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

Appellate Case, No. 2016-2339
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, Jonathan 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, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

APPELLANT'S FINAL REPLY BRIEF TO RESPONDENTS' BRIEF

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INTRODUCTION

This appeal arises out of the circuit court's refusal to compel the Owners, Subcontractors, and Spring Grove Plantation Development, LLC to arbitration pursuant to their respective agreements with Lennar Carolinas, LLC ("Lennar"). In response to Lennar's Initial Brief, the Owners[1], along with various Subcontractors[2] and Spring Grove Plantation Development, LLC, submitted several briefs. In the interest of efficiency Lennar has elected to reply to the various arguments in this Consolidated Reply Brief. Thus, the reply arguments herein are collective responses to opposing briefs when possible and responses to individual arguments only when it seemed necessary. The first section of this Consolidated Reply Brief addresses certain arguments of the Owners. The second section of this Consolidated Reply Brief addresses arguments contained in more than one Subcontractor brief and certain unique arguments made by only one Subcontractor or another.

ARGUMENTS

I. Reply to Owners' Arguments

A. Each separate agreement containing an arbitration provision should have been considered and enforced individually.

In deciding Lennar's Motion to Compel Arbitration, the circuit court had a well-defined and straightforward task; namely, the court was legally obligated to identify the arbitration provision within each of the four agreements at issue between Lennar and the Owners ((1) Purchase and Sale Agreement; (2) Lennar Warranty; (3) Covenants; and (4) Deeds) and to determine whether the respective arbitration provisions were valid and enforceable. In

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[1] The following Owners submitted a joint Respondents' Brief: Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Mathew Collins, Jonathan and Teresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow.

[2] The following Subcontractors submitted individual Respondent's Briefs: (1) Alpha Omega Construction, Inc.; (2) Guaranteed Framing, LLC; (3) DVS, Inc.; (4) Décor Corporation; and (5) Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

performing this analysis, the circuit court was limited to a review of only the arbitration provision in each agreement—not the agreement as a whole. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (finding that a court's analysis of the enforceability of an arbitration provision is restricted to that provision alone). In this case, because there were four separate agreements between Lennar and the Owners, if any one of those agreements contained a valid and enforceable arbitration provision, the circuit court was obligated to compel the case to arbitration.

B. The Purchase and Sale Agreement required the circuit court to compel arbitration.

The circuit court's analysis should have begun and ended with a review of Section 16 of the Purchase and Sale Agreement between Lennar and the Owners. Section 16 of that Agreement undeniably and unequivocally sets forth a valid and enforceable agreement to arbitrate.

Section 16 is separately and clearly labeled "**Mediation/Arbitration of Disputes.**" (R. 300). Section 16 is separately and uniquely identified not only by the aforementioned bold and underlined heading, but also within the numbering structure of the Agreement as sections 16.1 through 16.10. (R. 300-301). No other agreement, document or section of the Purchase and Sale Agreement is incorporated by reference into Section 16 or even mentioned in Section 16.

Section 16 of the Purchase and Sale Agreement provides:

> 16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) and not by or in a court of law or equity. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Agreement, the Property, the Community or any dealings between Buyer and

> Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community.

(R. 300).

There can be no valid finding that Section 16 contains a "cross-reference" to any other provision or section within the Purchase and Sale Agreement or to any other agreement. Likewise, there can be no valid finding that Section 16 is "intertwined" with any other provision or section of the Purchase and Sale Agreement or any other agreement. There is no physical, numerical, spatial or verbal "intertwining" in any form or fashion.

Indeed, neither the circuit court in its Order, nor the Owners in their Brief, cited to any "cross-referencing" or "intertwining" within Section 16. It is abundantly clear that both the circuit court and the Owners adopted a view that the decision in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), could be a basis for supporting their desired outcome of denying Lennar's Motion and refusing to compel arbitration, and each of them chose to parrot the findings of fact from *D.R. Horton* and adopt them in this case as though they were conclusions of law requiring no basis in fact specific to this case. Thus, neither the circuit court, nor the Owners ever link the buzz words—"due to the cross-references to one another" or "intertwining paragraphs"—to any factual support or justification in this Record.

