ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2009-CP-18-1601

DAVID AND BRIDGETTE MANNING,
INDIVIDUALLY AND AS LEGAL GUARDIANS OF
TATE M AND COLBY M
BOTH MINORS LESS THAN 18 YEARS OF AGE.. ..... Respondents.

v.

LENNAR CAROLINAS, INC., DON GALLOWAY
HOMES, LLC and LENNAR COMMUNITIES
OF THE CAROLINAS, INC ..... Appellants.

FINAL BRIEF OF APPELLANTS

James L. Werner
South Carolina Bar No. 6029
Jenna K. McGee
South Carolina Bar No. 76891
Laura E. Figueroa
South Carolina Bar No. 77679
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Telephone: (843) 727-2650
Facsimile: (843) 727-2680

Attorneys for Appellants Lennar Carolinas, Inc., Don Galloway Homes, LLC and Lennar Communities of the Carolinas, Inc.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR BY DETERMINING THAT THE FEDERAL ARBITRATION ACT ("FAA") DOES NOT APPLY WHERE, AS HERE, THE PARTIES' AGREEMENT EXPRESSLY STIPULATES THAT ALL DISPUTES BETWEEN THE PARTIES WILL BE SUBMITTED TO MANDATORY AND BINDING ARBITRATION UNDER THE FAA AND WHERE THE PURCHASE AND CONSTRUCTION OF THE RESIDENCE INVOLVED INTERSTATE COMMERCE?

II. DID THE LOWER COURT ERR BY DETERMINING THAT THE NEGLIGENCE, GROSS NEGLIGENCE, BREACH OF IMPLIED WARRANTY, AND UNFAIR TRADE PRACTICES CLAIMS ASSERTED BY RESPONDENTS ARE NOT WITHIN THE SCOPE OF THE ARBITRATION PROVISIONS?

III. DID THE LOWER COURT ERR BY DETERMINING THAT THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AND UNENFORCEABLE WHERE, AS HERE, RESPONDENTS DID NOT LACK MEANINGFUL CHOICE IN SIGNING THE AGREEMENT, AS THE ARBITRATION PROVISIONS ARE CLEAR AND CONSPICUOUS, THE RESPONDENTS NEGOTIATED THE TERMS OF THE AGREEMENT, AND THE TERMS OF THE ARBITRATION PROVISION CONTAIN NO ELEMENT OF SURPRISE?

IV. DID THE LOWER COURT ERR BY DETERMINING THAT THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AND UNENFORCEABLE WHERE, AS HERE, THE ARBITRATION PROVISIONS LACK OPPRESSIVE, ONE-SIDED TERMS, IN THAT THE AGREEMENT ALLOWS LIMITLESS DAMAGES, MUTUALLY OBLIGATES THE PARTIES, AND FAVORS NEITHER PARTY?

STATEMENT OF THE CASE

David and Bridgette Manning ("Respondents") brought this action in the Dorchester County Court of Common Pleas on June 10, 2009, alleging that Lennar Carolinas, Inc., Don Galloway Homes, LLC and Lennar Communities of the Carolinas, Inc. (collectively, "Appellants") defectively constructed their single family residence located at 200 Curico Lane in Dorchester County, South Carolina (the "Residence"). (*See generally* R. pp. 11-21, Complaint). Specifically, Respondents allege improper framing, roofing and foundation, improper installation of siding, windows, flashing, and moisture barriers, and various other structural defects and building code violations, which have purportedly damaged the Residence. (*See generally* R. p. 3).

On July 29, 2009, Appellants moved to stay the action based on Respondents' failure to comply with the pre-suit notification requirements of the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code. § 40-59-810 *et seq.* (the "Right to Cure Act"). (*See generally* R. pp. 22-23). As Appellants never received the required written notice, Respondents conceded that the action should be stayed until Respondents fulfilled those statutory obligations. (*See generally* R. pp. 24-30).

Thereafter, on July 12, 2010, Appellants filed a Motion to Stay the Action and Compel Arbitration on the grounds that the claims asserted in Respondents' Complaint are subject to mandatory and binding arbitration under the terms of the Purchase Agreement, dated July 30, 2002, between Respondents and Don Galloway Homes, LLC (the "Agreement"). (*See generally* R. pp. 31-61, Motion to Stay the Action and Compel Arbitration (the "Motion")).

