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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Presiding Judge

Appellate Case No. 2024-000369

Ralph Dawkins and Michelle Dawkins,
Marcel Franquelin and Patricia Franquelin,
Michael A. Martin and Adriana S. Iaquinto-Martin,
Louis Glavinos and Kimberly Glavinos,
Daniel J. O'Grady and Kaitlyn E. Grigoleit,
Christopher M. Raybon and LaShonda K. Jones Raybon,
Morris K. White and Rebecca A. White,
Paul A. Banker and April D. 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,..... Appellants.

APPELLANTS' FINAL BRIEF

James Edward Bradley, SC Bar #66130
Moore Bradley Myers Law Firm, PA
1700 Sunset Blvd. (29169)
PO Box 5709
West Columbia, SC 29171
803-796-9160
Ward@mbmlawsc.com
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

May sophisticated consumers who knowingly sign a homebuilding contract that gives the homebuilder the right to cancel before closing with limited remedies later strike that portion of the contract and sue the builder for additional damages and remedies after cancellation?

STATEMENT OF THE CASE

1. INTRODUCTION

The Plaintiffs and the Defendant Eastwood entered contracts for the construction and sale of homes. Due to a defect in the neighborhood's Restrictive Covenants, Eastwood cancelled the contracts pursuant to their terms. 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, ¶ 3). He then referred the case for a factual hearing on whether the contracts' cancellation and limitation of damages 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 contracts unconscionable and in violation of public policy. He then struck them from the contracts the parties voluntarily entered. Eastwood appeals his order.

2. THE PARTIES

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. The covenants in this neighborhood were not recorded by the prior developer from whom Eastwood bought the property. As a result, the neighborhood was not in compliance with Charleston County zoning requirements and not incorporated into the homeowners association of the prior three phases. (R. p. 488, ll. 9-16). Thus,

any home purchasers would not have access to the amenities promised in the development. And, Eastwood could not deliver the homes with appropriate covenants in place.

3. THE DISPUTE

When Eastwood discovered the covenants were not recorded, it stopped all construction and sales in phase four of the neighborhood. It sent letters to the customers from whom it had accepted deposits. These letters included a refund of the deposit in full, an additional $100, and an offer of first refusal when the house was constructed. (R. pp. 797-801). The letter also cancelled the contracts as Eastwood could not complete construction and convey the homes without correcting the covenants. A correction of the covenants requires the consent of the homeowners in the prior three phases.

The Plaintiffs hired lawyers and sent a demand letter to Eastwood. On June 17, 2021, they sued Eastwood for cancelling the agreements and not delivering the homes upon which they had placed deposits.

4. MOTIONS AND PROCEDURE

After written discovery, Eastwood moved to consolidate the cases and for summary judgment on the basis that the agreements allowed Eastwood to cancel and refund the Plaintiffs' deposits before closing. The parties argued these motions before Judge Markley Dennis on February 2, 2022. (R. pp. 32-38). Judge Dennis granted Eastwood's motion to consolidate the cases finding that the Plaintiffs all pursued similar claims on almost identical contracts. He also found that "[e]ach contract contains language which purports to give Eastwood the right to terminate" before closing. (R. p. 33). Judge Dennis held that "[i]f the contract language is enforceable as written, Eastwood is entitled to Summary Judgment on all claims." (R. p. 35, ¶ 3).

The Plaintiffs argued that the contracts should not be enforced as written. They claimed that the cancellation and limitation of damages clauses were unconscionable and in violation of public policy. In addition, the Plaintiffs' first cause of action sought a declaratory judgment that the contracts were not revocable. (R. pp. 82-83, ¶¶ 41-44). As a result, Judge Dennis set the Declaratory Judgment claim for trial and ruled that:

> The matters to be considered by the judge at this hearing and upon which the parties may present evidence [include] whether the contract is unconscionable or in violation of public policy. Once the issue of the enforceability of the contract language is resolved, the remaining issues will either be moot or can be tried accordingly.

(R. p. 37, ¶ 1).

The paragraphs that the Plaintiffs seek to strike from the agreements follow:

> 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. 657-658; 730-731).

The parties agreed to have the nonjury trial before Charleston Master-in-Equity Michael Scarborough. Circuit Judge Jennifer McCoy entered a consent order sending the matter to Judge Scarborough for a hearing. (R. pp. 28-31).

