THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2020-001048
Case No. 2014-CP-08-2424

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

Of whom Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Buetow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins are
Petitioners,

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, Respondent,

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 Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth-Party Defendants.

LENNAR CAROLINAS, LLC'S
RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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Respondent Lennar Carolinas, LLC ("Lennar") by and through undersigned counsel, respectfully submits the following Return to the Petition for Writ of Certiorari filed by the Petitioners Patricia Damico, Joshua and Brettany Buetow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lena Lucas, and Danny and Ellen Morrow (collectively, "Owners").

STATEMENT OF THE CASE

This action is about whether a general contractor (Lennar) may compel the individuals with whom it contracted for the sale of a lot and the construction of a house (Owners) to arbitrate those individuals' construction defect claims.

The houses at issue in this construction litigation are located in a development known as The Abbey at Spring Grove Plantation ("The Abbey") which is located in Berkeley County, South Carolina. The lots in The Abbey were originally owned by Spring Grove Planation Development, Inc. ("Spring Grove Development"). (R. 231).

Between January 2011 and May 2013, Owners each entered into a Purchase and Sale Agreement with Lennar for the construction and purchase of a home in The Abbey. (R. 296-713). As a part of the purchase, Owners selected various construction details, components, and finishes for their houses. (R. 715-764). Certain Owners also negotiated additional options to complete the construction of their residences including specific washers and dryers, faux blinds, privacy fencing, and other upgrades. (R. 715-764).

Each Purchase and Sale Agreement contains the following arbitration provision in a separately numbered Section 16.1, which bears a distinct and separate heading entitled "Mediation/Arbitration of Disputes."

> 16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration

> as provided by the Federal Arbitration Act 9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Agreement, the Property, the Community or any dealings between Buyer and Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. . . .

(R. 300). Section 16.3 of the Purchase and Sale Agreement further states:

> If the Dispute is not fully resolved by mediation, the Dispute shall be submitted to binding arbitration and administered by the AAA in accordance with the AAA's Home Construction Arbitration Rules currently in effect on the date of the request. If there are no Home Construction Arbitration Rules currently in effect, then the AAA's Construction Industry Arbitration Rules in effect on the date of such request shall be utilized. Any judgment upon the award rendered by the arbitrator may be entered in an enforced by any court having jurisdiction over such Dispute. If the claimed amount exceeds $250,000.00 or includes a demand for punitive damages, the Dispute shall be heard and determined by three arbitrators; however, if mutually agreed to by the parties, then the Dispute shall be heard and determined by one arbitrator. Arbitrators shall have expertise in area(s) of Dispute, which may include legal expertise if legal issues are involved. All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s). . . .

(R. 301).

On December 12, 2014, Owners filed a Complaint against Lennar, Spring Grove Development, and certain subcontractors based upon alleged construction defects in the houses. (R. 26). In response to the Complaint, Lennar filed its Answer, Cross-Claims, and a Third-Party Complaint. (R. 42). Lennar subsequently filed a Motion to Compel Arbitration. (R. 257).

On November 23, 2015, Owners filed their Amended Complaint (the "Amended Complaint"). (R. 75). In response, Lennar timely filed its Answer to Owners' Amended Complaint, Cross-Claims, and Third-Party Complaint. (R. 109). On March 30, 2016, Lennar

amended its Motion to Compel Arbitration. (R. 262). A hearing on the Motion to Compel Arbitration was held on April 11, 2016. (R. 203).

On September 21, 2016, the circuit court issued an order denying the Motion to Compel Arbitration. (R. 4). On October 3, 2016, Lennar filed a Motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (R. 2553). On October 16, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 order denying Lennar's Motion to Alter or Amend. (R. 3).

