THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
South Carolina Court of Appeals

Per Curiam, Court of Appeals

Appellate Case No. 2024-000369

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

v.

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

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rule 291 and 221(a) of the South Carolina Appellate Court Rules, Appellants 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 ("Eastwood" or "Appellants"), file this petition for rehearing and rehearing *en banc*. Eastwood respectfully submit that rehearing or issuance of a new opinion reversing the Panel's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended matters of facts and law. This matter is of importance as it involves the factors for consideration regarding unconscionability analysis.

In Unpublished Opinion No. 2025-UP-239 filed on July 16, 2025, a Panel of this Court affirmed in part and vacated in part the master-in-equity's ruling that two sections of Eastwood's

standard homebuilding contract were ambiguous and, when adopting Eastwood's interpretation, were unconscionable and against public policy. The Panel found that the master-in-equity erred in concluding that the ambiguous terms were against public policy because the master-in-equity failed to make a sufficient inquiry into the public policy analysis and rather came to its decision with conclusory sentences. However, the Panel found that the master-in-equity did not err in concluding that the terms were unconscionable. In this way, the Panel misapprehended matters of facts and law specifically determining that the contract's ambiguous terms were unconscionable by failing to adequately consider all of the factors of unconscionability.

DISCUSSION

I. THE PANEL MISAPPREHENDED THE FACTS AND LAW WHEN IT DETERMINED THE TERMINATION AND DAMAGES CLAUSES OF THE CONTRACT ARE UNCONSCIONABLE.

When interpreting a contract that can be interpreted in more than one way, the court should construe the contract in the most fair, reasonable, and just interpretation as opposed to embracing unusual or unfair interpretation. *See, Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). "[U]nconscionability is the absence of meaningful choice on the part of one party due to one-sided contract clauses together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Hardee v. Hardee*, 355 S.C. 385, 386, 585 S.E.2d 501, 505 (2003). Courts generally refer to the "absence of meaningful choice" as procedural unconscionability and "terms so oppressive that no reasonable person would make them" as substantive unconscionability. *See, Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 103, 472 S.E.2d 242, 245 (1996); 17A Am.Jur.2d Contracts § 272 (2016) (characterizing the two prongs as procedural and substantive unconscionability). These two factors need to be present and balanced, but they do not need to be equal. Courts balance the two factors as follows:

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

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

The Panel's Order does not adequately address all factors necessary for a finding of unconscionability which include all facts and circumstances of the case. *See, Holler*, 36 S.C. at 269, 612 S.E.2d at 476 ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." *quoting* 17A Am.Jur.2d Contracts § 279 (2004)). The Supreme Court has "emphasize[d] the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Damico*, 437 S.C. at 607, 879 S.E.2d at 754 (*quoting Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 36, 644 S.E.2d 663, 674 (2007)).

A. The Panel Misapprehended the Facts and Law When it Determined the Contract was Procedurally Unconscionable.

In concluding that the contract was procedurally unconscionable, the Panel misapprehended the facts and law by determining there was an element of surprise creating a lack of meaningful choice by elevating hypothetical facts over the actual facts of the case.[1] Additionally, the Panel misapprehended the facts and law by failing to consider all of the facts and circumstances of the formation and execution of the agreement in determining that Eastwood took advantage of the homeowners such that the homeowners had no meaningful choice.

[1] The Court failed to consider the real estate licensure and attorney ethics rules which provide that dishonest dealing up to and including fraudulent dealing constitute violations of real estate and lawyer licensure and ethics rules. Appellants were not able to sell the subject houses because the legal error involving phase 4 of the subdivision meant the marketing and sales materials and contracts (which advertised and contracted that phase 4 was legally annexed into the existing declaration of covenants were false. Thus, every contract would create individual liability for every homeowner to pay to privately maintain roads and infrastructure and to privately take on all risks of liability, insurance, and regulatory compliance (i.e. road and infrastructure maintenance, storm water, ordinance compliance) because phase 4 was not annexed, by supplemental declaration, into the Swygert's Landing Phases 1, 2 and 3 declaration of covenants. This legal issue was actual and is undisputed as the reason for the termination, not hypothetical nonexistent facts.

