

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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

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Appellate Case No. 2016-2339

Case No. 2014-CP-08-2424

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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, Geometries 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, Decor 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, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, 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.

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Final **BRIEF OF RESPONDENT MANALE LANDSCAPING, LLC**

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**ATTORNEYS FOR MANALE LANDSCAPING, LLC**

September 18, 2017

Charleston, South Carolina

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS .....	2
ARGUMENT .....	3
I.    Lennar has waived and abandoned its arguments that the Circuit Court erred in Denying in Lennar’s Motion to Compel Arbitration as to Manale .....	3
II.   The Circuit Court did not err in failing to rule on Lennar’s Motion to Compel Arbitration as to Subcontractor Defendants as the Arbitration clause was not triggered in light of the Court’s ruling that the Plaintiffs could not be Compelled into Arbitration.....	5
III.  Lennar has not argued on appeal that Manale should be compelled to Arbitration thus that issue is not properly before the Court .....	6
CONCLUSION.....	6

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<u>Fields v. Melrose Ltd. P'ship</u> , 312 S.C. 102, 439 S.E.2d 283, (Ct. App. 1993).....	3
<u>O'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000) .....	4
<u>Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.</u> , 413 S.C. 630, 776 S.E.2d 434, (Ct. App. 2015).....	6

## STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in denying Lennar's Motion to Compel without substantive analysis?
- II. Has Lennar waived its Appeal of the Motion to Compel as to Manale by failing to preserve its substantive arguments for appeal?

## STATEMENT OF THE CASE

The Homeowners at the Abbey located in the Spring Grove development (the "Plaintiffs") filed this lawsuit against Lennar and others based on alleged construction defects, Lennar asserted Cross-Claims against Co-Defendants and third-party claims against subcontractors. There are sixty-nine (69) single family homes in the Abbey located in the Spring Grove development (the "Subject Property" or the "Abbey").

Initially, the Plaintiff's complaint contained claims against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC ("Manale") based on allegations of deficiencies in the site grading and drainage of the specific to a portion of the Plaintiffs. Manale is alleged to have been a landscaping subcontractor of the general contractor, Lennar, during the construction (the "Project") of Plaintiffs' residences. (R. p. 24-43.) On November 23, 2015 an amended complaint was filed and the case was expanded to include all Plaintiffs at the Subject Property alleging wide ranging defects in the general construction of the Subject Property. (R. p. 75-108.) In turn, in Lennar's Answer to Plaintiffs' Complaint, Lennar asserted cross-claims and third-party claims against additional subcontractors for the Project: (R. p. 42-74.)

On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. p. 257-261.) On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's

Motion to Compel"), wherein it sought to compel arbitration of its claims against newly added subcontractor defendants as well. (R. p. 262-2434.)

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel. (R. p. 4-23.) While it contained detailed findings supporting its ruling denying Lennar's motion to compel arbitration as to Plaintiffs, the Order was silent the subcontractors. (R. p.4-23.) Accordingly, multiple parties filed a Motion to Alter or Amend. (R. p. 2553-2572; 2594-2599; 2844-2881; 2936-2940.) In its Motion to Reconsider, Lennar acknowledged that the trial court's Order encompassed a ruling denying Lennar's motion as to Manale and the other subcontractors, but sought clarification on that point from the trial court. On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3.) This appeal followed.

#### **STATEMENT OF FACTS**

Plaintiffs are a putative class of owners of single family residences in a development known as the Abbey. (R. p. 75-80.) Lennar alleges that on September 22, 2008, Manale entered a Contractor Base Agreement with Lennar (the "Contract"). (R.286-267;1395-1408.) However, Lennar has produced no admissible evidence of a written contract. (R. 1395-1408.) Moreover, the documents Lennar produced as evidence of a contract does not indicate that it applied to this Project. (R. 1395-1408.) Therefore, there is no applicable arbitration provision as to Manale and Lennar in the record at this time. Despite not having a legible copy of the Contract, Lennar contends that Manale is

party to an Arbitration clause. However assuming that the alleged arbitration clause in the alleged Contract is the same as those of other subcontractors, the full sentence states<sup>1</sup>:

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, INWHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR BY JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

In short, Lennar, purportedly, binds its subcontractors to the same type of action it faces.

