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Supreme Court of Texas.
In re PALM HARBOR HOMES, INC., and Palm Harbor Homes I, L.P. d/b/a Palm Harbor
Village, Relator.
No. 04-0490.

March 23, 2005

Appearances:
Craig Madison Patrick, (argued), Craddock Reneker & Davis, L.L.P., Dallas, TX, for Relator.
Douglas Vance Colvin, (argued), Law Offices of Wes Griggs, West Columbia, TX, for Real Party In Interest.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear argument in 04-0490 In re Palm Harbor Homes, Inc., and Palm Harbor Homes I, L.P.
SPEAKER: May it please the Court. Mr. Craig Patrick will present argument for the relators. Relators have reserved five minutes for rebuttal.

ORAL ARGUMENT OF CRAIG MADISON PATRICK ON BEHALF OF THE PETITIONER

MR. PATRICK: Good morning. May it please the Honorable Supreme Court.
In late 1998, the Ripples, for Real Parties in Interest purchased to manufacture a home from the retailer of this case Palm Harbor Village who was manufactured by the manufacturers, Palm Harbor Homes I, L.P. in re Palm Harbor Homes, Inc. In connection with the purchase of their home Palm Harbor Village and the Ripples signed two broad arbitration agreements and agreed that any disputes related to the home essentially would be submitted to binding arbitration. The second arbitration agreement, however, contained an opt-out provision wherein Palm Harbor Homes, a nonsignatory to the contract and the third party beneficiary under the contract, could elect opt out of the arbitration

proceeding.

JUSTICE O'NEILL: Let me -- I wanna be sure from the language of the opt-out clause whether they could wait 'til after arbitration to opt out, see what the warp was, or not. It almost --

MR. PATRICK: Well, my reading of it, your Honor, is that that actually -- our position is that this opt-out provision is a restriction on Palm Harbor Homes' rights. That Palm Harbor Homes was only able to opt out of the arbitration by giving a written notice of the election into all parties within 20 days of receipt of the notice from another party. So, once Palm Harbor Homes gets a notice from any party that they intend to go forward with arbitration. Palm Harbor Homes only has 20 days to send a written notice to the other party saying, "We don't wanna accept this benefit as third party beneficiary." Now, it is our position that the trial court abused its discretion in refusing to enforce this arbitration agreement and the focus of this mandamus action is on the Ripple's defenses to the arbitration agreement.

I see four primary issues in this case. The first three of which, I believe, concern solely the effect of this opt-out provision and the last one seems to address the arbitration provision as an agreement as a whole. The first issue is whether there was any independent consideration didn't for the opt-out provision. The second issue is whether the opt-out provision rendered the entire or that portion of the arbitration agreement substantively unconscionable. And then the third issue is similar to what we heard earlier this morning and that is whether Palm Harbor Homes as a manufacture of nonsignatory in the event that the Court were to find that it was the -- that the opt-out provision was subsequently unconscionable or lacking mutuality whether Palm Harbor Homes could then still enforce its rights under the arbitration of agreement as a nonsignatory to the contract. And finally, whether the entire arbitration agreement was entered into on a procedurally unconscionable fashion. Now, it's the relators position that the opt-out provision does not amount to lack of consideration because this was a mutually binding contract supported by consideration between Palm Harbor Village and the Ripples. And the agreement stated that they specifically inured to benefit of Palm Harbor Homes the manufacturer but allows Palm Harbor Homes a brief opportunity to decline the benefit. Now, as well reasoned contract law provides that the party beneficiary can prior to vesting, reject the offer or the benefit and moreover, the third party beneficiary who is not a part to the contract need not provide independent consideration because contracting parties cannot force a benefit on a nonsignatory to the party. And the opt-out provision is merely restricting Palm Harbor Homes' right.

