTER THE DATE OF PURCHASE. SOME STATES AND PROVINCES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY OR CONDITION LASTS, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU. THIS LIMITED WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE AND PROVINCE TO PROVINCE. Invalidity or unenforceability of any provision herein ***58** shall not affect the validity or enforceability of any other provision which shall remain in full force and effect.
>
> ANY ACTION BROUGHT BY YOU AGAINST TAMKO WILL BE ARBITRATED (OR, IF ARBITRATION OF THE ACTION IS NOT PERMITTED BY LAW, LITIGATED) INDIVIDUALLY AND YOU WILL NOT CONSOLIDATE, OR SEEK CLASS TREATMENT FOR, ANY ACTION UNLESS PREVIOUSLY AGREED TO IN WRITING BY BOTH TAMKO AND YOU.
>
> NO REPRESENTATIVE, EMPLOYEE OR OTHER AGENT OF TAMKO, OR ANY PERSON OTHER THAN TAMKO'S PRESIDENT, HAS AUTHORITY TO ASSUME FOR TAMKO ANY ADDITIONAL LIABILITY OR RESPONSIBILITY IN CONNECTION WITH THE SHINGLES EXCEPT AS DESCRIBED ABOVE.

At some point following OBH's completion, Respondents assert the community's buildings were affected by moisture damage, water intrusion, and termite damage, all resulting from various alleged construction deficiencies. In February 2010, a developer of OBH contacted Tamko to report a warranty claim on the roof shingles, contending they were blistering and defective. As part of its standard warranty procedure, Tamko sent the developer a "warranty kit," requiring the claimant to provide proof of purchase, samples of the allegedly defective shingles, and photographs. The

developer failed to return the warranty kit within 120 days and, therefore, Tamko inactivated the warranty plan.

On November 19, 2012, Respondents filed a proposed class action lawsuit on behalf of all owners of condominium units at OBH, alleging defective construction against the community's various developers. Respondents amended their complaint on December 30, 2013, to bring, *inter alia*, causes of action for negligence, breach of warranty, and strict liability against numerous contractors and commercial entities, including Tamko for its allegedly defective roof shingles. Tamko filed a motion to dismiss and compel arbitration on February 28, 2014, arguing Respondents were bound by the arbitration clause provided in the Warranty for its roof shingles. Respondents filed a memorandum in opposition to Tamko's motion, contending neither the Association nor the property owners ***59** ever agreed to arbitrate, and the arbitration clause was unconscionable and unenforceable.

After holding a hearing on the matter, the circuit court denied Tamko's motion to compel arbitration on September 17, 2014. In its order, the court ruled that South Carolina law invalidated several of the Warranty's provisions, including the arbitration agreement. Specifically, the court noted that the sale of Tamko's shingles was based upon an adhesion contract, and Respondents lacked any meaningful choice in negotiating warranty and arbitration terms. Relying heavily upon two prior cases addressing the subject,[1] the court held the arbitration agreement was unconscionable and unenforceable due to the cumulative effect of several oppressive and one-sided terms in the Warranty. Last, the court found it could not uphold the arbitration agreement because it was not severable from the Warranty's unlawful terms. This appeal followed.

****291 STANDARD OF REVIEW**

[1] [2] "The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This court reviews an arbitrability determination de novo. *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667.

LAW/ANALYSIS

Tamko argues the circuit court erred in finding the arbitration provision located in the Warranty was unconscionable and unenforceable. We agree.

[3] [4] [5] "The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. Unless the parties have contracted otherwise, the Federal Arbitration Act[2] (FAA) applies in federal or ***60** state court to any arbitration agreement involving interstate commerce.[3] *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). The FAA provides that a written arbitration provision in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2012). "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*, 343 S.C. at 540, 542 S.E.2d at 364 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)).

[6] [7] "General contract principles of state law apply to arbitration clauses governed by the FAA." *Id.* at 539, 542 S.E.2d at 364. Thus, courts may invalidate arbitration agreements on general state law "contract defenses, such as fraud, duress, and unconscionability." *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116.

[8] "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." *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. "In analyzing claims of unconscionability of arbitration agreements, the [U.S. Court of Appeals for 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." *Id.* at 25, 644 S.E.2d at 668 (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)).

In *Simpson*, our supreme court held an arbitration clause in a vehicle trade-in contract between an automobile dealership and customer was unconscionable and unenforceable. 373 S.C. at 34, 644 S.E.2d at 674. In upholding the denial of the dealer's ***61** motion to compel arbitration, the court first found the customer had no meaningful choice in agreeing to arbitrate. *Id.* at 25–28, 644 S.E.2d at 669–70.

The court noted the trade-in agreement was an adhesion, or "take-it-or-leave-it," contract that it viewed with "considerable skepticism" because automobiles are necessities in modern society. *Id.* at 26–27, 644 S.E.2d at 669–70. According to the court, the customer lacked business judgment to fully understand the ramifications of agreeing to arbitrate, had no attorney present to assist her, and was "hastily" presented with the contract by the dealer for her signature. *Id.* at 27, 644 S.E.2d at 670.

****292** Further, the *Simpson* court found the arbitration clause's limitation on statutory remedies was oppressive and one-sided. *Id.* at 28–30, 644 S.E.2d at 670–71. The court pointed out that the clause prohibited an arbitrator from awarding statutorily required double and treble damages for violations of the South Carolina Unfair Trade Practices Act[4] and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act.[5] *Id.* at 28–29, 644 S.E.2d at 670–71. Specifically, the court explained the provision was unconscionable because its unconditional requirement that the customer waive statutory remedies ran contrary to the statutes' very purpose in punishing acts that adversely affect the public interest. *Id.* at 30, 644 S.E.2d at 671. The court also found a provision in the arbitration clause that allowed the dealer's judicial remedies to supersede the customer's arbitral remedies was unconscionable because it failed to promote a neutral and unbiased arbitral forum. *Id.* at 30–32, 644 S.E.2d at 671–72. While the provision forced the customer to submit all of her claims to arbitration, it preserved the dealer's right to bring judicial proceedings against the customer for various causes of action that would not be stayed pending the outcome of arbitration. *Id.* at 30, 644 S.E.2d at 672.

Based upon the cumulative effect of the foregoing oppressive and one-sided provisions contained within the entire clause, the *Simpson* court held the arbitration clause was ***62** unconscionable and unenforceable. *Id.* at 34, 644 S.E.2d at 674. Last, the court ruled it could not sever the offensive provisions to save the arbitration clause because only a disintegrated fragment of the agreement would remain. *Id.* at 34–35, 644 S.E.2d at 673–74. Notwithstanding its finding that the dealer's arbitration clause was unconscionable, the court stressed "the importance of a case-by-case analysis ... to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

Following *Simpson*, this court later held an arbitration agreement embedded in a home sales contract was unconscionable and unenforceable. *D.R. Horton*, 403 S.C. at 14–15, 742 S.E.2d at 40–41. In *D.R. Horton*, the buyers purchased a house from a corporate homebuilder, which included an arbitration clause in its home purchase agreement. *Id.* at 12, 742 S.E.2d at 39. Paragraph 14 of the purchase agreement was titled "Warranties and Dispute Resolution," and it contained subparagraphs 14(a) through 14(j) addressing the obligations of the parties prior to and immediately following closing. *Id.* at 12–13, 742 S.E.2d at 39. While subparagraph 14(g) addressed arbitration between the parties, the homebuilder disclaimed various warranties in subparagraph 14(c) as well as liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special[,] or indirect damages" in subparagraph 14(i). *Id.*

In upholding the circuit court's denial of the homebuilder's motion to compel arbitration, this court held the arbitration agreement was unconscionable, particularly in light of subparagraph 14(i) which exempted the homebuilder from all monetary damages. *Id.* at 15, 742 S.E.2d at 40–41. Furthermore, the court found it should not sever the arbitration provision from the unconscionable provisions located in paragraph 14, again highlighting the homebuilder's attempt to waive its liability for the purchasers' damages. *Id.* at 16–17, 742 S.E.2d at 41.

After granting the homebuilder's petition for a writ of certiorari, our supreme court affirmed this court's decision. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 51, 790 S.E.2d 1, 5 (2016). The supreme court dismissed the homebuilder's assertion that the lower courts violated the *Prima Paint*[6] doctrine ***63** in looking ****293** beyond the express arbitration clause located in subparagraph 14(g) in their analysis of unconscionability because the various subparagraphs addressed important warranty information and contained numerous cross-references to each other. *Id.* at 48–49, 790 S.E.2d at 3–4. In construing the entirety of paragraph 14 as the arbitration agreement, the court held the buyers lacked any meaningful choice to arbitrate and the homebuilder's attempts to disclaim implied warranties and liability for all monetary damages were oppressive. *Id.* at 49–50, 790 S.E.2d at 4–5. Last, because the agreement did not contain a severability clause, the court found the parties did not intend for a court to sever any unconscionable terms from the arbitration agreement. *Id.* at 50 n. 6, 790 S.E.2d at 5 n. 6.

[9] Turning to the instant case, we first acknowledge, and Tamko concedes, the Warranty is an adhesion contract based

upon the sale of mass-produced goods. Consequently, we find the circuit court properly determined Respondents lacked any meaningful choice to arbitrate. However, our supreme court has made clear that adhesion contracts are not per se unconscionable. *See Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; *see also id.* at 36, 644 S.E.2d at 674 (recognizing "the importance of a case-by-case analysis ... to address the unique circumstances inherent in the various types of consumer transactions"). Therefore, we turn to the second prong of the unconscionability analysis to determine whether no reasonable person would make or accept any oppressive or one-sided terms within the arbitration agreement. *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668 (stating that an unconscionability analysis has two prongs).

Upon our review of the arbitration agreement, we hold the circuit court erred in finding the purportedly unenforceable disclaimers and limitations within the "Legal Remedies" paragraph contributed to the unconscionability of the arbitration agreement. Specifically, we recognize that Tamko continuously used language to the effect that any attempted disclaimer or ***64** limitation did not apply to purchasers in jurisdictions that disallowed them. Moreover, unlike the arbitration agreement in *D.R. Horton*, the legal remedies paragraph contains a severability clause. Therefore, even considering the terms Respondents find objectionable, we are unable to conclude these terms are oppressive because they would not apply in the underlying dispute if the arbitrator found they violated South Carolina law.[7]

[10] Next, we hold the circuit court erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions that precede the arbitration agreement on page five. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (providing that, 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"). On page four of the Warranty, Tamko included provisions that limited the transferability of the Warranty and excluded its liability for any damage to buildings resulting from defective shingles. In addition to being unconscionable, Respondents contend these provisions address Tamko's potential liability and must be read together with the arbitration agreement on the following page. We find, however, that such a construction of the contract violates the *Prima Paint* doctrine because these provisions are clearly outside the arbitration agreement. *See* 388 U.S. at 406, 87 S.Ct. 1801 (holding that courts may only consider the threshold question of whether the *arbitration agreement* is invalid, not whether the *contract as a whole* is invalid).

****294** Finally, we find the arbitration provision facilitates an unbiased decision by a neutral decisionmaker in the event of a ***65** dispute. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (stating courts should generally focus on whether an arbitration clause is "geared towards achieving an unbiased decision by a neutral decisionmaker"). Pursuant to the arbitration agreement, the purchaser must submit "every claim, controversy, or dispute of any kind whatsoever" relating to Tamko's shingles or the Warranty to arbitration in accordance with the rules of the American Arbitration Association.[8] The arbitration agreement does not unduly limit a purchaser's right to a meaningful legal proceeding. In fact, the agreement even anticipates actions from purchasers that "sound[ ] in warranty, contract, statute[,] or any other legal or equitable theory."

CONCLUSION

Based on the foregoing analysis, we hold the circuit court erred in finding the cumulative effect of the Warranty's purportedly unlawful terms rendered the arbitration agreement unconscionable and unenforceable. Therefore, the circuit court's order is

REVERSED.

LOCKEMY, C.J., and HUFF, J., concur.

All Citations

418 S.C. 51, 791 S.E.2d 286

Footnotes

1 *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), *aff'd*, 417 S.C. 42, 790 S.E.2d 1 (2016).

2 9 U.S.C. §§ 1–16 (2012).

3 Tamko is headquartered in Joplin, Missouri, and has several manufacturing facilities across the country, none of which are located in South Carolina. Therefore, because the subject shingles were sold in interstate commerce, the circuit court properly determined the FAA applies in this matter.

4 S.C. Code Ann. §§ 39–5–10 through –560 (1985 & Supp. 2015).

5 S.C. Code Ann. §§ 56–15–10 through –600 (2006 & Supp. 2015).

6 In *Prima Paint*, the United States Supreme Court ruled that an arbitration agreement 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. *See* 388 U.S. at 406, 87 S.Ct. 1801.

7 In any event, we believe South Carolina's Commercial Code generally permits sellers of goods to include most of the limitations and exclusions found in the Warranty. *See* S.C. Code Ann. § 36–2–316(2)–(3) (2003) (allowing a seller to exclude or modify implied warranties); S.C. Code Ann. § 36–2–719(1)(a) (2003) (permitting a seller to repair or replace nonconforming goods in lieu of statutory remedies); § 36–2–719(3) (allowing a seller to exclude consequential damages); *see also* *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91–94, 749 S.E.2d 139, 151–53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA).

8 Although the arbitration agreement may appear one-sided because only the consumer is required to submit claims to arbitration, Tamko contends it would never be forced to initiate a cause of action—such as a collection dispute—against an end user because it receives payment for its products upon delivery to its various distributors. Therefore, we find any perceived lack of mutuality in this commercial context does not make the arbitration agreement unconscionable because Respondents are not deprived of a remedy. *See* *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672 ("Our courts have held that lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable."); *id.* (stating that requiring one party to seek a remedy through arbitration rather than the judicial system does not deprive that party of a remedy altogether).

End of Document

6. *Davis v. ISCO Indus., Inc*., 434 S.C. 488, 864 S.E.2d 391 (Ct. App. 2021)

Davis worked for ISCO Industries as a mechanic and fusion technician from 2007 to 2015. When he began his employment at ISCO, he provided personal identifying information, including his Social Security number. Davis also signed an arbitration agreement, exclusively agreeing to arbitration for "any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO." ISCO suffered a data breach in 2016, and Davis's personal identifying information was released to a third party as a result. Davis brought suit based on breach of implied contract and negligence.

The court found no significant relationship existed between Davis's employment relationship and ISCO's conduct. While ISCO was in possession of Davis's personal identifying information solely because of his previous employment with it, the disclosure of his information to hackers fails to truly relate to his employment. He could not have anticipated ISCO would reveal his personal information to hackers when he provided the information. The court contrasted this case with *Landers*, where it was found the perceived inability to perform one's job directly relates to an employment contract (citing *Landers v. Fed. Deposit Ins. Corp.,* 402 S.C. 100, 115, 739 S.E.2d 209, 217 (2013)). Accordingly, the circuit court's decision to deny the motion to compel arbitration was affirmed.

434 S.C. 488
Court of Appeals of South Carolina.

Daniel Lee DAVIS, individually and on behalf of all those similarly situated, Respondent,

v.

ISCO INDUSTRIES, INC., Appellant.

Appellate Case No. 2018-000857
|
Opinion No. 5840
|
Heard December 8, 2020
|
Filed August 4, 2021
|
Rehearing Denied October 1, 2021
|
Certiorari Denied September 7, 2022

Synopsis

Background: Former employee brought action against employer on behalf of himself, all current, and all former employees whose personal identifying information was released as result of data breach that occurred when human resources department for employer released one year's worth of employee data including social security numbers, addresses, and compensation and tax withholding information of current and former employees to hackers for damages. The Circuit Court, Spartanburg County, R. Keith Kelly, J., denied employer's motion to dismiss and compel arbitration. Employer appealed.

[Holding:] The Court of Appeals, Konduros, J., held that employment arbitration agreement did not apply to compel arbitration of dispute over data breach.

Affirmed.

West Headnotes (19)

[1] **Alternative Dispute Resolution** Arbitrability of dispute

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination.

[2] **Alternative Dispute Resolution** Scope and standards of review

Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, the Court of Appeals will not overrule those findings.

2 Cases that cite this headnote

[3] **Alternative Dispute Resolution** What law governs

Alternative Dispute Resolution What law governs

State law determines questions concerning the validity, revocability, or enforceability of contracts generally, but Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within coverage of the Act. 9 U.S.C.A. § 1 et seq.

[4] **Alternative Dispute Resolution** Constitutional and statutory provisions and rules of court

Alternative Dispute Resolution What law governs

Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards together constitute a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. 9 U.S.C.A. § 1 et seq.

[5] **Alternative Dispute Resolution** Construction in favor of arbitration

Alternative Dispute Resolution Evidence

Court of Appeals must address questions of arbitrability with a healthy regard for the federal policy favoring arbitration, therefore, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, including the construction of the contract language itself.

