IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1371
Lower Tribunal Case No. 2D17-4372

SHANE R. HAYSLIP and
LAURA M. HAYSLIP,

Petitioners,

v.

U.S. HOME CORPORATION,

Respondent.

REPLY BRIEF OF PETITIONERS SHANE R. HAYSLIP and LAURA M. HAYSLIP

ON DISCRETIONARY REVIEW OF
AN OPINION OF THE SECOND DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

Petitioners, Shane R. Hayslip and Laura M. Hayslip, shall be referred to herein as the "Hayslips."

Respondent, U.S. Home Corporation, shall be referred to herein as "U.S. Home."

References to the Record on Appeal shall be referred to herein as "R. at ____."

References to Petitioners' Initial Brief shall be referred to herein as "I.B. at ____."

References to Respondent's Answer Brief shall be referred to herein as "A.B. at ____."

ARGUMENT

I. ACCEPTANCE OF A SUBSEQUENT DEED DOES NOT BIND THE HAYSLIPS TO THE ARBITRATION PROVISION IN THE ORIGINAL DEED.

In 2010, the Hayslips were conveyed a deed (the "Subsequent Deed") to the real property with an address of 12898 Stone Tower Loop, Fort Myers, Florida 33913 (the "Home"). The Subsequent Deed did *not* contain an arbitration provision. Nevertheless, U.S. Home contends the Hayslips' acceptance of the Subsequent Deed binds them to an arbitration provision (the "Arbitration Provision") contained within a prior, remote deed (the "Original Deed") conveyed by U.S. Home to the Home's original purchasers, the Kennisons.

U.S. Home asserts the alarmist notion that, if the Court were to agree with the Hayslips' position, then "the entire established body of real estate law recognizing covenants of record running with the land would be upended." (A.B. at 54). Not only is U.S. Home's assertion completely unfounded, but it entirely misstates the Hayslips' position. The Hayslips do not argue "that real estate covenants are only binding on Original Purchasers." (A.B. at 54). The Hayslips' position actually echoes Florida case law, recognizing that for a covenant to run with the land to bind successors, three conditions must be met: (1) intent, (2) notice, and (3) the

covenant must touch and concern the land. PGA North II of Florida, LLC v. State of Florida DOT, 126 So. 2d 1150, 1153 (Fla. 4th DCA 2012). U.S. Home incorrectly states that the Hayslips conceded the first two requirements. (A.B. at 20). The Hayslips have clearly contended, and continue to contend, that both the "notice" and "touch and concern" requirements are missing, and thus, the Arbitration Provision does *not* run with the land to bind the Hayslips as subsequent purchasers.

A. The Arbitration Provision does not touch and concern the land, as required to run with the land.

U.S. Home recites the Maule "touch and concern" test: "the thing required to be done must be something which touches such land, interest, or estate and the occupation, use or enjoyment thereof." Maule Indus., Inv. v. Sheffield Steel Prods., Inc., 105 So. 2d 798, 801 (Fla. 3d DCA 1958). U.S. Home contends that the underlying dispute—allegations regarding defective stucco—touches the "concrete and steel foundation that is buried in the ground," and therefore, "touches and concerns" the land. (A.B. at 22).

First, this argument, if accepted, would demonstrate, at most, a mere *tangential* relationship to the land. See Caulk v. Orange County, 661 So. 2d 932, 933 (Fla. 5th DCA 1995). The Caulk court refused to find that a covenant touched and concern the land, and stated: "Although the covenant 'concerns' the land, it does so only *tangentially*." Id. (emphasis added). The

concept of the underlying dispute concerning the land has nothing to do with the question of whether an arbitration provision "touches and concerns" the land. The thing which must "touch and concern" the land is the Arbitration Provision, *not* the topic of the underlying dispute which did not exist at the time the Original Deed containing the Arbitration Provision was recorded.

