RECEIVED
Oct 29 2024
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.

FINAL BRIEF OF RESPONDENTS

---

s/Ross A. Appel
Ross A. Appel, Esq., SC Bar No.: 79149
McCULLOUGH KHAN APPEL
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

s/Michael T. Cooper
Michael Thomas Cooper, SC Bar No.: 100053
APOSTOLOU LAW FIRM
3443 Rivers Ave.
North Charleston, SC 29405
(843) 853-3637
michael@apostoloulaw.net

COUNSEL FOR RESPONDENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

COUNTER-STATEMENT OF ISSUES ON APPEAL 1

COUNTER-STATEMENT OF THE CASE 1

STANDARD OF REVIEW 4

ARGUMENT 5

STATEMENT OF FACTS 5

SUMMARY OF TESTIMONY AT TRIAL 9

ANALYSIS 15

I. The Master-in-Equity correctly ruled the Contract is procedurally unconscionable. 15

II. The Master-in-Equity correctly ruled the Contract is substantively unconscionable. 20

a. The disguised termination-at-will provision is not even-handed, is one-sided, oppressive and unconscionable. 21

b. The limitation-on-damages provision is one-sided and unconscionable. 23

c. The law supports the Master-in-Equity's ruling. 24

d. The case law cited and relied upon by Eastwood is inapplicable to the facts of this matter 27

e. Eastwood's effort to distinguish *Damico* is unsupported. 32

f. Eastwood's purported reason for breaching the contract is disputed and was not at issue in the trial before the Master-In-Equity. 33

III. The Master-in-Equity correctly ruled the Contract violates the public policy of South Carolina. 35

IV. The Master-in-Equity correctly exercised its discretion to strike the unconscionable language at issue in this Declaratory Judgment Action. 37

V. Any issue not raised in Eastwood's Statement of Issues on Appeal is not before this Court and is the law of the case. 38

CONCLUSION 42

TABLE OF AUTHORITIES

Cases

315 Corley CW LLC v. Palmetto Bluff Dev., LLC,
No. 6074, 2024 S.C. App. LEXIS 55 (Ct. App. July 24, 2024) 17, 24, 25

Auto Owners Ins. Co., Inc., v. Newman,
385 S.C. 187, 686 S.E.2d 541 (2009) 4

Beaufort County School Dist. v. United National Ins. Co.,
392 S.C. 506, 518, 709 S.E.2d 85 (Ct. App. 2011) 22, 40

Carolina Renewal, Inc. v. S.C. DOT,
385 S.C. 550, 557, 684 S.E.2d 779, 783 (Ct. App. 2009) 38

Crary v. Djebelli,
329 S.C. 385, 496 S.E.2d 21 (1998) 4, 5

Damico v. Lennar Carolinas, LLC,
437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022) .... passim

Dorchester County Dep't of Soc. Serv. v. Miller,
324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996) 5

Ellis v. Taylor,
316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) 30

Erie Railroad Company v. Tompkins,
304 U.S. 64 (1938) 27

Faulker v. Miller,
319 S.C. 216, 460 S.E.2d 378 (1995) 29

Felts v. Richland County,
299 S.C. 214, 383 S.E.2d 261 (Ct.App.1989), aff'd 303 S.C. 354, 400 S.E.2d 781 (1991) 4

First Sav. Bank v. McLean,
314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) 38

Gladden v. Boykin,
402 S.C. 140, 739 S.E.2d 882 (2013) 30, 31

Glaesner v. Beck/Arnley Corporation,
790 F.2d 384 (4th Cir. 1986) 26, 27, 41

Hamilton v. Harborview Development Partners,
293 S.C. 226, 359 S.E.2d 516 (Ct. App. 1987).. 28

Hardee v. Hardee,
348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct. App. 2001).. 15

Holler v. Holler,
364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005)... 15

Huskins v. Mungo Homes, LLC,
439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2022)... 25, 32, 37

Isle of Palms Pest Control Co. v. Monticello Ins. Co.,
459 S.E.2d 318, 321 (S.C. Ct. App. 1994).. 36

Jordan v. Security Group, Inc.,
311 S.C. 277, 428 S.E.2d 705 (1993) 30

Judy v. Martin,
381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009).. 38

Kennedy v. Columbia Lumber & Mfg. Co.,
299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989)... 16

Lackey v. Green Tree Financial Corp.,
330 S.C. 388, 394, 498 S.E.2d 898 (Ct. App. 1998).. 4, 15

Marcrum v. Embry,
291 Ala. 400, 282 So.2d 49, 52 (Ala. 1973) 25

Maybank v. BB&T Corp.,
416 S.C. 541, 575, 787 S.E.2d 498, 515-16 (2016)... 15, 29, 30

McGill v. Moore,
381 S.C. 179, 672 S.E.2d 571 (2009) 4

McKinney v. McKinney,
261 S.E.2d 526, 527 (1980) 40

Miles v. Miles,
711 S.E.2d 880, 883 (2011) 40

Nelson v. Charleston & Western Carolina Railway Co.,
231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957). 38

Preferred Savings Bank v. Elkholy,
303 S.C. 95, 399 S.E.2d 19 (Ct. App. 1990) 28

Simpson v. MSA of Myrtle Beach, Inc.,
373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007) 15, 22, 23, 34

Small v. Springs Indus., Inc.,
357 S.E.2d 452 (1987) 36

Smith v. Coxe,
183 S.C. 509, 516, 191 S.E. 422, 425-26 (1937) 40

Smith v. D.R. Horton, Inc.,
417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) 16, 25, 32, 37

South Carolina Dep't of Soc. Serv. v. Cummings,
345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001) 5

S*outh Carolina Dep't of Soc. Serv. v. Forrester,*
282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) 5

State v. Wakefield,
323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) 38

Townes Assocs., Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976) 5

White v. J.M. Brown Amusement Co.,
601 S.E.2d 342, 345 (2004) 35

Williams v. Leventis,
290 S.C. 386, 350 S.E.2d 520 (1986) 27, 28

Statutes

S.C. Code Ann. § 36-2-302 37
S.C. Code Ann. § 40-57-350 34

Other Authorities

17A Am. Jur. 2d Contracts § 238 35
17A Am. Jur. 2d Contracts § 272 24
17A Am. Jur. 2d Contracts § 274 15
17A Am. Jur. 2d Contracts § 279 15

Rules

Rule 32 SCRCP 9, 13
Rule 208 SCACR 3, 4
Rule 210 SCACR 4

COUNTER-STATEMENT OF ISSUES ON APPEAL

Did the Master-in-Equity err by concluding language in Eastwood Homes' adhesion home purchase contract was unconscionable, violative of public policy, and severable where such language was found to be an ambiguous, disguised termination-at-will provision – exercisable by Eastwood Homes only, at Eastwood Homes' "sole option" any time prior to closing, and for any reason in Eastwood Homes' "sole judgment" with no challenge by the consumer whatsoever – and upon such unilateral termination, the consumer's exclusive remedy was the return of her earnest money deposit plus $100 in liquidated damages?

COUNTER-STATEMENT OF THE CASE

These consolidated cases[1] involve identical claims by Respondents, who are nine separate families and homebuyers, (the "Homebuyers") against 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; Eastwood Construction, LLC (collectively "Appellant" or "Eastwood"). The nine Summons and Complaints along with *lis pendens* were all filed on or about June 17, 2021. (R. pp. 75-134). Each Complaint alleges five causes of action: Declaratory Judgment, Specific Performance of Contract, Breach of Contract, South Carolina Unfair Trade Practices Act, and Breach of Contract Accompanied by Fraudulent Act. (R. pp. 75-130).

---

[1] The following cases were consolidated by court order pursuant to Rule 42(a), SCRCP: Case Nos. 2021-CP-10-2829, 2021-CP-10-2831, 2021-CP-10-2833, 2021-CP-10-2837, 2021-CP-10-2838, 2021-CP-10-2840, 2021-CP-10-2844, 2021-CP-10-2902, 2021-CP-10-3012. (Order dated March 11, 2022, p. 3). The order found as follows:

> These actions concern the same housing development, the plaintiffs all signed similar contracts with Eastwood, and the plaintiffs are all represented by the same counsel. The interpretation of the contract language is a threshold issue in each case. Thus, the Court finds these actions contain common questions of law and fact and consolidates them.

(R. pp. 34-35).

Each of the Homebuyers executed an identical New Home Purchase Agreement presented by Eastwood, on a take-it-or-leave-it basis, for a semi-custom, new home in Phase IV of Swygert's Landing on Johns Island in the City of Charleston. (R. pp. 78-79, 106-107, 980-988). Homebuyers contend Eastwood breached their respective contracts when Eastwood abruptly and unilaterally terminated them. (R. pp. 75-130).

On August 6, 2021, Eastwood filed its Answers and Counterclaims. (R. pp. 57-74). Eastwood denied any breach of contract, claiming its contract provides it the unquestioned right to terminate at will for any reason in its "sole judgment." (*Id*.). Eastwood counterclaimed for slander of title and abuse of process arising out of the *lis pendens* filed by Homebuyers. (*Id*.). On September 3, 2021, the Homebuyers filed replies to these counterclaims. (R. pp. 47-56).

On August 9, 2021, Eastwood filed a motion to dismiss and for summary judgment in all nine cases, citing Paragraphs 25 and 26 of the contract. (R. pp. 190-191). On August 19, 2021, Homebuyers filed a motion to dismiss the counterclaims, claiming the *lis pendens* are privileged as a matter of law. (R. pp. 188-189).

On February 1, 2022, Homebuyers filed memoranda in opposition to Eastwood's motion to dismiss and for summary judgment and in support of its motion to dismiss Eastwood's counterclaims. (R. pp. 930-939).

