THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-08-2424

Patricia Damico, and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Johnathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,

Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are

Respondents.

And

Lennar Carolinas, LLC,

Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are

Respondents,

RESPONDENT ALPHA OMEGA CONSTRUCTION, INC.'S FINAL BRIEF

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Catherine H. Chase (SC Bar No. 74593)
Mary S. Willis (SC Bar No. 102411)
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488

And

AIKEN, BRIDGES, ELLIOTT, TYLER & SALEEBY, P.A.
Preston B. Dawkins, Jr. (SC Bar No. 72431)
181 East Evans Street (29501)
P.O. Drawer 1931 (29503)
Florence, SC
(843) 669-8787

Attorneys for the Respondent Alpha Omega Construction Group, Inc.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

COUNTERSTATEMENT OF THE CASE 1

STANDARD OF REVIEW 4

ARGUMENT 4

I. THE CIRCUIT COURT IMPLICITLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALL SUBCONTRACTORS, INCLUDING ALPHA OMEGA, AND THEREFORE, THE ISSUE IS PROPERLY PRESERVED FOR APPELLATE REVIEW 4

II. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALL PARTIES, INCLUDING ALPHA OMEGA 7

a. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE IT IS FUNDAMENTALLY UNFAIR AND CONTRARY TO SOUTH CAROLINA LAW TO RETROACTIVELY APPLY THE "DISPUTE RESOLUTION" PROVISION FROM A CONTRACT ENTERED INTO *AFTER* ALPHA OMEGA COMPLETED ITS WORK ON THE PROJECT 7

b. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE PLAINTIFFS WILL LIKELY BRING DIRECT CLAIMS AGAINST IT SUBJECTING IT TO INCONSISTENT FINDINGS OF FACT, LIABILITY, AND JUDGMENTS 10

III. IN THE ALTERNATIVE, IF THIS COURT FINDS THE POST-DATED CONTRACT APPLICABLE, WHICH ALPHA OMEGA DENIES, THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA 11

a. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE THE POST-DATED CONTRACT'S "DISPUTE RESOLUTION" PROVISION UNAMBIGUOUSLY PROVIDES ALPHA OMEGA IS NOT REQUIRED TO ARBITRATE WITH THE APPELLANT UNLESS AND UNTIL THE PLAINTIFFS ARE REQUIRED TO DO SO 11

b. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE THE "DISPUTE RESOLUTION" PROVISION FAILS TO COMPLY WITH THE NOTICE PROVISION REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

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

C.A.N. Enters., Inc. v. S.C. Health & Human Serves. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 370 (1984) 11

Cape Roman Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 747 S.E.2d 461 (2013) 4

Cara's Notions, Inc. v. Hallmark Cards, Inc., 140 F.3d 566 (4th Cir. 1998)....................................8

Davis v. Greenwood Sch. Dist., 365 S.C. 629, 620 S.E.2d 65 (2005)....................................7

Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007)....................................11

Edens v. Laurel Hill, Inc., 271 S.C. 360, 247 S.E.2d 434 (1978)....................................7

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004)....................................11

Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994) 11

Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 693 S.E.2d 434 (Ct. App. 2010) 12

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920 (1995) 7

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) 6

Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009)....................................5, 6

Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 171 S.E.2d 398 (Ct. App. 2003)......................5

I'On, LLC v. Town of Mount Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000)...........................5

Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773 (2010)..........................9

Reese v. Commercial Credit Corp., 955 F. Supp. 567 (D.S.C. 1997) 7

Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016)....................................4

State v. Rogers, 361 S.C. 178, 603 S.E.2d 910 (Ct. App. 2004) 5

Superior Auto Ins. Co. v. Maners, 261 S.C. 257, 199 S.E.2d 719 (1973)....................................11

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) 7, 9

Vestry and Church Warden of Church of Holy Cross v. Orkin Exterminating Co., Inc., 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003) 8, 9

Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) 7, 8, 9, 13

Statutes

S.C. Code Ann. § 15-48-10(a) 12, 13

S.C. Code Ann. § 15-48-130(a) 10

STATEMENT OF ISSUES ON APPEAL

I. **DID THE CIRCUIT COURT IMPLICITLY DENY APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA CONSTRUCTION GROUP, INC.?**

II. **SHOULD THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA CONSTRUCTION GROUP, INC. BE AFFIRMED BECAUSE THE *ONLY* CONTRACT BETWEEN THE PARTIES WAS ENTERED INTO AFTER ALPHA OMEGA CONSTRUCTION GROUP, INC. COMPLETED ITS WORK ON THE PROJECT?**

III. **IF THIS COURT FINDS THE POST-DATED CONTRACT APPLICABLE, WHICH ALPHA OMEGA CONSTRUCTION GROUP, INC. DENIES, SHOULD THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTION TO COMPEL ARBITRATION BE AFFIRMED BECAUSE THE ARBITRATION PROVISION IS DERIVATIVE IN NATURE AND FAILS TO COMPLY WITH THE NOTICE PROVISION REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT?**

COUNTERSTATEMENT OF THE CASE

This appeal arises out of a construction defect lawsuit in which the general contractor, Appellant Lennar Carolinas, LLC (hereinafter "Lennar" or "Appellant"), moved to compel the Plaintiff homeowners (hereinafter "Plaintiffs" or "Owners"), as well as co-defendants and third-party defendant subcontractors, to arbitrate the claims arising in this suit. The Circuit Court denied Lennar's motion to compel arbitration, and Appellant has appealed the Circuit Court's denial to this Court. Respondent Alpha Omega Construction Group, Inc. (hereinafter "Alpha Omega"), one of the third-party defendant subcontractors, hereby files this brief in opposition to the Appellant's appeal and argues the Circuit Court correctly denied Appellant's motion to compel arbitration with respect to its claims against Alpha Omega.

As discussed in more detail below, compelling Alpha Omega to arbitration is patently unjust and contrary to South Carolina law considering, among other things: (1) Plaintiffs will likely bring direct claims against Alpha Omega subjecting it to inconsistent findings of fact, liability, and judgments; (2) the *only* contract between the Appellant and Alpha Omega post-dates Alpha Omega's work on the Project; (3) assuming, *arguendo*, the Post-Dated Contract is

applicable, the plain language of the "Dispute Resolution" provision in the Post-Dated Contract is derivative in nature and precludes compelling Alpha Omega to arbitration unless and until the Appellant is successful in compelling the Plaintiffs to arbitration; and (4) finally, assuming, *arguendo*, the Post-Dated Contract is applicable, the "Dispute Resolution" provision in the Post-Dated Contract is unenforceable because it fails to comply with the notice provision requirements of the South Carolina Uniform Arbitration Act.

This is a construction defects lawsuit wherein individual homeowners sued the Appellant for various defects related to the construction of their homes (hereinafter the "Project") in a development known as The Abbey, located in Berkeley County, South Carolina. (R. pp. 75-108). On November 23, 2015, Plaintiffs filed their first amended complaint against Appellant and others alleging various construction defects. (*Id.*). As is typical in most construction defect lawsuits, Appellant, in turn, answered the Plaintiffs' first amended complaint and asserted third-party claims against Alpha Omega and the other subcontractors purportedly involved in the Project. (R. pp. 111-164). Alpha Omega is alleged to have performed limited roofing work on some of the homes in The Abbey. (*Id.* at p. 140, ¶ 211). On January 13, 2016, Alpha Omega timely filed its Answer to Appellant's third-party complaint. (R. pp. 177-201).

