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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-2424

Opinion No. 5730 (S.C. Ct. App. filed June 10, 2020)

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.

PETITION FOR A WRIT OF CERTIORARI

John C. Hayes, IV
189 Meeting Street, Suite 330
Charleston, SC, 29401
jhayes@hayeslaw.org
(843) 805-7003

Catherine Dunn Meehan
PO Box 9
Charleston, SC 29402-0009
cmeehan@steinberglawfirm.com
(843) 720-2800

Jesse Sanchez
98 ½ Broad Street, Suite B
Charleston, SC 29401
jesse@jessesanchezlaw.com
(843) 814-8181

Michael J. Jordan
PO Box 1028
Goose Creek, SC 29455
mjordan@steinberglawfirm.com
(843) 572-0700

Attorneys for Petitioners Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow

Other Counsel of Record:

James Lynn Werner
Jenna K. McGee
Katon E. Dawson, Jr.
Parker, Poe, Adams & Bernstein, LLP
PO Box 1509
Columbia, SC 29201
(803) 255-8000
Attorneys for Respondent Lennar Carolinas, LLC

Shanna Milcetech Stephens
Wade Coleman Lawrimore
Anderson Reynolds & Stephens, LLC
PO Box 87
Charleston, SC 29402
(843) 723-0185
Attorney for Respondent A.C.&A Concrete, Inc.

Stephen L. Brown
Catherine H. Chase
Young Clement Rivers, LLP
PO Box 993
Charleston, SC 29402
(843) 720-5488
Attorneys for Respondent Alpha Omega Construction Group, Inc.

Preston B. Dawkins, Jr.
Aiken Bridges, P.A.
P.O. Drawer 1931
Florence, SC 29503
(843) 669-8787
Attorney for Respondent Alpha Omega Construction Group, Inc.

Stephen P. Hughes
Howell Gibson and Hughes, P.A.
PO Box 40
Beaufort, SC 29901
(843) 522-2426
Attorney for Respondent Builders FirstSource-Southeast Group, LLC

Kathy A. Carleston
N. Keith Emge (Chip)
Carlock Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
Attorney for Respondent Civil Site Environmental, Inc.

Brent M. Boyd
Brian Lincoln Craven
Rogers Edward Harrell, III
Everett Augustus Kendall, II
Timothy J. Newton
Murphy & Grantland, P.A.
PO Box 6648 4406-B Forest Dr.
Columbia, SC 29260
(803) 782-4100
Attorney for Respondents Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC

David S. Cobb
Turner Padget
PO Box 22129
Charleston, SC 29413
(843) 576-2803
Attorney for Respondent Construction Applicators Charleston, LLC

Carmen Vaughn Ganjeshani
Samia Nettles
Richardson Plowden & Robinson, P.A.
PO Box Drawer
7788 Columbia, SC 29201
(803) 253-8692
Attorneys for Respondent Décor Corporation

Edward and Sylvia Dengg
238 Maywood Drive
Moncks Corner, SC 29461
Pro Se Respondents

S. Markey Stubbs
Baker Ravenel Bender
PO Box 8057
Columbia, SC 29202
(803) 799-9091
Attorney for Respondent DVS, Inc.

Alan R. Belcher, Jr.
111 Coleman Blvd., Suite 300
Mount Pleasant, SC 29464
(843) 720-3460
Attorney for Respondent Guaranteed Framing, LLC

Christine Companion Varnado
The Seibels Law Firm
38 Broad Street, Suite 200
Charleston, SC 29401
(843) 722-6777
Attorney for Respondent Guaranteed Framing, LLC

Derek M. Newberry
Hall Booth Smith, P.C.
40 Calhoun Street, Suite 550
Charleston, SC 29401
(843) 720-3460
Attorney for Respondent Guaranteed Framing, LLC

Steven L. Smith
Zachary J. Closser
Samuel M. Wheeler
Smith Closser, P.A.
PO Box 405878
Charleston, SC 29423-0578
(843) 760-0220
Attorneys for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc

Erin D. Dean
Tupper Grimsely & Dean, P.A.
PO BOX 2055
Beaufort, SC 29901-2055
(843) 524-1116
Attorney for Respondents LA New Enterprises, LLC and Raul Martinez Masonry, LLC

John E. Rogers, II
The Ward Law Firm, P.A.
PO Box 5663
Spartanburg, SC 29304
(864) 573-8500
Attorney for Respondent Land/Site Services, Inc.

