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S.C. SUPREME COURT

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' RETURN TO APPELLANTS'
PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

The Petition for Writ of Certiorari filed by Eastwood Homes of Columbia, LLC, *et al.* (hereinafter “Eastwood”) should be denied.

The sole issue before the lower courts was the enforceability of Paragraph 26 (Seller Option to Cancel Prior to Closing) and a portion of Paragraph 25 (Buyer in Default; Seller Remedies) in Eastwood’s (a national residential homebuilder) standard New Home Purchase Agreement (the “Agreement”).¹ The Court of Appeals carefully reviewed these paragraphs, *which Eastwood has conceded are ambiguous*, and affirmed, in an unpublished opinion, the Master-in-Equity’s holding that they are both procedurally and substantively unconscionable. Eastwood chose not to appeal the Master-in-Equity’s finding that Paragraph 26 contained latent ambiguities; therefore, that issue is the law of the case and the lower courts properly considered extrinsic evidence, including Eastwood’s own testimony, to establish its meaning. Eastwood’s testimony supports the lower courts’ rulings on unconscionability.

Allen Nason, Eastwood’s Vice President and General Counsel, was asked about the meaning of the undefined term “dispute,” as it appears in Paragraph 26. He testified “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). When asked whether homebuyers have any say in the matter, he responded, “[i]t 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, “[y]our opinion is irrelevant because it’s

¹ Eastwood has consistently attempted to smuggle irrelevant matters into this appeal. Eastwood’s purported rationale for *why* it terminated its Agreements with the Homebuyers was never before the Master-in-Equity or Court of Appeals. In any event, Eastwood’s purported rationale is hotly contested by the Homebuyers as both pretextual and imaginary. As discussed further herein, given the unique procedural posture of this case, the sole issue before the Master-in-Equity and Court of Appeals was the enforceability of Paragraphs 25 and 26 of the Agreement. Therefore, this Court should reject Eastwood’s attempt to litigate these extraneous, irrelevant, and contested matters.

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).

Dion Matheny, Eastwood's Charleston Division President, testified Paragraph 26 gives Eastwood the ability to terminate for any reason, including Eastwood deciding it does not like the agreed price and wishes to find a new buyer at a higher price. (R. p. 481, line 12 - R. p. 482, line 12; R. p. 505, lines 4-8). He confirmed Eastwood could terminate any time the company wants prior to closing, and Eastwood has no obligation to provide any explanation to the homebuyer. (R. p. 490, lines 5-20; R. p. 492, lines 6-13). When Eastwood terminates, 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). However, if the homebuyer terminates, Eastwood would be authorized to keep the earnest money deposits and "go after them for damages." (R. p. 493, lines 5-16). Finally, Mr. Matheny confirmed Eastwood possessed all the bargaining power as it relates to all interactions with the homebuyers. (R. p. 506, line 19 - R. p. 507, line 5).

The Court of Appeals agreed with the Master-in-Equity's finding that Paragraph 26 is "plainly 'one-sided'" because it is a disguised termination-at-will provision exercisable only by Eastwood at any time and for any reason – no questions asked.² That, coupled with the severe

² The "disguised" nature of Paragraph 26 is highlighted by the following excerpt from the Master-in-Equity's order:

In one part [of the Agreement] 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.

...

limitation on homebuyer remedies to a refund of the buyer’s deposit and liquidated damages of \$100, fosters “complete asymmetry” in favor of Eastwood.

Eastwood’s Petition in no way calls into question the lower courts’ sound application of unconscionability law in the special context of a consumer home purchase agreement. Moreover, it fails to establish any of the considerations justifying this Court’s review set forth in Rule 242, SCACR. For the reasons set forth below, this Court should deny the Petition.

COUNTER-STATEMENT OF THE CASE

These consolidated cases involve identical claims by Respondents, nine separate families and homebuyers, (the “Homebuyers”) against Eastwood.³ Homebuyers contend Eastwood breached their respective Agreement by abruptly and unilaterally terminating without any forewarning or good faith attempt at resolution. (R. pp. 75-130).

