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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas
The Honorable Jessica A. Salvini, Circuit Court Judge

Appellate Case No. 2025-001404
Circuit Court Case No. 2024-CP-39-00465

David Griffith and William Coleman, as Trustee of the William Coleman Revocable Trust, individually, and on behalf of all others similarly situated, Respondents,
v.

JMC Communities, Inc., JMC Homes of South Carolina, LLC, Patrick Square, LLC f/k/a Digital Development, LLC, Alpha Omega Construction Group, Inc., Gorze, Inc., Cothran Landscapes and Grading, LLC, Gentry Services, LLC a/k/a Gentry Brothers Services, LLC, Tiny Bill Swaney d/b/a Swaney Masonry, Solid Rock Construction Services, LLC, H&H Concrete, LLC, Maria Construction Inc., F&V Framing, LLC, Five Star Construction, Inc., Davis Framing, LLC, Ashley Cothran d/b/a Cothran Custom Homes, LLC, UFP Mid-Atlantic, LLC, Builder First Source, Inc. a/k/a Builders Firstsource Atlantic Group, LLC a/k/a Builders Firstsource Southeast Group, LLC, RC Johnson, LLC, Gunter Heating and Air Conditioning of SC, LLC, 84 Lumber Company, LP, Dogwood Exteriors, LLC, H&R Drywall, Inc., Cristobal and Painters, LLC, Willow Tree Landscaping, Inc., Harbin Lumber Company, Inc., Soto HVAC, LLC, Riverside Landscaping, LLC, International Construction Services, Inc., Palmetto Grading and Drainage, Inc., Jane Doe #1-10, and John Doe #27-50, Defendants,

of which JMC Communities, Inc., JMC Homes of South Carolina, LLC and Patrick Square, LLC are the Appellants.

RESPONDENTS' INITIAL BRIEF

MICHAEL A. TIMBES, BAR NO. 77480
JESSE A. KIRCHNER (S.C. Bar No.: 70479)
T. HAPPEL SCURRY (S.C. Bar No.: 76646)
K. DALTON CLIFTON (S.C. Bar No.: 105271)
15 Middle Atlantic Wharf
Charleston, SC 29401
T: 843-937-8000

F: 843-937-4200
Michael@tktlawyers.com
Jesse@tktlawyers.com
Happel@tktlawyers.com
Dalton@tktlawyers.com

-AND-

GALLIVAN WHITE & BOYD, P.A.

CARTER R. MASSINGILL
S.C. Bar No.: 101802
W. DUFFIE POWERS
S.C. Bar No.: 73640
55 Beattie Place, Suite 1200
Greenville, SC 29601
T: (864) 271-9580
cmassingill@gwblawfirm.com
dpowers@gwblawfirm.com

Attorney for Respondents

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II. Whether the circuit court's order denying Appellants' motion to compel arbitration should be affirmed where Appellants rely on a "Binding Arbitration" provision within an adhesion contract that is unconscionable, against publicly policy, and inseparably intertwined with other unconscionable provisions of the contract that are one-sided and oppressive, and where severance of the offensive provisions would incentivize Appellant and other builders to use their unfair bargaining power to overreach against innocent, inexperienced homebuyers.

III. Whether the Federal Arbitration Act governs a transaction that is, in substance, a purchase and sale of a new home, merely because Appellants attempted to manufacture the appearance of a construction contract by requiring inexperienced homebuyers to nominally acquire title to their lots at the outset, despite being deprived of any beneficial rights to the lots until the construction was completed by a contractor they had no choice in selecting and were fully paid for, and only then were the completed homes transferred to the homebuyers.

STATEMENT OF THE CASE

Respondents David Griffith ("Griffith") and William Coleman, as Trustee of the William Coleman Revocable Trust ("Coleman"), brought this putative class action against Appellants JMC Communities, Inc. ("JMC Communities"), JMC Homes of South Carolina, LLC ("JMC Homes"), and Patrick Square, LLC f/k/a/ Digital Development, LLC ("Patrick Square")[1] after discovering substantial defects in their homes in the Patrick Square subdivision in Clemson, South Carolina (the "Subdivision"). Plaintiffs' First Amended Complaint, filed in the Pickens County Court of Common Pleas on September 24, 2024, asserting claims for (1) negligence, gross negligence/recklessness, and (2) breach implied warranty. (Amended Complaint).

Respondents unsuccessfully removed the case to federal court, and following remand to the Pickens County Court of Common Pleas, Appellants moved to compel arbitration. (Motion to Compel, Memo in Support of Motion to Compel), which Respondents opposed. (Memo in Opp. to Motion to Compel). Following a hearing on the motion to compel arbitration held May 7, 2025, the circuit court entered a Form 4 Order denying Appellants' motion. (May 7, 2025 Transcipt; May 8, 2025 Form 4 Order). A formal order denying the motion followed on June 30, 2025. (June 30, 2025 Order). This appeal follows. (Notice of Appeal).

RELEVANT FACTS

Respondents' claims arose when they discovered construction deficiencies throughout the Subdivision. The Subdivision contains approximately 300 single-family homes.[2] (Amended Complaint, ¶ 1; App. In. Br., p. 2). According to Appellants, JMC Homes pulled construction

[1] JMC Communities, JMC Homes, and Patrick Square are referred to herein as "Appellants." These parties are sometimes also called the "Developer Defendants." Respondents also asserted claims against numerous subcontractors, none of whom sought to compel arbitration.

[2] Appellants put the number of single family homes closer to 265. (Barr Aff., ¶ 7).

permits within the project and served as the general contractor. (App. Br., p. 2). The homes were sold to homebuyers, including Respondents, by Patrick Square (App. Br., p. 2; Barr Aff., ¶ 8).

The Griffith Contract

On December 19, 2018, Respondent Griffith contracted with JMC Homes for a 2,539 square foot home on Lot 0277 within the Subdivision. (the "Griffith Contract") (Memo. In Opp., Ex. B). The contract price was $375,560. (Memo. In Opp., Ex. B, ¶ 2 and internal Exhibit "B"). Lot 0277 had an assigned value of $77,000, which when added to the contract price yielded a "Sale Price" of $452,560 for the new home. (Memo. In Opp., Ex. B, Option Addendum).

Griffith's Contract provided for delivery of the "completed residence" within about 150 days after starting construction, which would start after execution of the contract or Griffith's acquisition of Lot 0277, whichever was later. (Memo. In Opp., Ex. B, ¶ 3). Although Griffith's Contract required him to first buy Lot 0277, JMC Homes insisted that it retain the "exclusive right to occupy the Lot until completion of the Residence and payment to Builder in full of the **purchase price** of the Residence **at which time the Lot and the Residence will be given to Owner**." (Memo. In Opp., Ex. B, ¶ 11) (emphasis added). In fact, if Griffith even came upon the Lot "**prior to settlement**" JMC Homes retained "**the right to dispossess [Griffith] from the Property by summary proceedings**." (Memo. In Opp., Ex. B, ¶ 11) (emphasis added).