Francis Heyward Grimball
James H. Elliott
Richardson Plowden & Robinson, P.A.
235 Magrath Darby Boulevard,
Suite 100
Mt. Pleasant, SC 29464
(843) 805-6550
Attorney for Respondent Manale Landscaping, LLC

Third Party Defendant
Myers Landscaping, Inc.
c/o Joseph H. Myers, Registered Agent
Myers Landscaping, Inc.
382 Big Bird Lane
Summerville, SC 29486

David Cooper Cleveland
Trey Matthew Nicolette
Clauson & Staubbes, LLC
126 Seven Farms Drive, #200
Charleston, SC 29402
(843) 577-2026
Attorney for Respondent Myers Landscaping, Inc.

Thomas F. Dougall
William A. Collins, Jr.
Michael Kalwajtys
Dougall & Collins
1700 Woodcreek Farms Road
Suite 100
Elgin, South Carolina 29045
(803) 865-8855
Attorney for Respondent Ozzy Construction, LLC

Anthony and Stacey Ray
107 Loch Circle
Hampton, VA 23669
Pro Se Respondents

Jenny C. Honeycutt
PO Box 13466
James Island, SC 29422
(843) 793-4744
Attorney for Respondent South Carolina Exteriors, LLC

Bachman S. Smith, IV
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, Third Floor
Charleston, SC 29401
(843) 720-4427
Attorney for Respondent Southern Green, Inc.

R. Trippett Boineau, III
Heath McAlvin Stewart, III
John Adam Ribock
McAngus, Goudelock & Courie, LLC
PO BOX 12519
Columbia, SC 29211
(803) 779-2300
Attorneys for Respondent Spring Grove Plantation Development, Inc.

R. Patrick Flynn
Michael Allen
Pope Flynn, LLC
PO Box 70
Charleston, SC 29402
(843) 790-9570
Attorneys for Respondent Super Concrete of SC, Inc

David Shuler Black
Howell Gibson & Hughes, P.A.
PO Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Respondent TJB Trucking/Leasing, LLC

Ronald G. Tate, Jr.
R. Batten Farrar
Gallivan, White & Boyd, P.A.
PO Box 10589
Greenville, SC 29603
(864) 271-5361
Attorneys for Respondent Volkmar Consulting Services, LLC.

INDEX

Certificate of Counsel 1

Questions Presented 1

Statement of the Case.....1

Arguments

1. BECAUSE THE COURT OF APPEALS EXPRESSLY DECLINED TO CONSIDER THE EVIDENCE RELIED UPON BY THE CIRCUIT COURT IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION, IT WAS ERROR FOR IT TO HOLD THAT THE CIRCUIT COURT'S FINDING LACKED ADEQUATE FACTUAL SUPPORT……...4

2. THERE IS ADEQUATE EVIDENCE THAT REASONABLY SUPPORTS THE CIRCUIT COURT'S FINDING THAT THE ARBITRATION PROVISIONS CONTAINED IN THE VARIOUS AGREEMENTS DRAFTED BY LENNAR "MUST BE READ AS A WHOLE TO COMPRISE THE ARBITRATION AGREEEMENT" DUE TO THE "CROSS-REFERENCES TO ONE ANOTHER" AND "INTERTWINING PARAGRAPHS".....5

3. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE AND THUS UNENFORCEABLE 8

   A. The Homeowners lacked a meaningful choice in entering into the Arbitration Agreement.....8

   B. The Arbitration Agreement contained terms so oppressive that no reasonable person would make them and no fair and honest person would accept them.……..……9

4. EVEN WHEN READ IN ISOLATION, THE ARBITRATION PROVISION CONTAINED IN THE THE PURCHASE AND SALE AGREEMENT IS UNCONSCIONABLE, AND THUS UNENFORCEABLE……..…….12

5. BECAUSE THE ARBITRATION AGREEEMENT IS UNCONSCIONABLE, AND THUS UNENFORCEABLE, THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE FAA DOES NOT APPLY…….……14

6. IN THE ALTERNATIVE, BECAUSE THE DEVELOPMENT OF REAL ESTATE IS AN INHERENTLY INTRASTATE ACTIVITY, THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE FAA DOES NOT APPLY……15

Conclusion 16

CERTIFICATE OF COUNSEL

Counsel for petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 1, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that the Circuit Court's finding lacked adequate factual support while at the same time expressly declining to consider the evidence relied upon by the Circuit Court in making the finding?
2. Did the Court of Appeals err in holding that the Circuit Court lacked adequate factual support to find that the arbitration provisions contained in the various agreements drafted by Lennar, including the entire Lennar Limited Warranty, "must be read as a whole to comprise the arbitration agreement" due to the "cross-references to one another" and "intertwining paragraphs?"
3. Did the Court of Appeals err in finding that the Arbitration Agreement is valid and enforceable?
4. Did the Court of Appeals err in finding that the FAA applies to the Arbitration Agreement?