The Homebuyers filed nine separate lawsuits along with *lis pendens* on or about June 17, 2021. (R. pp. 75-134). Each lawsuit alleges causes of action for Declaratory Judgment, Specific

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 any mutuality to the cancellation process in this case.

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

³ 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).

Performance of Contract, Breach of Contract, South Carolina Unfair Trade Practices Act, and Breach of Contract Accompanied by Fraudulent Act. (R. pp. 75-130).

On August 6, 2021, Eastwood answered the Homebuyers' lawsuits and asserted identical counterclaims. (R. pp. 57-74). Eastwood denied any breach of contract, claiming Paragraph 26 of the Agreement provides Eastwood the unquestioned right to terminate at will and for any reason in Eastwood's "sole judgment" and Paragraphs 25 and 26 limit Homebuyers' remedy to a return of their deposit and one hundred dollars in liquidated damages. (*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 replied 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 Agreement. (R. pp. 190-191). On February 2, 2022, a hearing was held before the Honorable R. Markley Dennis, Jr. (R. pp. 32-38). Judge Dennis' order provides as follows:

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 SCRCF. (R. pp. 28-31).

On May 24-25, 2023, the Master-in-Equity held a trial on the unconscionability, public policy, and enforceability of Paragraphs 25 and 26. On December 19, 2023, the Master-in-Equity issued its written order. (R. pp. 1-27). The Master-in-Equity held Paragraphs 25 and 26 were unconscionable, violative of public policy, and severable and remanded Homebuyers' cases to circuit court for further proceedings. (*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 same. (R. pp. 39-41).

On March 7, 2024, Eastwood filed and served its Notice of Appeal. On May 14, 2025, the Court of Appeals heard oral argument. On July 16, 2025, the Court of Appeals issued Unpublished Opinion No. 2025-UP-239, affirming the Master-in-Equity's findings on unconscionability and vacating his ruling on public policy.

The Court of Appeals observed Eastwood failed to appeal the Master-in-Equity's ruling that Paragraph 26 contained latent ambiguities, thus making that critical interpretive issue the law of the case. Considering this conceded ambiguity, the Court of Appeals properly considered Eastwood's General Counsel's and Division President's testimony on the meaning of Paragraph 26, which reveals their understanding that Eastwood can terminate at any time and for any reason of its choosing (including Eastwood simply deciding to recontract with another buyer for a higher price) without any input from the Homebuyers. Based this striking interpretation, the Court of Appeals concluded Paragraph 26 is "plainly 'one-sided'" and creates "complete asymmetry" in favor of Eastwood and against the Homebuyers. Since Paragraphs 25 and 26 severely restrict the Homebuyers' remedies to a return of their deposit and one hundred dollars in liquidated damages,

thus rendering the Agreement essentially illusory, the Court of Appeals “affirm[ed] the finding that paragraph 26 and the final sentence of the first paragraph of paragraph 25 are unconscionable.”

COUNTER-STATEMENT OF THE FACTS

Nature and Relationship of Parties

The Homebuyers each executed an Agreement, which was 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). Eastwood is a sophisticated, national residential home builder operating in Virginia, North Carolina, South Carolina, and Georgia. (R. p. 461, lines 9-16).

The Agreement is Eastwood’s standard home purchase agreement. (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 Agreement. *Id.* Homebuyers are prohibited from negotiating or changing any of the boilerplate language in the Agreement. (R. p. 269, lines 1-11; R. p. 470, lines 1-24). The Agreement 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). Eastwood admits it holds all 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

According to Eastwood, Paragraphs 25 and 26 provide it the exclusive, unquestioned right to terminate the Agreement for any reason and at any time with the buyer’s sole remedy being a return of their deposit and a check for one hundred dollars. (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; R. p. 613, Nason Dep. p. 93, line 11 - R. p. 613, Nason Dep. p. 94, line 19).

