

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

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers

Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants,

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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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

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SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others
similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg,
Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis
Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew
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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

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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, Costal 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

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE WHOLE OF (1) THE PURCHASE AND SALE AGREEMENT, (2) THE LENNAR WARRANTY, (3) THE COVENANTS, AND (4) THE DEEDS SHOULD BE READ IN CONJUNCTION WITH EACH OTHER AND COLLECTIVELY AS THE ARBITRATION AGREEMENT.
- II. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE.
- III. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO THE PURCHASE AND SALE AGREEMENT, THE LENNAR WARRANTY, OR THE DEEDS.
- IV. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE AMBIGUOUS.
- V. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE NOT SEVERABLE FROM THE OTHER PROVISIONS OF THE RESPECTIVE AGREEMENTS.
- VI. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO COMPEL THE OWNERS TO ARBITRATION PURSUANT TO THE COVENANTS.
- VII. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO PERFORM ANY ANALYSIS OF THE ARBITRATION AGREEMENT(S) APPLICABLE TO SPRING GROVE DEVELOPMENT AND THE SUBCONTRACTORS.

STATEMENT OF THE CASE

This action is about whether a general contractor—Lennar Carolinas, LLC (“Lennar”)—may compel the individuals with whom it contracted for the sale of a lot and the construction of a house to arbitrate those individuals’ construction defect claims.

The houses at issue in this construction litigation are located in a development known as The Abbey at Spring Grove Plantation (“The Abbey”) which is located in Berkeley County, South Carolina. The lots in The Abbey were originally owned by Spring Grove Plantation Development, Inc. (“Spring Grove Development”). 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. Lennar purchased the subdivision lots in The Abbey from Spring Grove Development subject to the Covenants.

Subsequently, Patricia Damico, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (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. The Owners’ individual purchases are subject to Lennar’s 1-2-10 Warranty (the “Lennar Warranty”). In addition to the Purchase and Sale Agreement and the Lennar Warranty, each Owner received either a Deed or Title to Real Estate from Lennar.² Furthermore, each individual lot is subject to

¹ Plaintiff Lenna Lucas purchased her home from Paula Sellers. 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.

² During the course the development of The Abbey, Lennar conveyed the lots pursuant to two separate documents. The individuals who purchased a lot in 2011 received a “Title to Real Estate” and those who purchased a lot in 2013 received a “Deed.” The documents will

the Covenants that remain valid and enforceable against each Owner.

The Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds from Lennar to the Owners each contain an arbitration provision that requires the Owners to arbitrate claims arising out of the construction of the houses in The Abbey.

To construct the houses for the Owners, Lennar entered into multiple (sub)contracts with the following subcontractors: Manale Landscaping, LLC; Super Concrete of SC, Inc.; Southern Green, Inc.; TJB Trucking/Leasing, LLC; Civil Site Environmental; 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; Décor Corporation; DVS, Inc.; Raul Martinez Masonry, LLC; Alpha Omega Construction Group, Inc.; South Carolina Exteriors, LLC; and Builders Firstsource-Southeast Group, LLC (collectively, the "Subcontractors").

The contracts with the Subcontractors fall into one of six categories of agreement: (1) the Subcontractor Base Agreement; (2) the Subcontract Agreement; (3) the Master Trade Partner Agreement; (4) the General Agreement for Consulting Services; (5) the Business Partner Agreement; and (6) the Supplier Base Agreement. Each of the aforementioned agreements contains a valid and enforceable arbitration provision.

The Owners filed this lawsuit against Lennar and others based upon alleged construction defects, and Lennar asserted cross-claims against co-defendants and third-party claims against the Subcontractors.

collectively be referred to as "the Deeds." Furthermore, the subsequent purchasers did not receive a deed from Lennar; however, the circuit court did not separately discuss the deeds at issue in this case.

Lennar subsequently filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court issue an order compelling the Owners to arbitration pursuant to the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds. Lennar's Motion also requested the circuit court compel Spring Grove Development to arbitration pursuant to the Covenants and the Subcontractors to arbitration based on their individual contracts with Lennar associated with the construction of the houses.

A hearing was held on Lennar's Motion to Compel Arbitration and the circuit court denied Lennar's Motion in its entirety. In denying Lennar's Motion, the circuit court violated the basic tenets upon which it was to review the enforceability of an arbitration agreement and read all of the Owners' agreements with Lennar as a single arbitration agreement. Utilizing this erroneous application of the laws of South Carolina, the circuit court found terms in the Lennar Warranty rendered all of the arbitration agreements unconscionable and unenforceable. Furthermore, the circuit court failed to provide any analysis or reasoning in support of its denial of the motion to compel either Spring Grove Development or the Subcontractors to arbitration.

Lennar filed a Motion to Alter or Amend; however, the circuit court denied Lennar's motion in a Form 4 order and did not provide any additional explanation. This appeal followed.

