

IN THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

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

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.

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**RETURN TO PETITIONERS' MOTION TO STRIKE  
THE JOINT BRIEF AND ORAL ARGUMENT  
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**

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The undersigned, who represent Spring Grove Plantation Development Inc. (hereinafter "Spring Grove") and some Subcontractors (hereinafter collectively "Undersigned Respondents"), oppose Petitioners' Motion to Strike and would show that it should be denied for the following reasons.

**PROCEDURAL BACKGROUND**

Petitioners (hereinafter collectively "Damico") are homeowners at a development known as The Abbey at Spring Grove Plantation in Moncks Corner, South Carolina (hereinafter "The Abbey"). Spring Grove 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, including the undersigned Subcontractor Respondents.

Damico filed this construction defect action against Lennar, Spring Grove, and others. (R. pp. 24-41, 75-108.) Lennar filed an Amended Motion to Compel Arbitration requesting the circuit court to compel Petitioners, Spring Grove, 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.

In resisting Lennar’s motion to compel, Damico developed the theory that multiple arbitration agreements should be considered together for purposes of their “cumulative effect.” (See R. p. 2447.) Spring Grove and the Subcontractors generally opposed Damico’s theory that separate arbitration agreements should be read together and instead asked the trial court to rule based upon the terms of each individual applicable contract (or lack thereof). (See, e.g., R. p. 2592 (“The court should not ‘lump’ all the parties into arbitration irrespective of whether they are bound by an arbitration agreement”).

The trial court denied Lennar’s Motion to Compel. (R. pp. 4-23.) The Order did not address Lennar’s motion with respect to Spring Grove and the Subcontractors. Nevertheless, the trial court ruled that separate documents “must be read as a whole to comprise the arbitration ‘agreement’ . . . .” (R. p. 8.)

The Court of Appeals rejected Damico’s theory of aggregation or cumulation of arbitration agreements. Damico v. Lennar Carolinas, LLC, 430 S.C. 188, 198-99, 844

S.E.2d 66, 72 (Ct. App. 2020). The Court of Appeals confined its ruling to the arbitration provision in a single document—the purchase and sale agreement executed by each homeowner. Id. The Court of Appeals remanded the motions concerning Spring Grove and the Subcontractors, finding the trial court had not specifically ruled on them. Id. at 199, 844 S.E.2d at 72.

Damico’s Petition for *Certiorari* sought reversal of the Court of Appeals’ opinion. In Argument 2 of the Petition, Damico requested review of the ruling as to the trial court’s “finding that the arbitration provisions contained in the various agreements drafted by Lennar ‘must be read as a whole to comprise the arbitration agreement’ . . . .” Lennar filed a return to the petition. In Damico’s reply filed September 8, 2020, Damico strenuously contended that Court’s decision in Smith v. D.R. Horton, Inc., 417 S.C. 42, 790 S.E.2d 1 (2016), should be given a broad interpretation that permits cumulation or aggregation of arbitration agreements.

This Court granted Damico’s petition by Order dated May 28, 2021. This Court did not confine its review to specific questions, but instead broadly granted *certiorari* “to review the court of appeals’ decision.” This Court directed “the parties” to serve and file briefs.

Damico’s Initial Brief pursues the theory that arbitration agreements in separate documents should be cumulated or aggregated to be considered as a whole. (Br. of Petitioners filed July 8, 2021, pp. 8-12.) The Undersigned Respondents opposed Damico’s position in a Joint Brief filed August 6, 2021. Damico filed a Reply to the Joint Brief on August 26, 2021.

Damico then filed a Motion to Strike the Joint Brief on December 13, 2021. The Motion to Strike contains many of the same arguments that are included in Damico's Reply Brief. The Undersigned Respondents would show that Damico's Motion to Strike should be denied.

### **ARGUMENT**

Damico contends that Respondents' Joint Brief and request for oral arguments are improper because they did not oppose Damico's petition for *certiorari* or raise the authorities cited in their Joint Brief in the proceedings below. These arguments are insufficient to support a motion to strike.

**I. The Undersigned Respondents' lack of opposition to Damico's Petition for Certiorari does not require the Joint Brief on the merits to be stricken.**

The striking of an appellate brief is a harsh sanction that is appropriate only when the alleged violations of procedural rules interfere with or preclude review. 4 C.J.S. Appeal and Error § 739 (Nov. 2021 Update). Appellate court rules should be construed reasonably but liberally so that rights on appeal are not lost by requirements not absolutely necessary from the literal words of the rule. 4 C.J.S. Appeal and Error § 40 (Nov. 2021 Update).