5. TRIAL PROCEEDINGS

The parties agreed to present two plaintiffs as witnesses – Patricia Franquelin and Kaitlyn E. Grigoleit.[1] By agreement, these two witnesses testified on behalf of all plaintiffs. (R. p 278, l. 10 – p. 280, l. 10). They were deposed as was Eastwood's local divisional president Dion Matheney and its general counsel Allen Nason.

On Wednesday, May 24, 2023, and Thursday, May 25, 2023, the parties tried the claims to Judge Scarborough. The Plaintiffs presented Patricia Franquelin and Kaitlyn Grigoleit as their witnesses. They presented the deposition testimony of Allen Nason, general counsel for Eastwood and called Eastwood's local divisional president Dion Matheney.

6. THE WITNESSES

a. Plaintiff Patricia Franquelin

Ms. Franquelin lives in Virginia and lived in New Jersey at the time she entered her agreement with Eastwood. (R. p. 285, ll. 6-20). She is retired from international cosmetics company L'Oréal Lancôme where she was a vice president. (R. p. 334, l. 23 – p. 335, l. 10). As a vice president of L'Oréal, Ms. Franquelin was responsible for L'Oréal's e-commerce division including logistics and customer service. (R. p. 335, ll. 7-18). She oversaw the work of two hundred people and made approximately $375,000 per year. (R. p. 335, l. 19 – p. 336, l. 16). Her

[1] Ms. Grigoleit changed her name to O'Grady after signing her contract. Thus, she may be referred to by either of these names throughout the proceedings.

husband has two masters degrees, and their combined income was over half a million dollars a year. (R. p. 336, l. 21 – p. 337, l. 2). Ms. Franquelin graduated from The State University of New York with a bachelor's degree in economics and has studied at Harvard University and in France. (R. p. 337, l. 7- p. 338, l. 9).

In her job as a vice president of L'Oréal, Ms. Franquelin reviewed contracts for the company. (R. p. 338, ll. 10-13). In fact, she has reviewed contracts in excess of $25,000,000. (R. p. 340, ll. 5-8). She reads and writes English at a very high level and is an intelligent person. (R. p. 345, ll. 8-13). 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. 14-16).

Before placing a deposit with Eastwood, 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 contract, 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 contract, 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 contract, 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 provision, but Eastwood would not agree to do so. (R. p. 350, ll. 13-18). So, she agreed to the contract 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 contract could be terminated and that she understood the contract. (R. p. 362, ll. 5-8; p. 364, ll. 15-21). She did not suffer high-pressure sales tactics, and no one was dishonest with her. (R. p. 367, ll. 11-16; p. 368, l. 24 – p. 369, l. 1). She acknowledges the contract gave Eastwood the right to walk away from the sale and refund her deposit which she knew when she signed the contract. (R. p. 374, ll. 2-4, 9-10).

Ms. Franquelin's deposit was approximately $14,000, and Eastwood sent her a check for her deposit along with $100 as required by the contract. (R. p. 375, ll. 13-15).

b. Plaintiff Kaitlyn Grigoleit O'Grady

Ms. O'Grady is an accountant from New Jersey. She has a bachelor's degree from the University of Delaware in accounting and is a certified public accountant. (R. p. 420, ll. 16-24). She worked for three years at a public accounting firm before becoming a controller at the private equity company New Mountain Capital. She manages accounting for multiple funds which are registered with the Securities and Exchange Commission. (R. pp. 421-423). She is responsible for compliance with the Securities and Exchange Commission's regulations. (R. p. 423, l. 21 – p. 424, l. 14).

Ms. O'Grady's husband manages between five and fifteen apartment complexes for a realty investment firm. (R. p. 424, l. 25 – p. 425, l. 7). Ms. O'Grady'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). After Eastwood cancelled their purchase agreement, they bought another house in Charleston.

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).

No one pushed the O'Gradys into signing an agreement with Eastwood, and they were not intimidated by the process. (R. p. 430, l. 15 - p. 431, l. 2). Ms. O'Grady read the entire contract and reviewed it with her real estate agent. (R. p. 432, ll. 11-18). Her husband Dan, who is a professional property manager, also read the contract. (R. p. 432, ll. 19-24).

Ms. O'Grady read paragraph 26, and asked in particular about it before signing the agreement. (R. p. 433, l. 19 – p. 434, l. 2). When she signed the contract she was free to buy a house from other sellers. (R. p. 439, ll. 16-20). 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. O'Grady 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 provision, but she signed the contract nonetheless. (R. p. 442, ll. 9-19).

