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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.

REPLY BRIEF

Ryan L. Beaver (SC Bar No. 75669)
Jonathan E. Schulz (SC Bar No. 79850)
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone (704) 388-6000
Facsimile: (704) 332-8858
rbeaver@bradley.com
jschulz@bradley.com
Attorneys for Appellants

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The Respondents' arguments are out of order and ask the Court to reach well beyond its appropriate role in assessing the arbitrability of this dispute. Bypassing preliminary questions of the applicability of the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (the "FAA"), the Respondents jump ahead to arguing about the scope of the arbitration agreements and whether they encompass the underlying dispute (Respondents' Brief § II) as well as other issues. But "whether federal or state arbitration law applies" is "a threshold issue." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). Indeed, the entire purpose for enactment of the FAA was to prevent what happened in the trial court below, *i.e.*, to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985).

Because the *Prima Paint* doctrine and its limitation on this Court's review is inconvenient to their arguments, the Respondents incredulously insist that *Prima Paint*, which is binding Supreme Court precedent, "does not apply here." (Respondents' Brief § III(B)). The Respondents effectively ask this Court to consider "every other term of the contract" and "the remaining contract terms." (Respondents Brief § III(B)). But in doing so, the Respondents are erroneously inviting this Court to wade into the merits of the parties' dispute, usurping the proper role of an arbitrator. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (limiting "unconscionability inquiry" to "the provisions of the arbitration agreement itself, and not those of the whole contract"). Because "the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded," *Damico*, 437 S.C. at 608–09, 879 S.E.2d at 753, this is yet another reason why the Court must first determine that the FAA applies.

Notwithstanding the Supreme Court of South Carolina's clarification of public policy toward arbitration as set forth in *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432

S.C. 633, 856 S.E.2d 150 (2021), prior case law discussing the presumptive validity of arbitration agreements remains good law that is binding on this Court. *See Heritage Healthcare*, 408 S.C. at 380, 759 S.E.2d at 731–32 (noting that "in practice, arbitration agreements enjoy a strong presumption of validity in federal and state courts"). By assessing the claims within the appropriate ordered framework, and by applying the requisite deference to the parties' private agreements to arbitrate, the Court should reverse the decision of the trial court.

I. The FAA applies to the agreements to arbitrate because the transactions at issue involve interstate commerce.

The Appellants previously argued that the transactions at issue involve interstate commerce—when considering the Respondents' own Complaint allegations and the broad reach of the Commerce Clause—because (i) out-of-state subcontractors were involved in the parties' transactions; (ii) materials were transported across state lines into South Carolina; and (iii) the scope of the larger development project—of which the homes of William and Deborah Coleman and David Griffith were a part—would necessarily require labor and materials from outside of South Carolina. (Appellants' Brief § I). The Appellants further argued that the parties' Construction Agreements[1] were, in fact, construction agreements as opposed to contracts for the sale of completed homes. This conclusion is supported by (i) the plain language of the Construction Agreements (which contemplate construction as opposed to the sale of a completed home); (ii) a comparison of the facts of this case to those found in *Dixon*[2] and *Damico*[3] (as

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[1] In their Appellants' Brief, the Appellants defined "Construction Agreements" to include both the November 7, 2016, Owner/Builder Agreement between JMC Homes and William and Deborah Coleman ("Coleman Construction Agreement") and the December 20, 2018, Owner/Builder Agreement between JMC Homes and David Griffith ("Griffith Construction Agreement"). The Appellants carry forward those definitions here.

[2] *Dixon v. Pattee*, 442 S.C. 233, 251–54, 898 S.E.2d 158, 167–69 (Ct. App. 2023).

[3] *Damico v. Lennar Carolinas, LLC,* 437 S.C. 596, 608, 879 S.E.2d 746, 753 (2022).

juxtaposed with the facts of *Bradley*[4]); (iii) the options—and in some case, the obligations—afforded to the Respondents to make personal choices to customize their homes (including the election of those options and associated expenditure of $42,460.00 and $37,290.00, respectively, for personal customization); and (iv) the Respondents' own Complaint allegations.