STATEMENT OF THE CASE

This is a construction defect lawsuit brought by several homeowners at The Abbey, a housing development in the Spring Grove Plantation neighborhood, located in Berkeley County, South Carolina.

On October 30, 2014, Petitioners ("Homeowners") commenced this action by filing a Complaint in the Berkeley County Court of Common Pleas (R. pp. 26-41). The Complaint asserted several causes of action against Defendant/Respondent Lennar Carolinas, LLC ("Lennar"), including causes of action for negligence, negligent misrepresentation, breach of the implied warranty of

habitability, breach of the implied warranty of good and workmanlike service, breach of fiduciary duty, and unfair trade practices. The Homeowners alleged that construction defects exist which have resulted in water intrusion, component and structural degradation, and extensive consequential damages. (R. pp. 26-41)

On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third Party Complaint, generally denying the allegations, asserting several affirmative defenses, making cross-claims against other named Defendants, and asserting causes of action against several of its own subcontractors. (R. pp. 42-74).

On June 1, 2015—over seven (7) months after the Complaint was filed—Lennar filed a Motion to Compel Arbitration. (R. pp. 259-261).

On November 23, 2015, Homeowners filed an Amended Complaint. (R. pp. 75-108). On November 25, 205, Lennar filed its Answer to the Amended Complaint, Cross-Claims, and Third Party Complaint. (R. pp. 109-164)

On March 30, 2016,—over eight (8) months after filing its initial Motion to Compel Arbitration—Lennar Carolinas amended its Motion to Compel Arbitration, requesting that the Court compel arbitration based on the Purchase and Sale Agreements, Lennar's Limited Warranty, the deeds to Homeowner's residences, and covenants. (R. pp. 262-1288). On April 7, 2016, Homeowners filed Plaintiff's Memorandum in Opposition to Defendant Lennar's Motion to Compel Arbitration. (R. pp. 2434-2530). A hearing on the Motion to Compel Arbitration was held on April 11, 2016. (R. pp. 203-256)

On September 21, 2016, the Circuit Court entered an Order Denying Defendant Lennar's Motion to Compel Arbitration. (R. pp. 4-23). Citing this Court's decision in Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d, 1 (2016), the Circuit Court found that "the arbitration provisions as set

forth in all four documents, including the entire Lennar Limited Warranty, must be read as a whole to comprise the arbitration 'agreement' due to the 'cross-references to one another' and 'intertwining paragraphs.'" (R. p. 8, ¶ 2). The Circuit Court also found that the terms of the arbitration agreement were unconscionable, and thus unenforceable under South Carolina law and prevailing equitable principles. (R. pp. 11-117). Further, the Circuit Court found that, in the alternative to being unconscionable, the arbitration provisions drafted by Lennar are unenforceable because they are ambiguous. (R. pp. 17-22).

On October 3, 2016, Lennar filed Defendant/Third-Party Plaintiff Lennar Carolina LLC's Motion to Reconsider Order Denying its Motion to Compel Arbitration. (R. 2553-2572). On October 26, 2016, the Circuit Court entered its Order denying Lennar's Motion for Reconsideration. (R. p.3).

On November 18, 2016, Lennar filed its Notice of Appeal. Oral arguments were heard before the Court of Appeals on February 19, 2020.

On June 10, 2020, the Court of Appeals **reversed** the Circuit Court's order denying Lennar Carolina's Motion to Compel Arbitration. (Patricia Damico, et al. v. Lennar Carolinas, LLC, Opinion No. 5730, filed June 10, 2020). The Court of Appeals held that the Circuit Court's finding that the various arbitration provisions, including the Lennar Warranty, must be read as a whole to comprise the arbitration agreement due to cross-references and intertwining paragraphs "lacked adequate factual support." However, in rendering its decision, the Court of Appeals declined to consider the arbitration provisions found in any document other than Purchase and Sale Agreement, including those documents which the Circuit Court had relied upon. "There is no need for use to consider the similar arbitration clauses found in the Lennar Warranty, the Deed, and the Covenants." The Court of Appeals also held that the Circuit Court's finding was not consistent with Smith v.

D.R. Horton, 417 S.C. 42, 48-49, 790 S.E.2d 1, 4 (2016).

On June 25, 2020, Homeowners filed a Petition for Rehearing. On July 2, 2020, the Court of Appeals denied Homeowners Petition for Rehearing. Petitioners seek a writ of certiorari to review the Court of Appeal's decision.

