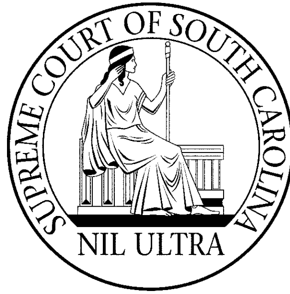

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 33
August 17, 2016
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Bryan Rearick, Appellant.

Appellate Case No. 2014-001692

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

Opinion No. 27654
Heard June 15, 2016 – Filed August 17, 2016

DISMISSED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General John Benjamin Aplin, Senior Assistant Deputy Attorney General Deborah R. J. Shupe, all of Columbia, and Solicitor Isaac McDuffie Stone, III, of Bluffton, for Respondent.

JUSTICE BEATTY: Following the circuit court judge's declaration of a mistrial over defense counsel's objection, Bryan Rearick moved to bar subsequent prosecution of the charge of felony driving under the influence resulting in death

("felony DUI") on the ground a second trial would violate the Double Jeopardy Clause of the South Carolina and United States Constitutions.[1] Rearick appeals the judge's order denying this motion, arguing: (1) the denial of a motion to dismiss on double jeopardy grounds is immediately appealable; and, if so, (2) the judge's declaration of a mistrial was erroneous in that there was no "manifest necessity" to justify the ruling. We adhere to well-established appealability precedent and dismiss the appeal as interlocutory.

I. Factual / Procedural History

During the late evening hours of May 30, 2010, Rearick was involved in a head-on collision on Hilton Head Island that resulted in the death of the driver of the other vehicle. Trooper Thomas Summers with the South Carolina Highway Patrol was dispatched to the accident scene where he found Rearick receiving medical treatment in an ambulance. Trooper Summers followed the ambulance to the hospital, interviewed Rearick, and ordered that blood be drawn for forensic toxicology analysis. On July 22, 2010, a Beaufort County grand jury indicted Rearick for felony DUI.[2]

Rearick waived his right to a jury trial and the case proceeded as a bench trial on January 30, 2014. At the beginning of the trial, defense counsel raised several pretrial motions. Initially, counsel moved to dismiss the case based on the State's failure to produce the arresting officer's video recording of the incident in violation of section 56-5-2953 of the South Carolina Code.[3] Additionally, counsel moved to suppress the blood sample taken from Rearick on the grounds: (1) it was obtained without a warrant and without any exigency in contravention of *Missouri*

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[1] U.S. Const. amend. V; S.C. Const. art. I, § 12.

[2] S.C. Code Ann. § 56-5-2945(A)(2) (Supp. 2015).

[3] *Id.* § 56-5-2953 (Supp. 2015) (requiring that a person charged with DUI have his conduct at the incident site recorded on video, including field sobriety tests, unless certain exceptions apply); *see City of Rock Hill v. Suchenski*, 374 S.C. 12, 17, 646 S.E.2d 879, 881 (2007) (holding dismissal of a DUI charge "is an appropriate remedy provided by [section] 56-5-2953 where a violation of subsection (A) is not mitigated by subsection (B) exceptions").

v. McNeely, 133 S. Ct. 1552 (2013);[4] (2) it was obtained in violation of section 56-5-2950,[5] which requires that a driver who is accused of DUI be offered a breath test before a blood sample is requested; and (3) the chain of custody of the sample was fatally defective in that the State failed to produce as a witness the nurse who allegedly drew the blood at the hospital.

The State called Trooper Summers as its primary witness during the pretrial hearing. According to Trooper Summers, the video recording device in his patrol car was activated when he turned on his blue lights to respond to the accident scene. When Trooper Summers arrived at the accident site, he encountered the EMS, the fire department, and deputies with the Beaufort County Sheriff's Department. However, he could not recall how many individuals were present and could not identify anyone by name. Yet, he specifically remembered speaking with Rearick at the scene.

On cross-examination, Trooper Summers admitted that he did not know whether a video recording of the incident had been placed into evidence. Defense counsel further questioned Trooper Summers regarding the contents of his accident report as well as the videotaped interview he provided to the South Carolina Department of Public Safety about the case. When it became evident that Trooper Summers could not recall the details of the incident, the trial judge took a forty-five minute recess to permit Trooper Summers to review his notes, the accident report, and the DVD of his interview.

Once Trooper Summers resumed his testimony, he recalled that "[t]here were some deputies" at the accident scene. He estimated that he spent approximately thirty to forty-five minutes at the accident scene and that the video

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[4] *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (holding that, in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant).

[5] S.C. Code Ann. § 56-5-2950 (Supp. 2015) (providing that a person driving a motor vehicle in South Carolina is deemed to have consented to a chemical test of his breath, blood, or urine if arrested for an offense arising out of acts alleged to have been committed while under the influence of alcohol, drugs, or a combination of the two).

recorder in his patrol car was running during that time. After hearing this testimony, defense counsel expressed concern that potentially exculpatory evidence had not been turned over by the State pursuant to *Brady*[6] and Rule 5, SCRCRimP. Counsel explained that the video recording may have contained images of Rearick's conduct and demeanor at the time of the accident and that Trooper Summers's lapel microphone may have recorded his conversations with Rearick.

