

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM
South Carolina Court of Appeals
Per Curiam, Court of Appeals

Appellate Case No. 2024-000369

Ralph Dawkins and Michelle Dawkins, Marcel Franquelin and Patricia Franquelin, Michael A. Martin and Adriana S. Iaquinto-Martin, Louis Galvinos and Kimberly Galvinos, Daniel J. O’Grady and Kaitlyn E. Grigoleit, Christopher M. Raybon and LaShonda K. Raybon, Morris K. White and Rebecca A. White, Paul A. Banker and April S. Banker, Patrick K. Daly and Brenda Daly, Respondents,

v.

Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes, Eastwood Construction Partners, LLC f/k/a Eastwood Construction LLC d/b/a Eastwood Homes, and Eastwood Construction, LLC,..... Petitioners.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN HOLDING THE TERMINATION CLAUSE IN EASTWOOD'S AGREEMENTS UNCONSCIONABLE WHEN IT CONSIDERED HYPOTHETICAL SITUATIONS AND CONSTRUED THE AGREEMENT AGAINST ENFORCEABILITY?
- II. DID THE COURT OF APPEALS ERR IN HOLDING THE DAMAGES CLAUSE IN EASTWOOD'S AGREEMENTS UNCONSCIONABLE WHEN IT FAILED TO CONSIDER BOTH PARTIES IN ITS DETERMINATION?
- III. DID THE COURT OF APPEALS IMPROPERLY FIND THAT A TERMINATION-AT-WILL PROVISION RENDERS A CONTRACT UNCONSCIONABLE?
- IV. DID THE COURT OF APPEALS ERR IN HOLDING THE TERMINATION CLAUSE IN EASTWOOD'S AGREEMENTS WAS PROCEDURALLY UNCONSCIONABLE?

STATEMENT OF THE CASE

Eastwood is a residential homebuilder. The Plaintiffs are individuals who placed deposits for homes and entered agreements with Eastwood to construct homes in phase four of the Swygert's Landing development in Charleston. Eastwood purchased the lots from a third-party developer. Eastwood paid for and owned each lot upon which each individual house was to be constructed. Eastwood paid for all costs of construction up through closing through its internal financing, with each individual respondent only posting a deposit. As such, Eastwood bore all risk up until final closing for all construction and incidences of sale.

A defect occurred when the third-party developer failed, per its underlying contract with Eastwood, to incorporate the fourth phase of Swygert's Landing into the existing phases one, two and three. Phases one, two and three were previously annexed into the community by supplemental declaration. The third-party developer's failure to file the supplemental declaration as required resulted in a title defect.

Due to the defect in the neighborhood's Restrictive Covenants, Eastwood cancelled the agreements pursuant to their terms. The defect in the Restrictive Covenants put the planned neighborhood in violation of zoning ordinances and kept it from being incorporated into phases one, two, and three of the development with the accompanying amenities. (R. p. 515, l. 16). As a result, the neighborhood was not in compliance with zoning requirements. (R. p. 515, l. 22). The neighborhood was not part of the homeowners association for phases one, two and three. (R. p. 516, l. 10). Any home sold in phase four did not have access to the neighborhood amenities. (R. p. 516, l. 10). Also, there was no mechanism for managing and maintaining the roads, ponds, and community areas in the neighborhood. (R. p. 516, l. 17 – p. 517, l. 3). Eastwood informed the Plaintiffs it could not sell them the homes in the agreements and cancelled the agreements

according to their terms. (R. p. 518, ll. 10-18). It also returned Plaintiffs' deposits and offered the Plaintiffs \$100 and a right of first refusal on the homes when the problem with the neighborhood was resolved. (R. p. 518, ll. 19-22).

The Plaintiffs sued for wrongful cancellation, and Eastwood moved for summary judgment. Judge Markley Dennis heard the motion for summary judgment. Judge Dennis found that "[i]f the contract language is enforced as written, Eastwood is entitled to summary judgment on all claims." (R. p. 35). He then referred the case for a factual hearing on whether the agreements' cancellation and remedy clauses were unconscionable or in violation of public policy as the Plaintiffs alleged. Judge Scarborough conducted the hearing and ruled the contested clauses of the agreements were unconscionable and in violation of public policy. He then struck them from the agreements the parties voluntarily entered. The paragraphs of Eastwood's standard agreement that the Plaintiffs argued should be struck from the agreements read as follows:

25. **Buyer in Default; Seller Remedies:** Buyer(s) shall be in default if Buyer(s) fail to make full and timely settlement under the terms and conditions set out in this contract. In the event of default the binder money may be retained by the Seller as liquidated damages and not as a penalty, in which event Buyer and Seller shall be relieved from further liability under this contract. In the alternative, and in Seller's sole discretion, Seller may retain the binder as payment of damages and pursue such other and further legal and/or equitable remedies the Seller may have by reason of the Buyer's breach or default. **In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages.** (Emphasis added)

...

