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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 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 RESPONDENT BRIEF

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IV. WHETHER OWNERS' BRIEF IMPROPERLY RAISES MULTIPLE UNPRESERVED ARGUMENTS.

STATEMENT OF THE CASE

This action is about whether a general contractor—Lennar Carolinas, LLC ("Lennar")—may enforce the arbitration provision in the Purchase and Sale Agreement executed by and between it and the Owners who purchased the houses being built and sold by Lennar. Said another way, the case is about Lennar's right to compel arbitration of the claims by the individuals with whom it executed a Purchase and Sale Agreement for the sale of a lot and the construction of a house.

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. 273). As the owner of all of the lots in The Abbey, Spring Grove Development drafted and filed the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Spring Grove Plantation Community ("Covenants") covering each individual lot. (R. 2315-2371). Lennar purchased the subdivision lots in The Abbey from Spring Grove Development subject to the Covenants.

Subsequently, Patricia Damico, Joshua and Brettany Beutow, Jonathan and Theresa Douglass, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively, the "Owners")[1] entered into individual contracts (the "Purchase and Sale Agreement") with Lennar for the purchase of a lot and the construction of a residence in The Abbey. (R. 296-713). The purchasers are not only subject to the individual Purchase and Sale Agreements which contain an agreement to arbitrate, they are also separately subject to the Lennar

[1] Lenna Lucas purchased her home from Paula Sellers and is also considered an "Owner" for the purpose of this appeal. Paula Sellers purchased the house she sold to Lenna Lucas from Lennar. The circuit court's order did not distinguish Lenna Lucas from the other Owners and the Court of Appeals treated Lenna Lucas as an "Owner" because, like the other Plaintiff Owners, she expressly asserted a claim for breach of the Purchase and Sale Agreement in the Amended Complaint.

1-2-10 Warranty (the "Lennar Warranty") (R. 825-886), and the separate Deed or Title to Real Estate from Lennar to each Owner (collectively, the "Deeds"). (R. 2243-2312).

The purchases occurred between January 2011 and May 2013. (R. 296-713). As a part of each purchase, each Owner specifically selected, as an express provision in the Purchase and Sale Agreement, various construction details, components, and finishes for his/her house. (R. 715-764). Certain Owners also negotiated additional options related to the construction of their residences, including installation of specific washers and dryers, faux blinds, privacy fencing, and other upgrades. (R. 715-764).

Each Purchase and Sale Agreement is a distinct contract that contains the following arbitration provision in a separately numbered Section 16.1, which section 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 and 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. 263). 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, 2016, 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. (Appendix 272). The Court of Appeals held:

1. The circuit court misapplied (violated) the *Prima Paint* doctrine by not considering the applicable arbitration provision in Section 16 of the Purchase and Sale Agreement as an independent arbitration provision and by not limiting its review to construe that arbitration provision and to determine unconscionability or enforceability based on the terms of that provision alone;

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 Purchase and Sale Agreement arbitration provision between Lennar and the Owners is not ambiguous and does not contain any cross-refences to provisions outside of the arbitration provision or to other intertwining paragraphs containing unconscionable terms;

3. The circuit court erred in finding the Federal Arbitration Act ("FAA") does not apply, because the Purchase and Sale Agreement's arbitration provision 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 construing the arbitration provision of the Purchase and Sale Agreement and concluding that Owners are required to arbitrate their claims against Lennar pursuant to that arbitration provision, found there was no need to consider separately or additionally the other arbitration clauses contained in the separate Lennar Warranty, the Deeds, or the 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. On May 28, 2021, this Court issued an order granting Owners' Petition for a Writ of Certiorari.

STANDARD OF REVIEW

"It is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). Whether a claim is subject to arbitration is an issue for judicial determination and is subject to *de novo* review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). However, a circuit court's factual findings will not be reversed on appeal if the evidence reasonably supports its findings. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). The party resisting arbitration bears the burden of proving that the arbitration agreement is unenforceable. *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015) (alteration in original) (quoting *Dean*, 408 S.C. at 379, 759 S.E.2d at 731).

