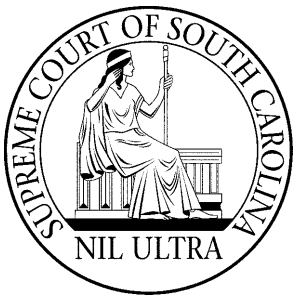

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 19
June 1, 2022
Patricia A. Howard, Clerk
Columbia, South Carolina
www.sccourts.org

CONTENTS

THE SUPREME COURT OF SOUTH CAROLINA

PUBLISHED OPINIONS AND ORDERS

UNPUBLISHED OPINIONS

None

PETITIONS - UNITED STATES SUPREME COURT

EXTENSION TO FILE PETITION - UNITED STATES SUPREME COURT

PETITIONS FOR REHEARING

THE SOUTH CAROLINA COURT OF APPEALS

PUBLISHED OPINIONS

UNPUBLISHED OPINIONS

2022-UP-230 – James Primus #252315 v. South Carolina Dep't of Corrections

2022-UP-231 – Francisco Nicolas Miguel v. Palmetto Asset Investments, LLC

2022-UP-232 – Bradley Circle v. Town of Hilton Head

2022-UP-233 – Richie D. Barnes v. James Reese

2022-UP-234 – State v. Ronald Brown

2022-UP-235 – River City Developers, LLC v. The Marshes

2022-UP-236 – David J. Mattox v. Lisa Jo Bare Mattox

PETITIONS FOR REHEARING

5898 – Josie Bostick v. Earl Bostick, Sr. Pending

5902 – Larry Tyler v. State Pending

5905 – State v. Richard K. Galloway Pending

5906 – Isaac D. Brailey v. Michelin, N.A. Pending

5907 – State v. Sherwin A. Green Pending

5908 – State v. Gabrielle Olivia Lashane Davis Kocsis Denied 05/25/2022

2022-UP-096 – Samuel Paulino v. Diversified Coatings, Inc. Pending

2022-UP-114 – State v. Mutekis J. Williams Pending

2022-UP-161 – Denis Yeo v. Lexington County Assessor Pending

2022-UP-169 – Richard Ladson v. THI of South Carolina at Charleston Pending

2022-UP-171 – SCDSS v. Lacie Smith Pending

2022-UP-180 – Berkley T. Feagin v. Cambria C. Feagin Pending

2022-UP-183 – Raymond A. Wedlake v. Scott Bashor Pending

2022-UP-184 – Raymond Wedlake v. Woodington Homeowners Pending

2022-UP-186 – William B. Justice v. State Pending

2022-UP-189 – State v. Jordan M. Hodge Pending

2022-UP-192 – Nivens v. JB&E Heating and Cooling, Inc. Pending

PETITIONS – SUPREME COURT OF SOUTH CAROLINA

5731 – Jericho State v. Chicago Title Insurance Pending

5738 – The Kitchen Planners v. Samuel E. Friedman Pending

5769 – Fairfield Waverly v. Dorchester County Assessor Pending

5776 – State v. James Heyward Pending

5782 – State v. Randy Wright Pending

5794 – Sea Island Food v. Yaschik Development (2) Pending

5816 – State v. John E. Perry, Jr. Pending

5818 – Opternative v. SC Board of Medical Examiners		Pending
5821 – The Estate of Jane Doe 202 v. City of North Charleston		Pending
5822 – Vickie Rummage v. BGF Industries		Pending
5824 – State v. Robert Lee Miller, III		Pending
5826 – Charleston Development v. Younesse Alami		Pending
5827 – Francisco Ramirez v. May River Roofing, Inc.		Pending
5829 – Thomas Torrence #094651 v. SCDC		Pending
5830 – State v. Jon Smart	Granted	05/17/2022
5832 – State v. Adam Rowell		Pending
5834 – Vanessa Williams v. Bradford Jeffcoat		Pending
5835 – State v. James Caleb Williams		Pending
5838 – Elizabeth Hope Rainey v. SCDSS		Pending
5839 – In the Matter of Thomas Griffin		Pending
5840 – Daniel Lee Davis v. ISCO Industries, Inc.		Pending
5841 – State v. Richard Passio, Jr.		Pending
5843 – Quincy Allen #6019 v. SCDC		Pending
5844 – Deutsche Bank v. Patricia Owens		Pending
5845 – Daniel O'Shields v. Columbia Automotive		Pending
5846 – State v. Demontay M. Payne		Pending

5849 – SC Property and Casualty Guaranty Fund v. Second Injury Fund	Pending
5850 – State v. Charles Dent	Pending
5851 – State v. Robert X. Geter	Pending
5853 – State v. Shelby Harper Taylor	Pending
5854 – Jeffrey Cruce v. Berkeley Cty. School District	Pending
5855 – SC Department of Consumer Affairs v. Cash Central	Pending
5856 – Town of Sullivan's Island v. Michael Murray	Pending
5858 – Beverly Jolly v. General Electric Company	Pending
5859 – Mary P. Smith v. Angus M. Lawton	Pending
5860 – Kelaher, Connell & Conner, PC v. SCWCC	Pending
5861 – State v. Randy Collins	Pending
5863 – State v. Travis L. Lawrence	Pending
5864 – Treva Flowers v. Bang N. Giep, M.D.	Pending
5865 – S.C. Public Interest Foundation v. Richland County	Pending
5866 – Stephanie Underwood v. SSC Seneca Operating Co.	Pending
5867 – Victor M. Weldon v. State	Pending
5868 – State v. Tommy Lee Benton	Pending
5870 – Modesta Brinkman v. Weston & Sampson Engineers, Inc.	Pending
5871 – Encore Technology Group, LLC v. Keone Trask and Clear Touch	Pending
5874 – Elizabeth Campione v. Willie Best	Pending

5875 – State v. Victoria L. Sanchez	Pending
5877 – Travis Hines v. State	Pending
5878 – State v. Gregg Pickrell	Pending
5880 – Stephen Wilkinson v. Redd Green Investments	Pending
5882 – Donald Stanley v. Southern State Police	Pending
5884 – Frank Rish, Sr. v. Kathy Rish	Pending
5885 – State v. Montrell Lamont Campbell	Pending
5888 – Covil Corp. v. Pennsylvania National Mut. Ins. Co.	Pending
5891 – Dale Brooks v. Benore Logistics System, Inc.	Pending
5892 – State v. Thomas Acker	Pending
5900 – Donald Simmons v. Benson Hyundai, LLC	Pending
2020-UP-244 – State v. Javon Dion Gibbs	Pending
2021-UP-009 – Paul Branco v. Hull Storey Retail	Pending
2021-UP-105 – Orveletta Alston v. Conway Manor, LLC	Pending
2021-UP-121 – State v. George Cleveland, III	Pending
2021-UP-141 – Evelyn Hemphill v. Kenneth Hemphill	Pending
2021-UP-147 – Gavin V. Jones v. State	Pending
2021-UP-161 –Wells Fargo Bank, N.A. v. Albert Sanders (2)	Pending
2021-UP-162 – First-Citizens Bank v. Linda Faulkner	Pending