The judge determined that a videotape from Trooper Summers's vehicle was not required under the circumstances and, thus, denied counsel's motion on that basis. However, the judge shared counsel's concern that the other deputies on the scene may have videotaped Rearick's conduct and that those recordings were either not available or had not been provided to defense counsel. When defense counsel moved to dismiss the case based on the State's failure to provide these videotapes, the trial judge took the motion under advisement.

With respect to defense counsel's remaining pretrial motions, the judge found no violation of the implied consent statute and ruled that any statements Rearick gave to Trooper Summers at the hospital were admissible. Still, the judge took under advisement defense counsel's motion to suppress Rearick's blood alcohol content.

When trial testimony began, the State presented several witnesses to establish the chain of custody of Rearick's blood draw at the hospital after the accident. At the conclusion of this testimony, the judge found the State had established the chain of custody and admitted the toxicology results of Rearick's blood alcohol content subject to defense counsel's ongoing, yet unresolved, objection that the blood evidence was obtained without a warrant.

The State then called Trooper Scott Ashe, a member of the Multi-Disciplinary Accident Investigation Team ("MAIT") and an expert in accident reconstruction, who testified regarding MAIT's conclusions regarding the accident. Following this testimony, defense counsel advised the judge that the State and Trooper Ashe had referred to documents that were not included in the materials turned over to her as part of discovery. The judge recessed to allow the State time to ascertain what was not included in the discovery materials provided to the defense, to obtain the identities of any Beaufort County deputies present at the

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[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

accident scene, and to determine whether there were any video recordings of the accident scene.

Once the trial reconvened the following week, the judge inquired whether all discovery material had been turned over to defense counsel. Defense counsel acknowledged that she received the missing MAIT notes the afternoon the court recessed, but stated she was also provided a number of pages identifying vehicle recall information regarding both vehicles involved in the accident. As a result, defense counsel moved for a dismissal on the ground that Rearick's due process rights had been violated by the State's failure to provide evidence that may have been exculpatory. In response, the State asserted that a continuance was the more appropriate remedy. The judge, however, declared a mistrial over the objection of defense counsel.

Nine days later, defense counsel filed a motion to bar subsequent prosecution on the ground a second trial would violate the Double Jeopardy Clause of the South Carolina and United States Constitutions. The judge denied this motion. While the judge noted the problems with the State's evidence and questioned whether certain exculpatory evidence had been turned over to the defense, the judge found there was no prosecutorial misconduct. The judge then explained that she considered the competing alternative remedies of a continuance, a dismissal, and a mistrial. After assessing these options, the judge determined there was "a high degree of necessity to declare a mistrial in the instant circumstance[s]." Having granted the mistrial "out of manifest necessity," the judge ruled that double jeopardy had not attached and, thus, the State was not barred from prosecuting the felony DUI charge.

Rearick appealed this order to the Court of Appeals and, subsequently, filed a motion to certify the appeal to this Court pursuant to Rule 204(b), SCACR. The State filed a motion to dismiss the appeal as interlocutory. This Court granted Rearick's motion to certify the appeal and denied the State's motion to dismiss.

II. Discussion

A. Appealability of An Order Denying A Double Jeopardy Claim

1. Arguments

Rearick readily acknowledges this Court in *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986), expressly held that an order denying a double jeopardy claim is not immediately appealable. However, he contends *Miller* conflicts with the United States Supreme Court's ("USSC") decision in *Abney v. United States*, 431 U.S. 651 (1977), which held that a pretrial order denying a defendant's motion to dismiss on double jeopardy grounds was a "final decision" and is "immediately appealable." Referencing *Abney*'s "substantial analysis of the Federal constitutional ban against double jeopardy," Rearick maintains *Abney* "demonstrates why an appeal *now* is required." Ultimately, Rearick seeks for this Court to overrule *Miller* and related precedent, reasoning that a state procedural rule that conflicts with a defendant's constitutional right not to be tried twice for the same crime cannot prevail.

2. *Abney*

In *Abney*, the USSC "granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291."[7] *Abney v. United States*, 431 U.S. 651, 653 (1977). The USSC determined that such pretrial orders "constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." *Id.* at 662.

In reaching this conclusion, the USSC prefaced its analysis by recognizing that there is no constitutional right to an appeal and there is a "firm congressional policy against interlocutory or 'piecemeal' appeals." *Abney*, 431 U.S. at 656. However, the USSC found that an order denying a defendant's motion seeking a

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[7] Section 28 U.S.C. § 1291 provided: "The courts of appeals shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court." *Abney*, 431 U.S. at 653 n.1.

dismissal on double jeopardy grounds satisfied the prerequisites for fitting within "'the small class of cases' that *Cohen*[8] has placed beyond the confines of the final-judgment rule." *Id.* at 659. The Court explained that: (1) these orders "constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim"; (2) "the very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial"; and (3) "the elements of [the double jeopardy] claim are completely independent of [a defendant's] guilt or innocence." *Id.* at 659-60.