On February 2, 2022, a hearing was held before the Honorable R. Markley Dennis, Jr. on Eastwood's motion for summary judgment and motion to dismiss and Homebuyers' motion to dismiss. (R. pp. 32-38). Following the hearing, Judge Dennis entered an order that held:

> The [Homebuyers] contend that the contracts are unconscionable and in violation of public policy. As a result, they contend the Court should not enforce the cancellation and limitation of damages clauses. The [Homebuyers'] first cause of action is for declaratory judgment action regarding the enforcement of the contract. As the enforcement of the limitation of liability clause is pivotal to this case, the

> Court orders that the [Homebuyers'] first cause of action be set for trial by the Clerk of Court to address these issues.
>
> The matters to be considered by the judge at this hearing and upon which the parties may present evidence whether the contract is unconscionable or in violation of public policy. Once the issue of enforceability of the contract language is resolved, the remaining issues will either be moot or can be tried accordingly.

(R. pp. 36-37).

Homebuyers and Eastwood subsequently agreed to refer the declaratory judgment trial on unconscionability and public policy to the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County pursuant to Rule 53 of the SCRCP. (R. pp. 28-31).

On May 24-25, 2023, the Master-in-Equity held a trial where both Homebuyers and Eastwood had a full and fair opportunity to present evidence on the issues of unconscionability, public policy, and enforceability of Paragraphs 25 and 26. On December 19, 2023, the Master-in-Equity entered the Court's written order. (R. pp. 1-27). The Master-in-Equity held Paragraphs 25 and 26 were unconscionable, violative of public policy, and severable. (*Id.*). He then remanded the cases to circuit court. (*Id.*).

On December 28, 2023, Eastwood moved to reconsider the Master-in-Equity's order. (R. pp. 173-187). On February 9, 2024, Homebuyers filed their return. (R. pp. 135-153). On February 20, 2024, the Master-in-Equity held a hearing on the motion to reconsider and issued an order that day denying it. (R. pp. 39-41).

On March 7, 2024, Eastwood filed and served its Notice of Appeal and initiated the instant appeal.[2] Eastwood contends the Master-in-Equity erred as a matter of law in finding the contract

---

[2] Homebuyers note that Eastwood's Brief does not comport with the South Carolina Appellate Court Rules in at least two ways. First, in violation of Rule 208 (b)(1)(C) of the South Carolina Appellate Court Rules, Eastwood's Statement of the Case contains multiple contested matters. Rule 208 (b)(1)(C), SCACR. Homebuyers therefore object to Eastwood's Statement of the Case as far as it includes matters beyond those set forth above in Homebuyers' Counter-Statement of the Case. Rule 210 (h), SCACR. Second, in violation of Rule 208(b)(4), Eastwood's Brief contains

provisions at issue to be unenforceable as unconscionable and violating public policy. (R. pp. 45-46).

STANDARD OF REVIEW

A declaratory judgment action is neither legal nor equitable, and therefore, the standard of review is determined by the nature of the underlying issue. *Auto Owners Ins. Co., Inc., v. Newman*, 385 S.C. 187, 686 S.E.2d 541 (2009). To determine the applicable standard of review, the Court must look to the kind of action in which the issue involved would have been decided if there were no declaratory judgment procedure. *Felts v. Richland County,* 299 S.C. 214, 383 S.E.2d 261 (Ct.App.1989), *aff'd* 303 S.C. 354, 400 S.E.2d 781 (1991).

The heart of this action involves interpretation of a contract and, as such, is an action at law. *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009) ("An action to construe a contract is an action at law.")

In an action at law, tried without a jury, the Court's scope of review extends merely to the correction of errors of law and factual findings which are unsupported by any evidence. *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898 (Ct. App. 1998); *Crary v. Djebelli,* 329 S.C. 385, 496 S.E.2d 21 (1998) ("Since the master-in-equity found there was a potential for repetition . . . the reviewing court's only task was to determine whether the record contained any evidence to support the trial judge's finding."). Thus, the trial court's factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings. *Id.; Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976).

---

many allegations and statements purporting to be facts without any reference to the record. Rule 208(b)(4), SCACR. Homebuyers therefore object to each and every statement and/or sentence set forth within Eastwood's Brief that does not possess a supporting reference to the record. Rule 210 (h), SCACR.

Similarly, credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal. *South Carolina Dep't of Soc. Serv. v. Cummings,* 345 S.C. 288, 293, 547 S.E.2d 506, 509 (Ct. App. 2001); *Dorchester County Dep't of Soc. Serv. v. Miller,* 324 S.C. 445, 452, 477 S.E.2d 476, 480 (Ct. App. 1996); *South Carolina Dep't of Soc. Serv. v. Forrester,* 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984).

ARGUMENT

This Court should affirm the Master-in-Equity's detailed and well-reasoned order, finding Paragraphs 25 and 26 to be unconscionable, violative of public policy, and severable from the Contracts. The Master-in-Equity's factual findings are entitled to significant deference, and Eastwood has failed to identify any errors of law.

STATEMENT OF FACTS

These cases arise from nine identical New Home Purchase Agreements ("the Contract") between Eastwood and Homebuyers. (R. pp. 3-5; 650-795).

Nature and Relationship of Parties

Homebuyers are families who contracted with Eastwood for semi-custom, residential homes in Phase IV of Swygert's Landing on Johns Island in the City of Charleston. (R. pp. 650-722; R. p. 402, lines 13-19). Respondent Kaitlyn O'Grady and her husband were first-time homebuyers who moved to Charleston from New Jersey in reliance on their agreement with Eastwood. (R. p. 405, lines 19-25; R. p. 453, lines 3-6). Respondent Patricia Franquelin and her husband, a semi-retired painter and teacher with Stage IV cancer also moved to Charleston from New Jersey based on their agreement with Eastwood. (R. p. 288, lines 3-10).

Eastwood is a sophisticated, national residential home builder operating in Virginia, North Carolina, South Carolina, and Georgia. (R. p. 461, lines 9-16). Eastwood is "just outside" of the fifty largest home builders in the United States. (R. p. 464, lines 13-22). Over the last ten years, Eastwood developed "five, six, seven" neighborhoods in the City of Charleston alone. (R. p. 464, lines 2-12). Before terminating the Contracts with Homebuyers, Eastwood sold fourteen homes in Phase IV of Swygert's Landing identical to those contracted by Homebuyers. (R. pp. 802-871; R. pp. 943-945).

The Contract is Eastwood's standard, boilerplate contract it uses for all its residential home sales. (R. p. 606, Nason Dep. p. 67, lines 2-9; R. p. 468, lines 6-25). Eastwood's Vice President and General Counsel Allen Nason drafted the Contract. *Id*. Eastwood does not allow Homebuyers to negotiate or make any changes to the standard language in the Contract. (R. p. 269, lines 1-11; R. p. 470, lines 1-24). The Contract was presented on a take-it-or-leave-it basis: "if they're not willing to sign the contract, then they're not our buyer." (R. p. 470, lines 1-24). Homebuyers did not have any bargaining power with Eastwood. (R. p. 417, lines 16-25; R. p. 307, lines 14-22). Eastwood admits it possessed all of the bargaining power in its dealings with Homebuyers. (R. p. 506, line 19 - R. p. 507, line 5).

The Contract Language at Issue in this Action

The Contract, according to Eastwood, gives it the exclusive, unquestioned right to terminate the Contract at will for any reason and at any time before closing. (R. p. 481, line 12 - R. p. 482, line 12; R. p. 490, lines 5-20; R. p. 492, lines 6-13; R. p. 505, lines 4-8). Eastwood relies on Paragraphs 25 and Paragraph 26 for this power. (R. pp. 613, Nason Dep. p. 93, line 11 - R. p. 613, Nason Dep. p. 94, line 19).

Paragraph 25 is titled "Buyer in Default; Seller Remedies." (R. p. 657). This provision states that "the binder money may be retained by the Seller as liquidated damages and not as a penalty . . . 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." (R. p. 657, Paragraph 25). Paragraph 25 goes on to specify what constitutes a Buyer "default" under the Contract and provides examples of "default," such as "engaging in abusive, harassing, threatening . . . manner," "refusing to work with designated Seller representatives . . ." or "otherwise unreasonably impeding Seller's performance." (R. pp. 657-658).

However, buried in the last sentence of the first paragraph of this same "Buyer in Default" provision, the Contract also limits Buyer remedies. (R. p. 657). The provision states: "In the event of a breach . . . 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. p. 657).

Paragraph 26 is titled "Seller Option to Cancel Prior to Closing." (R. p. 658). Paragraph 26 gives Eastwood the exclusive option to terminate, stating: "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." (R. p. 658). In addition, Paragraph 26 limits the Homebuyers' remedies should Eastwood elect to terminate, stating: "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." (R. p. 658). It also adds that "Buyer

shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing." (R. p. 658).

The Parties 'Competing Interpretations of Paragraph 26

Eastwood and the Homebuyers read Paragraph 26 differently. Eastwood reads it to give the company the power to terminate at any time, for any reason, and limiting damages to the refund of deposits plus $100.00. (R. p. 490, lines 5-20; R. p. 492, lines 6-13). Eastwood believes it has the sole and exclusive power to determine what a dispute means and whether it was capable of resolution – without any input from Homebuyers whatsoever. (R. p. 610, Nason Dep. p. 81, lines 12-17; R. p. 611, Nason Dep. p. 85, line 12 - 86, line 1; R. p. 618, Nason Dep. p. 116, lines 15-17; R. p. 619, Nason Dep. p. 118, lines 8-13).

On the other hand, Homebuyers read Paragraph 26 to require a genuine, material dispute with Eastwood, that cannot be resolved despite the parties' best efforts, prior to Eastwood having the authority to terminate. (R. p. 324, lines 14-22; R. p. 363, line 14 - R. p. 364, line 5; R. p. 411, lines 6-25; R. p. 409, lines 7-11). Homebuyers read the Contract to require a dispute resolution *process* because the Contract states, "if such bona fide dispute cannot be resolved to their mutual satisfaction . . ." *Id*. Homebuyers understood this to mean there had to be an element of mutuality in the process and that Eastwood could not just terminate for any reason it wants – no questions asked. *Id*.

The Reason for this Lawsuit

On or about Friday, June 4, 2021, Eastwood, through its representative Jill Bagwell, telephoned each of the Homebuyers to inform them Eastwood was canceling their respective Contract. (R. p. 312, line 20 - R. p. 314, line 3). Eastwood subsequently emailed the Homebuyers a document titled "Mutual Release" purporting to terminate each Contract. (R. pp. 796-798; R. p.