Although the total "Sale Price" for the home was $452,560, including $77,000 designated for the Lot, Patrick Square conveyed Lot 0277 to Griffith on January 24, 2019, for the nominal sum of $10.00. (Memo. In Opp., Ex. B, Option Addendum – 0, and Ex. E (Griffth Deed)).

Within Griffith's Contract is found Paragraph 22, entitled "Defaults and Disputes." Paragraph 22 has the only reference to arbitration in the entirety of Griffth's Contact, and it states:

> 22. **Defaults and Disputes**.
>
> **A. Owner's Rights: If Builder materially breaches its obligations under this Agreement**, **Owner shall be entitled**, after giving Builder written notice of such breach and a ten (10) day period in which to substantially cure the breach, **to demand arbitration or to terminate this Agreement in writing**.
>
> **B. Builder's Rights: If Owner fails to timely make any payment required under this Agreement or other breach**, **then Builder shall be entitled** after giving Owner written notice of such breach and a ten (10) day period to cure, **to immediately terminate this Agreement** by providing written notice to Owner of such termination **or to demand arbitration**. As an interim step, Builder shall also be entitled to suspend its obligations under this Agreement pending the curing of any breach by Owner. If Builder decides to suspend its obligations, it shall provide notice to Owner of such decision.

(Memo. In Opp., Ex. B, ¶ 22) (emphasis added). Appellants reserved the right to require specific performance Griffith's Contract, but he was not afforded an equivalent right against Appellants. (Memo. In Opp., Ex. B, ¶ 22 (C)).

The Griffith Contract also contains Paragraph 19, which purports to exculpate Appellants from a wide range of liabilities. This paragraph states:

> 19. **Limited Warranty**. The Builder warrants the Residence to the Owner upon completion and final payment against defects in the original materials and workmanship for a period of one (1) year from the date of Issuance of the Certificate of Occupancy for the Residence. This limited warranty is not transferable by Owner. This limited warranty does not cover lawns and landscaping or items which can be corrected by Owner as normal maintenance. Appliances, air conditioning and heating equipment, plumbing and electrical fixtures. hot water heaters, and all other consumer products installed in the Residence are warranted by the respective manufacturer. The term consumer products shall have the definition set forth in the Magnuson-Moss Warranty Act, 15 USC §2301 et seq. This warranty does not include defects caused by Owner modifications, abuse, improper maintenance, improper operation or latent defects inherent in the type or quality of materials requested or accepted by Owner which are not known or discoverable by Builder with the exercise of reasonable diligence.

> Any warranty or guarantee from any manufacturer of a consumer product shall be deemed to have been obtained for the benefit of Owner. Builder's liability shall be limited to repair or replacement of defective work which is reported in writing by Owner to Builder within the warranty period. **In no event shall Builder be liable to Owner for incidental or consequential damages. THIS WARRANTY IS GIVEN TO OWNER IN LIEU OF ANY AND ALL OTHER REMEDIES AS MAY BE PROVIDED BY LAW INCLUDING ANY IMPLIED OR EXPRESS WARRANTY INCLUDING WITHOUT LIMITATION WARRANTIES OF MERCHANTABILITY OR FITNESS FOR PURPOSES NOT SPECIFICALLY CONTAINED IN THIS LIMITED WARRANTY. The foregoing limitations on implied warranties and relief may be unenforceable in certain states**. This warranty gives you specific legal rights and you may also have other legal rights which vary from state to state.

(Memo. In Opp., Ex. B, ¶ 1) (emphasis added). As seen above, Paragraph 19 is couched as a non-transferable "Limited Warranty," but its effect is an attempt to disclaim all implied warranties and relieve Appellants of responsibility for "incidental or consequential damages" of any kind.

The Coleman Contract

On November 4, 2016, William Coleman and his wife contracted with JMC Homes for a Beaufort 2 "G" home on Lot 0235 within the Subdivision. (the "Coleman Contract"). (Memo. In Opp., Ex. A). The contract price was $354,190. (Memo. In Opp., Ex. A, ¶ 2 and internal Exhibit "B"). As with Griffith, for just $10.00, Patrick Square deeded Lot 0235 to Coleman[3] on December 1, 2016. (Memo. In Opp., Ex. E).

The Coleman Contract mirrored the Griffith Contact in most respects. For example, it also barred the Colemans from entering upon their Lot "prior to settlement," *i.e.*, prior to paying Appellants in full for the purchase price, which is the point in time when the Lot and Residence

[3] Mr. and Mrs. Coleman entered into the Contact, but ownership of the Lot and Residence is in the name of their Trust.

would be released. (Memo. In Opp., Ex. A, ¶ 11). The Coleman Contract also contained Paragraphs 19 and 22 in the same form as seen in the Griffith Contract. (Memo. In Opp., Ex. A, ¶ 22).

However, the Coleman Contract contains a particular provision that is found nowhere in the Griffth Contract—Paragraph 24, entitled "Binding Arbitration." (Memo. In Opp., Ex. A, ¶ 24). Paragraph 24 of the Coleman Contract states:

> 24. **Binding Arbitration**. All parties to this Agreement acknowledge that, in the event any issue in law or equity arises after execution of this Agreement, same shall be resolved through binding arbitration. If the claim relates to the warranty provided by Builder and/or other claims, then the arbitration will be provided through Construction Arbitration Services, Inc. ("CAS"). The CAS arbitration will be conducted in accordance with their rules in effect at the time of the request for arbitration and the Federal Arbitration Act. All parties by entering into this agreement acknowledge that arbitration shall be the only manner of settling any issue arising after execution of this Agreement and that the results of the arbitration decision shall be binding on the parties to this Agreement. All parties to the Agreement agree to arbitrate the matter while continuing to comply with the other terms of this Agreement including proceeding to Closing, unless the parties mutually consent to a stay of further compliance with the terms of the Agreement during the period the issue is being arbitrated. In the event that an arbitration decision requires repairs or adjustments to be made by the Builder, these repairs or adjustments shall be made in accordance with the standards as outlined in the Warranty, or which are customary to generally accepted local area building industry criteria and standards in the event the Warranty is silent as to an applicable standard. The provisions of this paragraph shall survive Closing and delivery of the limited warranty deed to the Owner.

(Memo. In Opp., Ex. A and B, ¶ 24).[4]

There is no provision in Griffith's limited warranty deed or Coleman's limited warranty deed that purports to require arbitration of claims. (Memo. In Opp., Ex. E).