The first page of the Agreement that Respondents signed provides in conspicuous, bold, underlined, and capitalized type:

> **ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE CONSTRUCTION OF THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PARTIES ACKNOWLEDGE THAT ARBITRATION SHALL BE THE SOLE, FINAL, BINDING AND EXCLUSIVE REMEDY OF THE PARTIES WITH RESPECT TO ANY SUCH MATTER FOR WHICH ARBITRATION IS REQUIRED HEREUNDER...THIS PROVISION SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT 9 U.S.C. § 1 ET SEQ.).**

(R. p. 167) (emphasis in original). The first line of the Agreement also states that "***THIS AGREEMENT IS SUBJECT TO ARBITRATION (SEE PARAGRAPH 7 HEREIN)***." *Id.* (emphasis in original).

On September 29, 2010, Respondents filed their Return and Reply to Appellants' Motion challenging their arbitration obligations. Respondents allege that the Agreement is an unenforceable adhesion contract because Respondents, who were not sophisticated parties, were without counsel in negotiating the real estate purchase underlying the Agreement. (*See generally* R. pp. 24-30).[1]

In support of their Motion, Appellants submitted numerous written documents for the lower court's consideration, including a Memorandum in Support of its Motion to Stay and Compel Arbitration filed on October 6, 2010 ("Memorandum"). Appellants provided law and relevant facts demonstrating that the FAA governs the enforceability of

[1] Respondents later admitted that they were represented by counsel. (R. p. 160, lines 1-4).

the arbitration provision contained in the Agreement and that the arbitration provision was not unenforceable as unconscionable because there was neither an absence of meaningful choice in Respondents' execution of the Agreement nor one-sided terms. (*See generally* R. pp. 62-133). In further support of their claims, Appellants filed the Affidavit of David Murphy, dated October 5, 2010, affirming that the construction of the Residence involved interstate commerce and that Respondents negotiated the terms of the Agreement. (*See generally* R. pp. 134-136).

On November 2, 2010, the lower court, with the Honorable Edgar Warren Dickson presiding, held a hearing on Appellants' Motion. Appellants presented evidence demonstrating that Respondents agreed to mandatory arbitration by executing the Agreement containing the conspicuous and clearly-marked arbitration provisions. (R. p. 142, line 17-p. 143, line 12, R. pp. 145, line 25-p.146, line 20). Appellants demonstrated that the broad scope of the arbitration provisions, which covers "all claims, controversies, or disputes between [Appellants] and [Respondents] arising out of or relating to the construction of the subject residence, or of any other kind," encompasses all of the claims that Respondents allege. (R. pp. 143, line 6-p. 144, line 6). Moreover, Appellants noted that the parties had stipulated in the Agreement that the Federal Arbitration Act ("FAA") would govern the arbitration provisions and that the transaction sufficiently involved interstate commerce such that the FAA would apply. (R. p. 142, line 25-p. 143, line 10; R. p. 145, line 25-p. 146, line 20). The lower court agreed stating:

> "[I]t's just interesting to me that a South Carolina[2] builder selling to a South Carolina owner for a house in South Carolina, is then governed arbitrarily by the Federal Arbitration Law just because some of the

[2] The lower court overlooked the fact that the builder was actually a Delaware limited liability company.

> products came from interstate commerce. I just find that, I mean, that's just to me is a fascinating concept. But I mean, I agree with you, I agree with your interpretation of the law and like that.

(R. p. 155, lines 3-11). Finally, Appellants cited relevant law indicating that the arbitration provision is not unconscionable because, among other reasons, it does not attempt to limit the remedies available to Respondents nor does it impose undue costs on one party. (R. p. 146, line 25-p. 147, line 5; R. p. 148, line 11-p. 149, line 2).

At the hearing, Respondents did not dispute that they executed the Agreement and conceded that the Agreement provides that all disputes between the parties regarding the Residence will be resolved through mandatory and binding arbitration. (R. p. 157, lines 20-23). However, Respondents alleged that their claims for negligence, breach of implied warranties, and unfair trade practices were not encompassed by the arbitration clause. (R. p. 161, line 24-p. 163, line 16). Furthermore, Respondents contended that the Agreement was an adhesion contract, though they admitted that there was no "lack of process" in the execution of the Agreement. (R. p. 159, lines 16-25; R. p. 163, line 18-p. 164, line 9).

Despite the clear evidence that the parties agreed and stipulated that all disputes regarding the Residence, the Agreement, and any dealings between the parties would be resolved through arbitration, nearly one year after the hearing, the Honorable Edgar Warren Dickson issued an Order, dated September 30, 2011, denying Appellants' Motion. (*See generally* R. pp. 2-10). Appellants received written notice of entry of the Order on October 6, 2011. Thereafter, Appellants filed their Notice of Appeal on October 17, 2011.