[6] **Alternative Dispute Resolution** Remedies and Proceedings for Enforcement in General

Motions to compel arbitration should not be denied unless arbitration clause is not susceptible of any interpretation that would cover asserted dispute.

[7] **Alternative Dispute Resolution** Arbitration favored; public policy

Statements that the law "favors" arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions; however there is no public policy, federal or state, "favoring" arbitration.

[8] **Alternative Dispute Resolution** Contractual or consensual basis

Alternative Dispute Resolution Persons affected or bound

Generally, arbitration is matter of contract and party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

[9] **Alternative Dispute Resolution** Contractual or consensual basis

Arbitration is available only when parties involved contractually agree to arbitrate.

[10] **Alternative Dispute Resolution** Arbitrability of dispute

Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract.

[11] **Alternative Dispute Resolution** Construction

Alternative Dispute Resolution Disputes and Matters Arbitrable Under Agreement

An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute.

[12] **Contracts** Ambiguity in general

The construction of a clear and unambiguous contract is a question of law for the court to determine.

[13] **Contracts** Intention of Parties

Contracts Language of contract

The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract.

[14] **Alternative Dispute Resolution** Modification or termination

When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract.

1 Case that cites this headnote

[15] **Alternative Dispute Resolution** Disputes and Matters Arbitrable Under Agreement

A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a "significant relationship" exists between the asserted claims and the contract in which the arbitration clause is contained.

[16] **Alternative Dispute Resolution** Disputes and Matters Arbitrable Under Agreement

To decide whether arbitration agreement encompasses dispute, court must determine whether factual allegations underlying claim are within scope of broad arbitration clause, regardless of label assigned to claim.

1 Case that cites this headnote

[17] **Alternative Dispute Resolution** Disputes and Matters Arbitrable Under Agreement

Mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.

2 Cases that cite this headnote

[18] **Alternative Dispute Resolution** Disputes and Matters Arbitrable Under Agreement

If an arbitration clause contains language compelling arbitration of any dispute arising out of relationship of the parties, it does not matter whether particular claim relates to the contract containing clause; it matters only that the claim concerns the relationship of parties.

[19] **Alternative Dispute Resolution** Employment disputes

There was no significant relationship between former employee's employment and data breach that occurred when employer's human resources department mistakenly released one year's worth of employee data including social security numbers, addresses, and compensation and tax withholding information of current and former employees to a hacker, and thus employment agreement arbitration clause did not apply to require arbitration of former employee's action against employer on behalf of himself, all current employees, and all former employees for damages caused by data breach; employment arbitration agreement stated it applied to any and all claims, disputes or controversies arising out of or relating to employee's candidacy for employment, employment and/or cessation of employment.

****393** Appeal From Spartanburg County, R. Keith Kelly, Circuit Court Judge

Attorneys and Law Firms

Jeffrey Andrew Lehrer, of Ford & Harrison, LLP, of Spartanburg, for Appellant.

John S. Simmons, of Simmons Law Firm, LLC, of Columbia; John Belton White, Jr., Ryan Frederick McCarty, and Marghretta Hagood Shisko, all of Harrison White P.C., of Spartanburg, for Respondent.

Opinion

KONDUROS, J.:

***491** ISCO Industries, Inc. appeals the circuit court's denial of its motion to compel arbitration in a suit its former employee, Daniel Lee Davis, brought against it following a data breach. ISCO contends the circuit court erred in determining an arbitration agreement did not apply due to the unforeseeable and outrageous tort exception and because Davis's negligence ***492** claim did not arise out of or relate to his employment relationship with ISCO. We affirm.

FACTS/PROCEDURAL HISTORY

ISCO is a Kentucky based corporation, which provides global customized piping solutions. It has locations and employees in over thirty-five states. Davis worked for ISCO as a mechanic and fusion technician in South Carolina from March 2007 until March 2015. At the start of his employment, ISCO required Davis to provide personal identifying information including his Social Security number. He also signed an arbitration agreement. In the arbitration agreement, he agreed to exclusively settle by arbitration "any and all claims, disputes or controversies arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO."

On March 2, 2016, an employee in ISCO's human resources department received an e-mail requesting employees' "2015 IRS Form W-2 data" purportedly from a senior executive at

ISCO. The employee gathered and e-mailed the requested data. The information included the Social Security numbers, addresses, and compensation and tax withholding information of current and former ISCO employees. Shortly thereafter, an employee at ISCO realized the e-mail was actually from an outside third party who had fraudulently disguised his e-mail address. On March 4, 2016, ISCO notified the affected employees of the data breach. ISCO provided these employees with free identity theft protection services through LifeLock, which it later renewed. The data breach affected 449 current and former employees throughout thirty-five states.

Davis filed an action against ISCO on September 13, 2017, alleging claims for breach of implied contract and negligence. Davis filed the action on behalf of all current and former ISCO employees whose personal identifying information was released as a result of the data breach. He alleged ISCO had a duty to exercise reasonable care in holding, securing, and protecting that personal identifying information; it was foreseeable Davis and the others would suffer substantial harm if ISCO employed inadequate safety practices for securing personal identifying information; and as a result of ISCO's negligence, Davis and others suffered and will continue to suffer ***493** damages and injury, including out-of-pocket expenses and the loss of productivity and enjoyment as a result of spending time monitoring and correcting consequences of the data breach.

ISCO filed a motion to dismiss and compel arbitration. Davis filed an amended complaint removing his cause of action for breach of contract. ISCO filed a motion to dismiss Davis's complaint in the event the court did not compel arbitration, asserting Davis lacked standing and failed to state facts sufficient to establish a negligence claim or to support an award of punitive damages or attorney's fees. Davis filed a response in opposition to ISCO's motions.

The circuit court held a hearing on both of ISCO's motions on February 23, 2018. The court determined the arbitration agreement ****394** was not applicable to Davis's cause of action.[1] The court found:

> The arbitration agreement that [Davis] signed applied to claims "arising out of or relating to my candidacy for employment, employment and/or cessation of employment with ISCO," but [Davis's] claims in this case arise out of [ISCO's] release of the personal identifying information of [Davis] and others to cyber-criminals. The [c]ourt finds that there is no relationship between the subject matter of [Davis's] claims in this case and the arbitration agreement, which relates to employment. Like the [c]ourt in *Aiken*,[2] this [c]ourt holds that [Davis's] claims in this case are "for unanticipated and unforeseeable tortious conduct" and are, therefore, not within the scope of the arbitration agreement.

(citation omitted).

This appeal followed.

STANDARD OF REVIEW

[1] **[2]** Unless the parties otherwise provide, "[t]he question of the arbitrability of a claim is an issue for judicial determination." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are ***494** subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

[3] **[4]** ISCO asserts the circuit court erred by denying its motion to compel arbitration by ruling Davis's negligence claim did not arise out of or relate to his employment relationship with ISCO. It argues there was a significant relationship between Davis's employment relationship and the conduct in this case. We disagree.

> [S]tate law determines questions "concerning the validity, revocability, or enforceability of contracts generally," *Perry v. Thomas*, 482 U.S. 483, 493 n.9 [107 S.Ct. 2520, 96 L.Ed.2d 426] (1987), but the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 [103 S.Ct. 927, 74 L.Ed.2d 765] (1983)[, *superseded by statute on other grounds as stated in Bradford-Scott Data Corp. v. Physician Comput. Network, Inc.*, 128 F.3d 504, 506 (7th Cir. 1997)].

Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (citations omitted). "These statutes constitute 'a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or

procedural policies to the contrary.' " *Id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, 103 S.Ct. 927).

[5] [6] [7] "We must address questions of arbitrability with a healthy regard for the federal policy favoring arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). "Therefore, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'," including " 'the construction of the contract language itself.' " *Id.* (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273-74 (4th Cir. 1997)). "Motions to ***495** compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Id.* at 41-42, 524 S.E.2d at 846. However, our supreme court recently noted that "statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy —federal or state—'favoring' arbitration." ****395** *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021.

[8] [9] [10] [11] [12] [13] "Generally, 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.' " *Int'l Paper Co.*, 206 F.3d at 416 (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). "Arbitration is available only when the parties involved contractually agree to arbitrate." *Berry v. Spang*, 433 S.C. 1, 11-12, 855 S.E.2d 309, 315 (Ct. App. 2021) (quoting *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44), *reh'g denied*, S.C. Ct. App. Order dated Mar. 26, 2021, *petition for cert. filed.* "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001). "Determining whether a party agreed to arbitrate a particular dispute is an issue for judicial determination to be decided as a matter of contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. "An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." *Id.* "The construction of a clear and unambiguous contract is a question of law for the court to determine." *Williams v. Gov't Emps. Ins. Co. (GEICO)*, 409 S.C. 586, 594, 762 S.E.2d 705, 710 (2014) (emphasis omitted). "The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties and, in determining that intention, the court looks to the language of the contract." *First S. Bank v. Rosenberg*, 418 S.C. 170, 180, 790 S.E.2d 919, 925 (Ct. App. 2016) (quoting *Watson v. Underwood*, 407 S.C. 443, 454-55, 756 S.E.2d 155, 161 (Ct. App. 2014)).

***496 [14] [15] [16] [17] [18]** "When a party invokes an arbitration clause after the contractual relationship between the parties has ended, the parties' intent governs whether the clause's authority extends beyond the termination of the contract." *Towles*, 338 S.C. at 41, 524 S.E.2d at 846. "A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119. "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Id.* at 597, 553 S.E.2d at 118.

> [T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties. For example, a clause compelling arbitration for any claim "arising out of or relating to this agreement" may cover disputes outside the agreement, but only if those disputes relate to the subject matter of that agreement. On the other hand, if the clause contains language compelling arbitration of any dispute arising out of the relationship of the parties, it does not matter whether the particular claim relates to the contract containing the clause; it matters only that the claim concerns the relationship of the parties. Under *Zabinski*, such a clause would have the broadest scope because it could be interpreted to apply to every dispute between the parties.

Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., 356 S.C. 202, 209-10, 588 S.E.2d 136, 140 (Ct. App. 2003) (citations omitted).

"Whether a particular claim is subject to arbitration has been examined in many cases ...." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629 n.7, 667 S.E.2d 1, 5 n.7 (Ct. App. 2008). In *Zabinski*, the supreme court found "any claim pursuant to the partnership agreement is arbitrable" because the arbitration agreement provided " 'any controversy or claim arising out of the partnership

agreement' should be settled by arbitration." 346 S.C. at 597, 553 S.E.2d at 119. The court determined "any tort claims between the ***497** partners that relate to the partnership agreement are arbitrable." *Id.* Further, the court held "the winding up of the partnership is covered by the arbitration ****396** agreement because it concerns issues that are the direct result of the partnership agreement." *Id.* at 597-98, 553 S.E.2d at 119. However, the court also determined "[d]espite South Carolina's presumption in favor o[f] arbitration, ... the remaining ... claims are not subject to arbitration because a significant relationship does not exist between the ... claims and the partnership agreement." *Id.* at 598, 553 S.E.2d at 119. Those remaining claims included "the action between [two of the partners] involv[ing] a dispute over the purchase agreement, which is completely unrelated to the partnership agreement.... The facts involved in this controversy are completely independent of any dispute arising out of the partnership agreement and are not arbitrable." *Id.*

In *Landers v. Federal Deposit Insurance Corp.*, an employee, Landers, "claim[ed] he was constructively terminated from his employment as a result of [the CEO's] tortious conduct towards him. [The employer and the CEO] moved to compel arbitration pursuant to the employment contract." 402 S.C. 100, 103, 739 S.E.2d 209, 210 (2013). "The trial court found that only Landers' breach of contract claim was subject to the arbitration provision, while his other four causes of action comprised of several tort and corporate claims were not within the scope of the arbitration clause." *Id.* Our supreme court "reverse[d] the trial court's order and h[e]ld that all of Landers' causes of action must be arbitrated," stating "Landers' pleadings provide a clear nexus between his claims and the employment contract sufficient to establish a significant relationship to the employment agreement." *Id.* The court determined "the claims are within the scope of the agreement's broad arbitration provision." *Id.*

The supreme court explained:

> Landers' tort claims bear a significant relationship to the Agreement. The Agreement contains not only monetary rights and obligations, but also articulates the duties and obligations of Landers and provides that Landers is subject to the direction of the employer, requiring him to diligently follow and implement all policies and decisions of the employer. Furthermore, the Agreement contemplates what constitutes cause for termination, including a "material diminution ***498** in [ ] powers, responsibilities, duties or compensation."
>
> Thus, in light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract. Even assuming the arbitrability of the claims was in doubt, which it is not, we cannot say with positive assurance that the arbitration clause is not susceptible of an interpretation that Landers' slander and intentional infliction of emotional distress claims are covered by the clause. Thus, we reverse the trial court's order denying Appellants' motion to compel the causes of action of slander and intentional infliction of emotional distress.

Id. at 111-12, 739 S.E.2d at 215 (alteration in original) (footnote omitted).

> We stress that our decision today is driven by the strong policy favoring arbitration, the nature of the Agreement, and Landers' underlying factual allegations. Certainly, we recognize that even the broadest of clauses have their limitations. However, Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement. Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated. In doing so, we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.

Id. at 115-16, 739 S.E.2d at 217 (footnote omitted).

[19] In the present case, the court found "there is no relationship between the subject matter of [Davis's] claims in this case and the arbitration agreement, which relates to employment." The arbitration agreement stated ****397** it applied to "any and all claims, disputes or controversies arising out of or relating to [Davis's] candidacy for employment, employment and/or cessation of employment with ISCO." Even though ***499** ISCO had Davis's personal identifying information only due to his previous employment with it, the grounds for his negligence claim—the human resources employee disclosing his information to hackers—do not truly relate to his employment. At the time Davis supplied his employer with his information in starting his

employment, he would not have been expected to anticipate employer would reveal that information to hackers.

Landers is distinguishable from the present case as the facts underlying Landers's causes of action are completely different than those here. *See id.* at 112, 739 S.E.2d at 215 ("[I]n light of the breadth of the Agreement and the particular manner in which Landers has pled his underlying factual allegations, we find Landers' tort claims significantly relate to the Agreement. The perceived inability to perform one's *job* certainly relates to an *employment* contract."); *id.* at 115, 739 S.E.2d at 217 ("Landers has essentially pled himself into a corner with respect to each of his claims. Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement.").

There was not a significant relationship between Davis's employment relationship and the conduct in this case. Therefore, the circuit court did not err in finding the arbitration agreement did not apply here. Accordingly, we affirm the circuit court's decision.[3]

CONCLUSION

The circuit court's decision to deny the motion to compel arbitration is

AFFIRMED.

LOCKEMY, C.J., and MCDONALD, J., concur.

All Citations

434 S.C. 488, 864 S.E.2d 391, 2021 IER Cases 293,692

Footnotes

1 The circuit court also denied ISCO's motion to dismiss, but ISCO did not appeal that ruling.

2 *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007) (providing an outrageous torts exception to arbitration enforcement in South Carolina).

3 Based on our determination of this issue, we need not address ISCO's remaining arguments on appeal, which concern the denial of its motion to compel arbitration on the basis of the unforeseeable and outrageous tort exception. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

End of Document

7. *Johnson v. Heritage Healthcare of Estill, LLC,* 416 S.C. 508, 788 S.E.2d 216 (2016)

Johnson signed an arbitration agreement on behalf of her mother upon admission to Heritage Healthcare ("HHE"). Johnson sought her mother's medical records, but HHE refused to produce the records. After Johnson's mother died and Johnson was appointed as her mother's personal representative, HHE produced the records. Johnson filed suit against HHE for a wrongful death and survival action, and HHE raised arbitration as one of its defenses in its answer. However, HHE did not move to compel arbitration but responded to Johnson's discovery requests and served requests of its own. HHE requested a "small amount of time to conduct discovery" to determine the defenses Johnson planned to raise. The parties engaged in discovery, specifically, HHE defended motions to compel and participated in a deposition before HHE moved to compel arbitration.

A central issue was whether HHE had waived its right to compel arbitration. The court based its reasoning on prejudice, starting "the party seeking to establish waiver has the burden of showing prejudice through undue burden caused by a delay in the demand for arbitration." (citing *Gen. Equip. & Supply Co.*, 344 S.C. at 556, 544 S.E.2d at 645; *see also Evans v. Accent Mfd. Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003)). The court found HHE's refusal to release the records was unreasonable because Johnson's mother and the court had appointed Johnson to speak on her mother's behalf, which caused her to incur unnecessary litigation expenses. In addition, HHE exacerbated delay by seeking discovery on limited issues but ignoring issues they deemed irrelevant, which caused further unnecessary expenses.

The court rejected HHE's argument that the delay and expenses were insignificant because Johnson had notice of the intention to compel arbitration in the future. The court held HHE had notice of Johnson's defense of waiver and carried the burden to cease any further action before filing a motion to compel. Instead, HHE waited eight months to file the motion, engaged in discovery, and appeared in court on several occasions during that time period. Accordingly, the court held HHE waived its right to enforce the arbitration agreement.