Finally, the USSC emphasized that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence." *Abney*, 431 U.S. at 660. The Court noted that it had long "recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." *Id.* at 660-61. The Court concluded, stating "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 662.

Although we appreciate the merit of *Abney*, it cannot be considered in a vacuum since we must analyze *Abney* in the context of the statutory prerequisites for appellate jurisdiction as prescribed by the South Carolina General Assembly.

3. A Criminal Defendant's Right to Appeal in South Carolina

In South Carolina, a criminal defendant has no constitutional right to appeal. Rather, a defendant's right to appeal is authorized by statutes and appellate court rules of procedure. *See State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) ("The right of appeal arises from and is controlled by statutory law."

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[8] *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (establishing "collateral order doctrine" as an exception to the final-judgment rule; describing collateral orders as "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated").

(citation omitted)). To appeal, a defendant must be "aggrieved"[9] by a decision that is statutorily classified as one that is appealable, which generally involves a final judgment. S.C. Code Ann. § 18-1-30 (2014) ("Any party aggrieved may appeal in the cases prescribed in this title."); Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."); *see* Rule 201(a), SCACR ("Appeal may be taken, as provided by law, from any final judgment, appealable order or decision.").

The General Assembly has expressly limited those decisions that are immediately appealable.[10] Originally enacted in 1896, section 14-3-330 of the South Carolina Code provides, in pertinent part, that an immediate appeal may be taken in a law case from:

> (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; *provided*, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
>
> (2) An 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, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

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[9] "[A]n aggrieved party is one who is injured in a legal sense or has suffered an injury to person or property." *State v. Cox*, 328 S.C. 371, 373, 492 S.E.2d 399, 400 (Ct. App. 1997).

[10] *See* S.C. Const. art. V, § 5 ("The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.").

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment.

S.C. Code Ann. § 14-3-330(1), (2), (3) (1976); *see State v. Samuel*, 411 S.C. 602, 604, 769 S.E.2d 662, 663 (2015) ("Absent some specialized statute, the immediate appealability of an interlocutory or intermediate order depends on whether the order falls within [section] 14-3-330 [of the South Carolina Code]." (citation omitted)); *see also* S.C. Code Ann. § 18-1-130 (2014) ("Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment.").

Significantly, appellate court decisions that pre-date and post-date the enactment of section 14-3-330 have consistently held that a defendant may appeal only after sentence has been imposed. Without explanation, this Court in 1880 dismissed a defendant's appeal, holding that the sentence of the defendant in the Court of General Sessions is the final judgment, from which alone an appeal may be taken. *State v. McKettrick*, 13 S.C. 439, 439 (1880).

Twenty years later, the Court applied the holding in *McKettrick* to dismiss as interlocutory an appeal of an order granting a mistrial. *State v. Hughes*, 56 S.C. 540, 35 S.E. 214 (1900). In so ruling, the Court explained:

> It is a bad practice, and generally condemned, to hear appeals by piecemeal, especially in criminal cases; for it is destructive of the prompt administration of justice, which is so essential to the peace of society. To allow appeals to be heard from such preliminary rulings would enable a party charged with the most serious crime always to secure a continuance, when otherwise not entitled to it, by simply moving to quash the indictment, and, when his motion is overruled, give notice of appeal from such ruling, and thereby stop the trial, as was in the present case. [But not so in the appeal at bar, for then several justices of this court refused to allow an appeal from a preliminary order to stay the wheels of justice.]. Both reason and authority require us to hold that this appeal is premature, and must therefore be dismissed.

Hughes, 56 S.C. at 543, 35 S.E. at 215.

For decades, this Court relied on *Hughes* and has consistently held that a criminal defendant may not appeal until sentence is imposed. In 1921, the Court relied on this authority to find that an order denying a motion to dismiss based on double jeopardy grounds following a mistrial provided no exception to well-established rules of appealability. *State v. Wyatt*, 115 S.C. 325, 326, 105 S.E. 704, 704 (1921) (dismissing appeal from an order denying a defendant's plea of former jeopardy following a mistrial on the ground that there had "not been any final judgment, the ruling of his honor, the presiding judge, is not appealable").