On June 1, 2015, Appellant filed a motion to compel arbitration asserting the Plaintiffs' claims were subject to arbitration. (R. pp. 259-261). On March 30, 2016, Appellant filed an amended motion to compel arbitration, wherein it moved to compel the Plaintiffs' claims and its third-party claims against the third-party defendants to arbitration. (R. pp. 262-269). Specifically, in its amended motion to compel arbitration, Appellant asserted each subcontractor is subject to arbitration pursuant to the arbitration provisions in their respective contracts with the Appellant. (*Id.* at 267). With respect to Alpha Omega, Appellant based its argument on a contract dated

August 7, 2015 (hereinafter the "Post-Dated Contract"), which was entered into after Alpha Omega completed its work on the Project and applies to separate and distinct projects.[1] (*R. p. 953*, § 21). If this Court finds the Post-Dated Contract applicable, which Alpha Omega denies, the "Dispute Resolution" provision provides Alpha Omega is only required to submit to arbitration if the Appellant is successful in forcing the Plaintiffs to arbitrate their claims. (*See id.*). In relevant part, the "Dispute Resolution" provision provides:

> If Lennar is involved in or becomes involved in litigation, arbitration, judicial reference or other alternative dispute resolution procedure ("ADR") with a third party and Lennar or any other party joins Subcontractor as a party to such ADR, then the disputes between Lennar and Subcontractor relative to the claims involved in the ADR proceeding shall be resolved in such proceeding. In the event that Lennar is required, by law or by contract, to resolve a dispute with a third party in an ADR forum, Subcontractor agrees to participate in and be bound by such procedure.

(*Id.*).

Alpha Omega, along with the Plaintiffs and several other subcontractors, filed memoranda in opposition to Appellant's motion to compel arbitration. The Honorable J.C. Nicholson, Jr. heard arguments on the Appellant's motion at a hearing on April 11, 2016. (*See generally* R. pp. 203-255). On September 19, 2016, the Circuit Court issued a formal order (hereinafter the "Order") denying Appellant's motion. (R. pp. 4-23). The Order contained a thorough analysis of its ruling denying Appellant's motion to compel arbitration as to the Plaintiffs but was silent as to the arguments presented between the Appellant and Alpha Omega, as well as the other subcontractors. (*Id.*).

---

[1] Appellant submitted vendor payment records as evidence Alpha Omega performed some work on the Project. (*See* R. pp. 1671-2241). These vendor payment records indicate Alpha Omega completed its work for the Appellant by August 2014 at the latest. (*Id.*). In addition, Alpha Omega's Operations Director has searched the company records and is unable to find any contract between the Appellant and Alpha Omega that predates the work referenced in the invoices for the subject neighborhood. (*See* R. p. 2909, ¶ 8).

Appellant filed a motion to reconsider, amend and/or alter the Order denying the Appellant's motion to compel arbitration pursuant to *South Carolina Rule of Civil Procedure* 59(e). (R. pp. 2553-2572). Likewise, Alpha Omega, and several other sub-contractors, filed motions to reconsider, amend and/or alter the Order. (*See generally* R. pp. 2882-2887). On October 26, 2016, the Circuit Court, without any further discussion, reasoning, or explanation, issued a Form 4 Order denying all motions to reconsider. (R. p. 3). This appeal followed.

STANDARD OF REVIEW

"Arbitration determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1 (2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012). "However, a circuit court's factual finding will not be reversed on appeal if any evidence reasonably supports the finding." *Id.* An order refusing to compel arbitration is immediately appealable. *Cape Roman Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121, 747 S.E.2d 461, 463–64 (2013).

ARGUMENT

I. THE CIRCUIT COURT IMPLICITLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALL SUBCONTRACTORS, INCLUDING ALPHA OMEGA, AND THEREFORE, THE ISSUE IS PROPERLY PRESERVED FOR APPELLATE REVIEW.

Appellant's assertion that this Court must "remand the circuit court's . . . ruling . . . to consider each of the Subcontractors' agreements to arbitrate individually" is misplaced. (App. Brief, p. 36). The parties thoroughly presented the facts, law, and their respective arguments in written motions, memoranda, and oral argument. A review of the hearing transcript, coupled with the written motions, memoranda, and resulting Order, demonstrate the Circuit Court, in denying Appellant's motion to compel arbitration in its entirety, considered and ultimately

rejected Appellant's argument to compel arbitration as to all parties, including Alpha Omega and the other subcontractors.