416 S.C. 508
Supreme Court of South Carolina.

Linda JOHNSON, as Personal Representative of the Estate of Inez Roberts, Petitioner,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a Heritage of the Lowcountry and/or Uni–Health Post Acute Network of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., And UHS–Pruitt Corporation, Respondents.

Appellate Case No. 2014–002502
|
Opinion No. 27639
|
Heard November 18, 2015
|
Filed May 25, 2016
|
Rehearing Denied August 8, 2016

Synopsis

Background: Personal representative of nursing home resident's estate sued nursing home for wrongful death and survival. Following months of discovery, nursing home moved to compel arbitration. The Circuit Court, Hampton County, Carmen T. Mullen, J., denied the motion. Nursing home appealed. The Court of Appeals reversed. Personal representative appealed.

[Holding:] The Supreme Court Toal, Acting Justice, held that nursing home waived right to enforce arbitration agreement.

Reversed.

Pleicones, C.J., dissented and filed separate opinion.

West Headnotes (6)

[1] **Alternative Dispute Resolution** Scope and standards of review

Arbitrability determinations are subject to de novo review; nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.

4 Cases that cite this headnote

[2] **Alternative Dispute Resolution** Evidence

The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration.

3 Cases that cite this headnote

[3] **Alternative Dispute Resolution** Arbitration favored; public policy

Alternative Dispute Resolution Waiver or Estoppel

South Carolina courts favor arbitration; nonetheless, a party may waive its right to enforce an arbitration agreement.

3 Cases that cite this headnote

[4] **Alternative Dispute Resolution** Waiver or Estoppel

Alternative Dispute Resolution Evidence

The party seeking to establish waiver of an arbitration agreement has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration; mere inconvenience or delay is insufficient to establish prejudice on its own.

3 Cases that cite this headnote

[5] **Alternative Dispute Resolution** Waiver or Estoppel

As in all cases involving waiver of an arbitration agreement any appropriate analysis is heavily fact-driven.

[6] **Alternative Dispute Resolution** Suing or participating in suit

Evidence supported finding that personal representative of nursing home resident's estate suffered prejudice from nursing home's discovery activities and delay in seeking arbitration, as required to establish waiver of right to compel arbitration by nursing home, in personal representative's wrongful death and survival action against nursing home; nursing home's tactics caused personal representative to incur further expenses, both in responding to nursing home's requested discovery, and in preparing for litigation in the event that the nursing home never moved to compel arbitration at all. S.C. R. Civ. P. 26(c)(1).

1 Case that cites this headnote

****217 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

Appeal From Hampton County, Carmen T. Mullen, Circuit Court Judge.

Attorneys and Law Firms

Margie Bright Matthews, of Bright Matthews Law Firm, LLC, of Walterboro, Lee D. Cope, of Hampton, and Matthew Vernon Creech, of Ridgeland, both of Peters Murdaugh Parker Eltzroth & Detrick, PA, and Charles J. McCutchen, of Lanier & Burroughs, LLC, of Orangeburg, for Petitioner.

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Opinion

ACTING JUSTICE TOAL:

***510** Linda Johnson asks this Court to review the court of appeals' decision in *Johnson v. Heritage Healthcare of Estill*, Op. No. 2014–UP–318, 2014 WL 3845115 (S.C. Ct. App. filed Aug. 6, 2014), reversing the circuit court's finding that Heritage Healthcare of Estill (HHE)[1] waived its right to arbitrate the claims between it and Johnson. We granted certiorari and now reverse.

Facts/Procedural Background

In 2007, Johnson enrolled her mother, Inez Roberts (Mrs. Roberts), in HHE to receive nursing home care. Johnson held a general power of attorney for Mrs. Roberts, and as such, signed an arbitration agreement with HHE on her mother's behalf upon Mrs. Roberts's admission to HHE.[2]

At the time, Mrs. Roberts was eighty-five years old and enjoyed good health. However, within six months of entering HHE, she developed severe pressure ulcers, resulting in the amputation of her leg and ultimately, her death in 2009.

Prior to Mrs. Roberts's death, in August 2008, Johnson requested HHE allow her access to Mrs. Roberts's medical records, but HHE refused, citing privacy provisions in the Health Insurance Portability and Accountability Act (HIPAA). Johnson then filed an ex parte motion for a temporary restraining order (TRO), seeking to obtain a copy of Mrs. Roberts's medical records from HHE and to restrain HHE from changing, altering, or destroying the records. The circuit ***511** court granted the TRO, and HHE filed a motion to dissolve the order, again citing HIPAA's privacy provisions.

Subsequently, at Johnson's request, the circuit court appointed her Mrs. Roberts's guardian *ad litem* (GAL) in order to pacify HHE's HIPAA concerns. However, HHE still refused to produce the records. The court again ordered HHE to produce the records, and HHE appealed. During the pendency of the appeal, Mrs. Roberts died, and Johnson became her personal representative. HHE then produced the records, and the parties dismissed the appeal by consent.

Several months after obtaining the records, in August 2010, Johnson filed a notice of intent (NOI) for a wrongful death and survival action against HHE. In October 2010, following an impasse at pre-suit mediation, Johnson filed her complaint. In November 2010, HHE filed its answer and asserted arbitration as one of several defenses, but did not move to compel

arbitration at that time. Instead, HHE filed arbitration-related discovery requests on Johnson.

****218** In December 2010, Johnson moved to strike HHE's arbitration defenses, arguing that HHE waived its right to enforce the arbitration agreement. Specifically, Johnson argued that although the TRO proceedings fell within the scope of the arbitration agreement, HHE did not move to compel arbitration during those proceedings, the GAL proceedings, or the subsequent appeal. Moreover, Johnson contended that HHE participated in pre-suit mediation, responded to Johnson's discovery requests, and served discovery requests on Johnson in return, thus availing itself of the court's authority.

In response, HHE speculated that if it moved to compel arbitration at that time, Johnson would raise defenses to arbitration. HHE therefore requested "a small amount of time to conduct discovery" to determine in advance the defenses Johnson intended to raise, and to obtain information through discovery that would allow HHE to better defend itself.

In March 2011, the circuit court denied Johnson's motion to strike, but found that Johnson could re-raise the waiver issue if, and once, HHE filed a motion to compel arbitration.

The parties then engaged in discovery. Johnson filed multiple motions to compel, and HHE appeared before the court to ***512** defend the motions. Further, in May 2011, the parties deposed Johnson and the HHE employee who signed the arbitration agreement on HHE's behalf. In August 2011, after a delay to obtain the deposition transcripts, HHE moved to compel arbitration.

The circuit court denied the motion, finding, *inter alia*, that HHE waived its right to enforce the arbitration agreement by waiting to file its motion to compel until after it participated in discovery and appeared multiple times in court. The court found that Johnson was prejudiced by HHE's tactics because they forced Johnson to waste a significant amount of time and money that was wholly within HHE's power to avoid.

HHE appealed, and the court of appeals reversed in an unpublished opinion. *Johnson*, Op. No. 2014–UP–318 (stating only "[w]e reverse as to whether the trial court erred in ruling [HHE] waived arbitration" (citing *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 759 S.E.2d 727 (2014))). By implication, the court of appeals found that HHE moved to compel arbitration at its first opportunity. *See id.*

The Court granted Johnson's petition for a writ of certiorari to review the decision of the court of appeals with respect to the waiver issue.

Issue

Whether HHE waived its right to enforce the arbitration agreement?

Standard of Review

[1] **[2]** "Arbitrability determinations are subject to de novo review." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731; *Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); *Rhodes*, 374 S.C. at 125–26, 647 S.E.2d at 250–51. The litigant opposing arbitration bears the burden of demonstrating that he has a valid defense to arbitration. *See Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (citations omitted); *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., S.C., Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). ***513**

Analysis

[3] South Carolina courts favor arbitration. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). Nonetheless, a party may waive its right to enforce an arbitration agreement. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) (citing *Hyload, Inc. v. Pre–Eng'd Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992) (per curiam)).

[4] "The party seeking to establish waiver has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration." *Gen. Equip. & Supply Co.*, 344 S.C. at 556, 544 S.E.2d at 645; *see also* ****219** *Evans v. Accent Mfd. Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76 (Ct. App. 2003). Mere inconvenience or delay is insufficient to establish prejudice on its own. *Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585; *Rich v. Walsh*, 357 S.C.

64, 72, 590 S.E.2d 506, 510 (Ct. App. 2003) ("[M]ere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions.").

[5] As in all waiver cases, any appropriate analysis is heavily fact-driven. *Liberty Builders*, 336 S.C. at 665, 521 S.E.2d at 753 (" 'There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.' " (quoting *Hyload, Inc.*, 308 S.C. at 280, 417 S.E.2d at 624)); *see also Rhodes*, 374 S.C. at 127, 647 S.E.2d at 252. Here, in its order finding that HHE waived its right to enforce the arbitration agreement, the circuit court set forth the relevant facts in detail, and made various factual and legal findings. However, in contrast, the court of appeals summarily reversed the circuit court, with no mention of any factual or legal errors. *See Johnson*, Op. No. 2014–UP–318 (stating only "[w]e reverse as to whether the trial court erred in ruling [HHE] waived arbitration"). In this fact-driven issue, we find the court of appeals' summary reversal inappropriate, particularly when compared with the circuit court's order, which clearly considered the facts of the case.

***514** **[6]** The initial dispute between HHE and Johnson began prior to the TRO proceedings, when HHE refused to release Mrs. Roberts's medical records to Johnson. At various times, Johnson functioned as Mrs. Roberts's power of attorney, GAL, and personal representative. Thus, both Mrs. Roberts *and* the court appointed Johnson to speak and act on Mrs. Roberts's behalf. Nonetheless, on multiple occasions, HHE unreasonably refused to release the records to Mrs. Roberts's duly-appointed representative, resulting in Johnson incurring unnecessary litigation expenses. Moreover, even after Johnson filed her complaint, HHE continued to delay by seeking limited discovery of issues that HHE wished to pursue, but ignoring Johnson's requests for discovery of issues that, in HHE's opinion, were irrelevant at that point in the litigation. Unsurprisingly, HHE's tactics caused Johnson to incur further expenses, both in responding to HHE's requested discovery, and in preparing for litigation in the event that HHE never moved to compel arbitration at all.

HHE contends that the delay and expenses are insignificant because Johnson was on notice that it intended to compel arbitration in the future. However, we note that similarly, after Johnson filed her motion to strike, HHE was on notice that Johnson intended to pursue a defense of waiver, and that further action before filing a motion to compel would be costly and dilatory. *See Evans*, 352 S.C. at 551, 575 S.E.2d at 77 (noting that the party seeking to compel arbitration has the burden to halt discovery and seek the court's protection from further discovery pursuant to Rule 26(c)(1), SCRCP, and stating that "Accent's prolongation of discovery necessitated Evans's pursuit of discovery, thereby forcing her to incur costs she would not have incurred in arbitration. Thus, we find evidence that Accent's continuation of discovery, rather than seeking arbitration in a timelier manner, prejudiced Evans by forcing her to incur discovery costs."). Nonetheless, HHE waited another eight months to file its motion to compel, in the meantime conducting its own discovery and appearing in court multiple times. *Cf. Gen. Equip. & Supply Co.*, 344 S.C. at 557, 544 S.E.2d at 645–46 (finding no waiver when the parties only appeared in front of the court twice in eight months to substitute a defendant, and to refer the action to a Master-in-Equity, and that as such, neither party had yet incurred ***515** substantial attorney's fees); *Liberty Builders*, 336 S.C. at 666, 521 S.E.2d at 753 (finding waiver when the parties sought the court's assistance approximately forty times prior to the filing of the motion to compel, on matters such as motions to amend, compel, dismiss, add parties, and restore under Rule 40(j), SCRCP); *see also Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251.

Accordingly, in light of the court of appeals' summary reversal and failure to outline any factual or legal errors committed by the circuit court, we reverse and find that HHE waived its right to enforce the arbitration agreement.

Conclusion

For the foregoing reasons, the court of appeals' decision is **REVERSED.**

****220** BEATTY, HEARN, JJ., and Acting Justice James E. Moore, concur.

PLEICONES, C.J., dissenting in a separate opinion.

CHIEF JUSTICE PLEICONES:

I respectfully dissent and would dismiss the writ of certiorari as improvidently granted since I believe the Court of Appeals correctly reversed the trial court's order finding HHE waived its right to arbitration.[3]

***516** I disagree with the majority that Johnson's first litigation, seeking her mother's medical records, is somehow

relevant to the issue whether HHE waived its right to seek arbitration in this medical malpractice suit. In this matter, HHE raised arbitration in its answer filed on November 24, 2010, and Johnson filed a motion to strike that defense on December 1, 2010. It was only after the circuit court denied Johnson's motion to strike in March 2011 that HHE was permitted to engage in discovery related to the arbitration issue. The majority holds, however, that when Johnson moved to strike HHE's arbitration defense shortly after the answer was filed, HHE was obligated to immediately move to compel arbitration, because anything less was both "costly and dilatory." It is undisputed, however, that the arbitration issue was in limbo until Johnson's motions to strike were resolved in March 2011, and that the multiple court appearances were the result of Johnson's own "multiple motions to compel," and that "HHE appeared before the court [only] to defend [against Johnson's] motions." *Johnson v. Heritage Healthcare of Estill, LLC*, *supra*. I do not see any facts in this record supporting the majority's conclusions that HHE's actions were costly or dilatory, nor any evidence that Johnson was prejudiced by HHE's failure to move to compel arbitration for approximately nine months after filing its answer raising the issue, especially since the arbitration discovery process was unavailable from December 2010 until March 2011 as the result of Johnson's filing the motion to strike the defense. *Compare*, *e.g.*, *Evans v. Accent Mfg'd Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003) (finding waiver where arbitration was neither pleaded nor raised for first nineteenth months of litigation)

In my opinion, nothing in this record supports a finding that Johnson met her "heavy burden" of overcoming the presumption that HHE did not waive its right to arbitrate, nor that she suffered an "undue burden" caused by HHE's "delay" in demanding arbitration. *Dean*, *supra*. I therefore dissent, and would dismiss the writ as improvidently granted.

All Citations

416 S.C. 508, 788 S.E.2d 216

Footnotes

1 In addition to HHE, there are three other Respondents: United Clinical Services, Inc.; United Rehab, Inc.; and UHS–Pruitt Corporation, each of which are parent companies of HHE. For ease of reference, we refer to all of them as HHE.

2 The arbitration agreement stated, in relevant part, that Mrs. Roberts and HHE agreed to arbitrate "any and all controversies, claims, disputes, disagreements or demands of any kind ... arising out of or relating to the Resident's Admission Agreement with the Facility ... or any service or care provided to the Resident by the Facility." The covered claims explicitly included, *inter alia*, "negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract."

3 The majority suggests that reversal is somehow compelled because "of the Court of Appeals' summary reversal and failure to outline any factual or legal errors committed by the circuit court...." The Court of Appeals adequately addressed the waiver issue in its opinion:

> 3. We reverse as to whether the trial court erred in ruling Heritage waived arbitration. *See Dean* at 47 (ruling the appellants did not delay in filing their demand for arbitration when the appellants participated in the statutorily required mediation process, and after the respondent filed her formal complaint, moved to compel arbitration at their first opportunity).
>
> *Johnson v. Heritage Healthcare of Estill, LLC*, Op. No. 2014–UP–318 [2014 WL 3845115] (S.C. Ct. App. filed August 6, 2014).

Even if this passage did not to meet the requirements of Rule 220(b), SCACR, the proper remedy would be to remand the case to the Court of Appeals and not a reversal, as it is not within a party's power to compel that court to give a fuller explanation. In my opinion, however, there is simply no evidence in this record that Johnson overcame "the presumption against finding a party has waived its right to compel arbitration," *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014) (internal citation omitted), and therefore no necessity for such a remand.

End of Document

South Carolina Bar

Continuing Legal Education Division

A life raft in the Tyger River: tips on how to successfully set up and respond to time limit demands

Laura Locklair
Elizabeth Wieters
&
Jennifer Syssa

A Life Raft in the Tyger River: Tips on How to Successfully Set Up and Respond to Time-e Limited Demands

Few doctrines in South Carolina law have evolved as dynamically—or have carried such practical consequence for insurers and defense counsel—as the *Tyger River* doctrine. Originating in 1933, *Tyger River Pine Co. v. Maryland Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933) created a judicially implied duty requiring insurers to exercise good faith and due consideration toward their insureds when controlling defense and settlement decisions.

Over the following decades, the doctrine expanded dramatically, reaching first-party claims, generating exposure for punitive damages, and eventually prompting courts to recalibrate its boundaries. Today, *Tyger River* represents a careful balance: insurers remain accountable for unreasonable or self-interested conduct, but courts increasingly emphasize reasonableness, documentation, and process integrity over hindsight judgment.