The Respondents insist that the construction projects carried out pursuant to the Construction Agreements do not involve interstate commerce, and that the FAA does not apply to the parties' disputes. But the Respondents relegate this "threshold issue," *Heritage Healthcare*, 408 S.C. at 379, 759 S.E.2d at 731, to the last section of their brief (*see* Respondents' Brief § IV), impliedly conceding the weakness of their position (and that espoused by the trial court). Indeed, the Respondents do not address the majority of the Appellants' arguments, resorting instead to calling them a "ruse," a "crafty approach," characterizing construction payments under a draw schedule as a "guise," and describing the Construction Agreements as "disguised real estate purchase and sale contract[s]." (Respondents Brief §§ III(C), IV). The Court should be guided by the plain language of the Construction Agreements, and not by the Respondents' mischaracterizations thereof.

The few arguments advanced by the Respondents on this issue are easily rebutted. The Respondents contend that the statements by Jim Baar in the October 31, 2024, Affidavit of Jim Baar ("Baar Aff") regarding the use of out-of-state subcontractors and the transportation of materials across state lines into South Carolina are not specific to the Respondents and instead relate to the "Project" more generally. But of course, Mr. Baar also attests to the fact that the

4 *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458–59, 730 S.E.2d 312, 318 (2012).

Construction Agreements with the Colemans and with Mr. Griffith were part of that same "Project." (R. p. 191, ¶¶ 10–11).

More importantly, the Respondents fail to acknowledge that the allegations in their own Complaint—in which the only actual Plaintiffs are David Griffith and Wiliam Coleman—also make clear that contractors and subcontractors who allegedly participated in the construction of the dwelling units include entities organized in North Carolina, Georgia, Pennsylvania, and Delaware. (R. pp. 21–25, ¶¶ 28–53). This is sufficient to establish the involvement of interstate commerce for purposes of the FAA. *See Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 431, 343 S.E.2d 45, 47 (Ct. App. 1986) (relying on affidavit regarding equipment and supplies shipped into South Carolina for interstate-commerce analysis); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 639–40, 239 S.E.2d 647, 651–52 (1977) (relying on the inclusion of "out-of-state subcontractors" in a project to conclude "the contract documents 'evidence transactions in commerce' on their face" and the FAA applies). The Respondents' one-sentence reliance on *Bradley* for the contrary point ignores the factual distinctions between this case and *Bradley*—which concerned a "Home Purchase Agreement" with no options for personal customization, 398 S.C. at 458, 730 S.E.2d at 218—and fails to grapple with the case law analysis comparing this case to *Dixon* and *Damico*, and contrasting it with *Bradley*. (*See* Appellants' Brief § I(B)).

Because the transactions contemplated in the Construction Agreements evidence transactions involving interstate commerce, the FAA applies, and the arbitration provisions "shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation" thereof. 9 U.S.C. § 2. And the Supreme Court of South Carolina's decision in

Palmetto Construction Group does not affect or change the presumptive validity of arbitration agreements under the FAA, which policy remains in force.[5]

II. The Respondents' claims fall within arbitration agreements.

The Appellants previously argued that both Construction Agreements provide for arbitration "[i]f Builder materially breaches its obligations under this Agreement" (R. p. 84, § 22(A); p. 96, § 22(A)), and the Coleman Construction Agreement further provides for arbitration of "any issue in law or equity [that] arises after execution of the [Coleman Construction] Agreement" (R. p. 85, § 24). The Appellants further argued that (i) the allegations in the Respondents' First Amended Complaint are replete with references to breaches of specific provisions in the Construction Agreements; and (ii) the fact that the Respondents sued in negligence and breach of implied warranty—as opposed to breach of contract—is immaterial to assessing whether the arbitration provisions in the Construction Agreements encompass this dispute. (Appellants' Brief § II).

The Respondents note in passing that they have not "asserted a claim for breach of contract." (Respondents' Brief § II(A)). But the Respondents fail to acknowledge, much less take on, case law relied upon by Appellants making clear that the true nature of the claims—and not their self-serving label—dictates whether an arbitration agreement encompasses a claim. *See Dixon* 442 S.C. at 249, 255–556, 898 S.E.2d at 166, 170 (finding arbitration provision