In determining whether an absence of choice is meaningful, courts consider, among all facts and circumstances, "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson,* 373 S.C. at 21, 644 S.E.2d at 666. Additional factors to consider include the following:

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

17A Am.Jur.2d *Contracts* § 272 (cited with approval in *Damico,* 437 S.C. at 611*,* 879 S.E.2d at 755.)

1. The Panel misapprehended the facts and law when it determined there was an element of surprise in the application of the termination clause preventing the Plaintiffs from having a meaningful choice.

The Panel discusses a possible element of surprise in how the ambiguous terms in the termination clause are to be applied in determining that the contract was procedurally unconscionable. This is an improper application of the element of surprise factor. The Panel improperly relied on Eastwood's 30(b)(6) deposition testimony that Eastwood could hypothetically terminate the sales contract unilaterally instead of the actual fact that Eastwood cancelled the contracts because of unrecorded covenants impeding the ultimate sale of the homes. The court in both *Holler* and *Damico* emphasizes the importance of looking at the facts and circumstances of the particular case in order to ensure a case-by-case analysis. Instead, the Panel relied on imaginary circumstances that did not occur to find the provisions unconscionable.

The application of the clause under the actual facts shows that it is not unconscionable. The Panel determined that the contract contained a termination-at-will clause thus it was "plainly 'one-

sided"' because the Panel improperly relied upon the cross-examination testimony of Eastwood's 30(b)(6) witness regarding situations under which Eastwood could cancel the contract. *Dawkins, et al. v. Eastwood Homes of Columbia, LLC d/b/a Eastwood Homes, et al.*, 2025 WL 1949798, 3 (S.C. Ct. App. July, 16, 2025). By doing so, the Panel took into account hypothetical scenarios put forth by the Plaintiffs in their brief, including if Eastwood wanted to renegotiate a higher price on the homes. Instead, the Panel should consider the actual cancellation that occurred which relied upon an error in recording the plat for Phase 4 of the neighborhood.

Eastwood is a residential homebuilder that purchased Phase 4 of a previous development with the intention of entering into contracts to build homes. Eastwood's divisional president for Charleston, South Carolina, Dion Matheney, testified that the Swygert's Landing development was set up in six phases by the original developer CAM Management. (R. p. 510, l. 23 – p. 511, l. 9). Originally, Eastwood only bought lots in the neighborhood, built houses and sold them. (R. p. 511, ll. 11-15). After developing phases one, two and three, CAM Management stopped the development and sold phase four directly to Eastwood. (R. p. 511, l. 16 – p. 512, l. 2). So, Eastwood bought phase four as an undeveloped tract from CAM Management, the original developer, after phases one, two and three were complete. (R. p. 512, ll. 9-13). CAM Management did not record declarations and covenants on phase four as it had done on phases one, two and three (R. p. 512, l. 23 - p. 513, l. 2; p. 513, ll. 11-15), though Eastwood did not know this at the time. Eastwood cleared the land and built roads for the neighborhood. (R. p. 513, ll. 20-23). It then began building and selling homes. (R. p. 513, l. 24 – p. 514, l. 4).

After building and selling homes in the neighborhood, Eastwood learned that the covenants and restrictions were not recorded. (R. p. 514, l. 5 – p. 515, l. 2). This put the neighborhood in violation of zoning ordinances and kept it from being incorporated into phases one, two and three with the accompanying amenities. (R. pp. 514-515). The neighborhood was not part of the homeowners

association for phases one, two and three. (R. p. 515, ll. 10-16). Any home sold in phase four did not have access to the neighborhood amenities. (R. p. 516, ll. 7-10). Also, there was no mechanism for managing and maintaining the roads, ponds, and community areas in the neighborhood. (R. p. 516, l. 11 – p. 517, l. 3). Eastwood determined that it could not complete or sell the houses without correcting the problem with the covenants. This led to the current dispute which Mr. Matheney described as: "[T]he defendants wanted us to sell them the house. We could not at that time sell them the house…." (R. p. 486, ll. 16-18). Eastwood has not constructed or sold homes in phase four since discovering the problems with the covenants. (R. p. 520, ll. 16-22). And, the Plaintiffs have placed Lis Pendens on the lots and partially completed homes. Eastwood has not sold any homes in this neighborhood since it discovered the problem with the covenants. (*Id.*).