[4] Paragraph 24 twice uses the term "Closing," without defining the term. However, it is used in the context of delivering a "limited warranty deed" as is common in a residential real estate closing.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012); *Simpson v. MSA*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT AND CITATION OF AUTHORITY

I. There is no policy in South Carolina "favoring" arbitration, and Appellants opened the door to facts that extend beyond the Griffith and Coleman Contracts.

At the outset, it is appropriate to address two points raised by Appellants. First, beginning with their first argument heading, Appellants contend Respondents' claims must be submitted to arbitration because of a "liberal policy favoring arbitration." (App. Br., p. 11). Recognizing there is ample commentary about this in our appellate history, our Supreme Court recently clarified that there is no such policy in South Carolina. *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is, however, no public policy—federal or state—'favoring' arbitration.").

Second, in Section IV.B. of their initial brief, Appellants contend, "this Court should limit its review to the narrow issue before it: whether the arbitration provisions in the Coleman [Contract] and the Griffith [Contract] require the only two defendants (sic)[5] in this case to arbitrate

[5] Ostensibly, this reference to "defendants" was intended to mean the "plaintiffs" instead, although this same characterization appears earlier in Appellant's Section IV.B. as well.

the claims they have asserted against [Appellants]."). (App. Br., p. 32-33). Appellants brought this appeal before the circuit court considered class certification. Ostensibly, Appellants wish to avoid discussion of the systemic problems throughout the Subdivision and the terms of *other* contracts in the Subdivision. However, Appellants do not practice what they preach.

For starters, Appellants opened the door to evidence outside of the Griffith and Coleman Contracts through Jim Barr's Affidavit, which they filed in support their motion to compel arbitration. (Barr Affidavit). Rather than limiting his Affidavit to personal knowledge of narrowly tailored facts concerning the defective homes sold to Griffith and Coleman, Barr went further. He offered that Appellants constructed approximately 236 out of the approximately 265 homes in the Subdivision and added that Appellants' "standard procedure . . . during the time in which these [236] homes were constructed" was to request that homeowners agree to arbitrate construction-related disputes. (Barr Aff., ¶¶ 7, 9). Barr went so far as to state that arbitration agreements were included "in each" of the hundreds of homeowners' agreements. (Barr Aff., ¶ 9). Plainly intending to raise facts that extend well beyond the Griffith and Coleman Contracts, he stated that "JMC Homes of SC entered substantially similar construction agreements **with the other proposed Plaintiffs in the class**" and that these contracts "contain substantially similar arbitration provisions to the Coleman [Contract] and the Griffith [Contract]." (Barr Aff., ¶¶ 12, 13).[6]

For what it is worth, Respondents agree that this appeal could have focused on just the Griffith and Coleman Contracts. However, when Appellants opened this door, they welcomed Respondents to enter. In addition to Griffith's Contract, the record contains contracts from two additional owners, Rozendale and Donahue, neither of which contains a provision similar to

[6] Although neither provision should be enforced, it is notable in light of Barr's statements that the arbitration provisions in the Griffith and Coleman Contracts differ materially from one another.

Paragraph 24 in Coleman's Contract. (Memo. In Opp., Ex. A, B, C and D). This casts serious doubt on Appellant's suggestion that "Paragraph 24 – Binding Arbitration" was regularly required within the Subdivision. (Barr Aff., ¶¶ 12, 13).

Regardless, it is long-standing and well-settled law that a party cannot be compelled to arbitrate unless it has agreed to submit its claims to arbitration. *See Simmons v. Lucas & Stubbs Assocs., Ltd.*, 283 S.C. 326, 333, 322 S.E.2d 467, 470 (Ct. App 1984). Because the Griffth Contract and the Coleman Contract treat arbitration differently, each contract is afforded its own review. For the several reasons explained herein, the result below should be affirmed, and neither Griffith nor Coleman should be compelled to arbitration.

II. The trial court was correct to deny Appellants' motion to compel Griffith to arbitration, because his contract contains no provision requiring the arbitration of his claims.

The Supreme Court of South Carolina has repeatedly instructed that, "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Zabinski*, 346 S.C. at 596-97, 553 S.E.2d at 118. "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Id.* at 597, 553 S.E.2d 118; *see also Vestry & Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 206-07, 588 S.E.2d 136, 138 (Ct. App. 2003); "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001).

A. Paragraph 22 of Griffith's Contract does not grant Appellants the right to demand that he arbitrate the claims he asserted against them.

The only mention of arbitration found anywhere in Mr. Griffith's contract is found in Paragraph 22, which is narrow in scope and separately explains when Griffith could demand arbitration (under Paragraph 22(A)) from when Appellants could do so (under Paragraph 22(B).

Paragraph 22(A) afforded Griffith the right in limited circumstances to demand arbitration or terminate the agreement of if Appellants breached the contract. It is undisputed that Griffith has not demanded arbitration, nor has he asserted a claim for breach of contract. Thus, the rights *Griffth* possessed under Paragraph 22(A) are not at issue in this appeal. Rather, Appellants are the ones claiming a right to force *him* to arbitrate. Thus, Paragraph 22(B), governs what rights to demand arbitration Appellants reserved for themselves, and they are limited.

By its plain, unambiguous terms, Paragraph 22(B) does not grant Appellants the right to demand that Griffith submit his own claims against them to arbitration. Paragraph 22(B) states:

> Paragraph 22(B): "**Builder's Rights: *If*** [Griffith] fails to timely make any payment required under this Agreement or other breach, ***then Builder shall be entitled after giving [Griffith] written notice of such breach*** and a ten (10) day period to cure, to immediately terminate this Agreement by providing written notice to [Griffith] of such termination ***or to demand arbitration***.

(Memo in Opp., Ex. B, ¶ 22) (underline and bold italics added).

Paragraph 22(B) affords Appellants the limited right to demand arbitration only where Appellants believe *Griffith* breached the contract—a setting where Appellants would be on offense, not defense. That is opposite the facts here. Appellants have not asserted, nor can they assert at this point, a claim that Griffith failed to make a payment or otherwise breached the contract.[7] It is undisputed that Griffith paid the purchase price for his home, took title and possession of it, fully performed, and did not breach his contract. For this simple, undisputed reason, the rights Appellants reserved under Paragraph 22(B) do not apply to this case.

[7] Nor can Appellants claim Griffith breached the contract by not exercising his right to demand arbitration when he asserted claims against them for negligence and breach of implied warranties (not breach of contract) years after purchasing the home. Paragraph 22(B) does not entitle Appellants to dictate how Griffith proceeds against Appellants for their wrongs. It was intended to allow Appellants to compel Griffith to Arbitration *if he had breached the contract*, but he did not, nor has it been alleged by Appellants that he did.

Because Paragraph 22 is the sole source of arbitration rights in the Griffith Contract, and neither of its subparts applies here, the trial court's finding that Appellants cannot compel Griffith to arbitrate his claims should be affirmed. *Zabinski*, 346 at 596-97, 553 S.E.2d at 118 (observing "a party cannot be required to submit to arbitration any dispute which he has not agreed to submit"); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000) (citing Rule 220(c), SCACR, and noting that "an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal."). There is more.