ARGUMENTS

I. Owners misconstrue the proper standard of review for the arbitration provision in the Purchase and Sale Agreement in an improper effort to impose restrictions on an appellate court's review of a circuit court order denying a motion to compel arbitration.

The law is clear, a court's purview in assessing whether an arbitration provision in a contract should be enforced to compel arbitration of a dispute between parties is:

1. Identify a contract between the parties containing an arbitration provision;

2. Determine whether the arbitration provision in the contract is self-contained and isolatable;

3. Separate the arbitration provision from the rest of the contract;

4. Analyze the plain and unambiguous language of the arbitration provision without looking to other sections of the contract or entirely separate agreements to decide whether the parties entered into a valid agreement to arbitrate; and

5. Decide whether the claims at issue are within the scope of the arbitration provision or if the parties delegated that gateway issue for determination by the arbitrator.

See Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 406 (1967); *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020).

Courts are to apply the general principles of contract law in determining whether a valid and enforceable agreement to arbitrate exists. *Doe v. TCSC, LLC*, 430 S.C. 602, 611, 846 S.E.2d 874, 878 (Ct. App. 2020); *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016). Fundamental to the interpretation of the arbitration clause in the Purchase and Sale Agreement is the proposition that the construction of a contract is a question of law for the Court. *Crenshaw v. Erskine Coll.*, 432 S.C. 1, 26, 850 S.E.2d 1, 14 (2020). Furthermore, "[i]t is a question of law for the court whether the language of a contract is ambiguous," and no separate factual findings are required or permitted to alter the interpretation after a court finds, as a matter of law, that a contract is unambiguous. *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (2020) (quoting *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001)); *Gordon Farms, Inc. v. Carolina Cinema Corp.*, 294 S.C. 158, 160, 363 S.E.2d 235, 237 (Ct. App. 1987) ("[E]xtraneous evidence is not admissible to alter or vary the terms of an unambiguous written contract.").

Owners seek to assign error to the Court of Appeals for not expressly considering and addressing all of the factual matters relied upon by the circuit court in its erroneous decision that the arbitration provision was not enforceable. Of course, however, what the Court of Appeals did was properly to construe the Purchase and Sale Agreement arbitration provision by:

1. Identifying the relevant contract between each Owner and Lennar – the Purchase and Sale Agreement.

2. Determining that the arbitration provision in that Agreement is self-contained and isolatable – Section 16 of the Agreement.

3. Separating the arbitration provision (Section 16) from the rest of the Agreement – it contained no cross-references, incorporations or commingling of agreements or provisions.

4. Concluding that the arbitration provision (Section 16) was unambiguous.

5. Deciding that the current disputes are within the context of the clause and issues of arbitrability are expressly delegated to the arbitrator.

Owners' assertion that the Court of Appeals erred in failing to find the arbitration agreement contains cross-references and intertwining paragraphs is without merit. The issue for the Court was a matter of law, of contract interpretation, which the Court of Appeals was to construe *de novo*. *Dean*, 408 S.C. at 379, 759 S.E.2d at 731. The Court of Appeals properly found that the circuit court's construction of the Purchase and Sale Agreement was incorrect as a matter of law. The actual language of the arbitration provision was not ambiguous and does not support the circuit court's interpretation or construction. The unambiguous arbitration provision in the Purchase and Sale Agreement does not allow the circuit court to look outside that provision as part of an exercise to construe other provisions, and totally separate agreements, as part of the arbitration clause to create ambiguity or unconscionability. Therefore, the Court of Appeals did not make improper "factual findings" when analyzing the construction of the Purchase and Sale Agreement's plain and unambiguous arbitration provision, and it did not err by not considering other factual materials just because they were improperly relied upon by the circuit court. The Court of Appeals simply corrected the circuit court's erroneous legal conclusions in relation to the construction of the Purchase and Sale Agreement's arbitration provision. Thus, this Court should

reject Owners' argument that the Court of Appeals abused its discretion by reaching improper factual conclusions related to the construction of the Purchase and Sale Agreement.