2021-UP-167 – Captain's Harbour v. Jerald Jones (2) Pending

2021-UP-171 – Anderson Brothers Bank v. Dazarhea Monique Parson(3) Pending

2021-UP-182 – State v. William Lee Carpenter Pending

2021-UP-196 – State v. General T. Little Pending

2021-UP-229 – Peter Rice v. John Doe Pending

2021-UP-230 – John Tomsic v. Angel Tomsic Pending

2021-UP-242 – G. Allen Rutter v. City of Columbia Pending

2021-UP-247 – Michael A. Rogers v. State Pending

2021-UP-252 – Betty Jean Perkins v. SCDOT Pending

2021-UP-254 – State v. William C. Sellers Pending

2021-UP-259 – State v. James Kester Pending

2021-UP-272 – Angela Bain v. Denise Lawson Pending

2021-UP-273 – SCDHEC v. Davenport Pending

2021-UP-275 – State v. Marion C. Wilkes Pending

2021-UP-277 – State v. Dana L. Morton Pending

2021-UP-278 – State v. Jason Franklin Carver Pending

2021-UP-279 – State v. Therron R. Richardson Pending

2021-UP-280 – Carpenter Braselton, LLC v. Ashley Roberts Pending

2021-UP-281 – In the Matter of the Estate of Harriet Kathleen Henry Tims Pending

2021-UP-283 – State v. Jane Katherine Hughes	Pending
2021-UP-288 – Gabriel Barnhill v. J. Floyd Swilley	Pending
2021-UP-289 – Hicks Unlimited v. UniFirst Corporation	Pending
2021-UP-293 – Elizabeth Holland v. Richard Holland	Pending
2021-UP-298 – State v. Jahru Harold Smith	Pending
2021-UP-302 – State v. Brandon J. Lee	Pending
2021-UP-306 – Kenneth L. Barr v. Darlington Cty. School Dt.	Pending
2021-UP-312 – Dorchester Cty. Taxpayers Assoc. v. Dorchester Cty.	Pending
2021-UP-330 – State v. Carmie J. Nelson	Pending
2021-UP-336 – Bobby Foster v. Julian Neil Armstrong (2)	Pending
2021-UP-341 – Phillip Francis Luke Hughes v. Bank of America	Pending
2021-UP-351 – State v. Stacardo Grissett	Pending
2021-UP-354 – Phillip Francis Luke Hughes v. Bank of America (2)	Pending
2021-UP-360 – Dewberry v. City of Charleston	Pending
2021-UP-367 – Glenda Couram v. Sherwood Tidwell	Pending
2021-UP-368 – Andrew Waldo v. Michael Cousins	Pending
2021-UP-370 – State v. Jody R. Thompson	Pending
2021-UP-372 – Allen Stone v. State	Pending
2021-UP-373 – Glenda Couram v. Nationwide Mutual	Pending
2021-UP-384 – State v. Roger D. Grate	Pending

2021-UP-385 – David Martin v. Roxanne Allen	Pending
2021-UP-395 – State v. Byron L. Rivers	Pending
2021-UP-396 – State v. Matthew J. Bryant	Pending
2021-UP-399 – Henry Still, V v. Barbara Vaughn	Pending
2021-UP-400 – Rita Brooks v. Velocity Powersports, LLC	Pending
2021-UP-405 – Christopher E. Russell v. State	Pending
2021-UP-408 – State v. Allen A. Fields	Pending
2021-UP-418 – Jami Powell (Encore) v. Clear Touch Interactive	Pending
2021-UP-422 – Timothy Howe v. Air & Liquid Systems (Cleaver-Brooks)	Pending
2021-UP-429 – State v. Jeffery J. Williams	Pending
2021-UP-436 – Winston Shell v. Nathaniel Shell	Pending
2021-UP-437 – State v. Malik J. Singleton	Pending
2021-UP-447 – Jakarta Young #276572 v. SCDC	Pending
2021-UP-454 – K.A. Diehl and Assoc. Inc. v. James Perkins	Pending
2022-UP-003 – Kevin Granatino v. Calvin Williams	Pending
2022-UP-021 – State v. Justin Bradley Cameron	Pending
2022-UP-022 – H. Hughes Andrews v. Quentin S. Broom, Jr.	Pending
2022-UP-023 – Desa Ballard v. Redding Jones, PLLC	Pending
2022-UP-025 – Nathenia Rossington v. Julio Rossington	Pending

2022-UP-028 – Demetrius Mack v. Leon Lott (2)	Pending
2022-UP-036 – John Burgess v. Katherine Hunter	Pending
2022-UP-051 – Ronald Paul v. SCDOT (2)	Pending
2022-UP-059 – James Primus #252315 v. SCDC	Pending
2022-UP-063 – Rebecca Rowe v. Family Health Centers, Inc.	Pending
2022-UP-075 – James A. Johnson v. State	Pending
2022-UP-081 – Gena Davis v. SCDC	Pending
2022-UP-085 – Richard Ciampanella v. City of Myrtle Beach	Pending
2022-UP-089 – Elizabeth Lofton v. Berkeley Electric Coop. Inc.	Pending
2022-UP-097 – State v. Brandon K. Moore	Pending
2022-UP-119 – Merilee Landano v. Norman Landano	Pending
2022-UP-146 – M & T Bank v. Tyrone Davis	Pending

The Supreme Court of South Carolina

Re: Amendments to the South Carolina Electronic Filing Policies and Guidelines

Appellate Case No. 2022-000582

ORDER

Based on the adoption of Rules 613 and 614 of the South Carolina Appellate Court Rules (SCACR), we amend several provisions of the South Carolina Electronic Filing Policies and Guidelines (SCEF). These amendments, which are set forth in the attachment and are effective immediately, are intended to allow for the greater use of electronic signatures, as recognized in Rule 614, SCACR, and for other forms of electronic service that may be authorized by Rule 613, SCACR. Further, several other provisions are amended in recognition of this Court's decision to change its public denomination from the Judicial Department to the Judicial Branch.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
May 27, 2022

Section 1(d), (e), (n), (o), and (p), SCEF, are amended to provide:

(d) "Electronic Filing System" or "E-Filing System" is the South Carolina Judicial Branch's automated system for receiving and storing documents filed in electronic form.

(e) "Electronic Signature" is a signature made in compliance with Rule 614, SCACR.

. . .

(n) "Traditional Filing" is the physical filing of paper documents in the office of the Clerk of Court or as otherwise authorized under the South Carolina Rules of Civil Procedure.

(o) "Traditional Service" is the service of a document using the forms or methods of service authorized under the South Carolina Rules of Civil Procedure, or by electronic means pursuant to an order of the Supreme Court issued under Rule 613, SCACR.

(p) "Traditional Signature" is the original, handwritten signature of any person. All persons who are not authorized by Rule 614, SCACR, to use an Electronic Signature, including, but not limited to, paralegals, legal assistants, and notaries, are required to use a Traditional Signature on all E-Filed documents.

Section 3(c)(2), SCEF, is amended to provide:

(2) Notification of Unauthorized Use. An Authorized E-Filer shall immediately notify the South Carolina Judicial Branch Information Technology (IT) Helpdesk at the telephone number or email address listed on the South Carolina Judicial Branch's website, www.sccourts.org, if the Authorized E-Filer learns or suspects his or her login and password has been used without authorization.

Section 4(e)(5)(A) and (B), SCEF, are amended to provide:

(5) Service By or Upon a Party Who is Not an E-Filer in a Case.

