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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. 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 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, Plaintiffs,

Of whom 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 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, 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.

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

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Petitioners, above-named, hereby respectfully submit their Reply to Respondent Lennar Carolina, LLC's Return to the Petition for a Writ of Certiorari.

ARGUMENT

I. Special and important reasons exist for granting Homeowner's Petition for a Writ of Certiorari: The Court of Appeal's Order conflicts with prior decisions of the Supreme Court of South Carolina, directly involves substantial constitutional issues, and addresses a federal question of law.

Contrary to Respondent's contention, Homeowners' Petition raises several special and important issues warranting review of the Court of Appeal's Order by this Court under Rule 242(b), SCACR.

A. This Court should grant Homeowners' Petition because the Court of Appeal's Order conflicts with prior decisions of the Supreme Court.

As the Homeowners note in their Petition, the Court of Appeals diverged from the standard of review set forth by this Court for arbitrability determinations in Bradley v. Brentwood Homes, Inc. and comparable cases. 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). (Homeowners' Petition, pp. 4-5). In Bradley, this Court reiterated that while arbitration determinations are subject to *de novo* review, "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id., citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). [Emphasis added]. In the present case, the circuit court found that the arbitration provisions drafted by Lennar in the Purchase and Sale Agreement, Limited Warranty, Covenants, and Deeds "must be read as a whole to comprise the arbitration 'agreement' due to the 'cross-references to one another' and 'intertwining paragraphs.'" (Circuit Court Order, R. p. 8, citing Smith v. D.R. Horton, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016)). The Court of Appeals, however, expressly declined to consider the evidence examined by the circuit court, finding "there is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed, and the

covenants."

By arbitrarily limiting its analysis to Section 16 of Purchase and Sale Agreement, the Court of Appeals ignored the various cross-references contained within the arbitration provisions drafted by Lennar, including cross-references to the Purchase and Sale Agreement and cross-references to the Lennar Warranty. Had the Court of Appeals reviewed all of the evidence relied upon by the circuit court (i.e. each of the arbitration provisions drafted by Lennar), it would have found that the arbitration provisions contain cross-references to one another; expressly incorporate by reference **all the terms** of the Purchase and Sale Agreement, not just section 16; cross-reference the Lennar Warranty; and contain unsegregated, unconscionable provisions, expressly disclaiming the Implied Warranty of Workmanlike Construction and Implied Warranty of Habitability. (See Homeowners' Petition, Arguments 1 and 2, pp. 2-8). It was, therefore, 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 upon which the circuit court relied upon. In doing so, the Court of Appeals diverged from the standard of review set forth by this Court in Bradley and comparable cases.

The Court of Appeal's Order granting Lennar's Motion to Compel arbitration also conflicts with this Court's decision in Smith v. D.R. Horton, wherein the Court found that an arbitration agreement may not be enforced where it contains unconscionable provisions. 417 S.C. 42, 790 S.E.2d 1 (2016). Specifically, this Court found that the arbitration agreement by D.R. Horton was unconscionable because, *inter alia*, it attempted to disclaim all implied warranties and preclude the homeowners from seeking consequential damages. *Id*. 417 S.C. at 50, 790 S.E.2d at 5. In the present case, the arbitration agreement drafted by Lennar also disclaims all implied warranties and attempts to preclude owners from seeking consequential damages. Specifically, the arbitration provisions expressly incorporate by reference **all of the terms** of the Purchase and Sale Agreement, which in

turn incorporate by reference **all of the terms** of the Lennar Warranty; expressly disclaim the Implied Warranty of Workmanlike Construction and Implied Warranty of Habitability; and limit Homeowner's remedies to those set forth by Lennar in its purported "Warranty." (See Homeowners' Petition, Arguments 2 - 4, pp. 5-15). Accordingly, this Court should grant Homeowner's petition because the Court of Appeal's Order conflicts with this Court's decision in Smith v. D.R. Horton, by permitting the enforcement of an unconscionable arbitration agreement.

B. This Court should grant Homeowner's Petition because the Court of Appeal's Order directly involves a constitutional issue.

In Cooper v. Poston, this Court held, "It would be unfair to allow one party to abrogate another party's constitutional right to a jury trial by choosing arbitration as the final binding forum for the action." 483 S.E.2d 750, 326 S.C. 46 (1997). Although this Court went on to state that "a different outcome would likely result if the parties had a voluntary, ***enforceable*** arbitration agreement," the present case does not involve an enforceable arbitration agreement. *Id*. at N. 2 [Emphasis added]. As set forth above and in Homeowner's Petition, the arbitration agreement drafted by Lennar is unenforceable for the very reasons set forth in Smith v. D.R. Horton: It is on its face unconscionable (i.e. it attempts, *inter alia*, to disclaim implied warranties and preclude Homeowners from seeking consequential damages). Said differently, there is a lack of meaningful choice due to one-sided provisions and the Arbitration Agreement, as written by Lennar, contains terms so oppressive that no reasonable person would make them and no fair and honest person would accept them. (See Homeowners' Petition, Arguments 2 - 4, pp. 5-15).

