THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2009-CP-18-1601

David and Bridgette Manning,
Individually and as Legal Guardians of
Tate M. and Colby M
Both Minors Less Than 18 Years of Age,..Respondents,

v.

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

FINAL BRIEF OF RESPONDENTS

FOR THE RESPONDENTS:

Michael A. Timbes, Esquire
THURMOND KIRCHNER TIMBES & YELVERTON, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
Email: mtimbes@tktylawfirm.com

John E. Robinson, Esquire
McDOWELL LAW OFFICES
36 Broad Street
Charleston, SC 29401
Phone: (843) 723-5152
Facsimile: (843) 577-4570
Email: john.robinson@charlestonlawoffice.com

Lindsey W. Cooper, Esquire
THE LAW OFFICES OF L.W. COOPER, JR. ESQUIRE
36 Broad Street
Charleston, South Carolina 29401
Phone: (843) 723-5152
Facsimile: (866) 721-8680
Email: lwc@lwcooper.com

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STATEMENT OF THE ISSUES ON APPEAL

I. **DOES THE EVIDENCE IN THE RECORD REASONABLY SUPPORT THE CIRCUIT COURT'S CONCLUSION THAT NO AGREEMENT TO ARBITRATE EXISTED BETWEEN THE PARTIES?**

II. **DOES THE EVIDENCE IN THE RECORD REASONABLY SUPPORT THE CIRCUIT COURT'S CONCLUSION THAT THE FEDERAL ARBITRATION ACT DOES NOT APPLY WHERE THE PROVISION IN WHICH ITS APPLICATION IS REFERENCED IS DEEMED UNCONSCIONABLE AND UNENFORCEABLE?**

STATEMENT OF THE CASE[1]

This is a construction defect case concerning a newly-constructed residence purchased by David and Bridgette Manning (collectively, "Respondents"). Respondents commenced this action in the Dorchester Court of Common Pleas on June 10, 2009, against Lennar Carolina, Inc., Don Galloway Homes, LLC, and Lennar Communities of the Carolinas, Inc. (collectively, "Appellants") alleging various deficiencies in the construction of the home. The Complaint sets forth causes of action for negligence, gross negligence, breach of implied warranties, and violations of South Carolina's Unfair Trade Practices Act stemming from numerous defects discovered throughout the home. In addition, Respondents asserted claims for personal injuries to their minor children, Colby and Tate Manning. More specifically, the Complaint alleges that as a result of moisture problems caused by the construction defects, their children have developed various ailments including lung infections, asthma, allergic reactions, and immune system deficiencies. The Complaint seeks actual, compensatory, and punitive damages against Appellants. Respondents do not allege any claim for breach of contract against Appellants.

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

Prior to answering the Complaint, Appellants moved on July 29, 2009, to stay the action in accordance with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code § 40-59-810, *et. seq.* The parties thereafter agreed to stay the action to accomplish the notice requirements set forth therein. A year later, on July 12, 2010, Appellants moved to dismiss the action on the grounds that the claims asserted in the Complaint are subject to arbitration pursuant an agreement to arbitrate between the parties. (R. pp. 31-32) Respondents filed an Objection to Appellants' Motion arguing, *inter alia*, that the purported arbitration provision is unconscionable and unenforceable under South Carolina law. (R. pp. 24-30) Although the case was filed in 2009, no discovery has taken place in the case in light of the foregoing proceedings.

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

STATEMENT OF THE FACTS

In late July 2002, Respondents drove through the Plum Creek subdivision in Summerville, South Carolina, while looking for a new home to raise their children, whom were about to be adopted. (R. p. 137) This was the first time the couple had ever sought to buy a home. (R. p. 138) Plum Creek was being developed by Appellants Lennar Carolinas, Inc.,