II. The Court of Appeals conducted a proper and complete analysis of the applicable arbitration provision in the Purchase and Sale Agreement and did not err in reversing the circuit court and compelling the Owners to arbitrate their respective claims against Lennar.

The Court of Appeals properly analyzed Lennar's Motion to Compel Arbitration and did not err in rejecting the scope of review advocated by Owners and performed by the circuit court. Lennar moved to compel Owners to arbitrate because there were arbitration provisions in each of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds. Lennar asserted that it was entitled to compel arbitration, alternatively, under the arbitration provision in each or any of those agreements. It was not necessary that the arbitration provision in each and every one of those documents be separately enforceable.

The Court of Appeals started its analysis with the undeniably applicable Purchase and Sale Agreement and correctly found (1) the FAA applies to the Purchase and Sale Agreement, (2) the arbitration provision within the Purchase and Sale Agreement is valid and enforceable—not unconscionable, and (3) the Purchase and Sale Agreement expressly delegated any other arbitrability issues to the arbitrator. Upon reaching these valid and correct conclusions, the Court of Appeals concluded that analysis and review of the separate documents (the Lennar Warranty, the Covenants, or the Deeds) was unnecessary since the Purchase and Sale Agreement required the arbitration of the claims.

A. The Court of Appeals correctly found the Federal Arbitration Act controls the Purchase and Sale Agreement's arbitration provision.

An agreement to arbitrate must be enforceable under either the FAA, or an applicable state statute. It is not necessary that it be enforceable under both, and it is not necessary that the agreement satisfy the state arbitration statute when it is enforceable under the FAA.[2]

The FAA, 9 U.S.C.A. § 2, provides that a written arbitration provision in any contract "evidencing a transaction involving commerce" is to be compelled to arbitration if a controversy arises out of the contract or the refusal to perform the contract. This Court has adopted the United States Supreme Court's broad interpretation of the phrase "involving commerce" to mean "affecting commerce." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001); *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002). Thus, an arbitration provision is subject to the FAA if the contract affects interstate commerce. *See id.*

The FAA governs the Purchase and Sale Agreements in this case because (1) Lennar and Owners expressly agreed that their transactions involve interstate commerce and are governed by the FAA (R. 300); and (2) under South Carolina law, an agreement for the construction and purchase of a residential property involves interstate commerce, *see Blanton*, 351 S.C. at 541, 570 S.E.2d at 569.

1. The FAA applies to the Purchase and Sale Agreement because Lennar and Owners agreed and stipulated that the contract involved interstate commerce and that the FAA applies.

Section 16.1 of the Purchase and Sale Agreement states:

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[2] Owners argue in their brief that the South Carolina Uniform Arbitration Act ("SCUAA") invalidates the arbitration provision in the Purchase and Sale Agreement based on the argument that the notice provision fails to meet the statutory requirements of S.C. CODE ANN. § 15-48-10. The FAA is applicable to the arbitration provision found in the Purchase and Sale Agreement and, therefore, analysis of the applicability of the SCUAA is unnecessary. *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 dispositive).

> 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.

(R. 300). This provision is enforceable as written. *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."). This clear and unambiguous term in the arbitration provision is not disputable. *See 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.").

The unambiguous designation or stipulation by the parties to the Purchase and Sale Agreement that their transaction involves interstate commerce and is subject to arbitration pursuant to the FAA is allowable and enforceable. The stipulation and clear language of the parties to the Agreement establishes undeniably that Owners and Lennar recognized that the transaction between them involved interstate commerce and they chose to have any dispute arising from their transaction to be subject to arbitration and governed by the FAA. Therefore, the Court of Appeals properly held that Owners' disputes arising from the Purchase and Sale Agreement are subject to arbitration that is governed by the FAA because the Purchase and Sale Agreement's plain language states as much.

2. Additionally, the FAA applies to the Purchase and Sale Agreement because it is a contract for the construction of a residence which involves interstate commerce.