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[5] The Supreme Court of South Carolina in *Palmetto Construction Group* made clear that the Court's prior statements that the law "favors" arbitration is a statement of judiciary policy to ensure the enforceability of private agreements to arbitrate. 432 S.C. at 639, 856 S.E.2d at 153. Thus, this "favoratism" policy is not dispensed but clarified. Indeed, *Palmetto Construction Group* did not explain how its holding might impact the presumptive validity of arbitration agreements, as described in prior opinions. *See, e.g.*, *Dean*, 408 S.C. at 380, 759 S.E.2d at 731–32 (explaining that, under the FAA, "in practice, arbitration agreements enjoy a strong presumption of validity in federal and state courts"). Those prior opinions were not vacated or abrogated, and they remain good law.

encompassed claim for equitable indemnification, despite argument that claimants "were not trying to sue under the Agreement or Warranty," because the claim "arises from the construction of the home" and the argument was "belied by the language in their complaint"); *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim.").

Otherwise, the Respondents advance three arguments on this point, one of which is asserted for the first time on appeal, all of which are without merit. Each is addressed in turn.

A. <u>Section 22(A) of the Construction Agreements requires the Respondents to arbitrate their disputes.</u>

First, the Respondents contend that § 22(A) of the Construction Agreements contains permissive language—"shall be entitled"—which affords the Respondents the option, but not the obligation, to arbitrate their disputes. (Respondents' Brief § II(A)). Respondents further contend that because they, themselves, have not demanded arbitration, that ends the inquiry.[6] They cite no

[6] The Respondents' reference to, and arguments about, Section 22(B) of the Construction Agreements (*see* Respondents' Brief § II(A))—as opposed to Section 22(A)—is a distraction. No party is arguing that Section 22(B) is at issue, and the Appellants are not arguing that the Respondents breached the Construction Agreements. That is not part of this appeal.

on-point case law supporting this broad-brush argument made for the first time on appeal.[7] In operation, Section 22(A) is no different than a permissive arbitration clause—e.g., "may arbitrate"—which the Fourth Circuit[8] has found to afford "an aggrieved party the choice between arbitration and abandonment of his claim, he 'may' either arbitrate or abandon the claim." *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir. 1996); *see also United States v. Bankers Ins. Co.*, 245 F.3d 315, 320–21 (4th Cir. 2001) (relying on *Austin*, noting an arbitration clause's "use of permissive phraseology is not dispositive," and collecting cases finding permissive arbitration language to be mandatory in practice).

Second, the Respondents contend—again without citing any supporting case law—that § 22(A) of the Construction Agreements contains some unwritten (and unknowable) time limitation, and that it is somehow void and of no effect whatsoever now that the Respondents have paid for their homes and taken possession. (Respondents' Brief § II(B)). As the argument goes according to the Respondents' *ipse dixit*, (a) terminating the Construction Agreements or demanding arbitration under Section 22(A) are "coextensive" rights; (b) the ability to terminate the

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7 The Respondents did not raise this issue before the trial court. Therefore, it is not preserved for appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Specifically, the Respondents' arguments before the trial court were focused on whether the arbitration provision in Section 22(A) was enforceable; there was no argument that it is not a mandatory arbitration agreement provision at all. Quite to the contrary, the Respondents plainly asserted before the trial court that "Paragraph 22 describes the procedure for resolving conflict." (R. p. 58). And the trial court order also describes Section 22 as "the procedure for resolving conflict if that conflict arises out of contract." (R. p. 6).

8 In the absence of on-point South Carolina authority, the Court can—and should—look to persuasive jurisprudence developed by the Fourth Circuit. *See, e.g., Damico*, 437 S.C. at 612, 879 S.E.2d at 612 (looking to Fourth Circuit law to determine when contract is unconscionable); *O'Shields v. Columbia Auto., LLC*, 435 S.C. 319, 342, 867 S.E.2d 446, 458 (Ct. App. 2021) (finding "Fourth Circuit's majority position on [an] issue persuasive").

Construction Agreements became moot following full payment and possession; therefore (c) the alleged "coextensive" right to arbitrate is now also, somehow, moot. But of course, a more rational reading of Section 22(A) would merely have the aggrieved owner demanding arbitration as a remedy once his termination rights became toothless. This common sense reading of Section 22(A) eliminates the need for this Court to attempt to derive some attenuated intent from Section 22(A) that did not exist in the contemplation of the parties.

