

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

SC Court of Appeals

Case No. 2009-CP-18-1602

Jennifer Short and David Stover,.....Respondents,

v.

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

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE¹

This is a construction defect case concerning a newly-constructed residence purchased by Jennifer L. Short and David A. Stover (collectively, the “Respondents”). Respondents commenced this action in the Dorchester Court of Common Pleas on June 10, 2009, against Lennar Carolina, Inc., Don Galloway Homes, LLC, and Lennar Communities of the Carolinas, Inc. (collectively, the “Appellants”), alleging various deficiencies in the construction of the home. The Complaint sets forth causes of action for negligence, gross negligence, breach of implied warranties, and violations of South Carolina’s Unfair Trade Practices Act as a result of numerous defects discovered throughout the home. Respondents do not allege any claim for breach of contract against Appellants.

On July 29, 2009, prior to filing an Answer to the Complaint, Appellants moved to stay the action in accordance with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code § 40-59-810, *et. seq.* The parties thereafter agreed to stay the action to accomplish the notice requirements set forth therein. Additionally, Appellants contended the action should be dismissed on the grounds that the claims asserted in the Complaint are subject to arbitration pursuant an agreement to arbitrate between the parties. (R. pp. 21-23) Respondents filed an Objection to Appellants’ Motion arguing, *inter alia*, that the purported arbitration provision is unconscionable and unenforceable under South Carolina law. Although the case was filed in 2009, no discovery has taken place in the case in light of the foregoing proceedings.

¹ Respondents cannot join in Appellants’ Statement of the Case as set forth in their Initial Brief considering the argumentative nature in which it is presented. See Rule 208(b)(1)(D) (“The statement shall not contain contested matters....”).

On November 2, 2010, the Honorable Edgar Warren Dickson conducted a hearing² to determine the enforceability of the arbitration provision. Thereafter, on September 30, 2011, the circuit court entered an Order denying Appellants' Motion to dismiss the action, finding that the arbitration provision could not be enforced. Appellants appeal from that determination.

BACKGROUND FACTS

Prior to purchasing the home that is the subject of this action, Respondents and their children resided in a mobile home. (R. p. 129) They became interested in the Plum Creek subdivision being developed in Summerville, South Carolina, by Appellants Lennar Carolinas, Inc., Don Galloway Homes, LLC, and Lennar Communities of the Carolinas³ because it was a new neighborhood that appeared to be family oriented. (R. p. 129)

On March 11, 2003, Respondent Jennifer Short entered into a South Carolina Purchase Agreement (the "Agreement") to purchase the newly-constructed home located at 201 Temuco Lane within the Plum Creek subdivision from Appellants (the "Residence"). Respondent David Stover did not sign the Agreement and, in fact, was not present when it was signed. (R. pp. 160-171) According to Ms. Short, she "filled out her name and information and that's all [Appellants' Representative] needed." (R. p. 131) She was not allowed to select any options for the home or make any changes because the home was nearly complete at the time

² The hearing in this matter was consolidated with another related action captioned as *Manning v. Don Galloway Homes, LLC, et al.*, Case No. 2009-CP-18-1601 (the "Manning Action"). The Manning Action involves the same arbitration provision and the same defendants as are found in the present matter. Therefore, the circuit court consolidated Appellants' Motions to Compel arbitration in both matters into a single hearing.

³ The Purchase Agreement lists Don Galloway Homes, LLC, a "Lennar Company," as the seller. However, it is unclear at this time exactly which "Lennar" party, if such a distinction exists, is invoking the claim of mandatory mediation under the Purchase Agreement. Because discovery has not taken place, Respondents have not been furnished with any proof other than the pleadings of Appellant to substantiate whether any parties are incorrectly named as defendants in the underlying action.