FACTS / PROCEDURAL HISTORY

The owners of ten residences (the Owners) in The Abbey brought this action, individually and on behalf of a putative class, against Lennar and others claiming defective construction of their single-family homes.³ (R. 26). Through the contracts with Lennar, and purchasing property in The Abbey, the Owners agreed in four separate documents to arbitrate the claims or disputes:

³ The circuit court never certified the class and, therefore, the Owners are addressed in their individual capacities.

- a. the Covenants (R. 2315 - 2371);
- b. the Purchase and Sale Agreement (R. 296 - 713);
- c. the Lennar Warranty (R. 825-886); and
- d. the Deeds. (R. 2243-2312).

A. The Covenants and Spring Grove Development

On October 22, 2010, Lennar entered into an agreement for the Purchase and Sale of subdivision lots with Spring Grove Development. (R. 231). Lennar agreed to purchase sixty-nine (69) residential subdivision lots in The Abbey from Spring Grove Development. (R. 209).

Prior to Lennar's acquisition of the land on which it would eventually construct houses for the Owners, Spring Grove Development filed the Covenants. (R. 2315-2371). The top of the first page of the Covenants expressly states the following:

**THIS AGREEMENT IS SUBJECT TO BINDING
ARBITRATION PURSUANT TO THE SOUTH CAROLINA
UNIFORM ARBITRATION ACT (S.C. CODE ANN. § 15-48-
10 ET SEQ., AS AMENDED**

(R. 2315). Thereafter, on page 48, in a separately and distinctly numbered section (Section 15), with a clear and specific heading "BINDING ARBITRATION," the Covenants provide:

The Owner and the Association by acceptance of a deed agree that any dispute arising out of use, occupancy, [or] ownership of a Lot or on the Common Area of the enforcement of any covenant, condition, rule or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

(R. 2362).

B. The Purchase and Sale Agreement

Between January 2011 and May 2013, Owners entered into a Purchase and Sale Agreement with Lennar for the construction and purchase of a home in The Abbey. (R. 296 - 713). As a part of the purchase, Owners selected various construction details, components, and

finishes for their houses. (R. 715-764). Certain Owners also negotiated additional options to complete the construction of their residences including specific washers and dryers, faux blinds, privacy fencing, and other upgrades. (R. 715-764).

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

16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims (1) arising under, or related to, this Agreement, the Property, the Community or any dealings between Buyer and Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; and (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Property, or in the Community. 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 be bound hereby. Any Dispute shall be submitted for binding arbitration within a reasonable time after such Dispute has arisen. Nothing herein shall extend the time period by which a claim or cause of action may be asserted under the applicable statute of limitations or statute of repose, and in no event shall the Dispute be submitted for arbitration after the date when institution of a legal or equitable proceeding based on the underlying claims in such Dispute would be barred by the applicable statute of limitations or statute of repose.

(R. 300).

C. The Lennar Warranty

In conjunction with a Purchase and Sale Agreement, the Owners also became party to the Lennar Warranty. The Lennar Warranty contains a distinctly labeled section, segregated on

pages six through eight of the Lennar Warranty, entitled "**MEDIATION/ARBITRATION OF DISPUTES.**" (R. 831). That arbitration agreement provides:

By purchasing a Lennar home and receiving this warranty, Buyer specifically agrees 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 your Purchase and Sale Agreement, the Property, the Community (as these terms are defined in Buyer's Purchase and Sale Agreement) or any dealings between Buyer and Seller

(R. 831).

D. The Deeds

Separate and apart from the Purchase and Sale Agreement and the Lennar Warranty, each Owner who accepted the conveyance of a lot from Lennar received either a Deed or Title to Real Estate. Each Deed and Title to Real Estate from Lennar included an arbitration provision. (R. 2243-2312).

E. The Subcontracts

To construct the houses for the Owners, Lennar entered into multiple (sub)contracts with the Subcontractors. Each of the contracts between the Subcontractors and Lennar contains an express arbitration provision in a separate and distinct section of the contract, clearly labeled. (R. 888-1669).

F. Procedural History

On December 12, 2014, the Owners filed a Complaint against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC based upon alleged construction defects in the houses. (R. 26). On February 17, 2015, Lennar filed its

Answer, Cross-Claims, and Third-Party Complaint. (R. 42). On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. 257).

On November 23, 2015, the Owners filed their Amended Complaint (the "Amended Complaint"). (R. 75). On November 25, 2015, Lennar timely filed its Answer to Plaintiff's Amended Complaint, Cross-Claims, and Third-Party Complaint. (R. 109).

On March 30, 2016, Lennar amended its Motion to Compel Arbitration requesting the circuit court issue an order compelling the Owners to arbitration pursuant to the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. (R. 257). Lennar's Amended Motion to Compel Arbitration (the "Motion") also requested the circuit court compel Spring Grove Development to arbitration pursuant to the Covenants and the Subcontractors to arbitration on the cross-claims or third-party claims pursuant to their individual contracts with Lennar. (R. 262).

A hearing on the Motion was held on April 11, 2016. (R. 203).