ARGUMENT

1. BECAUSE THE COURT OF APPEALS EXPRESSLY DECLINED TO CONSIDER THE EVIDENCE RELIED UPON BY THE CIRCUIT COURT IN DENYING LENNAR CAROLINAS' MOTION TO COMPEL ARBITRATION, IT WAS ERROR FOR IT TO HOLD THAT THE CIRCUIT COURT'S FINDING LACKED ADEQUATE FACTUAL SUPPORT.

Arbitrability determinations are subject to *de novo* review. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However, a Circuit Court's factual findings will not be reversed on appeal if **any** evidence reasonably supports the findings. [Emphasis added] Id. at 453, 730 S.E.2d at 315. See also, Smith v. D.R. Horton, Inc., 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016), a similar case, adopting the same standard of review.

In the present case, evidence considered by the Circuit Court reasonably supports its finding that the arbitration provisions set forth in the Purchase and Sale Agreement, Limited Warranty, Covenants, and Deed "must be read as whole to comprise the arbitration 'agreement' due to the 'cross-references to one another' and 'intertwining paragraphs.'" (R. p. 8). In rendering its decision, however, the Court of Appeal expressly declined to consider all the evidence examined by the Circuit Court, instead, finding "there is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed, and the Covenants." In doing so, it ignored the various cross-references to the entirety of the Purchase and Sale Agreement and other documents, which caused the Circuit Court to find that the arbitrations provisions contained in each of these documents, and the entire Lennar Limited Warranty, must be read as a whole to comprise the

Arbitration Agreement.

The Circuit Court's limited analysis falls short of the standard of review set forth in Bradley and comparable cases. Petitioners respectfully submit that a review of the evidence relied upon by the Circuit Court will reasonably support its finding that the arbitration provisions and the Lennar Limited Warranty should be read together to constitute the entire Arbitration Agreement. It was error for the Court of Appeals to hold that the Circuit Court's finding lacked adequate factual support while at the same time expressly declining to consider the evidence it relied upon.

2. THERE IS ADEQUATE EVIDENCE THAT REASONABLY SUPPORTS THE CIRCUIT COURT'S FINDING THAT THE ARBITRATION PROVISIONS CONTAINED IN THE VARIOUS AGREEMENTS DRAFTED BY LENNAR CAROLINAS MUST BE READ "AS A WHOLE TO COMPRISE THE ARBITRATION AGREEEMENT" DUE TO THE "CROSS-REFERENCES TO ONE ANOTHER" AND "INTERTWINING PARAGRAPHS"

In Smith v. D.R. Horton, Inc., the South Carolina Supreme Court held that, in applying the *Prima Paint* doctrine, separate subparagraphs must be read together to constitute the entire arbitration provision due to "numerous cross-references to one-another, intertwining the subparagraphs so as to constitute a single provision." 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016). Similarly, in the present case, the evidence reasonably supports that the arbitration paragraphs contained in the Purchase and Sale Agreement, Limited Warranty, Covenants, and Deeds must be read together to constitute a single provision due to the cross-references to each other. For example, the arbitration provision contained in the Deeds—which Lennar sought to compel arbitration under—expressly incorporates by reference **all the terms** of the Purchase and Sale Agreement and cross-references the Lennar Warranty. (R. Vol. 5, pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301). It also contains unsegregated arbitration language and the same type of warranty disclaimers, which this Court found unconscionable in Smith v. D.R Horton, Inc.:

> ALL DISPUTES IN CONNECTION WITH THIS DEED, THE UNDERLYING PURCHASE AGREEMENT AND DISPUTES

> CONCERNING THE SALE AND CONSTRUTCION OF THE HOME ARE **SUBJECT TO FINAL AND BINDING ARBITRATION**.
>
> **ALL OF THE TERMS AND CONDITIONS OF THE PURCHASE AGREEMENT FOR THE SALE AND PURCHASE OF THE HOUSE AND LOT ARE HEREBY INCORPORATED BY REFERENCE AS IF SET FORTH IN FULL** AND SHALL NOT BE MERGED WITH THIS DEED **AND REMAIN VALID AND SHALL SURVIVE THE CLOSING AND THE EXECUTION AND FILING OF THE DEED**. ALSO THE PURCHASER HEREBY ACKNOWLEDGES AND ACCEPTS THAT **THE LIMITED WARRANTIES PROVIDED IN THE BUILDER'S WRITTEN WARRANTY DOCUMENTS PROVIDE IT WITH ITS SOLE REMEDY AT LAW OR IN EQUITY IN LIEU OF ALL OTHER WARRANTES, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION AND THE IMPLIED WARRANTY OF HABITABILITY.** PURCHASER HEREBY AGREES TO WAIVE SUCH OTHER WARRANTIES AS THEY ARE FULLY AND COMPLETELY DISCHARGED HEREIN.
>
> [Emphasis Added in Bold]
>
> (R. Vol. 5, pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301)