Ms. O'Grady's down payment was $10,283 which Eastwood refunded to her with an additional $100 though she did not cash the check. (R. p. 442, l. 24 – p. 443, l. 3; p. 443, l. 20 – p. 444, l. 6). She signed the contract knowing Eastwood had the right to cancel it. (R. p. 445, ll. 9-12). She did not think the contract was fair at the time, but she signed it nevertheless. (R. p. 457, ll. 17-20).

c. Eastwood's Representative Dion Matheney

Dion Matheney is Eastwood's divisional president for Charleston, South Carolina. (R. p. 462, ll. 13-16). He graduated from Clemson University in 2001 with a bachelor's degree in economics. (R. p. 509, ll. 14-21). Mr. Matheney testified that the Swygert's Landing development was set up in six phases by the original developer CAM Management. (R. p. 510, l. 23 – p. 511, l. 9). Originally, Eastwood only bought lots in the neighborhood, built houses and sold them.

(R. p. 511, ll. 11-15). After developing phases one, two and three, CAM Management stopped the development and sold phase four directly to Eastwood. (R. p. 511, l. 16 – p. 512, l. 2). So, 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). After building and selling homes in the neighborhood Eastwood learned that the covenants and restrictions were not recorded. (R. p. 514, l. 5 – p. 515, l. 2). This put the neighborhood in violation of zoning ordinances and kept it from being incorporated into phases one, two and three with the accompanying amenities. (R. pp. 514-515). As a result, the neighborhood was not in compliance with zoning requirements. (R. p. 515, ll. 17-22). The neighborhood was not part of the homeowners association for phases one, two and three. (R. p. 515, ll. 10-16). Any home sold in phase four did not have access to the neighborhood amenities. (R. p. 516, ll. 7-10). Also, 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).

Eastwood determined that it could not complete or sell the houses without correcting the problem with the covenants. This led to the current dispute which Mr. Matheney described as: "[T]he defendants wanted us to sell them the house. We could not at that time sell them the house… ." (R. p. 486, ll. 16-18).

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). It also offered the Plaintiffs a right of first refusal on the homes when the problem with the neighborhood was resolved. (R. p. 519, ll. 3-7).

Eastwood has not constructed or sold homes in phase four since discovering the problems with the covenants. (R. p. 520, ll. 16-22). And, the Plaintiffs have placed Lis Pendens on the lots and partially completed homes. Eastwood has not sold any homes in this neighborhood since it discovered the problem with the covenants. (*Id*.).

Eastwood carries the risk of damage for each house before the house is sold. (R. p. 523, ll. 8-13). The approximate cost of purchasing and preparing each lot is $145,000. (R. p. 523, l. 14 – p. 524, l. 3). Before a home is sold, Eastwood has invested approximately $500,000 into it and the land beneath it. (R. p. 525, ll. 1-4). Eastwood takes deposits on homes of approximately ten to fifteen thousand dollars. (R. p. 525, ll. 14-16).

7. JUDGE SCARBOROUGH'S RULING AND THIS APPEAL

On May 25, 2023, Judge Scarborough concluded the nonjury trial without oral argument. He announced his ruling from the bench, but stayed a written ruling for the parties to mediate the case. (R. pp. 550-563). The parties later did so, but were not able to reach an agreement. Judge Scarborough issued a written order December 19, 2023, striking the contested paragraphs as unconscionable and in violation of public policy. (R. pp. 1-27). Eastwood moved to reconsider on December 28, 2023. (R. pp. 173-187). Judge Scarborough conducted a hearing on Eastwood's motion to reconsider February 20, 2024. (R. pp. 229-247). Judge Scarborough entered a Form 4 Order denying the motion to reconsider that day. (R. pp. 39-41). Eastwood then served and filed its Notice of Appeal. (R. pp. 45-46).

STANDARD OF REVIEW

1. DECLARATORY JUDGMENT

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Williams v. Government Employees Ins. Co. (GEICO)*, 409 S.C. 586, 593, 762 S.E.2d 705, 709 (2014).