JUSTICE: I noticed that you relied on commentators mostly meaning --

MR. PATRICK: Yes. This was an area of law that is difficult to find some specific cases and it seems to be something that we can look at for this. You know, I couldn't find cases to the contrary as that we are looking at what seems to be commentary and what seems to be well-reasoned and well --

JUSTICE: As well as the third, the whole term third party beneficiary implies that its people claiming, third party is claiming of benefits, you know, when we have a third party obligee area of the law or something but you might, other than these, recent arbitrations cases, you're unaware of any?

MR. PATRICK: No, your Honor. And that's our point. Since this a

benefit that two parties to a contract can't force this benefit on someone and the case law says that -- the commentary states that until that right vests in Palm Harbor then you become Palm Harbor Homes, the manufacturer, it does become bound that it has the right to reject that basis. And this particular clause is actually a limit on that right. Let's say you have to notify everyone in writing in 20 days or you're gonna be bound. Essentially is an expressed vesting provided there in the contract. And, basically, you know, the expressed ability of a third party beneficiary to disclaim this benefit especially should not destroy the underlying consideration between Palm Harbor Homes and all the village of retailer and the Ripples. And so as a minimum, what we have here, we have a valid --

JUSTICE: Have any Texas cases of -- that seems to me that would be a rule of general application of any Texas cases specifically by this Court that each clause of the contract does not require independent consideration.

MR. PATRICK: It's --

JUSTICE: That's what you're arguing, you know, if I understand you correctly that --

MR. PATRICK: And that's consistent with what the way that the court of appeals in this case considered it. They looked at the clause itself and say that the clause did not have independent consideration.

JUSTICE: And what's your authority for saying, "Well, the whole rest of the contract is independent consideration"?

MR. PATRICK: Well, I guess what I'm arguing is if the clause itself does not have independent consideration, that shouldn't destroy the entire contract between the retailer and the purchaser on both sides of a mutually binding contract. And for those reasons, we believe that the court of appeals is incorrect in its majority as well as that the dissenting opinion also in finding that this particular opt-out provision rendered a contract void for lack of mutuality.

JUSTICE O'NEILL: Does the opt-out provision matter if the Grigson test is met?

MR. PATRICK: I honestly don't think it does. And that's -- and that -- I guess the only time it would matter is if we got to the last part of the argument and that is the procedural unconscionability as a whole but when you're looking at the first two issues, the substantive unconscionability and you're looking at the lack of consideration, those focus just on the opt-out provision and under Grigson and some other state cases which are not exactly following Grigson but I believe are still applicable that the -- whether the opt-out provision is therefore not Palm Harbor Homes, the manufacturer, can compel arbitration.

As to the substantive unconscionability argument in in re First Merit Bank --

JUSTICE: So you asked if they're --

MR. PATRICK: Yes?

JUSTICE: -- This clause is governed by the FAA?

MR. PATRICK: The clause is governed by the FAA as well as the Texas arbitration.

JUSTICE: Well, I mean, my recollection says that you all chose it to be governed by the FAA --

MR. PATRICK: Yes. Yes.

JUSTICE: -- and so the extent of any conflict, the FAA would govern.

MR. PATRICK: Right.

JUSTICE: And yet in your section on substantive unconscionability,

you cite only Texas cases. What's the federal law of unconscionability?

MR. PATRICK: I believe that on the substantive unconscionability that state law applies --

JUSTICE: Because?

MR. PATRICK: Because this is a contractual, this is -- I believe that the contract whether the --

JUSTICE: But Grigson doesn't apply to state law. Grigson just applies federal law governed by the FAA. I'm wondering whether why this shouldn't be governed by --

MR. PATRICK: We're -- we're -- I mean, obviously Grigson is not binding on this Court and Grigson is just -- is an example of --

JUSTICE: If -- if Grigson is not but if the US Supreme Court says the same thing, it certainly is because that's federal arbitration and it's --

MR. PATRICK: I -- I probably --

JUSTICE: -- when its state law, we can't say Texas unconscionability law preempts the FAA.