As an initial matter, to preserve an issue for appellate review, it must have been raised to and ruled upon by the circuit court. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912 (Ct. App. 2004); *see also Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171 S.E.2d 398, 399 (Ct. App. 2003) (holding arguments are not preserved for appeal if they are raised at the circuit court level, but are not ruled on by the circuit court judge). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). However, when a trial court is presented with several interrelated issues and arguments regarding the same fundamental question, this Court has found, in certain circumstances, an issue is properly preserved for appellate review when the trial court's findings implicitly rule on an issue. *See Rogers*, at 648, 511 S.E.2d at 97 (finding the issue of willfulness at a revocation hearing was raised to and ruled upon by the circuit court because the essence of the defendant's argument was "that the violation was not willful because [the probationer] believed his probationary period had terminated" and the judge ruled "that the violation was 'intentional'"); *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009) (finding the family court implicitly ruled on whether it was proper to impute income to the husband because the court ruled on the issue of underemployment, which goes hand in hand with the imputation of income). In *Gartside*, this Court found, after a careful review of the trial court record, the issue of income imputation was properly preserved for appellate review because the Wife's counsel directly raised and the trial court directly ruled on the issue of underemployment. *Id.* at 43, 677 S.E.2d at 625–26. This Court reasoned that, because income imputation goes hand in

hand with underemployment, the trial court could not have made its ruling on underemployment without also considering income imputation. *Id.* at 43–44, 677 S.E.2d at 626.

Here, Appellant's amended motion to compel arbitration, memorandum in support of said motion, and oral argument to the Circuit Court directly raised and thoroughly addressed its argument to compel arbitration as to each subcontractor. (R. p. 267; R. pp. 245-251). Likewise, Alpha Omega, and numerous other subcontractors, filed memoranda in opposition to Appellant's motion to compel arbitration and raised those arguments to the Circuit Court. (*See* R. pp. 231-244). While the Appellant is correct in its assertion that the Order fails to explicitly address each individual arbitration agreement in relation to each individual subcontractor, it is abundantly clear from the record that the Circuit Court, in denying the Appellant's motion in its entirety, carefully considered and ultimately rejected the Appellant's argument to compel arbitration as to all parties, including each individual subcontractor.

Moreover, a review of the "Dispute Resolution" provision in the Post-Dated Contract[2] between Alpha Omega and the Appellant demonstrates the provision is derivative—i.e., Alpha Omega cannot be compelled to arbitration unless and until the Appellant is successful in compelling the Plaintiffs to arbitration. (R. p. 953, § 21). Accordingly, similar to the trial court's implicit ruling on the issue of income imputation in *Gartside*, the Circuit Court implicitly ruled on the issue of arbitration as to Alpha Omega by denying arbitration as to the Plaintiffs. Once the Circuit Court denied Appellant's motion to compel arbitration as to the Plaintiffs, there was no need for it to undertake an extensive analysis as to whether Alpha Omega was required to submit to arbitration. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive). Accordingly, this Court should affirm the Circuit Court's denial of Appellant's

[2] Alpha Omega denies the Post-Dated Contract is applicable in this matter, as discussed in more detail below.

motion to compel Alpha Omega to arbitration because it implicitly ruled on the issue when it denied Appellant's motion as to the Plaintiffs.

II. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALL PARTIES, INCLUDING ALPHA OMEGA.

a. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE IT IS FUNDAMENTALLY UNFAIR AND CONTRARY TO SOUTH CAROLINA LAW TO RETROACTIVELY APPLY THE "DISPUTE RESOLUTION" PROVISION FROM A CONTRACT ENTERED INTO *AFTER* ALPHA OMEGA COMPLETED ITS WORK ON THE PROJECT.