To base a finding of "touch and concern" off of the underlying dispute would lead to a wide disparity of determinations as to whether arbitration provisions "touch and concern" the land. The topics of certain disputes may touch and concern the land, while the topics of other disputes may not touch and concern the land. Therefore, sometimes the arbitration provision would run with the land and sometimes it would not—however, this would be undeterminable until the dispute, itself, were to arise in the future.

If enforcement of an arbitration provision were determined by the underlying dispute, then even if a potential home buyer were to discover an arbitration provision in a prior, remote deed, that individual would have no way of knowing if the provision would govern a future dispute, because one cannot anticipate the topic of every potential, future underlying dispute. The arbitration provision should be assessed; not the underlying dispute. Unlike an easement or covenant regarding use of land, a provision requiring

arbitration as a method of future dispute resolution does *not* touch and concern the land.

U.S. Home also proposes methods for analyzing deed provisions, that de-emphasize the "touch and concern" element. (A.B. at 29). See Davidson Bros., Inc. v. D. Katz & Sons, Inc., 579 A.2d 288, 295 (N.J. 1990) (suggesting "reasonableness" be the "guiding inquiry"); Restatement (Third) of Property § 3.2 (cmt. a) (Am. Law. Inst. 2000) (suggesting "touch and concern" requirement be replaced with public policy analysis). However, even were the Arbitration Provision in the instant case to be viewed through the lenses of these alternative approaches, it would *still* fail to bind the Hayslips.

In Davidson, the New Jersey Supreme Court provided factors for guidance in determining the reasonableness of a deed provision, including:

> Whether the covenant was in writing, recorded, and if so, whether the subsequent grantee had **actual notice** of the covenant…Whether the covenant is reasonable concerning area, time or duration. Covenants that extend for **perpetuity** or beyond the terms of the lease may often be unreasonable…Whether the covenant interferes with the **public interest**….

Davidson, 579 A.2d at 295 (emphasis added). Even applying the Davidson reasonableness test suggested by U.S. Home, the Arbitration Provision clearly would not bind the Hayslips, as the Hayslips did not have actual notice of the Arbitration Provision, and the Arbitration Provision is designed to exist

in perpetuity—both contrary to the Davidson reasonableness factors. See id.

Additionally, the adverse public policy implications of binding subsequent purchasers to an arbitration provision, to which the subsequent purchasers did not knowingly and voluntarily agree, also support a finding of unenforceability—based on both the Davidson public interest factor and the public policy approach of the Restatement. See id; Restatement (Third) of Property § 3.2 (cmt. a).

B. The Hayslips were not provided proper notice of the Arbitration Provision.

Constructive notice, via the recording of the Original Deed, is insufficient to bind the Hayslips to the Arbitration Provision contained within the Original Deed. The Arbitration Provision's unique characteristics—as a personal covenant, implicating contract law and Florida Constitutional Rights—necessitate an actual notice requirement. See Art. I, §§ 21-22, Fla. Const; see American Int'l Group v. Cornerstone Bus., Inc., 872 So. 2d 333, 336 (Fla. 2d DCA 2004) ("Arbitration provisions are personal covenants, usually binding only upon the parties to the covenant.").

U.S. Home contends the Hayslips "had notice of, and accepted, what they bargained for…including the arbitration covenant." (A.B. at 7). Not only are these assertions fiction, but they highlight the very issues at hand. The

Hayslips did *not* have actual notice, did *not* accept the Original Deed containing the Arbitration Provision, and did *not* have an opportunity to bargain, as they had no relationship with, nor any interaction with, U.S. Home, the grantor of the Original Deed.