ARGUMENT

I. STANDARD OF REVIEW

Appeal from the denial of a motion to compel arbitration is subject to de novo review. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) (reversing trial court's denial of motion to compel arbitration in action involving the construction of a church); *Timmons v. Starkey*, 380 S.C. 590, 671 S.E.2d 101 (Ct. App. 2008) (overturning trial court's denial of motion to compel arbitration where claims fell within scope of broadly-worded arbitration clause); *McMillian v. Gold Kist, Inc.*, 353 S.C. 353, 577 S.E.2d 482 (Ct. App. 2009) (reversing trial court's refusal to compel arbitration where FAA governed the enforceability of an arbitration provision).

II. THE LOWER COURT ERRED BY NOT APPLYING THE FEDERAL ARBITRATION ACT ("FAA") BECAUSE THE PARTIES' AGREEMENT EXPRESSLY STIPULATES THAT ALL DISPUTES BETWEEN THE PARTIES WILL BE SUBMITTED TO MANDATORY AND BINDING ARBITRATION UNDER THE FAA AND BECAUSE THE PURCHASE AND CONSTRUCTION OF THE RESIDENCE INVOLVED INTERSTATE COMMERCE.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*, codifies the well-established federal policy favoring arbitration. *See O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997) (stating that the FAA represents "a liberal federal policy favoring arbitration agreements."). The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.E.2d 26 (1991); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001) ("The basis purpose of the FAA

is to overcome state courts' refusal to enforce arbitration agreements."). As a result, trial courts must address questions of arbitrability "with a healthy regard for the federal policy favoring arbitration." *Id.* (there is a heavy presumption in favor of the validity of arbitration agreements). Because the Agreement expressly states that the arbitration provision should be construed and enforced pursuant to the FAA and because the construction and purchase of the Residence involved interstate commerce, the lower court erred by declining to apply the FAA to the Agreement.

A. THE FAA APPLIES BECAUSE THE AGREEMENT EXPRESSLY STIPULATES THAT THE ARBITRATION PROVISIONS "SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. § 1 ET SEQ)."

The Agreement expressly states that "[the arbitration provisions] shall be construed and enforced, at all times, pursuant to the Federal Arbitration Act (9 U.S.C. § 1 et seq)." (R. p. 167). Arbitration agreements, like other contracts, are enforceable in accordance with their terms. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (stating that trial court should apply ordinary principles that govern the formation of contracts when determining whether an agreement to arbitrate exists).

In particular, courts are obligated to enforce contractual provisions in which parties agree that the FAA will govern. *Munoz,* 343 S.C. at 539, 542 S.E.2d at 364 (overturning trial court's refusal to apply the FAA to parties' agreement which stated that "this contract and the relationships which result from this contract" is to be governed by the FAA). Here, the terms of the arbitration provisions clearly and simply state that the FAA shall govern the enforceability of the arbitration provision. (R. p. 167). As a result,

because the parties specifically contracted for the FAA to govern the enforceability of the Agreement's arbitration provisions, the lower court erred by refusing to enforce the arbitration provisions in accordance with the FAA.

B. THE FAA APPLIES BECAUSE THE PURCHASE AND CONSTRUCTION OF THE RESIDENCE INVOLVED INTERSTATE COMMERCE, INCLUDING OUT-OF-STATE PARTIES, MATERIALS, AND SUPPLIERS.

Even if the Agreement did not expressly stipulate that the FAA applies, which it does, the FAA must apply in this case because the Agreement contains arbitration provisions and the purchase and construction of the Residence involved interstate commerce. Title 9 U.S.C. § 2 of the FAA provides, in pertinent part:

> [A] written provision in any ... contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such a contract ... shall be valid, irrevocable, and enforceable."

The FAA applies in federal and state courts to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction, unless the parties specifically contract to the contrary. *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

For purposes of the FAA, the United States and South Carolina Supreme Courts define interstate commerce "broadly." *Zabinski*, 346 S.C. at 591, 553 S.E.2d at 115; *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) ("The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its fullest extent."). "To determine whether a transaction involves commerce within the meaning of the FAA, the Court must examine the agreement, the complaint, and the surrounding facts." *Towles v. United*

HealthCare Corp., 338 S.C. at 36, 524 S.E.2d at 843 (finding employee's duties in reviewing invoices from out-of-state providers sufficient to invoke the FAA).

That the purchase and construction of the Residence involves interstate commerce is evident from the face of the Agreement. (*See generally* R. p. 167). In the Respondents' Complaint, they incorrectly identified Don Galloway Homes, LLC ("Don Galloway") as a "limited liability company organized pursuant to the laws of North Carolina." (R. p. 12). Don Galloway is, in fact, a Delaware limited liability company. Regardless of whether Don Galloway is a North Carolina or Delaware company, however, it is clear that the relevant real estate transaction involved parties from different states, such that the Agreement involved interstate commerce and the FAA should have been applied. *See Munoz*, 343 S.C. at 531, 542 S.E.2d at 360 (finding interstate commerce involved in a construction contract where builder was domiciled in South Carolina but, under the terms of the contract, assigned its contractual rights to a Delaware creditor).