On September 19, 2016, the circuit court issued an order denying the Motion. (R. 4). The circuit court made the following findings in its order: (1) the Purchase and Sale Agreements, the Lennar Warranty, the Covenants and the Deeds should be read together as a single arbitration provision; (2) the agreements are adhesion contracts; (3) the Lennar Warranty's terms are unconscionable; (4) the Lennar Warranty's terms are not severable from the arbitration provision; (5) the arbitration provisions are ambiguous because they contain references to both the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et. seq.* ("SCUAA"), and the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.* ("FAA"); (6) the FAA does not apply to the Owners' contracts with Lennar because they only involve intrastate commerce; and (7) the arbitration provisions fail to comply with the SCUAA's notice requirements. (R. 4-23). The

circuit court made no specific or separate findings regarding the arbitration agreements between either Lennar and Spring Grove Development; or Lennar and the individual subcontractors.

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, arguing the circuit court erred in:

1. Failing to follow the *Prima Paint* doctrine by relying on terms outside of each document's arbitration provision to find the provisions unconscionable;
2. Relying on terms in the Lennar Warranty to find the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds unconscionable;
3. Failing to give effect to the arbitration agreements' severability provisions;
4. Finding the Lennar Warranty's arbitration provision contains oppressive and one-sided terms;
5. Finding the arbitration provisions are ambiguous;
6. Failing to find that regardless of any potential ambiguity the parties clearly demonstrated an intent to arbitrate any dispute arising from their transaction;
7. Failing to consider evidence that the parties' agreement for the construction and sale of a house involves interstate commerce;
8. Finding Lennar—a Delaware company—is organized in South Carolina;
9. Finding the Covenants comply with the SCUAA but failing to compel arbitration under its terms; and
10. Ruling on the motion to compel the Subcontractors to arbitration without considering or analyzing any of Lennar's agreements to arbitrate with the Subcontractors.

(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).

STANDARD OF REVIEW

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).. A circuit court's factual findings for which there is reasonable evidentiary support should not be reversed on appeal. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016), *reh'g denied* (Sept. 5, 2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (internal quotation marks and citation omitted). In other words, there is a presumption in favor of the enforceability and application of arbitration agreements to disputes, and the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013).

ARGUMENT

Lennar moved the circuit court to compel the Owners to arbitrate the claims in their Complaint. Lennar also moved the circuit court to compel Spring Grove Development and the Subcontractors to arbitrate the claims in the Cross-Complaints and in the Third-Party Complaints.

With respect to the motion against the Owners, Lennar asserted that any one (and indeed each) of four separate agreements required the Owners to arbitrate; namely, (1) the Purchase and Sale Agreement; (2) the Lennar Warranty; (3) the Covenants; or (4) the Deeds. With respect to the motion against the Subcontractors, Lennar asserted that each subcontract agreement required arbitration of the claims or disputes. Regarding Spring Grove Development, Lennar asserted that

the Covenants required arbitration of the claims or disputes.

In considering Lennar's Motion with respect to the Owners, the circuit court was required to determine whether any one of the four agreements to arbitrate, upon which the Motion was premised, was valid and enforceable under the controlling law. If any one of the four agreements to arbitrate is valid and enforceable on its own, the Motion to Compel Arbitration should have been granted. There need not be review of the other agreements to arbitrate once any one is determined to be enforceable.

In considering Lennar's Motion with respect to the Subcontractors, the circuit court was required to evaluate the agreement to arbitrate with respect to each specific subcontractor and determine whether that agreement to arbitrate was valid and enforceable.

In considering Lennar's Motion with respect to Spring Grove Development, the circuit court was required to evaluate the Covenants and determine whether Lennar and Spring Grove Development's agreement to arbitrate was valid and enforceable.

In each case, Lennar's Motion to Compel Arbitration was to be reviewed and decided in the context of the absolutely clear and unquestionable policy, of both South Carolina and the United States, favoring the arbitration of disputes. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

The circuit court generally recognized the controlling legal authorities and standards applicable to its review of Lennar's Motion to Compel Arbitration; however, the circuit court then incorrectly applied that law and erred in denying Lennar's Motion. In doing so, the circuit court abused its discretion, misapplied the law, and made findings unsupported by the record. Additionally, the circuit court did not even address Lennar's agreements to arbitrate with the Subcontractors and, instead, merely issued a blanket denial of Lennar's Motion to Compel arbitration based on its erroneous analysis of the agreements to arbitrate with the Owners.

Similar to the circuit court's analysis of the Subcontractors and their agreements with Lennar, the circuit court conducted no analysis of whether Spring Grove Development should be compelled to arbitration pursuant to the Covenants.