In 1986, the Court expressly considered the implications of *Abney* to extant appealability rules, including *Wyatt*. *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986). In *Miller*, the defendant was convicted of murder, grand larceny, and housebreaking; however, the trial judge granted the defendant's motion for judgment notwithstanding the verdict ("JNOV"). *Id.* at 426, 346 S.E.2d at 705. The State appealed, and this Court reversed the judge's grant of JNOV and reinstated the verdicts of guilty on the charges of murder and grand larceny. *Id.* This Court, however, upheld the dismissal of the housebreaking conviction and remanded the case for sentencing. *Id.* (citing *State v. Miller*, 287 S.C. 280, 337 S.E.2d 883 (1985)). On remand, Miller moved to bar the capital sentencing proceeding on double jeopardy grounds. *Id*. The trial judge denied the motion, after which Miller filed a notice of appeal. *Id.*

This Court dismissed the appeal without prejudice to Miller's right to appeal from final judgment. *Miller*, 289 S.C. at 428, 346 S.E.2d at 706. In so ruling, the Court relied on its prior decisions holding that a criminal defendant may not appeal until sentence has been imposed and decisions holding that an order denying a double jeopardy claim is not immediately appealable. *Id.* at 427, 346 S.E.2d at 706 (citing *Hughes* and its progeny as well as *Wyatt*). The Court acknowledged Miller's argument that the rule prohibiting an immediate appeal from an order denying a double jeopardy claim had been overruled by federal decisions, including *Abney*, which hold that appeals based on double jeopardy grounds involve final judgments that are directly appealable. *Id.* Nevertheless, the Court found that in both state and federal courts, the right to appeal a criminal conviction is conferred by statute and, as noted in *Abney*, in order to exercise that statutory right to appeal, a defendant must come within the terms of the applicable statute. *Id.* Significantly, the Court concluded that the cases cited by Miller, including *Abney*, which were based on 28 U.S.C. § 1291 had "no application to state court appeals." *Id.* The Court explicitly adhered to its "view that under § 14-3-330

(1976) a criminal defendant may not appeal until after sentence has been imposed." *Id.*

Fourteen years later, the Court reaffirmed *Miller* in *State v. Gregorie*, 339 S.C. 2, 528 S.E.2d 77 (2000). In *Gregorie*, the defendant was convicted in magistrate's court of speeding. *Id.* at 3, 528 S.E.2d at 78. He appealed to the circuit court, which reversed and remanded for a new trial, finding the State failed to introduce any evidence of the applicable speed limit. *Id.* On appeal, the Court of Appeals initially dismissed the appeal, but reinstated it and affirmed the circuit court's ruling. *Id.*

This Court overruled *Gregorie* and another related decision in which the Court of Appeals erroneously created an exception to the rule established in *Miller* that "a criminal defendant claiming a double jeopardy violation is not exempt from the regular appealability requirements." *Gregorie*, 339 S.C. at 4 n.1, 528 S.E.2d at 78 n.1. The Court clarified that the test for appealability is "not whether the appeal involves a double jeopardy claim . . . but whether the party bringing the appeal is aggrieved." *Id.* at 4, 528 S.E.2d at 78.

Applying this rule, the Court found Gregorie's appeal was immediately appealable not because it involved a double jeopardy claim, but because Gregorie was otherwise aggrieved by the new trial remedy ordered by the circuit court. *Id.* The Court noted that the circuit court found the State failed to meet its burden of proof and the State's failure to appeal that finding became the law of the case. *Id.* Ultimately, the Court found Gregorie correctly asserted that, under those circumstances, a second trial in magistrate's court would violate his double jeopardy rights. *Id.*

Recently, this Court analogized a denial of a request for immunity under the South Carolina Protection of Persons and Property Act ("Act") to a denial of a motion to dismiss a criminal case on the ground of double jeopardy. *State v. Isaac*, 405 S.C. 177, 747 S.E.2d 677 (2013). Citing *Miller*, the Court held a denial of a request for immunity under the Act is not immediately appealable. *Id.* at 185, 747 S.E.2d at 681. The Court reasoned that "[a]bsent an unambiguous expression of legislative intent, we see no reason to alter settled law concerning appealability, which additionally would have the illogical effect of elevating a statutory immunity claim over one constitutionally based." *Id.* at 184, 747 S.E.2d at 680.

4. Import of *Abney* to Appellate Review in State Courts

Despite the wealth of South Carolina authority to the contrary, Rearick maintains that *Abney* is controlling because the federal constitutional right against double jeopardy cannot be trumped by a state procedural rule.

We recognize the split of authority as to the import of *Abney* in the state appellate court realm. Some courts "suggest that the state, as part of its constitutional obligation to effectively enforce the double jeopardy bar, must provide for an immediate appeal from the trial court's denial of a non-frivolous double jeopardy objection." 7 Wayne R. LaFave et al., *Criminal Procedure* § 27.2(c) (4th ed. 2015).[11] In contrast, some courts reject *Abney*'s application to state