MR. PATRICK: Well, I think that the distinction is that we look at Federal Arbitration Act to determine whether a valid arbitration clause exists and whether it comes within the scope f the arbitration, but whether there's an actual offense to the contract, that's stable.

JUSTICE: It wouldn't. But wouldn't unconscionability be for the arbitrators --

MR. PATRICK: It can be --

JUSTICE: -- under the FFA?

MR. PATRICK: You held that in First Merit that both substantive and procedural arbitrability -- unconscionability are arguable claims that could be submitted to the arbitrator. But in the in re First Merit claims, basically, substantive unconscionability is a principle of pervading oppression and unfair surprise and will set the contract to determine if on its face it's so one-sided to be fair or impressive. And, we believe that the only basis for findings of substantive unconscionability is to look at the opt-out provision itself.

JUSTICE O'NEILL: Well, let me ask you this. If the manufacturer exercises the opt-out clause, let's say the purchaser wanted to compel arbitration. Palm Harbor, nobody on Palm Harbor side one that arbitrate but the Ripples here decided they wanted to compel arbitration and the manufacturer sent notice to opt out. Don't you think that they could not opt out? I mean don't you think that -- that under Grigson, they'll be forced to arbitrate?

MR. PATRICK: That's -- that's possible. I mean, whether --

JUSTICE O'NEILL: I mean we could finally --

MR. PATRICK: -- and they stop the converse of whether the party who is attempting to file claims could force a nonsignatory to arbitrate his claims which is the opposite to what we have here where we have a nonsignatory trying to force the signatory to arbitrate his claims.

JUSTICE O'NEILL: But I guess what I'm getting at is we need to start by analyzing the opt-out provision or restart public in Grigson because it seems to me that under Grigson, the opt-out provision could be just unenforceable if the claims are an extra clean or twine and you're lying on the agreement for the duties that you are suing on then -- then the opt-out just wouldn't apply.

MR. PATRICK: I -- I don't believe that Grigson's second -- the second prong of the Grigson test basically says that when a signatory to a contract raises, contains an arbitration clause raises allegations substantially into dependent concerted misconduct by the nonsignatory

and one or more signatory that, I thought in Grigson that basically we have what we have here and that is a nonsignatory trying to --

JUSTICE O'NEILL: I know. I understand that. I'm just trying to understand how it would work the other way if you had a signatory trying to compel the nonsignatory here. It doesn't seem to me like the opt-out right would be any good.

MR. PATRICK: Well, that very well might be if we are on that issue. If we make -- if that had happened, I can't sit here. I haven't thought that through --

JUSTICE O'NEILL: Well honestly, you got an enforceable opt-out provision that strikes me as ah, that you try to analyze whether an opt-out provision can make the agreement unconscionable if it turns out not to be enforceable in the first place.

MR. PATRICK: I guess if we assume that it's unenforceable, then we just would step into the Grigson test then it would argue that in fact we should still be allowed as Palm Harbor Homes to enforce the arbitration provision against the Ripples.

JUSTICE: What claims were there that we needed Homes for? Were there any claims that were recoverable only against Homes as to supposed Village?

MR. PATRICK: And that really kind of to me takes more if we look at -- I guess if we look at the petition and we' ought to move over to the Grigson analysis. I would like to just point out that there is some Texas Courts of Appeals that have, one has followed Grigson and another has kind of set up what appears to be its own standard, but to me, they seem similar. The court of appeals in in re Educational Management Corporation says that a party may be estopped from avoiding arbitration of claims against nonsignatories if those claims and the claims against the signatory based on the same operative facts or are inherently inseparable, and it seems to be that inherently inseparable is very similar to substantially interdependent and concerted misconduct. But what we have here is we have a petition that makes claim -- there's three claims in the petition or all you see is a breach of warrant complaint. There's a breach applied on merchantability, a breach of failure to repair in a good and workman-like manner, and there is a breach in expressed work. All of the claims are directed to both defendants and allege the exact conduct which agrees to all these warranties. So, I'm not aware of any specific claim in this case that was made solely against one defendant or the other defendant. There weren't any alleged misrepresentations by the retailer that wouldn't apply to the manufacturer and there weren't any claims against the manufacturer that they didn't try to make against the retailer as the seller.