(A) E-Filed motions, pleadings, or other papers that must be served upon a party who is not represented by an Authorized E-Filer in the case or who is a Traditional Filer must be served by a Traditional Service method in accordance with Rule 5, SCRCP, or any order of the Supreme Court issued under Rule 613, SCACR. An Authorized E-Filer who has E-Filed a motion, pleading, or other paper prior to service of the pleading, motion, or other paper shall serve a copy of the corresponding NEF on the Traditional Filer(s). The Authorized E-Filer must also file proof of Traditional Service as to all other parties who are Traditional Filers.

(B) Traditional Filers must continue to serve all parties with a copy of the pleading, motion, or other paper by a Traditional Service method in accordance with Rule 5, SCRCP, or any order of the Supreme Court issued under Rule 613, SCACR, and file a copy of the pleading, motion, or other paper with the Clerk of Court, together with proof of service, as required by Rule 5(d), SCRCP, or any order of the Supreme Court issued under Rule 613, SCACR.

Section 5(a)(2) and (c), SCEF, are amended to provide:

(2) The use of an Electronic Signature in the signature line of an E-Filed document shall constitute the Authorized E-Filer's Electronic Signature on all E-Filed documents in accordance with Rule 11, SCRCP. The Authorized E-Filer shall also provide other identifying information, including the name, physical address, telephone number,

and email address of the E-Filer, along with the E-Filer's South Carolina Bar Number. For example:

s/John Doe
S.C. Bar No. 12345
Attorney for the Plaintiff
1234 Any Street
Columbia, SC 29201
803-555-0111
name@email.com

. . .

(c) Documents Requiring a Traditional Signature. Only an attorney or party authorized by Rule 614, SCACR, may utilize an Electronic Signature on an E-Filed document. Documents containing the signature of persons who are not authorized to use an Electronic Signature under Rule 614, SCACR, including affidavits, other notarized documents, or certificates of service signed by paralegals or legal assistants, cannot be E-Filed with an Electronic Signature. Any document that requires a signature of a person who is not authorized to use an Electronic Signature must be signed with a Traditional Signature and E-Filed as a scanned PDF image.

Section 8(c), SCEF, is amended to provide:

(c) Proposed Orders. Proposed orders must be prepared in Microsoft Word (*.doc or *.docx) format, unless the proposed order is a consent order signed by a person who is not authorized to use an Electronic Signature under Rule 614, SCACR, in which case the signed proposed order should be scanned to PDF. Proposed orders should be submitted in one of two ways:

. . . .

Section 9(a), (d)(2)(A), and (e), are amended to provide:

(a) Point of Contact. The point of contact for an Authorized E-Filer who is experiencing difficulty E-Filing a document is the South Carolina Judicial Branch Information Technology (IT) Helpdesk at the telephone number or email address listed on the South Carolina Judicial Branch's website, www.sccourts.org. The IT Helpdesk is open during the hours listed on the website and in the E-Filing application. Authorized E-Filers are encouraged to E-File documents during normal business hours in the event a problem with an Electronic Filing occurs.

. . .

> **(d)(2)(A)** Email with an attachment containing the document with an Electronic Signature in PDF format, sent to the email address for Technical Failures for the county Clerk of Court listed on the E-Filing Web Portal; or

. . .

(e) Traditional Service Methods Permitted. Where a Technical Failure or technical difficulty prevents an Authorized E-Filer from submitting a document for E-Filing and E-Service, and that document is required to be served on one or more Authorized E-Filers in accordance with the SCRCP, order of the court, or South Carolina law on the day of the Technical Failure or technical difficulty, the Authorized E-Filer may serve the document on any other Authorized E-Filer by any Traditional method of service under Rule 5, SCRCP, or any order of the Supreme Court issued under Rule 613, SCACR. The Authorized E-Filer must E-File the document, together with proof of Traditional Service on all parties, within one business day after the Technical Failure is remedied or, in the case of a technical difficulty, the next business day, and pay any required fees.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Appellant,

v.

Sylvester Ferguson, III, Respondent.

Appellate Case No. 2018-002133

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5915
Heard February 10, 2022 – Filed June 1, 2022

AFFIRMED

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, all for Appellant.

Appellate Defender David Alexander, of Columbia, for Respondent.

WILLIAMS, C.J.: In this criminal appeal, pursuant to Article I, Section 10 of the South Carolina Constitution, the trial court suppressed evidence of methamphetamine production that officers found inside an apartment occupied by Sylvester Ferguson. The State argues the trial court erred in (1) finding officers

needed a reasonable suspicion of criminal activity before approaching the apartment to conduct a "knock and talk" and (2) ruling the officers did not have a reasonable suspicion to approach the apartment. We affirm.

FACTS/PROCEDURAL HISTORY

On January 17, 2017, Laurens County Sheriff's Deputy Andrew Hall was conducting routine patrol in Joanna, South Carolina. While parked at a gas station, an unknown male approached Deputy Hall and told him that Ferguson was in the upper-left unit of an apartment building on Whitmire Highway "cooking dope." Deputy Hall was unfamiliar with the tipster, and he failed to collect his name or any means to contact him. He also failed to ask any questions to verify the tipster's statement. Although he had never personally arrested Ferguson, Deputy Hall was familiar with Ferguson from prior encounters at the Laurens County Detention Center. Deputy Hall immediately called Investigator Charles Nations,[1] a member of the Laurens County Sheriff's Office narcotics unit, to relay the tip and to ask if Investigator Nations wanted to accompany him in conducting a knock and talk at the apartment. Deputy Hall explained that the town of Joanna is a high traffic drug area and that he wanted a narcotics investigator to assist in the investigation. Roughly twenty minutes after receiving the tip, Deputy Hall and Investigator Nations arrived at the apartment to conduct a knock and talk.

Investigator Nations testified that he and Deputy Hall had to "guesstimate" which apartment building the tipster referred to in his statement, but narrowed their search quickly as there was only one apartment building on Whitmire highway. As officers approached the upper-left unit, they noticed the front window was open and they heard the sound of the front door deadbolt cycling. Before the officers could knock, Henry Davis, Ferguson's cousin, opened the door to leave for work.[2]

---

[1] Investigator Nations also had prior encounters with Ferguson. He had observed officers arrest Ferguson one night during a "ride-along" after receiving information that Ferguson was manufacturing methamphetamine in Joanna. However, he admitted that he was unaware of Ferguson's entire criminal history or prior convictions before the date of the arrest in this case.

[2] Davis leased the apartment. It is unclear if Ferguson lived there, but Investigator Nations testified that he believed Davis rented Ferguson a room in the apartment for money. Officers also found vocational rehabilitation papers and a job application with Ferguson's name on it, and Ferguson's clothing. Investigator

Investigator Nations stated that despite the window being open and Davis opening the door, he did not smell ammonia or other pungent fumes associated with methamphetamine production. Davis spoke with the officers outside of the residence and confirmed that Ferguson was inside. As Davis went to retrieve Ferguson, Investigator Nations took a step into the apartment to maintain contact with Davis and Ferguson appeared out of a rear bedroom. The officers explained to Davis and Ferguson that they received a tip about drug manufacturing, but both men denied any knowledge of illegal activity in the apartment. Investigator Nations then asked if he could walk through the house. Ferguson hesitated and then acquiesced once Davis consented.