On November 11, 20216, Lennar filed its Notice of Appeal. The Court of Appeals held oral argument on February 19, 2020. On June 10, 2020, the Court of Appeals issued its opinion reversing the circuit court and compelling Owners to arbitrate their claims against Lennar pursuant to the Purchase and Sale Agreement's arbitration provision. The Court of Appeals held:

1. The circuit court misapplied (violated) the *Prima Paint* doctrine by not considering the applicable arbitration provision as an independent arbitration agreement and by not limited its review to determine unconscionability or enforceability to the terms of that provision;

2. The circuit court improperly applied the holding in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), because the applicable arbitration provision in this case does not contain any cross-refences to provisions outside of the arbitration agreement or other intertwining paragraphs containing unconscionable terms;

3. The circuit court erred in finding the Federal Arbitration Act ("FAA") does not apply, because the applicable arbitration agreement contains express language stating the parties agree that the transaction involves interstate commerce; and

4. The circuit court erred in finding the FAA does not apply because Owners—through the Purchase and Sale Agreement—entered into contracts for the construction of a home.

The Court of Appeals, after concluding that Owners are required to arbitrate their claims against Lennar pursuant to the arbitration provision in the Purchase and Sale Agreement, found there was

no need to consider the other arbitration clauses found in the Lennar Warranty, the deeds for the properties, or the Spring Grove Covenants.

Owners filed a Petition for Rehearing, arguing the Court of Appeals erred in refusing to consider matters outside of Section 16 of the Purchase and Sale Agreement when analyzing whether to compel Owners to arbitrate their claims against Lennar. Owners' Petition for Rehearing also attempted to raise new arguments regarding the purported unconscionability of terms within Section 16 of the Purchase and Sale Agreement. The Court of Appeals denied Owners' Petition for Rehearing on July 1, 2020.

ARGUMENT

I. Owners' Petition for a Writ of Certiorari fails to raise any special or important reasons, required by Rule 242(b) of the South Carolina Appellate Court Rules, to qualify for review by this Court.

As Rule 242 (b), SCACR, provides, a writ of certiorari is not a matter of right. While such review is a matter of discretion for this Court, it is well settled that such review should only be granted when the petition raises special and important reasons. Generally, as embodied in Rule 242 (b) itself, these special and important reasons should take the form of: (1) a novel question of law; (2) the existence of a dissent in the decision of the Court of Appeals; (3) a conflict between the decision by the Court of Appeals and a prior decision by the Supreme Court; (4) the direct involvement of a substantial constitutional issues; and (5) the existence of a federal question and a conflict between the decision of the Court of Appeals and a prior decision by the United States Supreme Court. Owners' Petition does not identify or raise any such special and important reason for review by this Court—and none exist. For that reason alone, the Petition in this case should be denied.

Owners, in their Petition, really just seek to have this Court substitute a new decision for that of the Court of Appeals. However, the Court of Appeals conducted a proper analysis of the

law and attendant facts applicable to Lennar's Motion to Compel Arbitration and effectively corrected the errors by the Circuit Court, including its misapplication of the *Prima Paint* doctrine, when it originally denied the Motion to Compel Arbitration.

II. The Court of Appeals considered all of the relevant and applicable facts in determining Owners must arbitrate their claims against Lennar pursuant to the arbitration agreement in the Purchase and Sale Agreement.

The Court of Appeals, in reviewing the Order of the Circuit Court denying the Motion to Compel Arbitration, was required first to correct the Circuit Court's errors of law related to the proper scope of review of the Motion. Then the Court of Appeals applied the proper scope of review to correct the Circuit Court's unsupported findings of fact. In their Petition, Owners persist in their refusal to understand and accept the correct legal standard for the scope of review of an arbitration agreement. Thereafter, they attempt to argue that by applying the proper scope of review the Court of Appeals committed error by not considering "facts" which are outside the allowable scope of review. Owners' argument is not merely misguided, it is specious and spurious.

The Court of Appeals corrected the Circuit Court's misapplication of the *Prima Paint* doctrine. The *Prima Paint* doctrine stands for the basic principle that when a court reviews the validity of an arbitration provision contained in a more comprehensive agreement, its analysis is restricted to the arbitration provision alone. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967); *see also S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (adopting a broad interpretation of *Prima Paint* in South Carolina, and holding that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause"). In correcting the Circuit Court's erroneous application of the *Prima Paint* doctrine, the Court of Appeals correctly analyzed the arbitration provision contained in the Purchase and Sale Agreement between Lennar and

Owners.[1] First it identified the arbitration provision (Section 16) and determined that it was self-contained and isolatable. Then the Court isolated the arbitration provision and correctly analyzed the arbitration provision without looking to other sections of the Purchase and Sale Agreement or entirely separate agreements. In doing this, the Court of Appeals properly applied the *Prima Paint* doctrine and restricted its analysis to only Section 16 of the Purchase and Sale Agreement.