26. **Seller Option to Cancel Prior to Closing:** If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller's sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then **Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.** (Emphasis added) If Seller terminates this Agreement, Seller shall return to Buyer all deposits, whether refundable or not, and pay the Buyer an additional amount of \$100.00, as liquidated damages in the event the Seller cancellation constitutes a default under this agreement. Buyer agrees that such sum is a fair determination of Buyer's damages

in the event such cancellation constitutes a default by the Seller hereunder, being that actual damages are difficult to assess. **Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing.** (Emphasis added)

(R. pp. 730-31, ¶¶ 25-26). Eastwood appealed his order.

On appeal, the South Carolina Court of Appeals affirmed Judge Scarborough's finding determining that the agreements contained a termination-at-will clause thus it was "plainly 'one-sided'" and substantively unconscionable. *Dawkins, et al. v. Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes, et al.*, 2025 WL 1949798, 3 (S.C. Ct. App. July, 16, 2025). Additionally, the Panel held that the remedy clause is substantively unconscionable because the Plaintiffs could not "pursue any claims against it and could only receive a refund." *Id.* at 4. Finally, the Court of Appeals held the Plaintiffs were not "on equal playing field with a large homebuilder like Eastwood, specifically in the context of a home purchase and especially when presented with a 'take-it-or-leave-it,' nonnegotiable, form contract." *Id.* at 3. Thus, the clauses were found to be procedurally unconscionable.

The Court of Appeals overlooked or misapprehended several matters of law and fact in rendering their opinion. First, the Court of Appeals improperly determined that the termination clause of the agreement was a hidden termination-at-will provision by relying on cross examination answers provided by Eastwood's 30(b)(6) witness in regard to hypothetical and imaginary situations, and construing the agreements in the most extreme fashion in favor of the drafter find the provision unconscionable. Second, the Court of Appeals improperly determined the damages clause was substantively unconscionable by failing to consider the business implications behind the clause and the lack of harm to the Plaintiffs from its invocation. The Court placed no emphasis on Eastwood bearing all of the lot acquisition and construction loan risk, while each individual homeowner only bore minimal deposit risk. Hence, Eastwood bore the risk

associated with each home in phase four. Eastwood did not, as inferred by the Court, use its size to make the playing field unequal. Eastwood financed the entire cost of the lots and the construction with the homebuyers taking no risk. Additionally, Eastwood is not, as characterized by the Court, a “large” homebuilder. Eastwood Homes is not publicly traded, national in scope, or in the top echelon of builders due to it being a private and family owned business. Finally, the Court of Appeals improperly determined the agreement was procedurally unconscionable by misinterpreting the Court’s opinion in *Damico v. Lennar Carolinas* to find that no individual plaintiff can have the intelligence, education, and sophistication to enter a procedurally enforceable contract with a homebuilder.

ARGUMENTS

I. THE COURT OF APPEALS MISAPPREHENDED THE FACTS WHEN IT FOUND THE TERMINATION CLAUSE WAS SUBSTANTIVELY UNCONSCIONABLE BY CONSIDERING HYPOTHETICAL SITUATIONS INSTEAD OF THE FACTS OF THE CASE, AND CONSTRUED THE TERMINATION CLAUSE AGAINST ENFORCEABILITY AND IN FAVOR OF THE DRAFTER.

The Court of Appeals found that the termination clause of Eastwood’s standard agreement was substantively unconscionable. It held the agreement contained a hidden termination-at-will clause; thus it was “plainly ‘one-sided’.” *Dawkins, et. al*, 2025 WL 1949798, at 3. In making this determination, it relied on testimony elicited on the cross-examination of Eastwood’s 30(b)(6) witness regarding hypothetical scenarios put forth by the Plaintiffs, such as if Eastwood wanted to renegotiate a higher price on the homes. As an attorney, the 30(b)(6) witness could not ignore the underlying legal and real estate ethical implications as referenced in the appeal. (R. p. 612 (tr. pg. 91, ll. 4 – 11). Additionally, the Court of Appeals adopted the Master-in-Equity’s construction of the agreement in the most extreme fashion in favor of the drafter to support the conclusion that the provision is unconscionable.