314, lines 4-17). There was no discussion or process toward mutual satisfaction of any "dispute" between the parties. (R. p. 315, lines 5-9).

Homebuyers did not sign the "Mutual Release" purporting to terminate the Contract and did not negotiate the check for the deposit refund or $100.00 liquidated damages. (R. p. 330, lines 11-21). Instead, Homebuyers sent a letter to Eastwood extending an opportunity to cure any default prior to closing and to assist with whatever Eastwood might believe necessary to resolve whatever issue they might have. (R. pp. 872-876; R. p. 315, lines 10-22).

However, Eastwood's position was "it was after the contract had been terminated, so there would have been no paragraph 18 for them to use this particular provision at that junction." (R. p. 617, Nason Dep. p. 111, lines 9-18). "[I]t obviously requires there to be a contract in order for there - to be able to utilize a provision of the contract. So if there's no contract, there's no provision of a contract to be utilized." (R. p. 617, Nason Dep. p. 111, line 19 - R. p. 618 Nason Dep. p. 112, line 2). According to Eastwood, once the Mutual Release was sent, there was no longer any contract between the parties. (R. p. 618, Nason Dep. p. 112, lines 12-17). This was so even though none of the Homebuyers ever executed the Mutual Release or accepted the return of deposit and liquidated damages.

SUMMARY OF TESTIMONY AT TRIAL

During the two-day trial before the Master-in-Equity, Homebuyers presented the testimony of three live witnesses, Patricia ("Pat") Franquelin, Kaitlyn O'Grady, and Dion Matheney.[3] In addition, Homebuyers, without objection from Eastwood, presented the testimony of Allen Nason through his deposition transcript, pursuant to Rule 32(a), SCRCP.

Patricia Franquelin

[3] Homebuyers and Eastwood agreed that Mrs. Franquelin and Mrs. O'Grady would testify on behalf of all Homebuyers as to the specific issues relevant to the declaratory judgment claim on the enforceability of the Contract.

Homebuyers' first witness Patricia Franquelin testified she was retired. (R. p. 285, lines 21-22). She was previously employed in the e-commerce division at L'Oreal Lancome where she worked for 37 years. (R. p. 285, lines 23-25; R. p. 286, lines 1-2). Mrs. Franquelin is married to Marcel Franquelin, a semi-retired artist from France who gets most of his income from teaching art and selling an occasional painting. (R. p. 286, lines 12-25; R. p. 287, lines 1-11; R. p. 338, line 5). Neither of the Franquelins ever worked in real estate. (R. p. 286, lines 9-11; R. p. 287, lines 12-14). Their interactions with Eastwood were as individual residential home buyers. (R. p. 297, lines 3-10). At the time they contracted with Eastwood to purchase a home, they were living in New Jersey and looking for a less stressful life in Charleston because Marcel had Stage IV cancer. (R. p. 288, lines 3-10).

Mrs. Franquelin testified that she felt a great deal of pressure in the home buying process because of the lack of inventory and the urgency created by Eastwood. (R. pp. 294-295). In fact, between September 4th and September 8th, Eastwood raised the price of the home she wanted by $17,500. (R. p. 295, lines 1-6). Through its on-site sales agent, Eastwood informed Mrs. Franquelin, "If - you know, you need to take the contract as it's written . . . you either take the contract as it is - and I, being from New Jersey, I was like, what, I can't have a lawyer review this, I can't have them make any modifications?" (R. p. 295, lines 10-16). Eastwood told her, "no, its a boilerplate, you take it as it is, there's no modification, there's nothing, you take it as it is." (R. p. 295, lines 17-22). Mrs. Franquelin was not able to negotiate the price of the home at all with Eastwood either. (R. p. 296, line 5 - R. p. 297, line 2).

Additionally, Eastwood's representative assured Mrs. Franquelin that the company had never invoked the boilerplate contract provisions. (R. p. 298, lines 15-18). Eastwood also told Mrs. Franquelin, "Well, you can get a lawyer, but it won't make any difference because they're

not going to change [the contract].” (R. p. 299, lines 3-5). Eastwood made it “crystal clear” they would not negotiate or change any terms of the contract and it was a take-it-or-leave it option. (R. p. 301, lines 13-19). And Mrs. Franquelin had no bargaining power with Eastwood. (R. p. 307, lines 14-22).

Three weeks before she is supposed to close on her home, Eastwood contacts Mrs. Franquelin and cancels the contract, saying “you’ll be the first person that we offer it to at the new fair market value and you can choose to purchase the home if you’d like.” (R. p. 313, lines 23-25).

Kaitlyn Grigoleit O’Grady

Homebuyers next called Kaitlyn O’Grady (n/k/a Kaitlyn E. Grigoleit). Mrs. O’Grady testified that she was living in Jersey City at the time she contracted with Eastwood to buy a home in Charleston. (R. p. 401, lines 5-7). Mrs. O’Grady was a first-time home buyer when she entered the contract with Eastwood. (R. p. 405, lines 19-25; R. p. 453, lines 3-6). Mrs. O’Grady is a CPA and was working as the assistant controller for a company maintaining the books, the general ledger, financial statements, and other accounting tasks. (R. p. 402, lines 1-7). Mrs. O’Grady has never worked in real estate. (R. p. 402, lines 8-12). Her interactions with Eastwood were as a consumer and individual home buyer. (R. p. 402., lines 13-19).

Mrs. O’Grady testified that she has a similar experience with Eastwood to that of Mrs. Franquelin: “asking if certain things can be changed or struck or edited in any way, especially given we were moving . . . And we were told nothing could be changed, you know. She kind of laughed at me, not in a malicious way, but laughed and was like, that’s cute, but we don’t change these.” (R. p. 404, lines 15-20). Eastwood informed Mrs. O’Grady that the Contract was a form contract and they would not consider any changes. (R. p. 405, lines 1-18). Eastwood set the price

of the home and would not negotiate. (R. p. 406, line 22 - R. p. 407, line 9). Mrs. O'Grady asked if they could have a lawyer review the contract but was told "in the time that it would take for it to go through the process they may sell the lot to someone else." (R. p. 415, lines 12-15). The Eastwood contract was presented as a "take-it-or-leave-it scenario," and Mrs. O'Grady had "absolutely" no bargaining power in the formation of the contract. (R. p. 417, lines 16-25).

Mrs. O'Grady testified that based on the language of the agreement and representations by Eastwood, she did not understand the Contract, specifically Paragraph 26, to operate as a termination-at-will agreement - "100 percent no." (R. p. 408, lines 13 - R. p. 409, line 24; R. p. 410, line 22 - R. p. 411, line 1; R. p. 418, lines 3-7). And Eastwood gave her "assurances that that clause, that that paragraph, that has never been invoked . . . and that it was like an end of the world type of thing" but "there would be a process, there would be a discuss, there would be some sort of mutual, you know, arrangement that - before this bona fide dispute becomes determined." (R. p. 411, lines 6-25; R. p. 409, lines 7-11).

Mrs. O'Grady received Eastwood's written notice of cancelation via e-mail while she was literally driving in the car to move from Jersey City, New Jersey to Charleston, South Carolina. (R. p. 413, line 3 - R. p. 415, line 5). No one from Eastwood ever spoke with Mrs. O'Grady prior to that cancellation to let her know there was any kind of issue or give context to the notice of cancellation. (R. p. 413, line 23 - R. p. 414, line 8).

Dion Matheney (Eastwood's Division President)

Next, Homebuyers presented Dion Matheney, the Division President for Eastwood in Charleston, South Carolina. (R. p. 460, line 7 - R. p. 461, line 5). Eastwood is a national homebuilder doing business in Georgia, South Carolina, North Carolina, and Virginia. Eastwood considers itself to be a mid-sized home builder - "we're just outside . . . the top 50" of all home

builders in the United States. (R. p. 464, lines 13-22). Prior to cancelling the Contracts at issue in these lawsuits, Eastwood sold fourteen lots and homes, identical to those contracted by Homebuyers, in Phase IV of Swygert's Landing without any issues or problems. (R. p. 467, lines 1-2).

Mr. Matheney testified the Contract is a standard form contract Eastwood requires all buyers use. (R. p. 468, lines 6-25). Eastwood did not allow any of the Homebuyers to negotiate any of the terms. (R. p. 269, lines 1-11). The Contract was presented on a take-it-or-leave-it basis where Eastwood requires a buyer to "use our purchase agreement," and "if they're not willing to sign the contract, then they're not our buyer." (R. p. 470, lines 1-24).

Mr. Matheney testified the Contract gives Eastwood the ability to terminate the agreement for any reason, including Eastwood deciding it does not like the price set by the Contract and wanting to renegotiate a higher price. (R. p. 481, line 12 - R. p. 482, line 12; R. p. 505, lines 4-8). The termination by Eastwood could happen any time prior to closing, and Eastwood has no obligation to provide any explanation to its buyers. (R. p. 490, lines 5-20; R. p. 492, lines 6-13). When Eastwood terminates the Contract, the buyers' sole and exclusive remedy is $100.00 liquidated damages and return of earnest money deposits. (R. p. 492, lines 6-13). The buyers had no arbitration remedy and no judicial remedy. (R. p. 506, lines 3-18). On the other hand, if the buyers were to terminate the contract, Eastwood would be authorized to keep the earnest money deposits and "go after them for damages." (R. p. 493, lines 5-16).

Finally, Mr. Matheney confirmed Eastwood possessed all the bargaining power as it relates to the interactions with these Homebuyers. (R. p. 506, line 19 - R. p. 507, line 5).

Allen Nason (Vice President and General Counsel)

Lastly, Homebuyers presented, without objection, the testimony of Allen Nason via deposition transcript pursuant to Rule 32(a), SCRCP. (R. p. 546, lines 2-24). Mr. Nason is Eastwood's Vice President and General Counsel. (R. p. 591, Nason Dep. p. 6, lines 5-7). He drafted the Contract, which is a standard, form contract Eastwood uses for all home sales. (R. p. 606, Nason Dep. p. 67, lines 2-9).