I. The Pre-Tyger Landscape: Contractual Duties Only

Before *Tyger River*, South Carolina recognized no tort liability for an insurer's failure to settle within policy limits. Insurance contracts were viewed as purely contractual promises. If a verdict exceeded policy limits, the insured bore the excess loss, even though the insurer controlled settlement decisions.

The *Tyger River* Court observed this imbalance and introduced a public-policy overlay to prevent abuse of insurer control. By assuming exclusive authority over settlement, the insurer effectively assumed a fiduciary-like duty to exercise good faith—though later courts would clarify it is a duty of equal consideration, not fiduciary loyalty.

Implied in every contract is an obligation of good faith and fair dealing in its performance and enforcement. Good faith is defined in Uniform Commercial Code § 1-201(19) as "honesty in fact in the conduct or transaction concerned." Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

II. The 1933 Decision: Creating the Duty of Good Faith

In *Tyger River*, the insurer refused to settle a claim within policy limits despite clear liability, resulting in an excess judgment against the insured. The South Carolina Supreme Court held that when an insurer controls the defense and settlement, it must give equal consideration to the insured's potential exposure as it gives to its own financial interests. *Tyger River*, 170 S.C. at 286, 170 S.E. at 348.

The Court framed the test as one of objective reasonableness—whether a prudent insurer, faced with the same facts, would have accepted the offer. *Tyger River*, 170 S.C. at 286, 170 S.E. at 349. The decision did not create strict liability for unsuccessful defense strategies; rather, it imposed a standard of good faith when exercising settlement discretion. *See id.*

II. The 1980s Expansion: From Settlement Duty to General Fair-Dealing

Half a century later, South Carolina joined a national trend recognizing insurer bad faith as an independent tort. In *Nichols v. State Farm Mutual Automobile Insurance Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983), the Supreme Court extended *Tyger River* principles to first-party claims, holding that an insurer's unreasonable refusal to pay benefits could give rise to tort damages.

Nichols transformed the doctrine from a narrow third-party settlement duty into a broad standard of fair dealing governing all aspects of claims handling. It also opened the door to punitive damages where conduct is willful, wanton, or in reckless disregard of the insured's rights.

Subsequent cases such as *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 345 S.E.2d 711 (1986) and *Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996) illustrated this expansion, producing punitive awards far exceeding actual damages and revealing the doctrine's new potency.

Under South Carolina law, insurers are required to consider and can be liable for uncovered damages when they fail to settle the covered aspects of a claim when they could and should have done so had they acted fairly and honestly towards their insured. *See Snyder v. State Farm Mut. Auto. Ins. Co.*, 586 F. Supp. 2d 453, 457 (D.S.C. 2008); *Ocean Winds*, 241 F. Supp. 2d at 576; *Wright v. Unum Life Ins. Co.*, 2001 WL 34907077, at *11 (D.S.C. Aug. 31, 2001).

The South Carolina Supreme Court has also recognized an insurer may be liable for consequential damages in addition to the amount of the excess judgment if the insurer acts in bad faith to the insured in some respect other than protecting the insured from an excess judgment. *See Tadlock Painting Co. v. Maryland Cas. Co.,* 322 S.C. 498, 501, 473 S.E.2d 52, 53 (1996) ("[I]mplicit in the holding [of Nichols] is the extension of a duty of good faith and fair dealing in the performance of all obligations undertaken by the insurer for the insured." (*quoting Carolina Bank & Tr. Co. v. St. Paul Fire & Marine Co.*, 279 S.C. 576, 580, 310 S.E.2d 163, 165 (Ct. App. 1983))); 322 S.C. at 504, 473 S.E.2d at 55 (permitting the recovery of consequential damages).

IV. The Era of Recalibration: Limiting Who May Sue

As verdicts swelled, the courts sought equilibrium. In *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 473 S.E.2d 52 (1996), the Supreme Court reaffirmed the existence of a bad-faith cause of action but restricted it to relationships grounded in the insurance contract. The duty of good faith, the Court clarified, flows only from the insurance contract—not from broader equitable considerations.

Two 2000 decisions—*Kleckley v. Northwestern National Casualty Co.*, 338 S.C. 131, 526 S.E.2d 218, and *Gaskins v. South Carolina Farm Bureau Casualty Insurance Co.*, 343 S.C. 666, 541 S.E.2d 269—further confined standing, holding that third-party claimants lack independent bad-faith rights. Only insureds or their valid assignees may pursue such claims.

V. Assignments and Standing: Gradual Acceptance with Caution

Assignments of bad-faith claims have generated significant debate. The Court of Appeals first endorsed them in *Mixson, Inc. v. American Loyalty Insurance Co.*, 349 S.C. 394, 562 S.E.2d 659 (Ct. App. 2002), permitting assignments so long as they are executed in good faith and without collusion.

The Supreme Court revisited the issue in *Reeves v. South Carolina Municipal Insurance & Risk Financing Fund*, 434 S.C. 18, 862 S.E.2d 248 (2021), acknowledging *Mixson* but declining to formally approve or disapprove the practice. *Reeves* warned that collusive assignments designed to manufacture exposure remain contrary to public policy.

Most recently, *Portrait Homes – South Carolina, LLC v. Pennsylvania National Mutual Casualty Insurance Co.*, 442 S.C. 515, 900 S.E.2d 245 (Ct. App. 2023), reaffirmed that assignments can be enforceable. There, the Court of Appeals upheld an assignment from a subcontractor to a homeowners' association, finding no collusion and confirming that the insurer's prior breach of duty to defend justified the transfer. The court's willingness to honor the assignment, coupled with its affirmance of punitive and fee awards, underscores the modern expectation that insurers must engage proactively in claim investigation and communication. The ability to assign a bad-faith claim gives the insured additional tools to avoid personal liability.

VI. Modern Clarification: Reasonableness, Not Negligence

In *Hood v. United Services Automobile Association*, 445 S.C. 1, 910 S.E.2d 767 (2025), the Supreme Court clarified the modern boundary of *Tyger River*. The Court held that South Carolina recognizes only contract and bad-faith tort actions in this context; negligence is not an independent cause of action. Negligence may serve as evidence of bad faith, but it cannot stand alone.

The decision re-emphasizes that liability attaches only for conduct reflecting willful, wanton, or reckless disregard of the insured's rights—not for mere misjudgment. The result is a balanced rule: insurers are accountable for unreasonable conduct, but not for every erroneous evaluation.

VII. Punitive Damages: Deterrence with Limits

Punitive exposure remains one of the most serious risks under *Tyger River* and *Nichols*.

- In *Varnadore* (1986), the jury awarded $3,000 in actual and $50,000 in punitive damages for a reckless refusal to pay a fire-loss claim.
- In *Cock-N-Bull* (1996), punitive damages reached $1.5 million after the insurer denied coverage without investigation.
- In *Portrait Homes* (2023), the Court of Appeals again upheld punitive and attorney's-fee awards where the insurer ignored its duty to investigate and communicate.

South Carolina courts apply the proportionality principles articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996): evaluating the reprehensibility of conduct, the ratio of punitive to actual damages, and comparable civil sanctions.

For insurers and defense counsel, the practical lesson is clear: document the reasoning behind every settlement or coverage decision. Good-faith analysis on paper is often the best defense to a punitive-damage claim.

VIII. Statutory Context: Supplement, Not Replacement

Although South Carolina's insurance code touches bad-faith issues, it does not displace the common-law doctrine.

1. **§ 38-59-20 – Unfair Claim Practices Act**: Enumerates prohibited conduct for insurers (e.g., misrepresentation, undue delay), enforced by the Department of Insurance. It provides **no private right of action**, but its standards often inform the analysis of good faith and can be relevant to a court's determination of bad faith.
2. **§ 38-59-40 – Attorney's Fees for Unreasonable Refusal to Pay**: Allows insureds to recover fees and costs in contract actions where an insurer unreasonably refuses to pay. It supplements contractual remedies and coexists with, but does not limit, the tort of bad faith.
3. **§ 38-73-1105 – UM/UIM Bad-Faith Penalties:** Provides administrative penalties for willful or reckless UM/UIM misconduct. It is regulatory, not a source of private claims.

Collectively, these statutes reinforce the policy of fair claim handling but leave the substantive duty of good faith squarely within the judicially created *Tyger River* framework.

IX. Contemporary Trends

Recent unreported decisions illustrate the courts' modern emphasis on process quality rather than outcomes.

- In *Morris v. State of Fiscal Accountability Auth.*, No. 2021-000502, 2024 WL 3595623 (S.C. Ct. App. July 31, 2024), a timely tender of policy limits before trial defeated a bad-faith claim.
- In *Allstate Prop. & Cas. Ins. Co. v. Hamilton*, No. 2018-001675, 2023 WL 3614272 (S.C. Ct. App. May 24, 2023), the courts rejected attempts to convert time-limited "set-up" demands into automatic bad-faith exposure.

The message from these cases and *Portrait Homes* alike is consistent: reasoned, documented decision-making defeats hindsight claims of bad faith.

X. Practical Implications

For plaintiff's counsel:

- Set reasonable deadlines to allow for a meaningful response
- Make sure the demand is within the limits of the policy/policies
- Include photographs, excerpts from expert reports, depositions and related documents, and relevant law to ensure the insurer's file contains information supporting the demand
- Ensure the demand directs that it should be shared with all adjusters for implicated insurers
- Clearly outline how the demand must be accepted (i.e. in writing, by tendering funds, etc.)
- Propose that the insured obtain and/or share the demand with personal counsel

For insurers and defense counsel:

- Respond promptly and in writing to all settlement demands.
- If additional information is required in order to evaluate the demand, clearly communicate to the relevant parties what such information is and why it is relevant.
- Keep insureds informed and involved in key decisions.
- Consider referral of the client to personal counsel when an insurer has agreed to defend under a reservation of rights.
- Maintain contemporaneous claim notes explaining the rationale for offers, refusals, and evaluations.
- Use mediation and early-resolution mechanisms to demonstrate good faith.

For policyholder counsel:

- Provide detailed, evidence-supported, time-limited demands.
- Avoid artificial deadlines that appear designed to "set up" a bad-faith claim.
- Preserve written communication to build a clear record of reasonableness.
- Consider independent evaluation of claims to supplement that offered by insurance defense counsel.

XI. The Doctrine Today: Balanced Accountability

Ninety years after its inception, the *Tyger River* doctrine remains central to South Carolina insurance practice. Yet its modern incarnation is more restrained. Courts no longer treat every denied settlement or coverage position as potential bad faith. Instead, they examine whether the insurer's decision was objectively reasonable, well-informed, and made in good faith based on the information available at the time. In that sense, *Tyger River* has matured from a shield for insureds into a standard of accountability for both sides—requiring insurers to act reasonably and policyholders to make fair, timely demands.

XII. Conclusion

The *Tyger River* doctrine's endurance reflects South Carolina's pragmatic approach to insurance law. Its evolution—from the duty to settle, to the duty to pay fairly, to today's emphasis on reasoned process—demonstrates an ongoing search for balance between protecting insureds and preserving insurer discretion.

For practitioners, the lesson is straightforward but critical: Bad faith is not about being wrong; it's about being unreasonable. Diligence, transparency, and documentation remain the surest defenses to *Tyger River* exposure.

Additional materials including the powerpoint presentation are available for download at: https://boyleleonardanderson.filev.io/r/s/b1ebssV4BHxAwRdtPLTz9GZXuhzytuejJBctYCuDfJiwcoUE2tNZEalU

South Carolina Bar

Continuing Legal Education Division

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Bryan Kelley

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ARBITRATION

A. Arbitration provision unenforceable due to shortened statute of limitations, where a contract of adhesion does not include severability clause or merger clause.

This case arose out of the sale of a home that the Huskinses purchased from Mungo Homes. The parties executed a contract which contained an arbitration clause. Included within the arbitration clause was a sentence dictating a ninety-day statute of limitations provision for bringing a demand for arbitration. Such limitation runs afoul of § 15-3-140 which provides that contract provisions shorting the statutory limitations period in which claims can be brought are void. The contract also contained waivers of implied warranties including the warranty of habitability. The Huskinses brought suit against Mungo Homes relating to the sale alleging that they were harmed specifically through the wavier of warranties. Mungo in turn sought to dismiss the action and compel arbitration. The Huskinses argued that the arbitration provision was unconscionable and unenforceable. The trial court disagreed and granted the motion to compel arbitration. The Court of Appeals severed the statute of limitations provision and affirmed the trial court's order compelling arbitration.

The Supreme Court disagreed with both the trial court and the Court of Appeals and found that the entire arbitration provision was unenforceable. Specifically, the Court looked towards the effect of the limitations provision upon the purpose of arbitration. Arbitration is intended to provide an alternative way to resolve disputes in a fair and efficient manner. Whereas, Mungo Homes attempted to limit the claim period, thus reducing the number of disputes altogether and running afoul of South Carolina public policy.

Huskins v. Mungo Homes, LLC, 444 S.C. 592, 910 S.E.2d 474 (2024).

B. When questions of arbitrability are delegated to the arbitrator, district court was not permitted to decide whether dispute fell within the scope of arbitration agreement.

In *Berkeley County School District*, the Fourth Circuit reversed the district court for a third time after it denied three successive motions to compel arbitration between the parties. At issue on the third appeal was whether the district court exceeded its authority in ruling on questions of arbitrability to deny a motion to compel arbitration where the parties' arbitration agreement incorporated the American Arbitration Association's ("AAA") commercial rules that the district court had previously determined was evidence that "unmistakably delegate[d] questions of arbitrability to the arbitrator." The trial court ruled that the incorporation of the AAA rules reserved questions of arbitrability to the arbitrator. Nevertheless, the trial court proceeded to determine that the allegations raised by the parties fell outside of the arbitration clause. The Fourth Circuit held that the district court was barred from revisiting arbitrability after acknowledging that incorporation of the AAA rules was a valid delegation to the arbitrator.

Berkeley County School District v. Hub International Ltd., 130 F.4th 396 (4th Cir. 2025).

C. Non-signatory compelled to arbitration where it relied on the unsigned underlying contract to assert claims for breach of the warranty containing the arbitration provision.

In this case, TAMKO Building Products, LLC ("Tamko") moved to compel crossclaims asserted against it by Donnix Construction, LLC ("Donnix") based upon an arbitration provision contained in Tamko's express limited warranty. The trial court denied Tamko's motion because Donnix did not sign a contract containing the arbitration clause. On appeal, the Court of Appeals held that the circuit court erred in refusing to compel arbitration. Specifically, Donnix filed a crossclaim against Tamko for breach of implied and express warranty. Despite the fact that Donnix was a nonsignatory, the Court found that Donnix was estopped from asserting its lack of signature precluded enforcement of the arbitration provision where it relied on the contract language to its advantage, i.e., in asserting claims for breach of implied and express warranty. The Court also held that Donnix received a direct benefit from the express warranty because it created a right for Donnix to assert a breach of express warranty claim. Furthermore, the Court found that Donnix's remaining causes of action should also be addressed in arbitration because those claims relate to or arise out of the product. Lasty, the Court held that the circuit court did not err in denying Tamko's motion to dismiss as the appropriate relief is a stay rather than dismissal.

Petersen v. DCTCL, L.P., 2024-UP-324, 2024 WL 4403970 (S.C. Ct. App. Oct. 2, 2024).

D. 4th Circuit reaffirms ruling in *Friedler v. Stifel, Nicolaus, & Co.* in holding federal courts lack jurisdiction over petition to vacate arbitration award stemming from underlying dispute involving federal copyright law, where petition is not based on independent jurisdictional grounds.

Design Gaps, Inc. v. Shelter, LLC, involved numerous challenges to an arbitration award stemming from an dispute surrounding a home renovation project specifically relating to the design and installation of cabinets and closets.

In an arbitration arising out of the subject project, the parties asserted numerous claims against one another. Notably, Design Gaps, Inc., the cabinetry designer and installation contractor, asserted a claim for violation of the Copyright Act against the homeowners, the Highsmiths, and the project manager, Shelter, LLC. The Highsmiths prevailed in arbitration. Subsequently, Design Gaps moved to vacate the award on grounds that the arbitrator manifestly disregarded the law and failed to issue a reasoned award. The Highsmiths also moved to confirm. The district court confirmed the award, and Design Gaps appealed.

On appeal, Design Gaps again contended the arbitrator manifestly disrgarded the Copyright Act, and failed to issue a reasoned award. After the parties briefed the issue, the 4th Circuit handed down its ruling in *Friedler v. Stifel, Nicolaus, & Co.*, 108 F.4th 241 (4th Cir. 2024). In *Friedler*, the 4th Circuit, applying the Supreme Court's ruling in *Badgerow v. Walters*, 596 U.S. 1 (2022), held that there is no federal jurisdiction over a petition to vacate an arbitration award, absent an independent basis beyond the Federal Arbitration Act, such as diversity of citizenship of federal question.