2. UNCONSCIONABILITY

The Plaintiffs' claims of unconscionability are an action in equity. The Master-in-Equity's rulings of unconscionability are equitable rulings. *Wells Fargo v. Smith*, 398 S.C. 487, 496, 730 S.E.2d 328, 333 (Ct. App. 2012) ("Jurisdictions throughout the country agree that common law unconscionability is an equitable cause of action… ."). In equity actions, "an appellate court can review the record and make findings based on its view of the preponderance of the evidence." *J&W Corporation of Greenwood v. Broad Creek Marina of Hilton Head,* 441 S.C. 642, 669, 896 S.E.2d 328, 344 (Ct. App. 2023).

3. PUBLIC POLICY

Whether a provision in a contract "violates the public policy of the state is a question of law that is reviewed *de novo* by an appellate court." *Williams v. Government Employees Ins. Co. (GEICO)*, 409 S.C. 586, 598, 762 S.E.2d 705, 713 (2014). "Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare." *Id.*

ARGUMENT

I. THE COURT SHOULD ENFORCE THE CONTRACT AS WRITTEN BECAUSE IT WAS KNOWINGLY ENTERED BY SOPHISTICATED PLAINTIFFS AND IS NOT PROCEDURALLY OR SUBSTANTIALLY UNCONSCIONABLE. THE MASTER ERRED IN MODIFYING THE CONTRACTS WHICH THE PARTIES ENTERED.

"The court's duty is to enforce the contract made between the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Jordan v. Security Group,* 311 S.C. 227, 428 S.E.2d 705 (1993). (Reversing trial judge for adding requirements to contract and citing *McPherson v. J.E. Sirrine Co.*, 206 S.C. 183, 33 S.E.2d 501, 510 (1945)). Thus, "[w]here the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* at 230, 420 S.E.2d at 707. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Butler v. Travelers Home and Marine Ins.,* 433 S.C. 360, 366, 858 S.E.2d 407, 410 (2021).

A. The Master Erred in Finding the Contract Unconscionable and Did Not Consider All Appropriate Factors in Determining Unconscionability.

The Master's order does not address all factors necessary for a finding of unconscionability which include all acts and circumstances of the case. *See, Holler v. Holler*, 36 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)). "[U]nconscionability is the absence of meaningful choice on the part of one party due to one-sided contract 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).

Courts generally refer to the "absence of meaningful choice" as procedural unconscionability and "terms so oppressive that no reasonable person would make them" as substantive unconscionability. *See, Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 103, 472 S.E.2d 242, 245 (1996); 17A Am.Jur.2d *Contracts* § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability). 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)).

1. The Contract does not lack meaningful choice and is not procedurally unconscionable because the Plaintiffs are returned to the status quo, had alternatives to these homes, are sophisticated consumers, and knew what they were signing as well as the risks they assumed.

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,* 373 SC 14, 21, 644 S.E.2d 663, 666, (2007).

The Court's order does not adequately address these factors. Additional factors to consider include the following:

> [T]he ability of the particular contracting party, in light of education, intelligence or lack thereof, to understand the terms of the contract. Other factors to be considered include the use of sharp practices or high pressure tactics, the sophistication or wealth of the parties, the relative scarcity of the subject matter of the contract, the age of the parties, who drafted the contract, whether the terms were explained to the weaker party, and whether alterations in the printed terms were possible. It has to do with oppression or surprise.

17A Am.Jur.2d *Contracts* § 272 (cited with approval in *Damico v. Lennar Carolinas, LLC,* 437 SC 596, 611*,* 879 S.E.2d 749, 755, (2022)).

a. The nature of Plaintiffs' injuries indicates that the Contract is not procedurally unconscionable.

The Plaintiffs' injury is that they are not able to purchase a home they had planned to purchase. The contract required Eastwood to return their deposits with a $100 agreed upon damage. Eastwood did this. Thus, the Plaintiffs are placed in their prior position before entering the contracts. They are returned to the status quo with no loss of money or investment. They may purchase another home. They are not left with defective homes and no remedy for repair as the Plaintiffs in *Damico v. Lennar Carolinas*, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022). Instead, their deposits have been returned, and they are free to purchase another home without monetary loss. Their only damage is delay.

b. The relative disparity in the Parties' bargaining power does not make the Contract procedurally unconscionable.

