NOT DESIGNATED FOR PUBLICATION

No. 125,627

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

MICHAEL LAUGHLIN and RACHEL LAUGHLIN,
Appellants,

v.

ROBERT A. WASHAM CONSTRUCTION, INC., d/b/a ROBERT WASHAM HOMES,
Appellee,

and

EDUARDO LOPEZ GARCIA, d/b/a TOMAS PAINTING, and
TOMAS LOPEZ DE LIRA, d/b/a TOMAS PAINTING,
Defendants.

MEMORANDUM OPINION

Appeal from Johnson District Court; JAMES F. VANO, judge. Opinion filed September 15, 2023. Affirmed.

Stephanie B. Poyer, of Butler & Associates, P.A., of Topeka, for appellants.

Christopher R. Staley and *Jeffrey C. Baker*, of Sanders Warren & Russell LLP, of Overland Park, for appellee.

Before SCHROEDER, P.J., MALONE, J., and MARY E. CHRISTOPHER, S.J.

PER CURIAM: Michael and Rachel Laughlin (the Laughlins) contracted with Robert A. Washam Construction, Inc., d/b/a Robert Washam Homes (Washam), to build them a home. After closing on the home, the Laughlins filed a petition alleging breach of contract and violations of the Kansas Consumer Protection Act (KCPA), K.S.A. 50-623,

et seq., by Washam, and damage to their personal property through the negligence of Washam's subcontractor. Washam filed a motion to compel arbitration and dismiss, asserting the arbitration clause in the parties' construction contract required an arbitrator to determine the scope of arbitral issues. The district court dismissed the action, finding the Laughlins' claims were subject to the arbitration clause. The Laughlins now argue the district court erred because the scope of the arbitration clause narrowly applies to claims for construction defects, which were not alleged in their petition. Finding no error by the district court, we affirm.

FACTS

The Laughlins' home construction contract with Washam contained an arbitration clause. While the contract is not in the record on appeal, the paragraph at issue is in the record and provides: "Between builder and buyers concerning defective construction of the residence or the property on which it is located shall be settled by arbitration." And "[a]ny disputes concerning . . . the interpretation or enforceability of the arbitration agreement, including, without limitation, its revocability or voidability for any cause, the scope of arbitral issues, and any defense shall be decided by the arbitrator."

Following the closing on the home, the Laughlins filed a petition for damages against Washam and one of Washam's subcontractors, alleging breach of contract and KCPA violations by Washam and damage to their personal property by the subcontractor. Specifically, the Laughlins alleged they paid Washam $8,798.49 for kitchen appliances which were not provided. They alleged Washam breached their contract by failing to provide the appliances and engaged in deceptive and unconscionable practices under the KCPA based on representations the appliances would be provided and/or the money would be returned. The Laughlins further alleged the painting in the home was incomplete and defective at the time of closing. Washam hired a subcontractor, Tomas Painting, to fix the painting, but Tomas Painting damaged the Laughlins' personal

property with overspray. The Laughlins alleged this resulted in damages of $13,911.50. They sought judgment against Washam for their breach of contract and KCPA claims and judgment against both Washam and Tomas Painting for damage to their personal property.

The district court granted default judgment against Tomas Painting and its employees. Washam filed a motion to dismiss and compel arbitration. The district court granted Washam's motion and dismissed Laughlins' petition, finding the arbitration clause broadly gave the arbitrator authority to decide the scope of arbitrable issues. The Laughlins timely appealed. Tomas Painting and its employees do not participate in this appeal. Additional facts are set forth as necessary.

ANALYSIS

The Arbitration Clause Controls

The Laughlins assert the district court erred in granting Washam's motion because the arbitration clause is narrow and only applies to construction defects. They argue their breach of contract and KCPA claims regarding the kitchen appliances Washam was supposed to provide is beyond the scope of the arbitration clause. They further assert their claim of personal property damage from overspray by the painters is not a construction defect claim; thus, it is also not within the scope of the arbitration clause.

Standard of Review

Arbitration is a matter of contract. *Portfolio Recovery Assocs. v. Dixon*, 52 Kan. App. 2d 365, 369, 366 P.3d 245 (2016). An appellate court exercises unlimited review over the interpretation and legal effect of written instruments and is not bound by the lower court's interpretations or rulings. *Trear v. Chamberlain*, 308 Kan. 932, 936, 425

P.3d 297 (2018). "'The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.'" *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015). Additionally:

> "'An interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citations omitted.]'" *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013).