This Court need only find the circuit court erred in failing to compel the Owners to arbitration pursuant to any one of the Owners' four separate agreements to arbitrate in order to reverse the circuit court's denial of Lennar's Motion to Compel. Reversal is appropriate because the circuit court plainly erred in applying well settled South Carolina law to the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds. Specifically, the circuit court erred in: (1) reading the entirety of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds together as a single arbitration agreement; (2) finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds unconscionable based on reference only to other provisions (not the arbitration provision) in the Lennar Warranty; (3) finding the arbitration provisions are not to be severable within their respective contracts; (4) finding the arbitration provisions to be ambiguous; (5) finding the FAA does not apply to the Purchase and Sale Agreement, the Lennar Warranty, and the Deeds; (6) finding the SCUAA does not apply to the Covenants; and (7) failing to compel either Spring Grove, or the Subcontractors, to arbitration pursuant to their respective contracts and arbitration agreements with Lennar without any analysis of the agreements to arbitrate in each the applicable agreements.

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE WHOLE OF (1) THE PURCHASE AND SALE AGREEMENT, (2) THE LENNAR WARRANTY, (3) THE COVENANTS, AND (4) THE DEEDS SHOULD BE READ IN CONJUNCTION WITH EACH OTHER AND COLLECTIVELY AS THE ARBITRATION AGREEMENT.

A. The court erred in considering extrinsic evidence when it evaluated the separate and distinct arbitration provisions.

The circuit court erred in its application of the basic analysis upon which a court may

review a motion to compel arbitration.

An arbitration provision in a contract should be interpreted by a court using the standard rules of contract interpretation. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). The primary difference in interpreting an arbitration provision compared to a contract, is that when a court reviews the validity of an arbitration provision, its analysis is restricted to that provision alone. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967).

If the language of a contract is clear and unambiguous, then that language alone determines the contract's force and effect. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). In other words, if a contract's language is clear, then extrinsic evidence cannot be used to give the contract a meaning different from that indicated by its terms. *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E.2d 155, 161 (Ct. App. 2014). Therefore, when reviewing an arbitration provision a court is required to consider the language of that provision alone to determine the arbitration provision's force and effect. *See Prima Paint*, 388 U.S. at 406.

In deciding whether parties agreed to submit a particular grievance to arbitration, a court is not to consider the merits of the underlying claims. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. In other words, once a court determines a dispute must be compelled to arbitration its analysis of that issue is complete.

In the instant case, the circuit court utterly misapplied the law, and facts, applicable to a proper review of the motion to compel arbitration in a dispute arising out of a transaction for the construction and purchase of a house. In doing so, the circuit court erred.

A proper analysis of Lennar's Motion to Compel would have resulted in the circuit court examining each document, and its respective arbitration provision, separately and without

considering any extrinsic evidence—as required by the basic rules of contract interpretation.

For example, the circuit court should have reviewed the Purchase and Sale Agreement and located the arbitration provision in Section 16. (R. 300). Since the language of Section 16 is clear and unambiguous, the circuit court's review is restricted to Section 16 and only Section 16. The circuit court should have then interpreted Section 16 to find that it provides that all disputes arising from the contract are subject to arbitration:

16.1 The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall . . . be submitted to binding arbitration as provided by the Federal Arbitration Act.

(R. 300). For the purposes of the circuit court's review under the Motion to Compel Arbitration, Section 16 is the entirety of the agreement. The circuit court's interpretation of that agreement to arbitrate is restricted to only its plain and unambiguous terms. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008). The circuit court may not look outside of Section 16's plain and unambiguous terms to create an ambiguity. *See id.* (finding a party may not create an ambiguity when it does not exist within the four corners of the contract). Since the terms of Section 16 are plain and unambiguous, the circuit court should have found that the Owners' dispute with Lennar must be compelled to arbitration. At this point, the circuit court's analysis was complete. Once a dispute or claim is subject to arbitration a court may not consider its merits, and further analysis of the other provisions within that contract, or of the other documents or agreements was unnecessary and improper. Any finding regarding the other documents was simply superfluous, because compelling arbitration pursuant to the Purchase and Sale Agreement is appropriate and it is unnecessary to conduct further analysis when the disposition of a prior issue is dispositive of the remaining issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate courts

need not address remaining issues when disposition of a prior issue is dispositive).

If the circuit court found the Owners' claims were not subject to arbitration pursuant to the Purchase and Sale Agreement (which it could not under any valid review), then the circuit court should have proceeded with an analysis of whether the Owners' claims were subject to arbitration pursuant to the Lennar Warranty. The circuit court's analysis should have continued with each additional agreement to arbitrate, one by one, until it either determined that Lennar's claims were subject to arbitration under any one of them, or there were no remaining agreements to review. Any analysis after determining the claims are subject to arbitration was improper and simply unnecessary.

Instead of conducting this simple and straightforward analysis, the circuit court employed a misguided and erroneous interpretation of South Carolina law to weave the four agreements (the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds) into a single conflated arbitration provision. In doing this, the circuit court erred by violating the basic rules of contract interpretation and the controlling law applicable to the specific analysis of an agreement to arbitrate.

