

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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**RECEIVED**  
AUG 31 2018  
SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brittany 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.

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**APPELLANT LENNAR CAROLINAS, LLC'S RETURN TO RESPONDENTS'  
PETITION FOR FULL APPELLATE COURT REVIEW**

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*Attorneys for Appellant Lennar Carolinas, LLC*

Appellant Lennar Carolinas, LLC (“Lennar”), by and through undersigned counsel, respectfully submits this Return to Respondents’ Patricia Damico, Joshua and Brettany Beutow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the “Owners”) Petition for Full Appellate Court Review.

### **FACTUAL BACKGROUND**

The Owners purchased homes in a community known as The Abbey at Spring Grove Plantation (“The Abbey”) which is located in Berkeley County, South Carolina.

The Owners filed this lawsuit against Lennar and others alleging the right to proceed as a class action on claims of alleged construction defects. Lennar asserted cross-claims against co-defendants and third-party claims against other subcontractors. Lennar also filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling all of the parties in this action to arbitration pursuant to various applicable documents and agreements.

The circuit court held a hearing on Lennar’s Motion to Compel Arbitration and denied Lennar’s Motion.

Subsequently, Lennar filed a Notice of Appeal, which triggered the application of Rule 205, SCACR, and automatically stayed proceedings in the circuit court. After Lennar filed the Notice of Appeal, the Owners attempted to proceed with discovery, and the Berkeley County Clerk of Court set seventeen (17) motions for hearing on December 6, 2016, including several discovery-related motions. Lennar was forced to submit a Motion to Enforce the Automatic Stay pursuant to Rule 205 to the Court of Appeals. On December 19, 2016, the Court of Appeals issued the first order enforcing the automatic stay of proceedings in the circuit court.

At this time, the appeal has been fully briefed to the Court of Appeals, and the parties are awaiting notice as to whether the above-captioned case will be set for oral argument.

On February, 27, 2018, Patricia Damico and Lenna Lucas filed a Motion to Lift the Automatic Stay. On April 11, 2018, the circuit court held a hearing on the Motion to Lift the Automatic Stay. On May 31, 2018, the circuit court issued an order lifting the automatic stay to allow discovery to proceed while the appeal is pending.

On June 5, 2018, Lennar filed a Petition pursuant to Rule 241(d)(2) of the South Carolina Appellate Court Rules requesting the Court reverse the circuit court's order and reinstate the stay of the entire action during the pendency of the appeal.

On July 30, 2018, the Court issued the second order granting Lennar's Petition and reinstating the automatic stay for the duration of the appeal.

On August 14, 2018, the Owners filed a Petition for Full Appellate Court Review.

Lennar submits this Return to the Owners' Petition for Full Appellate Court Review and requests the Court deny the Owners' Petition and affirm the Court's first and second orders staying the entire action for the duration of the appeal.

### ARGUMENT

**I. This Court is not limited to review of the prior circuit court order purporting to lift the Rule 205 automatic stay by an abuse of discretion standard. Rather, the Court is free to decide questions of law (such as the circuit court's jurisdiction to entertain the motion to lift the stay) with no deference to the circuit court.**

The Owners effectively ask the Court to lift the stay and allow portions of this case, in particular discovery, to proceed while the issue of whether the case is subject to arbitration is on appeal. Because the Owners obtained a prior order from the same circuit court which denied the motion to compel arbitration purporting to lift the automatic stay under Rule 241, SCACR, the Owners argue that the circuit court's prior order can be reversed only if the circuit court is found

to have abused its discretion. The Owners' argument is misplaced and the standard of review urged is incorrect.

Lennar's appeal from the order denying the Motion to Compel Arbitration triggered the automatic stay under Rule 205, SCACR. For the circuit court to take any further action regarding this case, the matters upon which the circuit court seeks to act must be ones "not affected by the appeal." The issue is one of jurisdiction. The circuit court only "retains jurisdiction over matters not affected by the appeal." Rule 205, SCACR.

