

IN THE STATE OF SOUTH CAROLINA

RECEIVED

In the Supreme Court

Aug 06 2021

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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

Civil Action No.: 2014-CP-08-2424

Appellate Case No. 2020-001048

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,.....Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually,.....Defendants,

Of which

Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are.....Respondents.

And

Lennar Carolinas, LLC, ..... Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services,

Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, 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, Isidru 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.

Of whom

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 are the ..... Petitioners.

---

**JOINT BRIEF ON BEHALF OF RESPONDENTS  
SPRING GROVE PLANTATION DEVELOPMENT, INC.,  
MANALE LANDSCAPING, LLC,  
SUPER CONCRETE OF SC, INC.  
MYERS LANDSCAPING, INC.,  
KNIGHT'S CONCRETE PRODUCTS, INC.,  
KNIGHT'S REDI-MIX, INC.,  
COASTAL CONCRETE SOUTHEAST, LLC,  
COASTAL CONCRETE SOUTHEAST II, LLC,  
GUARANTEED FRAMING, LLC  
LA NEW ENTERPRISES, LLC,  
DECOR CORPORATION,  
RAUL MARTINEZ MASONRY, LLC,  
ALPHA OMEGA CONSTRUCTION GROUP, INC., AND  
SOUTH CAROLINA EXTERIORS, LLC**

---

R. Trippett Boineau, III, Esquire  
S.C. Bar No. 73769  
Heath McAlvin Stewart, III, Esquire  
S.C. Bar No. 74190  
John Adam Ribock, Esquire  
S.C. Bar No. 100731  
MCANGUS, GOUDELOCK & COURIE,  
LLC  
P.O. Box 12519  
Columbia, SC 29211  
(803) 779-2300  
Attorneys for Respondent  
Spring Grove Plantation Development, Inc.

Carmen Ganjehsani, Esquire  
S.C. Bar No. 73515  
James H. Elliott, Jr., Esquire  
S.C. Bar No. 13620  
Francis Heyward Grimball, Esquire  
S.C. Bar No. 101743  
RICHARDSON, PLOWDEN & ROBINSON, PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, SC 29202  
(803) 771-4400  
Attorneys for Respondents  
Manale Landscaping, LLC and  
Decor Corporation

Michael E. Wright, Esquire  
S.C. Bar No. 75316  
ROBERTSON HOLLINGSWORTH  
MANOS & RAHN, LLC  
550 King Street, Suite 300  
Charleston, SC 29403  
(843) 723-6470  
Attorney for Respondent  
Super Concrete of SC, Inc.

David Cooper Cleveland, Esquire  
S.C. Bar No. 13005  
Trey Matthew Nicolette, Esquire  
S.C. Bar No. 100197  
CLAWSON AND STAUBES, LLC  
126 Seven Farms Dr., Suite 200  
Charleston, SC 29492  
(800) 774-8242  
Attorneys for Respondent  
Myers Landscaping, Inc.

Rogers E. Harrell, III, Esquire  
S.C. Bar No. 101532  
MURPHY & GRANTLAND, P.A.  
4406-B Forest Drive (29206)  
Post Office Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
Attorney for Respondents  
Knight's Concrete Products, Inc. and  
Knight's Redi-Mix, Inc.

Brent M. Boyd, Esquire  
S.C. Bar No. 66217  
Timothy J. Newton, Esquire  
S.C. Bar No. 71640  
MURPHY & GRANTLAND, P.A.  
Post Office Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
Attorneys for Respondents  
Coastal Concrete Southeast, LLC, and  
Coastal Concrete Southeast II, LLC

Alan R. Belcher, Jr., Esquire  
S.C. Bar No. 71686  
Elizabeth F. Wieters, Esquire  
S.C. Bar No. 78064  
HALL BOOTH SMITH, P.C.  
111 Coleman Boulevard, Suite 301  
Mount Pleasant, South Carolina 29464  
Telephone: (843) 720-3460  
Attorneys for Respondent  
Guaranteed Framing, LLC

Christine Companion Varnado, Esquire  
S.C. Bar No. 66185  
THE SEIBELS LAW FIRM  
38 Broad Street, Suite 200  
Charleston, SC 29401  
(843) 722-6777  
Attorney for Respondents  
Guaranteed Framing, LLC

Erin D. Dean, Esquire  
S.C. Bar No. 65320  
TUPPER, GRIMSLEY, DEAN &  
CANADAY, P.A.  
Post Office Box 2055  
Beaufort, SC 29901-2055  
(843) 524-1116  
Attorneys for Respondents  
LA New Enterprises Construction, Inc., and  
Raul Martinez Masonry

Stephen L. Brown, Esquire  
S.C. Bar No. 66468  
Catherine H. Chase, Esquire  
S.C. Bar No. 74593  
CLEMENT RIVERS, LLP  
25 Calhoun Street, Suite 400  
Charleston, SC 29401  
(843) 720-5488  
Attorneys for Respondent  
Alpha Omega Construction Group, Inc.