The Plaintiffs refer to Paragraph 25 of the contract as a termination-at-will clause of the contract arguing that Eastwood could terminate the contract at any point for any reason or no reason at all. Paragraph 25 does not indicate that it is a termination-at-will provision. The Panel should not rely upon hypothetical situations in which Eastwood might have terminated the contracts. Instead, the Panel should rely upon why Eastwood actually terminated the contracts to determine unconscionability. Eastwood canceled the contracts because the covenants on the homes to be built were not recorded properly, meaning the Plaintiffs would not have been part of the HOA, and would not have access to the amenities or the community areas of the neighborhood. Eastwood did not cancel these contracts because of an increase in lumber prices, a desire to renegotiate a higher price, or no reason at all as argued by the Plaintiffs, and there is no evidence in the record to support these imaginary arguments the Panel relied upon. Eastwood cancelled the contracts to ensure the homes purchased were in compliance with zoning ordinances and the Plaintiffs have no evidence supporting their imaginary hypotheticals.

If Eastwood continued to build the homes as demanded by the Plaintiffs and sold the homes as demanded by the Plaintiffs, it would be sued after the sale for failing to provide the Plaintiffs with access to the neighborhood. Eastwood had to decide to cancel the contracts in accordance with their terms as agreed to by the Plaintiffs, or continue to build and risk later litigation for a problem with the covenants of which it was aware.

The Plaintiffs were not surprised by the terms of the contract. They knowingly signed the contract after reviewing the terms which Eastwood followed when canceling the contracts.

2. The Panel misapprehended the facts and law when it determined the Plaintiffs' sophistication is not on the same level of as Eastwood's preventing the Plaintiffs from having a meaningful choice.

First, the Panel reads *Damico* to say despite the Plaintiffs' intelligence, education and sophistication, they are not "on equal playing field with a large homebuilder like Eastwood, specifically in the context of a home purchase and especially when presented with a 'take-it-or-leave-it,' nonnegotiable, form contract." *Dawkins, et al.*, 2025 WL 1949798, 3. This reading of *Damico* is improper because it fails to take a case-by-case approach in analyzing the factors of unconscionability as emphasized in the same opinion. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755. *Damico* does not say that all contracts of adhesion are unconscionable between homebuilders and new purchasers; rather, a contract of adhesion is one factor. *Id.* It does not end the analysis into unconscionability. *Id.*

Here, when reviewing all of the facts of the case, the contract was not procedurally unconscionable. The Panel primarily addresses the intelligence of the Plaintiffs and determines their intelligence and sophistication is not at the same level as the Eastwood, thereby ignoring key facts in the record that show the high level of intelligence and sophistication of the Plaintiffs not just in their personal life, but in the process of signing the contract at issue. Testimony from Ms. Franquelin and Ms. O'Grady establish themselves and their spouses as highly intelligent, highly capable individuals

who understood the terms at issue, signed the contracts anyway, and now wish to change the terms they agreed upon.

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

Ms. Franquelin read the agreement with Eastwood before she signed it, and she reviewed it with her real estate agent. (R. p. 347, ll. 20-25). She was concerned about the contract, and she called a lawyer regarding it. (R. p. 348, ll. 1-3). She read the paragraphs she now wishes to strike before she signed the contract, and she was very concerned about these paragraphs. (R. p. 350, ll. 10-12). She did not like the terms and asked to change them, but Eastwood would not agree to do so. (R. p. 350, ll. 13-18). Before she signed the contract, she knew that if Eastwood cancelled before closing, her remedy was a return of her deposit plus $100. (R. p. 353, l. 25 – p. 326, l. 3). She particularly asked to change this clause, but Eastwood would not agree to do so. (R. p. 350, ll. 13-18). So, she agreed to the contract knowing what it said. (R. p. 350, ll. 10-12). Ms. Franquelin "knew that there could be a possibility that they [Eastwood] could terminate the contract." (R. p. 355, ll. 20-21). Ms. Franquelin testified she knew the risk the contract could be terminated and that she understood the contract. (R. p. 362, ll. 5-8; p. 364, ll. 15-21).