It is not a matter of the circuit court's discretion to decide if it has jurisdiction. Whether the circuit court has jurisdiction is a question of law, and this Court is "free to decide questions of law with no deference to the [circuit] court." *Chew v. Newsome Chevrolet Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631 (Ct. App. 1993); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). The circuit court only retains jurisdiction over matters not affected by the appeal. *See* Rule 241, SCACR. Thus, the question of whether discovery may proceed while the appeal of the arbitration issues is pending should be determined based on whether further proceedings, including discovery, in the underlying case are affected by Lennar's appeal. This determination is a question of law that is to be decided with no deference to the circuit court.

The Owners' Petition for Full Appellate Court Review is premised on the proposition that the circuit court's decision to lift the stay in this case is a matter to be reviewed for an abuse of discretion. In support of this proposition, the Owners seek to rely on the decision in *Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Commission*, 367 S.C. 141, 151, 625 S.E.2d 227, 232 (Ct. App. 2006), *cert. granted, decision rev'd sub nom, Carolina Water Service, Inc. v. Lexington County Joint Municipal Water & Sewer Commission*, 373 S.C. 96, 644 S.E.2d 681 (2007), and *overruled by Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529

(2006). However, the decision in *Carolina Water Service* provides no support for such proposition and is utterly inapplicable to this case.

The court in *Carolina Water Service* did not review a decision to lift a statutory automatic stay or an automatic stay under Rule 205, SCACR. In *Carolina Water Service*, the Lexington County Joint Municipal Water & Sewer Commission (the “Joint Commission”) initiated a condemnation action to acquire certain facilities owned by Carolina Water Service, Inc. (“Carolina Water”) and Utilities, Inc. (“Utilities”). *Carolina Water Serv.*, 367 S.C. at 145, 625 S.E.2d at 229. In response to the Joint Commission’s action, Carolina Water, Utilities, and the Town of Lexington filed separate actions challenging the Joint Commission’s right to pursue the condemnation proceeding (the “Challenge Actions”). *Id.* Carolina Water then sought a statutory stay of the condemnation proceedings and the circuit court issued an Order granting the statutory stay. *Id.* The circuit court also imposed a discretionary stay of the Challenge Actions pending the resolution of a related case in the South Carolina Administrative Law Court. *Id.* Subsequently, the circuit court issued an order lifting the discretionary stay of the Challenge Actions; however, the statutory (automatic) stay of the condemnation action remained intact. *Id.* at 151, 625 S.E.2d at 232 (“[T]he order lifting the stay in this case did not purport to disturb the statutory [automatic] stay on the condemnation proceeding, but dissolved the [discretionary] stay only as to the Challenge Actions.”). On appeal, the court reviewed the circuit court’s decision to lift the discretionary stay for an abuse of discretion. The court did not review the issuance or enforcement of the statutory automatic stay. Therefore, Owners’ argument that the Court should apply the same standard of review and analyze the issue of whether the circuit court had the authority to issue an order permitting discovery to proceed for an abuse of discretion fails. Rather, the Court is to review jurisdictional questions without deference to the circuit court.

The controlling question before the Court is whether the circuit court retained the jurisdiction to order the parties to conduct discovery while Lennar's appeal of the circuit court's refusal to compel the entire action to arbitration is pending.<sup>1</sup> If discovery in this case is affected by Lennar's appeal, then the circuit court did not have jurisdiction to issue an order allowing discovery to proceed and that order is void for a lack of jurisdiction. *See* Rule 205, SCACR; *Luthi v. Luthi*, 297 S.C. 306, 376 S.E.2d 782 (Ct. App. 1989) (holding a lower court's order that was issued while the case was pending appeal was void for lack of jurisdiction).

