

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001223
Case No. 2019-CP-10-04807

Erik Kramer and Kevin N. Hedges, on behalf of themselves and others similarly situated,
Respondents,

v.

Lennar Carolinas, LLC, Alpha Prime, LLC, Alpha Prime Construction, LLC, Sagehorn and
Company, Inc., and Royal Palms Holding, LLC, Defendants.

Of which Lennar Carolinas, LLC is the Appellant.

**RESPONDENTS' RETURN TO APPELLANT'S MOTION TO HOLD APPEAL IN
ABEYANCE**

Respondents Erik Kramer and Kevin N. Hedges, on behalf of themselves and others pursuant to 240(e) SCACR file their return and opposition to Appellant's Motion to Hold Appeal in Abeyance and respectfully request the Court to deny the Motion.

I. Procedural Background

The underlying matter was filed in the Charleston County Court of Common Pleas on September 18, 2019. After the Circuit Court denied Appellants' Motion to Compel Arbitration on July 16, 2020 and denied Appellant's Motion to Reconsider on August 5, 2020, Appellant filed its Notice of Appeal. Appellant filed its final reply brief with this Court on May 7, 2021, and the

Court has tentatively scheduled this case for oral arguments in June 2023. Appellant now asks this Court to delay the case even longer pending its petition for a writ of certiorari to the United States Supreme Court in a separate lawsuit involving Lennar. Appellant has delayed this case for almost 3 years with the arbitration issue and now wants to put this case on hold for an unknown period of time with this motion to hold in abeyance.

II. The Petition has a low probability of being granted.

The chances of the United States Supreme Court accepting a petition for writ of certiorari in the Damico case is miniscule. Appellant would first brief the Court as to why it should hear the case. Only 1.4 to 2.1 percent of petitions filed for writ of certiorari with the U.S. Supreme Court are granted review.¹ Even if a petitioner passes the first hurdle of convincing the Court to grant the petition, the parties would then be required to file a new set of briefs on the merits of the case. Even if the United States Supreme Court granted a petition for writ of certiorari, it would still have to decide the case on the merits. Appellant Lennar has not even passed the first massive hurdle of having its petition granted and included in the 2% of cases which move to the merits stage. Appellant is using the Damico case as another stall tactic to delay oral arguments and delay a decision in the present case.

III. The Arbitration Provision in Damico was found unconscionable by the South Carolina Supreme Court and is not likely to be overturned.

¹ “The [United States Supreme] Court usually is not under any obligation to hear these cases, and it usually only does so if the case could have national significance, might harmonize conflicting decisions in the federal Circuit courts, and/or could have precedential value. In fact, the Court accepts 100-150 of the more than 7,000 cases that it is asked to review each year. Typically, the Court hears cases that have been decided in either an appropriate U.S. Court of Appeals or the highest Court in a given state (if the state court decided a Constitutional issue).” *United States Courts, Supreme Court Procedures*, <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1#:~:text=Parties%20who%20are%20not%20satisfied,grant%20a%20writ%20of%20certiorari.>

Respondents submitted a copy of the South Carolina Supreme Court's opinion in Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022) as a supplemental citation to highlight the finding that the Damico arbitration provision was unconscionable according to South Carolina contract law. This case involves an identical arbitration provision found to be unconscionable by the South Carolina Supreme Court.

If this Court were to find this case involved interstate activity subject to the FAA, then the unconscionability of the arbitration provision, as decided by Damico, comes into play. Damico found the arbitration provision, which is identical to the arbitration provision found in the real estate purchase agreement at issue in this case, was unconscionable. The Court applied South Carolina contract law and found the general description of unconscionability applies to all contract terms, not merely arbitration provisions. Damico, 437 S.C. 596, 879 S.E.2d 746 (2022), Cf. AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). Contrary to Appellant Lennar's assertion in its Petition for Writ of Certiorari, the South Carolina Supreme Court did not find that arbitration agreements were *disfavored* in Damico; it found that arbitration agreements *should be placed on equal footing* with all other contracts. Id.(citing Kindred Nursing Ctrs. Ltd. P'ship v. Clark, 581 U.S. 246, 248 (2017)).

IV. There are additional legal arguments to be reviewed by this Court.

Respondents' legal arguments on appeal are two-fold. First, as in Damico, the arbitration provision is unconscionable. Since the arbitration provisions are identical, Damico is controlling.

Second, and unlike Damico, Respondents have produced an extensive record establishing their transaction with Lennar was not a construction contract, but rather a contract for the purchase and sale of real estate. If this court were to find this contract a real estate transaction, our courts have deemed real estate transactions to be *intrastate*, which does not involve the interstate

commerce clause of the Constitution. Bradley v. Brentwood, 398 S.C. 447, 730 S.E.2d 312 (2012). In that event, the FAA does not preempt, and the SCUAA applies, which would also find the arbitration provision unenforceable.

Even in the unlikely event the United States Supreme Court grants cert, and then later Damico were to be overturned, there are still additional legal arguments to be reviewed and decided by this Court which are separate from the Damico decision. Appellant simply wants to delay this case indefinitely with this Motion.

V. Conclusion

Appellant Lennar is making yet another futile attempt to delay this case with its long-shot attempt to have its petition granted and its attempt to overturn the ruling of the South Carolina Supreme Court as to its interpretation of a contract under South Carolina law. In the unlikely event the United States Supreme Court grants the petition, the Appellant could always renew at that time. At this juncture, it would be fundamentally unfair to delay the arguments and deliberations in this case.

WHEREFORE, Respondents respectfully request the Motion to Hold the Appeal in Abeyance be denied and the case move forward.

Respectfully Submitted,

s/Allison B. Thompson

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March 16, 2023

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SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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Erik Kramer and Kevin N. Hedges, on behalf of themselves and others similarly situated,
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v.

Lennar Carolinas, LLC, Alpha Prime, LLC, Alpha Prime Construction, LLC, Sagehorn and
Company, Inc., and Royal Palms Holding, LLC, Defendants.

Of which Lennar Carolinas, LLC is the Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on March 16, 2023, copies of Respondents Erik
Kramer and Kevin N. Hedges, on behalf of themselves and others similarly situated **Return to**
Appellant Lennar Carolinas, LLC's Motion to Hold Appeal in Abeyance were served on all
counsel of record via email containing the above-referenced documents to counsels' individual
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VIA EMAIL [ctappfilings@sccourts.org]

The Honorable Jenny Abbott Kitchings
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RE: Erik Kramer and Kevin N. Hedges, on behalf of themselves and others
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Appellate Case No. 2021-001223

Dear Ms. Kitchings:

Attached please find for filing Respondents' Return to Appellant's Motion to
Hold Appeal in Abeyance and Proof of Service in connection with the above-
referenced appeal.

Sincerely,

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