For the reasons set forth herein, this Court should reverse the circuit court and compel the Owners' claim to arbitration pursuant to the terms of the Purchase and Sale Agreement's arbitration provision. Consideration of the remainder of the circuit court's order—that is an undeniable misapplication of the law—is unnecessary. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

B. The circuit court violated the *Prima Paint* doctrine when it erroneously applied the decision in *D.R. Horton* to conflate all of the four contracts collectively as one arbitration agreement.

The circuit court erred in finding that four separate documents—(1) the Purchase and Sale Agreements; (2) the Lennar Warranty; (3) the Covenants; and (4) the Deeds—should be

read together and considered as one whole integrated arbitration agreement.

When there is an arbitration clause contained in a written contract, a motion to compel arbitration should be granted unless the arbitration clause in question is not susceptible to any interpretation which would apply to the dispute in issue. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399 S.E.2d 864, 865 (Ct. App. 2000). “Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012) (quoting *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118).

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.” *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4 (emphasis in original); see *Prima Paint*, 388 U.S. at 406. This principal of law is referred to as the *Prima Paint* doctrine. See *S.C. Public Service Authority v. Grant W. Coal (Ky.), Inc.*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (adopting the *Prima Paint* doctrine in South Carolina). Therefore, when applying the *Prima Paint* doctrine, it is an error of law to find an arbitration provision is unconscionable based upon other terms of the contract that are not themselves in the arbitration provision, because a court may only consider the terms of the arbitration provision itself—not the terms of the whole contract. *Id.*

The circuit court seeks to justify its decision to read the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds together as a single arbitration provision based on our Supreme Court’s decision in *D.R. Horton*. See *D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4. The court in *D.R. Horton* 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. *Id.* Section 14 in the D.R. Horton home purchase agreement was

entitled “Warranties and Dispute Resolution.” *See id.* at 55, 790 S.E.2d at 7. Section 14 of the contract consisted of subparagraphs 14(a) through 14(j). *See 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.**” *See 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.” *See id.* The court chose to read the entirety of Section 14 as the arbitration agreement’s arbitration provision because it found Section 14’s subsections (subparagraphs) contained numerous cross-references to one another, and were intertwined. 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. . . .

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

The circuit court in this case took unwarranted liberties, apparently based on an exaggerated interpretation of the decision in *D.R. Horton*, and 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). The circuit court did this by specifically ignoring that each of those separate agreements contained a clearly delineated, distinct arbitration provision which was segregated within a much

broader whole contract.

Obviously, the circuit court felt liberty to take an overbroad review and analysis of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds because the court in *D.R. Horton* decided to consider 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. Horton* court for characterizing the arbitration agreement in that case more broadly than just subpart “g” of Section 14 is not justified, by either the controlling law or the applicable facts, in this case. The agreement to arbitrate in each Lennar document is not intertwined with other sections or documents; rather, each is markedly segregated, separate, and distinct. The terms of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds provide no basis for the circuit court’s overly broad and erroneous application of *D.R. Horton*.

The circuit court erred and violated the *Prima Paint* doctrine when it misapplied an expansive interpretation of *D.R. Horton* to (1) the Purchase and Sale Agreement, (2) the Lennar Warranty, (3) the Covenants, and (4) the Deeds to expand the scope of each agreement’s arbitration provision.

1. The Purchase and Sale Agreement

The circuit court erred in applying an expansive interpretation of *D.R. Horton* so that it could consider terms outside of the Purchase and Sale Agreement when it reviewed the Purchase and Sale Agreement’s arbitration provision.

The entirety of the Purchase and Sale Agreement’s arbitration provision is found in Section 16. (R. 300-301). Section 16 does not contain any cross-references to other sections of the Purchase and Sale Agreement. (R. 300-301). Section 16 also does not contain any cross-reference to any provision in another document. (R. 300-301). The unique circumstances that allowed the court in *D.R. Horton* to read Section 14 and all of its subparagraphs as a single

arbitration provision are not present in Section 16 of the Purchase and Sale Agreement. Therefore, consideration by the circuit court of any terms outside of Section 16 violates the *Prima Paint* doctrine and is not justifiable under any applicable precedent. Accordingly, the circuit court erred in considering terms that are outside of Section 16 when it reviewed the Purchase and Sale Agreement's arbitration provision.

2. The Lennar Warranty

The circuit court erred in applying an expansive interpretation of *D.R. Horton* so that it could consider terms outside of the Lennar Warranty's arbitration provision when it reviewed the Lennar Warranty's arbitration provision.

The Lennar Warranty contains seven separately labeled and segregated sections that are clearly marked with bold and underlined headings. Additionally, each section ends with a page break that clearly marks the end of the section and segregates it from any other section. The third section of the Lennar Warranty is expressly labeled "**MEDIATION/ARBITRATION OF DISPUTES.**" (R. 831).