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[11] *See, e.g.*, *State v. Choate*, 725 P.2d 764, 764 (Ariz. Ct. App. 1986) (citing *Abney* and finding that "an interlocutory appeal of a double jeopardy claim is constitutionally mandated"); *State v. Baranco*, 884 P.2d 729, 733 (Haw. 1994) (adopting *Abney* rationale and holding that "the collateral order exception to the final judgment rule permits an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds"); *People v. Torres*, 549 N.W.2d 540, 552 (Mich. 1996) (discussing *Abney* and concluding that trial court's nonfinal decision to grant a new trial was immediately appealable because the defendant "could only have avoided the second trial by seeking an immediate appeal"); *Roberson v. State*, 856 So. 2d 532, 533 (Miss. Ct. App. 2003) (referencing *Abney* and determining that "[a]n immediate appeal regarding a denied double jeopardy claim is permitted"); *State v. Milenkovich*, 458 N.W.2d 747, 750 (Neb. 1990) (analyzing *Abney* and concluding that "a defendant must be granted the opportunity to raise a claim of double jeopardy prior to being subjected to the second trial"); *State v. Anderson*, 6 N.E.3d 23, 32 (Ohio 2014) (discussing *Abney* and concluding that "an accused would not be afforded a meaningful review of an adverse decision on a motion to dismiss and discharge on double-jeopardy grounds if that party must wait for final judgment as to all proceedings in order to secure review of the double-jeopardy decision"); *Commonwealth v. Orie*, 22 A.3d 1021, 1027 (Pa. 2011) (permitting immediate appellate review of trial court's order determining that petitioner's double jeopardy challenge was frivolous); *State v. Godette*, 751 A.2d 742, 745-46 (R.I. 2000) (citing *Abney* and recognizing that the denial of a motion to dismiss on double jeopardy grounds constitutes an exception to the general rule regarding appeals in criminal cases).

courts on the ground that *Abney* "is better interpreted as a case interpreting the federal statute governing appeals, not the scope of the constitutional prohibition against double jeopardy, so that its holding is not binding on state courts interpreting their own law." *Id.*[12]

We are persuaded by the holdings in those state jurisdictions that decline to adopt *Abney*. A careful review of *Abney* reveals the USSC's analysis is narrowly confined to an interpretation of federal law with no indication of a mandatory application in state courts. As we interpret *Abney*, the USSC was not analyzing whether a defendant has a constitutional right to appeal the denial of a pretrial motion to dismiss on double jeopardy grounds. Rather, the USSC was deciding whether such denial was a "final decision" within the context of 28 U.S.C. § 1291, the federal appeals statute. Thus, we find those state jurisdictions that adopt the

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[12] *See, e.g.*, *Jones v. State*, 450 So. 2d 186, 187 (Ala. Crim. App. 1984) (acknowledging split of authority on *Abney* but taking "the view that a denial of a pretrial motion based on a plea of double jeopardy is not immediately appealable"); *State v. Fisher*, 579 P.2d 167, 170 (Kan. Ct. App. 1978) (limiting *Abney* to construction of federal appeals statute and ruling that denial of motion to dismiss did not constitute a "judgment" within the meaning of a state statute providing for appeals in criminal cases); *Huff v. State*, 599 A.2d 428, 436 (Md. 1991) (finding *Abney* "does not constitutionally mandate interlocutory appeals" and that due process does not require the State to provide an immediate appeal); *State v. Murphy*, 537 N.W.2d 492, 495 (Minn. Ct. App. 1995) (rejecting application of *Abney* where state had specific jurisdictional rule prohibiting review of a pretrial order denying defendant's motion to dismiss on double jeopardy grounds); *State v. Nemes*, 963 A.2d 847, 848 (N.J. Super. Ct. App. Div. 2008) (concluding that *Abney* does not embody a constitutional holding and, thus, defendant could not appeal as of right from trial court's interlocutory order denying his motion to dismiss on double jeopardy grounds); *State v. Joseph*, 374 S.E.2d 132, 135 (N.C. Ct. App. 1988) (limiting *Abney* to federal statute and concluding order denying defendant's motion to dismiss on double jeopardy grounds was not immediately appealable); *State v. Salzmann*, 850 P.2d 1122, 1126 (Or. Ct. App. 1993) ("The nature of the Court's analysis and the specificity in its holding persuade us that *Abney* is merely a case of statutory construction of a federal statute and not one that establishes a constitutional mandate for interlocutory appeals throughout the several states.").

rationale in *Abney* misconstrue the holding and extend it beyond what was intended by the USSC.[13]

Further, we believe an adoption of the rationale in *Abney* would have dire consequences for the future of appellate review in South Carolina. If we were to carve out an exception for the denial of a double jeopardy claim, we believe all pretrial motions implicating a constitutional right would be subject to immediate appeal.

B. Other Remedies

While the procedural bar of *Miller* may seem harsh, a defendant is neither denied a future appeal nor other remedies. A defendant may still challenge the denial of a motion to dismiss on double jeopardy grounds *via* (1) a petition for federal habeas corpus relief, or (2) a petition for this Court to issue an extraordinary writ.[14] *See Livingston v. Murdaugh*, 183 F.3d 300, 301 (4th Cir. 1999) (affirming grant of writ of federal habeas corpus on double jeopardy grounds and recognizing that "appeal of a denial of a double jeopardy claim would be futile because the South Carolina Supreme Court has held that 'an order denying a double jeopardy claim is not immediately appealable'" (quoting *Miller*, 289 S.C. at 427, 346 S.E.2d at 706)); *Gilliam v. Foster*, 63 F.3d 287, 291 (4th Cir. 1995) (denying State's motion to stay federal district court's grant of habeas corpus for pending decision on merits of defendant's double jeopardy claim in state court proceedings; stating, "[i]t is also regrettable that, because South Carolina law does not permit an interlocutory appeal of the double jeopardy ruling, the appellate courts of that state were not the ones to rule on the matter in the first instance"); *cf. Paul v. People*,

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[13] Notably, this Court has expressly recognized that the federal collateral order doctrine, upon which *Abney* is based, is not applied in our state courts. *See Capital U-Drive-It, Inc. v. Beaver*, 369 S.C. 1, 8 n.2, 630 S.E.2d 464, 468 n.2 (2006) ("Although the federal collateral order doctrine is not applied in our state courts, we believe the reasoning of these cases is sound.").