"Arbitration is a matter of contract, and the court can only compel arbitration if the parties have agreed to arbitrate." *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 569 (D.S.C. 1997) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 1923–24 (1995)). Under South Carolina law, a contract must demonstrate the parties' meeting of the minds as to all essential and material terms of the agreement. *Davis v. Greenwood Sch. Dist.*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005); *see also Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (holding that it is well settled in South Carolina that a binding contract requires a mutual manifestation of assent to the terms). Furthermore, "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). To decide whether an arbitration agreement covers a particular dispute, "the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement . . ." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

While South Carolina courts have, in limited circumstances, retroactively applied arbitration provisions to disputes arising ***under prior contracts***, the common theme underlying those cases "is that the parties expressly agreed that all controversies between them, not just

those appurtenant to the contract containing the clause, were to be submitted to arbitration." *Vestry and Church Warden of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 208, 588 S.E.2d 136, 139 (Ct. App. 2003) (emphasis added). In *Vestry*, this Court addressed whether an arbitration provision would retroactively apply to cover the Plaintiff's claim that arose under a prior contract executed before the signing of the arbitration agreement. *Id.* at 207–13, 588 S.E.2d at 138–42. This Court noted that "[c]ourts have retroactively applied arbitration clauses to disputes arising ***under prior contract***, but, in doing so, the courts have generally found the existence of ***a broadly worded clause*** which governed the overall relationship between the parties." *Id.* at 207–08, 588 S.E.2d at 139 (emphasis added) (citing *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 568–71 (4th Cir. 1998) (finding a broad arbitration clause which called for arbitration of "[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship" established that the clause was intended to apply to all conflicts between the parties)). This Court ultimately denied the Plaintiff's request to retroactively apply the arbitration provision finding its claim arose under prior, unrelated contracts and the arbitration provision failed to include sufficiently broad language to expand coverage to all claims arising between the parties. *Id.* at 211, 588 S.E.2d at 141. Moreover, even when an arbitration provision is broadly-worded, the South Carolina Supreme Court has held retroactive application of an arbitration provision when the dispute does not arise under the governing contract is appropriate only "when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." *Zabinski*, 326 S.C. at 598, 553 S.E.2d at 119.

Retroactive application of the arbitration provision in the Post-Dated Contract between Alpha Omega and the Appellant fails to meet the requirements set forth in *Vestry* and *Zabinski* in

several respects. First, unlike the parties in *Vestry*, ***there is no prior contract*** between Alpha Omega and the Appellant. (*See* R. p. 2909, ¶8). Second, akin to the parties in *Vestry*, the arbitration provision in the Post-Dated Contract contains no language expanding its coverage to include *completed projects*. (R. p. 953, § 21). Indeed, Alpha Omega did not agree to arbitrate controversies arising out of completed projects and "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America*, 363 U.S. at 582. If the Appellant wanted to expand coverage to include completed projects, as the drafter of the contract, it could have done so. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) (finding "a court will construe any doubts or ambiguities in an agreement against the drafter of the agreement."). Finally, even if this Court were to find the arbitration provision in the Post-Dated Contract "broadly-worded," in light of the "significant relationship" test set forth in *Zabinski*, retroactive application of this arbitration provision still must fail. The claims asserted in this lawsuit have no relationship to the Post-Dated Contract because the Post-Dated Contract relates to separate and distinct projects and was executed nearly a year after Alpha Omega completed its work on the Project. (*See* R. p. 2908, ¶ 6; *see also* R. p. 953, § 21). Accordingly, Alpha Omega respectfully requests this Court affirm the Circuit Court's denial of Appellant's motion to compel arbitration as to Alpha Omega because the arbitration provision in the Post-Dated Contract is narrow in scope, does not speak to relationships, contains no language expanding its coverage to include completed projects, and should not be retroactively applied.

b. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE PLAINTIFFS WILL LIKELY BRING DIRECT CLAIMS AGAINST IT SUBJECTING IT TO INCONSISTENT FINDINGS OF FACT, LIABILITY, AND JUDGMENTS.