B. Paragraph 22 does not apply to claims arising after completion of the closing and transfer of the Residence to Griffith.

Paragraph 22 applies to disputes arising between Griffth and Appellants before Griffith paid in full for his new home and took possession. Several facts establish this intent. First, once Griffith paid for the home and took possession, he owed no further payment or performance obligations to Appellants. Once he fully performed—which is not in dispute—Paragraph 22(B) became inoperable. Paragraph 22(C) sheds additional light on this point, wherein Appellants reserved the right in the event of Griffith's breach (again, there was not one) to seek the remedy of specific performance. Hypothetically, had that occurred, once Griffith performed, Appellants' remedies under Paragraph 22 would have been fulfilled. That is how things stand today.

Because Griffith performed, it would be impossible for either party to now exercise their alternative right under Paragraph 22 to terminate the contract in the event of the other's uncured breach. The fact that this now-moot alternative remedy was coextensive with the right to demand arbitration in the event of a breach of the contract by the other party reveals that Paragraph 22 was not intended to apply post-closing, much less to claims arising years later. For this additional reason, Paragraph 22(B) cannot form the basis of a right for Appellants to demand arbitration in this case. *Zabinski*, 346 S.C. at 596-97, 553 S.E.2d at 118 (noting "the range of issues that can be

arbitrated is restricted by the terms of the agreement."); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364 ("Arbitration agreements, like other contracts, are enforceable in accordance with their terms.").

C. Whatever rights may at some point have existed under Paragraph 22, they were extinguished by the merger doctrine.

Under the merger doctrine, "[t]he execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed." *Wilson v. Landstrom*, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) (quoting *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504-05, 99 S.E.2d 187, 193 (1957)). "A deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract…" *Wilson*, 281 S.C. at 264, 315 S.E.2d at 133 (quoting *Charleston & W. Carolina Ry. Co.*, 231 S.C. at 504-05, 99 S.E.2d at 193). Nowhere in Griffith's deed is there any reference to arbitration of claims. (Memo. In Opp., Ex. E). Under the merger doctrine, Griffith's deed controls over any language his prior contract that governed the parties' rights up until closing. This is fatal in the absence of language demonstrating a contrary intent.

While it is true that when parties intend for antecedent agreements to survive, those terms will not be merged into the deed, it is also true that "[t]he party denying merger has the burden of proving **by clear and convincing evidence** that merger was not intended." *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260-61, 743 S.E.2d 868, 874 (Ct. App. 2013). Here, that high burden rests with Appellants, and they failed to meet it.

In *Carlson*, this Court held the parties did not intend for the arbitration clause to be superseded by the subsequently-executed deed where the purchase agreement provided: "The covenants, disclaimers and agreements contained in this Agreement **shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive**

the Closing and continue to be binding upon both parties." *Id*. at 261, 743 S.E.2d at 874 (emphasis added). Further, the arbitration clause at issue also states that "**[a]fter closing, every controversy or claim** arising out of or relating to this Agreement . . . shall be settled by binding arbitration." *Id*. (emphasis added).

Here, nothing in the text of Paragraph 22 reveals an intent that its provisions should survive closing. Not only does this lend validity to the point above about Paragraph 22 only applying to alleged breaches occurring prior to closing, but it also proves Appellants cannot meet their clear and convincing evidentiary burden to show merger was not intended.

Although the focus here is on the Griffith Contract, reference to the Coleman Contract is enlightening. Paragraph 24 of the Coleman Contract *does attempt* to avoid the merger doctrine, stating "the **provisions of this paragraph**[8] **shall survive Closing** and delivery of the limited warranty deed to the Owner." Clearly aware of the merger doctrine, Appellants took steps to try and avoid it with respect to Paragraph 24 in Coleman's Contract.[9] However, Paragraph 24, in the form found in Coleman's Contract, exists nowhere in Griffith's Contract, and neither Coleman's Contract nor Griffith's Contract includes survival language in their respective and identical Paragraphs 22. By including survival language in Paragraph 24 of the Coleman Contract, but

[8] The reference to "this paragraph" means Paragraph 24 in the Coleman Contract. Paragraph 24 in the Coleman Contact also states that "arbitration shall be the only manner of **settling any issue arising after execution of this Agreement** . . . ." (Memo In Opp., Ex. A, ¶ 24) (emphasis added). This is language that shows an intent to avoid merger. *Carlson,* 404 S.C. at 261, 743 S.E.2d at 874 (finding a provision that states, **"[a]fter closing, every controversy** or claim arising out of or relating to this Agreement . . . **shall be settled by binding arbitration**" was not precluded by the merger doctrine) (emphasis added).

[9] For that matter, in Paragraph 25 of Griffith's Contract, Appellants used a survival clause to preserve their right following substantial completion to obtain and use photographs of Griffith's Lot and Residence for promotional purposes, proving Appellants knew how to protect such rights from the merger doctrine. No such language is found in Paragraph 22. Coleman's Contract contains the same reference in Paragraph 26.

omitting such language from Paragraph 22 of both contracts, the evidence in the record supports only one result, *to wit*, that Paragraph 22 was not intended to survive closing. *Evins v. Richland Cty. Historic Pres. Comm'n*, 341 S.C. 15, 19, 532 S.E.2d 876, 878 (2000) (observing that under the "maxim of *expressio unius est exclusio alterius*, expression of one thing is exclusion of another" and where certain things are specified in a contract, "an intention to exclude all others from its operation may be inferred").

In light of the foregoing points and authorities, the trial judge was correct to deny Appellants' motion to compel arbitration of the claims asserted by Griffith. This Court should affirm that result because Paragraph 22 never afforded a right for Appellants to demand arbitration of claims asserted against them, Griffith never agreed to submit his present claims to arbitration, and whatever rights Appellants once had under Paragraph 22, they expired upon Griffith's full performance and were extinguished by the merger doctrine.

III. The "Binding Arbitration" agreement in Coleman's Contract is unenforceable because it is unconscionable.

Before addressing the unconscionability of the additional arbitration agreement in Coleman's Contract, we first incorporate in full the preceding arguments raised above that focus on Paragraph 22, which is identical in both Griffith's and Coleman's Contracts. Paragraph 22 does not entitle Appellants to demand arbitration of Coleman's claims for same reasons that it does not allow Appellants to compel arbitration of the claims asserted by Griffith.

However, unlike Griffith's Contract (and others in the record),[10] the Coleman Contract contains a different Paragraph 24, entitled "Binding Arbitration," inviting further analysis. The

[10] *See* Memo. In Opp., Ex. A, B, C and D. By inviting the lower court to accept that it was their standard practice during the Project to include "substantially similar" arbitration provisions in all contracts, Appellants opened the door to evidence to the contrary. Unless the *inclusion* of

Arbitration agreement contained in Paragraph 24 of Coleman's Contract should not be enforced because of inseparably intertwined one-sided and oppressive terms that render the arbitration agreement unconscionable and against public policy.