In their effort to justify the contention that the arbitration provision of the Purchase and Sale Agreement (Section 16) contained cross-references and was intertwined with other provisions, the circuit court and Owners assert that the language in Section 16 which clarifies the scope of disputes which would be subject to arbitration—to include all disputes "whether contract, warranty, tort, statutory or otherwise"—justifies the contention that every other provision which refers to or deals with warranty matters may be read as though it is part and

parcel of the arbitration provision. (R. 7-11). Indeed, in the attempt to expand the analysis of the arbitration provision to include some term which the circuit court and the Owners could argue might be unconscionable, they seek to read all, or portions of Sections 3, 5, 17, 28, 30 and Rider B of the Purchase and Sale Agreement as though they are part and parcel of Section 16, the arbitration provision. (R. 8-10). In fact, they seek to have the wholly separate Lennar Warranty document treated as though it is an indistinguishable part of the arbitration provision. These efforts by the circuit court and the Owners are improper.

No fair or justifiable reading of Section 16, or those other sections or agreements, will support a conclusion that they cross-reference each other or are intertwined. The attendant facts and circumstances which allowed the court in *D.R. Horton* to consider all of the paragraphs and subparagraphs of Section 14 in the agreement applicable in that case are utterly different and distinguishable from the facts and circumstances associated with Section 16 of the Purchase and Sale Agreement in this case. The error of the circuit court's and Owner's position in this case is further evident by reviewing the decision in *One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Company*, 418 S.C. 51, 56, 791 S.E.2d 286, 289 (Ct. App. 2016). In *One Belle Hall*, which was decided after *D.R. Horton*, the court analyzed an arbitration provision in a warranty agreement between a shingle manufacturer and a buyer. The arbitration provision stated that it covered claims "relating to or arising out of the shingles or [the] limited warranty . . . regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory." *One Belle Hall*, 418 S.C. at 51, 791 S.E.2d at 289. While the buyer in that case sought to expand the scope of review of the arbitration provision by, as the circuit court and Owners wish to do here, blurring the lines of the arbitration provision and including within it the various other terms, the Court of Appeals rejected those attempts. *Id.*, 418 S.C. at 64, 791

S.E.2d at 293. In fact, this Court found that the circuit court in that case erred when it considered terms outside of the identifiable arbitration provision to analyze the issues. *Id.*

C. The Lennar Warranty is not included in the Purchase and Sale Agreement's arbitration provision.

The Lennar Warranty is a separate and distinct agreement from the Purchase and Sale Agreement. Although the Lennar Warranty provides an additional basis for compelling arbitration in this case, it is not necessary to the decision where it is clear that arbitration is already required by virtue of Section 16 of the Purchase and Sale Agreement.

There is certainly no basis to conclude that the arbitration provision in the Purchase and Sale Agreement is intermingled or cross-referenced with the arbitration provision in the Lennar Warranty merely because the language in the two separate agreements is "almost verbatim." Yet, this was the justification by the circuit court and the argument by the Owners. Reliance on the theory that provisions in separate agreements are similar or "almost verbatim" to justify a conclusion that the separate agreements and separate provisions may be read together because they are deemed "cross-referenced" or "intermingled" has no basis in law (or fact). *See One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293. (R. 10-11). The decision of the circuit court based on such a finding or conclusion is clear error.

D. Jury Trial and Class Action Waivers are not Unconscionable.

Any conclusion by the circuit court, or contention by the Owners, that the arbitration provision in the Lennar Warranty is unconscionable because it contains a jury trial and class action waiver is unsupportable. As a matter of law, jury trial and class action waivers are not unconscionable terms in an arbitration provision. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding a class action waiver in an arbitration agreement is not unconscionable); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91-94, 749 S.E.2d 139, 151-

53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) ("The loss of the right to a jury trial is an obvious result of arbitration."). Therefore, the circuit court erred in relying on commonly accepted contract terms to find the arbitration provisions at issue in this case to be unconscionable.