Third and finally, the Respondents argue that any arbitration rights with respect to Respondent Griffin were extinguished by the doctrine of merger because "[n]owhere in Griffith's deed is there any reference to arbitration of claims." (Respondents' Brief § II(C)).[9] The merger doctrine does not apply to the Griffith Construction Agreement because the parties plainly did not intend for the transfer of a deed (concerning solely a land sale) to supersede the entirety of their construction agreement (concerning the construction of a single-family home from beginning to end).

Under what is commonly referred to as the contrary intent exception to the merger doctrine, "[w]here a deed constitutes only part performance of a preceding contract, other distinct and unperformed provisions of the contract are not merged in the deed." *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993); *see also South Carolina Dep't of Transp. v. McDonald's Corp.*, 2006 WL 7285985, at *3–4 (S.C. Ct. App. May 9, 2006), *vacated on other grounds sub nom.*, 375 S.C. 90, 650 S.E.2d 473 (2007) (finding merger doctrine inapplicable because parties' agreement necessarily required performance after deed execution). Here, the record is replete with evidence that the parties did not intend for the mere

9 The Respondents' merger doctrine argument is limited to Respondent Griffin. The Respondents concede it does not apply to Respondent Coleman.

transfer of a deed to Respondent Griffith to supersede the entirety of the Griffith Construction Agreement.[10]

The Griffith Construction Agreement, executed December 20, 2018, contemplates extensive work, obligations, and duties that necessarily extend beyond the date the Griffin deed was recorded on January 28, 2019, thirty-nine (39) days after the Griffith Construction Agreement was executed. (R. pp. 125–128). For example, under Section 3, "Builder shall use its best efforts to deliver the completed residence specified herein on or about 150 days from start of construction." Under Section 8, "Owner agrees to make all necessary selections for exterior colors, interior finishes, electrical outlet locations, and lighting locations within forty-five (45) days from the effective date of this agreement." Under Section 9, "[t]he Residence is considered complete when the balance of the Price of the Residence is paid to Builder and a certificate of occupancy for the Residence is issued by the City of Clemson." Yet a certificate of occupancy was not issued from the City of Clemson to Mr. Griffith until October 10, 2019, almost nine (9) months *after* the deed was delivered to Respondent Griffith. (R. p. 188). And under Section 10, the obligations of a walk-through inspection do not come into play until "[a]t or near the time of Substantial Completion."

[10] On the issue of which portions of the Construction Agreements this Court can consider, the Respondents are arguing out of both sides of their mouths, and they are doing so incorrectly in both circumstances. As discussed in *infra* Section III(A), when the Court is conducting an "unconscionability analysis," it may only consider "the provisions of the arbitration agreement" and not "the whole contract." *D.R. Horton*, 417 S.C. at 48 & n.4, 790 S.E.2d at 3–4 & n.4. Yet, the Respondents ask the Court to consider the entire Coleman Construction Agreement for that purpose. (*See* Respondents' Brief § III(B)). Here, however, when the Court must necessarily consider an entire contract to determine which parts are unrelated to the transfer of a deed, the Respondents want the Court to limit its review to the arbitration clauses only. (*See* Respondents' Brief § II(C) ("[N]othing in the text of Paragraph 22 reveals an intent that its provisions should survive closing.")) The Respondents are wrong in both circumstances.

None of these contractual obligations is set forth in the deed. Yet, taking the Respondents' argument to its logical end, they must be contending that all of these obligations were superseded as of January 28, 2019, when the Griffith deed was recorded. Viewed through this lens, the Respondents' merger argument would lead to absurd results. Because the parties clearly did not intend for the deed to supersede the entirety of the Griffith Construction Agreement, the merger doctrine does not apply to somehow void the application of the arbitration clause in Section 22(A) of the Griffith Construction Agreement.

B. Section 24 of the Coleman Construction Agreements also requires Respondent Coleman to arbitrate his disputes.[11]

The Coleman Construction Agreement requires Respondent Coleman to submit his claims to arbitration pursuant to Section 22(A), as noted above. In addition, Section 24 of the Coleman Construction Agreement also requires Respondent Coleman to submit his claims to arbitration. The plain language of Section 24 provides that "in the event any issue in law or equity arises after execution of [the Coleman Construction Agreement], same shall be resolved through binding arbitration." (R. p. 85, § 24). Therefore, even if the Court determines that Section 22(A) of the Coleman Construction Agreement does not require Respondent Coleman to arbitrate his claims (which it should not), he is nevertheless required to arbitrate pursuant to Section 24. Apart from