As noted above, the arbitration provision and warranty disclaimers contained in the Deeds are (1) unsegregated by distinct headings, (2) expressly incorporate by reference **all the terms and conditions of the Purchase and Sale Agreement and not just Section 16**, (3) make express reference to builder's written warranty documents (i.e. Lennar's Warranty), noting that said documents provide homeowners with their "sole remedy at law or in equity", (4) and expressly disclaim the Implied Warranty of Workmanlike Construction and the Implied Warranty of Habitability. In other words, the arbitration language contained in the Deeds—with its cross-references to other documents, including the entirety of Lennar's Purchase and Sale Agreement and Warranty—**reasonably supports** the Circuit Court's finding that the arbitration provisions "must be read as a whole" so as to constitute a single provision. (R. p. 8), citing Smith v. D.R. Horton, Inc.,

417 S.C. at 48, 790 S.E.2d at 4.

In addition, the Purchase and Sale Agreement—which is incorporated by reference **in its entirety** within the Deed's arbitration provision—**expressly incorporates by reference the entirety of Lennar's Limited Warranty**. (See Circuit Court's analysis of Purchase and Sale agreement at R. pp. 8-11, and source Purchase and Sale Agreements at R. pp. 296-713). Further, The Purchase and Sale Agreement expressly states that, "THE EXPRESS LIMITED WARRANTY AND REMEDIES PROVIDED BY SELLER CONSTITUTE EXCLUSIVE WARRANTY AND REMEDIES TO BE MADE AVAILABLE BY SELLER." (R. pp. 8-11, pp. 296-713). Based on the foregoing, there was sufficient evidence to support the Circuit Court's finding that the various arbitration provisions drafted by Lennar, including the entire Lennar Limited Warranty, "must be read as a whole to comprise the arbitration agreement" due to the "cross references to one another" and "intertwining paragraphs". (R. p. 8, ¶ 2). It was error for the Court of Appeals to hold that the Circuit Court lacked adequate factual support to make it finding.

It is also worth noting that Lennar—a sophisticated developer of residential homes throughout South Carolina and other parts of the country—drafted the problematic language, which incorporates by reference other documents **in their entirety**, expressly disclaims warranties, and sets limitations on liability. Ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its shortcomings." Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), vacated on other grounds, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). As the architect if its own problem, Lennar should not be permitted avoid review of all the evidence

considered by the Circuit Court and cherry-pick which one of its documents this Court reviews.

3. THE ARBITRATION AGREEMENT IS UNCONSCIONABLE AND THUS 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. Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). In the present case, both prongs for establishing unconscionability are met.

A. The Homeowners Lacked Meaningful Choice in Entering into the Arbitration Agreement.

The Homeowners lacked a meaningful choice. Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. Gladden v. Boykin , 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting Simpson , 373 S.C. at 25, 644 S.E.2d at 669). Thus, parties frequently allege they lacked a meaningful choice when the dispute involves an adhesion contract. See Munoz v. Green Tree Fin. Corp. , 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (defining adhesion contracts as "standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable"). While adhesion contracts are not unconscionable per se, courts tend to look upon them with "considerable skepticism" because they give rise to "considerable doubt that any true agreement ever existed to submit disputes to arbitration." Id. at 26–27, 644 S.E.2d at 669–70 (quotation marks omitted). In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, inter alia, the relative disparity in the parties' bargaining power, the parties' relative sophistication, whether the parties were represented by independent counsel, and whether " 'the plaintiff is a substantial business concern.' " Id. (quoting Simpson , 373 S.C. at 25, 644 S.E.2d at 669).

In Smith v. D.R. Horton, Inc., the South Carolina Supreme Court took "judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." 417 S.C. at 50, 790 S.E.2d at 4., quoting Kennedy v. Columbia Lumber & Mfg. Co. , 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) ; cf. Sapp v. Ford Motor Co. , 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (stating that South Carolina's "courts have shifted from following the doctrine of caveat emptor ('let the buyer beware') to the doctrine of caveat venditor ('let the seller beware')").