Applying this standard, the Court of Appeals correctly concluded that terms or language not in the isolated arbitration provision are not appropriate or relevant for consideration of whether that arbitration provision is enforceable. Thus, the Court of Appeals committed no error in not relying upon other agreements or other terms in deciding the enforceability of the arbitration provision in the Purchase and Sale Agreement.

III. The Court of Appeals properly found Owners are required to arbitrate their claims pursuant to the Purchase and Sale Agreement's arbitration provision.

Having determined the appropriate standard or scope of review for the agreement to arbitrate, and having properly isolated the arbitration provision to be reviewed, the Court of Appeals proceeded with the review of the relevant arbitration provision. In doing so, the Court of

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[1] In this case, the Motion to Compel Arbitration identified several separate and distinct agreements to arbitrate, each of which on its own might justify the decision that the Owners were bound to arbitrate their claims against Lennar. (R. 257). The Court of Appeals recognized and concluded, at least implicitly, that each potentially applicable agreement to arbitrate was to be identified and isolated to determine whether it provided a sound basis to compel arbitration. If, and when, even one enforceable agreement to arbitrate was identified, the necessary inquiry was complete. Logically, the first agreement to arbitrate to consider was that contained in the Purchase and Sale Agreement by which the houses were obtained by Owners from Lennar. When the Court of Appeals analyzed the arbitration provision in the Purchase and Sale Agreement and concluded it is enforceable and provided sufficient grounds to compel arbitration, there was no need for further review by the Court of Appeals. Upon finding that Owners are required to arbitrate their claims pursuant to the Purchase and Sale Agreement's arbitration provision, the Court of Appeal's analysis was complete. Consideration of the other arbitration provisions or agreements (the deeds for the properties, the Lennar Warranty and the Spring Grove Covenants) was unnecessary because it had already been determined that the claims were subject to arbitration. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts need not address remaining issues when disposition of a prior issue is determinative).

Appeals analyzed Section 16 of the Purchase and Sale Agreement applicable between the parties, which is clearly the relevant agreement to arbitrate.

First, the Court of Appeals observed that the parties had stipulated in Section 16.1 that the underlying transaction involved interstate commerce and that any dispute should be submitted to binding arbitration as provided by the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.*, and not by or in a court of law or equity. (R. 300). This clear and unambiguous term in the arbitration provision is not disputable. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)("If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.").

Second, the Court of Appeals analyzed the law applicable to such a contract term. The Court correctly found that such a term is enforceable as written. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (finding FAA applied because the parties agreed the contract involved interstate commerce); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013) ("[T]he Contract expressly invokes the FAA and such contractual provisions should be enforced in accordance with their unambiguous terms.").

Third, the Court of Appeals also analyzed the facts of the underlying transactions between Owners and Lennar and found that the transactions, in fact, involved interstate commerce. Contrary to the Circuit Court's erroneous finding, and Owners' argument, the Court of Appeals correctly concluded that the underlying transactions in this case were not merely the sale of completed real estate; rather, the transaction involved construction and then sale of the houses. Thus, the transactions were not purely intrastate as a matter of law, but they were, in accordance with well settled precedent, interstate transactions. *See Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract

for the construction of an eighteen-story building involved interstate commerce because "[i]t would be virtually impossible to construct" such a building "with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina"); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding a contract for construction of a church pertained to a transaction "involving interstate commerce due to the nature of the construction project" and the builder's affidavit swearing the project would involve businesses and supplies from outside of South Carolina); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 122-23, 747 S.E.2d 461, 464-65 (2013) (holding that a contract for the construction of a marina involved interstate commerce because the raw materials used in construction would originate from out of state and the materials would be transported in the channels of commerce); *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (holding a contract for the construction of a restaurant involved interstate commerce).