The Lennar Warranty's arbitration provision does not contain cross-references to other sections or paragraphs in the Lennar Warranty, or to any other document or agreement. (R. 831). The Lennar Warranty's arbitration provision is entirely contained in the Lennar Warranty's third section and is not intertwined with any other provisions or terms. (R. 831). The unique circumstances that allowed the court in *D.R. Horton* to read Section 14 and all of its subparts as a single arbitration provision are not present in the Lennar Warranty's arbitration provision. The *Prima Paint* doctrine requires that the court review only the Lennar Warranty's arbitration provision—not the entire agreement—when evaluating the provision's enforceability. *See Prima Paint*, 388 U.S. at 403-04. Therefore, the circuit court erred in considering terms that are not

part of the Lennar Warranty's arbitration provision when it analyzed the enforceability of the Lennar Warranty's arbitration provision.

3. The Covenants

The circuit court erred in applying an expansive interpretation of *D.R. Horton* so that it could consider terms outside of the Covenants' arbitration provision when it reviewed the Covenants' arbitration provision.

Section 15, on page 48, of the Covenants constitutes the entirety of the Covenants' arbitration provision. (R. 2362). Section 15 is separately numbered and labeled and is distinct from any other section or provision. (R. 2362). Section 15 states:

The Owner and the Association by acceptance of a deed agree that any dispute arising out of use, occupancy, [or] ownership of a Lot or on the Common Area of the enforcement of any covenant, condition, rule or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

(R. 2362). This arbitration provision obviously contains no cross-references to other provisions or documents. Any interpretation of this provision that incorporates additional language is an error, because unlike the arbitration provision in *D.R. Horton*, this provision is in no way intertwined with any other provisions or documents. It does not even have other paragraphs. Yet, the circuit court chose to read this simple provision in conjunction with three other documents as one integrated whole. The circuit court's unjustified expansion of Section 15 of the Covenants is an obvious error of law that this Court should correct. Accordingly, the Court should reverse the circuit court's finding that the Covenants' arbitration provision should be interpreted in conjunction with anything other than Section 15 of the Covenants.

4. The Deeds

The circuit court did not address the Deeds' arbitration provisions in deciding that the terms of all four documents constituted a single arbitration agreement. The circuit court

erroneously applied the holding in *D.R. Horton* to find the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds were a single arbitration agreement and the terms of this agreement were unconscionable. In reaching this flawed conclusion, the circuit court did not address the Deeds. The circuit court merely concluded—without any explanation—that the Deeds were a part of a single arbitration agreement that was comprised of the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. Therefore, this Court should find the circuit court erred in finding the entirety of the Deeds are incorporated into a single arbitration agreement with the other three documents.

For the reasons stated above, the circuit court's expansive application of *D.R. Horton* lacks precedential support, violates the *Prima Paint* doctrine, and is simply an error of law that must be corrected by this Court. Accordingly, this Court should reverse the circuit court's denial of Lennar's Motion to Compel Arbitration because the circuit court's decision was based upon an erroneous application of the law and factual conclusions unsupported by the Record.

II. THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS UNCONSCIONABLE.

The arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are not unconscionable, and the circuit court erred in finding otherwise.

Under South Carolina law, the test for establishing unconscionability consists of two elements: (1) "the absence of meaningful choice on the part of one party due to one-sided contract provisions" and (2) "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668 (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606

S.E.2d 752, 757 (2004)). Both elements must be present for the arbitration clause to be unconscionable. *Id.*

In *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016), this court addressed a similar issue regarding the unconscionability of a warranty's arbitration provision and reversed the circuit court's denial of a manufacturer's motion to compel arbitration. Similar to the circuit court in this case, the circuit court in *One Belle Hall* misapplied the holding in *D.R. Horton* to find terms—outside of the warranty's actual arbitration provision—that limited the manufacturer's liability and rendered the warranty's arbitration provision unconscionable. *Id.* This Court reversed the circuit court's holding on the grounds that the purported unconscionable provisions were not in the warranty's arbitration provision and, therefore, consideration of the terms outside of the warranty's arbitration provision violated the *Prima Paint* doctrine. *Id.*

Similar to the circuit court in *One Belle Hall*, the circuit court in this case purported to find terms outside of each respective document's arbitration provision rendered the arbitration provisions unconscionable. Specifically, the circuit court said that other terms in the Lennar Warranty resulted in (a) the loss of the right to a jury trial; (b) the loss of the ability to maintain a class action; and (c) the loss of other certain remedies otherwise allowed by South Carolina law. (R. 11-13).

As a preliminary matter, jury trial and class action waivers are not unconscionable terms in an arbitration provision as a matter of law. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding a class action waiver in an arbitration agreement is not unconscionable); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91-94, 749 S.E.2d 139, 151-53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA) *The Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 301, 792 S.E.2d

240, 250 (Ct. App. 2016), *reh'g denied* (Nov. 17, 2016) (holding a jury trial waiver is not unconscionable); *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 (“The loss of the right to a jury trial is an obvious result of arbitration.”). Therefore, the circuit court erred in finding these provisions have any impact on whether the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds are unconscionable.