Preston B. Dawkins, Jr., Esquire  
S.C. Bar No. 72431  
AIKEN BRIDGES ELLIOTT TYLER &  
SALEEBY, PA  
181 East Evans Street, Suite 409 (29506)  
Post Office Drawer 1931 (29503)  
Florence, SC  
(843) 669-8787  
Attorney for Respondent  
Alpha Omega Construction Group, Inc.

Jenny C. Honeycutt, Esquire  
S.C. Bar No. 72657  
BEST HONEYCUTT, P.A.  
Post Office Box 13466  
102 Wappoo Creek Drive, Suite 8 (29412)  
Charleston, South Carolina 29422  
(843) 793-4744  
Attorney for Respondent  
South Carolina Exteriors, LLC

**TABLE OF CONTENTS**

	<u>Page Number</u>
Table of Authorities .....	ii
Statement of the Case.....	1
Argument .....	4
I. South Carolina law regarding applicability of arbitration agreements .....	4
A. The test for doctrine of incorporation by reference .....	5
B. Law governing the scope of arbitration agreements and their enforceability against non-signatories .....	6
C. The various arbitration agreements cannot be incorporated into a single overall arbitration agreement. ....	6
1. Property relationships .....	7
a. Sales Contract .....	7
b. Deed .....	7
c. Restrictive Covenants .....	8
d. Application to this case.....	8
2. Building construction relationships .....	8
a. Contracts and Subcontracts.....	9
b. Warranties .....	9
3. Summary and Application .....	10
II. Undersigned Respondents’ arguments to the Court of Appeals .....	11
Conclusion .....	12

**TABLE OF AUTHORITIES**

**CASES**

	<u>Page Number</u>
<u>Carlson v. S.C. State Plastering, LLC</u> , 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) .....	7-8
<u>Carroll v. Britt</u> , 227 S.C. 9, 86 S.E.2d 612 (1955) .....	7
<u>Damico v. Lennar Carolinas, LLC</u> , 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020).....	3, 11
<u>Dreher v. S.C. Dep’t of Health &amp; Env’t Control</u> , 412 S.C. 244, 772 S.E.2d 505 (2015) .....	12
<u>I’on, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000) .....	11
<u>Kirkman v. Parex, Inc.</u> , 369 S.C. 477, 632 S.E.2d 854 (2006) .....	9-10
<u>Klutts Resort Realty v. Down’Round Dev. Corp.</u> , 268 S.C. 80, 232 S.E.2d 20 (1977).....	5-6
<u>Kramlich v. Hale</u> , 901 N.W.2d 72 (N.D. 2017).....	5
<u>Lane v. Trenholm Building Co.</u> , 267 S.C. 497, 229 S.E.2d 728 (1976).....	9
<u>Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.</u> , 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).....	8
<u>Sentry Eng’g &amp; Const., Inc. v. Mariner’s Cay Dev. Corp.</u> , 287 S.C. 346, 338 S.E.2d 631 (1985).....	5, 6, 9, 10, 11, 12
<u>Smith v. Comm’rs of Pub. Works of City of Charleston</u> , 312 S.C. 460, 441 S.E.2d 331 (Ct. App. 1994).....	8
<u>Smith v. D.R. Horton, Inc.</u> , 417 S.C. 42, 790 S.E.2d 1 (2016) .....	4, 10
<u>Weckesser v. Knight Enters. S.E., LLC</u> , 228 F. Supp. 3d 561 (D.S.C. 2017) .....	6
<u>Wilson v. Willis</u> , 426 S.C. 326, 827 S.E.2d 167 (2019) .....	6