Agreement was signed. (R. p. 129) According to Ms. Short, Appellants' agents pushed the use of their approved lenders. Ms. Short did not bring her own attorney at closing, and she did not have a realtor in her dealings with Appellants. (R. pp. 130-131)

The closing of the purchase and sale took place on May 9, 2003. (R. p. 130-131) Respondents and their young children then moved into their new home. It was the first home they had purchased together as a family. (R. p. 130) At no time did Appellants' sales agents or the closing attorney selected by Appellants ever mention arbitration to Respondents. (R. p. 130-131)

Respondents commenced this action after Appellants failed to correct various problems they discovered in the Residence. The deficiencies in the construction include structural problems with the foundation, defective site preparation, improper framing and roofing, improper installation of siding, windows, flashing moisture barriers, water intrusion into the home, violations of applicable construction codes, and failure of Appellants to follow manufacturer's instructions in assembling or installing components of the home. (R. pp. 11-21). There is no evidence in the record that Appellants ever disclosed the existence of these defects to Respondents before the Agreement was signed by Ms. Short or the closing was completed.

At issue in this appeal is the enforceability of an arbitration provision set forth in the Agreement. The Agreement, which is nine (9) pages in length, contains "boilerplate" information on a pre-printed form presented to Respondents by Appellants. (R. pp. 160-171) The Agreement states the terms of the sale, including the amount of purchase, limited options for the kitchen and various upgrades a typical owner might consider, although no changes were

allowed by Respondents. In addition, the Agreement contains the following arbitration clause on its face:

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 THE ARBITRATION IS REQUESTED HEREUNDER. AFTER AN AWARD IS RENDERED BY THE ARBITRATORS, A JUDGMENT MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NOT WITHSTANDING THE FOREGOING, DON GALLOWAY HOMES, LLC MAY BRING AN EQUITABLE JUDICIAL PROCEEDING AGAINST YOU FOR AN INJUNCTION OR SPECIFIC PERFORMANCE FOR ANY BREACH OR UNLAWFUL ACTION IN CONNECTION WITH YOUR OBLIGATIONS HEREUNDER AND THIS SHALL NOT CONSTITUTE A WAIVER OF ITS RIGHTS TO COMPEL ALL CLAIMS THAT MAY BE ASSERTED AGAINST DON GALLOWAY HOMES, LLC, TO BE ARBITRATED. IN PREPARATION FOR THE ARBITRATION HEARING, EACH PARTY MAY UTILIZE ALL METHODS OF DISCOVERY AUTHORIZED BY THE PROCEDURAL RULES AND STATUTES OF THIS STATE, AND MAY ENFORCE THE RIGHT TO DISCOVERY IN THE MANNER PROVIDED BY THE RULES OF CIVIL PROCEDURE THAT ARE APPLICABLE TO THIS MATTER. THIS PROVISION SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. Section 1 ET. SEQ.).

(R. p. 160) In addition, Paragraph 10 provides, “There are no other promises, representations, or guarantees either verbal or written, other than what are contained in the Purchase Agreement’s Special Stipulation Section #6, any addendum, sales contract specifications or in the Standards Provisions.” Section 6 is left blank in this instance. There is no discussion in the Agreement relative to the actual construction of the home,

with the limited exception of a pre-printed box on page 4 of the Agreement relating to Construction Scheduling. This box contains a statement that “We do our best to complete each home on schedule while at the same time maintaining our standard of high quality.” (R. p. 163) Notably, Appellants struck through this box and Respondents were not asked to initial beside these provisions. There are no other material terms and conditions relevant to the actual construction of the home set forth in the Agreement as provided to the Court in support of Appellant’s Motion.

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. *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).

LAW AND ANALYSIS

I. THE EVIDENCE IN THE RECORD SUPPORTS THE CIRCUIT COURT’S DETERMINATION THAT THE ARBITRATION PROVISION IS UNCONSCIONABLE AND UNENFORCEABLE.