In addition to the fact that one party to the transaction was an out-of-state company, Appellants also submitted an Affidavit to the lower court showing that the transaction that underpins the Agreement and forms the basis of the Complaint involves significant out-of-state activities. Indeed, the Residence could not have been constructed absent the infusion of out-of-state materials and supplies, such as shingles, windows, insulation, cabinets, and appliances, which were transported into the State of South Carolina. (*See* R. p. 135); (R. p. 144, lines 17-21). Specifically, the Affidavit of David Murphy, submitted to the lower court prior to the hearing, affirmed that the construction of the residence involved the infusion of out-of-state materials and supplies, including:

- The residence was sold with "Sill Seal," which was manufactured by the Dow Company, based in Midland, Michigan.
- The residence was sold with cabinets, which were manufactured by Merillat Cabinets, based in Ann Arbor, Michigan.
- The residence was sold with countertops, which were manufactured by Wilsonart International, based in Wilson Place Temple, Texas.
- The residence was sold with Moire Black shingles, which were manufactured by CertainTeed, based in Valley Forge, Pennsylvania.
- The residence was sold with windows, which were manufactured by Kinco Windows, based in Jacksonville, Florida.
- The residence was sold with insulation, which was manufactured by 31-W Insulation, based in Nashville, Tennessee.
- The residence was sold with appliances, which were manufactured by GE Appliances, based in Fairfield, Connecticut.

(R. p. 135).

Where, as here, a party submits evidence by affidavit demonstrating that nearly every material that was used in the construction of the Residence implicates interstate commerce, it is difficult to understand how the lower court found Appellants' arguments that the subject house was produced in interstate commerce "unavailing." (R. p. 7); *Blanton*, 351 S.C. 541, 570 S.E.2d at 569 (upholding application of FAA where party submitted an affidavit indicating that the performance of a contract necessitates the use of out-of-state materials); *Zabinski*, 346 S.C. at 117, 553 S.E.2d at 595 ("Both the United States Supreme Court and [the South Carolina Supreme Court] have relied on affidavits when determining whether a transaction involves interstate commerce.").

Even if Appellants had not proffered specific proof by affidavit that the purchase and construction of the Residence involved out-of-state actors and materials, which they did, South Carolina courts essentially accept it as given that construction involves

interstate commerce. *See Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct [a housing project for the elderly] with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."); *Blanton*, 351 S.C. at 541, 570 S.E.2d at 569 (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce because "the contract not only contemplated the use of materials manufactured outside the state of South Carolina, but realistically the project could not be constructed without the use of materials in interstate commerce"). In erroneously finding that the Agreement did not involve interstate commerce, the lower court overlooked not only the extensive evidence of interstate connections, but also the legal presumption that construction involves interstate commerce.

III. THE LOWER COURT ERRED BY DETERMINING THAT THE NEGLIGENCE, GROSS NEGLIGENCE, BREACH OF IMPLIED WARRANTY, AND UNFAIR TRADE PRACTICES CLAIMS ASSERTED BY RESPONDENTS ARE NOT WITHIN THE SCOPE OF THE ARBITRATION PROVISIONS.

The Agreement contains broadly-worded arbitration provisions. In pertinent part, the Agreement provides:

> **ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION.**

(R. p. 167) (emphasis in original). Despite the decidedly broad scope of the arbitration provisions, the lower court determined that Respondents' claims are not covered by the arbitration provisions. (R. p. 7). The lower court's determination that Respondents'

claims, which arose from purported construction defects at the Residence, are not subject to arbitration is unsupported by the controlling case law.

The South Carolina Supreme Court has confirmed that courts must disregard legal labels in deciding whether an arbitration agreement encompasses the factual allegations underlying a claim. *Zabinski,* 346 S.C. at 597, 553 S.E.2d 118. In the event that there is any dispute regarding the scope of an arbitration provision, South Carolina courts are required to decide such disputes in favor of arbitration. *Id.* "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Id.*; (R. p. 143, line 25-p. 144, line 9).

The arbitration provisions in this case apply to "all claims relating to the subject residence, or of any other kind." (R. p. 167).[3] Respondents' allegations of building code violations, improper installation, water intrusion, building envelope failures and mold damage are clearly construction defect claims that "relat[e] to the subject residence" and fall within the scope of the arbitration provisions. (R. p. 167; R. p. 143, lines 7-24).