Mr. Nason testified Eastwood relied upon Paragraphs 25 and 26 when unilaterally terminating Homebuyers' Contracts. (R. p. 607, Nason Dep. p. 72, lines 13-25). He testified Eastwood's understanding of the agreement meant that there could be a "dispute" without there being a disagreement between buyer and seller, "because Eastwood has sole judgment here, we are the ones that have the authority to state in our sole judgment that that dispute exists." (R. p. 609, Nason Dep. p. 80, line 17 - R. p. 610, Nason Dep. p. 81, line 6). He went on to say that "dispute" does not need to be defined in the contract, "because in Eastwood's sole judgment, it decides what a dispute is . . ." (R. p. 610, Nason Dep. p. 81, lines 12-17). In response to a question about the dictionary definition of "dispute," Mr. Nason testified, "I am ambivalent about it. It doesn't really matter. Again, if it's in my sole judgment . . . that's all that needs to be said because I make that decision . . . and that's it." (R. p. 611, Nason Dep. p. 85, line 12 - p. 86, line 1). Mr. Nason clarified, "Your opinion is irrelevant because it's the seller's sole judgment, so I don't really care what your opinion is. It's only my opinion that matters, period." (R. p. 618, Nason Dep. p. 114, lines 9-24). And Mr. Nason further made it clear that "that provision did not give any buyer the ability to question the way that Eastwood in its sole judgment interprets what that means." (R. p. 618, Nason Dep. p. 116, lines 15-17; R. p. 619, Nason Dep. p. 118, lines 8-13).

Mr. Nason also testified about the lack of mutuality in the Contract, stating "[t]here is no recourse at all other than, you know, my client following the process here in paragraph 26. Buyer

has no other rights or remedies should the seller exercise such right of cancellation prior to closing. This was done prior to closing, so that's it." (R. p. 611, Nason Dep. p. 86, lines 1-7). He testified that the "Mutual Release" was actually "a notice of termination under paragraph 26" and, once sent, there was no longer any contract with Homebuyers. (R. p. 613, Nason Dep. p. 93, lines 11-15; R. p. 617, Nason Dep. p. 112, lines 12-17).

ANALYSIS

I. The Master-in-Equity correctly ruled the Contract is procedurally unconscionable.

"The touchstone of the [unconscionability] analysis begins with the presence or absence of meaningful choice." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022). "The absence of meaningful choice on the part of one party is generally indicative of a fundamental unfairness of the bargaining process in the contract." *Maybank v. BB&T Corp.*, 416 S.C. 541, 575, 787 S.E.2d 498, 515-16 (2016); *see also, Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). "Thus, in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant." *Damico*, 437 S.C. 596, 613, 879 S.E.2d 746, 755-56 (citations omitted).

"A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) (quoting 17A Am. Jur. 2d Contracts § 279 (2004)). "In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct. App. 2001) (citing Restatement (Second) of Contracts § 208 (1981)), *aff'd as modified*, 355 S.C. 382,

585 S.E.2d 501 (2003); *see also Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998) ("If the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result.").

An adhesion contract is "a take-it-or-leave-it contract and is not necessarily unconscionable, even though it may indicate one party lacked a meaningful choice." 17A Am. Jur. 2d Contracts § 274; 17 C.J.S. Contracts § 9 & n.9 (2020). Due to the inherent and unequal bargaining power typifying these transactions, adhesion contracts in the residential home-buying context are procedurally unconscionable by their very nature. The Supreme Court in *Damico* observed:

> the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions. These factors combine to highlight the significant disparity in the parties' bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners. We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) ("We have [] taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.").

Damico v. Lennar Carolinas, LLC, 879 S.E.2d at 756-57.

In the present appeal, Eastwood essentially asks the Court to reverse the Master-In-Equity's findings on procedural unconscionability because, in Eastwood's opinion, a national homebuilder like itself can force a completely one-sided and oppressive contract onto a consumer *so long as the latter is educated and has enjoyed a modicum of success in his or her private endeavors*. Eastwood's argument, however, misses the relevant context of the kind of sophistication that matters in the consumer home purchase context.

Eastwood goes to great lengths to portray Homebuyers as successful, highly educated people. Eastwood is not wrong that Mrs. Franquelin and Mrs. O'Grady are intelligent and successful in their personal and professional endeavors. However, these facts are irrelevant to the procedural unconscionability analysis in the context of this consumer home purchase agreement. None of Homebuyers' attributes tip the scales in favor of Eastwood given the seismic disparity of bargaining power inherent under these facts. Our Supreme Court has "taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 4 (2016) (quoting *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989)).

After Eastwood initiated this appeal, this Court issued its opinion in *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, No. 6074, 2024 S.C. App. LEXIS 55 (Ct. App. July 24, 2024). This case affirmed the trial court's denial of a homebuilder's motion to compel arbitration on unconscionability grounds. In that case, as Eastwood argues here, Palmetto Bluff pushed back on procedural unconscionability by pointing to the wealth of the homebuyers and the fact that these were secondary homes. This Court rejected those arguments as follows:

> Here, the **Defendants' reliance on the sophistication of the Plaintiffs as wealthy purchasers of secondary homes is misplaced** in light of our supreme court's analysis in *Damico*:
>
> "[T]he sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar[, a real estate developer]. Given that Lennar has sold thousands of homes in the Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions."
>
> The contract here is one of adhesion. Agreement to the terms of the Club Documents is automatic and mandatory when purchasing a home in Palmetto Bluff. As the circuit court aptly put it, "there is no conceivable potential for bargaining power on the part of those whom the provisions purport to bind." We hold that

> agreement to the arbitration clause in this case is characterized by an absence of meaningful choice on the Plaintiffs' part.

Id. at *11-12 (Ct. App. July 24, 2024) (internal citation omitted) (emphasis added). *Damico* and *315 Corley CW, LLC* stand for the proposition that procedural unconscionability naturally exists in the consumer home purchase agreement where a national builder presents an adhesion home purchase agreement on a take-it-or-leave it basis. No amount of education, wealth, or other circumstances on the consumer's part alters this analysis given the nature of this transaction.

Homebuyers are undeniably residential home-buyer consumers and not commercial entities on equal footing with Eastwood. (R. p. 297, lines 3-10; R. p. 402, lines 13-19). And while Eastwood argues the Court should consider all the facts and circumstances, Eastwood conspicuously omits the fact that Kaitlyn O'Grady and her husband were first-time homebuyers. (R. p. 405, lines 19-25; R. p. 453, lines 3-6). Eastwood also omits the fact that Patricia Franquelin's husband is from France, his education was in the fine arts, and he had stage IV cancer at the time of contracting. (R. p. 286, lines 12-25; R. p. 287, lines 1-11; R. p. 288, lines 3-10; R. p. 338, line 5). At the end of the day, Homebuyers were consumers with zero ability to negotiate their respective Contract with Eastwood.

Eastwood, like Lennar in *Damico*, is a sophisticated homebuilder with far more experience and bargaining power in home-buying transactions compared to Homebuyers. (R. p. 464, lines 13-22). In the Charleston-area alone, Eastwood has developed at least "five, six, seven" neighborhoods. (R. p. 464, lines 2-12). Eastwood has been in business for at least forty-five years and develops residential property in at least four states: Virginia, North Carolina, South Carolina, and Georgia. (R. p. 461, lines 9-12; R. p. 462, lines 7-12). Eastwood is just outside the largest fifty home builders in the United States. (R. p. 464, lines 13-22).

Homebuyers lacked meaningful choice as to the boilerplate terms, including Paragraphs 25 and 26, of the Contract. (R. p. 406, line 22 - R. p. 407, line 9). Mrs. O'Grady testified, "And we were told nothing could be changed, you know. She kind of laughed at me, not in a malicious way, but laughed and was like, that's cute, but we don't change those." (R. p. 404, lines 15-20). Mrs. Franquelin testified that Eastwood made it "crystal clear" the company would not negotiate or change any terms of the form contract. (R. p. 405, lines. 13-19). Eastwood told her, "no its a boilerplate, you take it as it is, there's no modification, there's nothing, you take it as it is." (R. p. 295, lines 17-22).

Eastwood's division president, Dion Matheney, confirmed the builder held all of the bargaining power over the Homebuyers. (R. p. 506, line 19 - R. p. 507, line 5). Mr. Matheney also testified that the Contract was presented on a take-it-or-leave-it basis saying "if you want to purchase one of our homes, then we require that you use our purchase agreement." (R. p. 470, lines 17-24). Mr. Matheney went on to say, "if they're not willing to sign the contract, then they're not our buyer." (R. p. 470, lines 1-24).

The evidence is clear that, at the time the Contracts were executed, Eastwood possessed far superior bargaining power and sophistication in the context of home buying transactions than Homebuyers. The fact that Homebuyers had enjoyed some success in their private endeavors does not convert the bargaining process into a fair one. They were not on equal footing with Eastwood in the context of home buying transactions. It was a take-it-or-leave-it scenario. The fact that Eastwood was able to foist this one-sided contract upon these particular individuals actually weighs in Homebuyers' favor, further demonstrating the lack of meaningful choice here.

Because the Master-in-Equity properly applied the facts to the law on the question of procedural unconscionability, the Court should affirm the Master-In-Equity's determination that

the Contract is procedurally unconscionable. Eastwood has pointed to no error of law, and this Court should defer to the Master-in-Equity's findings under the applicable standard of review.

II. The Master-in-Equity correctly ruled the Contract is substantively unconscionable.

The Contract is not only procedurally unconscionable, but its terms are substantively unconscionable and unenforceable. The complained of provisions of Paragraph 25 and Paragraph 26 in the Contract, taken together, are so one-sided and oppressive that no reasonable homebuyer would agree to them and no honest residential home builder would insist on them.

Recognizing this, the Master-in-Equity held as follows:

> In light of Eastwood Homes' own interpretation and application of the cancellation provision, the Court finds this provision to be unconscionable and violative of public policy because such interpretation would allow the residential home builder and developer to unilaterally cancel the New Home Purchase Agreement at any time before closing and without consequence and without any ability for Buyers to do the same. Eastwood's interpretation and application of the cancellation provision is one-sided and lacks any mutuality in its application. It essentially means that the Seller is not bound by any contractual terms, while the Buyer must comply with all contractual terms.