The circuit court found that the arbitration agreement in question cannot be enforced against Respondents. Among other things, the circuit court determined that in light of guidance afforded by *Simpson* and similar authorities, Appellants’ purported arbitration provision must fail. (R. pp. 3-10) In its Order, the circuit court found that Appellants are a sophisticated business entity, whereas Respondents are not. Moreover, the circuit court found

that David Stover never executed the relevant agreement containing the subject arbitration clause. (R. pp. 3-10) With regard to Mr. Stover, the circuit court rejected Appellants' argument that he should nevertheless be bound by the arbitration provision on two separate grounds. First, the circuit court found that Mr. Stover was not seeking to enforce any agreement with Appellants because only claims arising in tort are alleged in the Complaint. In addition, the court found it appropriate to strike only so much of the purchase agreement as was necessary to cure its unconscionability, leaving the remaining provisions intact. Thus, even if Mr. Stover sought benefits under the Agreement, the circuit court found the arbitration language is severable and unenforceable. (R. pp. 3-10)

Additional findings by the circuit court include its determination that the Federal Arbitration Act does not apply because the language relating thereto is contained within the arbitration provision, which the circuit court deemed unconscionable and unenforceable. The circuit court further found that Respondents lacked any meaningful choice in agreeing to the arbitration provision. The Order notes that the arbitration clause was contained within a dense agreement and that Respondent Stover lacked any notice whatsoever that the arbitration clause even existed. (R. pp. 3-10) In its conclusion of the Order, the circuit court found that execution of the Agreement was hasty and incomplete. As explained herein, the evidence in the record supports the analysis and findings of the circuit court, requiring that it be affirmed on appeal.

A. The Circuit Court Correctly Applied a "Gateway" Analysis in Determining that No Valid Agreement to Arbitrate Existed Between the Parties.

In South Carolina, there is a strong presumption in favor of the validity of arbitration clauses. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). However, despite this presumption it is well-settled that "arbitration is a matter of

contract law and is available only when the parties involved contractually agree to arbitrate.” *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. See also *Aiken v. World Fin. Corp. of S. C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Zabinski*, at 596, 553 S.E.2d at 118). Thus, if it is determined that no agreement to arbitrate existed, arbitration must be denied. *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. That is exactly the case here.

The determination of whether an arbitration agreement exists is a matter for the circuit court to decide. *The Housing Authority of the City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). See also *Green Tree Fin. Corp. v. Bazzle*, 156 L. Ed. 2d 414, 123 S. Ct. 2402, 2407 (2003) (holding that in the absence of clear and unmistakable evidence to the contrary, “courts assume that the parties intended courts, not arbitrators, to decide . . . certain gateway matters, such as whether the parties have a valid arbitration agreement at all.”). “The initial inquiry to be made by the trial court is whether an arbitration agreement exists between the parties.” *Housing Authority*, at 334, 588 S.E.2d at 620. Courts should apply ordinary state-law principles that govern the formation of contracts in determining whether an agreement to arbitrate exists. *Id.* See also *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Consistent with basic principles of contract law, a party may challenge the enforceability of an agreement to arbitrate under “such grounds as exist at law or in equity” including fraud, duress, and unconscionability. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668; accord S.C. Code Ann. § 15-48-10(a).

In the instant case, Respondents challenged the existence of a valid agreement to arbitrate, arguing, among other things, that the Agreement is unconscionable. See *Jackson*

Mills, Inc. v. BT Capital Corp., 312 S.C. 400, 440 S.E.2d 877 (1994) (noting a party must specifically challenge the unconscionability (or other defect) of the arbitration clause it seeks to set aside). (R. pp. 49-56) When such a challenge is made, it is for the circuit court to decide, as a threshold matter, whether the arbitration provision is valid. *Simpson*, 373 S.C. at 23, 644 S.E.2d at 667. *Accord* S.C. Code Ann. § 15-48-20(a). In this vein, the circuit court must determine the “gateway” issue of whether there is, in light of state law contract principles, an enforceable agreement to arbitrate. As the record supports, in this instance no such enforceable agreement exists.

B. The Agreement is an Adhesion Contract.

At the outset it must be considered whether the Agreement in question is an adhesion contract, because that is the beginning point in the analysis of whether the contract is unconscionable. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998). Under general contract principles, an adhesion contract is offered on a “take-it-or-leave-it basis” with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not *per se* unconscionable, but in proper contexts may be viewed with “considerable skepticism.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670.