So, we believe that under either the Grigson test or the case set forth in the in the in re that's really set forth in re Educational Management that the court -- that either of those scenarios, either of those tests that because of it, the nature of the claims made by the claimant and also because of the fact that if you look at the arbitration agreement itself, it is very broad, and all of the claims against both the relators fit within the broad definition of claims related to the home. And for those reasons, we don't believe that even if the opt-out provision was rendered void that the Court should -- [inaudible] -- May I finish the [inaudible]?

JUSTICE: Yes.

MR. PATRICK: We don't believe that the court would be appropriate to find the -- or whether the clause is present or not, that it has no impact on the outcome of the case which would be to compel both the

Ripples to compel both their claims against the manufacturer and the retailer of the home.

CHIEF JUSTICE JEFFERSON: Next Counselor. The Court is ready to hear argument from the Real Party.

MR. COLVIN: Thank you.

SPEAKER: May it please the Court. Mr. Vance Colvin will present argument for the Real Party In Interest.

ORAL ARGUMENT OF DOUGLAS VANCE COLVIN ON BEHALF OF THE RESPONDENT

MR. COLVIN: May it please the Court. Forgive my legally feeble mind on this, but I've analyzed this thing much simpler. I begin with the question of why would this be so important as to allow us this Court's jurisdiction. I got to thinking maybe it has something to do with --

JUSTICE: Because if you put synopsis includes compel arbitration into west law, you get 40 cases.

MR. COLVIN: Yes, your Honor.

JUSTICE: So, you know how many are up by this Court? One, First Merit and so that's our job is to try to tell the other 14 courts of appeals. You may proceed.

MR. COLVIN: Thank you, your Honor. However, in further analyzing that, it becomes more simply not just the impact that arbitration or the lack thereof or the trial courts decision to grant arbitration or find that it's a valid clause or provision between the parties. They become simply down to the test that did the trial court abuse its discretion? Would it determine simply that a contract or agreement did not exist?

JUSTICE: And as I asked in the first case, what is the discretionary call here?

MR. COLVIN: The facts that surround the situation as applied to the law.

JUSTICE: If you're suing on the contract though --

MR. COLVIN: Yes.

JUSTICE: -- which then again that's an eight-corners question legal construction no discretion there, no fact-finding to be done.

MR. COLVIN: I understand rather than the facts apply to it came out as to the actual agreements between the party or the actual settings of the agreement of the alleged agreement or the actual --

JUSTICE: Well, you're -- the claim that trial courts normally don't decide to question is whether this whole contract was unconscionable or this whole contract was the signatures are forged. That's normally, if we see an arbitration agreement, normally, we send defenses to the whole contract to the arbitrators, don't we?

MR. COLVIN: Understandably, if in fact there is no question as to the facts surrounding the trial court's decision --

JUSTICE: If there was no question, there'll be no reason, nothing to send to the arbitrators. I'm assuming there is a question. somebody says, "I signed a contract under duress. That's not my signature. They breached first." All of those questions that the contract is not enforceable, not the arbitration clause specific, but the whole contract is not enforceable. That's the kind of thing that the arbitrators give a side on the merits, isn't it?

MR. COLVIN: Not necessarily, your Honor. Unfortunately, in this

case, Palm Home Harbor, the fact is there is no record below as to the facts that the actual trial court heard.

JUSTICE: When you saying no record, we don't have the contracts in our record.

MR. COLVIN: And let me rephrase that, Sir. I'm talking about reporters' record as to the arguments that were made. There are factual considerations that were opted in the argument that they don't --

JUSTICE: You mean by testify.