E. The "remedial-related provisions" are not included in any of the arbitration provisions.

The circuit court sought to justify its finding that the arbitration provision of the Lennar Warranty was unconscionable by reading other "remedial-related provisions" of the Lennar Warranty into the arbitration provision, and then holding that those remedial-related provisions were unconscionable. (R. 12-16). The "remedial-related provisions" are in the fifth section of the Lennar Warranty. (R. 836). The fifth section of the Lennar Warranty is not a part of the Lennar Warranty's arbitration provision, which separately and distinctly constitutes the third section of the document. (R. 831). It is a reversible error to rely upon purportedly unenforceable disclaimers and limitations of remedies provisions in sections of a contract other than the arbitration provision to find the arbitration provision is unenforceable. *See One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293 ("Upon our review of the arbitration agreement, we hold the circuit court erred in finding the purportedly unenforceable disclaimers and limitations within the "Legal Remedies" paragraph contributed to the unconscionability of the arbitration agreement."). Therefore, the circuit court's reliance upon such provisions is reversible error that should be undone by this Court.

F. The arbitration provisions may be severed from their respective contracts.

The circuit court erred in finding that the arbitration provisions (whether in the Purchase and Sale Agreement or the Lennar Warranty) could not be severed from other terms in the

agreements, and the Owners misrepresented the *D.R. Horton* decision as legal authority for the circuit court's error.

Generally, an arbitration provision is severable from a contract in which it is embedded. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001). A court's ability to sever unconscionable terms is limited essentially to when the removal of the terms would effectively require the court to rewrite the contract. *York*, 406 S.C. at 90-91, 749 S.E.2d at 151. In determining if the severing of terms would effectively require a rewrite, the test is whether the unconscionable terms are so intertwined with the arbitration provision that the court is unable to separate out a reasonable arbitration provision without rewriting the contract. *See Simpson*, 373 S.C. at 34, 644 S.E.2d at 674.

In this case, the only purported unconscionable provisions are asserted to be in the Lennar Warranty. Therefore, those terms are not part of the arbitration provision in the Purchase and Sale Agreement. "Severing" them from the arbitration provision is readily accomplished by not conflating them in the first instance and there is no need for any rewriting of the arbitration provision in the Purchase and Sale Agreement. The alleged unconscionable terms are in a wholly separate and distinct document and "severing" the two requires no revision of the standalone agreement.

Even within the Lennar Warranty, severing the arbitration provision of the document from other provisions does not require any rewriting of the arbitration section because they are separate and distinct in every way—distinctly headed and labeled and topically and spatially separated. In addition, the only terms within the Lennar Warranty's arbitration provision alleged to be unconscionable are the jury trial and class action waivers. As discussed above, jury trial and class action waivers are not unconscionable. Therefore, it is obvious that the purported

unconscionable terms do not "pervade each of the arbitration provisions" so as to prevent this Court from severing the arbitration provisions from their respective contracts. (R. 16-17).

Furthermore, the *D.R. Horton* decision has no applicability to the issue of severability in this case—let alone providing legal authority for that decision in this case. In *D.R. Horton*, the court declined to analyze whether the unconscionable terms were severable because the D.R. Horton contract did not contain a severability provision. *D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6.; *see also One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293 ("unlike the arbitration agreement in *D.R. Horton*, the legal remedies paragraph contains a severability clause."). Therefore, in the absence of a severability provision, the *D.R. Horton* court found that the parties did not intend for unconscionable terms to be struck from their arbitration agreement. *Id.* However, the arbitration provisions in the Purchase and Sale Agreement and the Lennar Warranty each contain an express severability provision—something the contract at issue in *D.R. Horton* lacked. (R. 301; 831-832). Accordingly, the circuit court erred in finding the purported unconscionable provisions are not severable from the arbitration provisions in the Purchase and Sale Agreement and the Lennar Warranty.