[14] S.C. Const. art. V, § 5 ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs."); S.C. Code Ann. § 14-3-310 (1976) ("The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other remedial and original writs.").

105 P.3d 628, 633 (Colo. 2005) (en banc) (concluding that denial of defendant's motion to dismiss on double jeopardy grounds was not immediately appealable, but reviewing the appeal pursuant to appellate court's original jurisdiction).

III. Conclusion

Despite Rearick's arguments to the contrary, we conclude that *Abney* does not alter the rule in *Miller*. Consequently, we dismiss this appeal without prejudice.[15]

APPEAL DISMISSED.

KITTREDGE and FEW, JJ., concur. PLEICONES, C.J., and HEARN, J., concurring in result only.

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[15] In view of our decision, we need not address Rearick's remaining issue regarding the trial judge's declaration of a mistrial. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address remaining issues when decision regarding a prior issue is dispositive).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., Defendants,

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

Appellate Case No. 2014-000782

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

Opinion No. 27655
Heard May 7, 2015 – Filed August 17, 2016

REVERSED

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

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

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

FACTS

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

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

In 2008, the Parsons discovered PVC pipes and a metal lined concrete box buried on their Property. The PVC pipes and box contained "black sludge," which tested

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

positive as a hazardous substance. JWH entered a cleanup contract with the South Carolina Department of Health and Environmental Control. JWH completed and paid for the cleanup per the cleanup contract.[2]

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

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

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

Second, the circuit court applied the outrageous torts exception to arbitration enforcement[3] and found that because the Parsons alleged outrageous tortious

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

[3] *See*, *e.g.*, *Wachovia Bank, Nat. Ass'n v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Timmons v. Starkey*, 389 S.C. 375, 698 S.E.2d 809 (2010); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 689 S.E.2d 602 (2010); *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007); *Simpson v. World*

conduct, namely, the intentional and unforeseeable conduct of JWH in failing to disclose concealed contamination on the Property, the arbitration clause was unenforceable.[4]

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

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

ISSUE

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

LAW/ANALYSIS

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

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

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

Fin. Corp. of South Carolina, 373 S.C. 178, 644 S.E.2d 723 (2007); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 666 S.E.2d 294 (Ct. App. 2008).
[4] We note the circuit court did not explain how the outrageous torts doctrine precluded arbitration of the Parsons' non-tort claims.

I. Scope

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

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

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

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

(Capitalization, bold, and underline in original).

Paragraph O of the Warranty provides, in pertinent part:

Mandatory Binding Arbitration. Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them. . . .

Any and all unresolved claims or disputes of any kind or nature between [petitioner] and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. This applies only to claims or disputes that arise after the later of: (a) the issuance of the final certificate of the occupancy for the home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.

. . . .

WIELAND AND HOMEBUYER(S) HEREBY ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSING OF THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUYER(S). WIELAND AND HOMEBUYERS HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN

EQUITY OR OTHERWISE WHICH MIGHT
OTHERWISE HAVE BEEN AVAILABLE TO THEM
IN CONNECTION WITH ANY SUCH DISPUTES.

(Capitalization, bold, and underline in original).

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

II. Outrageous Torts Exception

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

In *AT&T Mobility, L.L.C. v. Concepcion*, the Supreme Court reiterated its position that "courts must place arbitration agreements on equal footing with other contracts, . . . and enforce them according to their terms[.]" 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006); *Volt Info. Scis, Inc.*, 489 U.S. at 478). The *Concepcion* decision further explained that the Federal Arbitration Act ("FAA") permits arbitration agreements to be invalidated

by "generally applicable contract defenses," such as fraud, duress, or unconscionability, but not by defenses that apply solely to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.[5] *See* 131 S.Ct. at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) (finding courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions); *Perry v. Thomas*, 482 U.S. 483, 492–93, n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987) (finding state law, whether of legislative or judicial origin, is applicable only if it arose to govern issues concerning contract validity, revocability, and enforceability, and state-law principles that take their meaning from the fact that an arbitration agreement is at issue does not comport with the requirements of the FAA) (citation omitted)); *see also Nitro-Lift Techs., L.L.C. v. Howard*, --- U.S. ---, 133 S.Ct. 500, 502, 184 L.Ed.2d 328 (2012) (reiterating that state supreme courts must adhere to United States Supreme Court's interpretations of the FAA).