STATUTES AND COURT RULES

Page Number

Rule 59(e), SCRCP .....1

SECONDARY AUTHORITIES

Page Number

23 Am. Jur. 2d Deeds § 1 (May 2021 Update) .....7

17A C.J.S. Contracts § 419 (June 2021 Update) .....5

17A C.J.S. Contracts § 470 (June 2021 Update) .....9

92 C.J.S. Vendor and Purchaser § 3 (July 2021 Update) .....7

92 C.J.S. Vendor and Purchaser § 11 (July 2021 Update) .....7

John G. Sprankling, Understanding Prop. Law § 20.01[E], at 302 (2000) .....7

21 Williston on Contracts § 57:23 (4th ed. May 2021 Update) .....5

## STATEMENT OF THE CASE

This matter arises out of alleged construction deficiencies in a community of single-family homes known as The Abbey at Spring Grove Plantation in Moncks Corner, South Carolina (hereinafter “The Abbey”). Spring Grove Plantation Development Inc. (hereinafter “Spring Grove Development”) was the original owner of the land on which the homes are currently located and the declarant of the restrictive covenants for the project. Lennar Carolinas, LLC (“Lennar”) developed, constructed, and sold the homes. Lennar subcontracted its work to various subcontractors, many of which are parties to this action.

On December 12, 2014, Plaintiff homeowners filed this action alleging they own homes in the Abbey that were defectively constructed. (R. pp.24-41.) Plaintiffs sued Lennar, Spring Grove Development, and others. (Id.) Plaintiffs filed an Amended Complaint on November 23, 2015. (R. pp. 75-108.) Lennar asserted cross-claims and third-party claims against Spring Grove and many of its subcontractors and suppliers (hereinafter collectively “the Subcontractors”) when it filed its Answer to Plaintiffs’ Amended Complaint on November 25, 2015. (R. pp. 109-64.)

Lennar filed a Motion to Compel Arbitration on June 1, 2015. (R. pp. 257-261). Lennar’s Amended Motion to Compel Arbitration, filed March 30, 2016, requested the circuit court to compel Plaintiffs, Spring Grove Development, and the Subcontractors to arbitration. (R. pp. 262-269.) The Plaintiff homeowners opposed Lennar’s motion. (R. pp. 2434-52.) Spring Grove and some of the Subcontractors also filed memoranda in opposition.

The trial court heard Lennar’s motion on April 11, 2016. (R. pp. 2587-2593.) The Circuit Court denied Lennar's Motion to Compel on September 21, 2016. (R. pp. 4-23.) The Order did not address Lennar’s motion with respect to Spring Grove and the Subcontractors.

Lennar filed a Motion to Reconsider pursuant to Rule 59(e), SCRPC on October 3, 2016. (R. pp. 2553-2572.) Lennar pointed out in that motion that the trial court failed to discuss the

portions of Lennar's motion seeking to compel its subcontractors to arbitration. (R. pp. 2571-2572). Lennar recognized that its motion was denied in its entirety, but it sought clarification regarding the effect of the order on its claims against the subcontractors and the basis for the trial court's ruling. (Id. at 2572.)

On October 26, 2016, the Circuit Court issued a Form 4 Order denying all motions to reconsider. (R. p. 3.) This Order provided no clarification as to Lennar's claims against its Subcontractors and Spring Grove. (Id.) Lennar appealed both Orders.

In the Court of Appeals, Lennar focused upon its dispute with the Plaintiff homeowners. (App'x, Lennar Final Br. filed Sept. 5, 2017.) Lennar raised the issue at the end of its brief that the trial court's order failed to address Lennar's motion to compel as to the Subcontractors. (Id. at pp. 35-36.) Lennar requested that the Court of Appeals remand to the trial court for consideration of whether its claims against its Subcontractors should be submitted to arbitration. (Id. at p. 36.) The Plaintiff homeowners, who did not sue most of the Subcontractors, did not address arbitration of claims against Subcontractors in their Respondents' Brief. (See App'x filed Sept. 6, 2017.)

Spring Grove and the Subcontractors submitted briefs to the Court of Appeals. (App'x filed Sept. 6, 2017.) Spring Grove contended in its brief that it did not enter into any arbitration agreement. (Id., Spring Grove Final Br. filed Sept. 1, 2017.) Some Subcontractors also contended that Lennar has no contract with them. (See App'x.) The Subcontractors generally argued that Lennar waived its arguments against them by failing to adequately raise them in its brief. (See App'x.) Many Subcontractors argued in the alternative that Lennar's arbitration agreement with them, should it be found to be enforceable, is derivative of the outcome of Lennar's arbitration dispute with Plaintiffs. Should the court enforce Lennar's motion to compel arbitration, these Subcontractors

contend they may to compelled to arbitrate only in the same forum as the homeowners' claims against Lennar, and only pursuant to the Federal Arbitration Act (FAA). (See, e.g., App'x, Décor Corp. Br. filed Sept. 5, 2017, at p. 9.)