Given the typical course of action in a construction defect lawsuit, there is a strong likelihood Plaintiffs will bring direct claims against Alpha Omega. Because there is no contract between the Plaintiffs and Alpha Omega, neither party would be required to arbitrate those claims. If this Court were to find the Circuit Court erred in denying Appellant's motion to compel arbitration as to Alpha Omega—i.e., if Alpha Omega is compelled to arbitrate with the Appellant, but not compelled to do so with the Plaintiffs—it subjects Alpha Omega to the possibility of inconsistent decisions rendered by different deciders of fact and law, who sit in different arbitral tribunals or courts, and whose decisions on appeal would be constrained by different standards and scopes of appellate review. By way of example, under the South Carolina Uniform Arbitration Act, the grounds for vacating an arbitration award are limited to arbitrator misconduct, exceeding powers, corruption, fraud, and the like. *See* S.C. Code Ann. § 15-48-130(a). Such grounds are far more limited than those available for judicial appellate review of judgments on the merits, such as errors of law or correction of other substantive or procedural legal deficiencies. In an effort to avoid dual proceedings resulting in inconsistent findings of fact, liability, and judgments, Alpha Omega respectfully requests this Court affirm the Circuit Court's denial of Appellant's motion to compel arbitration as to all parties, including Alpha Omega.

III. In the alternative, if this Court finds the Post-Dated Contract applicable, which Alpha Omega denies, the Circuit Court properly denied Appellant's Motion to Compel arbitration as to Alpha Omega.

a. The Circuit Court properly denied Appellant's motion to compel arbitration as to Alpha Omega because the Post-Dated Contract's "Dispute Resolution" provision unambiguously provides Alpha Omega is not required to arbitrate with the Appellant unless and until the Plaintiffs are required to do so.

It is well established that the primary rule of contract interpretation is that courts should construe contracts "to give them effect and carry out the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (citations omitted); *C.A.N. Enters., Inc. v. S.C. Health & Human Serves. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 370, 372 (1984). If a written contract's "language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and [its] language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Courts must enforce an unambiguous contract according to its terms, regardless of the contracts wisdom or folly, or the parties' failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the documents force and effect. *Superior Auto Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973).

Section 21, entitled "Dispute Resolution," of the Post-Dated Contract provides in relevant part:

> If Lennar is involved in or becomes involved in litigation, arbitration, judicial reference or other alternative dispute resolution procedure ("ADR") with a third party and Lennar or any other party joins Subcontractor as a party to such ADR, then the disputes between Lennar and Subcontractor relative to the claims involved in the ADR proceeding shall be resolved in such proceeding. In the event that Lennar is required, by law or by contract, to resolve a dispute with a

> third party in an ADR forum, Subcontractor agrees to participate in and be bound by such procedure.

(R. p. 953, § 21). As applied to the circumstances of this case, the foregoing provision unambiguously demonstrates Alpha Omega and the Appellant agreed to resolve their disputes in the same forum in which disputes between the Appellant and "a third party" are resolved. Thus, if the Appellant is unsuccessful in its efforts to enforce its arbitration provisions against the Plaintiffs, it is precluded from independently compelling Alpha Omega to submit to arbitration because the foregoing provision is derivative and, therefore, does not provide for arbitration without a third party claim being adjudicated in the same action. *See Faltaous v. Anderson Ocean Club Dev., LLC*, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (observing arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit). In light of the provision's derivate nature, as it relates to Alpha Omega, Appellant's motion to compel arbitration must fail unless and until it successfully compels the Plaintiffs to arbitration. Accordingly, Alpha Omega respectfully requests this Court affirm the Circuit Court's denial of Appellant's motion to compel arbitration as to Alpha Omega.

b. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE THE "DISPUTE RESOLUTION" PROVISION FAILS TO COMPLY WITH THE NOTICE PROVISION REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

For an arbitration provision to be valid and enforceable under the South Carolina Uniform Arbitration Act ("SCUAA"), the contract containing that provision is subject to certain notice provision requirements set forth in Section 15-48-10(a). *See* S.C. Code Ann. § 15-48-10. Section 15-48-10(a) provides in relevant part:

> Notice that a contract is subject to arbitration pursuant to this chapter *shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*

S.C. Code Ann. § 15-48-10(a) (emphasis added). The South Carolina Supreme Court has held these elements are to be strictly adhered to in order to satisfy the notice requirements. *Zabinski*, 346 S.C. at 588–89, 553 S.E.2d at 114.