G. No Argument that the Covenants are Unconscionable.

The Owners argue the arbitration provision in the Covenants is unenforceable because the Covenants are an adhesion contract. However, "[t]here are many cases in this jurisdiction and others involving the enforceability of arbitration contracts in adhesion contracts. . . ." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. If the Court finds a contract is an adhesion contract, then it must determine whether the terms embedded in the arbitration provision are unconscionable. *Id.* The Owners do not argue, and the circuit court did not find, that the actual terms of the Covenants are unconscionable. Therefore, the circuit court's analysis is incomplete and provides no justification for finding that the arbitration provision in the Covenants is unenforceable. The

circuit court should be reversed because an arbitration provision in an adhesion contract is not per se unenforceable.

H. The Purchase and Sale Agreement's arbitration provision is not ambiguous.

The arbitration provision in the Purchase and Sale Agreement is not ambiguous. The Purchase and Sale Agreement, Section 16, states that the parties agree to submit their disputes to "binding arbitration as provided by the Federal Arbitration Act." (R. 300). The mere notice provision on the top of the first page is not contradictory, and it creates no ambiguity. The statement at the top of the first page merely provides notice to review Section 16 which sets forth the arbitration provision. That notice statement provides:

> **PURSUANT TO SECTION 15-48-10, SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED THIS SHALL CONSTITUTE WRITTEN NOTICE THAT THIS AGREEMENT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO SECTION 16 OF THIS AGREEMENT.**

(R. 296).

It is a well-established principle of law that, when interpreting a contract, a court should recognize that the specific language of a contract trumps the general language. *See Aetna Cas. & Sur. Co. v. Holsten*, 100 F.3d 950 (4th Cir. 1996) "[W]hen interpreting a contract, a court should follow the interpretive philosophy that specific language trumps general text." (citation omitted)); 11 Williston on Contracts § 32:10 (4th ed.) ("Even absent a true conflict, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate."); Restatement (Second) of Contracts § 203 (1981) ("[S]pecific terms and exact terms are given greater weight than general language").

The notice at the top of the first page of the Purchase and Sale Agreement indicates the contract is subject to binding arbitration as set forth specifically in Section 16. It does not state that Section 16 is governed by S.C. CODE ANN. § 15-48-10. In Section 16, the specific language of the arbitration provision states plainly and unambiguously that the parties agree to submit to "binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§1 et. seq.)." (R. 300). The specific language of the arbitration provision governs its terms, and Section 16 states that the arbitration is governed by the FAA. Section 16 makes no reference to the South Carolina Code.

I. The Owners agreed the Purchase and Sale Agreement and Lennar Warranty involve interstate commerce.

The Purchase and Sale Agreement arbitration provision (Section 16), and for that matter the specific arbitration provision in the Lennar Warranty, expressly state, "[t]he parties to this Agreement specifically agree that this transaction involves interstate commerce . . . ."

Pursuant to Section 2 of the FAA, a "written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, ..." 9 U.S.C. § 2 (emphasis added).

In South Carolina, an arbitration provision stipulating that it is governed by the FAA is in fact governed by the FAA. *See Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64.

Here, the Purchase and Sale Agreements, and the Lennar Warranty, provide unequivocally an agreement that the transactions involve interstate commerce. (R. 300; 831). Therefore, the Court is required to find that the contract evidences a transaction involving interstate commerce and to enforce it under the FAA.

II. Reply to Subcontractors' Arguments

A. The Subcontractors are only required to arbitrate the claims at issue in this case if the Owners are compelled to arbitrate their claims against Lennar.

The Subcontractors agreed to arbitrate in the event that Lennar is a party to an arbitration action in which it believes that the Subcontractors are liable in whole or in part for the claims being arbitrated. (R. 888-1669).