Paragraph 25, titled “Buyer in Default; Seller Remedies,” severely limits the Homebuyers’ remedies as follows: “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). However, Eastwood enjoys a full array of remedies should the Homebuyers breach: “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 26 is titled “Seller Option to Cancel Prior to Closing.” (R. p. 658). Paragraph 26 provides: “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 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 have competing interpretations of Paragraph 26. Eastwood reads it to give the company the power to terminate at any time and for any reason. (R. p. 490, lines 5-20; R. p. 492, lines 6-13). According to Mr. Nason, he drafted Paragraph 26 so Eastwood

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 (i.e. “bona fide”) dispute with Eastwood, which cannot be resolved despite the parties’ good faith efforts. (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 Agreement to require a dispute resolution *process*. *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 Agreement. (R. p. 312, line 20 - R. p. 314, line 3). Eastwood subsequently emailed the Homebuyers a document titled “Mutual Release” purporting to terminate each Agreement. (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 Agreement 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). Eastwood, however, ignored this overture from the Homebuyers, claiming the contracts had been terminated. (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).

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.⁴ In addition, Homebuyers, without objection from Eastwood, presented the testimony of Allen Nason through his deposition transcript, pursuant to Rule 32(a), SCRPC.

Patricia Franquelin⁵

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,

⁴ 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 Agreement.

⁵ Tragically, Patricia Franquelin passed away during the pendency of this appeal. Her husband Marcel, a cancer survivor himself, continues on.

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). Mrs. Franquelin had no bargaining power with Eastwood. (R. p. 307, lines 14-22).

Kaitlyn Grigoleit O’Grady

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). 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 Agreement, 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)

Dion Matheney is the Division President for Eastwood in Charleston, South Carolina. (R. p. 460, line 7 - R. p. 461, line 5). Mr. Matheney testified the Agreement 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 Agreement 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 Agreement gives Eastwood the ability to terminate 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 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 (Eastwood's Vice President and General Counsel)

Homebuyers presented, without objection from Eastwood, the testimony of Mr. Nason via deposition transcript pursuant to Rule 32(a), SCRPC. (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 Agreement. (R. p. 606, Nason Dep. p. 67, lines 2-9).

Mr. Nason testified Eastwood relied upon Paragraphs 25 and 26 when unilaterally terminating the Agreements. (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 Agreement, 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).

LEGAL STANDARD

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).

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

I. Eastwood conceded Paragraph 26 contained a latent ambiguity, therefore the lower courts properly considered Eastwood witness testimony as to its meaning.

Eastwood mischaracterizes its own witnesses' testimony concerning the meaning of Paragraph 26 as "hypothetical scenarios" that, for some reason, neither the Master-in-Equity nor the Court of Appeals should have considered when ruling on unconscionability. This argument is fundamentally misplaced. The lower courts properly considered this testimony to ascertain the meaning of Paragraph 26 – language Eastwood concedes is ambiguous.

At trial, the parties offered materially different interpretations of Paragraph 26. As a result, the Master-in-Equity found Paragraph 26 contained latent ambiguities.⁶ Eastwood chose not to appeal this finding to the Court of Appeals. Therefore, the Court of Appeals correctly found the ambiguity of Paragraph 26, a question of law, to be the law of the case. *Callawassie Island*

⁶ At trial, the parties hotly contested the meaning of Paragraph 26. Eastwood and the Homebuyers offered competing interpretations, specifically the meaning of the first sentence, which reads 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).

Members Club, Inc. v. Dennis, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) (whether contract language is ambiguous is a question of law).

As the Court of Appeals correctly noted, “neither party challenged the master’s finding that paragraph 26 was ambiguous or the master’s adoption of Eastwood’s interpretation of that provision.” As such, the Court of Appeals “must conduct our unconscionability analysis under that interpretation,” citing *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) (explaining, “right or wrong,” an unchallenged ruling is the law of the case and will not be disturbed on appeal). Therefore, the Court of Appeals properly considered the testimony of Eastwood’s Vice President (Mr. Nason) and General Counsel and Division President (Mr. Matheney) to ascertain the meaning of Paragraph 26.

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).

Since Eastwood conceded Paragraph 26 contained latent ambiguities, the Court of Appeals properly considered Eastwood witness testimony, as extrinsic evidence, to ascertain the meaning of Paragraph 26. It was not, as Eastwood maintains, the improper consideration of “hypothetical scenarios.” It was necessary to ascertain the meaning of disputed contractual language, which must be construed strongly against the non-drafting party (here, of course, Eastwood). *S. Atl. Fin. Servs., Inc. v. Middleton*, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003).

