THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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 Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.;

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida; RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

VNS Corp., individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc., Third-Party Plaintiff,

v.

Billy Grady d/b/a United Builders, LLC, Third-Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

Appellate Case No. 2014-002115

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

Opinion No. 5407
Heard May 4, 2016 – Filed June 1, 2016

REVERSED

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.

WILLIAMS, J.: 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 clause 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 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 the Warranty's inclusion of a binding arbitration clause 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.org OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

Beneath this clause, Tamko included a separate section, titled "Legal Remedies," in which it purportedly excluded all express and implied warranties and disclaimed its liability for all incidental and consequential damages. Additionally, the section stated that any dispute relating to the shingles or the limited warranty must be commenced within one year after the accrual of such cause of action or one year after purchase, depending upon whether the jurisdiction prohibited the exclusion of warranties or statutory claims. The section, however, provided that, if any of these

limitations were inconsistent with or unenforceable under any applicable state law, then such terms did not apply. In a subsequent paragraph, the Warranty prohibited class arbitration as well as class action litigation.

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 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 clause. 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 clause was

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[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), *cert. granted*, (July 24, 2014).

unconscionable and unenforceable due to the cumulative effect of several oppressive and one-sided terms in the Warranty. Lastly, the court found it could not uphold the arbitration clause because it was not severable from the Warranty's unlawful terms. This appeal followed.

STANDARD OF REVIEW

"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 clause located in the Warranty was unconscionable and unenforceable. We agree.

"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 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

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[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.

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, 411 (1967)).

"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.

"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 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 699–70. 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.

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,

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

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 unconscionable and unenforceable. *Id.* at 34, 644 S.E.2d at 674. Lastly, 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 clause 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 warranty. *Id.* at 12, 742 S.E.2d at 39. Under a provision outside the section addressing arbitration, the homebuilder retained the right to terminate the agreement if a dispute arose prior to closing, but the buyers would have no right to sue on the contract. *Id.* Likewise, the homebuilder disclaimed liability to the buyers in another section for "monetary damages of any kind, including secondary, consequential, punitive, general, special[,] or indirect damages." *Id.* at 13, 742 S.E.2d at 39.

In upholding the circuit court's denial of the homebuilder's motion to compel arbitration, this court held the arbitration clause was unconscionable, particularly

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

in light of the provision exempting 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 clause from the unconscionable provisions located in other sections of the purchase agreement, again highlighting the homebuilder's attempt to waive its liability for the purchasers' damages. *Id.* at 16–17, 742 S.E.2d at 41.

During the same year *D.R. Horton* was decided, however, this court also found an arbitration clause in another home sales agreement was not unconscionable. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 258–60, 743 S.E.2d 868, 873–74 (Ct. App. 2013). In *Carlson*, the home purchasers argued the arbitration clause was unconscionable based upon *Simpson* because the sales contract contained various one-sided limitations, including one that purported to shorten the applicable statute of limitations to two years. 404 S.C. at 259–60, 743 S.E.2d at 873–74. This court disagreed, finding the provisions were not located within the arbitration clause and, thus, irrelevant for purposes of determining whether the clause was unconscionable. *Id.* at 260, 743 S.E.2d at 874. Moreover, the court found the arbitration clause was clearly identified in the sales agreement, did not lack mutuality because it applied to both the seller and purchasers, and did not force the purchasers to waive any legal rights. *Id.* at 260, 743 S.E.2d at 873–74.

Turning to the instant case, we hold the circuit court erred in finding the arbitration clause in the Warranty was unconscionable. First, we find the circuit court erred in concluding the adhesive nature of the Warranty contributed to the unconscionability of the arbitration clause. *See Simpson*, 373 S.C. 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"). Our supreme court has made clear that adhesion contracts are not per se unconscionable. *See id.* at 27, 644 S.E.2d at 669. In this case, the underlying sale of Tamko's shingles was a typical modern transaction for goods in which the buyer never has direct contact with the manufacturer to negotiate prices or warranty terms. A manufacturer offers a standard warranty to the marketplace and gives buyers the choice of accepting it by keeping the goods or rejecting it by returning the goods for a refund. *See generally* S.C. Code Ann. § 36-2-204(1) (2003) ("A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."); S.C. Code Ann. § 36-2-606(1)(b) (2003) (providing a buyer accepts the goods if he fails to make an effective rejection following a reasonable opportunity to inspect them). Indeed, the Tamko shingles' packaging contained a section titled "Important: Read Carefully Before Opening," providing that, "if [the

purchaser] is not satisfied with the terms and conditions of [the Warranty], [then he must] return all unopened marketable products to the original place of purchase for a refund."

Second, we find the arbitration clause facilitates an unbiased decision by a neutral decisionmaker in the event of a 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 decision-maker"). Pursuant to the arbitration clause, 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. The arbitration clause does not unduly limit a purchaser's right to a meaningful legal proceeding. In fact, the clause even anticipates actions from purchasers that "sound[] in warranty, contract, statute[,] or any other legal or equitable theory." Therefore, we find the arbitration clause is not oppressive or one-sided.[6] *See Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74.

Finally, we hold the circuit court erred in finding the arbitration clause was not separable from the Warranty. *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"). While the circuit court cited *Simpson* for the proposition that it could not sever the arbitration clause from the Warranty's purportedly unlawful terms, our supreme court in that case directly focused upon whether it could sever unconscionable provisions that were *within* the arbitration clause. 373 S.C. at 34, 644 S.E.2d at 674 (finding the arbitration clause unconscionable due to the "cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause"). In the instant case, Tamko's section on legal remedies is separate and distinct from the Warranty's arbitration clause.[7] Accordingly, following the reasoning of *Munoz* and *Carlson*,

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[6] Although the arbitration clause 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 distributers.

[7] We disagree with Respondents' contention that the legal remedies section is a part of the arbitration clause. However, even if the section was a continuation of the

we hold that the Warranty's limitations and disclaimers are irrelevant to our analysis concerning the unconscionability of the arbitration clause because they are not part of the clause. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 (holding the issue of the validity of an arbitration clause is distinct from the validity of the contract as a whole); *Carlson*, 404 S.C. at 260, 743 S.E.2d at 874 (holding purportedly unlawful terms that were not part of the arbitration clause were irrelevant for purposes of determining whether the clause itself was unconscionable). *But see D.R. Horton*, 403 S.C. at 16–17, 742 S.E.2d at 41 (refusing to sever an arbitration clause from unconscionable provisions located in other parts of the contract).

In conclusion, we hold the circuit court erred in finding the cumulative effect of the Warranty's purportedly unlawful terms rendered the arbitration clause unconscionable and unenforceable.

CONCLUSION

Based on the foregoing analysis, the circuit court's order is

REVERSED.

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

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arbitration clause, it is prefaced with the phrase "[e]xcept where prohibited by law" and provides that "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." Therefore, even considering the terms Respondents find objectionable, we are unable to conclude the arbitration clause is unconscionable because these terms would not apply in the underlying dispute if the arbitrator found they violated South Carolina law. 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).