As is the case with the Copyright Act, the parties in *Friedler* argued that the federal court had independent federal jurisdiction because the underlying dispute involved federal securities law which provides federal courts with exclusive jurisdiction. Like federal securities law, the Copyright Act provides federal courts with exclusive jurisdiction. The Fourth Circuit in *Friedler* and in this case rejected these arguments holding that the motion to vacate an arbitration award is really just a contract dispute, which typically involves state law, despite the underlying nature of the action.

Design Gaps, Inc. v. Shelter, LLC, 130 F.4th 143 (4th Cir. 2025).

E. Silence may not constitute acceptance of arbitration agreement.

At issue on this appeal was whether an employee's silence and continued employment constituted acceptance of an arbitration agreement.

Employee Lampo was hired by Amedisys Holding, LLC (Amedisys) as a physical therapist in July 2013. One month later, Amedisys sent an email to all of its employees with the subject line "Important Policy Change - Must Read" with a hyperlink to a form. The form introduced Amedisys's new arbitration program. An employee then was required to hit an acknowledge button that would direct them to a webpage containing the Dispute Resolution Agreement. The Dispute Resolution Agreement provided for arbitration for any and all legal disputes between an employee and Amedisys pursuant to the Federal Arbitration Act. Additionally, an "Opt-Out Form" was attached to the Dispute Resolution Agreement. The Dispute Resolution Agreement provided that if an employee did not opt out within 30-days, that employee's continued employment would constitute mutual acceptance of the terms of the Dispute Resolution Agreement.

Lampo got the email, clicked on the hyperlink and hit acknowledge, but never submitted an Opt-Out Form. Five years later, a dispute ensued relating to Lampo's termination. Lampo filed suit in state court and Amedisys moved to compel arbitration. The trial court denied the motion to compel finding that there was no evidence of acceptance, mutual assent or a meeting of the minds. The Court of Appeals disagreed.

The central issue in this case was whether Lampo's failure to opt out and continued employment amounted to acceptance of the Dispute Resolution Agreement. Reversing, the

Supreme Court concluded that Lampo did not accept the arbitration agreement through her silence and continued employment. Instead, the Supreme Court found that while silence and inaction can sometimes indicate acceptance and while Amedisys made a clear offer, Lampo's continued employment here was pursuant to her original employment contract, not the proposed arbitration agreement, and thus did not signify acceptance of new terms.

Here the issue was acceptance, not consideration. Had Lampo been required to sign the Dispute Resolution Agreement, the Court would likely have enforced arbitration, because as the Court noted, continued employment itself can be sufficient consideration.

Lampo v. Amedisys Holding, LLC, 445 S.C. 305, 914 S.E.2d 139 (2025).

F. In dispute submitted to arbitration, determination of when statute of limitations begins to run and whether the doctrine of equitable estoppel applies are questions of fact for the arbitration panel.

At issue in this appeal was whether the circuit court erred in denying a motion to vacate or modify an arbitration award. Appellants argued that the circuit court erred in failing to find that the arbitration panel and the court lacked subject matter jurisdiction over the dispute and failed in refusing to find that the action was barred by the applicable statute of limitations. The Court of Appeals rejected both arguments.

First, the Court of Appeals determined that the trial court and arbitration panel had subject matter jurisdiction because the underlying dispute was a derivative action and South Carolina courts are vested with the power to hear a derivative action. Moreover, the parties consented to an order to compel the entirety of this dispute to arbitration. Thus, the arbitration panel had subject matter jurisdiction.

Second, the Court of Appeals held that the appellants failed to show that the arbitration panel manifestly disregarded the law in determining questions of fact surrounding statute of limitations and equitable estoppel.

Morgan v. Gilbert, 2025-UP-098 (S.C. Ct. App. Mar. 26, 2025).

G. Bold face typed notice of arbitration outside of arbitration clause itself is sufficient to apply SCUAA instead of FAA.

In last year's case law update, we reported on the Court of Appeals decision in *315 Corley CW, LLC v. Palmetto Bluff Development, LLC*, No. 6074, 2024 WL 3514884 (S.C Ct. App. July 24, 2024). That opinion was subsequently withdrawn, substituted and refiled on November 13, 2024.

This case arose out of dispute between residents of Palmetto Bluff, a planned residential community in Beaufort. As a condition of purchasing real estate, homeowners purportedly become automatic members of the Palmetto Bluff Club, a for-profit entity, upon acceptance of deed. Homeowners are also required to agree to the Club Documents which include a Club Membership Plan with governing terms and a Club Membership Agreement. In 2017, the Club amended the Club Membership Agreement to include a mandatory arbitration clause dictating that any controversy, disputes or claims relating directly or indirectly to the Club Membership Agreement were subject to arbitration in accordance with the AAA rules and to be governed by the substantive laws of South Carolina.

Dispute arose surrounding the Club's policies and procedures. The Club then sought to compel arbitration pursuant to the Federal Arbitration Act (the "FAA"). The trial court denied the Club's motion to compel arbitration finding that the agreement was a contract of adhesion and procedurally and substantively unconscionable – especially due to the unilateral amended rights, one-sided provisions, and limitation of statutory remedies such as treble and punitive damages. The trial court also held that the arbitration clause was governed by the South Carolina Uniform Arbitration Act (the "SCUAA"), rather than the FAA, and was therefore not enforceable.

The Court of Appeals determined – without even discussing interstate commerce or the FAA analysis – that SCUAA applied because the Club Membership Agreement contained an underlined provision in all capital letters that the Club Membership Agreement was subject to arbitration pursuant to the SCUAA. The Court then determined it was the proper forum to determine the arbitration agreement's validity rather than delegation to the arbitrator, despite incorporation of the AAA rules. The Court of Appeals affirmed in finding that the arbitration clause was unconscionable under SCUAA because the plaintiffs lacked any meaningful choice when entering the agreement and the agreement contained oppressive and one-sided terms that no reasonable person would accept. Specifically, the Club Membership Agreement gave the Club the unilateral right to modify any provision at will and denied the plaintiff treble damages under the South Carolina Unfair Trade Practice Act claims.

The Court of Appeals reached the same conclusion in both opinions. However, in the substituted opinion, it abandoned the position that the reference to the substantive laws of South Carolina mandated application of the SCUAA. Instead, it focused on the bold typed reference in the arbitration notice on the front page. It also changed the court's analysis with regard to unconscionability being held to be a question of the clause's validly for the court to decide as opposed to the court's original opinion which held that unconscionability challenges contract formation not its validity, and formation is a question for the court.

Certiorari was granted on June 25, 2025. *Corley* is a very significant opinion that may change the arbitration landscape in South Carolina. On one hand, proponents against contracts of adhesion will argue that unscrupulous contract provision written by the party with greater power should never be enforced. On the other hand, this opinion has the potential to reach into other

facets of arbitration even where a contract of adhesion is not present by potentially diminishing the federal and state policy favoring arbitration, as boilerplate references to SCUAA may be deemed sufficient for a court to determine SCUAA applies instead of the FAA and what is set forth in the actual arbitration clause itself. Additionally, delegation of questions of arbitrability may be given lesser weight. It will be interesting to see how the Supreme Court approaches this case.

315 Corley CW LLC v. Palmetto Bluff Development, LLC, 444 S.C. 521, 908 S.E.2d 892 (Ct. App. 2024) (*Corley II*).

H. Order compelling arbitration and dismissing action instead of issuing mandatory stay is immediately appealable.

This appeal followed a trial court's order compelling the parties to arbitration and dismissing the underlying action. The threshold issue determined by the Court of Appeals was whether such order was appealable. The Court of Appeals held that it was. Generally, an order compelling arbitration is not subject to immediate appeal under the South Carolina Uniform Arbitration Act. However, because a stay is mandatory, an order dismissing the underlying action rather than staying it is immediately appealable.

Weldon v. Dominion Clemson, LLC, 2025-UP-157, 2025 WL 1328815 (S.C. Ct. App. May 7, 2025).

I. Non-signatories suing as third-party beneficiaries of a provider agreement must arbitrate their claims under the contract's arbitration clause.

The South Carolina Court of Appeals addressed whether two Patients could compel enforcement of a healthcare provider agreement while avoiding its arbitration provision. The Court held that the Patients could not.

Patients received emergency medical treatment from ACS Primary Care Physicians-Southeast P.C. ("ACS") which had a network agreement with Blue Cross Blue Shield of South Carolina ("Insurer"). Under the network agreement, ACS was required to accept negotiated rates for covered services and resolve disputes through arbitration. However, instead of billing Insurer at these discounted rates, ACS billed Patients directly at significantly higher, non-contracted rates. As a result, Patients filed suit alleging they were third-party beneficiaries of the contract between ACS and Insurer and that ACS had overcharged them in violation of the network agreement. ACS moved to compel arbitration. The Court denied ACS's motion to compel, in finding that Patients had not signed nor agreed to arbitrate their disputes.

The South Carolina Court of Appeals reversed, finding Patients were equitably estopped from avoiding the arbitration clause. Under South Carolina law, a third-party beneficiary who accepts benefits of a contract is bound by its burdens, including arbitration. Patients were asserting rights under the network agreement, specifically the right to be charged at a discounted rate, and thus were bound by the arbitration provision.

Bennett v. ACS Primary Care Physicians–Southeast P.C., 444 S.C. 458, 908 S.E.2d 110 (Ct. App. 2024).

J. Reliance on agreement containing arbitration clause for claims bound non-signatory to arbitration.

On or around October 1, 2019, Anderson, a South Carolina resident, was hired as the Vice President of Sales for Ocular Science, Inc. ("Ocular Science"). Anderson executed an employment agreement whereby Anderson and Ocular Science both agreed to an arbitration provision that any "employment-related dispute" or claim "arising out of, relating to, or resulting from [Anderson's] employment" was subject to arbitration. ORSX, Inc. ("ORSX"), is a Montana-based pharmaceutical company involved in the compounding of ophthalmic medications, operating closely with Ocular Science. In late 2021 Anderson executed a second employment agreement with Ocular Science. ORSX was not a party to the Employment Agreement.

In 2022, Anderson was demoted, quit his job with Ocular Science and proceeded to start working for Ocular Science and ORSX's market rival, ImprimisRx. Allegedly, Anderson downloaded trade secrets and sensitive business documents prior to his departure and took them with him to ImprimisRx.

ORSX sued Anderson and ImprimisRx in federal court in South Carolina, alleging trade secret misappropriation, breach of contract and fiduciary duties, and tortious interference, and sought a preliminary injunction to prevent Anderson's continued work at ImprimisRx based on a non-compete clause in the employment agreements.

Anderson moved to compel arbitration based upon arbitration provisions in the employment agreements between himself and Ocular Science. ImprimisRx moved for dismissal for lack of personal jurisdiction.

The district court granted Anderson's motion to compel arbitration based on the arbitration clause contained in Anderson's employment agreements with Ocular Science (not OSRX). ORSX, although not a signatory, was equitably estopped from avoiding arbitration because it had sued on the basis of Anderson's employment agreements and alleged Anderson violated the employment agreements' terms. ImprimisRx was dismissed for lack of personal jurisdiction and since ORSX's claims against Anderson were sent to arbitration, the court found the request for injunctive relief moot.

On appeal, the Fourth Circuit affirmed the trial court's finding that OSRX was equitably estopped from arguing that his status as non-signatory precluded enforcement of the arbitration agreement against it. There the Court found that ORSX's heavy reliance on Anderson's employment agreements to its claims bound ORSX to the arbitration clause. The Fourth Circuit vacated and remanded issue of ImprimisRx's dismissal for lack of personal jurisdiction as the trial court used the wrong standard. Specifically, because no evidentiary hearing occurred, the proper standard was *prima facie* showing rather than a preponderance of evidence. A *prima facie* showing only requires allegations supported by affidavits and exhibits to suggest jurisdiction. The Fourth Circuit further vacated the denial of the request for injunction since the case against ImprimisRx might proceed and therefore the request was no longer moot.

ORSX, Inc. v. Anderson, No. 23-1252, 2025 WL 1430648 (4th Cir. May 19, 2025).

K. Court of Appeals reverses denial of arbitration where agreement contains delegation clause.

This unpublished opinion from the Court of Appeals affirms the strong federal and South Carolina policy of favoring arbitration and giving effect to the parties' agreement to resolve disputes by arbitration especially where the agreement contains a delegation clause. Several former Starbuck employees sued Starbucks and a manager (collectively "Starbucks") asserting claims of defamation and abuse of process. Starbucks moved to refer the case to business court, to dismiss the case based on preemption of federal law, and to compel arbitration. The circuit court denied the motion to compel for several alternative reasons including waiver, that the employees' claims fell outside the scope of the agreement, that Starbucks failed to timely raise the argument that the agreement delegated disputes about the agreement's scope to the arbitrator, and that the employees' claims satisfied the outrageous tort exception to arbitration. Starbucks appealed.

The Court of Appeals agreed with Starbucks and rejected each and every one of the trial court's alternative reasons in denying Starbucks' motion to compel arbitration.

As to waiver, the employees pointed to a case from the 7th Circuit to argue that filing a motion to dismiss constituted waiver. The Court rejected the employees reading of that case. The Court also held that seeking to transfer the case to business court did not amount to waiver. In fact, the Court highlighted that Starbucks objected to discovery on the basis that the case was subject to arbitration. Lastly, the motion to compel was made only six months after the lawsuit was commenced. Therefore, the court concluded that six months' passing where Starbucks also refused to participate in discovery certainly fell short of establishing waiver.

Next, the Court rejected the trial court's findings that the employees' claims fell outside the scope of the arbitration agreement and that Starbucks did not timely raise the argument that the arbitration agreement delegated disputes about the agreement's scope to the arbitrator. There, the

Court found that it was the burden of the employees and not Starbucks to assert a direct and specific challenge to the delegation clause. Instead, the employees argued that Starbucks waived any argument related to the delegation clause by not raising it until its reply brief. Moreover, the delegation clause expressed a clear and unmistakable intent to have all gateway issues decided by the arbitrator.

Finally, the Court rejected the trial court's findings that the employees' claims for defamation and abuse of process satisfied the outrageous tort exception to arbitration. Again, those questions must be answered by the arbitrator because of the delegation clause, not the court.

Blume v. Starbucks Corporation, 2025-UP-274, 2025 WL 2159033 (S.C. Ct. App. July 30, 2025).

L. Party held to have waived arbitration by participating in litigation for over two years prior to filing motion to Compel.

In *Airbnb, Inc. v. Foster*, the Court of Appeals affirmed the trial court's denial of Airbnb's motion to compel arbitration. The Court held that Airbnb had waived its right to arbitration by substantially participating in litigation for over two years before seeking to compel. Despite Airbnb stating its intention to compel arbitration early on, Airbnb actively engaged in discovery, filed multiple pleadings and motions and waited over two years after the complaint was filed to actually move to compel arbitration. The Court of Appeals reiterated that waiver of arbitration does not require a showing of prejudice but rather depends on the totality of circumstances. Here, wavier was dispositive.

Foster v. Airbnb, Inc., 2025-UP-297, 2025 WL 2409019 (S.C. Ct. App. 20, 2025).

M. Trial court errs in applying direct benefits estoppel to deny arbitration.

In *Riviere v. Airbnb, Inc.*, the Court of Appeals reversed the trial court's denial of Riviere's motion to compel arbitration of third-party claims brought against him by Airbnb and remanded for an order compelling arbitration. This case arose out of numerous civil lawsuits relating to alleged voyeurism activities through hidden cameras installed by Riviere in homes he rented through Airbnb.

Foster, an alleged victim and the plaintiff, brought this case against Airbnb and others. Airbnb subsequently brought third-party claims against Riviere. Riviere moved to compel arbitration of Airbnb's third-party claims. Airbnb did not oppose Riviere's motion. Nevertheless, the trial court denied the motion. The trial court's ruling was based on: (1) its application of the direct benefits estoppel doctrine to deny Riviere's motion, based upon the Plaintiff's, Foster, status as a non-signatory to the underlying arbitration agreement between Airbnb and Riviere; (2) that

arbitration was not appropriate because Riviere's acts were so outrageous that the same were unforeseeable; and (3) Riviere waived his right to arbitrate.

The Court of Appeals disagreed finding that Airbnb's claims fell within the scope of the arbitration agreement, that Foster's status as a nonsignatory is irrelevant, and that Riviere did not waive his right to arbitration as he filed his motion to compel one month after claims were asserted against him by Airbnb.

Riviere v. Airbnb, Inc., 2025-UP-298, 2025 WL 2409101 (S.C. Ct. App. 20, 2025).

CIVIL PROCEDURE

A. Voluntary dismissal without prejudice is a "final proceeding" under Rule 60(b), FRCP, from which relief from final judgment, order, or proceeding is available.

The sole issue in this case before the United State Supreme Court was whether a case voluntarily dismissed without prejudice under Rule 41(a), Fed. R. Civ. P., constitutes a "final proceeding" under Rule 60. The Supreme Court held that it does.