Here, the record reveals that the Agreement is an adhesion contract. It is obvious that the Agreement is a pre-printed form containing boilerplate language. Indeed, Appellants admit to drafting the Agreement and providing it to Respondents. (R. p. 140, lines 20-22) Further, Appellants concede that the Agreement is a standard form used by them. “This is a contract that was for the sale of a residential home and it’s a contract that we often use, or that Lennar oftentimes uses in selling its homes.” (R. p. 140, lines 14-17) More particularly, the

provisions of the Agreement containing the purported agreement to arbitrate are pre-printed, not negotiated, and contain no space for acknowledgement by Respondents. There were no options or alternatives presented to Respondents other than the predetermined terms crafted by Appellants. The circuit court properly determined that Respondents did not negotiate the arbitration clause, and, as a practical matter, they lacked the ability to do so under the Agreement. While Appellants made some efforts at making the clause conspicuous by underlining its capital letters, the provision is lengthy and of even margins with the rest of the page such that it does not stand out among other boilerplate terms. This is especially true where Ms. Short was simply told that all she needed was for Ms. Short to fill in the blanks with her name and information. (R. p. 131)

Because Appellants presented the Agreement on a take-it-or-leave-it basis, and there is evidence to support the circuit court's determination that Respondents lacked bargaining power to contribute to its drafting, the circuit court properly determined that the Agreement is an adhesion contract. Adhesion agreements may be unenforceable as unconscionable under South Carolina law where there is "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). Thus, the circuit court correctly proceeded to analysis of whether the adhesion contract was unconscionable and unenforceable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670.

C. **The Purported Arbitration Agreement in Question is Unconscionable and Unenforceable.**

In South Carolina, unconscionability 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. *Id.* at 25, 644 S.E.2d at 668.

1. **The Evidence Reasonably Supports the Circuit Court's Determination that Respondents Lacked Meaningful Choice in Agreeing to Arbitrate.**

“Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.” *Id.* at 25, 644 S.E.2d 669 (citing *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989)). In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the plaintiff, whether the plaintiff is a substantial business concern, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause. *Id.*

An evaluation of the above factors reveals Respondents had no meaningful choice. First, there is a significant disparity in the parties' bargaining power. Appellants admit to their sophistication as “a large residential home builder” and allege they are engaged in interstate commerce. (R. p. 140, lines 22-25) On the other hand, Respondents were a small family simply hoping to move out of their mobile home into a single family residence. (R. pp. 129-130) Respondent David Stover was a first-time homebuyer who neither signed nor participated in the execution of the Agreement. (R. pp. 130, 160-171) Respondents are ordinary consumers

who were hoping to buy a new home for their family—they are not sophisticated business concerns in the company of Appellants. Neither Jennifer Short nor David Stover possessed the business judgment necessary to make them aware of the sweeping implications of the arbitration agreement as interpreted by Appellants. Neither had an attorney present to provide any assistance other than a lawyer that was pre-selected by Appellants. Notably, Appellants’ pre-selected attorney made no mention whatsoever at the closing regarding the arbitration of disputes.⁴ (R. p. 130) Appellants also could select Respondents’ lender under the Agreement, and according to Jennifer Short, Appellants’ sales representative pushed her to use Appellants’ lenders. (R. p. 130) The Short Affidavit reveals that Appellants’ agent took down her name and told her where to initial the contract form. Beyond that, Short alleges there was no meaningful negotiation of the Agreement at all. Short’s affidavit states that the first time she heard the term “arbitration” was when it was explained to her by counsel in this case. (R. p. 130)

The Supreme Court has stated that the purchase of a vehicle intended for use as primary transportation is “critically important in modern day society.” *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. In this case, the circuit court noted that Respondents’ purchase of their new home was certainly more important than the purchase of a vehicle. (R. p. 7) *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (1989) (“We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce.”). Respondents point out that this litigation has had a major impact on them in relation to their single largest investment. (R. p. 130) The allegations of the

⁴ This raises the question of whether the Deed issued to Respondents at the closing contained an arbitration provision. If it does not, which would be Appellants’ burden to establish, the Doctrine of Merger may preclude the very remedy requested by Appellants as an additional sustaining ground supported by the Short Affidavit. *See Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984).