The determination that Respondents' claims were not subject to arbitration "because [Respondents] do not seek remedies on a breach of contract cause of action, but rather various tort-based claims" is reversible error. (R. p. 7). Tort claims are not, by their nature, exempt from arbitration. *See Stokes v. Metro. Life Ins. Co.,* 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) (finding employee's trespass and conversion claim

[3] The arbitration provisions at issue are not limitless, as Appellants made clear that claims involving outrageous tortious conduct such as harassment or defamation that would be unforeseeable to a reasonable consumer in the context of a normal business relationship would not be subject to arbitration. *See Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (2007).

against employer arbitrable under employment agreement); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (arbitration provision stating that any claim or controversy arising out of partnership agreement is arbitrable applied to tort claims between partners); *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2004) (determining negligence and breach of contract accompanied by fraudulent act claims within scope of arbitration agreement providing that any matter concerning the agreement or work performed would be subject to arbitration); *Goodwin v. Stanley Smith & Sons,* 300 S.C. 90, 386 S.E.2d 464 (Ct. App. 1989) (compelling arbitration of fraud claims where contract provision provided that all claims related to the contract were to be decided by arbitration).

Because the claims alleged by Respondents relate directly to the construction of the Residence, Respondents' negligence, gross negligence, implied warranty, and unfair trade practices claims are subject to arbitration under the scope of the Agreement's arbitration provisions.

IV. THE LOWER COURT ERRED BY DETERMINING THAT THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AND UNENFORCEABLE.

The lower court also improperly denied Appellants' Motion on the grounds that "the relevant arbitration provisions are unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." (R. p. 10). To be unenforceable as unconscionable under South Carolina law, there must be an "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." *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752, 757 (2004). Because the record reflects

neither absence of meaningful choice nor oppressive or one-sided terms, the lower court erred in refusing to compel arbitration pursuant to the terms of the Agreement.

A. RESPONDENTS DID NOT LACK MEANINGFUL CHOICE IN SIGNING THE AGREEMENT.

Absence of meaningful choice on the part of one party requires evidence of a fundamentally unfair bargaining process in the contract at issue. *See Herron v. Century BMW*, 387 S.C. 525, 532, 693 S.E.2d 394, 398 (2010) (holding consumer had meaningful choice in making decision to enter into adhesion contract with used car salesperson). Because the arbitration provisions are clear and conspicuous, the parties negotiated the terms of the Agreement, and the arbitration provisions contain no element of surprise, the lower court's determination that Respondents lacked meaningful choice in signing the Agreement should be reversed.

1. THE ARBITRATION PROVISIONS ARE CLEAR AND CONSPICUOUS.

The conspicuousness of an arbitration clause is one factor in a court's determination of whether a party lacked meaningful choice in executing a contract. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Here, the lower court invalidated the arbitration provisions on the stated grounds that "the terms for the arbitration clause are contained in a dense agreement." (R. p. 7). By contrast, Judge Dickson stated at the hearing:

> I have a one page contract that at the top say it's subject to arbitration, and then it says, see Paragraph Seven. And Paragraph Seven takes up twenty percent of the front page and it's underlined in big letters and says, y'all arbitrating. That's what it says to me.

(R. p. 157, lines 10-14). As such, the Order is contrary to the evidence and Judge Dickson's own observations at the hearing.

As the lower court noted, the arbitration provisions constitute at least twenty percent of the Agreement and are undeniably conspicuous. (R. p. 157, lines 10-14). It appears at the top of the first page of the document in bold, capital and underlined font. (*See generally*, R. p. 167).[4] The lower court's mischaracterization of the Agreement as "dense" is evident from the fact that the Agreement constitutes only 10 paragraphs, the longest of which is the 17 line arbitration provision. (*See generally* R. p. 167).

Because the arbitration provision is clear and conspicuous on the front page of the Agreement, the Respondents were not deprived of meaningful choice in agreeing to arbitrate. *Herron*, 387 S.C. at 533, 693 S.E.2d at 398 (holding that conspicuously labeled arbitration agreement renders the decision to sign such an agreement meaningful even in light of disparate bargaining power between a consumer and corporate entity). Accordingly, the record and the relevant law do not support the lower court's refusal to enforce the arbitration provisions.

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[4] As stated above, the Agreement provides:

> **ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND, SHALL BE SETTLED BY ARBITRATION.**

(R. p. 167) (emphasis in original).

2. RESPONDENTS NEGOTIATED THE TERMS OF THE AGREEMENT.

In determining whether a party lacked meaningful choice in executing an arbitration agreement, the court may also consider whether there was any disparity in the parties' bargaining power. *Simpson,* 373 S.C. at 25, 644 S.E.2d at 669. As grounds for its ruling that the arbitration provisions are unenforceable, the lower court stated that "it is obvious that the parties had disparate bargaining agreement." (R. p. 6). Specifically, the Order provides that "[Appellants are] relatively sophisticated business entit[ies] while [Respondents] are first time homebuyers." (R. pp. 6-7). The lower court's reasoning is insufficient to justify invalidating the arbitration provisions.