“Unconscionability is the absence of meaningful choice on the part of one party due to one-sided agreement provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Hardee v. Hardee*, 355 S.C. 385, 386, 585 S.E.2d 501, 505 (2003). In determining whether an absence of choice is meaningful, courts consider, among all facts and circumstances, “the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 21, 644 S.E.2d 663, 666 (2007).

Unconscionability can be substantive or procedural. Substantive unconscionability is when a contract contains “terms so oppressive that no reasonable person would make them.” *See, Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am.Jur.2d Contracts § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability). Both substantive and procedural unconscionability need to be present and balanced, but they do not need to be equal. Courts balance the two factors as follows:

Although procedural and substantive unconscionability must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability, both need not be present to the same degree; the agreement may be judged on a sliding scale: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.

Id. (quoted with approval in *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 607, 879 S.E.2d 746, 754 (2022)).

The Court of Appeal’s Order does not address all factors necessary for a finding of unconscionability which include all facts and circumstances of the case. *See, Holler*, 36 S.C. at 269, 612 S.E.2d at 476 (“A determination whether a contract is unconscionable depends upon all

the facts and circumstances of a particular case.” *quoting* 17A Am.Jur.2d Contracts § 279 (2004)). The Supreme Court has "emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Damico*, 437 S.C. at 607, 879 S.E.2d at 754 (*quoting Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 36, 644 S.E.2d 663, 674 (2007)).

Paragraph 25 of the agreement allows Eastwood to terminate the sale if, prior to closing, “a bona fide dispute should arise between the Buyer and Seller, in Seller’s [Eastwood’s] sole judgment.” (R. pp. 657-658; 730-731). The third-party developer’s failure to file the supplemental declaration on phase four as it had done on phases one, two and three, (R. p. 512, l. 23 - p. 513, l. 2; p. 513, ll. 11-15) resulted in a title defect. Eastwood determined that it could not complete or sell the houses without correcting the title defect; therefore it terminated the agreements it had entered and returned the buyers’ deposits, \$100, and a right of first refusal on the homes when the problem with the neighborhood was resolved. (R. p. 272).

A. The Court of Appeals Improperly Relied upon Hypothetical Situations in Which the Agreement Might be Enforced Instead of Relying on the Facts of This Case.

A finding of unconscionability must include all facts and circumstances of the case. *See, Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App. 2005) (“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” *quoting* 17A Am.Jur.2d Contracts § 279 (2004)). The Court has "emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Damico*, 437 S.C. at 607, 879 S.E.2d at 754 (*quoting Simpson*, 373 S.C. at 36, 644 S.E.2d at 674).

The Court of Appeals referred to testimony from Eastwood’s divisional president, Dion Matheney, and its general counsel, Allen Nason, regarding hypothetical situations in which

Eastwood might cancel the agreement under the termination provision, including if Eastwood could cancel the agreement even if it simply determines that it wants to renegotiate a higher price on the home. (Respondents' Brief, p. 21). The imaginary scenarios the Court of Appeals relied upon in coming to its determination did not happen and were not contemplated. As a result, it is not relevant as to whether the Purchase Agreement the Respondents voluntarily and knowingly signed is unconscionable. Neither this testimony nor Respondents' summary of testimony is relevant to the question of whether the agreement is unconscionable as applied in this case.

Eastwood bought phase four as an undeveloped tract from CAM Management, the original developer, after phases one, two and three were complete. (R. p. 512, ll. 9-13). CAM Management did not record declarations and covenants on phase four as it had done on phases one, two and three, (R. p. 512, l. 23 - p. 513, l. 2; p. 513, ll. 11-15), though Eastwood did not know this at the time. Eastwood cleared the land and built roads for the neighborhood. (R. p. 513, ll. 20-23). It then began building and selling homes. (R. p. 513, l. 24 – p. 514, l. 4). These unrecorded declarations and covenants put the neighborhood in violation of zoning ordinances and kept it from being incorporated into the earlier developed phases with the accompanying amenities. (R. pp. 514-515). The neighborhood was not part of the homeowners association for phases one, two, and three. (R. p. 515, ll. 10-16). Thus, any home sold in phase four did not have access to the neighborhood amenities, (R. p. 516, ll. 7-10), and there was no mechanism for managing and maintaining the roads, ponds, and community areas in the neighborhood. (R. p. 516, l. 11 – p. 517, l. 3). As a result of the title defect, Eastwood was unable to deliver houses as represented in that the homes were not within a covenant community. The phase one, two and three HOA will not agree to vote on incorporating phase four until the pending lawsuits are resolved. There was no representation or