Complaint cite myriad defects from site preparation and foundation problems to moisture intrusion into the home. Respondents' inability to resolve the defects with their house nine (9) years after they bought it and three (3) years after they filed suit manifestly demonstrates an element of surprise under the arbitration provision that has the practical effect of barring them from appropriate remedies for Appellants' alleged torts and deceptive trade practices.

Contrary to Appellants' contention that the Agreement was negotiated between the parties,⁵ the record readily reveals a different story, which supports the circuit court's ruling. Again, David Stover is not even a party to the Agreement. Moreover, Appellants' Agreement is a pre-printed form with blanks in certain areas simply to fill in basic factual information. For example, there is space for the purchaser's name, the location of the property, the down payment amount, and the total purchase price, as well as blocks for signatures at the bottom of the document. Paragraph 5 of the Agreement makes it clear that provisions numbered 1 through 13, which include the arbitration provision, are "Standard Provisions" that form the basis of the Agreement. Only certain options or upgrades to the otherwise Standard Provisions could be selected by any potential purchaser, and none of the Standard Provisions were negotiable, as evidenced by the lack of options, alternatives, or available space to alter or amend the Standard Provisions. The particular home style offered by Appellants was the "Tarleton," which is designed and offered by Appellants. Yet, even the Tarleton floor plan

⁵ At the hearing on Appellant's Motion, Appellant offered the Affidavit of David Murphy, who alleges that, among other things, the Respondents had the opportunity to negotiate their purchase agreement. Notably, Mr. Murphy's Affidavit fails to state that he has any personal knowledge of those purported facts. It likewise fails to demonstrate any basis upon which he could have any personal knowledge of the manner in which the Agreement was presented to Respondent Short. *Bradley v. Doe*, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) (rejecting affidavits where affiants had no personal knowledge of the accident in question). As such, there is no competent evidence in the record to suggest Respondents actually negotiated any of the terms set forth in the Agreement.

contains a disclaimer in nearly illegible print that floor plans and standard features “are subject to change without notice.” (R. p. 162) (emphasis added). It is clear the Appellants controlled all aspects of the project and the construction of Respondents’ Residence. Yet there is more.

Under the Agreement Appellants asserted the right to choose both Respondents’ closing attorney and their mortgage lender. In fact, the designated attorney, Lisa Herbert, is pre-typed on Appellant’s boilerplate form. (R. p. 164) Moreover, while the face page of the document places the Arbitration clause in bold, underlined writing, it is not offset, nor is there a space next to it to acknowledge Respondent Short’s consent to its terms as there is for many of the other terms and closing options.

While it is understood that parties are always free to contract away certain rights, the arbitration provision in this Agreement was inconspicuous in nature, and drafted by the superior party without any comment or revisions from the Respondents, without independent review or representation by an attorney on behalf of the Respondents, which ultimately functioned to contract away significant rights and remedies otherwise available to these homebuyers by law. Appellants concede Ms. Herbert owed a fiduciary responsibility to Respondents, yet Respondent Short explains that Ms. Herbert, who was picked by Appellants, never mentioned the arbitration provision. (R. p. 143, lines 9-11; p. 131)⁶ There was no meaningful choice in agreeing to arbitrate claims. A choice as to cabinet finishes and tile colors⁷ does not constitute meaningful negotiation of the parties’ legal relationship.