Discussion

The Laughlins' arguments are hard to decipher. We cannot determine whether and to what extent their claims may fall within the scope of the contract or even which matters are in dispute. The construction contract is not in the record on appeal. Washam's answer to the Laughlins' petition is also not in the record. Additionally, while the contract—or some portion of it—was apparently attached to Washam's motion to compel arbitration, that motion is also not in the record. The only evidence about the contract is the portions relating to the arbitration clause read into the record at the hearing on Washam's motion to compel arbitration: "Between builder and buyers concerning defective construction of the residence or the property on which it is located shall be settled by arbitration." And "[a]ny disputes concerning . . . the interpretation or enforceability of the arbitration agreement, including, without limitation, its revocability or voidability for any cause, the scope of arbitral issues, and any defense shall be decided by the arbitrator."

The Laughlins are asking us to do several things we cannot do. First, the Laughlins are asking us to read a contract provision in isolation by focusing their argument on the

language "concerning defective construction of the residence or the property on which it is located." This portion of the contract fails to acknowledge the broader language of the arbitration clause: "[T]he interpretation . . . of the arbitration agreement, including . . . the scope of arbitral issues . . . shall be decided by the arbitrator." We cannot read one provision in isolation. *Waste Connections of Kansas, Inc.*, 296 Kan. at 963.

Further, "'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Alliance Platforms, Inc. v. Behrens*, 49 Kan. App. 2d 53, 58, 305 P.3d 30 (2013); *Hague v. Hallmark Cards, Inc.*, 48 Kan. App. 2d 118, 121, 284 P.3d 369 (2012). The question of "'who has the power to decide arbitrability'" depends upon what the parties have decided. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). The Supreme Court has "recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68-69, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010). Arbitrability disputes "include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 34, 134 S. Ct. 1198, 188 L. Ed. 2d 220 (2014) If a court finds evidence of clear and unmistakable intent to arbitrate arbitrability, it must allow an arbitrator to decide those issues. *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1292 (10th Cir. 2017).

The Laughlins' argument essentially assumes all their claims are not—as a matter of fact or law—claims of defective construction. But whether they truly raise allegations of construction defects cannot be determined without ascertaining the nature and scope of construction as provided in the contract. The Laughlins are effectively asking us to presume error from a silent record without "'construing and considering the entire instrument from its four corners.'" *Waste Connections of Kansas, Inc.*, 296 Kan. at 963.

Error is never presumed. Appellants have an affirmative duty to furnish a sufficient record on appeal to prove their claims of error. *Phillips v. Fisher*, 205 Kan. 559, 560, 470 P.2d 761 (1970). Here, the Laughlins have failed to do so. Simply put, without the contract in the record, we cannot determine what is or is not a construction defect *within the parameters of the contract*. Accordingly, these claims are appropriate for the arbitrator to determine whether they are within the scope of arbitrable issues. Based on the limited record before us, the district court did not err in granting Washam's motion dismissing the case to allow arbitration to move forward.

The Laughlins' third claim—personal property damage by the painters—is likewise problematic because it is unclear what property was damaged. But at the outset of their petition, the Laughlins allege "[t]he interior painting remains incomplete, defective, and was not applied in a workmanlike manner." The petition further suggests all construction defect claims would be resolved through arbitration. At this point, however, it is unclear whether or to what extent the Laughlins' claim of personal property damage from paint overspray is intertwined with their broader allegations of defective painting. In other words, some of the deficient workmanship in the painting may have resulted in true construction defects. But these are points on which the arbitrator needs to make a finding as to whether the specific allegations underlying this claim—which are not in the record before us—are within the scope of arbitrable issues.

In short, all three of the Laughlins' claims may ultimately prove to be outside the scope of the arbitration clause. However, based on the broad language provided in the arbitration clause in the record before us regarding resolution of construction defect claims, the district court appropriately resolved all doubt about the scope of arbitral issues in favor of arbitration. See *Rent-A-Center, West, Inc.*, 561 U.S. at 68-69; *Hague*, 48 Kan. App. 2d at 121.