(R. p. 15).

Under the doctrine of unconscionability, procedural unconscionability and substantive unconscionability "need not be present to the same degree." *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 607, 879 S.E.2d 746, 754 (2022). "[T]he 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.* And when a contract is one of adhesion, the Court may examine it with "special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting." *Id.* at 614, 879 S.E.2d at 756. The Supreme Court has emphasized "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." *Id.* (emphasis in original). Paragraphs 25 and 26 are far from even-handed.

a. The disguised termination-at-will provision is not even-handed, is one-sided, oppressive and unconscionable.

The disguised termination-at-will provision is found in Paragraph 26. The operative sentence states: "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 dispute cannot be resolved to their mutual satisfaction then Seller at its sole option may terminate this Agreement . . ." (R. p. 658). Importantly, no dispute resolution provision exists in the Contract – arbitration or otherwise.

Paragraph 26 as drafted, interpreted, and applied under the facts of this case by Eastwood allows the company to unilaterally terminate the Contract for any reason it wants, or no reason at all, and at its sole, exclusive election. (R. p. 481, line 12 - R. p. 482, line 12; R. p. 505, lines 4-8). Eastwood's witnesses testified the company can terminate at any time prior to closing, including the day of closing. (R. p. 490, lines 5-20; R. p. 492, lines 6-13). Incredibly, according to Eastwood, the Contract gives the company the right to terminate even if it simply determines that it wants to renegotiate a higher price on the home. (R. p. 481, line 12 - R. p. 482, line 12; R. p. 505, lines 4-8).

The right to terminate-at-will is not mutual, though. The Contract does not contain any similar provision that would allow Homebuyers to terminate the Contract, much less at any time and for any reason they want. (R. pp. 650-722). This incredible power only belongs to Eastwood at its "sole option." *Id*. There is no mutuality in this arrangement.

Even though the language in Paragraph 26 appears to give Homebuyers a voice in the matter, Eastwood's testimony confirms no such power actually exists. The Contract uses the terms "bona fide dispute" and "mutual satisfaction." *Id*. Mrs. O'Grady testified that she was given assurance from a company representative that "there would be a process, there would be a discussion, there would be some sort of mutual, you know, arrangement - that before this bona

fide dispute becomes determined." (R. p. 411, lines 6-25; R. p. 409, lines 7-11). Mrs. O'Grady said, "100 percent no," she did not understand that provision to give Eastwood the right to terminate at-will. (R. p. 408, line 13 - R. p. 409, line 24; R. pp. 410, line 22 - R. p. 411, line 1; R. p. 418, lines. 3-7). However Eastwood has made it abundantly clear the Homebuyers have no say in the matter: "your opinion is irrelevant because it's the seller's sole judgment, so I really don't care what your opinion is." (R. p. 618, Nason Dep. p. 114, lines. 9-24). Homebuyers do not even have the "ability to question the way that Eastwood in its sole judgment interprets what that means." (R. p. 618, Nason Dep. p. 116, lines 15-17; R. p. 619, p. 118, lines 8-13).

At the time they entered the agreement, Homebuyers could not know that Eastwood would disregard the "bona fide dispute" language in favor of an aggressively expansive and one-sided interpretation of "in Seller's sole judgment." Similarly, Homebuyers could not have reasonably understood the use of "sole judgment" to modify "bona fide dispute" whereby Eastwood would disregard both the normal use of "bona fide" and the normal use of "dispute." *Beaufort County School Dist. v. United National Ins. Co*., 392 S.C. 506, 518, 709 S.E.2d 85 (Ct. App. 2011) ("The term 'series' is not defined in the endorsements, so it must be defined according to the usual understanding of the ordinary person."). In this way, Eastwood intended use of this provision was completely obscured. This is why Homebuyers referred to Paragraph 26, at trial, as a *disguised* termination-at-will provision. No reasonable, honest, or fair person would accept a term where the party with superior bargaining has the power to terminate the agreement at is exclusive election, at any time, for any reason, and without meaningful consequence.

b. The limitation-on-damages provision is one-sided and unconscionable.

Not only is the ability to terminate-at-will completely one-sided, but the limitation on damages and exclusive remedy provisions in Paragraphs 25 and 26 are wholly one-sided in favor of Eastwood as well.[4]

In *Simpson v. MSA of Myrtle Beach, Inc.*, the South Carolina Supreme Court found the limitation of liability provision within an arbitration provision as unenforceable. *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C.14, 29-30, 644 S.E.2d 663 (2007) (context of vehicle sale). The Supreme Court identified "The general rule is that courts will not enforce a contract with is violative of public policy, statutory law, or provisions of the Constitution." *Id*. The court then held the limitation on liability provision "violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims." *Id*. at 30, 644 S.E.2d 663. It reasoned that "unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest." *Id*. Like the contract in *Simpson v. MSA*, the Contract forced Homebuyers to

[4] In Paragraph 25, titled "Buyer in Default; Seller Remedies," the Contract states: "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. p. 657). This provision is hidden in the last sentence of the first part of Paragraph 25.

Similarly, in Paragraph 26, the Contract states: "If Seller terminates this Agreement, Seller shall return to Buyer all deposits . . . 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." (R. p. 658). It also states, "Buyer shall have no other rights or remedies should the Seller exercise such right of cancellation prior to closing." *Id.*

On the other hand, the Contract does not limit damages or remedies if there is a breach or default by the Buyer. Instead, "the binder money may be retained by Seller as liquidated damages and not as a penalty" or "[I]n 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 . . ." *Id*. Eastwood's Division President confirmed as much on the witness stand. (R. p. 493, lines 5-14).

waive statutory rights to damages by limiting the recovery to a return of Homebuilders' deposit money plus $100.00.

In its reading, the Contract allows Eastwood to terminate the Contract in the parking lot of the closing attorney's office on the day of closing and the sole and exclusive consequence would be returning Homebuyers' money and paying an additional $100.00. But if the Homebuyers canceled the Contract the week after signing, then Eastwood could file a lawsuit for breach of contract and get any and all damages available under the law. (R. p. 493, lines 5-14). Eastwood's ability to back out at any time for any reason whatsoever, including simply the desire for a higher price, makes the Contract uniquely one-sided, oppressive, unreasonable, and ultimately unconscionable – particularly in the home buying context. No reasonable homebuyer would ever knowingly agree to such a unilateral termination-at-will provision absent the complete lack of bargaining power seen in this case.

A penalty of $100.00 to an entity the size of Eastwood is essentially meaningless and makes the contract illusory. If the sole cost to the homebuilder for terminating a contract is $100.00, then the economic incentive makes it business malpractice to follow through and honor the promises made in the original contract. The residential developer is free to breach and walk away from the contract at the drop of a hat or at least a little more than the price of an authentic MLB ball cap. A term that makes a contract so one-sided in favor of the drafting party that it is essentially illusory cannot be anything but unconscionable.

c. The law supports the Master-in-Equity's ruling.

In *Damico*, the following clause was ruled unconscionable by the Supreme Court: "[Lennar] may, **at its sole election**, include [Lennar] contractors, subcontractors and insurer as parties in the mediation and arbitration" and "that mediation and arbitration will be limited to the

parties specified herein." *Id*. at 615, 879 S.E.2d at 757 (emphasis in original). The Court observed that "[g]iving Lennar the 'sole election' to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle." *Id*. (citing 17A Am. Jur. 2d Contracts § 272 ("Mutuality [] is a paramount consideration when assessing the substantive unconscionability of a contract term.")). The Court concluded that "[t]his creation of a procedural defense to liability for Lennar is wholly unreasonable and oppressive to Petitioners." *Id*. at 616-17, 879 S.E.2d at 757-58.

This Court was similarly troubled by the one-sided nature of the contract at issue *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*. It read, "[the Defendants] reserve[] the right **in [their] sole and absolute discretion**, from time to time, to modify the Membership Plan and Rules and Regulations . . . and to make any other changes to the Membership Documents . . . ." *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, No. 6074, 2024 S.C. App. LEXIS 55, at *12 (Ct. App. July 24, 2024). Observing, "[i]t is quite true that where one party reserves an absolute right to cancel or terminate a contract at any time, mutuality is absent," this Court held the builder's "sole and absolute discretion" language was substantively unconscionable even though it did not appear in the arbitration clause itself. *Id*. at *12-14 (citing *Marcrum v. Embry*, 291 Ala. 400, 282 So.2d 49, 52 (Ala. 1973)). This precedent further cements Paragraph 26 as substantively unconscionable and provides authority to read Paragraph 26's one-sided and oppressive termination-at-will language with the damages limitations found therein and Paragraph 25.

In *Smith v. D.R. Horton, Inc.*, the Supreme Court of South Carolina found that the builder's "attempts to disclaim implied warrant claims and prohibit any monetary damages are clearly one-sided and oppressive." 417 S.C. 42, 50, 790 S.E.2d 1 (2016). In *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, this Court found language precluding treble damages under the South Carolina

Unfair Trade Practices Act to be unconscionable. No. 6074, 2024 S.C. App. LEXIS 55, at *16 (Ct. App. July 24, 2024) In the case at hand, Paragraph 26 prohibits any damages for Homebuyers beyond the $100.00 exclusive remedy. (R. pp. 657-658). And Paragraph 25 states, "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. 657-658). However, there is no limitation on Eastwood's damages: "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." (R. pp. 657-658). In *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2022), the Court of Appeals dealt with the arbitration provision as a stand-alone provision and not as substantively intertwined with the limitation of warranties provision that may have otherwise infected the arbitration provision with unconscionable terms. *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2022). Nonetheless, the court struck the time limitation within the arbitration provision as it purported to waive a statutory right to bring a claim within the statute of limitations. *Id.*

Eastwood drafted and applied Paragraphs 25 and 26 to ensure a procedural and substantive victory by seizing the authority to decide whether a dispute exists in its "sole judgment" and limiting Homebuyers' damages to a return of their own money plus $100.00. The provisions of the Contract at issue in this case are substantively unconscionable for the same reasons the Court struck down the self-serving and one-sided provisions in the aforementioned cases. Given "South Carolina['s] … deeply-rooted and long-standing policy of protecting new home buyers," granting a residential builder such unchecked, powerful, and unilateral authority to disregard the Contract is one-sided, oppressive, unreasonable, and unconscionable.

d. The case law cited and relied upon by Eastwood is inapplicable to the facts of this matter.