⁶ In essence, Appellants induced Respondents to use Ms. Herbert by offering a discounted rate if Respondents agreed to use her. (R. p. 164; p.153, lines 1-9)

⁷ Even as to finish selections, the Agreement only gave Respondents seven (7) days to specify their choices. It states: “Color Selections not specified within the time limitations will be determined by Don Galloway Homes, LLC.” (R. pp. 160-161) This is further evidence of the control exerted by Appellants over Respondents relating to the construction of Respondents’ own home. In the case of Respondents, the home was

Appellants attempted to sway the circuit court by pointing out that the arbitration provision had previously been enforced. This argument overlooks the well-settled requirement that the enforceability of such contractual provisions must be evaluated on a case-by-case basis in light of its own particular facts and circumstances. *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. Interestingly enough, considering that this same boilerplate arbitration provision has been challenged by a number of other homeowners with damage claims, it is revealing that Appellants introduced no evidence whatsoever before the circuit court to demonstrate that Appellants had ever allowed any buyer to negotiate the strict arbitration terms it unilaterally crafted into its Standard Provisions for all of its sale transactions. This is but further proof that no meaningful opportunity was afforded to Respondents to negotiate such matters. *See Id.* at 25, 644 S.E.2d at 669 (“Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.”). The evidence in the record easily supports the circuit court’s determination that Respondents had no meaningful opportunity to negotiate the Agreement insofar as the issues before this Court are concerned.

2. The Evidence Reasonably Supports the Circuit Court’s Determination that the Arbitration Provision is Oppressive and One-Sided.

The terms of the arbitration provision, which were crafted by Appellants without input from Respondents, are not even-handed. Specifically, the arbitration provision provides that Appellants may “bring an equitable judicial proceeding against [Respondent] for an injunction or specific performance for any breach or unlawful action in connection with [Respondent’s] obligations” (R. p. 160) However, Respondents are deprived of any such right and,

well along in construction when the Agreement was signed and the closing occurred only two months later. As such, Respondents were not permitted to make any changes. (R. pp. 129-130)

instead, are forced to arbitrate any claim they might have against Appellants. As a practical matter, Appellants can seek and obtain under the arbitration provision injunctive relief and specific performance without regard to whatever remedies at law Respondents (or others considering its repetitive use) might have in the course of an arbitral proceeding. Applying *Simpson*, Appellants' disparate remedies render the provision one-sided and oppressive. *Id.* at 28-33, 644 S.E.2d at 670-673.

Furthermore, the Agreement purports to exclude any "promises, representations, or guarantees, either verbal or written" other than those contained in the document itself. Such language would facially appear to exclude any implied warranties of habitability. (R. p. 160) Respondents cannot be expected to understand or appreciate the effect of Appellants' superior position in drafting non-negotiable contract terms.

South Carolina Courts do not require absolute parity in terms of the remedies afforded to parties. *Id.* at 31, 644 S.E.2d at 672. For example, if an arbitration clause bears "a reasonable relationship to the business risks" inherent in secured transactions, it may survive even though there may be a lack of mutuality of remedies. *Id.* Cases applying this logic recognize that in cases of mortgages or secured transactions there may be a sound business reason for allowing a financier or other secured party, for example, certain equitable remedies in order to preserve its collateral. *See, e.g., Lackey*, 330 S.C. at 401, 498 S.E.2d at 905. Here, however, the home was nearly complete when the Agreement was signed, and Appellants washed their hands of the Residence at the closing table. Appellants were paid in full through independent financing and the Residence does not serve as collateral for any continuing obligation owed by Respondents to Appellant, as there are none. It is difficult to ascertain what meaningful need Appellants have for equitable remedies where Appellants are not a

secured lender to Respondents and this is not a traditional secured transaction. Therefore, Appellants cannot demonstrate any reasonable relationship between that the reservation of unilateral remedies unto itself might have to its own business risks in the transaction. As such, Appellants do not fall within the ambit of the logic applied in *Lackey*.

Viewed in this light, the language of the arbitration agreement facially provides an equitable remedy to one party that it does not provide the others, while having the practical effect in Paragraph 10 of the Agreement of limiting any guarantees or warranties, which Respondents allege to include the warranty of habitability, among other homeowner warranties as may have been available for the Residence or its components. Courts will not enforce an adhesion contract that has the effect of denying the weaker party remedies to which it is statutorily entitled. *Simpson*, at 30, 644 S.E.2d at 671. Considering the evidence in the record and the circumstances surrounding the transaction, Appellants' disparate arbitration provision is unenforceable in this case.