Ms. O'Grady is a certified public accountant working as a controller at a private equity firm. (R. p. 420, ll. 16-19; p. 422, ll. 4-6). She manages compliance with the Securities and Exchange

Commission for the company. (R. p. 421, ll. 8-9; p. 423, l. 21 - p. 424, l. 7). Not only is she highly educated, but her husband, Dan O'Grady, who is a professional property manager, also read the contract. (R. p. 432, ll. 19-24). Ms. O'Grady's husband manages between five and fifteen apartment complexes for a realty investment firm. (R. p. 424, l. 25 – p. 425, l. 7). Ms. O'Grady's pay is roughly $330,000 per year, and their combined income is over half a million dollars per year. (R. p. 426, ll. 6-11).

Before entering the agreement with Eastwood, the O'Gradys reviewed three different communities and up to a dozen other homes. (R. p. 427, ll. 9-24). They hired a real estate agent to help them find and purchase a home. (R. p. 428, ll. 8-20). Ms. O'Grady read the entire contract and reviewed it with her real estate agent. (R. p. 432, ll. 11-18). Ms. O'Grady read paragraph 26, and asked in particular about it before signing the agreement. (R. p. 433, l. 19 – p. 434, l. 2). She read paragraph 26, she was concerned about it, she asked to change it, and she was told no. Nevertheless, she signed the agreement, and she believes this was a reasonable decision. (R. p. 440, ll. 7-25). Ms. O'Grady reviewed the section of the agreement limiting her damages in the event of termination. (R. p. 441, ll. 17-20). She understood her remedies were limited at the time she signed the agreement. She did not like this clause, but she signed the contract nonetheless. (R. p. 442, ll. 9-19).

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

continue, placed a deposit, and acknowledged that if the contract was canceled she would only receive her deposit back and $100.

Ms. O'Grady's husband's involvement in property management puts her at a unique advantage to not only have knowledge of contracts in general due to her job, but also contracts relating to purchasing and managing a piece of property. Both she and her husband reviewed the contract with their real estate agent. Like Ms. Franquelin, Ms. O'Grady attempted to negotiate the section at issue, but, after being told she could not, she agreed to the terms with no high pressure sales tactics nor time pressure. When looking at the totality of the circumstances and facts, these Plaintiffs are highly sophisticated and were not without meaningful choice in signing this contract.

B. The Panel Misapprehended the Facts and Law When it Determined the Contract was Substantively Unconscionable.

In concluding that the contract was substantively unconscionable, the Panel misapprehended the facts and the law by determining that the contract's termination clause was so unfair no reasonable person would have agreed to the terms. Additionally, the Panel misapprehended the facts and the law when it determined the remedy clause was so unfair no reasonable person would have agreed to its terms.

Substantive unconscionability refers to oppressive and unreasonable terms so unfair that no reasonable person would agree to them and no reasonable person would attempt to enforce them. *Simpson*, 373 S.C. 14, 644 S.E.2d 663 (2007). In particular, when considering a challenge to a contract by a party who knowingly entered it:

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

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

1. The Panel misapprehended the facts and law when it determined the termination clause was so oppressive and unreasonable that no reasonable person would agree to it.