During the walkthrough, Investigator Nations found a bottle of lighter fluid and a clear wrapper that contained a yellow, paste-like substance in the bathroom. Another officer found a marijuana pipe with residue in it on a coffee table in the living room. Based on these discoveries, Investigator Nations applied for a search warrant, and it was issued roughly thirty minutes later. While waiting for the search warrant, officers noticed Ferguson fidgeting in his pockets and requested he stop. Ferguson continued and officers conducted a *Terry*[3] frisk. Officers found a vial containing powder on Ferguson's person that they presumed was crack cocaine or methamphetamine. Upon executing the search warrant, officers found three different bottles used to create hydrogen chloride, a bottle of sulfuric acid, and other paraphernalia used to produce methamphetamine, most of which was found in a trash pile on the back porch. Officers arrested both Davis and Ferguson based on their findings.

At a pretrial suppression hearing, Ferguson argued all evidence produced from the initial walkthrough and pursuant to the search warrant was inadmissible at trial because the officers violated his right to privacy under the South Carolina Constitution. Specifically, Ferguson argued that under *State v. Counts*,[4] Deputy Hall and Investigator Nations needed a reasonable suspicion that he was manufacturing methamphetamine to approach the apartment and conduct a knock and talk. Further, he argued the tip was equivalent to an anonymous tip due to the lack of information it provided about the tipster.

Nations claimed Davis told him Ferguson lived there while the two men were arrested.

[3] *Terry v. Ohio*, 392 U.S. 1 (1968).

[4] 413 S.C. 153, 776 S.E.2d 59 (2015).

In opposition, the State argued Ferguson did not have standing to assert a privacy interest in the apartment and that no knock and talk occurred because Davis opened the door before the officers could make it to the door. Further, the State contended the "fresh" tip from a face-to-face encounter was sufficient to establish reasonable suspicion when coupled with the officers' prior knowledge of Ferguson's connection to drug production and the apartment being in a high traffic drug area.[5]

The trial court ruled that *Counts* required the court to suppress the evidence. It determined the engagement by officers of the occupants of a residence triggers the need for reasonable suspicion, which the officers did not have in this case. In so holding, the trial court reasoned (1) the tipster was unknown and provided officers with no indicia of reliability or credibility, and Deputy Hall did not know at what point the tipster observed, if at all, Ferguson manufacturing methamphetamine; (2) the evidence collected at the apartment did not establish an active methamphetamine lab, which was the substance of the tip; and (3) the officers failed to take any measure to independently corroborate the tip. At the conclusion of the hearing, the State dismissed the case. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in suppressing all evidence seized from the apartment under Article 1, Section 10 of the South Carolina Constitution?

STANDARD OF REVIEW

The admission of evidence is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion. *State v. Wright*, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011). The trial court abuses its discretion when the ruling is based on an error of law or when the ruling is grounded in factual conclusions that lack evidentiary support. *Id.* "[A]ppellate court[s] will reverse only when there is clear error." *Id.* (quoting *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) (citation omitted)).

---

[5] Moreover, the State argued the officers' actions were supported by exigent circumstance. The trial court ruled no exigent circumstances existed because the officers could not smell the production of methamphetamine while approaching the door and none of their actions indicated they thought an emergency existed, including the officers' request for consent to enter the home.

LAW/ANALYSIS

The State asserts the trial court erred in suppressing the evidence under Article 1, Section 10's prohibition against unreasonable invasions of privacy. We disagree.

The South Carolina Constitution grants citizens an express right to privacy. S.C. Const. art. I, § 10.[6] "But, other than the use of the word 'unreasonable' to modify this right, there are no parameters concerning the right or a definition of what constitutes 'unreasonable invasions of privacy.'" *Counts*, 413 S.C. at 167, 776 S.E.2d at 67. "As a result . . . 'the drafters were depending upon the state judiciary to construct a precise meaning of this phrase.'" *Id.* (quoting Jaclyn L. McAndrew, *Who Has More Privacy?: State v. Brown and Its Effect on South Carolina Criminal Defendants*, 62 S.C. L. Rev. 671, 694 (2011)).

"[T]he privacy interests in one's home are the most sacrosanct, [and] there must be some threshold evidentiary basis for law enforcement to *approach* a private residence." *Id.* at 172, 776 S.E.2d at 69 (emphasis added). "[Officers] *must* have reasonable suspicion of illegal activity at a targeted residence *prior to approaching the residence* and knocking on the door." *Id.* at 172, 776 S.E.2d at 70 (emphasis added). "In establishing this threshold requirement, our supreme court reaffirmed that the South Carolina Constitution's privacy protection against unreasonable searches and seizures 'favors an interpretation offering a higher level of privacy protection than the Fourth Amendment.'" *State v. Boston*, 433 S.C. 177, 183, 857 S.E.2d 27, 30 (Ct. App. 2021) (quoting *Counts*, 413 S.C. at 168, 776 S.E.2d at 68), *cert. granted*, S.C. Sup. Ct. Order Dated Jan. 13, 2022.

"Reasonable suspicion consists of 'a particularized and objective basis' that would lead one to suspect another of criminal activity." *State v. Kotowski*, 427 S.C. 119, 128, 828 S.E.2d 605, 610 (Ct. App. 2019) (quoting *State v. Lesley*, 326 S.C. 641,

---

[6] In pertinent part, it provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and *unreasonable invasions of privacy* shall not be violated . . . .

(emphasis added).

644, 486 S.E.2d 276, 277 (Ct. App. 1997)), *aff'd in part, vacated in part on other grounds*, 430 S.C. 318, 844 S.E.2d 650 (2020). It is more than a hunch but amounts to less than what is required for probable cause. *Boston*, 433 S.C. at 185, 857 S.E.2d at 31. In evaluating the existence of reasonable suspicion, courts may consider an officer's experience and intuition. *Id.* "Nevertheless, 'a wealth of experience will [not] overcome a complete absence of articulable facts.'" *Id.* (quoting *Kotowski*, 427 S.C. at 129, 828 S.E.2d at 610). "Furthermore, an officer's impression that an individual is engaged in criminal activity, without confirmation, does not amount to reasonable suspicion." *Id.* (quoting *Kotowski*, 427 S.C. at 129, 828 S.E.2d at 610).