The only remaining provisions the circuit court found to be unconscionable are the “remedial-related provisions” of the Lennar Warranty. (R. 836-837). The circuit court did not identify which specific provisions it found to be unconscionable but a review of the Lennar Warranty reveals that the “remedial-related provisions” described by the circuit court are found in the fifth section of the Lennar Warranty. (R. 836). The fifth section of the Lennar Warranty, titled “Limitations on Lennar Limited Warranty,” disclaims all implied warranties, limits consequential damages, and caps Lennar’s total financial obligation to the original sales price of each Owners’ home. (R. 836). This is the only provision that might be construed to comport with the circuit court’s description of the Lennar Warranty’s “remedial-related provisions” that disclaim warranties and limit the Owners’ damages; however, it is not part of the arbitration provision which is distinctly and separately set forth.

The only terms that the circuit court cited as unconscionable are in the fifth section of the Lennar Warranty, which is not a part of the Lennar Warranty arbitration provision or any of the other documents’ arbitration provisions. None of the arbitration provisions in the Owners’ agreements with Lennar contain the terms the circuit court found to be unconscionable. The arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds do not contain oppressive or one-sided terms. The circuit court did not find the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds contain oppressive or one-sided terms. Instead, the circuit court relied exclusively

on terms in the fifth section of Lennar Warranty (which is not the Lennar Warranty's arbitration provision) to find each of the individual arbitration agreements is unconscionable.

As discussed above, the circuit court's decision to look outside of the individual arbitration agreements violates the *Prima Paint* doctrine and is unsupportable. *See Prima Paint*, 388 U.S. at 403-04. Any analysis of whether the individual arbitration provisions are unconscionable is limited to a separate review of each arbitration provision. It is improper to consider any other terms. Therefore, the circuit court erred in finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are unconscionable. Accordingly, the Court should reverse the circuit court's finding that the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are unconscionable and compel Owners' claims to arbitration.

III. THE ARBITRATION PROVISIONS ARE SEVERABLE FROM THE OTHER PROVISIONS OF THE RESPECTIVE AGREEMENTS.

The circuit court erred in finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Deeds, and the Covenants were not severable from their respective agreements.

An arbitration provision is severable from a contract in which it is embedded. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001). South Carolina case law is clear that an unconscionable provision should be severed to maintain the enforceability of an arbitration agreement. *See Simpson*, 373 S.C. at 34-35 n.9, 644 S.E.2d at 673-74 n.9; 6 C.J.S. *Arbitration* § 11 ("Agreements for arbitration contained in a contract are treated as separable parts of the contract, so that the illegality of another part of the contract does not nullify an agreement to arbitrate." (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959))).

The circuit court sought to rely on *Simpson* and *D.R. Horton* to find the arbitration provisions in the agreements are not severable.⁴ (R. 16-17). In both *Simpson* and *D.R. Horton*, the courts held that the unconscionable terms in the arbitration provisions were not severable from the arbitration provisions. However, in *Simpson*, the court found the arbitration provision was wholly unconscionable and unenforceable based upon the cumulative effect of the oppressive and one-sided terms specifically contained within the arbitration provision itself, and the unconscionable terms were so intertwined with the arbitration provision the court was unable to separate out a reasonable arbitration provision. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674. In *D.R. Horton*, the court declined to analyze whether the unconscionable terms were severable because the *D.R. Horton* contract did not contain a severability provision. Therefore, in the absence of a severability provision, the *D.R. Horton* court found that the parties did not intend for unconscionable terms to be struck from their arbitration agreement. *D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6.

Unlike the unconscionable terms in *Simpson* and *D.R. Horton*, the purported unconscionable terms of the Lennar Warranty are not a part of the Lennar Warranty's arbitration provision and they are not part of the arbitration agreements within the other Lennar documents for that matter. Therefore, the circuit court may separate out the arbitration provision from each contract from any potentially unconscionable term. The circuit court's failure to recognize that the alleged unconscionable terms in the Lennar Warranty are not in any of the agreements' arbitration provisions pervades its analysis in this case and is the basis for many of its erroneous

⁴ Significantly, the circuit court also relied on *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C.) for support; however, any reliance on that decision is utterly misplaced since that decision was reversed and remanded by the Fourth Circuit and the district court was ordered to compel the plaintiff's claims to arbitration. See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 287 (4th Cir. 2007).

rulings. This error is again evident in the circuit court's finding that the arbitration provisions are not severable from their respective contracts.

Additionally, the arbitration provisions in the Purchase and Sale Agreement (Section 16.4), the Lennar Warranty, and the Covenants each contain an express severability provision—something the contract at issue in *D.R. Horton* lacked. (R. 301; 831-832; 2359).

The circuit court failed to acknowledge or apply any of the applicable severability provisions. These provisions evidence the parties' clear intent for any unconscionable provision to be severed so that any dispute may be compelled to arbitration. Accordingly, the circuit court erred in finding the purported unconscionable provisions are not severable from the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, and the Covenants.