In truth, the Court of Appeals was not required to do more once it determined that the parties had enforceably stipulated that their Purchase and Sale Agreement involved interstate commerce and was subject to arbitration under the FAA. Nonetheless, the Court of Appeals also

addressed 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 transactions involved construction and then sale of the houses.

The FAA provides that a written arbitration provision in any contract "evidencing a transaction involving commerce" is to be compelled to arbitration if a controversy arises out of the contract. 9 U.S.C.A. § 2. It is well settled that a contract for the construction of a house involves interstate commerce. *See Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding 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 was 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.*, 405 S.C. at 122-23, 747 S.E.2d at 464-65 (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).

Owners sought to rely on the opinion in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012), to support of their argument that the Purchase and Sale Agreements do not involve interstate commerce; however, that reliance 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 expressly provided that it was merely for the purchase of a completed dwelling. 398 S.C. at 450, 730 S.E.2d at 313, 318. Importantly, 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 includes (and does not expressly eliminate) provisions for the purchaser to select "options" and "color selections" or other matters essential to 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 or activities, the Purchase and Sale Agreements in this case specifically involved the purchasers' exercise of Options Summaries, Color Selection Sheets, and Addenda to the Purchase and Sale Agreements which evidence that Owners entered into agreements with Lennar for the construction of a house. (R. 714-764).

Additionally, the affidavit of Lennar's Vice-President-Finance & Controller Robert Mauch which was filed with the circuit court, further establishes that the construction of the Owners' properties involved interstate commerce. (R. 271-294). Attached as exhibits to Mauch's affidavit are the documents evidencing that the Owners negotiated and made sections concerning the construction of their residences, including, selection of the model design of the home, color selections, and design package selections. (R. 714-764). The selection of design packages by Owners dictated, among other things, the finishes, whether a fireplace was included in the

residence, and the type of tile and flooring that would be used in the construction of the house. (R. 758-759).

The construction of the Owners' properties involved 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. *See Bernstein v. Pulte Home Co., LLC*, No. 0:19-CV-02805-JFA, 2019 WL 8014404 (D.S.C. Dec. 23, 2019) (Anderson, J.) (reviewing the application of *Bradley* based on facts that are similar to the present matter and holding that Pulte Home Company, LLC's Purchase and Sale Agreement was subject to the FAA). Accordingly, the Court of Appeals properly held the purchase and sale transaction between Lennar and each Owner involved interstate commerce and that the FAA applies to the Purchase and Sale Agreement.

B. The Court of Appeals properly analyzed the arbitration provision contained in the Purchase and Sale Agreement and correctly found that the Purchase and Sale Agreement's arbitration provision is not unconscionable.

At its core, Owners seek to have this Court ratify the circuit court's misapplication (violation) of the *Prima Paint* doctrine. Owners again wish to avoid the plain enforceability of the arbitration provision in the Purchase and Sale Agreement, by conflating language outside of the Purchase and Sale Agreement's arbitration provision in determining whether Owners must arbitrate their claims against Lennar.

The *Prima Paint* doctrine stands for the basic principle that when a court reviews the validity of an arbitration provision in an agreement, its analysis is restricted to that provision alone. *Prima Paint Corp.*, 388 U.S. at 406; *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). A party contesting the validity of a contract's arbitration provision "must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable."

Smith v. D.R. Horton, Inc., 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016) (emphasis in original). Therefore, when applying the *Prima Paint* doctrine, it is an error of law to find an arbitration provision is unconscionable based upon reference to or reliance on other terms of the contract that are not themselves in the arbitration provision. A court may only consider the terms of the arbitration provision itself—not the terms of the whole contract or those in completely separate agreements. *Id.*

Owners' argument ignores the plain and obvious fact that Section 16 of the Purchase and Sale Agreement is a separate and isolated arbitration provision that does not include any unconscionable terms. Owners' misguided approach seeks to have the Court search far and wide, through provisions of multiple agreements (the Deeds, the Covenants and the Lennar Warranty), to construct a position that broadly conflates everything together and gives rise to a proposition that the arbitration provision is unconscionable.

Section 16.1 of the Purchase and Sale Agreement provides:

> The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall . . . 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).