Assuming, *arguendo*, this Court finds the Post-Dated Contract applicable, which Alpha Omega denies, this Court should still affirm the Circuit Court's Order denying arbitration as to Alpha Omega because the arbitration provision in the Post-Dated Contract clearly fails to meet the requirements of Section 15-48-10(a). The arbitration clause is not capitalized, bolded, underlined, or rubber stamped. (*See* R. p. 953, § 21). Moreover, the arbitration clause is buried on the seventeenth page of the Post-Dated Contract. (*Id.*). Accordingly, the arbitration clause is unenforceable and Alpha Omega respectfully requests this Court affirm the Circuit Court's denial of Appellant's motion to compel arbitration as to Alpha Omega because it fails to comply with the notice provision requirements of the SCUAA.

CONCLUSION

For the foregoing reasons, Alpha Omega respectfully requests this Court affirm the ruling of the Circuit Court denying Appellant's motion to compel Alpha Omega to submit this matter to arbitration.

[Signature on next page]

Respectfully Submitted,

YOUNG CLEMENT RIVERS LLP

By: Mary Willis

Stephen L. Brown (SC Bar No. 66468)
Catherine H. Chase (SC Bar No. 74593)
Mary S. Willis (SC Bar No. 102411)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Telephone: (843) 720-5488
Facsimile: (843) 579-1369
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
mwillis@ycrlaw.com

AND

AIKEN, BRIDGES, ELLIOT, TYLER & SALEEBY, P.A.
Preston B. Dawkins, Jr. (SC Bar No. 72431)
181 East Evans Street (29501)
P.O. Drawer 1931 (29503)
Florence, SC
(843) 669-8787

Attorneys for the Respondent Alpha Omega Construction Group, Inc.

Charleston, South Carolina

Dated: 08/24/17

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

RECEIVED

AUG 28 2017

SC Court of Appeals

Case No. 2014-CP-08-2424

Patricia Damico, and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Johnathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,

Defendants,

Of which Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc., TJB Trucking/Leasing, LLC, and Civil Site Environmental are

Respondents.

And

Lennar Carolinas, LLC,

Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed

Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP,

Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are

Respondents,

RESPONDENT ALPHA OMEGA CONSTRUCTION, INC.'S CERTIFICATION OF FINAL BRIEF

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Catherine H. Chase (SC Bar No. 74593)
Mary S. Willis (SC Bar No. 102411)
25 Calhoun Street, Suite 400 (29401)
P.O. Box 993
Charleston, South Carolina 29402
(843) 720-5488

And

AIKEN, BRIDGES, ELLIOTT, TYLER & SALEEBY, P.A.
Preston B. Dawkins, Jr. (SC Bar No. 72431)
181 East Evans Street (29501)
P.O. Drawer 1931 (29503)
Florence, SC
(843) 669-8787

Attorneys for the Respondent Alpha Omega Construction Group, Inc.

I, Mary S. Willis, do hereby certify that the Final Brief of Respondent Alpha Omega Construction Group, Inc. complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby certifies that the Final Briefs comply with the Supreme Court order of April 15, 2014.

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: Mary Willis

Stephen L. Brown (SC Bar No. 66468)
Catherine H. Chase (SC Bar No. 74593)
Mary S. Willis (SC Bar No. 102411)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Telephone: (843) 720-5488
Facsimile: (843) 579-1369
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
mwillis@ycrlaw.com

AND

AIKEN, BRIDGES, ELLIOT, TYLER & SALEEBY, P.A.
Preston B. Dawkins, Jr. (SC Bar No. 72431)
181 East Evans Street (29501)
P.O. Drawer 1931 (29503)
Florence, SC
(843) 669-8787

Attorneys for the Respondent Alpha Omega Construction Group, Inc.

Charleston, South Carolina

Dated: 8/24/2017