A. The Coleman Contract is a contract of adhesion, and he lacked meaningful choice to negotiate its one-sided and oppressive terms, including the arbitration agreement.

Appellants request that this Court find the Federal Arbitration Act requires arbitration of Respondents' claims. As noted in *Damico*, "Section 2 of the FAA provides that any arbitration provision contained within a written contract involving interstate commerce must be enforced **except for 'upon such grounds as exist at law or in equity for the revocation of any contract.**'" *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 610-11, 879 S.E.2d 746, 754 (2022) (citing 9 U.S.C. § 2) (emphasis added). In this way, "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [the FAA]." *Id*. (citing *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996)). Here, the circuit court correctly determined Coleman's claims should not be compelled to arbitration in part because the arbitration agreement in his contract was unconscionable and violates public policy. (Order, pp. 7-8).

"[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *See, e.g., Smith, 417 S.C. at 49, 790 S.E. 2d at 4* (quoting *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668); *see also* 17A Am. Jur. 2d *Contracts* § 271 ("Generally, the doctrine of unconscionability protects

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Paragraph 24 was the exception, not the rule, these other contracts cast doubt on the statements made by Barr in his Affidavit. (Barr Aff., ¶¶ 13, 14).

against unfair bargains and unfair bargaining practices . . . ."). In the context of determining whether an arbitration agreement is unconscionable, the focus is on whether the arbitration agreement is geared towards achieving an unbiased decision by a neutral. *Damico,* 437 S.C. at 612, 879 S.E.2d at 755. "The whole point of an arbitration provision is to provide an alternative way to resolve disputes **in a fair and efficient manner**." *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 597, 910 S.E.2d 474, 477 (2024) (emphasis added). Fairness is often the problem due to adhesion contracts forced upon homebuyers by builders and developers.

Absence of meaningful choice requires consideration of all the facts and circumstances, including "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.* at 613, 879 S.E. 2d at 755 (citing *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). When adhesion contracts are involved, "courts tend to view adhesive arbitration agreements with 'considerable skepticism,' as it remains doubtful 'any true agreement ever existed to submit disputes to arbitration,'" *Id*. at 613, 879 S.E.2d at 756 (quoting *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. When an arbitration clause is unconscionable, the court may properly refuse to enforce it so "as to avoid any unconscionable result." S.C. Code Ann. § 36-2-302(1).

Here, just like the contracts in *Damico*, the Coleman Contract was a contract of adhesion. On the whole, the contract terms are predetermined, with only a few blanks for owners like Coleman to fill in. Various provisions speak to broad audiences, revealing these contracts are filled with boilerplate provisions that are not specific to Coleman or subject to negotiation, including Paragraph 2 (offering financing terms with a "check the box approach"),[11] Paragraph 19 (noting

[11] This is the same type of provision that the Supreme Court used as an example in *Damico* to demonstrate that Lennar used a boilerplate adhesion contract. *Damico*, 437 S.C. at 614 n.7, 879 S.E.2d at 756.

that "limitations on implied warranties and relief may be unenforceable *in certain states*") (emphasis added), and Paragraph 28 (applying additional terms if multiple owners are signing to account for different situations). (Memo. In Opp., Ex. A, Ex. B). Of course, the simplest proof lies in the nearly identical nature of the contracts signed by Griffith, Coleman, Rozendale, and Donahue, with the only meaningful difference between them being the inclusion of Paragraph 24, Binding Arbitration, in Coleman's Contract, proving these adhesion contracts were not negotiable. (Memo. In Opp., Ex. A, Ex. B, Ex. C, Ex. D).

Finally, the sophistication of Coleman and Griffith paled in comparison to Appellants. Neither had any education, training or professional experience in law, real estate of construction, while Appellants have been developing since 1978 in Florida and South Carolina. (Memo. In Opp., Ex. G, Ex. H, Ex. F). *See Damico,* 437 S.C. at 614-15, 879 S.E.2d at 756) (finding the homebuyers lacked meaningful choice to negotiate the arbitration agreement and observing, "we find it fair to characterize Lennar as significantly more sophisticated than Petitioners in home buying transactions). Coleman and Griffth signed Appellants' standard form agreements, were not represented by counsel, and had no opportunity to negotiate or modify dispute-related provisions in the contract. (Memo In Opp., Ex. G, Ex. H). Barr's affidavit does nothing to counter these sworn statements. In fact, Barr speaks to Appellants' "standard" contract procedures. (Barr Aff., 9). Thus, there is no debate that Coleman lacked a "substantially stronger bargaining position against [Developer Defendants] than the average homebuyer" and that he was not represented by independent counsel. *Smith*. 417 S.C. at 50, 790 S.E.2d at 4-5; see also Damico, 437 S.C. at 615, 437 S.E.2d at 756-57 ("These factors combine to highlight the significant disparity in the parties' bargaining power, with Lennar enjoying a much stronger bargaining position than Petitioners."); *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."). Neither Coleman nor Griffith was "a substantial business concern of [Appellants]" because they do not "comprise a large portion of [Appellants'] clientele." *Smith,* 417 S.C. at 50, 790 S.E.2d at 5.

The same logic applies here, and this Court should agree with the circuit court that Coleman (and Griffith for that matter)[12] lacked meaningful choice to negotiate the arbitration agreement, and this Court should view Paragraph 24 in Coleman's Contract with skepticism and find it unconscionable. *Damico,* 437 S.C. at 613, 879 S.E.2d at 756.

B. The arbitration provision in the Coleman contract contains the same oppressive terms found unconscionable under South Carolina law.

Paragraph 24 of Coleman's adhesion contract is not only oppressive, but it subtly strips away rights that were seemingly granted to Coleman elsewhere in his Contract. To frame the argument, in assessing whether the arbitration agreement is unconscionable, this Court must naturally determine the scope of the arbitration's provisions. *Damico*, 437 S.C. 596, 609, 879 S.E.2d 746, 753 (citing Smith, 417 S.C. at 48 n.4, 790 S.E.2d at 3 n.4). When an arbitration agreement does not stand alone but instead incorporates and is intertwined with other provisions of the contract, those provisions are properly interpreted together. *Smith*, 417 S.C. at 48, 790 S.E.2d

[12] The record is devoid of evidence that Griffith negotiated for the removal of Paragraph 24, Binding Arbitration, nor do Appellants contend as much. Although Griffith's claims are not subject to arbitration for the reasons set forth in Section II. above, this discussion on the disparity of bargaining power as it relates to Coleman and the adhesion contract he signed applies equally to Griffith and is adopted as to his claims as well. The attempted disclaimers and limitations of liability found in Paragraph 19 of Griffith's contact are just as unconscionable for the same reasons they are unconscionable in Coleman's contract. The only difference is that in Griffith's contract, Paragraph 19 is not intertwined with the inapplicable provisions of Paragraph 22, whereas in Coleman's contract the provisions of Paragraph 19 (and others) are inseparably intertwined with Paragraph 24.

at 4 (noting that where the arbitration provision contained cross-references to other provisions, it was appropriate to construe them together). That is the case here, as well.