C. This Court should grant Homeowner's Petition because the Court of Appeal's Order addresses a federal question of law, namely, whether a provision in a contract purporting to evidence interstate commerce may be used by a party to compel arbitration

under the FAA where grounds exist, at law or in equity, for revocation of the contract.

As set forth in Homeowner's Petition, 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, 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 of Homeowner's Petition, equitable and legal grounds exist for revoking the arbitration agreement drafted by Lennar. Specifically, applying this Court's analysis in Smith v. D.R. Horton, Inc. and Simpson v. MSA of Myrtle Beach, Inc., Lennar's arbitration agreement is not enforceable because it is on its face unconscionable. (See Homeowners' Petition, Arguments 2 - 4, pp. 5-15, cited *supra*). 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]

Because the Court of Appeal's Order is in conflict with the standard set forth by this Court in Bradley, and because the Order address a federal question of law (i.e. enforceability of arbitration under the F.A.A. despite the existence of unconscionable terms), this Court should grant Homeowners' Petition for a Writ of Certiorari. Review of the Court of Appeal's Order by this Court is warranted under Rule 242(b), SCACR.

II. The Court of Appeals failed to consider the terms contained within each of the arbitration provisions drafted by Lennar, including the cross-references to one another and unconscionable terms contained therein.

Lennar's Return erroneously states that Homeowners seek review of "facts outside the allowable scope of review." The opposite is true. As set forth in their Petition, Homeowners seek review of the terms contained **within** the arbitration provisions drafted by Lennar, including those terms expressly incorporated therein by reference. See Smith v. D.R. Horton, wherein applying the *Prima Paint* doctrine, this Court found that separate subparagraphs drafted by Developer D.R. Horton 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 the circuit court's finding that the arbitration paragraphs contained in the Purchase and Sale Agreements, Limited Warranties, Covenants, and Deeds must be read together to constitute a single

[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 (2001) ("General contract principles of state law apply to arbitration clauses governed by the FAA").

Agreement due to the cross-references to one another.

Lennar, on the other hand, now wishes to limit this Court's review to one of four arbitration provisions it drafted in an effort to avoid grappling with the cross-references and unsegregated unconscionable terms it drafted and inserted throughout its own arbitration provisions. This represents a complete reversal from Lennar's approach in the circuit court wherein it sought to compel arbitration under the terms of the Purchase and Sale Agreements, Lennar's Limited Warranty, the Deeds, and the Covenants. (See Lennar's Amended Motion to Compel Arbitration, R. pp. 7 -8).

Lennar's reason for wanting this Court to limit its analysis to the arbitration provision contained in the Purchase and Sale Agreements is clear: Lennar's other arbitration provisions expressly incorporate by reference **all of the terms** of the Purchase and Sale Agreement, not just Section 16, which in turn incorporates by reference **all of the terms** of the Lennar Warranty; expressly disclaims the Implied Warranty of Workmanlike Construction and Implied Warranty of Habitability; and limits Homeowner's remedies to those set forth by Lennar in its purported "Warranty." (See Homeowners' Petition, Arguments 2 - 4, pp. 5-15). By any other measure, Lennar's Motion to compel arbitration fails.

III. Petitioners have at all times relevant hereto maintained that the Arbitration Provisions drafted by Lennar are unconscionable.

Lennar's argument that Homeowners now seek to raise new issues on appeal is unfounded. A review of Homeowner's final briefs and recording of the oral arguments presented before the Court of Appeals reveal that the Homeowners have at all time maintained that Lennar's Arbitration Agreement is unenforceable and therefore unconscionable. In addition, as set forth by this Court, Arbitrability determinations are subject to *de novo* review, and while a Circuit Court's factual findings will not be reversed on appeal if <u>any</u> evidence reasonably supports the findings, this Court

has the authority to review the totality of the record and reach its own findings based on the record before it. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012).

CONCLUSION

For the reasons stated hereinabove as well as in Homeowners' Petition, Homeowners respectfully request that this Court grant their Petition for a Writ of Certiorari, reverse the Court of Appeal's Order, re-affirm the circuit court's findings and conclusions of law, and deny Lennar's Motion to Compel Arbitration.

Respectfully submitted,

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