Damico has not identified any appellate court rule with which the undersigned Respondents have failed to comply. Rule 240(e), SCACR, provides that failure to file a return "may be deemed a consent by that party to the relief sought in the motion or petition." In support of their Motion to Strike, Damico cited an Administrative Law Court Order dismissing an appeal for failure to file a return. See Chavis v. S.C. Dep't of Agriculture and Whillhite Seed, Inc., No. 13-ALJ-30-0471-AP, 2014 WL 494471 (S.C. Admin. Law Ct. Jan. 31, 2014).

These authorities are not applicable in this situation. The Undersigned Respondents did not oppose Damico's Petition for *Certiorari*, and the petition was subsequently granted. The Court has not ruled that the Undersigned Respondents' failure to oppose Damico's Petition was deemed a consent to the relief sought. But even if the "deemer clause" is applied, it would not affect the result here. Damico obtained the relief sought in their Petition for *Certiorari* without the Undersigned Respondents' consent. Because the relief sought in the Petition has been granted, Rule 240(e) has no further applicability.

All parties to an action whose interests may be adversely affected by the decision of the appellate court are proper and necessary parties to an appeal. 15 S.C. Jr. Appeal and Error § 31 (Nov. 2021 Update) (citing Spanish Wells Prop. Owners Ass'n, Inc. v. Bd. of Adjustment of the Town of Hilton Head Island, 295 S.C. 67, 367 S.E.2d 160 (1988)). When this Court granted Damico's Petition for *Certiorari* to review the Court of Appeals' decision, the Undersigned Respondents became parties to the appeal. The Undersigned Respondents contended that the Court of Appeals' decision should be affirmed as to them for the reasons set forth in their Joint Brief.

The Undersigned Respondents did not fail to file a return to Damico's brief on the merits of the appeal. They complied with Rule 240(e) by filing their Joint Brief. Thus, grounds for striking the Undersigned Respondents' merits brief due to failure to comply with the Appellate Court Rules do not exist.

**II. The Undersigned Respondents' legal authorities are properly before this Court.**

Damico cites no legal basis for the argument that the authorities raised by the Undersigned Respondents are not properly before this Court. The Undersigned

Respondents are proper parties to this appeal, and they are not seeking reversal based upon a new theory.

An appellant must generally raise issues to the trial court and obtain rulings to preserve issues for appeal. Smith v. NCCI, Inc., 369 S.C. 236, 247-48, 631 S.E.2d 268, 274 (Ct. App. 2006). On *certiorari*, the burden is on the petitioner to demonstrate error committed by the court below. 14 C.J.S. Certiorari § 95 (Nov. 2021 Update).

To the extent Damico seeks to introduce into this appeal an argument that the Undersigned Respondents' rights should be directly affected by cumulation of arbitration agreements, that argument is not preserved. Sloan v. Dep't of Transp., 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005) (holding that failure to appeal an alternative ground of the judgment below will result in affirmance). However, an appellate court may affirm upon any ground appearing in the record. I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Regardless, these are issues for resolution on the merits.

Moreover, the Undersigned Respondents have argued throughout this proceeding that the determination of arbitrability should be based upon the specific contracts to which they are parties. Their stated ground for seeking affirmance is consistent with that position.

Furthermore, the authorities the Undersigned Respondents cited will not lose their effect if the Undersigned Respondents' Joint Brief is stricken. The ethical rules of candor toward the tribunal require that controlling authority be disclosed, even if it is adverse to a party's position. Rule 407, SCACR, Rule 3.3(a)(2), Rules of Prof. Conduct.

## CONCLUSION

The fact that the Undersigned Respondents did not oppose Damico's Petition for *Certiorari* does not deprive them of their status as respondents to this appeal. Their merits brief should not be stricken because they have not failed to comply with any procedural rule, and their brief seeks affirmance of the Court of Appeals' opinion based upon their consistent position that cumulation of arbitration agreements should not extend to the contracts to which the Undersigned Respondents are party. The authorities cited in the Undersigned Respondents' Joint Brief are authoritative without regard to the party by whom they are cited. Therefore, Damico's Motion to Strike should be denied.

Respectfully submitted,

December 16, 2021

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