The Subcontractors individually entered into one, or more, of the following agreements with Lennar: (1) Contractor Base Agreement, (2) Subcontract Agreement, (3) Master Trade Partner Agreement, (4) Master Trade Partner Agreement (Labor and Supply), (5) General Agreement for Consulting Services, (6) Business Partner Agreement, or (7) Supplier Base Agreement. In those agreements the Subcontractors agreed to arbitrate claims if Lennar is a party to an arbitration action with a third-party. In such circumstances, the Subcontractors agreed to participate in the arbitration. (R. 888-1669).

As discussed above, the Owners' claims with Lennar are subject to arbitration. Therefore, under the plain language of the aforementioned subcontracts, each of the Subcontractors agreed to participate in arbitration with Lennar in this case where Lennar is involved in arbitration with the Owners. The Subcontractors must be compelled to arbitration, and any doubt the Court has in compelling the Subcontractors to arbitration should be resolved in favor of arbitration. *See Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

B. Lennar properly preserved its argument that the circuit court erred in failing to compel the Subcontractors to arbitration.

The argument by some Subcontractors that Lennar did not properly preserve its appeal rights based on the circuit court's error in refusing to compel the Subcontractors to arbitration fails because Lennar properly raised its argument to the circuit court (1) in its motion to compel

arbitration, (2) in the memorandum in support of the motion to compel arbitration, (3) at the hearing on the motion to compel arbitration, and (4) in its Rule 59(e) Motion to Alter or Amend.

The purpose of issue preservation rules is to provide the circuit court with a fair opportunity to rule on the issues, and to provide the court of appeals with a platform for meaningful appellate review. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006). An issue is preserved for appellate review if it is raised to and ruled upon by the circuit court, or if a party files a Rule 59(e) motion asserting issues that were raised to but not ruled upon by the circuit court. *Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510-11 (2006); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the circuit court).

In *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) this Court found that reference in a Rule 59(e) motion to an argument that was not ruled upon by the circuit court is sufficient to preserve the argument for appellate review. In *Chastain*, the appellant raised a due process argument under Rule 7(b)(1) of the South Carolina Rules of Civil Procedure to the circuit court; however, the circuit court did not rule on the motion. *Chastain*, 381 S.C. at 515, 673 S.E.2d at 829. The appellant then filed a motion to alter or amend, pursuant to Rule 59(e), on the grounds the circuit court did not rule on the appellant's "SCRCP 7(a) Due Process Argument." *Id.* On appeal, the appellant specifically based its argument on Rule 7(b)(1), SCRCP. *Id.* at 515-16, 673 S.E.2d at 829. Nonetheless, the respondent argued the issue was not preserved because the appellant did not specifically assert an argument pursuant to Rule 7(b)(1) in the Rule 59(e) motion to alter or amend. This Court held that the argument was preserved, and stated that it would "not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue." *Id.* at 516, 673 S.E.2d at 829.

In the instant case, Lennar properly raised in its Amended Motion to Compel Arbitration the argument that the Subcontractors should be compelled to arbitration pursuant to the terms of their subcontracts with Lennar. (R. 888-1669). In its Amended Motion to Compel Arbitration, Lennar identified each subcontractor and the documents containing the arbitration clauses that governed the disputes at issue in this case. (R. 277-294). The argument was clearly presented to the circuit court, but the circuit court's order only addressed the issue of arbitration between Lennar and the Owners. (R. 4-22). Therefore, Lennar filed a Rule 59(e) motion requesting the circuit court alter or amend its order denying its Motion to Compel Arbitration. (R. 2553). In its Motion to Alter or Amend, Lennar requested the court specifically address its request to compel the Subcontractors to arbitration, and Lennar relied on the reasons previously articulated in its motion, its supporting memoranda, and then presented at the hearing on the motion. (R. 2571-2572; 245-251). The circuit court's order in response to the Rule 59(e) Motion still contains no reference to an analysis or decision regarding the Subcontractors. (R. 3). Therefore, Lennar's arguments are clearly preserved for appellate review and the Subcontractor's arguments to the contrary are without merit.