II. The Court of Appeals correctly affirmed the Master-in-Equity’s ruling on procedural unconscionability.

“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).

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. This Court in *Damico* observed as follows:

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 its Petition, Eastwood advances the same procedural unconscionability arguments soundly rejected by the Master-in-Equity and the Court of Appeals. Yet again, Eastwood makes

the remarkable claim that a national homebuilder 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*. This argument completely ignores 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. Certainly, 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, the Court of Appeals issued its opinion in *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 908 S.E.2d 892 (Ct. App. 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 532-33, 908 S.E.2d at 898 (internal citation omitted). Under *Damico* and *315 Corley CW, LLC*, no amount of education, wealth, or other circumstances on the consumer’s part tips the balance away from procedural unconscionability 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). 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).

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). Eastwood’s Division President, Mr. 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 Agreement 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).

Eastwood has pointed to no error of law or other compelling factor for this Court to reconsider the lower court rulings on procedural unconscionability. When the Agreements 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. Therefore, both the Court of Appeals and the Master-in-Equity properly applied the facts to the law on the question of procedural unconscionability.

III. The Court of Appeals correctly affirmed the Master-in-Equity’s ruling on substantive unconscionability.

a. The disguised termination-at-will provision in Paragraph 26 is one-sided and oppressive.

In *Damico v. Lennar Carolinas, LLC*, this Court found the following language substantively unconscionable: “[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.

The Court of Appeals 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” 444 S.C. at 533, 908 S.E.2d at 898. 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,” the Court of Appeals 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 534, 908 S.E.2d at 899.

Paragraph 26 as drafted, interpreted, and applied under the facts of this case by Eastwood allows the company to unilaterally terminate 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 brazenly admit 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 Agreement 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).

However, the right to terminate-at-will for any reason and at any time is not mutual. The Agreement does not allow Homebuyers terminate at any time it wants and for any reason. (R. pp. 650-722). This incredible power asymmetry belongs to Eastwood only. *Id.* If the Homebuyers were to unilaterally terminate, Eastwood could sue for any legal or equitable theory, including specific performance. There is simply 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 Agreement 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. Mr. Nason testified: “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, according to Eastwood, 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).

When the Agreement was signed, Homebuyers could not have known or ever anticipated 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) (undefined terms in a contract 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.

Understandably, Eastwood – in its Petition – wants to distance itself from the extremely inflammatory testimony of its own witnesses as to the meaning of Paragraph 26. However, as previously mentioned, Eastwood conceded in this appeal that Paragraph 26 was ambiguous. As a result, extrinsic evidence was properly considered by the Court of Appeals in ascertaining the true meaning of Paragraph 26, which is simply unconscionable. No reasonable, honest, or fair person

would accept a term where the party with superior bargaining has the power to terminate the agreement at its exclusive election, at any time, for any reason, and without meaningful consequence.

b. The severe limitation on buyer’s remedies, found in Paragraphs 25 and 26, is one-sided and oppressive.

In *Smith v. D.R. Horton, Inc.*, this Court found that the builder’s “attempts to disclaim implied warranty claims and prohibit any monetary damages are clearly one-sided and oppressive.” 417 S.C. 42, 50, 790 S.E.2d 1 (2016). In *Simpson v. MSA of Myrtle Beach, Inc.*, this 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) (holding 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.”). This Court 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.*

While the Homebuyers’ remedies are severely limited by Paragraphs 25 and 26 to a return of their deposit and one hundred dollars in liquidated damages, the Agreement does not limit, in any way, the damages or remedies recoverable by Eastwood. This reflects a total lack of mutuality – so much so that the Agreement cannot really be considered a genuine contract. If Eastwood can terminate for any reason and at any time it wants – and its only penalty is a measly one hundred dollars – this effectively makes the Agreement not a genuine contract from Eastwood’s perspective. Functionally, the Agreement is an option to sell held by Eastwood because it can be disregarded with no consequence. 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.

CONCLUSION

For the reasons stated herein, the Court should deny Eastwood's Petition and affirm the lower court rulings on unconscionability.

Respectfully submitted,

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