Counts and *Boston* are both instructive. In *Counts*, an officer received an anonymous tip alleging the defendant was selling marijuana and crack cocaine out of his mother's house and a separate apartment. 413 S.C. at 157, 776 S.E.2d at 61–62. The tipster provided the defendant's name and aliases; the location of the alleged drug deals; the defendant's girlfriend's name; the make, model, and license plate number of his car; his phone number; and the make and model of the defendant's girlfriend's car. *Id.* at 157, 776 S.E.2d at 62. Based on this information, officers conducted surveillance on the defendant's mother's home and attempted two, unsuccessful, controlled drug buys from the the apartment. *Id.*

Roughly ten months later, another officer received an anonymous tip about the defendant. *Id.* The tipster claimed the defendant was selling drugs out of his apartment and provided the defendant's name, phone number, his girlfriend's name and phone number, and identified his vehicle. *Id.* The tipster also disclosed that the defendant used multiple identities because the defendant knew someone at the Department of Motor Vehicles through whom he procured two false forms of identification. *Id.*

Officers then corroborated the tip by reviewing the defendant's criminal record which showed two prior convictions for distribution of drugs and several other drug charges. *Id.* at 158, 776 S.E.2d at 62. The officers also confirmed that the defendant had two different identification cards on record. *Id.* Based on this information, the officers conducted surveillance on the defendant's apartment, and, upon identifying the defendant driving to and entering the apartment, the officers decided to do a knock and talk. *Id.* When the defendant opened his door after the officers knocked, the officers encountered the smell of marijuana and saw a rolled blunt on a coffee table. *Id.*

On appeal to our supreme court, the defendant argued that under South Carolina's express right to privacy, officers needed reasonable suspicion in light of the totality of the circumstances to initiate the knock and talk. *Id.* at 161, 776 S.E.2d at 64. The supreme court agreed with the defendant, stating, "law enforcement must have reasonable suspicion of illegal activity at a targeted residence prior to approaching the residence and knocking on the door." *Id.* at 172, 776 S.E.2d at 70. The court found, however, that the officers had reasonable suspicion to approach the defendant's residence and knock on the door because (1) the officers received two separate anonymous tips that alleged the defendant was selling drugs; (2) the tips identified vehicles driven by the defendant, his phone number, and his use of multiple identities; and, (3) through investigation, officers corroborated that the defendant had two false identification cards and prior drug distribution convictions on record. *Id.* at 173, 776 S.E.2d at 70. In conclusion, the supreme court noted,

> For our state constitutional right to privacy to have any significance, we believe there must be some minimum evidentiary standard met before law enforcement conduct a warrantless search of a South Carolina citizen's home. Therefore, we hold that law enforcement must have reasonable suspicion of illegal activity before approaching the targeted residence and conducting the "knock and talk" investigative technique.

Id. at 174, 776 S.E.2d at 70–71.

In *Boston*, this court determined that officers held a reasonable suspicion to approach and knock on the door of an apartment where the defendant was visiting. 433 S.C. at 186, 857 S.E.2d at 32. After responding to a call, an officer proceeded to patrol a nearby apartment community known for high volumes of narcotic activity and because "vulnerable" adults lived there. *Id.* at 179, 857 S.E. at 28. While surveilling the apartments, the officer observed two men that he knew were associated with drug activity enter an apartment. *Id.* at 180, 857 S.E.2d at 28. The officer knew the apartment to be the residence of an individual with mental disabilities that used narcotics. *Id.* Based on concerns for the resident's safety and the nature of the activities that might take place inside the apartment, the officer decided to conduct a knock and talk. *Id.* at 180, 857 S.E.2d at 28–29.

In response to a knock, the resident opened her door and allowed the officers to enter the apartment. *Id.* at 180, 857 S.E.2d at 29. Once inside, officers saw two men in the kitchen huddled around a microwave, two plastic bags with white residue on them, and a scale. *Id.* When the men noticed the officers, they opened the microwave, hid their hands, and ran to the bathroom. *Id.* Concerned for their safety, the officers conducted a protective sweep of the apartment and ordered the men out of the bathroom. *Id.* at 180–181, 857 S.E.2d at 29. The officers found a glass measuring cup filled with a steaming substance suspected to be crack cocaine. *Id.*

This court reasoned the officers had a reasonable suspicion to conduct the knock and talk because of the investigating officer's knowledge of (1) the two men in the apartment, (2) criminal drug investigation, and (3) the apartment community he surveilled. *Id.* at 185, 857 S.E.2d at 31. The officer testified to his objective knowledge of the apartment community and the three people inside the apartment, stating he knew all three and that he had previous encounters with the two men that entered the apartment. *Id.* The officer also had eleven years of criminal drug investigation experience and knew the apartment community was a hot spot for drug activity. *Id.*

Initially, we note that *Counts* is explicit in its ruling: our constitution's express right to privacy found in Article 1, Section 10, to have any substance, requires officers to form a reasonable suspicion *before approaching* a residence to conduct a knock and talk or a warrantless search of a home. *Counts*, 413 S.C. at 174, 776 S.E.2d at 70–71. Therefore, we find the state constitution required the officers in this case to develop reasonable suspicion that Ferguson was manufacturing methamphetamine before approaching the apartment to knock on the door.

Further, we find the officers did not form the requisite reasonable suspicion to approach the apartment building in an attempt to conduct a knock and talk. *See Counts*, 413 S.C. at 172, 776 S.E.2d at 70 ("[L]aw enforcement must have reasonable suspicion of illegal activity at a targeted residence *prior to approaching* the residence and knocking on the door." (emphasis added)). Unlike the two anonymous tips in *Counts*, the tip Deputy Hall received lacked any indicia of accuracy or credibility. Deputy Hall did not receive or solicit any information from the tipster that would further indicate Ferguson was manufacturing methamphetamine. For example, he did not ask if Ferguson lived at the apartment or if he drove a specific car that officers could identify and observe at the

apartment; he did not ask about potential sales Ferguson might make in the future; he did not ask for Ferguson's phone number or a description of what Ferguson was wearing; he did not ask if he could smell any scents associated with methamphetamine production; and, most importantly, he did not ask how he knew Ferguson or that Ferguson was "cooking dope" at the apartment. *Cf id.* at 173, 776 S.E.2d at 70 (finding officers had reasonable suspicion to approach a residence and conduct a knock and talk when the officers received two separate anonymous tips that the defendant was selling drugs and identified vehicles he drove, his phone number, and his use of multiple identities and identification cards).

Moreover, unlike the officers in *Counts*, Deputy Hall and Investigator Nations failed to conduct any form of independent investigation to buttress the tip—they did not conduct surveillance, research Ferguson's criminal record, or check the National Precursor Log Exchange.[7] *See Kotowski*, 427 S.C. at 129, 828 S.E.2d at 610 ("[A]n officer's impression that an individual is engaged in criminal activity, *without confirmation*, does not amount to reasonable suspicion." (emphasis added)); *id.* ("[An officer's] wealth of experience will [not] overcome a complete absence of articulable facts." (quoting *State v. Taylor*, 388 S.C. 101, 116, 694 S.E.2d 60, 68 (Ct. App. 2010), *rev's on other grounds*, 401 S.C. 104, 736 S.E.2d 663 (2013)).