C. Lennar neither waived, nor abandoned, its argument in favor of compelling the Subcontractors to arbitration.

Lennar neither waived, nor abandoned, its argument in favor of compelling the Subcontractors to arbitration. While the Subcontractors argue that Lennar failed to satisfy South Carolina Appellate Court Rule 208 because Lennar did not restate the citations to authority about the error by the circuit court in the subsection of the brief addressed at the Subcontractor decision, Lennar did, in fact, cite authority in support of its argument that the Subcontractors should be compelled to arbitration pursuant to their contracts with Lennar. First, Lennar's standard of review argument in the Initial Brief is applicable to each of its briefing issues, and

establishes first and foremost that there is presumption in favor of the enforceability and application of arbitration agreements to disputes. Lennar also cited authority that the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. (Lennar's Brief p. 9) (citing *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986)). In the introduction to its arguments, Lennar cited authorities establishing the clear and unquestionable policy, of both South Carolina and the United States, favoring the arbitration of disputes. (Lennar's Brief p. 10) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). Given these arguments and citations are applicable to each subsequent section and argument in the brief, repeated citation in each section is unnecessary and redundant. Lennar cited numerous authorities supporting its arguments that a party who agrees to arbitrate a dispute should be compelled to arbitrate that dispute. *See, e.g.*, *One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293; *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012); *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399540 S.E.2d 864, 865 (Ct. App. 2000).

Moreover, the circuit court orders appealed from failed to provide any reasoning for denying Lennar's Motion to Compel Arbitration as it related to the Subcontractors. Without a stated basis for the Motion having been denied, Lennar's argument is effectively limited to its original assertion that it has an agreement to arbitrate the disputes and, based upon the authorities cited above, the circuit court erred in failing to compel the Subcontractors to arbitration. Lennar's brief provides ample citation of authority in support of its argument that Subcontractors should be compelled to arbitration. Therefore, the Subcontractors' arguments that Lennar failed to cite authority in support of its argument should be disregarded and this Court should consider the merits of Lennar's arguments on appeal.

D. Arbitration agreements may apply retroactively.

Contrary to the arguments put forth by Guaranteed Framing, LLC ("Guaranteed Framing") and Alpha Omega Construction, Inc. ("Alpha Omega"), a party may be subject to arbitration for a claim that occurred prior to the execution of the arbitration agreement when the agreement to arbitrate is sufficiently broad so as to govern the general relationship between the parties and not merely a specific transaction.

Courts have retroactively applied arbitration clauses to disputes arising under prior contracts when there is a broadly worded arbitration clause which governed the overall relationship between the parties. *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 207-08, 588 S.E.2d 136, 139 (Ct. App. 2003); *see also 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 and not only to conflicts arising under the specific contract containing the arbitration clause); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 331-33 (10th Cir. 1993) (holding the parties were required to submit their claims to arbitration where the dispute predated the execution of the arbitration clause because the clause provided for the arbitration of "any controversy ... arising out of your business or this agreement"); *Rand Bond of N. Am., Inc. v. Saul Stone & Co.*, 726 F.Supp. 684, 687-88 (N.D.Ill.1989) (finding arbitrable a dispute arising prior to the execution of the arbitration agreement where the arbitration clause provided that the agreement extended to "[a]ny controversy or claim arising out of or relating to your accounts"); *B.G. Balmer & Co. v. United States Fid. & Guar. Co.*, 1998 WL 764669 (E.D. Pa. 1998) (noting that where an arbitration clause speaks in terms of relationships and not timing, it applies to disputes even if the claim

arose before the agreement was executed). The common theme in the courts' opinions finding that arbitration provisions may apply to disputes arising prior to the execution of the agreement was that in each case "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." *Id.*

In *Vestry*, the court found the following arbitration provision required the parties to arbitrate disputes that arose prior to the party's agreement to arbitrate:

> The [Church] and Terminix agree that all matters in dispute between them, including but not limited to (i) any controversy or claim between them arising out of or relating to this Agreement, (ii) any wood destroying insect report with respect to the described property or (iii) the described property in any way, in any such case whether by virtue of contract, tort or otherwise, shall be settled exclusively by arbitration.