mechanism available that would allow individual homeowners to pay into road maintenance, pond and other infrastructure maintenance due to there being no responsible homeowners association.

Based upon these facts, Eastwood determined that it could not complete or sell the houses without correcting the problem with the covenants; therefore it terminated the agreements it had entered and returned the buyers' deposits, \$100, and a right of first refusal on the homes when the problem with the neighborhood was resolved. (R. p. 272). Eastwood has not sold any homes in this neighborhood since it discovered the problem with the covenants. (R. p. 273).

The Court of Appeals should have taken a case specific approach to ensure it was considering all of the facts and circumstances relevant to the cancelation of the agreements. It should not rely upon hypothetical situations that might occur in which Eastwood might have terminated the agreements. Instead, the Court of Appeals should only consider why Eastwood did terminate the agreements to determine unconscionability. Had Eastwood continued to build and sell the homes, as demanded by the Plaintiffs, Eastwood would have been liable for failing to provide the Plaintiffs with access to the neighborhood amenities. Eastwood had two choices: cancel the agreements in accordance with their terms as agreed to by the Plaintiffs, or continue to build, risk liability under the agreements, and sell homes that did not comply with zoning ordinances. Because the Court of Appeals improperly relied upon imaginary situations instead of the facts of the case, it did not discuss the actual reason for the termination of the agreements. Eastwood terminated the agreements to ensure the homes sold were not in violation of any zoning ordinances and, as such, the agreements are not unconscionable, and Eastwood properly terminated the agreements.

B. The Court of Appeals Improperly Construed the Termination Clause Against Enforceability and in Favor of the Drafter in Violation of Contract Law.

When interpreting an agreement that can be interpreted in more than one way, the court should construe the agreement in the most fair, reasonable, and just interpretation as opposed to embracing an unusual or unfair interpretation. *See, Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). Agreements are construed in favor of enforceability and against the drafter. *See, Portrait Homes-South Carolina, LLC v. Pennsylvania National*, 442 S.C. 515, 580, 900 S.E.2d 245, 281 (Ct.App. 2024).

The termination provision of the agreements allows Eastwood to cancel the if “for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller’s sole judgment ... and if such bona fide dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.” (R. p. 731, ¶ 26). The Master-in-Equity interpreted the clause as a hidden termination-at-will clause because he determined that Eastwood could cancel the agreement for any reason or no reason at all. The Master-in-Equity determined this by relying on the imaginary hypotheticals that the Court of Appeals relied on in its decision. This interpretation is the most extreme interpretation and not consistent with the actual agreements or the facts underlying the agreements.

The Master interpreted the clause broadly in favor the drafter by giving the drafter the power to unilaterally terminate the agreement, and against the party who did not draft the agreement. As a result of this backward interpretation, the Master decided the contract was unconscionable because the Master interpreted the provision to allow the drafter unilateral power to terminate for no reason. This is directly at odds with the rules of contract interpretation. Any ambiguity is considered in favor of the non-drafting party – not in favor of the party that drafted the contract. The agreement should be interpreted based on what the parties understood the

agreement to mean. Plaintiffs understood the termination clause as requiring both parties to have a “bona fide dispute” and “mutual satisfaction.” (R. pp. 650-722). Interpreting the agreement in the Plaintiffs’ favor requires the Master-in-Equity to adopt this interpretation instead of the broad decision that the contract contained a termination-at-will interpretation.

The Court of Appeals found that “neither party challenged the master’s finding that paragraph 26 was ambiguous or the master’s adoption of Eastwood’s interpretation,” *Dawkins, et. al*, 2025 WL 1949798, at 2, but this is incorrect. Eastwood challenged the Master-in-Equity’s reliance on imaginary scenarios in both its Initial Brief and its Reply Brief. Eastwood also argued that the cancellation of the agreement was based on the unrecorded covenants and was not a termination-at-will. Thus, it properly challenged the master’s interpretation.