Eastwood points to various cases to support its contention that cancellation clauses and damages limitations are generally reasonable and not substantively unconscionable. To be clear, Homebuyers do not dispute the commercial reasonableness of cancellation clauses or limitations on damages in the general sense. However, these cases deal with the purchase of a home – not a toaster oven. None of the cases relied upon by Eastwood involve a "disguised" termination-at-will provision in the context of a residential consumer home transaction, presented on a take-it-or-leave-it basis by a large residential home builder holding all of the bargaining power over an individual homebuyer with the buyer's sole and exclusive remedy being a refund of buyer's deposits plus a nominal $100.00 liquidated damages amount.

Instead, Eastwood cites to cases inapplicable to the facts at hand. Eastwood's case citations deal with (1) contracts between sophisticated, commercial entities where both had the ability and/or opportunity to negotiate terms; or (2) consumer transactions outside the context of a residential home purchase.

For example, Eastwood relies upon *Glaesner v. Beck/Arnley Corporation* in support of its argument that the termination-at-will provision was not unconscionable in this case. *Glaesner v. Beck/Arnley Corporation*, 790 F.2d 384 (4th Cir. 1986). First, Homebuyers note that *Glaesner* was decided by the Fourth Circuit of the United States. *Id*. While Homebuyers have the utmost respect for that court, it is a federal appellate court and does not establish controlling South Carolina law. *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938). Second, *Glaesner* did not involve a claim for breach of contract or an application of the law of unconscionability. *Glaesner*, 790 F.2d 384, 386 n.1 ("Glaesner has alleged that Beck/Arnley is liable in tort, rather than in contract."). Lastly, *Glaesner* involved two commercial entities that negotiated an auto-

parts distributorship agreement. *Id*. As such, neither *Glaesner* nor the other cases cited regarding wrongful termination of contract are applicable to the case at hand.

While the tort of wrongful termination is not before the Court, Homebuyers note the law requires such termination be "not contrary to equity and good conscience." *Id*. And in the case at hand, the Master-in-Equity found the contract was unconscionable which would mean it was contrary to equity and not in good conscience. Therefore, even under the rubric in *Glaesner,* the Master-in-Equity's findings should be upheld.

Eastwood similarly relies upon *Williams v. Leventis,* 290 S.C. 386, 350 S.E.2d 520 (1986). In *Williams*, the case was tried by a judge without a jury as to whether the "poor performance" by Williams, a commercial entity, would justify a termination by County Council. *Id*. The trial judge held County Council was justified in doing so and dismissed the case. *Id*. at 387. Like the case at hand, the standard of review was "whether there is any evidence reasonably supporting the trial judge's holding . . ." *Id*. Stated further, "In an action tried by a judge without a jury, the jurisdiction of this court extends only to the correction of errors of law . . . The weight of the evidence presented at the trial . . . is not at issue . . . the question is whether there is any evidence in the record that would reasonably support the contentions of the party prevailing at trial." *Id.* at 389. Upon review of the record, the Court of Appeals determined the trial court's ruling must be affirmed. *Id*. *Williams* did not involve any analysis of the enforceability of the contract's termination provision. *Id*.

Eastwood, also, cites law on "rescission" arguing Homebuyers have been made whole and returned to the status quo. However, Eastwood neither raised "rescission" in its Answer and Counterclaims nor was this issue referred to the Master-in-Equity and tried. (Answer & Counterclaims). The law of "rescission" is simply not before this Court.

Next, Eastwood argues cancellation and refund of deposits are common in real estate transactions as a general matter. In support of this position, Eastwood cites cases that involve a seller retaining earnest money deposits when a buyer breached the sales contract. *Preferred Savings Bank v. Elkholy*, 303 S.C. 95, 399 S.E.2d 19 (Ct. App. 1990); *Hamilton v. Harborview Development Partners*, 293 S.C. 226, 359 S.E.2d 516 (Ct. App. 1987). However, these cases are inapplicable to the facts at hand. *Preferred Savings Bank* involved the question of whether the evidence reasonably supported the Master-in-Equity's ruling that the failure of the buyer of twenty condominium units to close within fourteen days of obtaining financing in breach of an express contract term justified seller's retention of earnest money deposits. *Preferred Savings Bank v. Elkholy*, 303 S.C. 95, 399 S.E.2d 19 (Ct. App. 1990). *Hamilton* involved the question of whether the evidence reasonably supported the circuit court's finding that the buyer of an office condominium breached an express term of the contract by failing to obtain financing when the buyer failed to provide the required underwriting documents to the lender procured by the seller for benefit of the buyer. *Hamilton v. Harborview Development Partners*, 293 S.C. 226, 359 S.E.2d 516 (Ct. App. 1987). These cases, which deal with commercial transactions between sophisticated parties with equal bargaining power, are not instructive to the issue at hand.

Similarly, Eastwood cites *Faulker v. Miller*, 319 S.C. 216, 460 S.E.2d 378 (1995) for the proposition that a return of earnest money is commercially reasonable. First, *Faulker* involved an arms length residential sales contract between two individuals. *Faulker v. Miller*, 319 S.C. 216, 460 S.E.2d 378 (1995). Additionally, *Faulker* involved the failure of a seller to return the buyer's earnest money deposit when properly notified of buyer's right to terminate the contract within the due diligence period. *Id*. The Master-in-Equity found the buyer gave proper notice of termination within the agreement's window and then ordered the seller to refund the earnest money deposits

plus an additional $28,697.98 in damages for costs and attorneys fees. *Id*. The *Faulker* case, if anything, supports Homebuyers' position in this case. *Faulkner* demonstrates the $100.00 liquidated damages provision in the Contracts is not commercially reasonable when compared to the award of $28,697.98 in actual damages for costs of litigation in a matter decided almost thirty years ago.

Eastwood also cites *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016) because the South Carolina Supreme Court reversed a trial court's ruling that the limitation on damages was unenforceable. *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016). However, *Maybank v. BB&T* did not involve a residential home purchase agreement. *Id*. Additionally, Eastwood appears to omit the portion of the opinion that says, "the law disfavors [limitation of liability provisions], and courts must strictly construe the language of the provision against the drafter." *Id*. at 574, 787 S.E.2d at 515. Eastwood also fails to mention the Supreme Court permitted the limitation of liability in that case because there was no clear, specific public policy statement on wealth management agreements, Maybank had "an extensive history as a trust advisor," and Maybank was still permitted to obtain actual damages under the liability limitation provision. *Id*. The present case involves a clear statement of public policy and the liability limitation restricts the sole and exclusive remedy to a refund of Homebuyers' money plus $100.00. As such, *Maybank v. BB&T* does not support Eastwood's contentions.

Eastwood cites *Ellis v. Taylor*, saying "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, 248, 449 S.E.2d 487, 488 (1994). First, *Ellis v. Taylor* involved application of a separation agreement that was negotiated at arms length through attorneys during divorce proceedings and incorporated into the Family Court's divorce

decree. *Id*. In Eastwood's recitation of law the law from this case, Eastwood omits the preceding sentence, which specifies that the language of the contract must first be "plain and capable of legal construction." *Id*. In the present case, the Master-in-Equity found the operative language in Paragraph 26 to be ambiguous and <u>Eastwood did not appeal that decision</u>. *Ellis v. Taylor* was not a case about unconscionability. In addition, the *Ellis v. Taylor* opinion references *Jordan v. Security Group, Inc.* for quoted statement of law. *Id*. The *Jordan v. Security Group, Inc.* case involved a party asking the court to read an additional, unexpressed term into a settlement agreement contract entered after "lengthy negotiations" through legal counsel as part of the dissolution of the parties' partnership. *Jordan v. Security Group, Inc.,* 311 S.C. 277, 428 S.E.2d 705 (1993). The *Jordan v. Security Group* case was not about unconscionability.

Finally, Eastwood relies upon *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (2013) in support of its contention that the Court should enforce the contract no matter how unfair, one-sided, or grossly unreasonable. However, *Gladden* supports Homebuyers' position in this case, not Eastwood's. The dispute in *Gladden* was between a residential home buyer and a "self-employed home inspector operating out of his home." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882 (2013). The court found that the home inspector "had no significantly greater bargaining power or cognizably more sophistication than a trained though not practicing real estate agent." *Id*. The limitation on liability provision was "in all capital letters and in bold" on a one-page contract. *Id*.

The Court of Appeals in *Gladden* recognized the difference between limitations of liability in the home inspection context from limitations of liability in the home purchase context. *Id*. at 143-44. The court looked to the Residential Property Condition Disclosure Act as a statement of public policy that ensures buyers are informed by sellers of known defects with the home. *Id*.

This public policy placed the burden upon the seller to disclose defects and provided the seller should be liable for failing to do so. *Id.* The court also recognized the "judicially crafted public policy affording heightened protection to home purchases." *Id.* at 144. The Court of Appeals drew the factual distinction applicable to the present case, saying "It is one thing to impose greater demands on the builder of a new home . . . and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering." *Id*. The Court of Appeals observed "the transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power . . ." *Id.*

Eastwood is not a home inspector. Eastwood is a builder of new homes - almost one of the largest fifty builders in the United States. (R. p. 464, lines 13-22). As such, *Gladden* supports the Master-in-Equity's rulings and Homebuyers' position in this appeal.

Because the Master-in-Equity's ruling is supported by the facts and the law, under the deferential standard of review applicable here, the Court should affirm the Master's ruling and remand this matter for a trial on the merits.

e. Eastwood's effort to distinguish *Damico* is unsupported.

While Eastwood would like to constrain the "deeply-rooted and long standing policy of protecting new home buyers" to apply only to causes of action accruing after the closing of the home purchase, such distinction is wholly unsupported in the law. Eastwood does not cite to any case to substantiate of its bald proposition that the application of unconscionability or public policy of our state are limited to causes of action arising out of defective homes. Instead, Eastwood conflates the application of the public policy in the context of defective homes with a limitation of the public policy to that context. Eastwood would have the Court arbitrarily distinguish home buyers based upon mere ipse-dixit.

