

Dec 12 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

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Appellate Case No. 2020-001048

Case No. 2014-CP-08-2424

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Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, Plaintiffs.

Of whom Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins are Petitioners,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are Respondents.

And

Lennar Carolinas, LLC, Respondent,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

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**LENNAR CAROLINAS, LLC'S  
RETURN TO THE PETITIONERS' MOTION FOR TAXATION OF COSTS**

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Respondent Lennar Carolinas, LLC ("Lennar") respectfully submits the following Return to the Petitioners' Motion for Taxation of Costs pursuant to Rule 222, Rule 240 and Rule 242 of the South Carolina Appellate Court Rules.

This appeal arose out of the circuit court's order denying Lennar's motion to compel the Petitioners to arbitrate their alleged claims against Lennar. The circuit court's order misapplied the *Prima Paint* doctrine and erroneously read the terms of several documents collectively as a single arbitration agreement. The circuit court also erroneously concluded that the transactions at

issue did not involve interstate commerce so as to trigger the application of the Federal Arbitration Act (“FAA”).

Following the denial of the Motion to Compel Arbitration, Lennar timely filed a Notice of Appeal of the Circuit Court’s order denying the Motion to Compel Arbitration. On appeal, the Court of Appeals reversed the Circuit Court and ordered the Petitioners’ claims against Lennar to arbitration. The Court of Appeals held that the arbitration agreement in the purchase and sale agreements were subject to, and governed by, the FAA and that the Circuit Court violated the *Prima Paint* doctrine by failing and refusing to limit its review of the arbitration issue to the specific and limited terms of the arbitration agreement itself, and by instead opining on the conscionability of terms plainly not within the arbitration agreement itself.

Thereafter, Petitioners sought a Writ of Certiorari from the Supreme Court pursuant to Rule 242, SCACR. The Supreme Court granted the Petition and the parties submitted briefs to the Supreme Court. On September 14, 2022, the Supreme Court issued an opinion affirming in part, reversing in part, and remanding the case. The Supreme Court’s opinion affirmed the Court of Appeals findings that: (1) the Circuit Court erred in its review of the arbitration provision and violated the *Prima Paint* doctrine; (2) the Circuit Court erred in finding the contracts and arbitration provisions at issue contain intertwining language and must be read collectively as a single agreement to arbitrate; and (3) the Circuit Court erred in failing to find that the purchase and sale agreements involve interstate commerce and, therefore, trigger the application of the FAA. However, the Supreme Court continued its analysis of the arbitration provision in the purchase and sale agreements and decided that certain terms within the arbitration provision rendered the arbitration provision unenforceable.

Following the issuance of the Supreme Court’s opinion affirming in part, and reversing in part the prior orders, Lennar filed a Petition for Rehearing. The Court denied Lennar’s petition for

rehearing and remanded the case to the circuit court. Thereafter, Petitioners filed a Motion for Taxation for Costs and Fees.

### ARGUMENT

The Court should deny Petitioners' Motion for Taxation of Costs and Fees. Rule 242(j)(1) of the South Carolina Appellate Court Rules permits the Supreme Court to award costs and fees associated with an appeal in certain limited circumstances. Those circumstances do not exist in this case and the Petitioners should not be awarded their costs and fees because the Supreme Court and the Court of Appeals identified and reversed several errors committed by the Circuit Court in its order denying the Motion to Compel Arbitration.

When the decision of the Court has the affect of affirming the judgment of the Circuit Court, then Rule 242(j) states that the costs shall be assessed against the appellant or, alternatively, when the decision of the Supreme Court has the effect of reversing the Circuit Court the costs shall be assessed against the respondent. However, "[w]hen the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court." Rule 242(j)(1), SCACR.

In this case, the decision of the Supreme Court affirmed in part, and reversed in part the orders of the lower courts and, therefore, Petitioners are not entitled to recover their costs and fees as a matter of right. Throughout this case the Petitioners argued in favor of an improper application of the *Prima Paint* doctrine and repeatedly took the position that the transactions at issue did not involve interstate commerce. The Supreme Court and the Court of Appeals rejected these arguments and reversed the Circuit Court's order in relation to those issues.

Rule 242(j), SCACR, does not require the Supreme Court to award costs and fees when a decision is affirmed in part, and reversed in part. In this case, Lennar appealed several issues

arising out of the Circuit Court's order denying the Motion to Compel Arbitration and the Court of Appeals and Supreme Court both agreed with Lennar that the Circuit Court's order denying the motion to compel arbitration contained several reversible errors. Petitioners should not be rewarded for their continued reliance and assertion of arguments that were rejected by both South Carolina Appellate Courts.

The appeal resulted in the reversal of the fundamental basis of the Circuit Court's order denying the motion to compel arbitration—a misapplication of the *Prima Paint* doctrine. Only after correcting the Circuit Court's errors did the Supreme Court continue its analysis and concluded that the arbitration provision in the purchase and sale agreements that were executed by the Petitioners was, nonetheless, not enforceable. Petitioners should not be awarded attorneys' fees because the Supreme Court agreed with Lennar's position regarding several of the errors committed by the Circuit Court in the order denying the Motion to Compel Arbitration. Lennar correctly identified several errors in the order on appeal and the Supreme Court and Court of Appeals reversed the Circuit Court's order to correct those errors.

The Supreme Court should award Petitioners none of their requested costs and fees because they presented several arguments that were based upon an incorrect application of the law in this case.

### **CONCLUSION**

Based on the foregoing, the Court should DENY the Petitioners' Motion for Costs.

s/James Lynn Werner  
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Columbia, South Carolina