Although we disagree with Ferguson that the tip was purely anonymous, the face-to-face encounter alone, or even coupled with the content and nature of the tip itself, is insufficient to create a reasonable suspicion that Ferguson was manufacturing methamphetamine at the apartment. *See United States v. Perkins*, 363 F.3d 317, 323 (4th Cir. 2004) ("The basic rules governing informant's tips are well-established. In cases where an informant's tip supplies part of the basis for reasonable suspicion, [appellate courts] must ensure that the tip possesses sufficient indicia of reliability."). As noted above, Deputy Hall did not ask the informant any follow-up questions to gain additional information regarding Ferguson, the apartment, or how he knew about the alleged methamphetamine production. The informant's tip only provided Ferguson's name, a general location, and the allegation that Ferguson was "cooking dope." While courts generally find

[7] The National Precursor Log Exchange is a real-time electronic logging and compliance system that tracks sales of over-the-counter cold and allergy medications containing pseudoephedrine, a necessary element of methamphetamine.

face-to-face tips sufficiently reliable due to an officer's ability to judge the tipster's credibility and demeanor, additional facts that allow an officer to evaluate the veracity of the tip are usually present. *See Adams v. Williams*, 407 U.S. 143, 146-47 (1972) (finding an officer had reasonable suspicion to perform a traffic stop based on a face-to-face tip he received from an informant he knew personally, that had provided accurate information in the past, and the information in the tip was immediately verifiable at the crime scene); *United States v. Christmas,* 222 F.3d 141, 143–45 (4th Cir. 2000) (finding an officer had reasonable suspicion to conduct a *Terry* stop based on a face-to-face tip received by an individual who did not provide her name but provided her home address and stated she lived two houses down from the illegal activity; she also provided the tip to the uniformed officer in close proximity to the illegal activity, increasing the probability that someone associated with the illegal activity could see her assist the officer); *State v. Driggers*, 322 S.C. 506, 511–14, 473 S.E.2d 57, 59–61 (Ct. App. 1996) (holding a face-to-face tip was reliable as the basis for probable cause to support a search warrant where the tipster provided her name to officers, signed a statement, lived in the residence with the defendant, observed the defendant prepare for the crime and talk about the crime afterwards, and provided specific details about evidence from the crime); *cf. Perkins*, 363 F.3d at 320, 323–24 (finding an anonymous tip reliable where the tipster disclosed her general location and her basis of knowledge, stated she was currently watching a crime be committed, the officer assumed the identity of the informant based on her close proximity to the crime and the nature of the description she provided, and the officer's subjective knowledge of the area and the informant's track record). Here, apart from the informant's limited information, Deputy Hall and Investigator Nations had no reason to suspect Ferguson of being inside the apartment, much less manufacturing methamphetamine.

Unlike the officer in *Boston*, Deputy Hall and Investigator Nations did not personally observe any specific circumstances that would lead an officer to believe Ferguson was manufacturing methamphetamine in the apartment. Although the officers were aware that Ferguson was connected to methamphetamine activity, they did not observe Ferguson enter the apartment or know that he was inside. While both Deputy Hall and Investigator Nations testified they were aware that Joanna was a drug hot spot, Joanna is an entire town and both officers testified they had never encountered Ferguson at the specific apartment building or made any drug-related arrests at the apartment building.

Because the informant's tip lacked any indicia of reliability and neither Deputy Hall nor Investigator Nations conducted independent investigations to corroborate the tip, we find the officers lacked the requisite reasonable suspicion to approach the apartment to conduct a knock and talk. *See Counts*, 413 S.C. at 172, 776 S.E.2d at 70 ("[L]aw enforcement *must* have reasonable suspicion of illegal activity at a targeted residence *prior to approaching the residence* and knocking on the door." (emphasis added)). Therefore, the trial court did not err in suppressing the evidence.

CONCLUSION

Accordingly, the trial court's ruling is

AFFIRMED.

KONDUROS and VINSON, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Amanda Leigh Huskins and Jay R. Huskins, Appellants,

v.

Mungo Homes, LLC, Respondent.

Appellate Case No. 2018-000889

Appeal From Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5916
Heard May 5, 2021 – Filed June 1, 2022

AFFIRMED AS MODIFIED

Charles Harry McDonald, of Belser & Belser, PA; Beth B. Richardson, of Robinson Gray Stepp & Laffitte, LLC; Brady Ryan Thomas, of Richardson, Thomas, Haltiwanger, Moore & Lewis; and Matthew Anderson Nickles, of Rogers, Patrick, Westbrook & Brickman, LLC, all of Columbia; and Terry E. Richardson, Jr., of Richardson, Thomas, Haltiwanger, Moore & Lewis, of Barnwell, all for Appellants.

Steven Raymond Kropski and David W. Overstreet, both of Earhart Overstreet, LLC, of Charleston, for Respondent.

LOCKEMY, A.J.: Amanda Leigh Huskins and Jay R. Huskins (collectively, the Huskinses) appeal the circuit court's order granting Mungo Homes, LLC's (Mungo's) motion to dismiss and compel arbitration. The Huskinses argue the circuit court erred in (1) finding the limitations period contained in the arbitration provision was not one-sided, oppressive, and unconscionable; (2) finding the arbitration provision applied mutually to Mungo and the Huskinses; (3) failing to consider the one-sided and oppressive terms of a limited warranty provision in determining whether the arbitration agreement was unconscionable; and (4) granting the motion to dismiss the Huskinses' claims involving the limited warranty provision even though it concluded the arbitration provision did not include claims arising under the limited warranty provision. We affirm the circuit court's order as modified.

FACTS AND PROCEDURAL HISTORY

The Huskinses entered into a purchase agreement (the Purchase Agreement) with Mungo in June 2015 for the purchase of a new home in the Westcott Ridge subdivision in Irmo. The Purchase Agreement consisted of three pages. The top of the first page provided: "THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO S.C. CODE 15-48-10 ET SEQ."[1] The second page included a paragraph with the heading "LIMITED WARRANTY" (the Limited Warranty provision), which stated the following:

> The Seller to furnish the Purchaser, at closing, a limited warranty issued by Quality Builders Warranty Corporation, a sample copy of which is available for inspection prior to closing at the offices of the Seller during reasonable business hours, said limited warranty is hereinafter referred to as the Quality Builders Warranty Corporation Limited Warranty.
>
> THE QUALITY BUILDERS WARRANTY CORPORATION LIMITED WARRANTY ISSUED TO THE PURCHASER IN CONNECTION WITH THIS

[1] *See* S.C. Code Ann. § 15-48-10 to -240 (2005) (establishing the South Carolina Uniform Arbitration Act (the UAA)).

> TRANSACTION IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ANY WARRANTY OF HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, MERCHANTABILITY, OR FITNESS FOR A PARTICULAR PURPOSE IS HEREBY EXCLUDED AND DISCLAIMED. SELLER SHALL IN NO EVENT BE LIABLE FOR CONSEQUENTIAL OR PUNITIVE DAMAGES OF ANY KIND. THERE IS NO WARRANTY WHATSOEVER ON TREES, SHRUBS, GRASS, VEGETATION OR EROSION CAUSED BY LACK THEREOF NOR ON SUBDIVISION IMPROVEMENTS INCLUDING, BUT NOT LIMITED TO, STREETS, ROADS, SIDEWALKS, SEWER, DRAINAGE OR UTILITIES. PURCHASER AGREES TO ACCEPT SAID LIMITED WARRANTY IN LIEU OF ALL OTHER RIGHTS OR REMEDIES, WHETHER BASED ON CONTRACT OR TORT. This limited warranty will be incorporated in the deed delivered at closing.
>
> The issuance of a certificate of completion or occupancy or final inspection approval by any governmental entity shall constitute a final determination, binding on the parties that the Property and improvements are in full compliance with all applicable laws, regulations and building codes.