The Court of Appeals erred in affirming the Master-in-Equity’s ruling that the termination provision was substantively unconscionable because this interpretation is counter to established contract law, and Eastwood challenged this ruling in its briefs.

II. THE COURT OF APPEALS MISAPPREHENDED THE LAW AND FACTS IN SUCH A WAY THAT IT DETERMINED THE AGREEMENTS’ REMEDY CLAUSE WAS SUBSTANTIVELY UNCONSCIONABLE.

The Court of Appeals found that the remedy clause of Eastwood’s standard agreement was substantively unconscionable. It held it is substantively unconscionable because the Plaintiffs could not “pursue any claims against it and could only receive a refund.” *Dawkins, et. al*, 2025 WL 1949798, at 4. The Court of Appeals erred in considering only the facts the Plaintiffs offered instead of weighing the parties’ risk and relative exposure.

Substantive unconscionability requires “terms so oppressive that no reasonable person would make them.” *See, Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am.Jur.2d Contracts § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability). If the court comes to a finding regarding an

agreement's unconscionability, it must include all facts and circumstances of the case. *See, Holler*, 36 S.C. at 269, 612 S.E.2d at 476. Facts and circumstances include "the nature of the injuries suffered by the plaintiff." *Simpson*, 373 SC at 21, 644 S.E.2d at 666.

Paragraph 25 of the agreement reads, "In the event of a breach of this Agreement by Seller, Buyer may recover the deposit, however in no event will Seller be liable for consequential damages or for damages or delays and Buyer hereby releases and waives any claims for such damages." (R. pp. 730-31, ¶ 25). While the homes are under agreement but yet to be closed on, Eastwood bears all of the risk of potential loss. Eastwood invests approximately \$500,000 in building each home before closing. (R. p. 525, ll. 1-4). Eastwood assumed the entire risk of damage to the homes or other unforeseen circumstances regarding the construction of the homes. (R. p. 523, ll. 12-13). On the other hand, Plaintiffs deposited between ten and fifteen thousand dollars. They undertook no risk of loss or further investment in the homes before closing. Their entire deposits have been returned, placing them back in the status quo before the agreement. Not only are they placed back in the status quo, but they also received \$100 and right of first refusal on the property to allow them to purchase the same home after the covenant issues with the neighborhood are resolved. Eastwood also incurs the risk of damage to the property prior to closing Eastwood, not the Plaintiffs, pays for repairs or damage prior to closing.

The Court of Appeals offers no consideration of the burden placed on Eastwood in finding of unconscionability. As a result, the Court of Appeals erred in finding the remedy clause was substantively unconscionable because the remedy clause puts the Plaintiffs back in status quo and Eastwood bears the entire monetary risk through closing.

III. THE COURT OF APPEALS IMPROPERLY FOUND THAT A TERMINATION-AT-WILL PROVISION RENDERS A CONTRACT UNCONSCIONABLE.

A. The Agreements Are Not So Oppressive a Reasonable Person Would Not Enter Them.

Even assuming the agreements are cancelable-at-will, the Court of Appeals erred in finding them unconscionable. The Master's order improperly concludes that the terms it strikes are substantially unconscionable. Unconscionability requires lack of meaningful choice and oppressive and unreasonable terms so unfair that no reasonable person would agree to them and no reasonable person would attempt to enforce them. *Simpson v. MSA Myrtle Beach*, 373 S.C. 14, 644 S.E.2d 663 (2007). The "oppressive and unreasonable terms" are called substantive unconscionability. *Id.* In general, courts enforce contracts as written to give each party the benefit of the bargain to which the parties agreed. "The Court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 449 S.E.2d 487 (1994); *See also, South Carolina Dept. of Transp. v. M & T Enterprises of Mount Pleasant*, 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008).

In particular, when considering a challenge to a contract by a party who knowingly entered it:

Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 739 S.E.2d 882 (2013).

Ms. Franquelin and Ms. Grigoleit are both sophisticated, experienced, educated people. They possess college degrees, advanced education and experience in the business world. They

both agree they are sophisticated people who can read, write and understand the English language on a high level. They both read the provisions of which they complain, expressed their reservation to those provisions, and signed the agreements nevertheless.