Arbitration agreements are governed by principles of Florida contract law—which U.S. Home concedes in its Answer Brief. (A.B. at 9). For an arbitration agreement to be enforceable, as with any contract, there must be an intent to arbitrate—evidenced by absolute and unconditional written acceptance of an offer to bind one's self to arbitration. See Eugene W. Kelsey & Son, Inc. v. Architectural Openings, Inc., 484 So. 2d 610, 611 (Fla. 5th DCA 1986) ("In order for a dispute to be arbitrable, a written contract must show the parties' intent to submit to arbitration") (emphasis added) ; see Cheverie v. Geisser, 783 So. 2d 1115, 1119 (Fla. 4th DCA 2001) ("Generally, the acceptance of an offer which results in a contract must be absolute and unconditional.").

U.S. Home contends that the Federal Arbitration Act ("FAA") does not require an arbitration agreement be signed to bind parties. (A.B. at 40). However, there still must be an actual agreement. While acknowledging that arbitration "'remains a matter of consent,'" U.S. Home further asserts that "consent can be implied" via the doctrine of equitable estoppel. (A.B. at 40)

(quoting Sanum Inv. Ltd. v. San Marco Cap. Partners LLC, 263 F. Supp 3d 491, 496-97 (D. Del. 2017)). U.S. Home quotes Sanum completely out of context.

The Delaware federal trial court in Sanum explained the limited circumstance where consent can be implied through estoppel. See 263 F. Supp 3d at 496. To summarize Sanum, when Party A and Party B create a signed arbitration agreement, a Non-Signatory Party can enforce that agreement against party A, *if* the Non-Signatory Party has a sufficiently close relationship with party B. See id. The Delaware federal trial court, in Sanum, in no way suggested that a party's consent can be implied when that party did not even possess knowledge of the agreement's existence. In the instant case, the Hayslips did not explicitly consent to arbitration, and further, the facts do *not* support an implication of consent.

U.S. Home further argues that: "'a party may be estopped from asserting that the lack of [the party's] signature on a **written contract** precludes enforcement of the **contract's** arbitration clause when [the party] has consistently maintained that other provisions of the **same contract** should be enforced to benefit [that party].'" (A.B. at 40) (quoting Int'l Paper Co. v. Schwabedissen, 206 F.3d 411, 418 (4th Cir. 2000) (emphasis added). However, the Original Deed is not a "contract" to which the Hayslips were a

party, and the Hayslips have not sought to enforce or benefit from other provisions of the Original Deed,[1] nor have the Hayslips assented to the Arbitration Provision in the Original Deed via their actions in any way. To enforce the Arbitration Provision in the Original Deed against the Hayslips, without the presence of *actual* notice, would be to improperly bind the Hayslips to a contract without their consent.

U.S. Home grasps at isolated state court opinions from Arizona and Nevada that have, in specific circumstances, characterized covenants, conditions and restrictions as contractual in nature, yet still able to run with the land. Although not remotely analogous, U.S. Home contends an arbitration provision—despite its contractual nature—should be permitted to run with the land with merely constructive notice. (A.B. at 14). However, there is a significant difference between a traditional covenant, condition and restriction—such as an easement, governed by principles of property law and historically found to have the ability to run with the land—and an arbitration provision—an expressly contractual agreement, governed by principles of contract law.

[1] Although the Hayslips have not sought to enforce provisions of the Original Deed, U.S. Home has continued attempting to enforce the Original Deed Provisions against the Hayslips, including the Arbitration Provision and a corresponding prevailing party attorneys' fees provision in the Original Deed. Indeed, U.S. Home filed a Motion to Tax Attorneys' Fees and Costs against the Hayslips in state court, dated October 18, 2017. (R. at 202). As a result, the Hayslips are contemporaneously herewith filing their Motion for Award of Attorneys' Fees and Costs to preserve any such viable claims.