Section 16.3 of the Purchase and Sale Agreement further states:

> [T]he 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.

(R. 301).

There is no term in Section 16 that would render it unconscionable or unenforceable. Therefore, the circuit court erred in refusing to compel Owners individually to arbitrate their claims

against Lennar, and the Court of Appeals properly reversed this erroneous decision. Accordingly, the Court should affirm the Court of Appeal's decision.

III. The Purchase and Sale Agreement does not contain "intertwining paragraphs" or "cross-references" that justify a court expanding its review beyond Section 16 of the Purchase and Sale Agreement.

Owners rely heavily on this Court's decision in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), to justify construing terms from the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds together as a single arbitration provision. Specifically, Owners argue that the terms of the Deeds, the Lennar Warranty, and the Covenants combine with the Purchase and Sale Agreement to form a single unified arbitration agreement consisting of all of the terms of the four agreements. Owners' argument fails because Section 16 of the Purchase and Sale Agreement is self-contained and does not involve cross-reference to other sections or incorporation of other documents.

In *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4, the Court reviewed the language of the D.R. Horton home purchase agreement to determine whether the home buyers' dispute with D.R. Horton should be compelled to arbitration. Section 14 in the D.R. Horton home purchase agreement was entitled "Warranties and Dispute Resolution." *Id.* at 55, 790 S.E.2d at 7. Section 14 of the contract consisted of subparagraphs 14(a) through 14(j). *Id.* at 55-58, 790 S.E.2d at 7-9. The specific arbitration agreement was subpart "g" of Section 14 entitled "**MANDATORY BINDING ARBITRATION**." *Id.* at 57, 790 S.E.2d at 9 (emphasis in original). Section 14, including all subparts, more broadly included warranty disclaimers, and a limitation of "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." *Id.* The Court majority chose to read the entirety of Section 14 as the agreement's arbitration provision because it found Section 14's subsections (subparagraphs) contained

numerous cross-references to one another, and were intertwined.[3] For example, Section 14 in the D.R. Horton agreement contained the following cross-references:

> **d. Exclusions.** The following are excluded from all warranties provided by Seller: . . . those matters excluded in sub-paragraph (f) below . . . .
>
> **h.** In addition to the rights and obligations of each party specified in subparagraph (a)-(d) above. . . .

Id. at 55-58, 790 S.E.2d at 7-9. The Court majority relied on subparagraphs like these to conclude there were intertwining subparagraphs, and concluded that the various cross-references between the subparagraphs in Section 14 made it proper, in that case, to read the entirety of Section 14 in the D.R. Horton home purchase agreement as a single arbitration provision. *Id.* at 48, 790 S.E.2d at 4.

Owners advocate in favor of this Court reversing the Court of Appeals and affirming the circuit court's order which took unwarranted liberties, apparently based on an exaggerated interpretation of the decision in *D.R. Horton*. The circuit court held that the applicable "arbitration agreement" to be reviewed to decide Lennar's Motion to Compel Arbitration with respect to the Owners was the collective and conjunctive total of all provisions in four separate agreements (the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds). Obviously, the circuit court conducted an improper and overbroad review and analysis of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds on the belief that the decision in *D.R. Horton* allowed consideration of all of Section 14 in the D.R. Horton home purchase agreement as the arbitration agreement. However, the limited reasoning employed by the *D.R.*

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[3] Justice Kittredge, dissented and filed an opinion in which Chief Justice Pleicones concurred, on the grounds that the majority improperly expanded the arbitration provision to include terms outside of subpart "g" of Section 14. *D.R. Horton*, 417 S.C. at 62, 790 S.E.2d at 11 (Kittredge, J., dissenting). The dissent recognized that subpart "g" was obviously divisible from the other subparts and the Court's review should have been limited to subpart "g" of Section 14 alone. *Id.*

Horton court allowing characterization of the arbitration agreement in that case more broadly than just subpart "g" of Section 14, is not justified in this case. Neither the controlling law, nor the applicable facts warrant such an analysis or conclusion in this case. The arbitration provision in the Purchase and Sale Agreement is not intertwined with other sections or documents; rather, it is markedly segregated, separate, and distinct. The Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds, as written, are not intertwined, cross-referenced or commingled. They provide no basis for the overly broad and erroneous application of *D.R. Horton* demanded by Owners in this case.