MR. COLVIN: The only testimony we have is in the form of affidavits by the Ripples which clearly -- I'm sorry.

JUSTICE: So, so, there's no, "What would the rule -- if we had had a reporters' record." It's always interesting for us to read what you all said at the trial court but usually, by the time it gets up here it's a little more of a fun and it's a waste of time to brief what you argued in the trial court. Is there anything a witness or somebody said in the trial court that's not in our record?

MR. COLVIN: Outside the affidavit, there is not. However, --

JUSTICE: But we don't have the affidavits in our records.

MR. COLVIN: Yes, you -- yes, you do. In the second, I believe the second response or the response to the defendant's second emotion to compel arbitration against the [inaudible] court. The thing about it is that after that ledger, the presumption is we can sit in Monday morning court and in fact, all we want to, presumption is that whatever the trial court heard, whatever testimony is there, the presumption is it heard enough.

JUSTICE O'NEILL: If there isn't. You're saying there wasn't any.

MR. COLVIN: Other than the forms of the affidavit.

JUSTICE O'NEILL: So, there is no presumption. There is no -- there aren't facts that the trial court heard.

MR. COLVIN: Your Honor, with due respect. I believe that there is a presumption that something, somehow, there were some facts that --

JUSTICE O'NEILL: You're telling us there weren't. Everybody agrees there weren't. Then there weren't and that there is no presumption.

MR. COLVIN: Outside of the affidavits, yes, Ma'am.

JUSTICE: Correct.

JUSTICE O'NEILL: Let me ask you this. Let's say that we agree with the opt-out provision was unconscionable and therefore, you throw out the arbitration agreement as to the manufacturer. Could you still seek to compel arbitration or would you still compel arbitration against the manufacturer [inaudible]?

MR. COLVIN: I don't believe so.

JUSTICE O'NEILL: Why not?

MR. COLVIN: Because my understanding is if the underlying contract which purportedly inured to the benefit of the manufacturer is void for whatever reason whether it is unconscionability, lack of consideration or meeting of the minds which all three were argued and of record. If for whatever reason the underlying contract, then it logically follows that any benefits in the retailer or the manufacturer would also be voided.

JUSTICE: How do you -- how do you claim they breach the warrantees in the contract if the contract is void?

MR. COLVIN: Well, outside of what Counsel for Palm Harbor said, I believe that inherently there are separate causes of action against the retailer versus the manufacturer. And even presuming --

JUSTICE: What's the difference? What are you suing the manufacturer for that you're not suing the retailer for?

MR. COLVIN: There are certain contractual obligations that the

retailer has with regards to conducting actual repairs --

JUSTICE: My question was what are you -- I understand there's things you're suing the retailer for that you're not suing the -- other way around. Is there anything -- is there some reason we have to have the manufacturer here? Can't you get everything you want from the retailer?

MR. COLVIN: Not on the statute, your Honor.

JUSTICE: What -- under --

MR. COLVIN: Under --

JUSTICE: Under what?

MR. COLVIN: -- the [inaudible] RCLA for example, UCC also breaches of warranty and working ability and things of that nature.

JUSTICE: All of those things are against everybody upstream, right?

MR. COLVIN: Those particular ones are, yes Sir.

JUSTICE: I mean they passed with the goods. So the question again is, is there anything that we have to have the manufacturer for? Or are they just in here to try to get around arbitration?

MR. COLVIN: No, sir --

JUSTICE: Well, I know that's what you're gonna say. I wanna know why.

MR. COLVIN: The only thing I can point to is that my understanding of the statutes provide that there are certain exclusive remedies against the manufacturer in this case under the old RCLA that are not provided for against the retailer, and I know this is a general answer but that's the best I can do. As far as my reading is that there are exclusively remedies against the manufacturer versus that of the retailer. And pursuing the form that it is we do grant arbitration or say that it was an error for the court not to grant the arbitration between the retailer and the Ripples. Later we say, for example, settle against the retailer and still have those outstanding claims against the manufacturer. Not only do we have two parties that did not and just by the record alone actively engage in the move for arbitrary, but you also questionably have a constitution violation and so, it is now two separate parties, not parties to the contract, are suddenly tossed into this mandatory arbitration as was questionably engaged in between the retailer and the Ripples.