"Inequality of bargaining power alone is insufficient to invalidate an arbitration agreement." *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365; *Gilmer*, 500 U.S. at 20, 11 S.Ct. at 1647. Indeed, the "mere fact that one party to the contract is larger than the other" cannot be the basis for finding that an arbitration clause is unenforceable. *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir. 1991). "There are many cases in this jurisdiction and others involving the enforceability of arbitration clauses . . . between commercial entities and consumers." *Simpson* 373 S.C. at 26, 644 S.E.2d at 669; *see also Herron, v.* 387 S.C. at 693 S.E.2d at 394 (enforcing arbitration agreement between consumer and commercial entity); *Munoz*, 343 S.C. at 542 S.E.2d at 360 (affirming enforcement of arbitration between individual, residential builder and creditor); *Stokes,* 351 S.C. at 606, 571 S.E.2d at 711 (compelling arbitration between employee and large commercial employer); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998) (reversing trial court's failure to order arbitration between individual borrower and commercial lender). As a result, South Carolina courts refuse to invalidate

arbitration provisions solely on the grounds that the transaction involves parties occupying unequal bargaining positions.

In addition, Respondents provided no evidence, by affidavit or otherwise, to suggest that they were disadvantaged by the allegedly disparate bargaining position. *See Holden v. Carolina Payday Loans, Inc.*, No. 08-182-TLW, 2008 WL 4198587, at * 14 (D.S.C. Sept. 5, 2008) (finding that all claims should be submitted to arbitration in accordance with the agreements where the plaintiffs failed to substantiate their allegations with affidavits); *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962) (arguments of counsel not properly considered evidence). To the contrary, Respondents admitted that they did not suffer a "lack of process" in executing the Agreement. (R. p. 159, lines 16-20). As such, the unrefuted evidence is that Respondents actively and meaningfully negotiated the terms of the Agreement with Don Galloway Homes, LLC by bargaining for payment of their closing costs, certain upgrades, and structural changes to the residence. (*See generally* R. pp. 62-133; R. pp. 134-136).

Where, as here, a party negotiates the terms of its Agreement with a commercial entity, the law does not permit the court to invalidate an arbitration provision in that Agreement on the grounds that the party lacked meaningful choice in making the decision to enter the Agreement.

3. THE TERMS OF THE ARBITRATION PROVISIONS DO NOT CONTAIN ANY ELEMENT OF SURPRISE.

The absence of surprise in the challenged arbitration provisions demonstrates the existence of meaningful choice on behalf of the parties to a contract. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. Because Respondents were aware, or should have been aware, of the terms included in the arbitration provisions, and had an opportunity to consult an

attorney prior to executing the Agreement, the lower court erred in determining that the Respondents lacked a meaningful choice in accepting the arbitration provisions. (R. p. 6); (R. p. 160, lines 1-4).

As stated above, the terms of the arbitration provisions were clearly and conspicuously stated on the first page of the Agreement and, therefore, should not have come as a surprise to Respondents. (*See generally* R. p. 167). Respondents' failure to read those arbitration provisions is not a recognized reason to deny arbitration in violation of the Agreement. *See Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986) ("[E]very contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it."); *First Baptist Church of Timmonsville v. George A. Creed & Sons, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) ("[I]n the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the provision by simply declaring: 'But I did not read the whole agreement.'").

Nor does the law impose a duty to explain a document's contents to an individual when that individual can learn the contents from simply reading the document. *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 ("[A]rbitration agreements governed by the FAA will not be set aside on the ground that the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it."). The duty to read is particularly important, where, as here, Respondents assert that the purchase of the residence was one of the most significant expenditures of their lives. (*See generally* R. pp. 24-30). As a result, the lower court erred in finding that Respondents' lack of awareness of the arbitration provisions constitutes lack of meaningful choice. *Towles*,

338 S.C. at 39, 524 S.E.2d at 845 (reversing trial court's refusal to compel arbitration where party claimed he was unaware of arbitration provision).

Respondents have also alleged that they lacked the ability to understand the arbitration provisions. (*See generally* R. pp. 24-30); (R. p. 6). However, at the time of execution of the Agreement, Respondents were represented by counsel, as Respondents acknowledge. (R. p. 150, lines 1-11; p. 160, lines 1-4); *Carolina Care Plan, Inc.*, 361 S.C. 555, 606 S.E.2d 758 (finding no unconscionability where party to agreement containing arbitration provision was represented by counsel). Assuming, *arguendo*, Respondents had been without counsel, Respondents have never alleged that the terms of the Agreement prohibited them from seeking an attorney. *See Lackey*, 330 S.C. at 399, 498 S.E.2d at 904 (reversing trial court's finding that arbitration agreement was unenforceable as unconscionable where mobile home purchasers were not prevented from consulting an attorney prior to signing a purchase contract).