The Plaintiffs had the option to purchase houses from multiple sellers before entering agreements with Eastwood. In fact, Ms. Franquelin looked at eighty homes before entering an agreement, and Ms. O'Grady looked at twelve homes before entering an agreement. (R. p. 345, l. 20 – p. 346, l. 9; p. 427, ll. 21-24). Thus, both Plaintiffs had reasonable alternatives to purchasing a home from Eastwood and were not forced into agreements with Eastwood.

c. The Parties' relative sophistication does not make the Contract procedurally unconscionable.

Both Plaintiffs are sophisticated, business-savvy, educated people who understood the agreement they entered. 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 managed its e-commerce division overseeing approximately 200 people. (R. p. 335, l. 9 – p. 336, l. 3). She made approximately $375,000 per year. (R. p. 335, ll. 15-17). 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 contracts in excess of $25,000,000. 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). Thus, Ms. Franquelin is not a naive consumer of whom Eastwood took advantage.

Likewise, Ms. O'Grady is well-educated, sophisticated and business savvy. She is a certified public accountant working as a controller of a private equity firm. (R. p. 420, ll. 16-19; p. 422, ll. 4-6). She worked three years at a public accounting firm before taking her current job. 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). Her husband who reviewed the agreement is a professional property manager. (R. p. 424, l. 25 – p. 425, l. 7). And their combined income is over half a million dollars per year. (R. 426, ll. 8-11). Like Ms. Franquelin, Ms. O'Grady is intelligent, well-educated, wealthy and not easily deceived. Eastwood did not take advantage of her.

Thus, the Plaintiffs' sophistication and wealth indicates the contract is not unconscionable.

d. Both Plaintiffs knew the Contracts allowed cancellation and limited damages. Thus, they were not surprised, pressured or tricked and the Contracts are not procedurally unconscionable.

Ms. Franquelin read the contract and reviewed it with her real estate agent. (R. p. 347, ll. 20-25). She also called a lawyer to discuss the contract. (R. p. 348, ll. 1-3). She read the clauses she now complains of, and she was concerned about them. (R. p. 350, ll. 10-12). Before she signed the contract, she knew Eastwood could cancel it, and she knew her remedies would be limited. (R. p. 353, ll. 1-11). She did not like these provisions, and she asked to change them. (R. p. 353, ll. 14-20). When they were not changed, she signed the contract anyway. She did not suffer any high-pressure sales tactics, and no one was dishonest with her. (R. p. 367, l. 6 – p. 369, l. 1).

Likewise, Ms. O'Grady read the contract. She also reviewed it with her real estate agent. (R. p. 432, ll. 14-18). In particular, she read paragraph 26 and asked about it before signing. (R. p. 433, l. 15 – p. 434, l. 2). And she believes this was a reasonable decision. (R. p. 440, ll. 22-25). She understood her remedies were limited in the event of termination, but she signed the contract anyway. (R. p. 442, ll. 9-19).

Thus, both Plaintiffs entered the contracts knowing the contracts could be terminated and that their remedies were limited. They knowingly and intelligently decided to sign the contracts despite this limitation. There was no sharp-dealing, hidden provisions, or surprise to either of them. And, the contract is not procedurally unconscionable because they knew what they were signing, knew the risk the contract would be rescinded, and signed it anyway.

2. The Contract is not so oppressive that no reasonable person would enter it. Thus the Master erred in finding it substantially 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.

B. The Contracts to Which the Parties Agreed Are Reasonable, Enforceable and Not Unconscionable.

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 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.

1. 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 .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.

2. Eastwood's cancellation, refund and offer of first refusal is reasonable and not in violation of equity or good conscience.

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 home or other unforeseen circumstances regarding the construction of the home. (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 the agreement. 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).

3. Cancellation and refund of deposit clauses are common in real estate sales contracts

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.

II. THE COURT SHOULD ENFORCE THE CONTRACT AS WRITTEN BECAUSE IT WAS KNOWINGLY ENTERED BY SOPHISTICATED PLAINTIFFS AND IT DOES NOT VIOLATE PUBLIC POLICY. THE MASTER ERRED IN MODIFYING THE CONTRACT WHICH THE PARTIES ENTERED.

"Sound public policy generally requires the enforcement of contracts freely entered into by the parties." *Wolf v. Colonial Life and Acc. Ins*., 309 S.C. 100, 107, 420 S.E.2d 217, 222 (Ct. App. 1992). Here Eastwood seeks to enforce the agreement as written. The Master's Order modifies the contracts altering the rights and responsibilities to which the parties agreed when they entered

the contracts. Courts examine the following factors when deciding if contracts violate public policy:

> Public policy considerations include not only what is expressed in state law, such as the constitution and statutes, and decisions of the courts, but also a determination whether the agreement is capable of producing harm such that its enforcement would be contrary to the public interest or manifestly injurious to the public welfare.