Going back to the presumptions that I believe are afforded to the trial court without any type of record. In fact, Justice Vance , his opinion says that in the absence of any kind of record below or the complete record below did in mandamus cannot lie. Obviously, I believe that the burden of proof or the burden to show that this was an error, not just an error, a clear abuse of discretion lies in the party that wishes to question that particular error of the court.

JUSTICE: So recent --

JUSTICE O'NEILL: These specifications -- the manufacturer's specifications, didn't they appear in the retail contract? There weren't two contracts.

MR. COLVIN: No, Ma'am. But the -- to answer the first question, the manufacturer's specifications did appear in the entire bundle of the contract if you will --

JUSTICE O'NEILL: In the retail --

MR. COLVIN: -- in the retail sales contract.

JUSTICE O'NEILL: So, the duties that the Ripples are seeking to enforce against the manufacturer arise from the agreement of which the arbitration clause appears.

MR. COLVIN: I don't necessarily find -- I think that's a little

oversimplification because the contract if we will. It seems that were kind of blurring the distinction between the contract as a whole, meaning the purchase of the actual home versus the snippets if you will, of the agreement to actual purchase it. I believe that this arbitration provision, both of them; the second one, of course, in our argument overrules the first because of the opt-out provision. But, I believe this arbitration agreement is and does stand alone. Despite the fact of the consideration that it claims that it resides.

JUSTICE O'NEILL: Why would it work, a contract between a buyer and a client, and the agreement said that the client at its option can opt-out of arbitration. Would that void the arbitration clause?

MR. COLVIN: If that were recited as a consideration and hence, one of the main components of consideration, I would argue that they would be invalid because it's illusory, because there's no obligation there and --

JUSTICE O'NEILL: The other -- the contracts required by other elements of consideration. The lawyer agrees to provide services. The client agrees to pay a fee and in those arbitration clauses, it says that if we're get in any kind of dispute about this, the services provided or the fee agreement, we're gonna arbitrate except that the client has at its option has 20 days opt-out. Would that void the arbitration clause --

MR. COLVIN: Outside of -- unopposed. Outside of the consideration argument, it may not believe that it would because it's unconscionable. I believe that it's patently unfair --

JUSTICE: So -- so anything and any contract that gives one of the parties an option in the future voids the whole contract?

MR. COLVIN: I --

JUSTICE: -- Or is it just an arbitration clause?

MR. COLVIN: I think that argument is an oversimplification -- or rather a generalization. I'm sorry, your Honor.

JUSTICE: We [inaudible] all the time. I want -- I rent an apartment for a year. At my option to continue month to month thereafter at 125% because it's my option whether to extend beyond the whole contract story.

MR. COLVIN: No, sir. I think --

JUSTICE: Can't be.

MR. COLVIN: No, sir.

JUSTICE: So, why does this -- so, this is a rule that only applies to arbitration clauses.

MR. COLVIN: No, sir. I think it's a fact specific. It has to do --

JUSTICE: How is that different from saying that it only applies to arbitration clause.

MR. COLVIN: No, sir. I would argue that that statement may be true if the facts dictates so. For example, the surrounding circumstances, we're talking about the bargaining power of the parties with regard to unconscionability. Are the facts that set this case apart and would distinguish it in saying this particular incidence because of what the affidavits say on the conditions and the circumstances surrounding the agreement --

JUSTICE: So, poor people can avoid -- so poor people's contracts are elusory but rich people's are not.

MR. COLVIN: No, sir. I think it has --

JUSTICE: What -- what facts are you talking about?