[11] The Appellants agree with the Respondents (*see* Respondents' Brief § I) that the Court should consider the Respondents separately, insofar as the respective Construction Agreements are not identical. This is a welcomed pivot from the Respondents' prior arguments before the trial court concerning class arbitration, which is not at issue. (R. pp. 59–60, § I). The Respondents additional arguments on appeal regarding consideration of the construction agreements signed by other prospective class members (who are not parties) and whether Appellants "opened the door" to such evidence (*see* Respondents' Brief § 1) is not relevant to the issues on appeal. Stated differently, while questions about commonality and typicality may be pertinent to a class certification proceeding (and are included in the Baar Aff. for that reason), they have nothing to do with whether the claims of the two Respondents here are subject to binding arbitration.

asserting contract defenses (discussed *infra* § III), the Respondents do not dispute that the breadth of Section 24 of the Coleman Construction Agreement encompasses the claims asserted by Respondent Coleman.

III. There are no defenses that prevent enforcement of the arbitration provisions in the Construction Agreements.

In addition to the Respondents' claims falling squarely within Sections 22(A) of the Construction Agreements (and Section 24 with respect to the Coleman Construction Agreement), there are no "grounds as exist at law or in equity" permitting Respondent Coleman to avoid the plain contractual language requiring arbitration of his disputes. 9 U.S.C. § 2.[12]

A. The Court should limit any unconscionability assessment to Section 24 of the Coleman Construction Agreement.

The starting point for any assessment of defenses is defining the scope of the arbitration agreements. *See Damico*, 437 S.C. at 609, 879 S.E.2d 753 ("the Court must first define the scope of the arbitration agreement"). That is because, under the FAA, "[t]he validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator." *Damico*, 437 S.C. at 609, 879 S.E.2d at 753. Stated differently, in assessing the arbitrability of this dispute, the Court may not consider "the whole contract"; it may only consider "the provisions of the arbitration agreement itself." *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4; *see id.* at 48 n.4, 790 S.E.2d at 3 n.4 (scope of arbitration agreement must be determined first "because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis"). By limiting the scope of the arbitration agreements to Section 22(A)

[12] As to Section 22(A) in both Construction Agreements, the Respondents are not arguing that the Construction Agreements are unconscionable. The Respondents' unconscionability argument is limited to Section 24 in the Coleman Construction Agreement. (*See* Respondents' Brief § III). The Appellants, in turn, limit their argument regarding unconscionability to Respondent Coleman and Section 24 of the Coleman Construction Agreement.

of the Construction Agreements (and Section 24 of the Coleman Construction Agreement in the case of Respondent Coleman), and by "narrowly constru[ing]" the ability to "permit[ ] agreements to arbitrate to be invalidated by generally applicable contract defenses," as this Court must, *D.R. Horton*, 417 S.C. at 52, 790 S.E.2d at 6 (internal quotation marks omitted), the Court should conclude that the routine and commonplace provisions set forth in Section 24 of the Coleman Construction Agreement are not unconscionable.

The Respondents go to great lengths to circumvent this requirement, inviting the Court to consider ***the entire*** Coleman Construction Agreement (before defining the scope of the arbitration agreement) and asking this Court to improperly encroach upon the role of the arbitrator by weighing in on the merits of the contract claims on whole. Specifically, before defining the limited four corners of what this Court should consider in assessing arbitrability, the Respondents argue that, "[o]n the whole, the contract terms are predetermined," and "[v]arious provisions speak to broad audiences." (Respondents Brief § III(A); *see id.* ("the Coleman Contract was a contract of adhesion")). The Respondents go on to ask the Court to improperly consider the following provisions of the Coleman Construction Agreement: **Section 2** (Contract Price and Method of Payment); **Section 3** (Construction Schedule); **Section 4** (Delays); **Section 10** (Walk Through Inspection); **Section 11** (Occupancy); **Section 19** (Limited Warranty); **Section 22(C)** (Payments Upon Termination After Commencement of Work); **Section 22(E)** (Interest); **Section 28** (Multiple Owners); and indeed the construction contracts of individuals who are not even parties to this dispute. (*See* Respondents' Brief § III(A)). The Court should not wander into the error the Respondents are expressly inviting.[13]

[13] Ironically, the Respondents acknowledge the need to define the contours of the arbitration agreement (*see* Respondents' Brief § III(B)), but only ***after*** they make unconscionability

The Respondents are directly asking this Court to consider whether the Coleman Construction Agreement—*on whole*—is unconscionable. That is contrary to binding precedent on this Court. *See Damico*, 437 S.C. at 609, 879 S.E.2d at 753 ("the validity of the contract as a whole is a matter for the arbitrator"). It would be plainly inappropriate for the Court to consider any of the foregoing provisions, unless and until the Court concludes that each of those provisions is part of the agreement to arbitrate, as allegedly intertwined with Section 24.