Paragraph 24 from Coleman's Contract incorporates by reference the "the warranty provided by Builder" which is contained in Paragraph 19—the only warranty Appellants purport to offer. Paragraph 24 goes on to state, "In the event that **an arbitration decision** requires repairs or adjustments to be made by the Builder, **these repairs or adjustments shall be made in accordance with the standards as outlined in the Warranty** . . . ." (Memo. In. Opp., Ex A, ¶¶ 24 and 19) (emphasis added), effectively constraining the relief an arbitrator can award to Coleman. Regardless, Paragraph 24 cannot be read or given effect without reference to the limitations Appellants afforded themselves through the "warranty" provisions of Paragraph 19.

When Paragraph 24 speaks to the potential for the arbitrator to require repairs or adjustments to be made, this derives from Paragraph 19, which shields Appellants' by limiting their liability to the "repair or replacement" of defective work reported in the "warranty period."[13] This is the same hollow "remedy" that the Court in *Smith* found oppressive and one-sided. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5 ("Under the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton. This is no remedy at all because it leaves the relief to the whim of D.R. Horton while

[13] At first look, Paragraph 19 appears to offer a one-year warranty, but it does not. The warranty runs from the date of Certificate of Occupancy, *not* the date Appellants transfer the home to Coleman. Because Appellants control when the Certificate of Occupancy is requested, they have unilateral power to shorten the beneficial warranty period that Coleman would have by starting the warranty clock before they turn over the home, considering Appellants forbid Coleman to occupy the Residence until he paid in full. (Memo. In Opp., Ex. A, ¶ 11) ("Builder shall have the exclusive right to occupy the Lot until completion of the Residence and payment to the Builder in full of the price of the Residence; At which time occupancy of the Lot and the Residence will be given to the Owner."). This reveals another one-sided term of Coleman's Contract: Paragraph 11 purports to treat his contract as a lease to Appellants, yet Appellants paid no rent whatsoever to Coleman. (Memo. In Opp., Ex. A, ¶ 11).

simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate."). It is just as oppressive and one-sided here.

Further, although Paragraph 19 purports to grant a "warranty" to Coleman, it primarily focuses instead on Appellants' efforts to *disclaim* any and all implied or express warranties and liabilities[14] and it further strips away rights that seemingly were granted to Coleman elsewhere in the contract. For starters, the so-called "warranty" in Paragraph 19 would deprive Coleman of the ability to recover *any* incidental or consequential damages against Appellants, *no matter how egregious the circumstances might be*. (Memo. In. Opp., Ex A, ¶ 19) ("**In no event** shall [Appellants] be liable to [Coleman] for incidental or consequential damages.") (emphasis added). This provision is unquestionably one-sided, as it cuts only in favor of Appellants—nowhere in the contract do Appellants waive their right to consequential damages. If Appellants' negligence results in serious damages to Coleman, his rights are severely limited by Paragraph 24. But, *if Coleman causes a delay* in Appellant's work through his own neglect, Appellants reserved the right to demand to "be compensated for all costs which it incurs as a result of such delay, and a change order will be issued therefore (sic)." This is yet another example of one-side terms that benefit only Appellants, and it is precisely why Paragraph 24 speaks only to the potential for an arbitrator to require repairs or adjustments, without reference to any other form of "relief." And it goes much further.

Paragraph 24 expressly mandates in relevant part:

> All parties to the Agreement agree to arbitrate the matter **while continuing to comply with the other terms of this Agreement, including proceeding to Closing, unless the parties mutually**

[14] Paragraph 19 essentially acknowledges that its attempt to disclaim all warranties and limit other relief normally available to buyers like Coleman violates public policy, stating, "The foregoing limitations on implied warranties and relief may be unenforceable in certain states." (Memo. In. Opp., Ex A, ¶ 19).

> **consent to a stay of further compliance with the terms of the agreement <u>during the period the issue is being arbitrated</u>**.

(Memo. In Opp., Ex. A, ¶ 24) (all emphasis added).

In this way, Paragraph 24 of Coleman's Contract incorporates and requires continued compliance with *every other term of the contract* throughout the entirety of any pending arbitration. Therefore, it is *literally impossible* to consider the arbitration agreement separately and in isolation from the remaining provisions of the contract given this express requirement. *Compare Damico*, 437 S.C. 596, 610, 879 S.E.2d 746, 754 (finding the arbitration agreement stood alone and noting, "Within Section 16, there is nothing that refers to the limited warranty booklet or incorporates it by reference. Rather, Section 16 is a standalone arbitration provision, dissimilar from that in *[Smith v. D.R. Horton*."). Paragraph 24 is the opposite of Lemor's paragraph 16. In this way, *Prima Paint*[15] does not apply here, because Appellants drafted the arbitration provision so that it plainly integrates, and is therefore inseparable from, the remaining contract terms. *Smith*, 417 S.C. at 48, 790 S.E.2d at 4 (finding the numerous cross-references to other provisions made it proper to consider portions of the contract outside of the arbitration agreement without running

[15] *Prima Paint* stands for the proposition that a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). So long as there is a challenge to the arbitration provision, like here, then courts can decide the "arbitrability" issue and, in doing so, can also consider both the arbitration provision and its affiliated provisions. As Justice Toal aptly explained during the oral arguments for *Smith*, *Prima Paint* "simply says you have to look at the arbitration provision" and "does not stand for the proposition that one can cherry pick out" certain language of a provision one drafted and which includes express references to other provisions. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126 n.3, 713 S.E.2d 799, 804 n.3 (Ct. App. 2011) ("Appellants contended this court is bound to reviewing the terms of the arbitration clause itself in determining its validity. We disagree. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability.") (citing *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670), *partially vacated on other grounds*, 292 S.C. 634, 636, 842 S.E.2d 653, 654 (2014); *see also Brady v. Brady*, 222 S.C. 242, 246, 72 S.E.2d 193, 195 (1952) ("[I]t is proper to read together the different provisions therein dealing with the same subject matter. . .").

afoul of *Prima Paint*). On careful review, this result creates serious problems under Coleman's Contract.