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

Don Galloway Homes, LLC, and Lennar Communities of the Carolinas.[3] On or about July 29, or 30, 2002, Respondents stopped by the Plum Creek sales office, reviewed some brochures, and decided to purchase a new home from Appellants. (R. p. 137) Overnight, the couple decided what selections they desired from the options package they received, and they signed a contract to purchase (the "Agreement") a Brighton style home situated at 200 Curico Lane within the subdivision (the "Residence"). (R. pp. 167-180) For the closing, Respondents used both Appellant's preferred lender and closing attorney.[4] (R. p. 138) Ms. Manning stated that she was unaware that she had signed a document containing an arbitration clause. Bridgette Manning does not recall an arbitration clause ever being mentioned. (R. p. 138)

Respondents commenced this action after discovering numerous problems in the Residence. The construction deficiencies include structural problems with the foundation, defective site preparation, improper framing and roofing, improper installation of siding, windows, flashing moisture barriers, water intrusion into the home, violations of applicable construction codes, and failure of Appellants to follow manufacturer's instructions in assembling or installing components of the home. (R. pp. 11-21)

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

[4] In footnote 1 of Appellants' Initial Brief, Appellants appear to take the facts well out of context, incorrectly suggesting that Appellants were represented by counsel when they executed the adhesion contract presented by Lennar. This was never "admitted" and is factually wrong. The transcript from the hearing speaks for itself, but to be clear Respondents simply informed the Court that they used one of Appellants' chosen lawyers <u>at the closing</u>. (R. p. 160, lines 1-7). Respondents were not represented by counsel when the contract was signed, and it is axiomatic that the closing followed in time the execution of the Agreement.

At issue in this appeal is the enforceability of an arbitration provision set forth in the Agreement. The Agreement, which is thirteen (13) pages in length, contains "boilerplate" information on a pre-printed form presented to Respondents by Appellants. (R. pp.167-180) The Agreement states the terms of the sale, including the amount of purchase, limited options for the kitchen and various upgrades a typical owner might consider. In addition, the Agreement contains the following arbitration clause:

> **ALL CLAIMS, CONTROVERSIES, OR DISPUTES BETWEEN DON GALLOWAY HOMES, LLC AND YOU ARISING OUT OF OR RELATING TO THIS CONTRACT, THE BREACH THEREOF, AND ALL CLAIMS RELATING TO THE CONSTRUCTION OF THE SUBJECT RESIDENCE, OR OF ANY OTHER KIND SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION. THE PARTIES ACKNOWLEDGE THAT ARBITRATION SHALL BE THE SOLE, FINAL, BINDING, AND EXCLUSIVE REMEDY FOR THE PARTIES WITH RESPECT TO ANY SUCH MATTER FOR WHICH THE ARBITRATION IS REQUESTED HEREUNDER. AFTER AN AWARD IS RENDERED BY THE ARBITRATORS, A JUDGMENT MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NOT WITHSTANDING THE FOREGOING, DON GALLOWAY HOMES, LLC MAY BRING AN EQUITABLE JUDICIAL PROCEEDING AGAINST YOU FOR AN INJUNCTION OR SPECIFIC PERFORMANCE FOR ANY BREACH OR UNLAWFUL ACTION IN CONNECTION WITH YOUR OBLIGATIONS HEREUNDER AND THIS SHALL NOT CONSTITUTE A WAIVER OF ITS RIGHTS TO COMPEL ALL CLAIMS THAT MAY BE ASSERTED AGAINST DON GALLOWAY HOMES, LLC, TO BE ARBITRATED. IN PREPARATION FOR THE ARBITRATION HEARING, EACH PARTY MAY UTILIZE ALL METHODS OF DISCOVERY AUTHORIZED BY THE PROCEDURAL RULES AND STATUTES OF THIS STATE, AND MAY ENFORCE THE RIGHT TO DISCOVERY IN THE MANNER PROVIDED BY THE RULES OF CIVIL PROCEDURE THAT ARE APPLICABLE TO THIS MATTER. THIS PROVISION SHALL BE CONSTRUED AND ENFORCED, AT ALL TIMES, PURSUANT TO THE FEDERAL ARBITRATION ACT (9 U.S.C. Section 1 ET. SEQ.).**