The bargaining power held by Petitioner Homeowners in the present case is identical to the bargaining power held by the homeowners in Smith v. D.R. Horton, Inc. As in that case, (1) there is no indication in the Record that any of the Petitioner Homeowners "enjoyed a substantially stronger bargaining position" against Lennar, or (2) that they were each represented by independent counsel in negotiating the agreement. 417 S.C. at 50, 790 S.E.2d at 4-5. Further, like the homeowners in Smith v. D.R. Horton, Petitioner Homeowners were each "single clients" to a corporation that develops and sells houses throughout South Carolina and other states. Accordingly, in applying the South Carolina Supreme Court's analysis in Smith v. D.R. Horton to the present case, this Court should affirm the Circuit Court's finding that **Petitioner Homeowners lacked a meaningful choice in their ability to negotiate the arbitration agreement**. *Id.*

B. The Arbitration Agreement Contained Terms So Oppressive that No Reasonable Person Would Make Them and No Fair and Honest Person Would Accept Them.

By reading the cross-referenced terms as a whole, like the South Carolina Supreme Court did in Smith v. D.R. Horton, Inc., it is clear that they are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Specifically, as noted above, the **unsegregated arbitration language** contained in the Deeds,

expressly incorporate by reference **all the terms and conditions** of the Purchase and Sale Agreement, make express reference to builder's written warranty documents (i.e. Lennar's Warranty), noting that said documents provide homeowners with their "sole remedy at law or in equity", and expressly disclaim the Implied Warranty of Workmanlike Construction and the Implied Warranty of Habitability. The language also expressly waives "such other warranties as they are fully and completely discharged herein." (R. Vol. 5, pp. 2252, 2258, 2264, 2278, 2284, 2290, 2301). Here, as in Smith v. D.R. Horton, Inc., Lennar's "attempts to disclaim implied warranty claims and prohibit any monetary damages are clearly one-sided and oppressive." Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016)

A review of the cross-referenced and incorporated provisions further serves to amplify the extreme nature of the oppressive terms:

1) The "Lennar Warranty" expressly disclaims and waives "all other warranties, express or implied, including but not limited to any implied warrant of habitability." (R. Vol. 6, p. 2529, ¶ 2). In addition, it states "Lennar's total financial obligations under the Lennar Limited Warranty are limited to the original sales price of your Home". (R. Vol. 6, p. 2529, ¶ 3). Further, the Lennar Warranty states "Consequential Damages Not Covered. Lennar shall not be liable for, and you expressly waive recovery of, any consequential damages..., including but not limited to: any diminution in value…; lost profits; damages to personal property; any personal injury of any kind..., any medical or hospital expenses; costs of food, moving and storage, relocation expenses, or rental value of the Home or any other costs due to loss of use..." (R. Vol. 6, p. 2529, ¶ 4). Both the Sales Contract and the Warranty (discussed below) are standard, nonnegotiable, Lennar form contracts. (R. p. 2438; Vol. 1, p. 218, line 16 to line 24; p. 219, line 11 to line 17).

2) Ostensibly, the Lennar Warranty purports to provide relief to aggrieved homeowners.

However, a detailed reading of the cross-referenced Warranty shows that its true purpose is to provide temporal limits on Lennar's responsibility for defective construction. After one to two years, the Warranty only provides a remedy for rare, load bearing, structural defects. (R. Vol. 6, p. 2529, ¶ 9). All other remedies of any kind for any other defect - no matter how egregious - are excluded. Even the "structural warranty" is a misnomer - the only structural components covered are those that Lennar deems are structured components. (R. Vol. 6, p. 2523) Stated differently, the Lennar Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, structurally unsound homes at The Abbey.

3) If there was any uncertainty left as to the lack of remedy of any kind available to the homeowners under the terms of the Arbitration Agreement, one only has to go to pages 6 through 9 of the cross-referenced Warranty, which prohibits any coverage or remedy for:

> **1.** Damage to land, landscaping (including sodding, seeding, shrubs, trees, and planting), sprinkler systems, outbuildings, carports, or any other appurtenant structure or attachment to the dwelling, or other additions or improvement not a part of your Home;
> **2.** Loss of use of all or a portion of your Home;
> **3.** Any loss or damage that is caused or made worse by any of the following causes: microorganisms, fungus, decay, wet rot, dry rot, soft rot, rotting of any kind, and mold;
> **4.** Any and all exclusions set forth in the Workmanship Systems and Structural Standards;
> **5.** Except as prohibited by law of the state in which the Home is located, all other warranties express or implied, including but not limited to any implied warrant of habitability, are hereby expressly disclaimed and waived;
> **6.** Lennar shall not be liable for, and you expressly waive recovery of any consequential damages that may result from the condition of any component of the Home, including but not limited to: any diminution in value of the Home before or after repairs are performed; lost profits; damages to personal property; any hospital expenses; cost of food, moving and storage relocation expenses, or rental value of the Home or any other costs due to loss of use, inconvenience or annoyance during repair. (R. Vol. 6, pp. 2527-2528).