The next page contains a paragraph with the heading "ARBITRATION AND CLAIMS" and states,

> Any claim, dispute or other matter in question between the parties hereto arising out of this Agreement, related to this Agreement or the breach thereof, including without limitation, disputes relating to the Property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration before

> three (3) arbitrators, one selected by each party, who shall mutually select the third, pursuant to the South Carolina Uniform Arbitration Act. Arbitration shall be commenced by a written demand for arbitration to the other party specifying the issues for arbitration and designating the demanding parties [sic] selected arbitrator. Each and every demand for arbitration shall be made within ninety (90) days after the claim, dispute or other matter in question has arisen, except that any claim, dispute or matter in question arising from either party's termination of this Agreement shall be made within thirty (30) days of the written notice of termination. Any claim, dispute or other matter in question not asserted within said time periods shall be deemed waived and forever barred.

In July 2017, the Huskinses filed an action against Mungo alleging the Purchase Agreement violated South Carolina law by disclaiming certain implied warranties without providing a reduction in sales price or other benefit to the purchaser for relinquishing such rights. The Huskinses alleged causes of action for (1) breach of contract and the implied covenant of good faith and fair dealing, (2) unjust enrichment, (3) violation of the South Carolina Unfair Trade Practices Act (SCUTPA),[2] and (4) declaratory relief regarding the validity of the waiver and release of warranty rights and the validity of Mungo's purported transfer of all remaining warranty obligations to a third party. They did not allege any problems with the home.

Mungo filed a motion to dismiss and compel arbitration, arguing the Huskinses' claims were subject to arbitration pursuant to the Arbitration and Claims provision (the Arbitration Clause) contained in the Purchase Agreement. The Huskinses filed a memorandum opposing the motion, arguing the Arbitration Clause was unconscionable and unenforceable. They asserted the court should consider the Purchase Agreement's limitations on warranties as part of the agreement to arbitrate and thus find the Arbitration Clause was unconscionable. In addition, the Huskinses argued a provision contained in the Arbitration Clause that limited the

[2] S.C. Code Ann. § 39-5-10 to -730 (1976 & Supp. 2021).

time to bring a claim to thirty or ninety days was unconscionable, could not be severed, and rendered the entire Arbitration Clause unenforceable.

After hearing the motion, the circuit court issued an order granting the motion to dismiss and compelling arbitration. The circuit court found that although the Huskinses lacked a meaningful choice, the terms of the Arbitration Clause were not one-sided and oppressive, and the Arbitration Clause was therefore not unconscionable. In considering whether the terms were one-sided and oppressive, the circuit court found that (1) the Limited Warranty provision must be read in isolation from the Arbitration Clause, and (2) the terms in the Arbitration Clause pertaining to the ninety-day time limit were not one-sided and oppressive because they did not waive any rights or remedies otherwise available by law. The Huskinses filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court summarily denied. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in finding the provision limiting the time in which to bring a claim was not one-sided, oppressive, and unconscionable?

2. Did the circuit court err in failing to consider the Limited Warranty provision as part of the Arbitration Clause and thus failing to find the Arbitration Clause unconscionable?

3. Did the circuit court err by granting Mungo's motion to dismiss the Huskinses' action when it involved claims falling under the Limited Warranty provision?

STANDARD OF REVIEW

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Id.*

"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." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citation omitted).

LAW AND ANALYSIS

I. APPEALABILITY

As an initial matter, Mungo maintains the circuit court's order is not immediately appealable. The Huskinses argue that under *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009), the order was immediately appealable because it granted Mungo's Rule 12(b)(6), SCRCP, motion to dismiss. We agree.

Our supreme court has held our state procedural rules—rather than the Federal Arbitration Act (FAA)—govern appealability of arbitration orders.[3] *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (2003) (holding that "because South Carolina's procedural rule on appealability of arbitration orders, rather than the FAA rule, [wa]s applicable, the court's order compelling arbitration [wa]s not immediately appealable"). Ordinarily, an order granting a motion to compel arbitration is not immediately appealable. *See* § 15-48-200(a) (providing that "[a]n appeal may be taken from: (1) An order denying an application to compel arbitration . . . ; (2) An order granting an application to stay arbitration . . . ; (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 th[e UAA]"). However, the "[d]ismissal of an action pursuant to Rule 12(b)(6) is appealable." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001).

In *Widener*, this court held an order dismissing the action without prejudice and ordering arbitration was immediately appealable, reasoning that "[b]y dismissing [the] action, the [circuit] court finally determined the rights of the parties[, and]

---

[3] *See* 9 U.S.C. § 16(a)(3) (providing that under the FAA, an appeal may be taken from "a final decision with respect to an arbitration"); *see also Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 731 (4th Cir. 1991) (holding "when a district court compels arbitration in a proceeding in which there are no other issues before the court, that order is final . . . because the court has disposed of the whole case on the merits").

therefore, [this court had] jurisdiction pursuant to section 14-3-330 of the South Carolina Code [(2017)]." 381 S.C. at 524, 674 S.E.2d at 173-74; *see also* § 14-3-330(2) (providing the appellate courts have jurisdiction in an appeal from "[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out . . . any pleading in any action"). The appellant in *Widener* argued the dismissal of the action prejudiced him because the statute of limitations would bar him from bringing any future action after the conclusion of the arbitration proceedings. *Id.* at 525, 674 S.E.2d at 174. This court did not decide the merits of the case but reversed and remanded the matter to the trial court to vacate the dismissal and enter an order staying the action "pending the outcome of the arbitration proceedings." *Id.* In contrast, the court in *Toler's Cove*—which did not involve a Rule 12(b)(6) dismissal—found the order compelling arbitration was not immediately appealable but addressed the merits of the appeal "because [the] issues [we]re capable of repetition and need[ed] to be addressed." 355 S.C. at 611, 586 S.E.2d at 584-85.

Here, as in *Widener*, the Huskinses appeal an order dismissing the case, which is an appealable order. *See Williams*, 347 S.C. at 233, 553 S.E.2d at 500 (stating an order dismissing an action pursuant to Rule 12(b)(6) is immediately appealable). In dismissing the Huskinses' claims, the circuit court addressed only the issue of the enforceability of the Arbitration Clause. Unlike the appellant in *Widener*, the Huskinses do not argue the dismissal prejudiced them; rather, they ask this court to address the merits of the circuit court's decision as to the enforceability of the Arbitration Clause and reverse the order compelling arbitration. We find the order granting the motion to dismiss and compelling arbitration is appealable, and we address the merits because the issue is capable of repetition. *See Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584-85 (finding an order compelling arbitration was not immediately appealable but reviewing the issues on the merits because they were "capable of repetition and need[ed] to be addressed").

II. ENFORCEABILITY OF ARBITRATION AGREEMENT

The Huskinses argue the Arbitration Clause was unenforceable because it included unconscionable terms that cannot be severed, including the Limited Warranty provision and a "limitation of claims" provision. We address each of these arguments in turn.

A. Limited Warranty Provision

The Huskinses challenge the validity of the Limited Warranty provision and assert it must be read together with the Arbitration Clause because it encompassed warranty claims and the provisions cross-referenced one another and were thus substantively intertwined. We disagree.