Williams v. Government Employees Ins. (GEICO), 709 S.C. 586, 598, 762 S.E.2d 705, 713 (2014).

A. This Dispute Does Not Involve a Homeowner's Limited Remedies for a Defective Home. Instead It Is a Cancelled Real Estate Sale.

The Master's Order and the Plaintiffs justify changing the contracts by referencing South Carolina's public policy of protecting new home buyers. South Carolina does extend protection to new home buyers. These protections have been extended to home purchases after a sale when a builder disclaims responsibility for defects in a home. In these cases, a home builder has attempted to disclaim responsibility for defects in a home or procedurally block a home buyer's remedy when a home buyer has already purchased a home. South Carolina has "a deeply-rooted and long-standing policy of protecting new home buyers." *Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 620,* 879 S.E.2d 746, 760 (2022) (*citing Kennedy v. Columbia Lumber*, 299 S.C. 335, 387 S.E.2d 730 (1989) (rejecting a result in which "a builder who constructs defective housing escapes liability while a group of innocent new home purchasers are denied relief because of the imposition of traditional and technical legal distinctions" *Lane v. Trenholm Building Co.*, 267 S.C. 497, 229 S.E.2d 728 (1976)). And it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce." *Id*. at 344, 384 S.E.2d at 736 (citing *Rogers v. Scyphers*, 251 S.C. 128, 135–36, 161 S.E.2d 81, 84 (1968)).

Thus, South Carolina protects consumers from defective new home purchases. And, South Carolina courts have invalidated overreaching arbitration provisions in home purchase agreements

when those agreements leave a homeowner without a remedy for the purchase of a defective home. *See, Damico v. Lennar Carolinas, LLC,* 437 S.C. 596, 879 S.E.2d 746 (2022) (Striking arbitration clause that deprived plaintiff of remedy for defective home.)

But, that is not the situation for these Plaintiffs. Through a defect in the covenants, the Plaintiffs have not been able to purchase homes they wished to purchase. They have had their deposits returned to them. The homeowner in *Damico* purchased a defective home and was deprived of a remedy for the defects through an overreaching arbitration clause. Ms. Damico invested substantial money into a home purchase and was left with no real remedy for its defects. In contrast, Ms. Franquelin and Ms. O'Grady have not been left with a defective home. Instead, through a defect in the covenants, they have not been able to purchase a home they planned to purchase. Unlike the homeowners who purchased defective homes, the Plaintiffs have been returned their deposits and are no worse off than when they began. They are free to purchase another home, and Ms. O'Grady did. Ms. Franquelin chose not to. Thus, South Carolina's public policy of protecting home buyers does not invalidate this contract. The Plaintiffs knowingly and voluntarily accepted the contract which does not leave them with a defective home and returns them to their status before entering the agreement.

B. Real Estate Sales Are Highly Regulated and Do Not Prohibit Cancellation Clauses.

The Master's finding concerning public policy disregarded that the contracts are for the sale of residential property which is heavily regulated by the South Carolina Real Estate Commission. *See,* S.C. Code Ann. §§ 40-57-5 to 40-57-810. These provisions do not prohibit limitations on damages clauses or cancellation of real estate sales contracts.[2] The Court's findings

[2] In fact, South Carolina Code Section 40-57-350(G)(1) insulates a real estate licensee from liability for truthfully disclosing a known material defect such as the zoning and covenant

do not address the South Carolina Legislature's extensive statements of public policy which regulate real estate transactions but do not prohibit limitation of damages clauses or cancellation of real estate sales contracts which are common.

C. Courts Commonly Hold That Contracts of This Sort Do Not Violate Public Policy.

The contracts limit the Plaintiffs' claims for damages incurred as a result of a breach. The challenged language in paragraph 25 indicates that "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." The language in paragraph 26 indicates that "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 as liquidated damages in the event the Seller cancellation constitutes a default under this agreement." It concludes that "Buyer shall have no other rights or remedies should Seller exercise such right of cancellation."