4) As noted above, the Deed's arbitration provision—upon which Lennar sought to compel arbitration—also expressly incorporates by reference **all the terms and conditions of the Purchase and Sale Agreement**, not just Section 16, which Lennar now wishes to cherry-pick and rely upon in isolation. **(R. Vol. 5, p. 2252, and p. 2264)**. In turn, the Purchase and Sale Agreement expressly incorporates by reference Lennar's Limited Warranty in its entirety. (See Circuit Court Analysis at R. pp. 8-11, and source Purchase and Sale Agreements, R. 296-713). The Purchase and Sale Agreement also expressly states that, "THE EXPRESS LIMITED WARRANTY AND REMEDIES PROVIDED BY SELLER CONSTITUTE EXCLUSIVE WARRANTY AND REMEDIES TO BE MADE AVAILABLE BY SELLER." (R. at Id.)

Based on the foregoing, there was sufficient evidence to reasonably support the Circuit Court's finding that the terms in Lennar's Arbitration Agreement were unconscionable, and thus unenforceable. See Smith v. D.R. Horton, Inc., wherein the South Carolina Supreme Court affirmed the Circuit Court and Court of Appeal's holdings that when read together as a singe provision, "**the arbitration provision is unconscionable and thus unenforceable**." 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016). This Court should grant Homeowners' Petition, reverse the Court of Appeal's Order, and deny Lennar's Motion to Compel Arbitration on the grounds that the Arbitration Agreement is unconscionable.

4. EVEN WHEN READ IN ISOLATION, THE ARBITRATION PROVISION CONTAINED IN THE PURCHASE AND SALE AGREEMENT IS UNCONSCIONABLE, AND THUS UNENFORCEABLE.

Even if this Court were to disregard Smith v. D.R. Horton and read Section 16 of the Purchase and Sale Agreement in isolation, as the Court of Appeals did in rendering its decision, disregarding all of the above cross-referenced and intertwining paragraphs, the arbitration provision would still be unconscionable because it purports that Homeowners have bound their children and

other third party occupants to binding arbitration. (R. Vol. 1, P. 301). Specifically, Section 16.1 states:

> Disputes (whether contract, **warranty**, tort, statutory or otherwise, shall include, but are not limited to, any and all controversies, disputes, or claims […] (3) **relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants to the Property, or in the Community. Buyer has executed this Agreement on behalf of his or her children and other occupants of the Property with the intent that all such parties be bound hereby.**

This provision provides (1) no meaningful choice to Homeowners, their children, or third party occupants and is, on (2) its face, so oppressive that no reasonable person would accept being bound as such.

Further, Section 16.4 of the Purchase and Sale Agreement is unconscionable because **it gives Lennar unilateral power to include contractors, subcontractors, and suppliers, as well as any warranty company and insurer as part of the Mediation and Arbitration**. (R. Vol. 1, P. 301). Specifically, Section 16.4 states:

> Buyer and Seller further agree […] that Seller may, at its sole election, include Seller's contractors, subcontractors and suppliers, as well as any warranty company and insurer as parties in the mediation and arbitration; and (3) that the mediation and arbitration will be limited to the parties specified herein.

Again, said provision is one-sided and provides Homeowners with (1) no meaningful choice as to what parties should be involved in arbitration, and (2) is on its face "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668. It is practically impossible to imagine how a Homeowner might effectively engage in arbitration when Lennar can **unilaterally** decide whether its subcontractors can participate in the arbitration—the very subcontractors that Lennar was responsible for managing and supervising.

Because the arbitration provision contained in the Purchase and Sale Agreement is unconscionable even when read in isolation, this Court should grant Homeowners Petition, reverse the Court of Appeal's Order, and deny Lennar's Motion to Compel Arbitration because **"the arbitration provision is unconscionable, and thus unenforceable.**" Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

5. BECAUSE THE ARBITRATION AGREEMENT IS UNCONSCIONABLE, AND THUS UNENFORCEABLE, THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE FAA DOES NOT APPLY.