Because the arbitration provisions contained no elements of surprise to Respondents, the lower court incorrectly determined that Respondents lacked meaningful choice in executing the Agreement.

B. THE ARBITRATION PROVISIONS DO NOT CONTAIN OPPRESSIVE, ONE-SIDED TERMS.

The lower court held that "[t]he contract that the parties are subject to in this action is one-sided, oppressive, and does not promote arbtitral remedies that are neutral in their effect on the parties." (R. p. 9). The record contains no evidence that would support this finding. On the contrary, the arbitration provisions provide for limitless damages, mutually obligate both parties, and favor neither party. (*See generally* R. p. 167). Because neither the record nor the law supports the lower court's determination

that the terms of the arbitration provision are oppressive and one-sided, the lower court's refusal to grant Appellant's Motion to Compel on the grounds that arbitration provisions are unconscionable should not stand.

1. THE ARBITRATION PROVISIONS DO NOT LIMIT RECOVERABLE DAMAGES.

The Order suggests that the arbitration provisions are invalid because they exclude implied remedies available to Respondents, including the implied warranty of habitability. (R. p. 8). Neither the arbitration provisions nor the Agreement contain such a disclaimer. (*See generally* R. p. 167). In addition, the Agreement does not "prevent[] the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the [A]greement limit any available statutory remedies." *Herron*, 387 S.C. at 534, 693 S.E.2d at 399; (*see generally* R. p. 167). As a result, the lower court's ruling that the Agreement limits remedies or recoverable damages available to Respondents is without factual support.

There is also no legal basis for the lower court's ruling. "An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined." *Munoz,* 343 S.C. 542 S.E.2d at 365 (emphasis in original). Respondents have not been deprived of any remedy available to them in a civil suit; rather, they must simply seek their remedy through arbitration. As a result, even if the Agreement had contained a disclaimer of warranties, such a disclaimer would not be a basis for avoiding arbitration, as a disclaimer applies with equal force in the arbitral forum as in the courts. *See e.g.*, *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006) (finding that the "principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability"). Because the arbitration

provisions merely set forth the forum in which Respondents are to bring their claims and do not limit the remedies available to Respondents, the lower court erred in denying the Motion.

2. THE ARBITRATION PROVISIONS MUTUALLY OBLIGATE THE PARTIES.

The Order provides that the arbitration provisions are unconscionable because Don Galloway is entitled to bring an equitable judicial action for injunction or specific performance. (R. p. 8).[5]

South Carolina courts reject the rule requiring mutuality of remedy in a contract. *See Columbia Water Power Co. v. City of Columbia*, 5 S.C. 225 (1873); *Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 355 S.E.2d 286 (Ct. App. 1987); *Lackey*, 330 S.C. at 402, 498 S.E.2d at 905 ("There is no requirement that the consideration for one party's obligation to arbitrate all issues under a contract be the other party's obligation to arbitrate all issues under that contract."). As such, the fact that Respondents are not allowed to judicially pursue certain remedies is not a sufficient reason for the lower court to invalidate the arbitration provisions. *Lackey*, 330 S.C. at 402, 498 S.E.2d at 905; Restatement (Second) of Contracts § 363 cmt. c (1981).

South Carolina courts have previously upheld arbitration provisions that permit judicial remedies to one contracting party and not the other. *Munoz,* 343 S.C. 542 S.E.2d at 365 (arbitration provision between consumer and lender not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate

[5] As the issue of inequality of remedies based on Don Galloway's reservation of rights to pursue equitable judicial action for injunction or specific performance was not raised in any of Respondents' written submissions or in oral arguments before Judge Dickson, the issue was not properly before the lower court.

counterclaims); *Lackey*, 330 S.C. at 400, 498 S.E.2d at 904-905 (upholding arbitration clause that permitted lender to choose a judicial forum while requiring borrower to arbitrate counterclaims). Because purported lack of mutuality is an insufficient basis at law to invalidate an arbitration provision, the lower court erred in refusing to compel arbitration.

3. THE ARBITRATION PROVISIONS DO NOT IMPERMISSIBLY FAVOR ANY PARTY.

The lower court refuses to compel arbitration because the terms of the arbitration provisions purportedly have a different impact on the parties. (R. p. 9). However, the record reflects that the arbitration clauses are geared toward achieving an unbiased and fair decision by a neutral decision-maker. *Hooters of Amer., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999), *Simpson*, 373 S.C. at 30, 644 S.E.2d at 671.