U.S. Home argues that the Subsequent Deed provided the Hayslips with *actual* notice that they would be subject to the Arbitration Provision because the Subsequent Deed stated that the Hayslips were taking the Home "[s]ubject to easements, restrictions, reservations, and limitations of record, if any." (A.B. at 15). This contention is contrived. This statement provided no notice, as the Arbitration Provision is not an easement, restriction, reservation or limitation, nor does it logically fit into this group of constraints. Easements, restrictions, reservations, and limitations all involve what can and cannot be done on, with, or to land (*i.e*., the aforementioned are all real covenants) whereas an arbitration provision is a personal, contractual covenant. The language in the Subsequent Deed further underscores that an arbitration provision is *not* in the same class or category of deed provisions that can or should bind subsequent purchasers, like the Hayslips, who have not explicitly agreed to be bound thereby.

II. PUBLIC POLICY CONSIDERATIONS DICTATE A FINDING THAT THE ARBITRATION PROVISION IN THE REMOTE, ORIGINAL DEED DOES NOT BIND THE HAYSLIPS.

A. Florida Public Policy requires actual notice to bind subsequent purchasers to an arbitration provision.

U.S. Home contends that "public policy should not allow purchasers, with notice of deed's covenants, to later avoid them claiming they lacked actual knowledge," claiming that a requirement of actual notice, rather than

mere constructive notice would "eviscerate Florida's long-standing and orderly notice doctrine." (A.B. at 17-18). U.S. Home's claim possesses no basis in reality.

The Hayslips do not seek to eviscerate Florida's notice doctrine; they simply argue that it is inapplicable in the instant case, given the unique, personal, contractual nature of arbitration provisions and the Constitutional Rights implicated. (I.B. at 33-35); see also American Int'l, 872 So. 2d at 336. Requiring actual notice to bind a subsequent purchaser to an arbitration provision in a prior deed would have no impact on Florida's notice doctrine, as an arbitration provision does *not* fit within the class of provisions for which the notice doctrine permits constructive notice to bind successors. See id.

B. Policies favoring alternative dispute resolution do not support binding individuals to agreements to which they did not enter.

U.S. Home asserts that federal policy favoring arbitration supports enforcing the Arbitration Provision against the Hayslips. (A.B. at 35). However, federal case law is clear that any support courts have shown for arbitration does not necessitate the enforcement of arbitration agreements against those who have not bound themselves to those agreements. (I.B. at 16-19); Seaboard Coast Line R. Co. v. Trailer Train Co., 690 F. 2d 1343, 1352 (11th Cir. 1982); Granite Rock Co. v. International Broth. of Teamsters,

561 U.S. 287, 299 (2010); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

Further, U.S. Home essentially argues that because the Florida Legislature finds it "beneficial to have an alternative method to resolve construction disputes" (§ 558.001, Fla. Stat.), and includes "arbitration" in the definition of an "Action" (§ 558.002(1), Fla. Stat.), Florida public policy favors arbitration to the exclusion of state trial court actions. (A.B. at 42, 44). However, section 558.002(1) also includes a "civil action" along with "arbitration" in the definition of an "Action." Moreover, the Florida Legislature could have included a mandatory arbitration provision in Chapter 558, Florida Statutes—as it included a mandatory pre-suit process—yet chose *not* to do so. Additionally, the Legislature's belief that an alternative method of dispute resolution is beneficial or favored is *not* akin to a mandate that arbitration be forced upon those who have not agreed to, and not bound themselves to, arbitration.

Utilizing the statutory definition of "Claimant" in section 558.002(3), Florida Statutes, U.S. Home creatively contends that by including "subsequent purchaser" in the definition of "Claimant," there is evidence of a legislative intent to "classify original purchasers and subsequent purchasers in the same way." (A.B. at 44). U.S. Home's argument is based on nothing

more than an illogical torture of this statutory definition to fit U.S. Home's unsupported narrative. See § 558.002(3), Fla. Stat. Even so, the inclusion of "subsequent purchaser" in the definition of "Claimant" *does* clearly evidence the Legislature's desire to establish the right of a "subsequent purchaser," like the Hayslips, to bring a construction defect claim.

C. Enforcing the Arbitration Provision against the Hayslips would start the path toward eviscerating "choice" in Florida's residential real estate marketplace.