Recall from earlier discussion that Paragraph 22(A) (in both the Coleman and Griffth Contracts), gave them the right to terminate the contract in the event of Appellants' breach. (Memo. In. Opp., Ex A, ¶ 22(A)) ("If Builder breaches its obligations under this Agreement . . . Owner shall be entitled . . . to terminate this Agreement in writing."). However, by adding Paragraph 24 to Coleman's Contract, Appellants took that right away. "All parties to the Agreement agree to arbitrate the matter while continuing to comply with the other terms of this Agreement **including proceeding to closing**[.]" In other words, Paragraph 24 requires Coleman to proceed to closing unless Appellants agree to suspend that requirement, stripping away his right to terminate.

Recall that Paragraph 22(B) gave Appellants the right "to suspend its obligations under this Agreement pending the curing of any breach by Owner." However, Paragraph 22(A) affords no equivalent right to Coleman if Appellants are in breach. (Memo. In Opp., Ex A. ¶ 22). Further to this point, it appears Paragraph 24 would force Coleman to continue to comply with the contract's other provision, while Appellants would ostensibly have the right to suspend it obligations under Paragraph 22(B), demonstrating once again that Paragraph 24 is one-sided and oppressive.

Additionally, Appellants did not provide Coleman the right to compel their specific performance—Appellants kept that right solely for themselves. (Memo. In. Opp., Ex A, ¶ 22(C)) ("*Builder* may seek specific performance of this Agreement"). Paragraph 24 incorporates these one-sided rights, along with all other contract terms, except where Appellants might agree not to enforce them.

Another example of where Appellants appear to offer some level of rights to Coleman, only to then strip them away, is found in Paragraph 4, which provides Appellants are not liable for

delays, *so long as the cause is beyond Appellant's reasonable control*. Thus, unreasonable delays *within Appellants' reasonable control* would not be protected by Paragraph 4. However, Paragraph 3 unequivocally states, "Builder **shall not be liable** to the Owner for **any damages or inconvenience** caused to Owner by delay in the completion of construction, **regardless of the cause for the delay**." (Memo. In Opp., Ex. A, ¶ 3) (emphasis added). These provisions are internally inconsistent, except for the common theme that Appellants take an unfair position over Coleman under the contract.

Appellants also ducked responsibility to correct any conditions or circumstances outside of Coleman's Lot even if those conditions affect his Lot, and even though Appellants were the developers of the entire Subdivision and presumably controlled conditions within the development. (Memo. In. Opp., Ex. A, ¶ 10; Barr Aff., ¶ 4, 6, and 7). Because Paragraph 24 limits an award against Appellants to repairs as provided in the warranty, and the warranty in Paragraph 19 excludes any relief beyond the repairs it authorizes, Coleman would have no relief for harm caused on his Lot by circumstances outside of his Lot, even though Appellants may be at fault.

Additionally, Appellants insisted on the right to charge Coleman interest at 18% per annum on payments they claim were owed by him, even in the event of termination by Coleman due to Appellants' breach. (Memo. In Opp., Ex. A, ¶ 22(E), and ¶ 2). Coleman would also be forced to pay in full for the home or face accruing interest charged by Appellants *even if Appellants admittedly had not finished the home*. (Memo. In Opp., Ex. A, ¶ 24 and ¶ 10 (stating, "[T]he fact that any repairs, touch ups, or adjustments are incomplete shall not constitute a valid reason for failure to make final payment" and Coleman was forbidden from "withholding of any or all or any such Walk Through Lists of items that may remain to be completed.")).

These are not *Prima Paint* problems, because Paragraph 24 cannot be interpreted or enforced independently of Paragraph 19 and, the remaining provisions of Coleman's Contract, because Paragraph 24 specifically requires continued compliance "with the other terms of this Agreement" in connection with any pending arbitration. (Memo. In Opp., Ex. A, ¶ 24). This intermingling of Paragraph 24 with other terms and conditions of the adhesion contract were intended to deprive Coleman of essential remedies, which is precisely the approach the Supreme Court found unconscionable in *Smith* at 48, 790 S.E.2d at 4 (finding DR Horton's arbitration provision was inseparably intertwined with other provisions of the contract depriving the owners of rights "so as to constitute a single arbitration provision.").

Because Paragraph 24 (and its numerous intertwined paragraphs, including Paragraph 19) is unconscionable and unenforceable as the circuit court properly found, there is no basis to compel Coleman's claims to arbitration.[16] Therefore, the circuit court should be affirmed.

C. Severance is improper and enforcement of the one-sided and unconscionable arbitration agreement would violate public policy.

Generally, an arbitration provision is separable from the contact in which it is embedded and its validity is distinct from the validity of the contract as a whole. *Munoz v. Green Tree Fin. Corp.*, 343 S.C at 531, 540, 542 S.E.2d 360 at 364. (citing *Prima Paint*, 388 U.S. 395, 18 L. Ed. 2d 1270, 87 S. Ct. 1801). However, severance is not always proper, and our appellate courts refuse to exercise discretion to blue-pencil the contract when doing so would essentially rewrite "the contact by severing multiple unenforceable provisions."[17] *Simpson*, 373 S.C. at 35, 644 S.E.2d at

[16] Respondents incorporate the discission in Section II., A., B., and C., *supra,* explaining why Paragraph 22 cannot serve as a basis to compel either Griffith or Coleman to arbitration. Nothing in Paragraph 22(B) grants Appellants the right to force Coleman to choose the option to demand arbitration under Paragraph 22(A)—which speaks to Coleman's rights, not those of Appellants.

[17] On the facts of this case, merely including a boilerplate severability provision in Paragraph 32 of Coleman's contract is not sufficient to make the arbitration agreements unconscionable terms

674 (recognizing that "severability is not always an appropriate remedy for an unconscionable provision . . .'[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . .'") (quoting *Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005)); *see also Damico*, 437 S.C. at 620, 879 S.E.2d at 760 ("Succinctly stated, once we sever the unconscionable terms in the arbitration provision, there is essentially nothing left.").

Additionally, this Court should follow the reasoning and direction of the Supreme Court in *Damico* and decline to rescue Appellants from their oppressive, grossly one-sided, and unconscionable arbitration agreement and contract drafting tactics, because attempting to sever the unconscionable provisions would not only effectively rewrite the parties' contract, but it would also violate public policy. *See Huskins,* 444 S.C. at 597, 910 S.E.2d at 477 (observing that "[W]hen a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract.") (citing *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 337 (4th Cir. 2017)).