These clauses are generally referred to as limitation of liability clauses. Such clauses are routinely entered. *See, Gladden v. Boykin,* 402 S.C. 140, 145, 739 S.E.2d 882, 883 (2013). They have been found commercially reasonable since "they permit the provider to offer the service at a lower price…." *Id.* (*quoting Heed v. US Inspect DFW, Inc.,* 159 S.W.3d 731, 748-49 (Tex.App.2005)) (*noting* courts uphold limitations of liability in burglar and fire alarm system contracts and finding limitation of liability clause in home inspection contract commercially legitimate.)

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problems with the lots at issue as follows: "Notwithstanding another provision of law, no cause of action may be brought against a licensee who has truthfully disclosed to a buyer a known material defect." *Id.* A statute of this nature sets forth the public policy of South Carolina.

In *Gladden v. Boykin*, a home purchaser hired a home inspection company to inspect a home before purchase. After purchasing the home, she sued the home inspection company for negligence in failing to conduct a thorough inspection. The home inspection company moved to dismiss on the basis that the home inspection contract limited its liability to the return of the inspection fee which it returned. The trial judge granted the home inspection company's motion for summary judgment over the home purchaser's arguments that this limitation was in violation of public policy.

The South Carolina Supreme Court affirmed the trial judge's decision. It found the agreement was not so oppressive that a reasonable person would not enter it and that no fair and honest person would accept it. And, it found the liability limitation did not violate public policy.

Likewise, in *Bahringer v. ADT*, 942 F.Supp.2d 585 (D.S.C. 2013) (Norton, J.), Judge Norton upheld a limitation on damages. Bahringer purchased an alarm system from ADT. The contract limited damages to $500 or 10% of the annual service charge. Bahringer alleged that his ADT system failed to alert to a fire at his home and sought recovery for the damage to his home. The contract clearly limited ADT's liability. In response to claims of unconscionability, the Court found Bahringer was at liberty to contract with other providers for this service, and that he was not cognitively impaired. Thus, the Court found the parties were on roughly equal footing in bargaining positions. As a result, the Court enforced the limitation of damages.

In *Maybank v. BB&T*, 416 S.C. 541, 787 S.E.2d 498 (2016), the South Carolina Supreme Court reversed the trial judge's decision to not enforce a limitation of damages clause. Maybank entered a contract with BB&T for wealth management advice. The contract contained a limitation of punitive and consequential damages. Over BB&T's objection, the trial judge found the limitation unconscionable and submitted the issues to the jury which awarded $5,000,000 in

punitive damages. The Supreme Court reversed. It held that limitations of liability and exculpatory clauses are commercially reasonable and enforceable. *Id.; See*, *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882, 884 (2013) (upholding a limitation of liability provision in a home inspection agreement which confined the liability of the inspection company to "a sum equal to the amount of the fee paid by the client for this inspection," and finding the clause neither unconscionable nor violative of public policy); *Huckaby v. Confederate Motor Speedway, Inc*., 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by a waiver and release voluntarily signed by plaintiff prior to entering the racetrack); *McCune v. Myrtle Beach Indoor Shooting Range, Inc.,* 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005) (upholding a release which explicitly and unambiguously limited paintball range's liability for negligence); *S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc*., 283 S.C. 182, 192, 322 S.E.2d 453, 459 (Ct. App. 1984) (enforcing the language of an exculpatory clause in a contract for the sale of a boiler).

As a result, limitations on damages are enforceable. In this case, the Plaintiffs have suffered no monetary loss as their deposits have been refunded to them. And the contracts the Plaintiffs knowingly and voluntarily signed do not violate public policy.

CONCLUSION

The sophisticated, wealthy and business-savvy Plaintiffs knowingly signed homebuilding contracts which allow Eastwood to terminate and return their deposits. When Eastwood did so, they sued asking the Court to invalidate the terms to which they agreed. The Master erred in doing so. This Court should preserve freedom of contract and reverse the Master. The contracts are enforceable as written. They do not lack meaningful choice and are not so oppressive such that no reasonable person would make them. They are in accord with South Carolina public policy and

place the parties back in the position they held before the agreement. As a result, this Court should reverse the Master and enter Summary Judgment for Eastwood.

Respectfully submitted,

s/James Edward Bradley_____
James Edward Bradley, SC Bar #66130
Moore Bradley Myers Law Firm, PA
1700 Sunset Blvd. (29169)
PO Box 5709
West Columbia, SC 29171
803-796-9160
Ward@mbmlawsc.com
Attorney for Appellants

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