The clauses are not obscured in any way. They are in the same print format as the remainder of the purchase agreement. In fact, both Ms. Franquelin and Ms. Grigoleit testified that they read both the limitation of consequential damages clause and the termination provision and understood their meanings. Both women indicated they discussed these terms with their real estate agents. Thus, they not only read the clauses, they understood the clauses, they did not like the clauses, and they consented to the clauses anyway.

In addition, the clauses merely return the Plaintiffs to the position they held before entering the contract. Their deposits are returned along with the agreed upon liquidated damages. They are free to go forward with another home purchase no worse than when they began.

Paragraph 26 allows Eastwood to cancel the purchase agreement as follows: “If for any reason, a bona fide dispute should arise between the Buyer and Seller, in Seller’s sole judgment, prior to Closing, and if such bona fide dispute cannot be resolved to their mutual satisfaction then **Seller at its sole option may terminate this Agreement** (emphasis added) ...” (R. p. 658, ¶ 26; p. 731, ¶ 26). Eastwood’s divisional president Dion Matheny testified that the covenants governing the neighborhood were not recorded such that phase four was not incorporated into phases one, two, and three of the neighborhood as required for zoning approval. In addition, phase four was not incorporated into the homeowners association and had no mechanism for its maintenance or amenities. As a result, Eastwood could not sell the homes. The Plaintiffs have not put forth any evidence to the contrary.

As indicated by filing their lawsuit, the Plaintiffs have insisted Eastwood construct and sell them homes despite the lack of covenants and zoning compliance. The Master-in-Equity found this is not a *bona fide* dispute, that this provision is unconscionable, and that Eastwood cancelled the purchase agreements without justification. The dispute is that Eastwood cannot sell the houses, and that the Plaintiffs insist on purchasing them.

B. Parties Are Free to Enter Contracts and Cancel Contracts According to Their Terms.

Cancellation clauses in contracts are not unreasonable or unconscionable. In fact, “[i]t is a well-established rule of law that a contract may provide for its termination at the option of one or either of the parties” *Philadelphia Storage Battery v. Mutual Tire Stores*, 161 S.C. 487, 159 S.E.2d 825 (1931). In *Glaesner v. Beck/Arnley Corporation*, 790 F.2d 384 (4th Cir. 1986), the Fourth Circuit Court of Appeals applied South Carolina law and overturned a breach of contract verdict on the basis that the contract allowed one party to terminate it. Beck/Arnley and Glaesner entered a contract for the distribution of automobile parts. Glaesner was the Charleston distributor of Beck/Arnley parts. The contract provided that “[e]ither party may terminate this Agreement at any time, without cause, upon one (1) month advance written notice.” *Id.* Beck/Arnley exercised its right to terminate the contract, and Glaesner sued. The trial court entered a verdict for Glaesner. But, the Fourth Circuit overturned the verdict because Beck/Arnley had a right to terminate the contract. It held that “[a] termination is not wrongful if it is in accord with the terms of the contract and not contrary to equity and good conscience.” *Id.* See also, *WMTC, Inc. v. G.A. Braun, Inc.*, 247 F.3d 114, 116 (4th Cir. 2001) (applying South Carolina law and reversing verdict on claim for wrongful termination of contract); *Richland Wholesale Liquors v. Glenmore Distilleries Co.*, 818 F.2d 312 (4th Cir. 1987) (overturning verdict of wrongful termination when contract allowed for termination which was not contrary to equity and good faith); *Carolina Cable Network v. Alert*

Cable TV, Inc., 316 S.C. 98, 447 S.E.2d 199, (1994) (overturning verdict for wrongful termination of contract).

Similarly, in *Williams v. Leventis*, 290 S.C. 386, 350 S.E.2d 520 (1986), the City of Columbia cancelled a garbage collection contract within its terms. The South Carolina Court of Appeals affirmed the trial judge holding that “[t]he parties to a contract fairly made and not contrary to equity and good conscience may agree that the contract might terminate at the election of **one or the other of them.**”(Emphasis added) *Id.* Thus, the contract term allowing Eastwood to terminate is not unconscionable.