3. The Agreement Bars Unforeseeable Claims of Tortious Conduct, And Respondents Could Not have Expected to have Knowingly Bargained away Their Rights as to Such Matters.

Appellants admit in their brief that the subject arbitration clause is not limitless (Initial Brief of Appellant, fn. 3). They allege some "outrageous tortious condition" would be unforeseeable to a reasonable consumer in a "normal" business relationship. In this case, Respondents are left occupying a house with alleged foundation problems, structural defects, and building code violations. The nature and extent of such problems constitute tortious conduct that was not foreseeable to a reasonable consumer. Respondents further allege that these deplorable conditions may have resulted from intentional, deceptive conduct through

their SCUTPA claims. Respondent Short's Affidavit confirms surprise related to their remedies and surprise as to the practical limitations to fixing their house through legal process.

Also problematic is that the Agreement combines an arbitration clause with language in Paragraph 10 that on its face could be construed to potentially exclude implied remedies, such as an action for the implied warranty of habitability arises as a matter of law against a seller under these circumstances. *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 477 (2006). The Agreement does not evidence any clear intent to waive such remedies, yet Paragraph 10 indicates there are no other obligations owed by Appellants except those set forth in the Agreement itself. If there was any agreement at all to arbitrate, the only reasonable conclusion is that it would be expected to apply to disputes over such negotiable terms of the contract, such as cabinet finishes, color selections, and the like as are set forth in the Agreement. In fact, even a cursory review of the Agreement reveals that it speaks to loan applications, closing and closing costs, and matters generally pertaining to the sale of the Residence. (R. pp. 160-171) There is no competent evidence in the record to suggest that Respondents agreed to an arbitration that would apply to tortious and deceptive conduct in the construction of the home, especially considering that the construction was nearly complete when the contract was signed by Respondent Short. As a result of Appellants' attempt to force these claims into arbitration, Respondents have been unable to litigate their case, even though the underlying action was filed in 2009. Furthermore, the parties continue to incur damages due to the delay in resolving their claims.

II. THE CIRCUIT COURT PROPERLY REFUSED TO APPLY THE FEDERAL ARBITRATION ACT TO THE DISPUTE IN QUESTION BECAUSE THE FAA HAS NO APPLICATION WHERE IT IS FIRST DETERMINED THAT NO AGREEMENT TO ARBITRATE EXISTED.

Appellants' argument that the Federal Arbitration Act, 9 U.S.C. 1 *et seq.*, ("FAA") contractually controls the enforceability of the arbitration provision at issue because the provision expressly contains that such a mandate is fundamentally flawed and misses the point. The circuit court determined the arbitration provision was unenforceable as set forth herein. Because there was no enforceable agreement between the parties to arbitrate in the first place, there likewise was no agreement between the parties for the FAA to control questions relating thereto. The relevant FAA language fails under the same logic and reasoning that is fatal to the purported arbitration requirement itself. "General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (*citing Munoz*, 343 S.C. at 539, 542 S.E.2d at 364). Applying these principles, as explained above, the circuit court correctly made inquiry into the facts, circumstances, and form of the Agreement itself and then properly refused to enforce the Agreement. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so" *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116. "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citations omitted). Here, the circuit court determined there was no privately negotiated, enforceable agreement. Hence, the FAA has no application to or effect upon the outcome.


CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the ruling of the circuit court and remand this action for further proceedings and, ultimately, a trial by jury in the circuit court.

Respectfully submitted,

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September 13, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

SC Court of Appeals

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Jennifer Short and David Stover,.....Respondents,

v.

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

CERTIFICATE OF COUNSEL

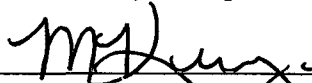
The undersigned attorney hereby certifies that the Final Brief of the Respondents
complies with Rule 211(b), SCACR.

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Sworn to and subscribed before me
This 13th day of September.


Notary Public for South Carolina
My Commission Expires 11/16/2020.

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