The purchase of a home is consumer transaction, which invokes public policy concerns. *Huskins,* 444 S.C. at 597, 910 S.E.2d at 477 ("The contract was for a consumer purchase of a new home, which brings into play public policy concerns *Damico* eloquently addressed."). South Carolina has a deeply-rooted and long-standing policy of protecting new homebuyers. *Damico*, 437 S.C. at 621, 879 S.E.2d at 760 (citing *Kennedy*, 299 S.C. at 341-44, 384 S.E.2d at 734-36). The Court long ago statated, it is "intolerable to allow builders to place defective and inferior

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severable. *See Damico*, 437 S.C. at 624, 879 S.E.2d at 762 ("It is clear Lennar furnished a grossly one-sided contract and arbitration provision, hoping a court would rescue the one-sided contract through a severability clause. **We refuse to reward such misconduct, particularly in a home construction setting**.") (emphasis added).

construction into the stream of commerce." *Kennedy,* 299 S.C. at 344, 384 S.E.2d at 736. "Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction." *Damico*, 437 S.C. 596, 621, 879 S.E.2d 746, 760.

Courts generally will not enforce a contract that violates public policy. *Carolina Care Plan, Inc.*, 361 S.C. at 555, 606 S.E.2d at 758. A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability. The latter focuses on the relationship between the parties (*i.e.*, Coleman and Appellants) and the effect of the agreement upon them, whereas a public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. *Damico*, 437 S.C. at 622, 879 S.E.2d at 760; *see also Huskins*, 444 S.C. at 598, 910 S.E.2d at 478 (declining to sever an illegal provision[18] from the arbitration agreement on public policy grounds and stating, "Were we to hold otherwise, parties who impose standard form adhesion contracts on weaker parties would have no downside to throwing in blatantly illegal terms betting they will go unchallenged or, at worst, that courts will throw them out and enforce the rest.").

Where, as here, there is an adhesive construction contract that contains an unconscionable arbitration agreement that is inseparably intertwined with oppressive, one-sided terms, this Court should find it is unconscionable and unenforceable, not just as between Coleman and Appellants, but additionally as a matter of public policy. Embracing Appellants' crafty approach to disguise this transaction as a construction contract when at bottom it was for the sale of one of several hundred homes in the Subdivision would only motivate Appellants and others to fashion creative

[18] The Court of Appeals found the provision unconscionable, but the Supreme Court believed it better to treat the provision as void and illegal as a matter of public policy. *Huskins*, 444 S.C. at 595, 910 S.E.2d at 476.

concepts to turn inherently intrastate transactions into transactions involving interstate commerce. The fact that building materials used to construct the home may have crossed state lines does not turn the sale of a completed home into anything other than the sale of a completed home. If we are to search for the true essence of the intended transaction, that is what it was. *See Damico,* 437 S.C. at 622, 879 S.E.2d at 760 (refusing to apply the severability clause because doing so "creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer").

IV. In addition to the inapplicability and unenforceability of the arbitration agreements at issue, these were intrastate transactions to which the Federal Arbitration Act does not apply.

Although neither Griffith's nor Coleman's claims are subject to arbitration as explained herein, we briefly touch on the applicability of the FAA to these contracts. Here, there is evidence supporting the circuit court's conclusion that these transactions were intrastate for the sale of a completed home, notwithstanding Appellants' ruse to make it appear differently. The effort Appellant's applied to make the sale of a home look like a construction project is telling.

First, Appellants failed to meet their burden to establish that Griffith's and Coleman's transactions involved interstate commerce. Baar's affidavit only generally claims, "upon information and belief" that "some materials used *on the Project*" traveled in interstate commerce, just like "some subcontractors" *on the Project* were from out of state. (Barr Aff., ¶¶ 13, 14). Barr does not tie these comments directly to Griffth's and Coleman's homes. Regardless, affidavits attesting that "out-of-state materials, suppliers, and subcontractors were used for the construction of the residence" do not "negate the intrastate nature of the sale and purchase of residential real estate." *Bradley,* 398 S.C. at 458, 730 S.E.2d at 31.

To conceal the real transaction—the closing of a real estate purchase and sale transaction to a new homeowner—Appellants first made Griffith and Coleman purchase their Lot, despite the fact that Appellants held exclusive possession of it and could eject Griffith and Coleman by summary proceedings for stepping foot on it "prior to settlement." (Memo. In Opp., Ex. A, ¶ 11, Ex. B, ¶ 11). Then, Appellants established a "draw schedule" for Griffith and Coleman to pay to Appellant JMC Homes under the guise of "construction payments", even though Barr's affidavit makes clear that once JMC Homes constructed the Residence, it would then be "sold" by Patrick Square to the owner. (Barr Aff., ¶ 8) ("[Patrick Square] acted as seller for the homes built by JMC Homes of SC on the Project."). One must ask, if Coleman and Griffith already owned the Lot and had already paid JMC Homes in full for all the labor and materials for their new home under a :"construction draw schedule, what was left for Patrick Square to "sell" to them at the end? The answer is nothing, unless the lot purchase/lease-back" structure with a preset construction draw that just so happened to match the agreed upon "purchase price" for the home was nothing more than a disguised sale of a completed home (which is what it was). This was not a construction contract—neither Coleman nor Griffith had any say in what was built or who did the work other than deciding which finished home model they wanted. Even the "Village Homes Included Features" specification sheet that purported to inform Coleman what he would receive in the form of exteriors, flooring, systems, trim, interiors, etc., states *in extremely small print at the bottom of the page*: "In an effort to continually improve **our product**, JMC Homes of South Carolina, in its sole discretion, **reserves the right to change these features without notice**." (Memo. In Opp., Ex. A (and included Ex. A, p.3)).

Calling this a construction contract, rather than a disguised real estate purchase and sale contract, ignores the fact that to Appellants, these homes were "our product" until the "Closing"

described in Coleman's contract occurred. (Memo. In Opp., Ex. A, ¶ 24 (twice referencing the "Closing" and delivery of the "limited warranty deed"). On these facts, the evidence in the record supports the circuit court's finding that the transaction did not involve interstate commerce to invoke the FAA. *Bradley*, 398 S.C. at 459, 730 S.E.2d at 459 ("[W]e conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA.").

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that this Court affirm the circuit court's finding that the claims asserted by Griffith and Coleman should not be compelled to arbitration.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

By: _____
MICHAEL A. TIMBES (S.C. Bar No.: 69730)
JESSE A. KIRCHNER (S.C. Bar No.: 70479)
T. HAPPEL SCURRY (S.C. Bar No.: 76646)
K. DALTON CLIFTON (S.C. Bar No.: 105271)
15 Middle Atlantic Wharf
Charleston, SC 29401
T: 843-937-8000
F: 843-937-4200
Michael@tktlawyers.com
Jesse@tktlawyers.com
Happel@tktlawyers.com
Dalton@tktlawyers.com

-AND-

GALLIVAN WHITE & BOYD, P.A.

CARTER R. MASSINGILL
S.C. Bar No.: 101802

W. DUFFIE POWERS
S.C. Bar No.: 73640
55 Beattie Place, Suite 1200
Greenville, SC 29601
T: (864) 271-9580
cmassingill@gwblawfirm.com
dpowers@gwblawfirm.com

Attorneys for Respondents

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Charleston, South Carolina