The Court of Appeals correctly rejected the Owners' argument and recognized and concluded that the circuit court's overly broad interpretation of the Purchase and Sale Agreement's arbitration provision was error. No fair or justifiable reading of Section 16 supports a conclusion that it contains cross-references, or is intertwined with other provisions of the Purchase and Sale Agreement, the Deeds, and Covenants as though they are part and parcel of Section 16. The attendant circumstances which allowed the Court in *D.R. Horton* to conclude it could consider all of the paragraphs and subparagraphs of Section 14 in the agreement applicable in that case are utterly different and distinguishable from the facts and circumstances associated with Section 16 of the Purchase and Sale Agreement in this case.

Therefore, Owners' arguments regarding the purported unconscionable terms of the Lennar Warranty, the Covenants, or the Deeds lack merit. The terms of those agreements are not relevant to a proper review of the Purchase and Sale Agreement's arbitration provision, and consideration of those terms violates the *Prima Paint* doctrine. Accordingly, the Court should affirm the Court of Appeal's decision.

IV. Owners' Brief improperly raises multiple unpreserved arguments.

Owners' Brief improperly raises multiple arguments that are not preserved for review by this Court.

First, Owners argue that the Court of Appeals erred in failing to find the arbitration provision is ambiguous. This issue was not raised in the Petition for Rehearing to the Court of Appeals or in the Petition for a Writ of Certiorari. Issues not raised in a petition for rehearing to the Court of Appeals are not preserved for review by this Court. *See* Rule 242(d)(2), SCACR. Issues not raised in the Petition for a Writ of Certiorari are not preserved for review by this Court. *See McCray v. State*, 317 S.C. 557, 559 n.1, 455 S.E.2d 686, 687 n.1 (1995). Therefore, this issue is plainly not preserved for review by this Court.

Next, Owners raised for the first time in their Petition for Rehearing to the Court of Appeals the argument that the Purchase and Sale Agreement's arbitration provision is unconscionable because it includes the following terms: (1) "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 are bound hereby[4];" and (2) "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

[4] This provision provides no basis for finding the Purchase and Sale Agreement's arbitration provision is unconscionable because it has no effect on the Owners in this matter. None of the Owners are being compelled to arbitration as a child of a person who executed a Purchase and Sale Agreement or as an "other occupant." A provision that has no effect on the party attempting to avoid arbitration cannot be so one-sided that no reasonable person would agree. Thus, the argument that this provision is unconscionable is mooted by the fact that it has no application to the parties to this dispute. *See Perry Finch & others similarly situated, Plaintiffs, v. Lowe's Home Centers, LLC, formerly known as Lowe's Home Centers, Inc., Defendant.*, No. 3:20-CV-02981-JMC, 2021 WL 2982863, at *9 (D.S.C. July 15, 2021) (rejecting the plaintiff's argument that an arbitration provision was unconscionable based upon the hypothetical application of a provision allowing Lowe's to modify the contract without notice to the plaintiff).

arbitration."[5] (R. 301). New arguments—like those now 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) (stating that issues "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."); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (stating that a respondent abandons an argument based on additional sustaining grounds by failing to raise the argument in their appellate brief). Therefore, the Court should refuse to consider these untimely and unpreserved arguments.

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals' decision to compel Owners individually to arbitrate their claims against Lennar pursuant to the Purchase and Sale Agreement's valid and enforceable arbitration provision.

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[5] *See, e.g., U.S. Home Corp. v. Lanier*, 431 P.3d 38 (Nev. 2018) (unpublished) (compelling homeowners to arbitrate their claims against the developer and holding that an arbitration provision that stated "only U.S. Home, and not the Homeowners, has the option 'to include subcontractors and suppliers in mediation and arbitration'" was not unconscionable).