U.S. Home contends that, if the Hayslips had an issue with the Arbitration Provision, they should have simply purchased a different house. (A.B. at 18-19). First, the Hayslips did not have actual notice of the Arbitration Provision to enable the Hayslips to make such a knowing, informed and voluntary decision. Second, U.S. Home's argument implicates the Hayslips' slippery slope concern (I.B. at 47-49), completely ignored by U.S. Home in its Answer Brief.

If an arbitration provision is found to run with the land to bind subsequent purchasers, then there would be no provision that will *not* run with the land. Specifically, there would be no limit as to what type of covenant could "touch and concern" land. The effect of this would enable original grantors of land—including big builders and other entities with excessive bargaining power—to inequitably include and impose a multitude of onerous,

burdensome provisions within deeds for the grantors' exclusive benefit, to the detriment of all subsequent purchasers; thereby binding every single, subsequent purchaser of that land, regardless of how remote their subsequent ownership might be. The logical consequence would be a lack of meaningful choice in the Florida residential real estate market, in addition to a significant, unfair burden and expense on Florida homeowners and Florida real estate professionals.

D. Binding the Hayslips to the Arbitration Provision would be unconscionable.

Not only is the Arbitration Provision unenforceable against the Hayslips due to the contractual requirements of an arbitration provision, but to enforce such a provision against the Hayslips without their affirmative agreement would rise to the level of unconscionability, as it would be both procedurally and substantively unconscionable. U.S. Home asserts that it would not be procedurally unconscionable, because the Hayslips could have simply avoided the provision by purchasing a different house. (A.B. at 18). This argument misses the mark.

First, U.S. Home's argument presupposes that the Hayslips had actual notice of the Arbitration Provision—which they did not. Again, constructive notice is insufficient to bind a party to a "contract" that would deprive them of constitutional rights. Additionally, not only is there procedural

unconscionability in *this* case, but binding the Hayslips to the Arbitration Provision would establish precedent for never-ending, continued future procedural unconscionability.

Binding subsequent purchasers to arbitration provisions in prior deeds would soon render "meaningful choice" illusory, as it would provide a green light to every residential home builder to not only force all subsequent purchasers into arbitration, but to use real property deeds as the vehicle to assert the builder's unfettered will over anyone seeking home ownership in Florida. If U.S. Home's argument were to be accepted, subsequent purchasers, who are not in contractual privity with the original home builder—and lack any opportunity to bargain with the home builder—would lack any option to purchase a home free from the encumbrance of an arbitration provision. This most certainly constitutes procedural unconscionability.

U.S. Home further claims that substantive unconscionability is not present, because "arbitration is a long-standing, judicially recognized and well-used forum for addressing claims." (A.B. at 58). The Hayslips, however, do not argue that arbitration in and of itself is unconscionable. Rather, the unconscionability exists in the deprivation of constitutional rights, by binding someone to mandatory, binding arbitration without their knowing, voluntary consent to waive such Constitutional rights. See Art. I, §§ 21-22, Fla. Const.

E. Infringement on Florida Constitutional Rights.

To bind the Hayslips to the Arbitration Provision in the Original Deed would be to improperly deny the Hayslips' Florida Constitutional rights to a trial by jury and access to courts without a knowing, voluntary waiver of these important rights. Art. I §§ 21-22, Fla. Const. U.S. Home points to Rule 1.430(d) of the Florida Rules of Civil Procedure and argues that a knowing and voluntary waiver of the right to a jury trial is not necessary, as an individual can already lose this right, even absent an intentional waiver. See (A.B. at 55-56). Rule 1.430(d) provides, in part, that: "A party who fails to serve a demand as required by this rule waives trial by jury."