The Court of Appeals reversed the trial court's Order in a published opinion. Damico v. Lennar Carolinas, LLC, 430 S.C. 188, 844 S.E.2d 66 (Ct. App. 2020). The Court of Appeals ruled that the arbitration agreements in the Purchase and Sales Agreements are enforceable under the FAA. Id. at 199, 844 S.E.2d at 72. The Court of Appeals did not analyze Lennar's arbitration disputes with its subcontractors or the effect of the restrictive covenants. In the concluding paragraph, the Court of Appeals held as follows:

Because it appears the circuit court did not specifically rule on Lennar's motions to compel the subcontractors and the developer, Spring Grove Plantation, Inc., to arbitration, we remand those motions to the circuit court for a ruling.

Id. Plaintiffs filed a Petition for Rehearing in the Court of Appeals on June 25, 2020. The Petition was denied on July 1, 2020.

Plaintiffs filed a Petition for *Certiorari* on July 31, 2020. The issues raised in the Petition relate to Plaintiffs' dispute with Lennar. Specifically, Plaintiffs contend that the arbitration agreements in the Purchase and Sale Agreements, Limited Warranties, Covenants, and Deeds must all be read together to comprise the overall arbitration agreement. Plaintiffs contend the referenced arbitration agreement(s) are unconscionable and unenforceable, whether read together or separately, and that the FAA does not apply.

This Court granted *certiorari* by Order dated May 28, 2021. The Order did not limit or specify the issues before this Court. The undersigned, who represent Spring Grove and some Subcontractors (hereinafter "Undersigned Respondents"), file this joint brief out of abundance of caution and to preserve the arguments they made to the Court of Appeals.

## ARGUMENT

This case involves around fifty (50) arbitration agreements. (See R. p. 267.) Plaintiffs seek to mix some or all of them together and to use the resulting confusion to argue for their unenforceability. It appears that the controlling case on this issue has been heretofore overlooked by all parties.

Undersigned Respondents contest Plaintiffs' position because this Court's ruling could affect their interests. If this Court rules that all arbitration agreements involving the Plaintiffs are to be read as a single contract, what prevents Spring Grove and the Subcontractors from being lumped in as well? If all of the applicable arbitration agreements are considered as a unit that transcends the scope of each particular contract, then who controls the terms of that overall arbitration "agreement?" Undersigned Respondents assert that each arbitration agreement must be read independently in the context of the instrument in which it is contained.

### **I. South Carolina law regarding applicability of arbitration agreements**

Plaintiffs' argument for aggregating various documents to create an overall arbitration agreement is based upon Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016). In Smith, this Court held that the entirety of a paragraph in a home purchase agreement entitled "Warranties and Dispute Resolution" constituted the arbitration agreement. Id. at 48, 790 S.E.2d at 4. The "Warranties and Dispute Resolution" provision was divided into ten (10) subparagraphs. Id. at 45, 790 S.E.2d at 2. This Court rejected the builder's argument that the arbitration agreement was limited to one subparagraph. See id. at 48, 790 S.E.2d at 4 ("D.R. Horton asserts that the arbitration agreement is wholly contained in subparagraph 14(g).").

Smith does not address the applicability of different arbitration agreements in separate documents. Smith is inapplicable because it fails to resolve two key issues in arbitration

jurisprudence: (1) incorporation by reference, and (2) enforcement upon non-signatories. Other cases control these issues.

**A. The test for doctrine of incorporation by reference**

The doctrine of incorporation by reference allows separate documents to be annexed into a contract. 17A C.J.S. Contracts § 419 (June 2021 Update). “For an incorporation by reference to be effective, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.” Id. “A reference to another document must be clear and unequivocal, and the terms of the incorporated document must be known or easily available to the parties.” Id. This type of incorporation is contractual in nature.

Arbitration agreements may be referenced in other documents. 21 Williston on Contracts § 57:23 (4th ed. May 2021 Update). A substantial body of law determines when an arbitration provision in one contract may be applied to disputes under other agreements. Kramlich v. Hale, 901 N.W.2d 72, 75 (N.D. 2017) (surveying applicable case law).