Plaintiff filed a federal age-discrimination lawsuit in district court before subsequently submitting his claims to arbitration. Rather than moving for a stay of the district court proceedings until the arbitration proceedings were concluded, the plaintiff voluntarily dismissed the district court action without prejudice pursuant to Rule 41(a) of the Federal rules of Civil Procedure.

After issuance of the arbitration award, plaintiff sought the district court's intervention in moving to vacate the arbitration award by reopening his dismissed lawsuit pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, which permits relief from "final judgment, order, or proceeding." The District Court held that a voluntary dismissal without prejudice constituted a "final proceeding," reopened the case, and vacated the arbitration award. The Tenth Circuit reversed concluding that a voluntary dismissal without prejudice is not a "final judgment, order, or proceeding." Reversing the Tenth Circuit, the Supreme Court held that: (1) a voluntary dismissal is "final" because it terminates the case; (2) a voluntary dismissal counts as a "proceeding" under Rule 60(b); and (3) the Supreme Court's reading of the rules of procedures is strengthened by the rules historical context.

Waetzig v. Halliburton Energy Services., Inc., 604 U.S. 305 (2025).

B. Post-removal amendment of complaint to remove all federal questions deprives federal court of supplemental jurisdiction over remaining state law claims.

This case addressed the issue of whether a federal district court may retain supplemental jurisdiction over state law claims where a party post-removal amends its complaint to remove all federal-law claims. The United States Supreme Court held that it may not.

In 2007, the Supreme Court issued *Rockwell International Corp. v. United States*, in which it held that federal courts do not have jurisdiction over a complaint that was properly filed in federal court but subsequently amended to remove federal-law claims. A footnote in Rockwell stated that this rule should not apply to removed cases because of "forum-manipulation concerns." The Royal Canin court dismissed that footnote as dictum in holding that the supplemental jurisdiction statute does not distinguish between cases originally filed in state court or in federal court. Therefore a federal district court is divested of jurisdiction where all federal-law claims are removed through an amended pleading regardless of where the case was originally filed.

Royal Canin U. S. A., Inc. v. Wullschleger, 604 U.S. 22 (2025).

C. Prejudgment interest pursuant to S.C. Code Ann. § 34-31-20(A) is mandatory when a party requests it and the sum at issue is a sum certain or capable of being reduced to certainty.

The trial court erred when it denied a party's request for pre-judgment interest. The court has no discretion in awarding pre-judgment interest under S.C. Code Ann. § 34-31-20(A) where the sum at issue is a sum certain and the pre-judgment interest is requested by a party.

Rosen Hagood, LLC v. Henson, 2025-UP-168, 2025 WL 1451172 (Ct. App. May 21, 2025).

D. Wear and tear is not an affirmative defense under South Carolina law that must be specifically pled.

In *Napier v. Mundy's Constr., Inc.*, No. 2024-UP-114 (S.C. Ct. App. Apr. 3, 2024), the court of appeals reversed the trial court's decision to reduce damages awarded to homeowner for alleged negligent construction of concrete pads in the homeowner's newly constructed homes. Specifically, the trial court reduced damages for wear and tear based on fourteen years of wear and tear depreciation to the homes, despite the fact that the homebuilder failed to prove wear and tear depreciation at trial. The Court of Appeals determined: (1) that the homebuilder failed to prove wear and tear; and (2) the homebuilder was required to affirmatively plead wear and tear as a defense under Rule 8(c), SCRCP.

The Supreme Court affirmed the Court of Appeal's decision based upon the homebuilder's failure to prove wear and tear; however, it modified the Court's decision in holding that the homebuilder was not required to affirmatively plead wear and tear as a defense. Because wear and tear limits the amount of damages that could be recovered, the defense of wear and tear does not conditionally admit the allegations in a complaint while submitting additional facts and evidence to bar liability for a cause of action. Therefore, wear and tear is not an affirmative defense.

Napier v. Mundy's Construction, Inc., 2025-MO-026, 2025 WL 275452 (S.C. Jan. 23, 2025).

E. Licensure not required for otherwise qualified expert to meet expert affidavit requirements for professional negligence claim as set forth in S.C. Code Ann. § 15-36-100.

Section 15-36-100 of the South Carolina Code sets out a mandatory requirement of an expert affidavit when filing a malpractice action against certain professional licensed through the State of South Carolina. While *Walker v. AnMed* involved medical malpractice, the decision of the Court of Appeals is of importance to professional negligence matters in which an expert affidavit is required. There, the Court of Appeals signaled that an individual may still qualify as an expert for purposes of § 15-36-100 so long as they have the requisite specialized knowledge to do so, regardless of whether or not they are hold the same professional license as the allegedly negligent professional. Additionally, a single factually supported opinion of a negligent act may be sufficient to meet the statutory standard. And, a defect in naming the organization rather than the individual professional does not invalidate the expert affidavit.

Walker v. AnMed Health, No. 6116, --S.E.2d.--, 2025 WL 1943756 (S.C. Ct. App. July 16, 2025).

F. Fourth Circuit holds South Carolina's Door Closing Statute is procedural for purposes of *Erie / Shady Grove* Analysis.

For several decades there has been confusion surrounding the application of South Carolina's Door Closing Statute, S.C. Code Ann. § 15-5-150, in diversity actions in federal court. The Door Closing Statute bars non-residents from suing foreign corporations in South Carolina unless the cause of action arose in this state or the subject of the action was situated in this state. Recently, the Fourth Circuit issued a significant decision in *Grice v. Independent Bank*, impacting the Door Closing Statute's application in federal court.

Grice, a South Carolina resident, sued Independent Bank in South Carolina federal district court alleging that the bank had wrongfully charged overdraft related fees through three different

practices. Grice sought to certify nationwide classes for each practice. The district court denied certification based on South Carolina's Door Closing Statute. Grice appealed.

The Fourth Circuit, applying the framework of the U.S. Supreme Court's decision in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010) and the Fourth Circuit's recent application of *Shady Grove* in *Pledger v. Lynch*, 5 F.4th 511, 520 (4th Cir. 2021), reversed the trial court's decision in holding that the Door Closing Statute is procedural rather than substantive and therefore cannot override Rule 23 of the Federal Rules of Civil Procedure, which governs class certification in federal court. Under the *Erie* doctrine analysis as set forth in *Shady Grove* where there is a potential conflict between applicable state law and a Federal Rule, the federal court sitting in diversity must apply a two-step analysis. First, the federal court must determine whether the particular federal rule's scope is sufficiently broad to cause a direct conflict with the state law. If the answer is yes, step two requires the federal court to determine whether the federal rule represents a valid exercise of Congress's authority under the Constitution. If both answers are affirmative, the federal rule displaces conflicting state law.

This decision may have a significant impact on the interpretation and application of the Door Closing Statute in federal court, even beyond the class action context or the Federal Rules of Civil Procedure as prescribed by the Rules Enabling Act, 28 U.S.C. § 2702, including the Door Closing Statute's application (if any) to substantive statutory law governing procedure directly enacted by Congress. While the Door Closing Statute remains a barrier in South Carolina state courts to non-residents bringing suit against out of state corporations for out of state conduct, *Grice* confirms that the Door Closing Statute does not bind federal courts where it conflicts with a valid federal procedural rule. Under *Grice*, when a federal rule covers the procedural question at issue, the federal district court sitting in diversity is not required to enforce the Door Closing Statute. This decision effectively weakens the reach of the Door Closing Statute in federal litigation and may limit the statute's ability to exclude certain claims based on a plaintiff's residency or the situs of the cause of action, at least in federal court.

Grice v. Independent Bank, -- F.4th --, 2025 WL 2217590 (4th Cir. Aug. 7, 2025).

G. Trial court cannot *sua sponte* reduce hourly rate for purposes of attorney's fee award; fee objections must be properly raised by the opposing party.

Following a jury verdict in favor of a Hess, the trial court awarded him attorney's fees as part of the damages, recognizing that the contract and South Carolina law allowed for fee-shifting under the circumstances. However, the trial court *sua sponte* reduced his attorney's hourly rate from $450 to $300, expressing concerns about the reasonableness of the fees charged. The Court of Appeals held that the trial court's *sua sponte* reduction was error. Specifically, no objections were raised by the opposing party to the reasonableness of the rate. Therefore, the court should not have independently lowered it without a proper adversarial presentation.

Hess v. Morphis Pediatric Group, -- S.E.2d. --, 2025 WL 1888447 (S.C. Ct. App. July 9, 2025).

CONTRACT

A. Contractor precluded from enforcing indemnity provisions that were unconscionable under South Carolina law and subject to collateral estoppel after having already been deemed unenforceable in related cases.

This appeal arose out of eight orders granting summary judgment to subcontractors of Builders FirstSource-Southeast Group, LLC ("BFS"). BFS sought indemnity and defense from eight of its subcontractors based on standardized subcontract agreements. On appeal, BFS argued that the circuit court erred in (1) applying the *Concord & Cumberland* clear and unequivocal standard; (2) finding indemnity provisions violated South Carolina law and public policy; (3) finding BFS's indemnity claims were collaterally estopped; (4) failing to address severability; and (5) deeming the subcontracts unconscionable and unenforceable. The Court of Appeals upheld all eight orders granting summary judgment.

The Court of Appeals upheld the trial court's findings that the indemnity provisions in the agreements were legally unenforceable under South Carolina law. Specifically, the clauses failed to meet the statutory requirements under South Carolina's anti-indemnity statute, S.C. Code Ann. § 32-2-10 and that indemnification for one's own negligence must be "clear and unequivocal." The Court further found that BFS was precluded from relitigating issues that had already been resolved in related litigation including the *MI Windows And Doors, Inc*. case. Furthermore, the indemnity clauses were not severable because the illegal and ambiguous language was fundamental to the agreement's risk-shifting provisions. As such the contracts were procedurally and substantively unconscionable. The Court noted the one-sided nature of the agreements, the disparity between bargaining power, and the lack of opportunity for subcontractors to negotiate the terms.

Builders FirstSource-Southeast Group, LLC v. Palmetto Trim and Renovation, 445 S.C. 566, 915 S.E.2d 736 (Ct. App. 2025).

B. Parties seeking contractual indemnification for own negligence must meet the "clear and unequivocal" standard; statute of limitations for indemnification begins to run upon payment of finding of liability.

This case stems out of the seminal *Damico v. Lennar* case that has been a topic of our past years case-law update. 437 S.C. 596, 879 S.E.2d 746 (2022), *cert. denied*, 143 S.Ct. 2581 (2023).

Builders Firstsource ("BFS") contracted with Lennar Carolinas to supply and install windows, doors, flashing and certain weatherproofing to a residential development in Berkeley County known as the Abbey at Spring Grove. BFS subcontracted its work to ECC Contracting, LLC ("ECC") and Charleston Exteriors, LLC ("Charleston Exteriors") through master subcontracts.

In the *Damico* litigation, certain homeowners sued Lennar including window-related claims. Lennar in turn sued BFS for indemnification and related claims. BFS then sued its subcontracts asserting equitable and contractual indemnification, breach of warranty, breach of contract, negligence, and contributions alleging that BFS incurred defense costs as a result of the underlying *Damico* litigation.

The trial court ruled that BFS's indemnity claims failed because the subcontract clauses did not "clearly and unequivocally" state that subcontractors agreed to indemnify BFS even for third-party claims. The trial court also dismissed contractual indemnity claims by finding that the statute of limitations began to run before BFS made any payment in the *Damico* litigation and final judgment was entered against it.

On appeal, the court of appeals affirmed the trial court's ruling in finding BFS was seeking indemnification for its own negligence. However, the court vacated the trial court's findings with respect to the statute of limitations in holding that BFS must have been found liable or paid for any injured party before the statute begins to run. Lastly, the court of appeals rejected BFS's argument that the circuit court lacked jurisdiction to hear dispositive motions until the *Damico* litigation was remanded to the trial court.

Builders Firstsource-Southeast Group, LLC v. MI Windows And Doors, Inc., No. 2025-UP-072, 2025 WL 657669 (S.C. Ct. App. Feb. 26, 2025).

C. Indemnity provisions that violate South Carolina law and public policy cannot be severed from rest of agreement.

In another round of appeals from Builders FirstSource-Southeast Group, LLC ("BFS"), the Court of Appeals yet again address questions concerning contractual indemnification in a master subcontract agreement with Hurley Services, LLC ("Hurley"). In these two separate appeals, several issues were before the appellate court: (1) whether the trial court erred in applying South Carolina's anti-indemnification statute, S.C. Code Ann. § 32-2-10 to the parties agreement; (2) whether the trial court mischaracterized the relief sought by BFS and thus mistakenly applied the clear and unequivocal standard as set forth in *Concord & Cumberland Horizontal Property Regime v. Concord & Cumberland, LLC*, 424 S.C. 639, 819 S.E.2d 166 (Ct. App. 2018); (3) whether the trial court erred in finding the contract was one of adhesion;[1] (4) whether the trial court erred in

[1] In *BFS v. Hurley*, the trial court determined the Agreement was confusing and unenforceable rather than one of adhesion.

addressing severability;[2] (5) whether the trial court erred in applying collateral estoppel to bar BFS's indemnity claims; and (6) whether the trial court erred in failing to find that a genuine issue of material fact existed such as to preclude partial summary judgment. The Court of Appeals rejected all arguments.

First, the Court of Appeals held that the terms of the parties' agreement provided that Hurley would indemnity and defend BFS for BFS's own negligence, thus violating § 32-2-10.

Second, the Court of Appeals held that the trial court properly applied the clear and unequivocal standard of *Concord & Cumberland* to reject BFS's arguments that the language of the contract of indemnity was not clear and unequivocal. Third, the Court of Appeals determined that the trial court did not err in characterizing the contract as one of adhesion. Fourth, the Court of Appeals determined that the indemnity provisions were "replete" with terms that violated South Carolina law and public policy such that they cannot be properly severed, therefore the trial court did not err on this issue. Fifth, BFS had previously litigated issues surrounding the exact same indemnity clauses in the same form of agreement that was at issue here. Collateral estoppel barred relitigation in this action. Finally, the Court concluded that partial summary judgment was appropriate.

Builders FirstSource-Southeast Group, LLC v. Hurley Services, LLC, 2025-UP-078, 2025 WL 1767943 (S.C. Ct. App. June 25, 2025) ("*BFS v. Hurley*")

Hurley Services, LLC v. Builders FirstSource-Southeast Group, LLC, 2025-UP-082, 2025 WL 782858 (S.C. Ct. App. Mar. 12, 2025) ("*Hurley v. BFS*").

D. Duty to defend and indemnify are distinct contractual obligations unless explicitly merged by the parties; Trial judge lacks authority to override other trial judge's summary judgment denial absent full factual findings or proper procedural basis.

Numerous homeowners brought suit against D.R. Horton and multiple subcontractors alleging defects in construction and landscaping. D.R. Horton asserted equitable and contractual indemnity cross-claims against its subcontractors. The subcontractors moved for summary judgment, contending that the indemnity clauses were unenforceable under South Carolina's anti-indemnity statute, S.C. Code Ann. § 32-2-10, and that the indemnity clauses were not clear and unequivocal as required by *Concord & Cumberland*. The trial court denied summary judgment finding that there were factual disputes to be decided by a jury. Thereafter, a different trial judge orally dismissed D.R. Horton's cross-claims with a verbal order finding that the indemnity provisions were unenforceable, effectively overriding the first judge's prior order. D.R. Horton appealed.

[2] Severability was not an issue before the Court in *BFS v. Hurley*.

On appeal, the South Carolina Court of Appeals reversed the verbal dismissal of the indemnity cross-claims. There, the Court of appeals found that the second judge lacked authority to override the earlier summary judgment denial without full factual findings or a proper procedural basis. The court further highlighted that the duty to defend and indemnify are distinct contractual obligations unless explicitly merged by the parties.

A petition for writ of certiorari filed by certain subcontractors is currently pending before the South Carolina Supreme Court.

Shafi v. D.R. Horton, Inc., No. 2025-UP-056, 2024 WL 5415792 (S.C. Ct. App. Feb. 19, 2025).

E. Cancellation clauses in residential newbuild contract found to be unconscionable.

This residential construction dispute arose surrounding a homebuilder's contract provisions. Eastwood Homes of Columbia, LLC ("Eastwood") entered into numerous contracts to with residential homebuyers for the construction and sale of new homes. At issue in this case were two contract provisions. One provision (Paragraph 26) allowed Eastwood to unilaterally cancel the contract at any time before closing if a bona fide dispute arose. In such case, Eastwood would return all deposits as well as pay $100 in liquidated damages to the homebuyers, barring other remedies. Additionally, another provision (Paragraph 25) provided an array of remedies including damages in the event of a homebuyer default; however, in the event of Eastwood's default, the homebuyers were only entitled to recover their deposits and waived all other claims.