Just like the case at hand, in *Damico* the language of the purchase agreement was the issue. The recent cases highlighting the "deeply-rooted and long standing policy of protecting new home buyers" arise from the application and analysis of terms of a residential purchase agreement. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (applying the doctrine of unconscionability to a purchase and sale agreement); *Smith v. D.R. Horton, Inc.,* 417 S.C. 42, 790 S.E.2d 1 (2016) (applying the doctrine of unconscionability to a home purchase agreement). The present case, like *Damico v. Lennar* and *Smith v. D.R. Horton*, is based upon the terms and provisions of the purchase agreement.

In fact, the Court of Appeals recently applied the doctrine of unconscionability to a residential purchase agreement where the home buyer "did not allege any problems with the home." *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 362, 887 S.E.2d 534 (Ct. App. 2022). In *Huskins*, the Court of Appeals found the provision within the arbitration agreement shortening the statute of limitations to be unconscionable and unenforceable even though the provision "purports to apply equally to both parties." *Id*. at 370. The court then severed the offending language from the remainder of the agreement. *Id*. at 371 ("notwithstanding the lack of a severability clause, it is possible for this court to simply delete the offending language . . ."). Because the present case involves questions of protections to residential home buyers, the long-standing public policy must apply.

f. Eastwood's purported reason for breaching the contract is disputed and was not at issue in the trial before the Master-In-Equity.

Eastwood attempts to smuggle in its alleged *reason* for unilaterally terminating the Contracts. Presumably, Eastwood does so to cast its decision as reasonable in the unconscionability analysis. However, Eastwood motivation is disputed by Homebuyers and irrelevant to the unconscionability analysis. Eastwood's reason for breaching the contract is not

only irrelevant to the unconscionability analysis – it is also outside the issues ordered to be tried by the Master-In-Equity. (R. pp. 28-31). Judge Dennis' Order and the Consent Order of Reference to this Court, limit the evidentiary hearing, presently on appeal, to whether the Contract is enforceable as written – nothing else. (R. pp. 32-38). Eastwood's rationale behind terminating the Contract has no bearing on the enforceability of its one-sided adhesion contract. *See generally, Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) The Master-in-Equity remanded the case for trial in the circuit court whereby Eastwood will have the opportunity to present to a jury the reasons the company breached the contract. (R. pp. 25-26).

While entirely irrelevant to this analysis, Eastwood's professed reason for terminating its Contracts with Homebuyers is belied by the facts in the record. Without any citation to the record, Eastwood proclaims that due to the alleged restrictive covenant errors "Eastwood could not sell the homes," and "[Homebuyers] have not put forth any evidence to the contrary." (Eastwood Homes' Brief p. 17). This is false.[5]

The only evidence in the record on this issue proves there was no obstacle to closing. When Eastwood purported to terminate the Contracts with Homebuyers, it had already sold, without any problem or issue, fourteen identically situated homes as those that were to be sold to Homebuyers. (R. pp. 802-871; R. pp. 943-945). Several of these very homes constructed and sold by Eastwood in Phase IV have since been re-sold without any title problem regarding the covenants or other issue. (R. pp. 872-876). For example, 2892 Claybrook Street, which Eastwood sold on October

[5] Eastwood's own brief contradicts that position. In footnote 2 on page 22 of Eastwood's Brief, the company states: "In fact, South Carolina Code § 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 problems with the lots at issue . . . no cause of action may be brought . . ." (Eastwood's Initial Brief, p. 22, n. 2). It would appear, as a matter of law, there was no obstacle or legal hurdle to close on the Contract.

02, 2020 for $599,180.00, was resold on September 19, 2022 for $960,000.00. (R. pp. 831-834; R. pp. 863-867; R. pp. 872-876).

This subsequent sale is also evidence of the nature of injury sustained by Homebuyers. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Homebuyers have not merely suffered "delay" as Eastwood contends. Homebuyers have been robbed of the benefit of the bargain on the contracted new home purchases. A similarly situated home will now cost Homebuyers hundreds of thousands of dollars more than what Eastwood promised to build and sell the home for under the Contract. (R. pp. 657-658; R. pp. 802-8871; R. pp. 872-876).

Homebuyers contend Eastwood's motivation for breaching the Contract is clear - the company wanted more money for these homes than the already promised contract price. (R. p. 482, lines 2-12). Eastwood's refusal to honor the contract price when extending the right of first refusal in the "Mutual Release" and offering to re-contract at the new fair market price belies Eastwood's stated motivation. (R. pp. 796-798; R. p. 313, line 15 - R. pp. 315, line 23). However, these are issue for the finder of fact and not currently before the Court in this appeal.

III. The Master-in-Equity correctly ruled the Contract violates the public policy of South Carolina.

The Master-in-Equity found Paragraphs 25 and 26 "violative of public policy: 1) due to South Carolina's strong policy of protecting home buyers and 2) the fact that Paragraph 26, as interpreted and applied by Eastwood Homes, renders the [Contract] fundamentally illusory, one-sided, and oppressive beyond basic notions of good faith and fair dealing." (R. pp. 22-23, pp. 22-23). This Court should affirm.

South Carolina courts "will not enforce contracts that violate public policy." *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 760 (2022). A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability. Rather than focusing on the

relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. 17A Am. Jur. 2d Contracts § 238 (Supp. 2021) (citation omitted).

Public policy may be expressed in constitutional or statutory authority or in judicial decisions. *White v. J.M. Brown Amusement Co*., 601 S.E.2d 342, 345 (2004); *see also* 17A Am. Jur. 2d Contracts § 238 (2016) (explaining courts may consider, inter alia, the subject matter of the contract, the strength of the public policy, and the likelihood that refusal to enforce the challenged term in the contract will further public policy).

The Supreme Court of South Carolina recently reminded litigants that "South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers." *Damico v. Lennar Carolinas, LLC* 437 S.C. 596, 621, 879 S.E.2d at 760. If the Court rules as Eastwood suggests, it would enable sophisticated homebuilders to force residential homebuyers to contract away, through adhesion contracts, all consumer protections whatsoever in exchange for a pittance. Upholding the one-sided language in the Contract tips the scales of bargaining power farther in favor of the corporate builder who already enjoys vastly superior bargaining power.

Additionally, South Carolina recognizes the illusory coverage doctrine in the employment and insurance contexts – both areas of the economy similarly populated by boilerplate contracts and massively unequal bargaining power. *Small v. Springs Indus., Inc*., 357 S.E.2d 452 (1987); *Isle of Palms Pest Control Co. v. Monticello Ins. Co*., 459 S.E.2d 318, 321 (S.C. Ct. App. 1994) (recognizing the illusory coverage doctrine to protect insureds where the terms of the policy exclude from coverage "the very risk contemplated by the parties," rendering a policy provision "virtually meaningless.").

If Eastwood were allowed to terminate the Contract any time prior to closing for any reason in its "sole judgment" with the only consequence being a refund of Homebuyers' deposit and liquidated damages of $100.00, it would turn almost all consumer residential home purchase agreements into essentially illusory option contracts. The effect would be to green light illegal builder conduct. In response to any consumer objection, builders would be able to simply say, "You don't like it? Here's $100.00. Get lost." Which would also incentivize builders to further push what might be acceptable. If $100.00 is acceptable, would $50.00 be? Would $10.00? The everyday consumer can feel the difference between $10.00 and $100.00. But there is no meaningful difference to a home builder the size of Eastwood. It is merely nominal - *de minimus* - to a company of that size.

Given the strong policy of protecting home buyers, contractual language that renders the agreement illusory violates public policy and is unenforceable. The Master-In-Equity's finding that Paragraphs 25 and 26 violate public policy should be affirmed.

IV. The Master-in-Equity correctly exercised its discretion to strike the unconscionable language at issue in this Declaratory Judgment Action.

The Master-in-Equity found it "reasonable and appropriate to sever the unconscionable and violative public policy language of Paragraphs 25 and 26. Severing the offending provisions is fundamentally fair under these circumstances as it is necessary to ensure Plaintiffs' benefit of the bargain does not become a casualty of Eastwood Homes' oppressive and one-sided business practices. Severing these provisions works to put the parties on an equal footing." (R. p. 25).

"If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result." *Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 758 (2022). S.C. Code Ann. 36-2-302 (1) applies in the home purchase agreement context. *Id*. at 758; *Smith v.*

D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016); *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 370-71, 887 S.E.2d 534, 542 (Ct. App. 2022) ("Although the Arbitration Clause contains no severability clause, section 36-2-302 (1) allows this court to effectively sever the unconscionable provision.").

Section 36-2-302 (1) reads as follows:

> If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

At trial, Eastwood essentially conceded the Master-in-Equity possessed the authority to sever language in the Contract deemed unconscionable and violative of public policy by citing and relying upon the South Carolina Uniform Commercial Code. (R. pp. 274, lines 8-17). In its Brief, Eastwood lodges no challenge to the Master-in-Equity's ability to sever language in the Contract deemed unenforceable. For these reasons, this aspect of the Master-in-Equity's Order is the law of the case and binding on all parties.

The Court should further affirm the Master-in-Equity's severance of the unenforceable language in Paragraphs 25 and 26 because this preserves the Homebuyers' benefit of the bargain and puts the parties on fair and equal footing.

V. Any issue not raised in Eastwood's Statement of Issues on Appeal is not before this Court and is the law of the case.

The only questions properly before this Court are those raised in Eastwood's Statement of Issues on Appeal. Eastwood's failure to raise an issue in its initial brief constitutes abandonment of the issue on appeal. *Carolina Renewal, Inc. v. S.C. DOT*, 385 S.C. 550, 557, 684 S.E.2d 779, 783 (Ct. App. 2009) (citing *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating the failure to provide arguments or supporting authority for an issue renders it

abandoned) and *State v. Wakefield*, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996) (noting, to be considered on appeal, all issues must be argued by the appellant in its initial brief)).

Under the law of the case doctrine, "a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009). "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957).