This Court has adopted a rule governing incorporation by reference as a matter of law as applied to arbitration agreements:

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the *same time*, by the *same parties*, for the *same purpose* and in the course of the *same transaction*, the courts will consider and construe the instruments together. The theory is that the instruments are effectively *one instrument* or contract.

Sentry Eng’g & Const., Inc. v. Mariner’s Cay Dev. Corp., 287 S.C. 346, 350, 338 S.E.2d 631, 633 (1985) (quoting Klutts Resort Realty v. Down’Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Under Sentry, arbitration agreements in one document apply to another only when the two instruments are executed (1) at the same time, (2) by the same parties, (3) for the same purpose, and (4) in the same transaction. Id. The court must effectively find that the two documents are part of the same instrument or transaction. Id.

Unless these requirements are met, courts do not read separate documents together. Weckesser v. Knight Enters. S.E., LLC, 228 F. Supp. 3d 561, 565-66 (D.S.C. 2017).

This Court has also adopted a rule for construction:

Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated.

Klutts, 268 S.C. at 88-89, 232 S.E.2d at 24. Construing two agreements together does not necessarily make non-signatories parties to an arbitration agreement. Weckesser, 228 F. Supp. 3d at 566.

**B. Law governing the scope of arbitration agreements and their enforceability against non-signatories**

Questions concerning the scope of arbitration agreements are evaluated under federal substantive law. Wilson v. Willis, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). On the other hand, the applicability of arbitration agreements to non-signatories is a question of state law. Id. at 338, 827 S.E.2d at 173-74.

South Carolina recognizes at least five theories for binding non-signatories, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil-piercing / alter ego, and (5) estoppel. Wilson, 426 S.C. at 338, 827 S.E.2d at 174. Under the direct benefits estoppel theory, a non-signatory may subject himself to an arbitration agreement by accepting the benefits of a contract containing an arbitration clause. Id. at 340, 827 S.E.2d at 175. None of these issues have been briefed in this appeal.

**C. The various arbitration agreements cannot be incorporated into a single overall arbitration agreement.**

The arbitration agreements at issue in this case cannot be incorporated and construed together under Sentry. The instruments in which the arbitration agreements are contained are

not all signed by all parties to this case. The instruments were created at different times for different purposes. They cannot all be considered effectively part of the same instrument or transaction. This is evident from an overview of the relationship of the parties.

A house, while a finished product, is considered real property. See Carroll v. Britt, 227 S.C. 9, 15, 86 S.E.2d 612, 615 (1955) (explaining that structures attached to the land become fixtures). The arbitration agreements at issue concern relationships pertaining to both property law and the construction of the buildings.

### **1. Property relationships**

Real property transactions typically occur in two stages, the contract for sale and the closing. Both of these transactions are relevant.

#### **a. Sales Contract**

“A contract for the sale of real property . . . is one in which one party agrees to buy and the other agrees to sell.” 92 C.J.S. Vendor and Purchaser § 3 (July 2021 Update). “It is an executory contract, to be performed in the future, . . . and, if fulfilled, results in a sale.” Id. The parties to the contract for sale are the vendor and the purchaser. 92 C.J.S. Vendor and Purchaser § 11 (July 2021 Update). The contract for sale is not binding on non-parties or those not in privity. Id.

#### **b. Deed**

A deed is a document that conveys title to an interest in real property. 23 Am. Jur. 2d Deeds § 1 (May 2021 Update). This transfer occurs at closing. John G. Sprankling, Understanding Prop. Law § 20.01[E], at 302 (2000).

Terms from the contract for sale typically merge into the deed. Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013). However, agreements that are not intended to be merged are not subject to this doctrine. Id. In

Carlson, the court held that an arbitration agreement in a purchase agreement was not merged into the deed. Id. at 261, 743 S.E.2d at 874.

### **c. Restrictive Covenants**

Restrictive covenants are “agreements to do, or refrain from doing, certain things with respect to real property.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). Restrictive covenants are not sales contracts—they “run with the land.” Id. This means they are enforceable by and against later grantees.” Id. Restrictive covenants are created by a declaration that is executed and recorded in the same manner as a deed. Smith v. Comm’rs of Pub. Works of City of Charleston, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994).