In assessing the appropriate scope of the arbitration agreement—and the appropriately limited scope of this Court's review—the Appellants previously argued that Section 24 of the Coleman Construction Agreement is more like the standalone arbitration provision in *Damico*, and less like the arbitration provision in *D.R. Horton*, the latter of which involved an arbitration provision comprised of multiple subsections. In other words, to fully understand and implement the meaning of Section 24 of the Coleman Construction Agreement, one does not need to read or consider any other provisions of the Coleman Construction Agreement.

While Respondents now ask this Court to erroneously consider myriad additional provisions, their primary focus is on Section 19 (Limited Warranty). But Section 19 is not intertwined with Section 24 because the Court does not need to review Section 19 in order to understand Section 24. Only two sentences in Section 24 make references to warranties, as follows:

- "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')."

- "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

arguments about the entirety of the Coleman Construction Agreement in the preceding section (*see* Respondents' Brief § III(A)).

industry criteria and standards in the event the Warranty is silent as to an applicable standard."

(R. p. 85, § 24 (emphasis added)). The former clause encompasses all "other claims," so resort to additional sections of the Coleman Construction Agreement is unnecessary. And the latter clause refers to workmanship standards, not the scope of any warranty.[14] Collectively, this language is no different than the following language from the agreement in *Damico*, which was deemed a standalone arbitration provision that did not require resort to separate contractual provisions:

- "The parties to this [purchase and sale a]greement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall first be submitted to . . . binding arbitration as provided by the Federal Arbitration Act . . . . "Disputes" (whether contract, **warranty**, tort, statutory or otherwise)[ ] shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this [purchase and sale a]greement, the Property, the Community or any dealings between Buyer and [Lennar]; (2) arising by virtue of any . . . **warranties** alleged to have been made by [Lennar] or [Lennar's] representatives; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. Buyer has executed this [purchase and sale a]greement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.

437 S.C. at 605–06, 879 S.E.2d at 751–52 (alterations on original; emphasis added). Importantly, despite the fact that the *Damico* arbitration agreement encompassed "warranties alleged to have been made by [builder]"—***just like the references to warranties in Section 24 of the Coleman Construction Agreement***—the Supreme Court of South Carolina in *Damico* concluded that "Section 16 [of the Damico agreement]," of which the above excerpt is the relevant portion, "is a

[14] While this clause uses the capital "Warranty," the word warranty is not defined in the Coleman Construction Agreement. In any event, workmanship standards are not set forth in Section 19 of the Coleman Construction Agreement, so resort would be made to workmanship standards "which are customary to generally accepted local area building industry criteria and standards." (R. p. 85, § 24). In this sense, to the extent provisions other than Section 24 might require consideration, one would look to Section 6 of the Coleman Construction Agreement concerning "Construction Standards." (*See* R. p. 81, § 6).

standalone arbitration provision, dissimilar from that in *D.R. Horton*." 437 S.C. at 610, 879 S.E.2d at 754.

The same is true here. But by failing to first properly define the scope of the arbitration agreement, the Respondents do not grapple with this argument. Instead, the Respondents take the most maximal position possible, arguing that Section 24 of the Coleman Construction Agreement incorporates and requires consideration of the entirety of the Coleman Construction Agreement, rendering the requirements of *Prima Paint* completely inapplicable. (*See* Respondents' Brief § III(B) ("Paragraph 24 is the opposite of [the relevant paragraph in *Damico*]. In this way, *Prima Paint* ***does not apply here***, because Appellants drafted the arbitration provision so that it plainly integrates, and is therefore inseparable from ***the remaining contract terms***." (emphasis added; footnote omitted)). Because "[t]he permissible scope of the initial judicial inquiry [regarding arbitrability] is highly circumscribed and must relate specifically to the arbitration clause," *D.R. Horton*, 417 S.C. at 53, 790 S.E.2d at 6, this is a bold and extreme position that finds absolutely no support in the case law.