"Arbitration clauses are separable from the contracts in which they are imbedded." *Hous. Auth. of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338, 588 S.E.2d 617, 622 (Ct. App. 2003) (quoting *Jackson Mills Inc. v. BT Cap. Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)). "[T]he issue of [the arbitration clause's] validity is distinct from the substantive validity of the contract as a whole." *Id.* (alteration in original) (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001)). "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."[4] *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) (quoting *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623); *see also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (noting the "*Prima Paint* doctrine" required that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract"); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

In *D.R. Horton*, instead of considering the arbitration agreement separately from the entire contract, our supreme court considered the warranty provisions and the arbitration provisions of the contract together and construed "the entirety of paragraph 14, entitled 'Warranties and Dispute Resolution,' as the arbitration agreement." 417 S.C. at 48, 790 S.E.2d at 4. The court stated,

---

[4] Although the circuit court determined the UAA governed the parties' dispute, the application of the UAA as opposed to the FAA does not affect our analysis. *See Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("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."); *Simpson*, 373 S.C. at 22 n.1, 644 S.E.2d at 667 n.1 (noting that "even in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause").

> As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

Id. The Arbitration Clause in this case differs from that in *D.R. Horton*. Although *D.R. Horton* also involved a home purchase agreement, there, Paragraph 14 of the agreement was titled "Warranties *and Dispute Resolution*" and consisted of subparagraphs 14(a) through 14(j). *Id.* at 45, 790 S.E.2d at 2 (emphasis added). Two of the subparagraphs stated the parties agreed to arbitrate any disputes related to the warranties contained in the purchase agreement and any claims arising out of the construction of the home. *Id.* In most of the remaining subparagraphs of Paragraph 14, D.R. Horton expressly disclaimed all warranties except for a ten-year structural warranty, and subparagraph 14(i) stipulated D.R. Horton was not "liable for monetary damages of any kind." *Id.* Here, however, the Limited Warranty provision is a completely separate provision in the Purchase Agreement and contains no reference to arbitration or the Arbitration Clause. Further, the Arbitration Clause contains no cross references to the Limited Warranty provision. Because the two provisions were completely separate and did not cross-reference one another, this court need not construe them together to determine the scope of the warranties or how different disputes were to be handled. This case is therefore distinguishable from *D.R. Horton*, and the circuit court did not err in reviewing the Arbitration Clause in isolation from the remainder of the Purchase Agreement, including the Limited Warranty provision.

B. Limitation of Claims Provision

The Huskinses argue the Arbitration Clause was unenforceable because it required a demand for arbitration to be filed within ninety days of the date the claim, dispute, or other matter arose, or within thirty days if the claim, dispute, or other matter arose from either party's termination of the Purchase Agreement or such claims would be forever barred. They assert this "limitation of claims" provision restricted the statutory limitations period from three years to ninety days and was not severable from the Arbitration Clause. The Huskinses additionally contend that, as a practical matter, this provision applied only to purchasers and such "lack

of mutuality" further demonstrated the "one-sided and oppressive nature" of the arbitration clause. We agree this provision abbreviates the statute of limitations period and is one-sided and oppressive. Nevertheless, we find the arbitration clause is enforceable because the unconscionable provision is severable.

"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." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016); *see also Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021), ("[W]hen considered in the proper context, our 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."), *reh'g denied*, S.C. Sup. Ct. Order dated Apr. 20, 2021. "[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." *Doe v. TCSC, LLC*, 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). "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." *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

1. Unconscionability

a. Absence of Meaningful Choice

We conclude the evidence showed the absence of a meaningful choice on the part of the Huskinses. *See id.* at 25, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the

inclusion of the challenged clause; and the conspicuousness of the clause." (quoting *Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989))); *id.* ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."). The Huskinses were average purchasers of residential real estate, were not represented by independent counsel, and were not a substantial business concern to Mungo such that they possessed more bargaining power than any other average homebuyer would. Therefore, evidence supports the circuit court's finding that the Huskinses lacked a meaningful choice in entering the agreement to arbitrate.

b. Oppressive and One-Sided Terms

Next, we conclude the evidence does not support the circuit court's finding that the terms contained in the limitation of claims provision were not one-sided and oppressive.

South Carolina provides for a three-year statute of limitations in an "action upon a contract, obligation, or liability, express or implied." S.C. Code Ann. § 1-3-530(1) (2005). Section 15-3-140 of the South Carolina Code (2005) provides:

> No clause, provision or agreement in any contract of whatsoever nature, verbal or written, whereby it is agreed that either party shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations, for similar causes of action, shall bar such action, but the action may be brought notwithstanding such clause, provision or agreement if brought within the time prescribed by the statute of limitations in reference to like causes of action.

The final two sentences of the Arbitration Clause effectively shorten the statutory period to ninety days and provide an even shorter period of thirty days when the "claim, dispute[,] or matter in question" arises from either party's termination of the Purchase Agreement. Even though this provision purports to apply equally to both parties, as a practical matter, it would disproportionately affect the homebuyer's ability to bring a claim. Further, it is not "geared towards achieving an unbiased decision by a neutral decision-maker." *See Simpson*, 373 S.C. at 25,

644 S.E.2d at 668. We conclude this provision violates sections 15-3-140 and 15-3-530 and is therefore unconscionable and unenforceable. *See id.* at 29-30, 644 S.E.2d at 671 ("The general rule is that courts will not enforce a contract [that] is violative of public policy, statutory law, or provisions of the Constitution."). We next consider whether this provision is severable or renders the entire Arbitration Clause unenforceable.

2. Severability

Although the Arbitration Clause contains no severability clause, section 36-2-302(1) allows this court to effectively sever the unconscionable provision. *See* S.C. Code Ann. § 36-2-302(1) (2003) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."); *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 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."); *see also Doe*, 430 S.C. at 615, 846 S.E.2d at 880 ("Courts have discretion though to decide whether a[n arbitration clause] is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive."); *cf. D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6 (declining to consider "whether the unconscionable provisions [we]re severable" when the agreement lacked a severability clause and because "doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions").

As we stated, we find the final two sentences of the Arbitration Clause shortening the statutory limitations period were unconscionable. Nevertheless, we conclude sections 15-3-540 and 36-2-302(1) operate to sever this portion of the Arbitration Clause. Here, as in *D.R. Horton*, the Arbitration Clause did not contain a severability clause. On the other hand, unlike *D.R. Horton*, the offending provision is distinct and constitutes the final two sentences of the Arbitration Clause. Thus, notwithstanding the lack of a severability clause, it is possible for this court to simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement. Based on the foregoing, we sever the

final two sentences from the remainder of the Arbitration Clause and we affirm the circuit court's order compelling arbitration as modified.

III. DISMISSAL OF WARRANTY CLAIMS

Finally, we find the Huskinses' contention that the circuit court erred in dismissing claims related to the Limited Warranty provision when it found the Limited Warranty "f[ell] outside" of the Arbitration Clause is without merit. The circuit court did not find such claims fell outside of the scope of the Arbitration Clause. Rather, in considering the enforceability of the Arbitration Clause, the circuit court concluded the Limited Warranty provision was separable and that the Arbitration Clause did not specifically limit the Huskinses' ability to bring a warranty action in a judicial setting. The circuit court additionally concluded the Arbitration Clause provided that all claims and disputes arising out of the Purchase Agreement were subject to arbitration. Thus, we conclude this argument is without merit.

CONCLUSION

For the foregoing reasons, we find the order dismissing the Huskinses' complaint and compelling arbitration was immediately appealable. We affirm, as modified, the order dismissing the complaint and compelling arbitration.

AFFIRMED AS MODIFIED.

MCDONALD and HEWITT, JJ., concur.