### **d. Application to this case**

Plaintiffs’ arguments on appeal concern all three types of documents. The Purchase and Sales Agreements are sales contracts that contain arbitration agreements. (See e.g., R. p. 300.) The Deeds through which Plaintiffs took title contain arbitration agreements. (See e.g., R. pp. 2244, 2246.) Special rules apply to merger of provisions from the Purchase and Sales Agreements into the Deeds—issues that have not been briefed in this appeal. The Declaration of Covenants also contains an arbitration provision. (R. pp. 2315, 2362.) The restrictive covenants are completely separate from the sales contracts and deeds. They are part of a separate transaction(s) at a different time(s) by different parties. Moreover, these are only some of the documents at issue in this case that contain arbitration agreements. These all relate to ownership and use of the land.

## **2. Building construction relationships**

A separate body of law concerns building construction and claims of defective construction. These relationships are governed by different contracts and warranties.

### **a. Contracts and Subcontracts**

Typically, a developer owns the property and prepares the land for construction. Spring Grove allegedly performed some or all of this work. The builder (in this case, Lennar) contracts with either the developer or the homeowner to construct the building. The builder, in turn, often subcontracts portions of the work to independent contractors. The builder also contracts with suppliers to provide materials for the project. The undersigned Subcontractors contracted with Lennar to either perform a specified scope of work or supply materials for the project.

Each of these contracts contains numerous provisions specifying the rights and duties of the respective parties. Lennar's Motion to Compel concerns approximately 30 alleged arbitration agreements in supplier, subcontractor, and consultant agreements. (R. p. 267.) Each of these subcontracts form separate transactions that cannot be aggregated with all the other instruments involved in this case under Sentry.

### **b. Warranties**

Manufacturers and builders are expected to stand behind their products. One means of accomplishing this is through warranties. "A 'warranty' is an assurance by one party to a contract of the existence of a present fact upon which the other party may rely." 17A C.J.S. Contracts § 470 (June 2021 Update). A warranty "amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue." Id. Warranties can be either express or implied in law. Id.

South Carolina imposes certain warranties as a matter of law. See Lane v. Trenholm Building Co., 267 S.C. 497, 229 S.E.2d 728 (1976) (warranty of workmanlike service); Kirkman v. Parex, Inc., 369 S.C. 477, 482-83, 632 S.E.2d 854, 856-57 (2006) (warranty of

habitability). Disclaimers of warranties are permitted in certain circumstances. Id. at 485, 632 S.E.2d at 858.

Lennar's Motion to Compel references a Limited Warranty. (R. pp. 825-33.) Lennar's Limited Warranty contains certain disclaimers and express warranties. It also has an arbitration provision. (R. pp. 831-33.) Lennar and the Plaintiffs dispute the applicability and enforceability of the arbitration provision in the Limited Warranty.

Lennar appears to acknowledge that its Limited Warranty was incorporated into the Purchase and Sales Agreements. (R. p. 276, ¶ 12.) However, any such incorporation is contractual and should not be imposed by law. The Limited Warranty serves a different purpose than the Purchase and Sales Agreements. Warranties concern the quality of the construction of the homes as a product, whereas sales contracts and deeds focus upon ownership of the property.

### **3. Summary and Application**

Smith does not address the question of whether arbitration agreements in separate documents must be read together. Sentry is the controlling case concerning the applicability of arbitration agreements to separate contracts or instruments.

Based upon the above, it is manifest that the Sentry test cannot be met. Many of the numerous arbitration agreements at issue in this case are contained in separate contracts in separate transactions at different times by different parties for different purposes. Each arbitration provision must be read independently in the context of the particular contract or instrument within which each is contained, and with regard to its particular transaction.

Undersigned Respondents are concerned about the implications of a broad rule as requested by the Plaintiffs in this matter. Such a rule would create confusion and invite litigation that would tax judicial resources, undermining the aims of alternative dispute

resolution. It may also put South Carolina law at odds with the law of other states and even federal law.

Accordingly, Undersigned Respondents request that this Court reaffirm Sentry and apply it to this case. The Court of Appeals implicitly followed Sentry by reversing the trial court ruling that all of the applicable arbitration provisions should be read together. Damico, 430 S.C. at 198, 844 S.E.2d at 72. The Court of Appeals' opinion should be affirmed on this issue. See I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding that an appellate court may affirm upon any additional sustaining ground appearing in the record). Under Sentry, arbitration agreements may not be aggregated from separate documents into a single undifferentiated whole. Rather, each separate contract must be considered in its own context. Provisions for incorporation must be interpreted according to their terms in the context of the particular contract or instrument in which they appear.