## ARGUMENT

### **I. LENNAR HAS WAIVED AND ABANDONDED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO MANALE.**

While it addressed the lower court's ruling denying the motion to compel arbitration as to Manale and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Manale in its appeal brief. However, the Court below denied Lennar's motion outright. (R. p. 3;4-23). "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without

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<sup>1</sup> Lennar omitted the underlined portion of the alleged arbitration clause from its Motion to Compel Arbitration arguments made as to Manale.

supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citations omitted).

Manale disagrees with Lennar's procedural concern that the Order does not make specific findings as to the portion of Lennar's Motion to Compel directed at subcontractors as the alleged arbitration clause in the Contract as is outlined below. However, several subcontractor Defendants moved the circuit court to amend the Order to address the arguments and offered proposed findings. (R. p. 2594-2599; 2844-2881; 2936-2940.) In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Guaranteed and the subcontractors. (R. p. 2571-72.) These motions were denied in the Form 4 Order. (R. p. 3.)

"The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). The filing of the Rule 59(e) motion, although an important first step, is not the only step a party must take to preserve an issue for appeal.

Lennar may argue it preserved its substantive arguments in its Motion to Reconsider by referencing the "the reasons previously articulated in writing and at the hearing on the Motion", but this general statement is not sufficient to preserve the arguments in the appeal. *See* Fields at 106 n.3, 285 n.3 (R. p.2572.). In order to preserve the issue for appeal before this Court, Lennar was obligated to put forth each of its substantive arguments as to why its claims against Manale are subject to arbitration along with citations to supporting case law. Id. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration

clauses, but it does not specifically set forth any arguments as to Manale nor does it contain applicable references to supporting authority. *Id.* Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Manale to arbitrate the claims in this matter.

**II. THE CIRCUIT COURT DID NOT ERR IN FAILING TO RULE ON LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SUBCONTRACTOR DEFENDANTS AS THE ARBITRATION CLAUSE WAS NOT TRIGGERED IN LIGHT OF THE COURT'S RULING THAT THE PLAINTIFFS COULD NOT BE COMPELLED INTO ARBITRATION**

Manale contends that the Circuit Court did not err in its ruling below. However, assuming *in arguendo* that Manale is bound by the alleged arbitration provision, it is a conditional provision. The provision alleged by Lennar to be applicable to Manale in its Motion to Compel Arbitration begins with “**IF...**”. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, **IF ... (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR BY JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.**

(R. 1415<sup>2</sup> (emphasis added.)) As applied to this case, the foregoing provision unambiguously demonstrates Lennar intended to drag their subcontractors into the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar

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<sup>2</sup> Manale notes that the contract language quoted is from the alleged Contract between Myers Landscaping. The record on appeal does not contain a legible, or therefore, enforceable, copy of the alleged contract between Manale and Lennar.

is unable to enforce its arbitration provisions against Plaintiffs, it cannot compel Manale to submit to arbitration because the arbitration provision in the alleged Contract is conditional and, as to Manale, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

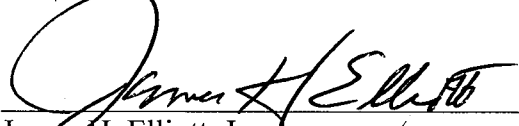
**III. LENNAR HAS NOT ARGUED ON APPEAL THAT MANALE SHOULD BE COMPELLED TO ARBITRATION THUS THAT ISSUE IS NOT PROPERLY BEFORE THE COURT**

“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.” Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 642, 776 S.E.2d 434, 441 (Ct. App. 2015), citing Rule 208(b)(1)(B), SCACR. Here Lennar has not argued on appeal that its alleged arbitration provision with Manale is enforceable, thus that issue is not presently before the court on appeal.

**CONCLUSION**

For the foregoing reasons, Manale respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Manale to submit this matter to arbitration.

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