(R. p. 167) In addition, Paragraph 10 of the Agreement provides, "There are no other promises, representations, or guarantees either verbal or written, other than what are contained in the Purchase Agreement's Special Stipulation Section #6[5] any addendum, sales contract specifications or in the Standards Provisions." Page 10 of the Agreement restates these same points. There is no material discussion in the Agreement relative to the actual construction of the home, with the limited exception of pre-printed dialogue on page 7 of the Agreement, relating to Construction Scheduling and certain materials generally describing the features of the home selected by Respondents.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to de novo review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT AND CITATION OF AUTHORITY

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

The circuit court found that the arbitration agreement in question cannot be enforced against Respondents. Among other things, the circuit court determined that in light of guidance afforded by *Simpson* and similar authorities, Appellants' purported arbitration

[5] Section 6 on the face of the Agreement is left blank in this instance.

provision must fail. (R. pp. 3-10) In its Order, the circuit court found that Appellants are a sophisticated business entity, whereas Respondents are simply first-time homebuyers. (R. pp. 6-7) In rejecting the arbitration provision, the circuit court observed that Respondents were not seeking any remedies under the purchase contract in which the arbitration provision is obtained, and that the clause lies within a dense document. (R. p. 7) In addition, the court found it appropriate to strike only so much of the Purchase Agreement as was necessary to cure its unconscionability, leaving the remaining provisions intact. (R. p. 7) Thus, the circuit court found the arbitration language is severable and unenforceable. (R. p. 7)

The circuit court also determined that the Agreement is one-sided and suffers from a lack of mutuality of remedies. Further, the Agreement excludes certain remedies otherwise available to Respondents, specifically the implied warranty of habitability owed by Appellants as the seller. (R. pp. 3-10) The circuit court also found that the Federal Arbitration Act does not apply because the language relating thereto is contained within the arbitration provision, which the circuit court deemed unconscionable and unenforceable. (R. p. 7) The circuit court determined that Respondents lacked any meaningful choice in agreeing to the arbitration provision. As explained herein, the evidence in the record supports the analysis and findings of the circuit court, requiring that it be affirmed on appeal.

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

In South Carolina, there is a strong presumption in favor of the validity of arbitration clauses. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Despite this presumption it is well-settled that "arbitration is a matter of contract law and is available only when the parties involved contractually agree to arbitrate." *Simpson*, 373

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

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

In the instant case, Respondents challenged the existence of a valid agreement to arbitrate, arguing, among other things, that the Agreement is unconscionable. *See Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 440 S.E.2d 877 (1994) (noting a party must

specifically challenge the unconscionability (or other defect) of the arbitration clause it seeks to set aside). (R. pp. 24-30) When such a challenge is made, it is for the circuit court to decide, as a threshold matter, whether the arbitration provision is valid. *Simpson*, 373 S.C. at 23, 644 S.E.2d at 667. *Accord* S.C. Code Ann. § 15-48-20(a). In this vein, the circuit court must determine the "gateway" issue of whether there is, in light of state law contract principles, an enforceable agreement to arbitrate. As the record supports, in this instance no such enforceable agreement exists.

B. <u>The Agreement is an Adhesion Contract</u>.

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

Here, the record reveals that the Agreement is an adhesion contract. It is obvious that the Agreement is a pre-printed form containing boilerplate language. Indeed, Appellants admit to drafting the Agreement and providing it to Respondents. (R. p. 147, lines 20-22) Further, Appellants concede that the Agreement is a standard form used by them. "This is a contract that was for the sale of a residential home and it's a contract that we often use, or that Lennar oftentimes uses in selling its homes." (R. p. 147, lines 14-17) More particularly, the provisions of the Agreement containing the purported agreement to arbitrate are pre-printed,

not negotiated, and contain no space for acknowledgement by Respondents. There were no options or alternatives presented to Respondents other than the predetermined terms crafted by Appellants. The circuit court properly determined that Respondents did not negotiate the arbitration clause, and, as a practical matter, they lacked the ability to do so under the Agreement.

Because Appellants presented the Agreement on a take-it-or-leave-it basis, and there is evidence to support the circuit court's determination that Respondents lacked bargaining power to contribute to its drafting, the circuit court properly determined that the Agreement is an adhesion contract. Adhesion agreements may be unenforceable as unconscionable under South Carolina law where there is "an absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan Inc. v. United Health Care Servs. Inc.*, 361 S.C. 544, 606 S.E.2 d 752, 757 (2004). Thus, the circuit court correctly proceeded to an analysis of whether the adhesive contract was unconscionable and unenforceable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670.