## **II. Undersigned Respondents' arguments to the Court of Appeals**

As discussed above, Undersigned Respondents presented various defenses to the trial court and the Court of Appeals. Spring Grove contended it did not enter into any arbitration agreement. Other Undersigned Respondents asserted that Lennar did not have contracts with them for the work at issue. Some or all of the Undersigned Respondent argued in the Court of Appeals that Lennar waived its arguments regarding its arbitration agreements with Undersigned Respondents by failing to make substantive arguments and citations to authority. Many Undersigned Respondents also contended that Lennar cannot compel them to arbitration independently of the forum in which the Plaintiffs' disputes with Lennar are litigated. The Court of Appeals found that the trial court did not address arbitration issues pertaining to Spring Grove and the Subcontractors and remanded those issues to the trial court for consideration.

The Court of Appeals ruled that Plaintiffs and Lennar must arbitrate their disputes under the FAA. That ruling is consistent with Undersigned Respondents' position to the extent it would allow for Lennar's third-party claims against Subcontractors to be litigated in the same arbitration proceeding pursuant to the FAA. A reversal of the Court of Appeals ruling could adversely affect Undersigned Respondents' interests when the trial court takes up the arbitration agreements in the applicable instruments (to the extent such agreements exist). Plaintiffs' position could force non-signatories into arbitration to which they did not consent. Also, the effect of the arbitration provision in Lennar's subcontracts is to some extent derivative of the outcome of this dispute between Lennar and Plaintiffs.

Undersigned Respondents are unsure of the relevance of their other arguments to the Court of Appeals in the current procedural posture of this case. To avoid waste of judicial resources, Undersigned Respondents will not repeat them here. Nevertheless, Undersigned Respondents hereby incorporate by reference their arguments in their respective briefs to the Court of Appeals as if re-stated herein.

### **CONCLUSION**

For the foregoing reasons, Undersigned Respondents respectfully submit that the Court of Appeals ruling be affirmed to the extent it applies to them. This case should be remanded to the trial court with instructions to interpret each arbitration agreement consistently with Sentry. Undersigned Respondents further submit that because no party sought review of the Court of Appeals' ruling as to Spring Grove and the Subcontractors, the Court of Appeals' disposition, and its recognition that the instruments affecting Undersigned Respondents are to be treated separately, should remain undisturbed on remand. Dreher v. S.C. Dep't of Health & Env't Control, 412 S.C. 244, 249, 772 S.E.2d 505, 508 (2015) ("An unappealed ruling is the law of the case and requires affirmance.").

Respectfully submitted,

August 6, 2021

s/ John Adam Ribock

R. Trippett Boineau, III, Esquire  
S.C. Bar No. 73769  
Heath McAlvin Stewart, III, Esquire  
S.C. Bar No. 74190  
John Adam Ribock, Esquire  
S.C. Bar No. 100731  
MCANGUS, GOUDELOCK & COURIE,  
LLC  
P.O. Box 12519  
Columbia, SC 29211  
(803) 779-2300  
Attorneys for Respondent  
Spring Grove Plantation Development, Inc.

s/ Carmen Ganjehsani

Carmen Ganjehsani, Esquire  
S.C. Bar No. 73515  
James H. Elliott, Jr., Esquire  
S.C. Bar No. 13620  
Francis Heyward Grimball, Esquire  
S.C. Bar No. 101743  
RICHARDSON, PLOWDEN & ROBINSON,  
PA  
1900 Barnwell Street (29201)  
Post Office Drawer 7788  
Columbia, SC 29202  
(803) 771-4400  
Attorneys for Respondents  
Manale Landscaping, LLC and  
Decor Corporation

s/ Michael E. Wright

Michael E. Wright, Esquire  
ROBERTSON HOLLINGSWORTH  
MANOS & RAHN, LLC  
S.C. Bar No. 75316  
550 King Street, Suite 300  
Charleston, SC 29403  
(843) 723-6470  
Attorney for Respondent  
Super Concrete of SC, Inc.

s/ David Cooper Cleveland

David Cooper Cleveland, Esquire  
S.C. Bar No. 13005  
Trey Matthew Nicolette, Esquire  
CLAWSON AND STAUBES, LLC  
126 Seven Farms Dr., Suite 200  
Charleston, SC 29492  
(800) 774-8242  
Attorneys for Respondent  
Myers Landscaping, Inc.