A term allowing for termination is not unreasonable or unconscionable just because it allows a party to terminate an agreement. In addition, the termination clause is integral to the purchase agreement. It assigns the risk of loss before closing and the largest monetary investment to Eastwood. Eastwood invests approximately \$500,000 in building the homes before closing. (R. p. 525, ll. 1-4). And Eastwood assumed the entire risk of damage to the homes or other unforeseen circumstances regarding the construction of the homes. (R. p. 523, ll. 12-13). On the other hand, Plaintiffs deposited between ten and fifteen thousand dollars. They undertook no risk of loss or further investment in the home before closing. Their entire deposit has been offered back to them placing them back in the *status quo* before entering the agreements. This is a proper remedy for rescission of a contract. *See, Rice & Santos v. Jones*, 279 S.C. 201, 305 S.E.2d 74 (1983) (“The fundamental prerequisite for rescission is that the parties be returned to the status quo prior to the contract.” *citing* 17A C.J.S., *Contracts* § 438; 17 Am.Jur.2d *Contracts* § 512).

Cancellation clauses and refunds of earnest money claims are common in real estate sale contracts. *See, Preferred Savings Bank v. Elkholy*, 303 S.C. 95, 399 S.E.2d 19 (Ct. App. 1990),

(affirming damages of earnest money for real estate contract cancellation); *Faulkner v. Miller*, 319 S.C. 216, 460 S.E.2d 378 (1995) (affirming refund of earnest money as damages); *Benya v. Gamble*, 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984) (“The parties to a real estate contract may by express provision stipulate that a particular sum shall be paid by the purchaser to the seller in the event the purchaser fails to perform.”); *Hamilton v. Harborview Development Partners*, 293 S.C. 226, 359 S.E.2d 516 (Ct. App. 1987) (allowing retention of deposit as damages for breach of real estate contract.)

Thus, the cancellation clause is not unconscionable. It is reasonable in light of the parties’ relative risk and investment in the sale. And, it returns the Plaintiffs their entire deposit. As a result, the Plaintiffs are returned to their status before the agreement and have no monetary loss. Furthermore, cancellation and return of deposit agreements are common in real estate transactions such that this contract is not unusual or unconscionable.

IV. THE COURT OF APPEALS MISAPPREHENDED THE LAW WHEN IT DETERMINED THE AGREEMENTS’ TERMINATION AND REMEDY CLAUSES WERE PROCEDURALLY UNCONSCIONABLE.

The Court of Appeals found Eastwood’s standard agreement to be procedurally unconscionable. It reads the Court’s opinion in *Damico* to say that despite the Plaintiffs’ intelligence, education and sophistication, they are not “on equal playing field with a large homebuilder like Eastwood, specifically in the context of a home purchase and especially when presented with a ‘take-it-or-leave-it,’ nonnegotiable, form contract.” *Dawkins, et al.*, 2025 WL 1949798 at 3. This reading of *Damico* is improper because it fails to take a case-by-case approach in analyzing the factors of unconscionability as emphasized in the same opinion. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755. *Damico* does not say that all contracts of adhesion are unconscionable between homebuilders and new purchasers. Rather, it states that adhesiveness is only one factor to be considered and it does not end the unconscionability analysis. *Id.* Courts generally refer to

procedural unconscionability as the “absence of meaningful choice” in agreement formation. *See, Fanning*, 322 S.C. 399, 403, 472 S.E.2d at 245 (1996); 17A Am.Jur.2d Contracts § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability).

The Panel primarily addresses the intelligence of the Plaintiffs and determines their intelligence and sophistication is not at the same level as Eastwood, thereby ignoring key facts in the record that show the high level of intelligence and sophistication of the Plaintiffs not just in their personal lives, but also in the process of signing the agreements at issue. Testimony from Ms. Franquelin and Ms. Grigoleit establish themselves and their spouses as highly intelligent, capable individuals who understood the terms at issue, signed the agreements, and now wish to change the terms they agreed upon.

Ms. Franquelin retired as a vice president of international cosmetics company L’Oréal Lancôme which is traded on the French stock exchange. (R. p. 334, l. 23 – p. 335, l. 8). She has a bachelor’s degree in economics from The State University of New York and has studied at Harvard and in France. (R. p. 337, l. 7 – p. 338, l. 1). She has reviewed agreements in excess of \$25,000,000. (R. p. 337, l. 7 – p. 338, l. 1). Her net worth is between 4.5 and 5 million dollars, and she bought *five* homes before placing a deposit with Eastwood. (R. p. 345, ll. 14-19). Ms. Franquelin and her realtor reviewed thirty homes. (R. p. 345, l. 20 – p. 345, l. 5). She also reviewed about fifty homes online such that she viewed eighty homes in total. (R. p. 346, ll. 6-9).