The Panel indicates that the termination clause is substantively unconscionable because the Plaintiffs had a "different understanding of how and when that clause would be applied." *Dawkins, et al.*, 2025 WL 1949798, 3. The Plaintiffs signed the contracts fully aware of the clauses and their meaning having consulted a lawyer and real estate agents. The clauses are not obscured in any way. They are in the same print format as the remainder of the purchase agreement. In fact, both Ms. Franquelin and Ms. Grigoleit testified that they read both the limitation of consequential damages clause and the termination clause and understood their meanings. Both women indicated they discussed these terms with their real estate agents. Thus, they not only read the clauses, they understood the clauses, they did not like the clauses, and they consented to the clauses anyway. The Panel's determination that the terms are plainly one-sided is based on its reliance on hypothetical scenarios put to Eastwood's 30(b)(6) witness instead of the actual facts of this case. Viewed in its totality, the contract is not substantively unconscionable because the termination clause was reviewed by highly sophisticated individuals who were aware of the clauses and the possible application of the clauses.

2. The Panel misapprehended the facts and law when it determined the remedy clause was oppressive and unreasonable that no reasonable person would agree to it.

The Panel held that the damages clause is substantively unconscionable because the Plaintiffs could not "pursue any claims against it and could only receive a refund." *Dawkins, et al.*, 2025 WL 1949798, 4. This does not make the terms so oppressive and unreasonable that no reasonable person would agree to them. This is largely because Eastwood bears all of the risk of potential loss before closing. Eastwood invests approximately $500,000 in building each home before closing. (R. p. 525, ll. 1-4). And Eastwood assumed the entire risk of damage to the home or other unforeseen

circumstances regarding the construction of the home. (R. p. 523, ll. 12-13). On the other hand, Plaintiffs deposited between ten and fifteen thousand dollars. They undertook no risk of loss or further investment in the home before closing. Their entire deposit has been offered back to them placing them back in the status quo before the agreement. This means that if there was damage to the property prior to closing, it was Eastwood, not the Plaintiffs, which has to pay for repairs or damage.

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

II. THE PANEL ERRED IN FINDING THAT THE CONTRACT WAS TERMINABLE-AT-WILL BY EASTWOOD AND THUS UNCONSCIONABLE.

Paragraph 25 of the contract allows Eastwood to terminate the sale if prior to closing "a bona fide dispute should arise between the Buyer and Seller, in Seller's [Eastwood's] sole judgment." (R. pp. 657-658; 730-731). The Master-in-Equity relied upon this language and the cross-examination of Eastwood's 30(b)(6) witness to find that the clause is a terminate-at-will clause such that it is unconscionable. This finding is at odds with the rule that contracts are construed in favor of enforceability and against the drafter. *See, Portrait Homes-South Carolina, LLC v. Pennsylvania National*, 442 S.C. 515, 580, 900 S.E.2d 245, 281 (Ct.App. 2024). Instead, the Master construed the contract in the most extreme fashion in favor of the drafter to support his conclusion that the provision is unconscionable. The Panel concluded that it would not revisit this finding because "neither party challenged the master's "decision." *Dawkins, et. al*, 2025 WL 1949798, 1. The Panel further decided "neither party challenged the master's finding that paragraph 26 was ambiguous or the master's adoption of Eastwood's interpretation." *Id.*, 2. The Panel acknowledged that "unconscionability is a

fact-specific inquiry that must be decided on a case-by-case basis." *Id.* However, it concluded that Eastwood's reasoning behind canceling the contracts was not relevant to the analysis. *Id.*, 1. In fact, Eastwood did challenge the master's reliance on imaginary situations. For the Court's convenience, Eastwood directly quotes its reply brief which challenged these arguments as follows:

> **II. THE RESPONDENTS' RELIANCE ON TESTIMONY FROM DION MATHENEY AND ALLEN NASON REGARDING IMAGINARY SITUATIONS IS IN ERROR.**
>
> The Respondents repeatedly reference testimony from Eastwood's divisional president Dion Matheney and its general counsel Allen Nason to support their contention that the contract is unconscionable and in violation of public policy. The testimony referenced throughout the Respondents' brief is responses to counsel's cross examination and deposition questions regarding hypothetical questions of when Eastwood might or might not cancel a contract. For instance, this hypothetical argument occurred at page twenty-one of Respondents' brief: "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. " (Respondents' Brief, p. 21). This imaginary scenario created by counsel did not happen and has not happened. As a result, it is not relevant as to whether the Purchase Agreement the Respondents voluntarily and knowingly signed is unconscionable. None of this testimony or Respondents' summary of testimony is relevant to the question of whether the contract is unconscionable. "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, 269-270 (Ct. App. 2001) (Citing Restatement (Second) of Contracts § 208 (1981)). Thus, Respondents' counsel's imaginary arguments and speculation about what may or may not happen with these contracts is improper.

Eastwood Reply Brief, pp. 2-3.

Furthermore, Eastwood's initial brief argued that the court should apply the language of the contract itself rather than imaginary scenarios citing relevant law as follows:

> Thus, "[w]here the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." *Id.* at 230, 420 S.E.2d at 707. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Butler v. Travelers Home and Marine Ins.,* 433 S.C. 360, 366, 858 S.E.2d 407, 410 (2021).

Eastwood Initial Brief, p. 11.

Eastwood also argued that its cancellation of the contract in this case relied on the problem of the unrecorded covenants and was not a termination-at-will as follows:

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

Eastwood Initial Brief, p. 17.

As a result, Eastwood appealed the master's finding of unconscionability as he relied on a terminable-at-will clause, and the Panel erred in finding the master's findings to be the law of the case.

Eastwood raised the master's reliance on imaginary scenarios and his subsequent finding of unconscionability on that basis. And, the Panel incorrectly ruled otherwise. The Court should rely on the actual facts of the transaction – not imaginary scenarios that did not occur – in ruling on unconscionability. As a result, the Panel erred in affirming the master's ruling that the contract provision was unconscionable as a terminable-at-will clause as this is not what occurred, and Eastwood challenged this ruling in its brief.

CONCLUSION

This Court should grant rehearing or rehearing *en banc* in this matter because:

1. The Panel misapprehended the facts and law when it determined there was an element of surprise in the application of the termination clause preventing the Plaintiffs from having a meaningful choice;

2. The Panel misapprehended the facts and law when it determined Eastwood's contract prevented the Respondents from having a meaningful choice;

3. The Panel misapprehended the facts and law when it determined the termination clause was oppressive and unreasonable that no reasonable person would agree to it;

4. The Panel misapprehended the facts and law when it determined the remedy clause was oppressive and unreasonable that no reasonable person would agree to it; and

5. The Panel improperly determined that Eastwood failed to contest the master's finding of unconscionability based upon imaginary scenarios.

Respectfully submitted,

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August 27, 2025
West Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
South Carolina Court of Appeals

Per Curiam, Court of Appeals

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d/b/a Eastwood Homes, and Eastwood Construction, LLC, ... Appellants.

PROOF OF SERVICE

I, Lynn G. Ivey, an employee of the Moore Bradley Myers Law Firm, P.A., certify that I have served the Appellants' Petition for Rehearing and Rehearing *En Banc* by transmitting a copy of the same on August 27, 2025, via email addressed to their attorneys of record as follows:

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C. David Sawyer, Jr.‡
Billy C. Coleman (1916-2019)
Stanley L. Myers†◆ (1976-2023)
Robert D. Hazel‡ (1936-2024)

August 27, 2025

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211
Via Email and US Mail

Re: 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, and Patrick K. Daly and Brenda Daly
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
Appellate Case No. 2024-000369

Dear Ms. Kitchings:

I hope you are well. Appellants have filed by email this date a petition for rehearing and rehearing en banc with proof of service. Our firm check is enclosed under cover of this letter for the motion fee.

Please contact our office with any questions or concerns. Thank you for your assistance with these filings.

Sincerely,

Lynn G. Ivey
Assistant to James Edward Bradley

Enclosure
cc: Allen Nason (via email)
Ross A. Appel, Esquire (via email)
Jamie A. Khan, Esquire (via email)
Michael T. Cooper, Esquire (via email)