Owners' reliance on the opinion in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) for support of their argument that the Purchase and Sale Agreements do not involve interstate commerce is misplaced and wrong. Owners ignore the critical and distinguishing fact that the court in *Bradley* was analyzing an arbitration provision in a contract which expressed that it was for the purchase of a completed dwelling. 398 S.C. at 450, 730 S.E.2d at 313, 318. The court in *Bradley* acknowledged that the outcome would have been different if the contract in issue was for the construction of a residential property:

> We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA.

Id. at 458 n.8, 730 S.E.2d at 318 n.8.

Furthermore, the *Bradley* decision indicates that when the sales agreement contains (and

does not eliminate) provisions for the purchaser to select "options" and "color selections" or other matters essential with the completion of construction, it is not merely the sale of a completed dwelling but is one involving construction. *Id.* at 458, 730 S.E.2d at 318. Unlike the contract at issue in *Bradley*, which excluded such construction components, the Purchase and Sale Agreements in this case specifically included Options Summaries, Color Selection Sheets, and Addenda to the Purchase and Sale Agreement evidence that Owners entered into agreements with Lennar for the construction of a house. (R. 296 - 713). The construction of a house involves interstate commerce because it would have been impossible for Lennar and the subcontractors to build houses for Owners with the materials, equipment, and supplies all produced and manufactured solely within the State of South Carolina.

Finally, the Court of Appeals analyzed Section 16 of the Purchase and Sale Agreement to determine a basis for the Circuit Court's finding, and Owners' argument, that the applicable arbitration provision contained "cross-references" and "intertwining paragraphs to justify reading other terms or provisions into the arbitration agreement to determine its enforceability." The Court of Appeals definitively and expressly found that:

> The arbitration agreement here was contained in a distinct, separate section of the [Purchase and Sale Agreement]. The Circuit Court's finding that the arbitration provisions encompassed more than this section lacks adequate factual support. We therefore conclude the Circuit Court erred by considering the contract as a whole rather than, as *Prima Paint* demands, focusing only on the discrete arbitration provision.

Damico v. Lennar Carolinas, LLC, 430 S.C. 188, 198-99, 844 S.E.2d 66, 72 (Ct. App. 2020), *reh'g denied* (July 1, 2020) (citing *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016)).

Indeed, any review of Section 16 of the Purchase and Sale Agreement substantiates the Court of Appeals analysis and conclusion. As the Court of Appeals clearly found, within Section

16 there is no physical, numerical, spatial or verbal "intertwining" in any form or fashion, no cross-references to other sections of the Purchase and Sale Agreement, and no incorporation of entirely separate agreements. Thus, since the Circuit Court order and Owners' arguments premised the conclusion of unconscionability exclusively on terms not found within Section 16 of the Purchase and Sale Agreement (and identified no purported unconscionable terms actually found within Section 16), the Court of Appeals rejected any finding or argument that the applicable arbitration provision was unconscionable. Therefore, the Court of Appeals found the Purchase and Sale Agreement's arbitration provision is valid and must be enforced.

IV. Owners may not raise new arguments for the first time in their Petition for a Writ of Certiorari.

Owners' Petition for Rehearing to the Court of Appeals raised for the first time the argument the arbitration provision in the Purchase and Sale Agreement was unconscionable because it contains a provision stating that the arbitration provision is binding on the Owners' children or third-party occupants.

New arguments—like those asserted by Owners—may not be raised for the first time in a Petition for Rehearing. *See Rogers v. Rogers*, 221 S.C. 360, 374, 70 S.E.2d 637, 644 (1952) ("The question now brought to the attention of the Court, having not been presented to or passed upon by the Court below and having not been made as a sustaining ground by respondents, cannot be raised for the first time on a petition for a rehearing."); *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." (citation omitted)). To be considered by this Court in a Petition for a Writ of Certiorari an issue must have been properly raised to the Court of Appeals and in the petition for rehearing. *See* Rule 226(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing

shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

Owners' new arguments were not properly raised to the Court of Appeals and, therefore, were not properly raised in their Petition for Rehearing. Accordingly, these issues are not proper for inclusion in the Petition for Writ of Certiorari and the Court should refuse to consider these new and improper arguments and deny Owners' Petition for a Writ of Certiorari.

CONCLUSION

Based on the foregoing, the Court should DENY Owners' Petition for a Writ of Certiorari.

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