The Arbitrator Must Determine Whether the Laughlins' KCPA Claim Is Within the Scope of Arbitrable Issues

The Laughlins further argue the district court erred in finding their KCPA claim could be subject to arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (2018). Their argument essentially presents an issue of contract interpretation, which is a question of law subject to unlimited review. *Trear*, 308 Kan. at 936. Washam asserts the Laughlins' KCPA claim is within the scope of the arbitration agreement; therefore, the FAA requires the claim be arbitrated. Washam's argument essentially presents a question of whether federal law—the FAA—preempts Kansas law—the KCPA. This raises an issue regarding the interpretation of statutes, which is also a question of law subject to unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

The Laughlins' argument is flawed insofar as it assumes their KCPA claim is beyond the scope of the arbitration agreement. Accordingly, we decline to delve into the particulars of Washam's preemption argument because the record is unclear whether the Laughlins' KCPA claim raises an allegation of defective construction. But if, as the Laughlins contend, their KCPA claim is not within the scope of arbitrable issues, then it is not subject to arbitration under the FAA, even if some of their other claims are. See *City of Wamego v. L.R. Foy Constr. Co.*, 9 Kan. App. 2d 168, 171, 675 P.2d 912 (1984) ("[W]henever a motion to compel arbitration comes on for hearing, the threshold determination to be made by the court is whether an agreement to arbitrate exists and whether this agreement includes arbitration of the specific point at issue."). To the extent Washam's preemption argument is necessary to our decision, the argument is sound as further explained herein.

The FAA applies when the arbitration agreement is in writing and involves interstate commerce. 9 U.S.C. § 2. Here, it is undisputed the arbitration agreement is in

writing, although the contract itself is not in the record. While it is not entirely clear whether the contract involves interstate commerce, the parties also do not dispute this point. As another panel of this court explained in *Wilson v. Mike Stevens Motors, Inc.*, No. 92,468, 2005 WL 1277948, at *4 (Kan. App. 2005) (unpublished opinion):

> "The FAA provides that a written arbitration agreement 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. That provision is deemed '"a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary,"' and effectively creates '"a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the [FAA]."' *Perry v. Thomas*, 482 U.S. 483, 489, 96 L. Ed. 2d 426, 107 S. Ct. 2520 (1987) (quoting *Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 [1983]). The basic purpose of the FAA was to overcome the refusal of courts to enforce arbitration agreements. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995). Thus, a court cannot 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.' *Perry*, 482 U.S. at 492 n. 9."

The *Wilson* panel further explained:

> "The FAA applies in state and federal courts and '"preempts conflicting state laws which exempt enforcement of arbitration agreements involving interstate commerce." *Skewes v. Shearson Lehman Bros.*, 250 Kan. 574, Syl. ¶ 1, 829 P.2d 874 (1992).' *Biomat, Inc. v. Sampson*, 28 Kan. App. 2d 242, 244, 15 P.3d 846 (2000); see also *Southland Corp. v. Keating*, 465 U.S. 1, 15-16, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984) (holding that the FAA applies in state courts). For example, the Kansas Uniform Arbitration Act, K.S.A. 5-401 *et seq*. (KUAA) has an exception for tort claims, but the FAA does not provide tort exception. Therefore, when the FAA applies, a tort claim may be arbitrated even though such a claim is excepted in the KUAA. 28 Kan. App. 2d at 248." *Wilson*, 2005 WL 1277948, at *4.

Ultimately, the *Wilson* panel found there was nothing in the language of the KCPA that precluded arbitration of KCPA claims, but, even if there was, it would be preempted by the FAA. 2005 WL 1277948, at *7. While the Laughlins point to various provisions in the KCPA indicating the legislative purpose of protecting consumers from unconscionable acts and precluding a consumer from waiving or foregoing protections under the KCPA, these points were addressed by *Wilson*. See K.S.A. 50-623(b); K.S.A. 50-625(a); *Wilson*, 2005 WL 1277948, at *7. To be clear, the Laughlins do not argue arbitration of their KCPA claim under the FAA would violate public policy. Rather, they argue their KCPA claim is beyond the scope of the arbitration clause, so the FAA does not apply. Again, we find the Laughlins' position unpersuasive.

The FAA applies to the Laughlins' KCPA claim insofar as the arbitration clause provides: "[T]he interpretation . . . of the arbitration agreement, *including . . . the scope of arbitral issues . . . shall be decided by the arbitrator*." (Emphasis added.) See *Rent-A-Center, West, Inc.*, 561 U.S. at 68-69. Here, the FAA applies to the "threshold determination" by the arbitrator of whether the Laughlins' KCPA claim amounts to an allegation of construction defects—the apparent subject matter of the arbitration clause. See *City of Wamego*, 9 Kan. App. 2d at 171. Because the arbitration clause specifically reserves this threshold determination for the arbitrator, the district court correctly resolved "all doubts about the scope of what issues are subject to arbitration '. . . in favor of arbitration.'" *Hague*, 48 Kan. App. 2d at 121.

Affirmed.