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

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Id.* at 25, 644 S.E.2d at 668.

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

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

An evaluation of the above factors reveals Respondents had no meaningful choice. First, there is a significant disparity in the parties' bargaining power. Appellants admit to their sophistication as "a large residential home builder" and allege they are engaged in interstate commerce. (R. p. 147, lines 22-25) On the other hand, Respondents were first-time homebuyers. (R. p. 138) Respondents are ordinary consumers who were hoping to buy a new home for their family—they are not sophisticated business concerns in the company of Appellants. Respondents lack the business judgment necessary to make them aware of the sweeping implications of the arbitration provision as interpreted by Appellants. Neither did they have an attorney present to provide any assistance other than a lawyer that was pre-selected <u>by Appellants</u>. Notably, Bridgette Manning cannot recall anyone ever mentioning the arbitration provision to Respondents, including the Appellants' preferred lawyer who handled

the closing.[6] (R. p. 138) In similar keeping, Respondents were induced by Appellants to use one of Appellants' preferred lenders. (R. p. 138) Respondents had no meaningful choice with regard to the Agreement.

The Supreme Court has stated that the purchase of a vehicle intended for use as primary transportation is "critically important in modern day society." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. In this case, the circuit court noted that Respondents' purchase of their new home was certainly more important than the purchase of a vehicle. (R. p. 7) *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (1989) ("We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce."). The allegations of the Complaint cite myriad defects from site preparation and foundation problems to moisture intrusion into the home. The Complaint also reveals personal injury claims for injuries to Respondents' minor children. Respondents' inability to resolve the defects with their house nine (9) years after they bought it and three (3) years after they filed suit manifestly demonstrates an element of surprise under the arbitration provision that has the practical effect of barring them from appropriate remedies for Appellants' alleged torts and deceptive trade practices. If that were not surprise enough, attention is drawn to Respondents' inability to seek faster relief through the courts due to the instant procedural delays in order to resolve the health problems suffered by their children, which Respondents attribute to the poor conditions of the Residence. This constitutes additional surprise—how their children's injuries from the home they were buying would be resolved was clearly not bargained for by Respondents.

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

Contrary to Appellants' contention that the Agreement was negotiated between the parties,[7] the record readily reveals a different story, which supports the circuit court's ruling. The Agreement is a pre-printed form with blanks in certain areas simply to fill in basic factual information. For example, there is space for the purchaser's name, the location of the property, the down payment amount, and the total purchase price, as well as blocks for signatures at the bottom of the document. Paragraph 5 of the Agreement makes it clear that provisions numbered 1 through 13, which include the arbitration provision, are "Standard Provisions" that form the basis of the Agreement. Only certain options or upgrades to the otherwise Standard Provisions could be selected by any potential purchaser, and none of the Standard Provisions were negotiable, as evidenced by the lack of options, alternatives, or available space to alter or amend the Standard Provisions. The particular home style offered by Appellants was the "Brighton," which is designed and offered by Appellants. Yet, even the Brighton floor plan contains a disclaimer in nearly illegible print that floor plans and standard features "are subject to change without notice." (R. p. 170) (emphasis added). It is clear Appellants controlled all aspects of the project and the construction of Respondents' Residence and simply left blanks for Respondents to check or initial to show their selection or understanding. It is telling, therefore, Appellants elected not to provide a space for Respondents (and presumably all other

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

buyers) to acknowledge their understanding of its terms and sweeping scope of the arbitration clause. Instead Appellants saved such opportunities for simple matters of finish selections and for extras for which they could charge additional money to Respondents. (*See, generally,* Agreement). Yet there is more.