The Supreme Court recently reconfirmed the obligation state courts have to apply *Concepcion*, and ensure arbitration agreements are "on equal footing with all other contracts." *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) ("No one denies that lower courts must follow this Court's holding in *Concepcion*. . . . Lower court judges are certainly free to note their disagreement with a decision of this Court. . . But the Supremacy Clause forbids state courts to dissociate themselves from federal law. . . The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it." (citing U.S. Const., Art. VI, cl. 2; *Howlett v. Rose*, 496 U.S. 356, 371 (1990); *Khan v. State Oil Co.*, 93 F.3d 1358, 1363–1364 (CA7 1996), *vacated*, 522 U.S. 3 (1997))). In finding California state courts failed to meet the requirements set forth in *Concepcion*, and, therefore, the arbitration agreement at issue was enforceable, the Supreme Court found, in relevant part:

> [S]everal considerations lead us to conclude that the court's interpretation of this arbitration contract is unique, restricted to that field. . . . The language used by the Court of Appeal focused only on arbitration. . . . Framing that question in such terms, rather than in generally applicable terms, suggests that the Court of

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

> Appeal could well have meant that its holding was limited to the specific subject matter of this contract—arbitration. . . . [T]here is no other principle invoked by the Court of Appeal that suggests that California courts would reach the same interpretation of [the phrase at issue] in other contexts. . . . The fact that we can find no similar case interpreting [the phrase at issue] . . . indicates, at the least, that the antidrafter canon would not lead California courts to reach a similar conclusion in similar cases that do not involve arbitration.

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

Analogous to *DIRECTV*, the application of the outrageous torts exception in South Carolina is "unique," and "restricted" to the field of arbitration. Comparable to the analysis provided in *DIRECTV* in finding California courts failed to place arbitration on equal footing with other contracts, the language of every outrageous torts exception case published by this Court has focused explicitly on arbitration. Further, comparable to the analysis in *DIRECTV*, this Court has never used the terminology associated with, or applied the principle of, the outrageous torts exception outside the context of arbitration enforcement.[6] Because the outrageous

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

torts exception is not a general contract principle, but instead one that has been applied only to arbitration clauses, I find the exception inconsistent with *Concepcion* and its supporting federal jurisprudence. Accordingly, to the extent South Carolina cases apply the outrageous torts exception, I would now overrule those cases and find the trial court erred by determining the exception precluded enforcement of the arbitration clause.[7]

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

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

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

III. Unconscionability

As an additional sustaining ground, the Parsons ask this Court to find the arbitration clause is unconscionable. *Cf. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000) (noting the decision to review an additional sustaining ground is discretionary). We find the Parsons' arguments as to unconscionability are without merit. *See Simpson*, 373 at 25, 644 S.E.2d at 668–69 (explaining unconscionability requires courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999))); *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (citation omitted) ("Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.").

CONCLUSION

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

The Court of Appeals' decision is therefore

REVERSED.

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

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149 (2003) (addressing the merits of a claim in the interest of judicial economy).

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

I agree with the majority that the scope of the arbitration clause covers the claims against JWH. However, I also agree with the dissent that the outrageous and unforeseeable torts exception remains a viable principle of law after *Concepcion*,[8] because it embodies a generally applicable contract principle: effectuating the intent of the parties. In my opinion, abolishing the "exception"—allegedly applicable only to arbitration[9]—could lead to absurd results, such as forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement. *See Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) ("Even though there is [a] presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties." (citation omitted) (internal quotation and alteration marks omitted)); *see also, e.g.*, *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (explaining a contract "interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided"); *cf. Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008) (stating the Court will refuse to interpret statutory language in a manner that would lead to an absurd, and clearly uncontemplated, result (citation omitted)).

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[8] *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333 (2011).

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

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

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

Accordingly, in this instance, I believe the correct inquiry is whether JWH's alleged fraud in failing to disclose the presence of hazardous waste on the property

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

is essentially a freestanding tort that is not significantly related to the sales contract and arbitration agreement between JWH and the Parsons. I would find there is a significant relationship between the claim and the contract in which the arbitration agreement is contained. The Parsons could not bring their claim against JWH absent the sales contract, as the claim is entirely reliant on the parties' statuses under the contract. In other words, absent the sales contract, JWH would be under no duty to disclose these particular defects with the property to the Parsons or any other third-party.

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

BEATTY, J., concurs.

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

I. General Contract Principles

In "overrul[ing] the judiciary's long-standing refusal to enforce agreements to arbitrate," the United States Supreme Court has held numerous times that arbitration agreements must be placed "upon the same footing as [all] other contracts." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (citations omitted) (internal quotation marks omitted). Accordingly, the Federal Arbitration Act (FAA)[12] "imposes certain rules of fundamental importance, including the basic [contract] precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt*, 489 U.S. at 479); *see also Volt*, 489 U.S. at 478 ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement." (internal citations omitted)).[13] Similarly, as with all other contracts, when a court interprets an arbitration agreement, "'the parties' intentions control'" such that the court's interpretation merely "'give[s] effect to the contractual rights and expectations of the parties.'" *Stolt-Nielsen*, 559 U.S. at 681–82 (quoting *Volt*, 489 U.S. at 479; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

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

[12] 9 U.S.C. §§ 1–16 (2006).