Prefaced with the confusing statement "[t]hese are not *Prima Paint* problems" (Respondents' Brief § III(B)), the Respondents' effort to incorporate the entirety of the Coleman Construction Agreement into the arbitration agreement in Section 24 seemingly hinges on the statement in Section 24 requiring both parties to "continu[e] to comply with the other terms of this Agreement" while arbitrating. (R. p. 85, § 24). But this mutual statement does not impact the scope of arbitral issues and, therefore, does not intertwine the entirety of the Coleman Construction Agreement into the arbitration agreement, a result that would render *Prima Paint* meaningless.[15]

B. <u>The routine and commonplace provisions in Section 24 of the Coleman Construction Agreement are not unconscionable.</u>

The Appellants previously argued that the routine, commonplace, and largely mutual provisions in Section 24 of the Coleman Construction Agreement are not "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755; *see id.* at 614, 879 S.E.2d at 756 ("adhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed") (emphasis omitted).[16] The Appellants specifically argued that the types of one-sided provisions deemed unconscionable in *D.R. Horton* and *Damico* do not appear in the Section 24 of the Coleman Construction Agreement. (*See* Appellants' Brief § III(A)).

By circumventing *Prima Paint* and making the extreme argument discussed in *supra* § III(A), the Respondents do not even argue that Paragraph 24 of the Coleman Construction Agreement—*i.e.*, the four corners of what this Court should actually consider in assessing arbitrability—is unconscionable standing alone. And while the Respondents make more general arguments about unequal bargaining power (*see* Respondents' Brief § III(A)), the Respondents not only direct the Court to provisions of the Construction Agreements outside of this Court's

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[15] To be certain, once this matter is properly referred to arbitration, the Respondents may raise these issues regarding the overall contract with the arbitrator in the first instance. *See Damico*, 437 S.C. at 609, 879 S.E.2d at 753 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). But it is plainly beyond the scope of this Court's review—and that of the trial court—to consider such issues beyond the narrow issue of arbitrability.

[16] Appellants previously made the same argument with respect to Section 22(A) of both Construction Agreements (*see* Appellants' Brief § III(B)), but the Respondents have now abandoned any unconscionability argument with respect to Section 22(A).

appropriate and circumscribed review, but they also fail to acknowledge that "[a]dhesion contracts . . . are not per se unconscionable," *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 669 (2007), and "one party['s] lack[of] a meaningful choice" is "not necessarily unconscionable," *Damico*, 437 S.C. at 612, 879 S.E.2d at 755.

Because there are no contract defenses to enforcement of Section 24 of the Coleman Construction Agreement, the FAA requires this Court to enforce the parties' agreement.[17]

CONCLUSION

For the foregoing reasons and those set forth in the Appellants' Brief, this Court should reverse the decision of the trial court which denied the Appellants' motion to compel arbitration and dismiss or stay this action, and it should remand the action to the trial court, with instructions to refer this matter to arbitration and to dismiss or stay the action pending resolution of arbitration proceedings.

This 21st day of July 2026.

/s/ Jonathan E. Schulz
Ryan L. Beaver (SC Bar No. 75669)
Jonathan E. Schulz (SC Bar No. 79850)
BRADLEY ARANT BOULT CUMMINGS LLP
214 North Tryon Street, Suite 3700
Charlotte, North Carolina 28202
Telephone (704) 388-6000
Facsimile: (704) 332-8858
rbeaver@bradley.com
jschulz@bradley.com

Attorneys for JMC Communities, Inc., JMC Homes of South Carolina, LLC, and Patrick Square, LLC

[17] Because Section 24 of the Coleman Construction Agreement is not unconscionable, the Court need not consider the issue of severance. (*See* Respondents' Brief § III(C)).

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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.

RULE 211(b) CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing **REPLY BRIEF** complies with SCACR 211(b) because it is identical to the previously filed Initial Reply Brief except for references to the record and correction of typographical errors and misspellings

This 21st day of July 2026.

/s/ Jonathan E. Schulz
Jonathan E. Schulz (SC Bar No. 79850)