Vestry, 356 S.C. at 212, 588 S.E.2d at 141. The court interpreted this language and found that "[t]he fact that the dispute accrued prior to the execution of the . . . contract is not dispositive where, as here, the terms of the agreement are susceptible to an interpretation which covers any dispute existing between the parties." *Id.*, 356 S.C. at 213, 588 S.E.2d at 141-42.

In 2015, Guaranteed Framing and Alpha Omega each entered into Master Trade Partner Agreements with Lennar. (R. 1218; 937). The Agreements were amended several times, and the third amendment amended their respective agreements to arbitrate. (R. 1236-1237; 961-962). The arbitration agreement in their respective agreements states the following:

> 15. ARBITRATION: If any claim or controversy that arises out of or relates to, directly or indirectly, this Agreement or **any dealings between the parties** cannot be settled by the parties with sixty (60) days after Contractor is first provided with written notice of the claim or controversy by the Subcontractor. . . the claim or controversy shall be resolved by final and binding arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. . . . Should a claim or controversy arise between Contractor and a buyer of a residence regarding

> materials supplied or work performed by or through Subcontractor, Subcontractor agrees to participate as a party in, and be bound by, any mediation and arbitration proceedings between Contractor and the buyer.

(R. 1236-1237; 961-962) (emphasis added).

The language "any dealings between the parties" clearly indicates an agreement to arbitrate *all* controversies that may arise between either Guaranteed Framing or Alpha Omega and Lennar. Furthermore, the arbitration provision makes no temporal distinction as to the timing in which the dispute must have arisen. Therefore, it is clear that Guaranteed Framing and Alpha Omega each agreed to arbitrate any dispute between them and Lennar.

E. Challenges to the enforceability of the entire agreement are to be decided by the arbitrator.

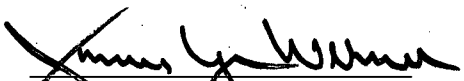
Décor Corporation, DVS Inc., and the Subcontractors who adopted the arguments raised in the other Respondents' Briefs, challenge the enforceability of their contract as a whole in an effort to avoid being compelled to arbitration.

When a party files a motion to compel arbitration the court is limited to consideration of challenges to the arbitration clause itself, and issues of a contract's validity are to be considered by the arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."). The court's review of the validity of an arbitration provision is restricted to that provision alone. *Prima Paint*, 388 U.S. at 406. The legality and enforceability of a contract is an issue for the arbitrator to decide. *The Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338-39, 588 S.E.2d 617, 622-24 (Ct. App. 2003) (holding because a party did not directly challenge the arbitration agreement in either of the two contracts, the legality and enforceability of the contracts is an issue for the arbitrator to decide).

Certain Subcontractors challenge the enforceability of the arbitration provisions on the grounds that the contract is not enforceable due to the lack of a "Purchase Order" or an attached "Schedule A." These arguments seek to challenge the validity of the contract as a whole. It is well established that challenges to the enforceability of the agreement, and not the arbitration provision, are to be resolved by the arbitrator and not the court. *See Buckeye Check Cashing*, 546 U.S. at 445-46. Therefore, Subcontractors' arguments as to the enforceability of the contract are not ripe for the Court's consideration at this time.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Lennar's Motion to Compel Arbitration. Neither the law, nor the facts, support a finding that the terms of any of the contracts at issue in this case contain unenforceable agreements to arbitrate and, therefore, Lennar respectfully requests this Court reverse the circuit court's order denying Lennar's Motion to Compel Arbitration.



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September 1, 2017
Columbia, South Carolina

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

Appellate Case, No. 2016-2339
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, Jonathan 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, Costal 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, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are also Respondents.

and

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

LENNAR CAROLINAS, LLC'S CERTIFICATE OF COUNSEL

The undersigned hereby certifies on September 1, 2017, that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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