**II. The appeal of the circuit court's order denying the Motion to Compel Arbitration affects all matters in the case and does not leave the issue of proceeding with discovery while the appeal is pending within the jurisdiction of the circuit court. Further proceedings in this case, including discovery, are affected by the underlying appeal and, therefore, the circuit court lacked jurisdiction to issue an order allowing discovery to proceed.**

Lennar's appeal of the arbitration issues in this case affects all further proceedings in the circuit court, including discovery. The Court's July 30, 2018, Order recognizes this reality. Thus, the Court properly reversed the circuit court's order lifting the automatic stay.

The issue of discovery in this case, including what discovery might be ultimately available, and from whom, is a matter inextricably intertwined with the resolution of the pending appeal. Lennar's appeal seeks to compel the case to arbitration under arbitration agreements which provide that any and all controversies, disputes or claims arising under or related to (a) the agreements by which Owners acquired the houses in issue, (b) the property itself, or (c) to any personal injury or property damage alleged by the Owners are to be submitted to binding arbitration. Thus, regardless of whether the Owners make claim against Lennar or one of Lennar's subcontractors involved in the construction of the houses, all of the claims in the case

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<sup>1</sup> En banc consideration is not favored and ordinarily will not be granted except: (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions; or (2) when the proceeding involves a question of exceptional importance. Rule 219, SCACR. This case does not satisfy either exception and, therefore, to the extent this standard applies the Court should reject the Owners' Petition.

are subject to arbitration because all of the claims arise under and are related to the property and the Owners' claimed injuries and damages sustained because of alleged defects in the properties. Moreover, the claims against the subcontractor defendants are affected by Lennar's appeal. The seventh issue in Lennar's statement of issues on appeal is "[w]hether the circuit court erred in failing to perform any analysis of the arbitration agreement(s) applicable to Spring Grove Development and the Subcontractors." The circuit court's finding that the matters relating to the claims against the subcontractors are not affected by the appeal was patently false and a wholly inappropriate basis for lifting the automatic stay and permitting discovery related to the subcontractors to proceed. There are no claims in the case which are not affected by and at issue in the appeal of the circuit court's denial of Lennar's Motion to Compel Arbitration.

Since all relevant matters in the case are affected by Lennar's appeal, the circuit court lacked the authority to issue an order lifting the automatic stay and permitting discovery to proceed. Therefore, the Court properly reversed the circuit court's order lifting the automatic stay and the Court should now deny the Owners' Petition for Full Appellate Court Review.

**III. The Court's citation to *Stokes v. Metropolitan Life Insurance Company*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) was not an error of law.**

In its July 30, 2018, Order the Court correctly recognized that the appeal of the circuit court order denying the Motion to Compel Arbitration calls into question whether the claims in the case will all be subject to arbitration rather than further proceedings in the circuit court. This Court correctly recognized that if the appeal results in this case proceeding to arbitration, then by operation of law any further proceedings in the circuit court would be subject to a further stay on account of the arbitration. The Court's reference and citation to the decision in *Stokes v. Metropolitan Life Insurance Company*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002), and supports the conclusion that as long as the claims in this case may be subject to mandatory arbitration, it is logical and proper to enforce the stay of all proceedings, including discovery.

The Court cited to *Stokes* merely as support for its own logical conclusions underlying the proposition that it is appropriate to stay all proceedings when the underlying appeal involves the issue that all of a plaintiff's claims must be compelled to arbitration. The Court recognized that, in *Stokes*, the court stayed the entire case (including discovery) when the plaintiff's claims were determined to be subject to arbitration. The *Stokes* holding demonstrates that if the Court reverses the circuit court's improper denial of the motion to compel arbitration, then the entire action will be stayed and discovery will not proceed under the South Carolina Rules of Civil Procedure. Thus, it is reasonable and proper to continue the Rule 205 stay in the interim.