s/ Rogers E. Harrell, III

Rogers E. Harrell, III, Esquire  
S.C. Bar No. 101532  
MURPHY & GRANTLAND, P.A.  
4406-B Forest Drive (29206)  
Post Office Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
Attorney for Respondents  
Knight's Concrete Products, Inc. and  
Knight's Redi-Mix, Inc.

s/ Timothy J. Newton

Brent M. Boyd, Esquire  
S.C. Bar No. 66217  
Timothy J. Newton, Esquire  
S.C. Bar No. 71640  
MURPHY & GRANTLAND, P.A.  
Post Office Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
Attorneys for Respondents  
Coastal Concrete Southeast, LLC, and  
Coastal Concrete Southeast II, LLC

s/ Elizabeth F. Wieters

Alan R. Belcher, Jr., Esquire  
S.C. Bar No. 71686  
Elizabeth F. Wieters, Esquire  
S.C. Bar No. 78064  
HALL BOOTH SMITH, P.C.  
111 Coleman Boulevard, Suite 301  
Mount Pleasant, South Carolina 29464  
Telephone: (843) 720-3460  
Attorneys for Respondent  
Guaranteed Framing, LLC

s/ Christine Companion Varnodo

Christine Companion Varnado, Esquire  
S.C. Bar No. 66185  
THE SEIBELS LAW FIRM  
38 Broad Street, Suite 200  
Charleston, SC 29401  
(843) 722-6777  
Attorney for Respondents  
Guaranteed Framing, LLC

s/ Erin D. Dean

Erin D. Dean, Esquire  
S.C. Bar No. 65320  
TUPPER, GRIMSLEY, DEAN &  
CANADAY, P.A.  
Post Office Box 2055  
Beaufort, SC 29901-2055  
(843) 524-1116  
Attorneys for Respondents  
LA New Enterprises Construction, Inc., and  
Raul Martinez Masonry

s/ Catherine H. Chase

Stephen L. Brown, Esquire  
Catherine H. Chase, Esquire  
CLEMENT RIVERS, LLP  
S.C. Bar No. 66468  
25 Calhoun Street, Suite 400  
Charleston, SC 29401  
(843) 720-5488  
Attorneys for Respondent  
Alpha Omega Construction Group, Inc.

s/ Preston B. Dawkins, Jr.

Preston B. Dawkins, Jr., Esquire  
AIKEN BRIDGES ELLIOTT TYLER &  
SALEEBY, PA  
S.C. Bar No. 72431  
181 East Evans Street, Suite 409 (29506)  
Post Office Drawer 1931 (29503)  
Florence, SC  
(843) 669-8787  
Attorney for Respondent  
Alpha Omega Construction Group, Inc.

s/ Jenny C. Honeycutt

Jenny C. Honeycutt, Esquire  
S.C. Bar No. 72657  
BEST HONEYCUTT, P.A.  
Post Office Box 13466  
102 Wappoo Creek Drive, Suite 8 (29412)  
Charleston, South Carolina 29422  
(843) 793-4744  
Attorney for Respondent  
South Carolina Exteriors, LLC

IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED

Aug 06 2021

S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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

Civil Action No.: 2014-CP-08-2424

Appellate Case No. 2020-001048

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, ..... Respondents,

v.

Lennar Carolinas, LLC, Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, Paragon Site Constructors, Inc., Civil Site Environmental and Rick Bryant, Individually, ..... Defendants,

Of which

Spring Grove Plantation Development, Inc., Manale Landscaping, LLC, Super Concrete of SC, Inc., Southern Green, Inc. TJB Trucking/Leasing, LLC, and Civil Site Environmental are ..... Respondents.

And

Lennar Carolinas, LLC, ..... Appellant,

v.

The Earthworks Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C. & A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete

Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, 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, Isidru Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aparecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, ..... Fourth-Party Defendants.

Of whom

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 are the ..... Petitioners.

---

**CERTIFICATE OF COUNSEL**

---

In accordance with Rule 211(b), SCACR, the undersigned certifies that the Joint Brief of Respondent complies with the Supreme Court Order of April 15, 2014.

S/Timothy J. Newton

Brent M. Boyd, Esquire

Timothy J. Newton, Esquire

MURPHY & GRANTLAND, P.A.

Post Office Box 6648

Columbia, South Carolina 29260

(803) 782-4100, ext. 1210

tnewton@murphygrantland.com

Attorneys for Respondent

Coastal Concrete Southeast, LLC and

Coastal Concrete Southeast II, LLC

August 6, 2021