In rendering its decision in the present case, the Court of Appeals held that the FAA applies because "the parties 'specifically agree that this transaction involves interstate commerce'" and "We must enforce this agreement like an other contract term," citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001). However, Petitioner Homeowners respectfully submit that the Court's analysis was incomplete. Specifically, in Bradley v. Brentwood Homes, Inc., the South Carolina Supreme Court set forth the standard for enforcing contractual agreements, which purport to evidence an agreement by the parties that a transaction involves commerce:

> The FAA provides: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract.**" 9 U.S.C.A. § 2.
>
> [Emphasis added]
>
> Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012)

As noted by the above-cited language, a provision in a contract purporting to evidence interstate commerce is not enforceable where grounds exist, at law or in equity, for its revocation. As set forth under Arguments 2 and 3, *supra*, equitable and legal grounds exist for revoking the arbitration agreement drafted by Lennar. Specifically, applying the South Carolina Supreme Court's

analysis in Smith v. D.R. Horton, Inc. and Simpson v. MSA of Myrtle Beach, Inc., the terms of the arbitration agreement are unconscionable (i.e. the Respondent Homeowners lacked any meaningful choice and the terms are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Accordingly, "**the arbitration provision is unconscionable and thus unenforceable**." Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

Said differently, this Court should grant Homeowner's Petition, reverse the Court of Appeal's order, and affirm the Circuit Court's finding that the FAA does not apply because sufficient grounds exist for revoking the arbitration agreement. Where a Court finds any clause of a contract unconscionable, including an arbitration clause, as is the case here, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. See S.C. Code§ 36-3-302(1) 2003.[1] Accordingly, this Court should grant Homeowner's petition, reverse the Court of Appeal's order and deny Lennar's Motion to Compel Arbitration because the arbitration agreement is unconscionable and thus unenforceable.

6. IN THE ALTERNATIVE, BECAUSE THE DEVELOPMENT OF REAL ESTATE IS AN INHERENTLY INTRASTATE ACTIVITY, THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE FAA DOES NOT APPLY.

"To ascertain whether a transaction involves commerce within the meaning of the FAA, the

[1] As aptly noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to AT&T Mobility, LLC v. Concepcion: "even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States." 131 S.Ct. 1740, 1760 (2011) (emphasis added); Rent-A-Center, 130 S.Ct. at 2775 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses'"); Munoz v. Green Tree Financial Corp., 343 S.C. 531,539, 542 S.E.2d 360,363-64 (200 I) ("General contract principles of state law apply to arbitration clauses governed by the FAA").

court must examine the agreement, the complaint, and the surrounding facts." Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012), quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). In rendering its decision the present case, the Court of Appeals held that the present case implicates the FAA because "the transaction also involved the construction of residential homes." Petitioner Homeowners respectfully submit, that the present transaction did not involve the construction of residential homes. Rather, like the Homeowners in Bradley v. Brentwood, Homes, Inc., the contracts at issue in this case are a "Purchase and Sale Agreement" and a "Warranty", **not** construction contracts. (R. pp. 2454–2521 and pp. 2522–2530. respectively). Id. 398 S.C. 447, 458 730 S.E.2d 312, 318 (2012).

In South Carolina, our Supreme Court adheres to the view that real estate purchase contracts only implicate intrastate commerce because "the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity." Id., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) quoting Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18. The Court further confirmed its prior rulings that the sale of a residence is inherently intrastate. Id. Accordingly, it was error for this Court to find that the transaction involved the "construction of residential homes" involving interstate commerce.

Further, the Court of Appeal's reliance on an affidavit by Lennar's controller that the transaction involved interstate commerce because it allegedly uses out-of-state contractors and materials and equipment manufactured outside of South Carolina is not dispositive. See Bradley v. Brentwood Homes, wherein the South Carolina Supreme Court found, "[Developer's] affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling." 398 S.C. at 458, 730 S.E.2d at 318. Lennar's attestation that the transaction involved interstate

commerce does not make it so, particularly when the transaction involves a Purchase and Sale Agreement like we have here and not a Construction Contract. Accordingly, Respondent Homeowners respectfully request that this Honorable Court grant a Homeowners' Petition for a Writ of Certiorari, reverse the Court of Appeal's decision, and affirm the Circuit Court's finding that the transaction was purely intrastate in nature and did not implicate interstate commerce.

CONCLUSION

For the reasons stated, petitioners respectfully ask the Court to grant Homeowner's Petition for a Writ of Certiorari, reverse the Court of Appeal's order, and deny Lennar's Motion to Compel Arbitration.

[Signature on following page.]

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/ Jesse Sanchez
98 ½ Broad Street, Suite B
Charleston, SC 29401
(843) 814-8181
jesse@jessesanchezlaw.com

THE HAYES LAW FIRM, LLC

John C. Hayes, IV
180 Meeting Street, Suite 330
Charleston, SC 29401
(843) 805-7003
jhayes@hayeslaw.org

Attorneys for Petitioners
Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Davis Morrow

July 31, 2020
Charleston, South Carolina