MR. COLVIN: In this particular instance, all the facts that are outlined in the affidavits. For example, the [inaudible] adherence of the defense for example. The fact, that in light of the recent

Prudential case that was not a knowing, voluntary, and intelligent waiver of the [inaudible] trial. The other circumstances as to you have a manufacturer from this industries' commercial park --

JUSTICE: Well, I mean, let's not -- let's not beat around the bush. Rich people don't normally buy mobile homes, manufactured homes. These are not gonna be our most sophisticated, most highly-educated consumers. Are we in effect saying, "You can't sell manufactured homes in Texas because people that tend to buy those will be able to get out of the contract because they are not as highly-educated or whatever."

MR. COLVIN: I would believe that [inaudible], your Honor. I believe that --

JUSTICE: How do -- how do we accept your argument that this was unconscionable here without in fact telling all manufacturers of manufactured homes, you sell manufactured homes in Texas at your own risk.

MR. COLVIN: No, sir. I believe that you can get around the dilemma by saying, if the facts that the trial court is presumed to have heard which are evident here, if the facts dictate that other -- the contract failed for lack of consideration or unconscionability, or just for genuinely, a want of the meeting of the minds, then factually it distinguishes that if this particular waiver of the jury trial, and I know that kind of analogously, but if those waivers and if these things that your bargaining for, whether they be arbitration or any contract, if those things are not bargained for and there are facts of record that the trial court has presumed to have heard, then yes Sir, you can avoid that contract especially arbitration.

JUSTICE: Let me hear your argument about the documents being ambiguous. You make an argument in your brief, page 8 and page 9 and page 10, these two documents are ambiguous and therefore mandamus should issue.

MR. COLVIN: And I tie this into the intent or showing the intent of the parties because on one hand, in the first one of the document that the Ripples signed, we have a general arbitration rule that does not include any kind of opt-out provision. Yet, on relators' petition, they argue that these were all bargained for type of agreement, etcetera, etcetera. However, a few months down the road, we have another set of documents that contains this opt-out provision. So, in merely just by taking two provisions that supposedly apply to the entire contract in and of itself, just the mere fact that two of them exist that are mutually exclusive terms and very material exclusive terms, that provides an ambiguity as to the intent of the place --

JUSTICE: Therefore they lose. Is that correct? Is that your --

MR. COLVIN: That's one of the arguments that was still with -- by the trial court. And the presumptions according to it is that is some reason, that is some evidence that he goes to show where other [inaudible] for lack of consideration for the contract [inaudible].

I'm basically, resting my laurels on the presumption it will go to the trial court. I realize that that may be an oversimplification but because there is no record of --

JUSTICE O'NEILL: But you -- but you agreed of the only thing, the only fact in the record are the affidavits. There's no dispute about that.

MR. COLVIN: That is correct as far as testimony or facts that are --

JUSTICE O'NEILL: What other evidence was there other than the evidence in the documents?

MR. COLVIN: No evidence, but according to the case law, the trial

court can view all these proceedings argued by Counsel --

JUSTICE O'NEILL: That's not evidence.

MR. COLVIN: I understand that, your Honor. But they've made some early review and it's presumed because it's an early review of petition of arguments on things of that nature because they were able to summarily review that, they're presumed to have heard enough facts or enough evidence or presumed to have found some evidence of record to justify this position. And notwithstanding any of that response, the fact is that there is some evidence of unconscionability at the very minimum in the Ripples' affidavits. That's a particular substance that the trial court could have made his decision. And as far as I'm concerned, and again it may be oversimplistic, but that's as far as this Court needs to go. The fact that there is some evidence of record that goes to show to the trial court could have made decision that it did and just because this Court may decide in another way doesn't necessarily mean that it will be overturned. And with that again, I appreciate your time and I'll rest on the laws of --

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

MR. COLVIN: Thank you.