Ms. Franquelin read the agreement with Eastwood before she signed it, and she reviewed it with her real estate agent. (R. p. 347, ll. 20-25). She was concerned about the agreement, and she called a lawyer regarding it. (R. p. 348, ll. 1-3). She read the paragraphs she now wishes to strike before she signed the agreement, and she was very concerned about these paragraphs. (R. p. 350, ll. 10-12). She did not like the terms and asked to change them, but Eastwood would not agree

to do so. (R. p. 350, ll. 13-18). Before she signed the agreement, she knew that if Eastwood cancelled before closing, her remedy was a return of her deposit plus \$100. (R. p. 353, l. 25 – p. 326, l. 3). She particularly asked to change this clause, but Eastwood would not agree to do so. (R. p. 350, ll. 13-18). So, she agreed to the agreement knowing what it said. (R. p. 350, ll. 10-12). Ms. Franquelin “knew that there could be a possibility that they [Eastwood] could terminate the contract.” (R. p. 355, ll. 20-21). Ms. Franquelin testified she knew the risk the agreement could be terminated and that she understood the agreement. (R. p. 362, ll. 5-8; p. 364, ll. 15-21).

Ms. Grigoleit is a certified public accountant working as a controller at a private equity firm. (R. p. 420, ll. 16-19; p. 422, ll. 4-6). She manages compliance with the Securities and Exchange Commission for the company. (R. p. 421, ll. 8-9; p. 423, l. 21 - p. 424, l. 7). Not only is she highly educated, but her husband, Dan O’Grady, who is a professional property manager, also read the agreement. (R. p. 432, ll. 19-24). Ms. Grigoleit’s husband manages between five and fifteen apartment complexes for a realty investment firm. (R. p. 424, l. 25 – p. 425, l. 7). Ms. Grigoleit’s pay is roughly \$330,000 per year, and their combined income is over half a million dollars per year. (R. p. 426, ll. 6-11).

Before entering the agreement with Eastwood, the O’Gradys reviewed three different communities and up to a dozen other homes. (R. p. 427, ll. 9-24). They hired a real estate agent to help them find and purchase a home. (R. p. 428, ll. 8-20). Ms. Grigoleit read the entire agreement and reviewed it with her real estate agent. (R. p. 432, ll. 11-18). Ms. Grigoleit read paragraph 26, and asked in particular about it before signing the agreement. (R. p. 433, l. 19 – p. 434, l. 2). She read paragraph 26, she was concerned about it, she asked to change it, and she was told no. Nevertheless, she signed the agreement, and she believes this was a reasonable decision. (R. p. 440, ll. 7-25). Ms. Grigoleit reviewed the section of the agreement limiting her damages in the

event of termination. (R. p. 441, ll. 17-20). She understood her remedies were limited at the time she signed the agreement. She did not like this clause, but she signed the agreement nonetheless. (R. p. 442, ll. 9-19).

Both of these Plaintiffs have extensive knowledge and experience with agreement formation and home purchasing. Ms. Franquelin has previously purchased five homes and has a job reviewing multi-million dollar agreements. She was given an opportunity to review the agreement and decide if she wanted to enter it. She not only reviewed the agreement, she consulted her real estate agent and a lawyer, and she attempted to negotiate the agreement to remove the sections at issue. She was told she could not. She could have not signed the agreement as she had viewed at least fifty other potential homes with her real estate agent. Instead of choosing to purchase another house without this clause, she decided to continue, placed a deposit, and acknowledged that if the agreement was canceled she would receive her deposit back and \$100.

Ms. Grigoleit's job as a certified public accountant and her husband's involvement in property management provides her with knowledge of an experience with agreements relating to purchasing and managing a piece of property. Both she and her husband reviewed the agreement with their real estate agent. Like Ms. Franquelin, Ms. Grigoleit attempted to negotiate the section at issue, but, after being told she could not, she agreed to the terms without high pressure sales tactics or time pressure. When looking at the totality of the circumstances and facts, these Plaintiffs are highly sophisticated and were not without meaningful choice in signing this agreement.

The Court of Appeals improperly took a blanket approach and failed to consider the circumstances of these transactions, and the intelligence and sophistication of these Plaintiffs when it determined that should be read to conclude that any contract signed between individuals and a homebuilder is procedurally unconscionable.

CONCLUSION

For the reasons stated, the Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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