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

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

Accordingly, I disagree with the majority's assertions that the outrageous and unforeseeable tort exception to arbitration is not a general contract principle. In my view, the exception treats arbitration agreements and contracts precisely

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

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

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

It appears that the majority approves of considering the parties' intentions in determining the scope of the agreement, but takes issue with the exception because

of its label—the outrageous and unforeseeable tort exception *to arbitration*. However, this label is a misnomer. The analysis underlying the exception—defining the scope of the agreement by effectuating the parties' contractual expectations—is equally applicable to contracts and arbitration agreements.

Accordingly, I disagree that the Court should abolish this analytical process in future cases. Abolishing the outrageous and unforeseeable tort exception effectively places arbitration agreements in a position of vast superiority to all other contracts. In essence, arbitration agreements now become "super contracts," in which the parties' intentions in outlining the scope of their agreement are irrelevant, and courts must now indiscriminately send parties to arbitration regardless of their intentions. As stated previously, this blind imposition of judicial might on the parties not only lacks a legal foundation, but takes the Supreme Court's directives to enforce arbitration agreements to irrational lengths. *See Stolt-Nielsen*, 559 U.S. at 684 ("It falls to courts and arbitrators to give effect to the[] contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: *to give effect to the intent of the parties*." (emphasis added)).[15]

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

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

II. Application

South Carolina courts have applied the outrageous and unforeseeable tort exception sparingly and are reluctant to declare the tortious conduct underlying a lawsuit to be unrelated to the contract containing the arbitration agreement.[16] In

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

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

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

determining whether the exception applies, a court should focus on the parties' intent, the foreseeability of a particular claim when the parties entered into the agreement, and whether or not the specific claims fall within the scope of the arbitration agreement, either expressly or because they significantly relate to the contract. *See Chassereau*, 373 S.C. at 172–73, 644 S.E.2d at 720–21.

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

III. Residential Construction Arbitration Agreements

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

South Carolina courts have historically been inclined to expand general contract and tort principles to protect innocent homebuyers. *See, e.g.*, *Kennedy*, 299 S.C. at 343–44, 384 S.E.2d at 735–36; *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 501–03, 229 S.E.2d 728, 730–31 (1976) ("Disparity in the law should be founded upon just reason and not the result of adherence to stale principles which do not comport with current social conditions."); *Rogers v. Scyphers*, 251 S.C. 128, 132–34, 135–36, 161 S.E.2d 81, 83, 84–85 (1968). To that end, South Carolina courts embraced the maxim *caveat venditor*, or "seller beware," and abolished the requirement of strict privity between a home purchaser and a homebuilder. *McCullough v. Goodrich & Pennington Mortg. Fund, Inc.*, 373 S.C. 43, 53, 644 S.E.2d 43, 49 (2007); *Kennedy*, 299 S.C. at 343, 344–45, 384 S.E.2d at 735, 736;

see also Sapp v. Ford Motor Co., 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (discussing *Kennedy* and noting that its holding "followed cases from around the country expanding protections afforded to homebuyers and imposing tort liability on residential homebuilders"). Thus, in cases involving residential construction contracts, general contract and tort principles occasionally give way to the State's dual policies of protecting the homebuyer and making it easier for that buyer to pursue claims against the builder or seller.

Because *Kennedy* and its progeny explicitly apply only to residential construction *contracts*, this Court has not previously had occasion to address how this line of cases applies to residential construction *arbitration agreements*. However, again, the Supreme Court has held numerous times that arbitration agreements must be placed "upon the same footing as [all] other contracts." *Volt*, 489 U.S. at 478 (citations omitted) (internal quotation marks omitted). Thus, I conclude that South Carolina's longstanding policy of protecting innocent homebuyers extends to arbitration agreements involving residential construction as well. *See Perry v. Thomas*, 482 U.S. 483, 492–93 n.9 (1987) ("Thus state law, whether of legislative or judicial origin, is applicable [to arbitration agreements] *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. . . . **A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law**." (bold emphasis added)).[17] Accordingly, as in all other residential construction cases, I would extend this Court's protection to the Parsons, as the innocent homebuyers.[18]

In the arbitration context, I believe this protective "gloss" specifically applies to whether the homebuilder's conduct is outrageous, unforeseeable, and not contemplated by the parties when entering into the residential construction contract. Thus, as applied here, *Kennedy* and its progeny lead me to find that

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

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

JWH's failure to disclose the extreme pollution and defects with the property was not only unreasonable, but unforeseeable as well. As stated, *supra*, I would therefore refuse to compel arbitration between the parties, as claims based on such outrageous conduct by a homebuilder surely were not contemplated by the parties.

IV. Conclusion

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