Eastwood then sent the homebuyers a "mutual release" cancelling the contracts and refunding the deposit money and the additional $100 liquidated damages. The homebuyers did not sign the mutual release or deposit the refunds and instead filed suit against Eastwood. The Master-in-Equity held that Paragraph 26 was ambiguous, yet adopted Eastwood's view that it had the right to unilaterally cancel the contract. However, the Master also found both Paragraph 25 and 26 were unconscionable and against public policy. Eastwood appealed. No party appealed the Master's adoption of Eastwood's view of Paragraph 26, but the determination of unconscionability *was* appealed.

On appeal, the Court of Appeals affirming the master's ruling with regard to unconscionability, finding that the contract was an adhesion contract and was both procedurally and substantively unconscionable and therefore unenforceable under a *Damico v. Lennar Carolinas, LLC* analysis. 437 S.C. 596, 879 S.E.2d 746 (2022). The Court of Appeals vacated the master's finding that the provisions violated public policy as public policy focuses on builder warranties and defect liability rather than cancellation clauses, like the ones at issue in this case.

Dawkins v. Eastwood Homes of Columbia, LLC, No. 2025-UP-239, 2025 WL 1949798 (S.C. Ct. App. July 16, 2025).

F. Trial court abuses discretion in denying request for attorney's fees provided by contract and failing to award prejudgment interest for sum certain.

This cross-appeal followed a jury trial after the trial court denied Fast Formliners Company's ("Fast Formliners") motion for attorney's fees, costs, and prejudgment interest and denied Construction Resource Group's ("Construction Resource") motion for a new trial and to offset the jury verdict. At issue in this action was a commercial dispute over alleged defective construction material and unpaid invoices. The underlying contract provided for the recovery of attorney's fees to the prevailing party. Despite prevailing at trial, Fast Formliners's motion for attorney's fees, interest, and costs was denied by the trial court. On appeal, the Court of Appeals determined that the trial court erred in denying Fast Formliners's motion where the contract entitled it to recover its attorney's fees and costs and the trial court gave no reasoning for its denial. Additionally, the Court of Appeals held that prejudgment interest must be considered where the claim was for a liquidated sum certain amount.

As to Construction Resources appeal, the Court of Appeals determined that the trial court did not err when it denied Construction Resource's motion for a new trial based on alleged jury bias, as there was insufficient evidence to show bias or justify a new trial. Additionally, the Court of Appeals rejected Construction Resource's argument that it was entitled to receive a credit through an offset for costs allegedly incurred due to alleged defective construction materials in holding that there was no legal authority to support such argument. Lastly, the Court of Appeals rejected Construction Resource's argument that the circuit court erred in admitting a video that was taken by a Fast Formliners employee in Construction Resource's facility, in which Construction Resource alleged that it violated the South Carolina Homeland Security Act. The Court of Appeals determined that the video was lawfully created.

Fast Formliners Company v. Construction Resource Group, Inc., No. 2025-UP-122, 2025 WL 986040 (S.C. Ct. App. Apr. 2, 2025).

DISCOVERY SANCTIONS

A. South Carolina Supreme Court upholds severe discovery sanctions and appointment of limited-purpose receiver after willful refusal to comply with court-ordered discovery.

This legacy asbestos coverage case was taken up by the South Carolina Supreme Court to address discovery sanctions and court-appointed receivership of insurance assets held by a foreign corporation. The suit arose out of a wrongful death action in which the decedent was alleged to have been exposed to Atlas Turner, Inc.'s ("Atlas Turner") asbestos products in the 1960's and 70's. Atlas Turner, a Canadian corporation, moved to dismiss for lack of personal jurisdiction. The trial court denied that motion. Atlas Turner refused to participate in discovery, including

personal jurisdiction discovery and refused to designate or otherwise produce any witness to testify as its Rule 30(b)(6) designee asserting that no one had historical knowledge to testify. Furthermore, Atlas Turner refused to turn over company records alleging that doing so would violate the Quebec Business Concerns Records Act (the "QBCRA").

The trial court found that Atlas Turner's refusal to participate in discovery was willful and intentional. The trial court sanctioned Atlas Turner by striking its answer, placing it in default, and appointing a receiver to investigate and collect Atlas Turner's insurance assets and "any other assets which are related to, touch or are otherwise relevant to such insurance."

The South Carolina Supreme Court upheld the imposition of sanctions and the appointment of the receiver. Specifically, the Court rejected Atlas Turner's arguments that it could not produce a 30(b)(6) designee. Focusing on the affidavit of Atlas Turner's Canadian counsel, which it relied on in support of the motion to dismiss, the Court found it curious how counsel gained access to facts surrounding Atlas Turner's historical business dealings (or lack thereof) in South Carolina while also contending that historical facts of corporate conduct was unknown to anyone. Next, the Court, while citing to numerous federal and state opinions, rejected that Atlas Turner's arguments that foreign blocking statutes like the QBCRA excuse a party from complying with a valid American court order. Third, the Court affirmed the trial court's receivership order in finding that Atlas Turner's conduct justified the prejudgment appointment of a receiver. However, the Court reversed the trial court's receivership order that would have allowed the receiver to control "any other assets which are related to, touch or are otherwise relevant to such insurance" as the Court declared this language too broad.

A petition for certiorari is currently pending before the United States Supreme Court.

Welch v. Advance Auto Parts, Inc., 445 S.C. 640, 916 S.E.2d 320 (2025).

B. South Carolina Supreme Court upholds trial court's striking of pleadings as discovery sanctions for repeated and willful violation of court orders and discovery misconduct.

Innovative Waste Management ("IWM") initiated litigation against Dunhill Products, Crest Energy Partners, Henry Wuertz, and Edward Girardeau alleging breach of contract, fraud and misappropriation of trade secrets (collectively the "Defendants"). IWM sought both economic damages totaling $12 million as well as punitive damages. After seven years of discovery, including three motions to compel and two sanctions, the trial court found Defendants in contempt for repeatedly ignoring discovery orders. The trial court issued further sanctions by ultimately striking Defendants' answers and counterclaims pursuant to Rule 37(b)(2)(C), SCRCP, as a result of Defendants' prolonged and continued discovery abuse. Defendants appealed. The South Carolina Court of Appeals affirmed the trial court's ruling that the Defendant's discovery

misconduct constituted a "deliberate pattern of discovery abuse" so as to warrant the striking of their pleadings.

The South Carolina Supreme Court was then asked to address whether Defendants waived appellate review by continuing to flout discovery orders and whether the trial court abused its discretion in imposing the sanction of striking their pleadings.

The Supreme Court unanimously upheld the Court of Appeals ruling, finding there was no abuse of discretion on the part of the trial court. Specifically, Defendants repeatedly failed to meet disclosure deadlines, responses were partial or inadequate, they failed to comply with motions to compel and neglected to pay court ordered sanctions all while trial was quickly approaching. The Supreme Court found these actions to be willful misconduct aimed to delay proceedings, and constituted a waiver of their rights to challenge the discovery orders through continuing non-compliance with discovery. As a result, striking the pleadings was a justifiable sanction for this conduct.

Innovative Waste Management, Inc. v. Crest Energy Partners GP, LLC, 445 S.C. 19, 911 S.E.2d 406 (2025).

INSURANCE

A. Fourth Circuit revives builder's insurance claim under "wrap-up" policy, in holding that while repair of defective work is excluded, remediation costs tied to resulting covered property damage may be covered under the policy.

In *Trident Construction Services, LLC v. Houston Casualty Company*, the Fourth Circuit addressed whether costs stemming from post-construction water intrusion at a high-end Charleston condominium project were covered under a Commercial General Liability "wrap-up" policy. There, Trident Construction Services, LLC ("Trident"), the general contractor on the project, sought coverage from Houston Casualty Company ("HCC") for reimbursement under the policy for stucco repair and interior water damage.

The Fourth Circuit affirmed in part and vacated in part the trial court's decision that reimbursement for these costs were not covered under the "wrap-up" policy. Under South Carolina law, costs associated with repairing defective construction, standing alone, does not constitute "property damage" caused by an "occurrence." However, under South Carolina law, damages to otherwise non-defective property resulting from faulty workmanship may be covered. Thus, the Court concluded that the trial court correctly determined that costs associated with replacing faulty stucco and related materials were not within the coverage of Trident's "wrap-up" policy. The Court further agreed with the trial court that consequential and economic damages stemming from

expenses incurred in removing non-defective building components to access water damages areas could not be read into the policy's coverage.

However, the Court vacated the trial court's decision to dismiss Trident's breach of contract and bad faith claims as being premature. Specifically, under the policy, Trident may be entitled to coverage for additional costs incurred to repair resultant property damage. The Court found that Trident had identified certain portions of its claim that may be qualified as covered property damaged caused by water intrusion. It concluded that there were factual questions regarding whether HCC acted unreasonably in denying or ignoring these portions of the claim, including failing to follow up on submitted documentation and refusing to explain its partial denial, that HCC had previously indicated may be "potentially covered."

Houston Casualty Company v. Trident Construction Services, LLC, No. 24-1634, 2025 WL 1864765 (4th Cir. July 7, 2025).

MECHANIC'S LIEN

A. Failing to serve all parties with mechanic's lien within 90 days of claimed last date of work invalidates mechanic's lien.

This case arose from a dispute surrounding labor and materials provided by TCC of Charleston, Inc. ("TCC") on a condominium project owned by Concord & Cumberland HPR ("HPR") and individual unit owners. TCC entered into a guaranteed max contract with HPR for the project. The original guaranteed max price was approximately $3.9 million. After commencement, TCC discovered differing site conditions and submitted 134 proposed change orders, which substantially increased the total project cost to approximately $5.9 million. The proposed change orders were to be paid on a cost-plus basis. Thereafter, HPR failed to approve or pay for a number of the change orders. In addition, TCC asserted that it had continued to perform labor and provide materials beyond the scope of the original guaranteed max contract, relying on implied or verbal approvals from HPR. Disputes surrounding the unpaid change orders led TCC to file a mechanic's lien and subsequent foreclosure suit in which TCC sought approximately $2.4 million dollars for unpaid labor and materials it supplied in furtherance of the proposed change orders. The parties then moved to compel arbitration.

TCC was awarded $2.02 million at arbitration. TCC subsequently moved for an award of costs and attorney's fees as the prevailing party under the mechanic's lien statute before the arbitration panel. The arbitration panel awarded costs, yet determined that it did not have jurisdiction to consider attorney's fees and denied TCC's motion without prejudice so that it could seek them in circuit court.

TCC then moved to confirm the award and HPR moved to vacate. The circuit court confirmed the arbitration award. HPR deposited the award into the court. Several motions followed

In particular, one of the property owners ("Beatty") and HPR filed motions for summary judgment to argue that TCC's mechanic's lien was dissolved because Beatty was not served with the notice of the lien within ninety days of the last date in which TCC furnished materials and labor. Both TCC's mechanic's lien statement of account and TCC's complaint alleged that March 17, 2016 was the last day of work. Beatty was not served with the notice until June 22, 2016, ninety-seven days after the date of last furnishing as was alleged in the statement of account and complaint. The master-in equity issued an order granting Beatty's motion for partial summary judgment and finding that she was the prevailing party for purposes of awarding attorney's fees for the mechanic's lien cause of action only, and not to TCC. Both TCC and HPR raised several issues on appeal.

First – the Court of Appeals rejected TCC's arguments that the lien was not dissolved because TCC failed to meet its statutory window and service obligations. TCC argued that its last date of work was January 23, 2017 not March 17, 2016 as there was evidence that work was performed on a tower into January of 2017. The Court held that the last date of work as written on the statement of account and in the complaint was binding on TCC. The Court also rejected TCC's argument referencing the post-March 2016 tower work because a mechanic's lien must be based on work already performed at filing, and the later date of the tower work post-dates the lien filing and is thus inconsistent. The Court further rejected TCC's argument that *res judicata* based on the arbitration award did not apply because the arbitration panel specifically did not make any finding of fact about the last date of work. The Court rejected TCC's additional argument that the lien did not dissolve because it timely served HPR. The Court held that all property owners must be served within the 90 days.

Second – the Court of Appeals rejected HPR's cross appeal that the arbitrator manifestly disregarded the law by disregarding a lien waiver, failed to issue a reasoned award, and misallocated costs. None of HPR's arguments satisfied the "manifest disregard of the law" standard, noting that the standard is a herculean task to prove. Moreover, HPR presented no evidence of technical errors on the part of the arbitration panel that would justify a modification or correction of the arbitration award. HPR's arguments regarding modification were based on disputed facts, not technicalities.

Third – the Court of Appeals held that the Master erred in suspending interest upon HPR's deposit of the award into the court. Under Rule 67 and the parties agreement, contractual interest continues to accrue until full payment is made – not merely by deposit.

Lastly – the Court of Appeals denied TCC's request for attorney's fees as it was not the prevailing party. The Court reversed and remanded for a reevaluation of the attorney's fees

awarded to HPR because the Court found that the record did not include evidence to support the master's award.

TCC of Charleston, Inc. v. Concord and Cumberland HPR, -- S.E.2d. --, 2025 WL 2161167 (S.C. Ct. App. Jul. 30, 2025).

REAL PROPERTY

A. South Carolina Residential Property Condition Disclosure Act does not support independent claim against real estate agent absent actual knowledge and reliance.

This dispute arose from moisture damage alleged to have been discovered after closing on the sale of a home. The Onionses entered into a contract for sale of their home with First Buyers. The Onionses were represented by a real estate agent named Kopchynski. During due diligence, the home inspection noted issues with the crawlspace. Thereafter the Onionses hired an exterminator to inspect the crawl space which led to a finding of elevated moisture levels and evidence of wood-decaying fungi. The Onionses then hired a handyman to repair the crawlspace. After repair, the First Buyers engaged Lane's Professional Pest Elimination to perform a termite inspection on the residence. The CL-100 wood infestation report prepared by Lane's Professional Pest Elimination flagged excessive moisture levels. First Buyers and the Onionses terminated the contract for reasons unrelated to the inspections. The Onionses proceeded to put the home back on the market with Kopchynski still representing them. Kopchynski reached out to previously-interested potential buyers, the Isaacs, to let them know the home was back on the market. In so doing, Kopchynski indicated the "CL-100 was done yesterday and from what I understood it was good, but I can obtain the report if/when necessary as the sellers paid for it." The Isaacs' hired Lane to do another CL-100, which indicated that there was no evidence of active or non-active wood-destroying fugus and the moisture levels were not excessive.

The Isaacs proceeded to purchase the home from the Onionses. After closing, the Isaacs discovered significant moisture damage and wood decay in the home's crawlspace that allegedly was not disclosed prior to closing. The Isaacs claimed that they were not informed of the first CL-100 report prior to closing. The Isaacs then proceeds to sue the Onionses, Kopchynski, and Lane's Professional Pest Elimination, asserting claims for fraud, negligent misrepresentation, civil conspiracy, breach of fiduciary duty, and violations of South Carolina Residential Property Condition Disclosure Act (the "SCRPCDA"). The trial court dismissed all of the Isaacs claims, and the Isaacs appealed.

The South Carolina Court of Appeals partially reversed the trial court's ruling in determining that there was enough evidence to preclude summary judgment on the Isaac's claims for negligent misrepresentation and violation of the SCRPCDA. Kopchynski petitioned the Supreme Court for certiorari.

The South Carolina Supreme Court reversed the Court of Appeals and reinstated summary judgment in favor of Kopchynski finding that the Isaacs failed to demonstrate reasonable reliance on Kopchynski's alleged mischaracterization of the CL-100 inspection report given to the First Buyers, especially given that the Isaacs themselves commission an inspection. Moreover, the SCRPCDA does not support independent liability against a real estate agent absent actual knowledge and reliance.

Isaac v. Onions, -- S.C. --, 915 S.E.2d 492 (2025).

B. Court of Appeals underscores highly deferential standard appellate courts apply to zoning board determinations.

After Oconee County Board of Zoning Appeals (BZA) unanimously granted a variance permitting developers to construct a private access road on a narrow strip of land peninsula on Lake Keowee in order to access a planned subdivision site, John's Marine Service (JMS) and several adjacent landowners challenged the BZA's decision by appealing to the circuit court. The BZA granted the variance and found that moving an existing right-of-way slightly would alleviate a "gap" logistically used by JMS and the neighboring landowners, subject to standard permitting and abandonment procedures. JMS and the landowners argued that the BZA exceeded its jurisdiction by making determinations related to a prescriptive easement, that the BZA improperly presumed the existence of such an easement, that the BZA arbitrarily expanded the boundaries of the alleged easement, and that the variance itself was both arbitrary and capricious. The circuit court affirmed finding that its limited scope of judicial review of a board of zoning appeals required it to sustain the decision unless it was arbitrary, capricious or unsupported by any evidence.