While it is understood that parties are always free to contract away certain rights, the arbitration provision in this Agreement was inconspicuous in nature, and drafted by the superior party without any comment or revisions from the Respondents, without independent review or representation by an attorney on behalf of the Respondents, which ultimately functioned to contract away significant rights and remedies otherwise available to these homebuyers by law. Appellants concede Ms. Herbert owed a fiduciary responsibility to Respondents, yet Ms. Manning has no recollection of Ms. Herbert, who was picked by Appellants, mentioning the arbitration provision. (R. pp. 150, lines 9-11; 138)[8] There was no meaningful choice in agreeing to arbitrate claims. A choice as to cabinet finishes and tile colors[9] does not constitute meaningful negotiation of the parties' legal relationship.

Appellants attempted to sway the circuit court by pointing out that its arbitration provision had previously been enforced. This argument overlooks the well-settled requirement that the enforceability of such contractual provisions must be evaluated on a case-by-case basis in light of its own particular facts and circumstances. *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. Interestingly enough, considering that this same boilerplate arbitration provision has been

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[8] In essence, Appellants induced Respondents to use Ms. Herbert by offering a discounted rate if Respondents agreed to use her. (R. p. 160, lines 1-9)

[9] Even as to finish selections, the Agreement only gave Respondents seven (7) days to specify their choices. It states: "Color Selections not specified within the time limitations will be determined by Don Galloway Homes, LLC." (R. p. 168) If Respondents requested <u>any</u> change after those first 7 days, they were hit with a $300.00 fee. This is further evidence of the control exerted by Appellants over Respondents relating to the construction of Respondents' own home.

challenged by a number of other homeowners with damage claims, it is revealing that Appellants introduced no evidence whatsoever before the circuit court to demonstrate that Appellants had ever allowed any buyer to negotiate the strict arbitration terms it unilaterally crafted into its Standard Provisions for all of its sale transactions. This is but further proof that no meaningful opportunity was afforded to Respondents to negotiate such matters. *See Id.* at 25, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue."). The evidence in the record easily supports the circuit court's determination that Respondents had no meaningful opportunity to negotiate the Agreement insofar as the issues before this Court are concerned.

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

The terms of the arbitration provision, which were crafted by Appellants without input from Respondents, are not even-handed. Specifically, the arbitration provision provides that Appellants may "bring an equitable judicial proceeding against [Respondent] for an injunction or specific performance for any breach or unlawful action in connection with [Respondent's] obligations . . . ." (R. p. 167) However, Respondents are deprived of any such right and, instead, are forced to arbitrate any claim they might have against Appellants. As a practical matter, Appellants can seek and obtain under the arbitration provision injunctive relief and specific performance without regard to whatever remedies at law Respondents (or others considering its repetitive use) might have in the course of an arbitral proceeding. Applying *Simpson*, Appellants' disparate remedies render the provision one-sided and oppressive. *Id.* at 28-33, 644 S.E.2d at 670-673.

Furthermore, the Agreement purports to exclude any "promises, representations, or guarantees, either verbal or written" other than those contained in the document itself. Such language would facially appear to exclude any implied warranties of habitability. (R. p. 167) Respondents cannot be expected to understand or appreciate the effect of Appellants' superior bargaining position when drafting non-negotiable contract terms.

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

Viewed in this light, the language of the arbitration agreement facially provides an equitable remedy to one party that it does not provide the others, while having the practical

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

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

Appellants admit in their brief that the subject arbitration clause is not limitless (Initial Brief of Appellant, fn. 3). They allege some "outrageous tortious condition" would be unforeseeable to a reasonable consumer in a "normal" business relationship. In this case, Respondents are left occupying a house with alleged foundation problems, structural defects, and building code violations. The nature and extent of such problems constitute tortious conduct that was not foreseeable to a reasonable consumer. Respondents further allege that these deplorable conditions may have resulted from intentional, deceptive conduct through their SCUTPA claims. Certainly, it is not "normal" for Respondents' children to suffer health problems caused by the family's new home. This further supports the circuit court's decision.