At trial, the parties hotly contested the meaning of Paragraph 26. Eastwood and the Homebuyers each offered competing interpretations of Paragraph 26, specifically the meaning of the first sentence therein. The first sentence provides 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 the Seller at its sole option may terminate this Agreement by written notice to the Buyer prior to Closing.

The Master-In-Equity's Order summarizes the competing interpretations as follows:

> Plaintiffs view this language as requiring, at a minimum, a genuine ("bona fide") disagreement ("dispute") between the parties ("between the Buyer and Seller") over a material term of the contract that cannot be resolved with the buyer, despite Eastwood Homes' efforts. Eastwood Homes, on the other hand, interprets this language – and Paragraph 26 generally – as a termination-at-will clause wherein Eastwood has the exclusive, unfettered power to define the "dispute" and the exclusive, unfettered power to "terminate this Agreement" for any reason it wants or for no reason at all.

(R. pp. 7-8).

Homebuyers' arguments are grounded in Eastwood's witnesses' testimony on the meaning of Paragraph 26. Eastwood's general counsel, Allen Nason, drafted the Contract. He testified that a "bona fide dispute," which is not a defined term in the Agreement, does not mean its common

and normal meaning as a “disagreement.” Mr. Nason testified, **“**[t]here can be a dispute without a disagreement.” (Nason Dep. p. 80, lines 21-22). Mr. Nason informed Homebuyers, through their counsel, “[y]our opinion is irrelevant because it’s the seller’s sole judgment, so I don’t really care what your opinion is. It’s only my opinion that matters, period.” (R. p. 618, Nason Dep. p. 114, lines 21-24). Eastwood’s position is the company can define the terms of the Contract, including the word “dispute,” however it likes, regardless of the reasonableness of such definition or interpretation.

At trial, Eastwood’s Division President testified that, under Paragraph 26, Eastwood could unilaterally terminate the Agreement for any reason it wants. Mr. Matheney testified that Eastwood could unilaterally terminate the Agreement even if it simply wanted a higher sales price or if material costs increased after entering the Agreement. (R. p. 481, line 12 - R. p. 482, line 12; R. p. 505, lines 4-8).

On the other hand, Homebuyers testified they understood “bona fide dispute” differently than Eastwood. (R. p. 408, line 13 - R. p. 409, line 24; R. p. 410, line 22 - R. p. 411, line 1; R. p. 418, lines 3-7).

Based upon the testimony and review of the exhibits, the Master-in-Equity determined the first sentence of Paragraph 26 contains latent ambiguities.[6] (R. p. 13). The Master-In-Equity Order offers the following support:

[6] Under South Carolina law, where an agreement that is clear on its face and unambiguous, “the court’s only function is to interpret its lawful meaning and the intent of the parties as found within the agreement.” *Miles v. Miles*, 711 S.E.2d 880, 883 (2011). However, if the agreement is ambiguous, the Court’s duty is to “determine the intent of the parties.” *Id*. A court may do so by “examining extrinsic evidence.” *McKinney v. McKinney*, 261 S.E.2d 526, 527 (1980). “Even if an ambiguity exists in a contract, extrinsic evidence may not be considered if the ambiguity is a patent ambiguity.” *Beaufort Cnty. School Dist. v. United Nat. Ins. Co*., 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011). However, a latent ambiguity exists when “there is no defect arising on the face of the instrument but arising when attempting to apply the words of the instrument to the object or subject described.” *Smith v. Coxe*, 183 S.C. 509, 516, 191 S.E. 422, 425-26 (1937).

> In one part [of the Contract] it appears there must be a "bona fide dispute," but in another it appears that Eastwood Homes has the sole ability to determine if there is a "bona fide dispute" and how "dispute" should be defined. Applying this contract language, the "bona fide dispute" may not be bona fide at all. The ambiguity is highlighted by the "sole option" to terminate the Agreement. On the one hand, the provision appears to provide mutuality to the dispute resolution process by using the term "mutual satisfaction." However, only Eastwood Homes as the Seller has authority to terminate the Agreement. The Buyer has no authority to terminate if Buyer is not satisfied. I find the terms of the Agreement, in reality, lack **any** mutuality.
>
> …
>
> Plaintiffs aver they had no reason to believe Paragraph 26 would be read and applied by Eastwood Homes as a termination-at-will provision at the time the contracts were executed. Plaintiffs read the use of "bona fide dispute" and "mutual satisfaction" to place limits on Eastwood's authority to unilaterally terminate the contract and impose mutuality to the dispute resolution process. Plaintiffs contend the ability of Eastwood Homes to unilaterally terminate the agreement in its sole discretion was disguised in the wording of the Agreement. It is easy to see how Plaintiffs' reading of this language induced their acquiescence. In reality, it was cold comfort. Eastwood did not interpret its contract to impose any limitation on its ability to terminate and, in fact, did not apply <u>any mutuality</u> to the cancellation process in this case.
>
> Given the wording of Paragraph 26 and the different reasonable interpretations by the parties, the Court concludes it may consider extrinsic evidence to interpret the parties' true meaning. Accordingly, the Court may look to the testimony of Defendant's general counsel that drafted the Agreement and the division president that administered the Phase 4 contracts. In light of Eastwood Homes' own interpretation and application of the cancellation provision, the Court finds this provision to be unconscionable and violative of public policy because such interpretation would allow the residential home builder and developer to unilaterally cancel the [Contract] at any time before closing and without consequence and without any ability for Buyers to do the same. Eastwood's interpretation and application of the cancellation provision is one-sided and lacks any mutuality in its application. It essentially means that the Seller is not bound by any contractual terms, while the Buyer must comply with all contractual terms.

(R. pp. 13-15) (emphasis in original).

Eastwood's motion to reconsider argued the Master-In-Equity "inappropriately disregarded the clear language of the contract attempting to create an ambiguity that does not exist." (R. p. 175). The Master-in-Equity denied the motion to reconsider. (R. pp. 39-41).

Now, on appeal to this Court, Eastwood has for whatever reason decided to abandon its argument that Paragraph 26 is unambiguous and extrinsic evidence must be rejected. Eastwood's Brief is wholly silent on these issues. Therefore, Eastwood has accepted the Master-in-Equity's findings which are now the law of the case and binding on all parties. Put another way, for the purposes of this appeal Eastwood concedes Paragraph 26 is ambiguous and extrinsic evidence, to include Eastwood's witnesses' testimony, should be considered as to its meaning.

Homebuyers' unconscionability and public policy arguments include that Paragraph 26 is a *disguised* seller termination-at-will provision due to its ambiguity. *Gladden v. Boykin*, 402 S.C. 140, 739 S.E.2d 882 (S.C. 2013) ("were the terms obscured in any way or inconspicuous"). Paragraph 26 does not expressly state Eastwood can terminate the contract for any reason it wants and at any time it wants. Rather, it speaks to the need for a "bona fide dispute" and contemplates the parties making efforts to resolve the dispute to "mutual satisfaction." The contract's wording lulled Homebuyers into a false sense of security. The true meaning of Paragraph 26 is only seen through Eastwood's testimony and conduct that reveal it is a termination-at-will provision. Eastwood did not hide the provision in small type font or on the reverse side of a page. Instead, Eastwood hid the provision by using words that Homebuyers reasonably understood would have meaning, namely "bona fide" and "mutual satisfaction."

CONCLUSION

For the reasons stated herein, the Court should affirm the Master-in-Equity's detailed and well-reasoned order striking the language of Paragraphs 25 and 26 in the New Home Purchase Agreement between Eastwood and the Homebuyers as unconscionable and violating public policy.

Respectfully submitted,

s/Ross A. Appel
Ross A. Appel, Esq., SC Bar No.: 79149
McCULLOUGH KHAN APPEL
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

s/Michael T. Cooper
Michael Thomas Cooper, SC Bar No.: 100053
APOSTOLOU LAW FIRM
3443 Rivers Ave.
North Charleston, SC 29405
(843) 853-3637
michael@apostoloulaw.net

COUNSEL FOR RESPONDENTS

October 29. 2024
Charleston, South Carolina

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.

RESPONDENTS' CERTIFICATION FOR FINAL BRIEF

---

s/Ross A. Appel
Ross A. Appel, Esq., SC Bar No.: 79149
McCULLOUGH KHAN APPEL
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

s/Michael T. Cooper
Michael Thomas Cooper, SC Bar No.: 100053
APOSTOLOU LAW FIRM
3443 Rivers Ave.
North Charleston, SC 29405
(843) 853-3637
michael@apostoloulaw.net

COUNSEL FOR RESPONDENTS

We, Ross A. Appel and Michael T. Cooper do hereby certify that the **Final Brief of Respondents** complies with Rule 211(b), SCACR, and the Supreme Court's order of April 15, 2014.

Respectfully submitted,

s/Ross A. Appel
Ross A. Appel, Esq., SC Bar No.: 79149
McCULLOUGH KHAN APPEL
2036 eWall Street
Mount Pleasant, SC 29464
(843) 937-0400
(843) 937-0706 (fax)
ross@mklawsc.com

s/Michael T. Cooper
Michael Thomas Cooper, SC Bar No.: 100053
APOSTOLOU LAW FIRM
3443 Rivers Ave.
North Charleston, SC 29405
(843) 853-3637
michael@apostoloulaw.net

COUNSEL FOR RESPONDENTS

RECEIVED
Oct 29 2024
SC Court of Appeals

October 29, 2024
Charleston, South Carolina

RECEIVED
Oct 29 2024
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.

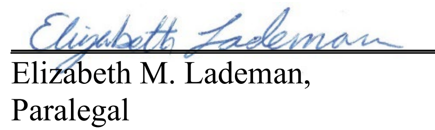
v.

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.

PROOF OF SERVICE

I, Elizabeth M. Lademan, paralegal at McCullough Khan Appel, hereby certify that I have served **Respondents' Final Brief and Certification for Final Brief** on all parties to this matter via email to their respective counsel of record, on this 29th day of October, 2024, containing the above-referenced documents as an attachment in .pdf, sent to the addresses shown below.

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



Elizabeth M. Lademan,
Paralegal

October 29, 2024
Charleston, South Carolina