In the instant case, Lennar appealed the circuit court's denial of its Motion to Compel Arbitration. If on appeal the Court rules in Lennar's favor, then the entire matter will be compelled to arbitration and the case before the circuit court will be stayed pending the resolution of the arbitration. Since, the entire case will be stayed if the Court rules in Lennar's favor, the entire proceeding before the circuit court is affected by the appeal and nothing should proceed while the appeal is pending. The Court's reliance on *Stokes* for support of this proposition is appropriate and the Owners' attempt to distinguish *Stokes* from this case should be rejected. Accordingly, the Court should deny the Owners' Petition and affirm the Court's Order reversing the circuit court's order lifting the automatic stay.

**IV. The Court's citation to federal authority was proper.**

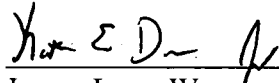
The Court cited to *Levin v. Alms & Associates, Inc.*, 634 F.3d 260, 264 (4th Cir. 2011) for the proposition that a motion to compel arbitration challenges the continuation of all proceedings before the court and, therefore, a lower court lacks jurisdiction over the continuation of any proceedings relating to the claims at issue while a motion to compel arbitration is pending on appeal. This reference to *Levin* reflects the Court's recognition that other learned courts have addressed the same issues presented here and have reached consistent well-founded, logical and

persuasive conclusions as this Court. Citation to *Levin* does not reflect any misplaced reliance on a sister court's prior holdings. On the contrary, it merely supports the Court's logical conclusion that when the underlying appeal presents the potential that all claims must be compelled to arbitration, it is logical and proper that further judicial proceedings in the meantime should be stayed.

The Owners' argument in opposition to the *Levin* citation lacks merit. The Court's citation to *Levin* reflects the fact that arbitration affects all of the proceedings before the lower court. South Carolina courts have consistently found that arbitration affects the entire case and when a case is compelled to arbitration the circuit court is divested of jurisdiction. *Steinmetz v. Am. Media Servs., LLC*, 393 S.C. 72, 74, 709 S.E.2d 708, 709 (Ct. App. 2011) ("When a case is sent to arbitration, the circuit court is divested of jurisdiction over the case."). Whether in state or federal court, the logical and legal basis for that proposition remains true. *See id.; Levin*, 634 F.3d at 264. Contrary to the Owners' assertion, the Court clearly did not apply a procedural device that is inapplicable in state court. The Court merely cited to a decision by the Fourth Circuit that further supports a recognized principle of South Carolina law. Accordingly, the Owners' argument criticizing the citation to *Levin* provides no basis for reversing the second order reinstating the automatic stay pending the resolution of Lennar's arbitration appeal.

### **CONCLUSION**

The circuit court's order lifting the automatic stay is void for a lack of jurisdiction because the circuit court's order ruled on matters directly affected by Lennar's appeal of the arbitrability issues. Therefore, the Court correctly reversed the circuit court's order lifting the automatic stay. Accordingly, the Court should deny the Owners' Petition for Full Appellate Court Review and affirm the prior order reinstating the automatic stay of discovery for the duration of Lennar's pending appeal.



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August 31, 2018  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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SC Court of Appeals

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.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on August 31, 2018, copies of Appellant Lennar Carolinas, LLC's Return to Respondents' Petition for Full Appellate Court Review were served on all counsel of record by placing a copy in the United States Mail, first class postage prepaid, addressed as follows:

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August 31, 2018  
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August 31, 2018

**Via Hand Delivery**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**RECEIVED**

**AUG 31 2018**

**SC Court of Appeals**

**Re: Patricia Damico, et al. v. Lennar Carolinas, LLC, et al.  
Case No. 2014-CP-08-2424; Appellate Case No. 2016-2339**

Dear Mrs. Kitchings:

Enclosed for filing please find the original and one copy of Appellant Lennar Carolinas, LLC's Return to Respondents' Petition for Full Appellate Court Review regarding the above-entitled matter.

Please file the original with the Court and return a file-stamped copy with our courier. By copy of this letter, I am serving opposing counsel with copies of same.

With kindest regards,

Sincerely,

Katon E. Dawson, Jr.

KED:bg  
Enclosures  
cc: Counsel of Record (via U.S. Mail)

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