On appeal to the Court of Appeals, the Court affirmed the circuit court's ruling on all issues. The Court held that the BZA had authority to consider and assume easement boundaries for the purpose of evaluating the variance and that it did not improperly shift any burden to JMS or landowners regarding easement existence. The Court rejected JMS and the landowner's arguments that the BZA unlawfully expanded the alleged prescriptive easement and that the BZA's findings were supported by the evidence in the record. And, the Court supported the application of the statutory four-factor test set forth in S.C. Code Ann. § 6-29-800(A)(2): exceptional conditions affected the parcel; application of the zoning ordinance would restrict reasonable use without the variance in that the planned development would be severely limited; the variance would not harm public interest or adjacent property; and the character of the neighborhood would remain intact.

John's Marine Service, Inc. v. Oconee Board of Zoning Appeals, 445 S.C. 423, 914 S.E.2d 481 (Ct. App. 2025).

C. Expert opinion relying on general possibilities rather than specific concrete proof was too speculative to link State construction project to alleged property damage the project allegedly caused.

In *Marlowe v. SCDOT*, the South Carolina Supreme Court affirmed that the Stormwater Management and Sediment Reduction Act (the "Act") does not shield the SCDOT from liability; however, the Court reversed the appellate court by finding insufficient evidence to support an inverse condemnation claim stemming from flooding allegedly caused by highway construction.

The Marlowes owned a residence adjacent to Highway 378 in Florence County. In the early-2010s, SCDOT began a project to widen the road from two lanes to four. The project elevated the roadway and involved installation of new bridges and drainage infrastructure including replacement of an existing box culvert adjacent to the Marlowes' property with a larger one.

While the project was ongoing, the Marlowes' home flooded twice during hundred years and a thousand year rain events. Hurricane Matthew later passed through and the home flooded again. The new culvert was not complete at the time of this third flood event.

Thereafter, the Marlowes commenced an action against SCDOT asserting claims for negligence, conversion, due process violations, and inverse condemnation. The trial court granted summary judgment in favor of SCDOT on all claims. The trial court determined that the Act immunized SCDOT from liability. On appeal, the Court of Appeals: (1) affirmed summary judgment on the Marlowes' negligence claim; (2) reversed summary judgment on the inverse condemnation claim; and (3) reversed the trial court's holding that the Act immunized the SCDOT from liability. SCDOT petitioned the Supreme Court for a writ of certiorari.

The Supreme Court agreed with the Court of Appeals that a plain reading of § 48-14-160 (the Act) neither imposed nor shielded SCDOT from liability. However, the Supreme Court determined that while SCDOT's actions in raising and expanding the road as well as installing drainage may qualify as an affirmative act, causation could not be supported by the record. Thus, summary judgment was warranted on the claim for inverse condemnation. There, the Marlowes did present evidence that SCDOT's project was a substantial contributor to the flooding through expert affidavit. However, the court ruled that there must be evidence that would allow the fact finder to determine, without speculating, just how much of the flooding was caused by the project. Here, that evidence was not enough to rise above speculation on the causation issue. The Court emphasized that plaintiffs must present concrete evidence establishing a causal link between the government's actions and the alleged taking in order for inverse condemnation claim to survive summary judgment.

Marlowe v. South Carolina Department of Transportation, --S.E.2d.--, 2025 WL 909152 (S.C. Mar. 26, 2025).

D. Ambiguities in condominium documents and long-term use can present jury questions over property control.

The South Carolina Court of Appeals recently addressed a dispute over whether a rooftop terrace on a condominium building, Shoreham Towers, was the exclusive property of a unit owner ("Griffin") or a common element controlled by the Shoreham Towers' Homeowners Association (the "HOA").

Since 1983, Griffin or his uncle had owned the unit in question. For three and a half decades, the rooftop terrace was treated as part of Griffin's unit until 2019, when the HOA began to question whether it was a common element. The HOA attempted to restrict Griffin's use and access by enlisting counsel to provide an opinion as to whether it was a common element. After counsel advised the HOA that the roof terrace was a common element, the HOA proceeded to adopt rules and regulations to govern its use. During this time, the HOA specifically excluded Griffin and rejected Griffins own alternative rules.

In response, Griffin filed suit against the HOA asserting breach of contract, acquiescence, conversion, and breach of contract accompanied by a fraudulent act. Griffin also brought claims against individual HOA board members for civil conspiracy. After suit was filed, the HOA hired a safety inspector to give a report of the roof. The inspector did not inspect any other part of the condominium building. After Griffin refused to remove his furniture from the roof, the HOA proceeded to remove it themselves and proceeded to remove specific tiles Griffin had installed. Griffin sought and obtained a temporary restraining order.

At trial, the jury ruled in Griffin's favor on all of his claims. Following trial, the HOA and the board member defendants moved for a JNOV, moved for a new trial *nisi remittitur*, and for a new trial absolute. The trial court denied these motions and the HOA and board members appealed raising numerous issues.

The key issue on appeal was whether the master deed and related condominium documents unambiguously defined the rooftop terrace as a common element or whether it was part of Griffin's private unit. The Court of Appeals held that the language was ambiguous because it failed to clearly categorize this space. Due to the ambiguity, it was proper for the trial court to submit the issue to the jury to determine the intent and effect of the documents using supporting evidence. When a written instrument is ambiguous, court must look beyond the text of the document to determine the parties' intent. In such case a question of fact is appropriate resolved by the fact finder rather than judicial interpretation alone. In this case, the Court put significant emphasis on the fact that, for three and a half decades, the terrace was treated as part of Griffin's private unit.

The Court of Appeals further rejected the remaining claims of the appellants to affirm the trial court decision. The Court concluded that the ambiguities in the property documents, Griffin's

longstanding use, and the behavior of the HOA board members all raised genuine factual issues that were properly submitted to the jury and supported by the evidence.

Griffin v. Giovino, -- S.E.2d --, 2025 WL 1943963 (S.C. Ct. App. July 16, 2025).

TORTS

A. Supreme Court holds that non-settling defendant is entitled to a full setoff for $1 million covenant not to execute by a jointly liable party, while allowing only partial setoffs for other settlements that were not clearly allocated to jury-tried defects.

In 2005, a developer ("Island Pointe") contracted with Complete Building Corporation ("CBC"), a general contractor to construct a condominium project on near Folly Beach named Palmetto Pointe at Peas Island ("Palmetto"). CBC subcontracted certain roofing and siding work to Tri-County Roofing ("TCR"). Thereafter, in 2014 or 2015, Palmetto began noticing leaks related to the roofing. Palmetto brought suit against multiple contractors and subcontractors including CBC and TCR for certain latent construction defects. Palmetto settled with many defendants, but not all. In total, Palmetto received $6.8 million from pretrial and post-trial settlements. The case proceeded to trial where the jury returned a joint-and-several special verdict against CBC and TCR.

TCR then moved for setoff based on (1) a $1,000,000 settlement between CBC and Palmetto (the "CBC Pretrial Settlement") with a covenant not to execute and (2) other pretrial settlements from four other subcontractor defendants totaling $1,975,000 (collectively the "Subcontractor Pretrial Settlements"). The trial court denied TCR's motion to set off the $1,000,000 paid by CBC. Palmetto conceded to the trial court that TCR was entitled to portions of the Subcontractor Pretrial Settlements based upon pretrial allocation of jury-determined defects. The Court of Appeals agreed with the trial court.

Before the Supreme Court were these two groups of pretrial settlements. (1) CBC's Pretrial Settlement and (2) the Subcontractor Pretrial Settlements. The Supreme Court addressed each.

First, the Supreme Court held that TCR was entitled to full setoff in the amount of $1,000,000 from the CBC Pretrial Settlement because CBC and TCR were jointly liable for the same defect-related injuries. Furthermore, the covenant not to execute falls squarely within the South Carolina Contribution Among Tortfeasors Act's (§ 15-38-50) mandate for credit against non-settling defendants. The Supreme Court reversed the Court of Appeals on these grounds.

Next, the Supreme Court affirmed the Court of Appeals with respect to the allocation of the Subcontractor Pretrial Settlements. Unlike the CBC Pretrial Settlement, these Subcontractor Pretrial Settlements required allocation to specific defect categories supported by trial evidence.

Thus, the Supreme Court upheld partial credits for these settlements but denied a blanket setoff of the entire $1,975,000 since certain portions did not relate to defects presented to the jury.

Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC, -- S.C. --, 915 S.E.2d 501 (2025).

B. Court of Appeals affirms summary judgment for contractor and real estate agent in home construction defect case involving contractor's unknown and unauthorized use of contractor's license and incomplete Seller disclosure form.

In *Moody v. ServePro of Pickens County d/b/a Bule Moon Enterprises, Inc.* the South Carolina Court of Appeals affirmed the trial court's grant of summary judgment in favor of *ServePro of Pickens County d/b/a Blue Moon Enterprises, Inc.* (Blue Moon) and TCT1, LLC d/b/a Keller Williams Western Upstate (TCT1).

In 2017, the Moodys bought a newly constructed home for $288,000. The Moodys' agent, Emery, employed by TCT1, had given the Moody's the Seller's disclosure statement, which had a key section, Disclosure 7, left blank. Disclosure 7 includes "foundation, slab, fireplaces, chimneys, wood stoves, floors, basement, windows, driveway, storm windows/screens, doors, ceilings, interior walls, exterior walls, sheds, attached garage, carport, patio, deck, walkways, fencing, or other structural components including modifications." A year later, the Moodys discovered major foundation and water intrusion issues. The Moodys then learned that the builder, Santa Fe Construction, had used Blue Moon's contractor license to obtain permits. Blue Moon itself did not construct the home.

Thereafter, the Moody's sued several parties including Blue Moon and TCT1 alleging that Sante Fe Construction had constructed and sold shoddy homes using Blue Moon's license. As to Blue Moon, the Moodys brought claims for: (a) civil conspiracy, (b) breach of implied warranty, (c) negligence, (d) negligent supervision, and (e) equitable indemnity. As to TCT1, the Moodys brought claims for negligence and breach of fiduciary duty by their buyer's agent, Emery, for failing to warn them that the Seller's disclosure was incomplete.

The trial court found that Blue Moon, a company that specializes in fire and water damage restoration which has never been in the business of new construction, did not construct the Moodys' home and had no involvement in its sale. Although, Caufield, a former Blue Moon employee, had used Blue Moon's general contractor's license to pull permits for the construction, the court determined this unauthorized use was not enough to create liability for Blue Moon. Specifically, Blue Moon had terminated Caufield before the permit was pulled and had no knowledge or control over the unauthorized construction. As a result, the court awardee summary judgment to Blue Moon in concluding that Blue Moon owed no legal duty to the Moodys, was not vicariously liable for its former employee, Caufield's actions, and therefore had not breached any obligation through negligent supervision. The Court of Appeals affirmed.

The trial court also awarded summary judgment to TCT1. Specifically, the trial court held that real estate agents are not legally obligated to verify and/or complete disclosure forms provided by sellers. Because the Moodys had acknowledged reading and signing the form and did not ask TCT1's agent, Emery, to further investigate the disclosures, the trial court found that Emery had fulfilled all legal duties. The duty to investigate and inspect lies with the buyers not their agents. The Court of Appeals affirmed in holding that TCT1's agent had no duty to inform the Moodys of the content of the disclosure statement they signed and thus, summary judgment was warranted.

Moody v. ServePro of Pickens County d/b/a Bule Moon Enterprises, Inc., 2025-UP-284, 2025 WL 2237852 (S.C. Ct. App. Aug. 6, 2025).

C. South Carolina Supreme Court clarifies economic loss rule application in the products-liability context.

On July 23, 2025, the South Carolina Supreme Court issued a significant opinion, *Caroll v. Isle of Palms Pest Control, Inc.*, providing much needed clarification on the application of the economic loss rule under South Carolina.

The Court began by discussing the evolution of the economic loss rule as it emerged in the product liability context and served to distinguish between recovery under contract law rather than tort. In *Kennedy v. Columbia Lumber & Mfg. Co* (1989), the Court recognized a narrow exception to the rule in finding that it does not apply in the residential home building context where a builder violates industry standards or other regulated conduct such as building codes thereby creating a serious risk of physical harm or property damage to a homeowner. Such an exception aligns with the strong South Carolina public policy of protecting homebuyers, as a person's home is likely their largest investment. Then in *Colleton Preparatory Academy v. Hoover Universal* (2008), the Court expanded the exception to commercial construction context. *Sapp v. Ford Motor Co.* (2009) expressly narrowed the rule again, overruling Colleton Preparatory Academy, explaining that Kennedy was a "very narrow" exception.

Next, the Court examined the national development of the economic loss rule, highlighting the doctrinal confusion that has emerged over time. Initially rooted in products liability law, the rule was intended to distinguish between recoverable contract remedies and nonviable tort claims where a product defect resulted solely in economic loss—such as diminished value or repair costs—without physical injury or damage to other property. Under this framework, tort recovery was limited to cases involving physical harm or damage beyond the product itself.

Over time, however, courts across the country have introduced various exceptions, leading to significant inconsistency. South Carolina jurisprudence has similarly contributed to the confusion. The South Carolina Supreme Court carved out the residential homebuilding exception in *Kennedy*. Later, Sapp suggested that the economic loss rule applies whenever the loss was within the contemplation of the contracting parties, thus shifting the focus from the defendant's

conduct to the nature of the resulting damages. Further complicating the doctrine, South Carolina has acknowledged that tort liability may still arise in cases involving duties independent of contractual obligations, such as in the context of professional services rendered by architects, engineers, accountants, or attorneys.

As Justice Hill aptly observed in *Carroll*, "anyone who can explain the economic loss rule does not truly understand it."

The *Carroll* decision clarifies the rule's limits: the economic loss rule applies only in the products liability context—for example, where a product has been manufactured or sold. The rule is inapplicable in non-product cases. In such contexts, defendants can no longer invoke the economic loss rule as a shield to limit liability to contractual remedies, even where damages are purely economic in nature. Where a party breaches a duty independent of the underlying contract and engages in negligent or wrongful conduct outside the contract's terms, tort liability may be appropriate. Furthermore, this decision expressly overrules *Sapp*, to the extent *Sapp* stands for the proposition that tort claims are prohibited where the damage is contemplated by the parties' contract.

Carroll v. Isle of Palms Pest Control, Inc., -- S.E.2d --, 2025 WL 2055721 (S.C. July 23, 2025).

OTHER

A. Court of Appeals allows equitable indemnification claim to proceed where trial court conflated the concepts of "responsibility" with "fault," while affirming dismissal of all other claims due to procedural and statutory defects.

In this construction defect case, Waterfall Investments & Construction Group, LLC ("Waterfall"), a general contractor, sued its subcontractor Jeronimo Ponce d/b/a JP & Sons Builders ("Ponce"), who was responsible for framing work on a custom house Waterfall was building for the Smith family. After construction issues arose, the Smiths withheld payment. Waterfall then left the project and sued the Smiths for nonpayment. The Smiths brought counterclaims for construction defects. Waterfall then filed a third-party complaint against numerous subcontractors, including Ponce, for negligence, contribution, and equitable indemnification.

Waterfall, the Smiths, and several subcontractors settled at mediation. Ponce was excluded from the settlement. As part of the settlement, the Smiths assigned their claims to Waterfall. After the Smiths' assignment of their rights, Waterfall amended its third-party complaint against Ponce to assert claims for breach of contract, breach of implied warranties, and contractual indemnity

along with the initial claims for negligence, contribution, and equitable indemnity. The trial court granted summary judgment to Ponce on all claims.

On appeal, the Court of Appeals affirmed summary judgment for all claims expect equitable indemnity. As to Waterfall's contribution claim, the Court held that under the South Carolina Uniform Contribution Among Tortfeasors Act, a party cannot pursue contribution unless the settling party's liability is extinguished for all joint tortfeasors. Here, the settlement specifically preserved claims against Ponce.

Second, the Court affirmed summary judgment on Waterfall's negligence, breach of contract, and breach of implied warranty claims in finding that the claims were barred because the applicable three-year statute of limitations ran before Waterfall amended its complaint. Those claims did not relate back in time pursuant to Rule 15, since they were based on rights assigned from the Smiths. Furthermore, the Court, emphasizing the *Stoneledge I* and *Stoneledge II* cases, found that these claims were merely claims disguised as equitable indemnification claims.

Third, the Court of Appeals affirmed the trial court's summary dismissal of Waterfall's claim for contractual indemnity, as Waterfall failed to address that issue before the appellate court, and the Court deemed it abandoned. Lastly, the Court of Appeals reversed summary judgment on Waterfall's equitable indemnity claim. The trial court had determined that an affidavit of Waterfall's principal conceded Waterfall's "fault" and therefore there was no issue of material fact. The Court of Appeals disagreed in holding that the trial court conflated "responsibility" with "fault."

Waterfall Investment and Construction Group, LLC v. A&E Construction & Maintenance, LLC, 2025-UP-287, 2025 WL 2237372 (S.C. Ct. App. Aug. 6, 2025).