REBUTTAL ARGUMENT OF CRAIG MADISON PATRICK ON BEHALF OF THE PETITIONER

MR. PATRICK: May it please the Court. I want just to close my argument by discussing the procedural unconscionability argument that was made by the opposing Counsel but the reason is this would confirm appeals in the agreement with underlying majority did find that the arbitration agreement was procedurally unconscionable or essentially that the trial court had enough evidence to support that because we believe that we look at the only evidence and Justice Owen is correct and it's the only record is -- are the documents that were before the court, the pleadings, and the affidavits -- Those were two identical affidavits provided by the Ripples in support of their defenses.

JUSTICE O'NEILL: What about the ambiguity argument?

MR. PATRICK: Well, actually, I believe that there is no ambiguity just because there's two documents. In fact, I think that the fact that there are two documents helps defeat that their argument that they didn't understand what they were doing because they had two bites of the apple to agree to the contract.

JUSTICE O'NEILL: Well, one says that the manufacturer has arbitrate and the other says no one benefits to opt out.

MR. PATRICK: Well, if the second -- I mean, my opinion is that we would concede that the second one when there is any type -- I believe court of appeals addressed that issue and found that the second argument is controlling because it adds a new term in contract. I don't believe that renders them unambiguous on their face.

JUSTICE: If it been the Village that have the opt-out right, then it would be illusory.

MR. PATRICK: I believe so.

JUSTICE: Do you concede there is unequal bargaining, however?

MR. PATRICK: No, I don't --

JUSTICE: Why not?

MR. PATRICK: That is the procedural unconscionability question and the courts, especially on employer-employee relationships have held

that the fact that you have a giant company that's an employer and an employee then that's not unfair bargaining power. And certainly, we can't -- we can't hold that every consumer who buys an automobile --

JUSTICE: So, what is unequal bargaining power? When does it occur?

MR. PATRICK: I -- I can't. I don't have any specific examples in mind right know. But in this particular case, the only arguments that they put forth in their affidavits or that they run sophisticated is their first transaction that they reported necessary documents, that they weren't explained, that they unaware of what arbitration was and if they would not have signed if they fully understood what they had signed. And if you look right above the signature line, in plain bold print, it says the parties knowingly waive any right to a jury trial. But they didn't read any of the entire document other than the big bold print line in all caps right above the signature line. They should've at least understood this means I don't get the crime [inaudible] --

JUSTICE O'NEILL: But let me ask you this. You said that -- that if the opt-out provision had inured to the benefit of the retailer, the arbitration clause would have been illusory.

MR. PATRICK: No, I think what I said was that if he retailer as a contracting party had an opt-out right then that would be illusory, and I believe it, too.

JUSTICE O'NEILL: I thought that's what I said but if I didn't --

MR. PATRICK: Kind of burden in right.

JUSTICE O'NEILL: Right. If it's illusory, then why is it not illusory against the manufacturer, since the manufacturer as a third party beneficiary steps into the shoes of the retailer?

MR. PATRICK: You only step into the shoes once you invest and I think that a third party beneficiary wants its right best and it does step into the shoes then there is no more opt. There is no more opt-out provision because he's already vested and they have to step in the shoes and comply with the terms of agreement.

JUSTICE: In other words, A and B can't agree that C will do the following things. C can always disclaim, but C can't accept it for awhile and then decide to opt out.

MR. PATRICK: Correct. And in this case, if Palm Harbor waits 21 days in they're bound by it because their opt-out provision has expired on its own terms. And I think that it's well-established in the course that one who signs a contract is presumed to know its contents that the agreements explain what the process is, that it clearly states that they waive their right to a jury trial, and because the cases have held that these types of arguments which had been made in the past do not arise with people unconscionability, we believe that the court erred and abused its discretion in finding that the parties should not be compelled to arbitration. For that reason, we request that the Court issue a mandamus for the trial court to correct it there. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. This Court will take a recess.

SPEAKER: All rise.

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