Also problematic is that the Agreement combines an arbitration clause with language that could be construed to potentially exclude implied remedies, such as an action for the implied warranty of habitability arises as a matter of law against a seller under these circumstances. *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 477 (2006). The Agreement does not evidence any clear intent to waive such remedies, yet Paragraph 10 indicates there are

no other obligations owed by Appellants except those that are set forth in the Agreement itself. Likewise, page 10 of the Agreement echoes these same disclaimers, which are seemingly in contrast to the suggestion on page 8 of the Agreement that Appellants would do their best to maintain their "standard of high quality." (R. pp. 174, 176) If there was any agreement at all to arbitrate, the only reasonable conclusion is that it would be expected to apply to disputes over such terms such as cabinet finishes, color selections, and matters relating to the closing. There is no competent evidence in the record to suggest that Respondents agreed to an arbitration clause that would apply to tortious and deceptive conduct in the construction of the home. As a result of Appellants' attempt to force these claims into Arbitration, Respondents have been unable to litigate their case, even though the underlying action was filed in 2009. Furthermore, the parties continue to incur damages due to the delay in resolving their claims.

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

Appellants' argument that the Federal Arbitration Act, 9 U.S.C. 1 et seq., ("FAA") contractually controls the enforceability of the arbitration provision at issue because the provision expressly contains such a mandate is circular and fundamentally flawed. The circuit court determined the arbitration provision was unenforceable. Because there was no enforceable agreement between the parties to arbitrate in the first place, there likewise was no agreement between the parties for the FAA to control questions relating thereto. The relevant FAA language fails under the same logic and reasoning that is fatal to the purported arbitration requirement itself. "General contact principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (*citing Munoz*, 343 S.C. at 539, 542 S.E.2d at 364). Applying these principles, as explained above, the

circuit court correctly made inquiry into the facts, circumstances, and the form of the Agreement itself and then properly refused to enforce the Agreement. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . ." *Zabinksi,* 346 S.C. at 592, 553 S.E.2d at 116. "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citations omitted). Here, the circuit court determined there was no privately negotiated, enforceable agreement. Hence, the FAA has no application to or effect upon the outcome.

CONCLUSION

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

Respectfully submitted,

THURMOND KIRCHNER TIMBES YELVERTON, P.A.

By:

Michael A. Timbes
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
mtimbes@tktylawfirm.com

-AND-

John E. Robinson, Esquire
MCDOWELL LAW OFFICES
36 Broad Street
Charleston, SC 29401
Phone: (843) 723-5152
Facsimile: (843) 577-4570

-AND-

Lindsey W. Cooper, Esquire
THE LAW OFFICES OF L.W. COOPER, JR.
36 Broad Street
Charleston, South Carolina 29401
Phone: (843) 723-5152
Facsimile: (866) 721-8680
Attorneys for Respondents

September 13, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2009-CP-18-1601

David and Bridgette Manning,
Individually and as Legal Guardians of
Tate M. and Colby M
Both Minors Less Than 18 Years of Age,..Respondents,

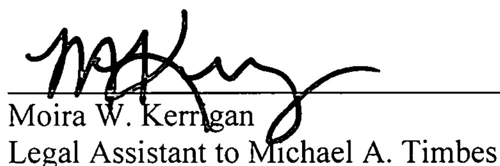
v.

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

AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for the Respondents, do hereby certify that I have on this date, hand-delivered, a true and correct copy of the Respondent's Final Brief to following counsel of record:

JAMES L. WERNER, Esquire
JENNA K. MCGEE, Esquire
LAURA E. FIGUEROA, Esquire
Parker Poe Adams & Bernstein, LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
Phone: (843) 727-2650
Facsimile: (843) 727-2680
Attorneys for Appellants.



Moira W. Kerrigan
Legal Assistant to Michael A. Timbes

September 13, 2012
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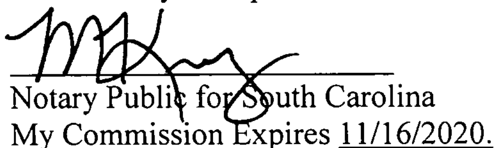
CERTIFICATE OF COUNSEL

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

FOR THE RESPONDENTS:

Michael A. Timbes, Esquire
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf, Suite 101
Charleston, South Carolina 29401
Phone: (843) 937-8000
Facsimile: (843) 937-4200
Email: mtimbes@tktlawfirm.com

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



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