Far from being unconscionable, certain provisions of the Agreement favor the customer. For instance, Respondents are permitted to choose the arbitral venue and are not obligated to arbitrate in Miami, Florida, where Lennar is headquartered, or some other location that would be potentially inconvenient to Respondents. (*See generally* R. pp. 62-133); (R. p. 148, line 19-p. 149, line 2); (Construction Industry Arbitration Rule R-12).

In addition, the costs of arbitration do not have a disparate impact on the parties. Instead, Appellants and Respondents share in the costs of arbitration, with the costs of the arbitrator and AAA representatives being borne equally by the parties. (Construction Industry Arbitration Rules R-53 and 54). Furthermore, Respondents have not presented any evidence demonstrating that the costs of arbitration will prevent them from pursuing their claims. *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 502 (4th Cir. 2002) ("Where

a party seeks to invalidate an arbitration agreement on the ground that the arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."); *Tolers Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (affirming finding that costs relating to arbitration did not render arbitration clause unenforceable).

Based on the terms of the arbitration provisions, an unbiased arbitrator will decide the parties' disputes in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"), which is universally recognized as a full service provider of alternative dispute resolution. In addition, Respondents are expected to participate in the selection of a neutral arbitrator. (Construction Industry Arbitration Rule R-14). Because the Agreement does not contain terms that impermissibly favor one party, the arbitration provisions are geared toward achieving an unbiased and fair decision by a neutral decision-maker and do not fail for unconscionability.

CONCLUSION

For the foregoing reasons, the lower court erred by denying Appellants' Motion to Stay and Compel Arbitration. The FAA governs the enforceability of the arbitration provisions by virtue of the parties' express stipulation and in light of the overwhelming evidence that the purchase and construction of the Residence involves parties from different states and the infusion of out-of-state materials and suppliers. As neither the law nor the facts support the lower court's determination that the terms of the Agreement are one-sided or oppressive and Respondents lacked meaningful choice in agreeing to the arbitration provision, it was error for the lower court to declare the arbitration provisions unenforceable as unconscionable.

James L. Werner
South Carolina Bar No. 6029
Jenna K. McGee
South Carolina Bar No. 76891
Laura E. Figueroa
South Carolina Bar No. 77679
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Telephone: (843) 727-2650
Facsimile: (843) 727-2680

Attorneys for Appellants Lennar Carolinas, Inc., Don Galloway Homes, LLC and Lennar Communities of the Carolinas, Inc.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2009-CP-18-1601

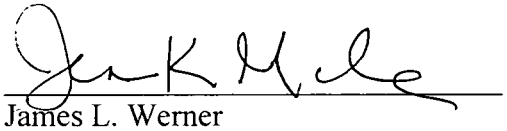
DAVID AND BRIDGETTE MANNING,
INDIVIDUALLY AND AS LEGAL GUARDIANS OF
TATE M. MANNING AND COLBY D. MANNING,
BOTH MINORS LESS THAN 18 YEARS OF AGE.. ..... Respondents.

v.

LENNAR CAROLINAS, INC., DON GALLOWAY
HOMES, LLC and LENNAR COMMUNITIES
OF THE CAROLINAS, INC ..... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellants complies with Rule 211(b), SCACR.



James L. Werner
South Carolina Bar No. 6029
Jenna K. McGee
South Carolina Bar No. 76891
Laura E. Figueroa
South Carolina Bar No. 77679
Parker Poe Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Telephone: (843) 727-2650
Facsimile: (843) 727-2680

Attorneys for Appellants Lennar Carolinas, Inc., Don Galloway Homes, LLC and Lennar Communities of the Carolinas, Inc.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2009-CP-18-1601

David and Bridgette Manning, individually and as legal guardians of Tate M. and Colby M., both minors less than 18 years of age... ..... Respondents.

v.

Lennar Carolinas, Inc., Don Galloway Homes, LLC, and Lennar Communities of the Carolinas, Inc.....Appellants.

CERTIFICATE AND PROOF OF SERVICE

On September 13, 2012, the undersigned hereby certifies that on she served a copy of the **Final Brief of Appellants** on all Counsel of Record to this Appeal by United States Mail, postage prepaid, addressed as follows:

John E. Robinson, Esq.
McDowell Law Offices
36 Broad Street
Charleston, SC 29401

Lindsey W. Cooper, Jr., Esq.
The Law Offices of L.W. Cooper, Jr., LLC
36 Broad Street
Charleston, SC 29401

Michael A. Timbes, Esq.
Thurmond Kirchner & Timbes, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, SC 29401

PARKER POE ADAMS & BERNSTEIN LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
(843) 727-2650
Attorneys for Appellants