However, the potential waiver of a jury trial under Rule 1.430(d), is *not* an appropriate comparison to the deprivation of the jury trial right based on an arbitration provision in a remote, prior deed. When involved in litigation in Florida state court, a party is knowingly governed by the Florida Rules of Civil Procedure, including Rule 1.430(d). Importantly, Rule 1.430(a) provides: "The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate." Further, Rule 1.430(d) additionally provides: "If waived…the court may allow an amendment in the proceedings to demand a trial by jury or order a trial by jury on its own motion." Significantly, U.S. Home's argument further falls flat, in the instant

case, as the Hayslips in fact did demand a jury trial when they filed their Complaint and Demand for Jury Trial against U.S. Home in state court. (R. at 128-131).

U.S. Home references jury trial waiver in the criminal context, citing Westberry v. State, 239 So. 3d 186, 191 (Fla. 3d DCA 2018); however, this very case, cited by U.S. Home states: "An effective waiver of a constitutional right must be knowing, voluntary, and intelligent." (A.B. at 56). The Hayslips did not knowingly, nor voluntarily, nor intelligently waive their constitutional rights to a jury trial or access to courts. Art. I §§ 21-22, Fla. Const.

U.S. Home also asserts that a waiver of constitutional rights can be *implied*—for instance, when one enters into an arbitration agreement. (A.B. at 56). While it is correct that a waiver of a jury trial right can be implied when one knowingly and voluntarily enters into an arbitration agreement, in the instant case, U.S. Home seeks to not only imply the waiver, but *also* seeks to imply the arbitration agreement itself. This is one implication too far.

In an apparently alternative argument, U.S. Home contends that the Hayslips still have redress in court to set aside an arbitration award—seemingly arguing that arbitration is not a complete relinquishment of one's access to courts. (A.B. at 58); § 682.13(1), Fla. Stat. This contention, however, is misleading, as section 682.13(1), *only* allows for an arbitration

award to be vacated in a very narrow set of circumstances essentially amounting to fraud, corruption or an abuse of power. If the Hayslips were forced to abide by an arbitration provision to which they did not knowingly bind themselves, it would constitute an improper deprivation of their constitutional rights. See Art. I §§ 21-22, Fla. Const.

III. FLORIDA CASE LAW—NOT FOREIGN CASE LAW—SHOULD GUIDE THE INSTANT CASE.

U.S. Home continues to misplace reliance on the case law of other states to assert that an arbitration provision "touches and concerns" land. (A.B. at 23-29). However, "the validity of an arbitration clause is…an issue of state contract law." See (I.B. at 28-33); Powertel, Inc. v. Bexley, 743 So. 2d 570, 547 (Fla. 1st DCA 1999). Accordingly, Florida case law—not foreign case law—governs.

U.S. Home nevertheless relies on another out-of-state case from California: Pinnacle Museum Tower Ass'n v. Pinnacle Mkt. Dev., 282 P.3d 1217 (Cal. 2012). However, in Pinnacle, a California-specific law—known as the Davis-Stirling Act—applied, and that California-specific law rendered it inconsequential whether a covenant ran with the land in California. See 282 P.3d at 1237 (Werdegar, J., concurring) (stating that the Davis-Stirling Act does not require covenants to run with the land to be enforceable against

subsequent purchasers). This significant variation between California law and Florida law makes Pinnacle entirely inapplicable to the instant case.

The Court should safeguard the Florida real estate market and potential Florida home buyers and make clear for the entire State of Florida that arbitration provisions are personal covenants that are only binding upon the parties to the covenant. See American Int'l, 872 So. 2d at 336.

CONCLUSION

For all of the aforementioned reasons, the Court should answer the certified question in the negative, disapprove the decision of the Second District Court of Appeal, reverse the trial court's order compelling arbitration, and remand this action to proceed in state court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Courts E-Filing Portal, this 6th day of May, 2021 to the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the applicable font and word count limit requirements of Rules 9.045(b) and 9.210(a)(2) of the Florida Rules of Appellate Procedure, respectively. It is written in Arial 14-point font and contains 3,983 words.

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