IV. THE FAA GOVERNS ANY ARBITRATION OF A DISPUTE THAT ARISES PURSUANT TO THE PURCHASE AND SALE AGREEMENT, THE LENNAR WARRANTY, OR THE DEEDS.

The circuit court erred in finding the FAA does not govern the Purchase and Sale Agreement and the Lennar Warranty because (1) the parties expressly agreed in each of those documents that their transaction involves interstate commerce and is governed by the FAA; and (2) an agreement for the construction and purchase of a house involves interstate commerce and is subject to the FAA.

A. The parties agreed any dispute arising from the Purchase and Sale Agreement and the Lennar Warranty is subject to binding arbitration as provided by the FAA.

The circuit court erred in ignoring the plain language of the Purchase and Sale Agreement and the Lennar Warranty and failed to recognize that the Owners and Lennar contractually agreed for any dispute arising from their transaction to be subject to arbitration governed by the FAA.

Parties are free to choose the terms under which they will arbitrate their disputes. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 472 (1989); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). Therefore, an arbitration provision that states the parties agreed that it is governed by the FAA is in fact governed by the FAA. *See id.*

The Purchase and Sale Agreement and the Lennar Warranty each contain a provision stating that the parties “specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall . . . be submitted to binding arbitration as provided by the Federal Arbitration Act. . . .” (R. 300; 831). This allowable and enforceable language presents undeniable evidence that the Owners and Lennar chose to have any dispute arising from their transaction to be subject to arbitration and governed by the FAA. Therefore, any dispute arising from either the Purchase and Sale Agreement, or the Lennar Warranty, is subject to arbitration that is governed by the FAA, because the documents’ plain language states as much. The circuit court erred in finding otherwise, and its findings must be reversed.

B. An agreement for the construction and purchase of a house involves interstate commerce.

The circuit court erred in finding the Purchase and Sale Agreement involved intrastate and not interstate commerce.

“The FAA is intended to ensure that arbitration will proceed in the event a state law would have preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). 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 or the refusal to perform the contract. 9 U.S.C.A. § 2. “The United States Supreme Court has held that the phrase

‘involving commerce’ is the same as ‘affecting commerce,’ which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.” *Blanton v. Stathos*, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (“We have interpreted the term ‘involving commerce’ in the FAA as the functional equivalent of the more familiar term ‘affecting commerce’-words of art that ordinarily signal the broadest permissible exercise of Congress’ Commerce Clause power.”). The South Carolina Supreme Court has adopted the United States Supreme Court’s broad interpretation of the phrase “involving commerce.” *See Zabinski*, 346 S.C. at 591, 553 S.E.2d at 115.

It is well settled that contract for the construction of a house involves interstate commerce. *Blanton*, 351 S.C. at 540-41, 570 S.E.2d at 568; *Episcopal Hous. Corp. v. Federal Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (concluding performance required under a contract for the construction of an eighteen-story building involved interstate commerce because “[i]t would be virtually impossible to construct” such a building “with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina”); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) (finding contract for construction of a church pertained to a transaction “involving interstate commerce due to the nature of the construction project” and the builders’ affidavit swearing the project would involve businesses and supplies from outside of South Carolina). A contract for the construction of a home involves interstate commerce because it undoubtedly contemplates the use of materials, equipment and supplies that are manufactured outside of South Carolina. *Blanton*, 351 S.C. at 541, 570 S.E.2d at 569; *Bradley*, 398 S.C. at 458 n.8, 730 S.E.2d at 318 n.8. (“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.”).

In the instant case, the circuit court erred in finding the agreement for the construction and purchase of a house between the Owners and Lennar did not involve interstate commerce.

The Purchase and Sale Agreements, Options Summaries, Color Selection Sheets, and Addendums to the Purchase and Sale Agreement provide ample evidence that the Owners entered into agreements not merely for the sale of a completed house, but for the construction of a house. (R. 296 - 713). The construction of a house involves interstate commerce because it would have been impossible for Lennar and the Subcontractors to build houses for the Owners with the materials, equipment, and supplies all produced and manufactured solely within the State of South Carolina. Furthermore, several of the Owners were residents of other states at the time of purchase. (R. 888-1669).

Additionally, the circuit court erroneously found that Lennar—a Delaware corporation—is a corporation organized under the laws of the State of South Carolina. (R. 21). Lennar denied this assertion in its Answer to Plaintiff’s Amended Complaint, and the South Carolina Secretary of State records demonstrate that Lennar is organized and existing under the laws of the State of Delaware. (R. 113; 223). The circuit court’s finding is plainly contrary to, and unsupported by, the evidence in the record.

Therefore, the evidence presented to the circuit court required it to find that the Owners—some of whom are from out of state—entered into agreements with a Delaware corporation for the construction and purchase of a home in Berkeley County, South Carolina. Accordingly, the FAA applies because the Owners’ contracts for the construction of a residence involve interstate commerce.

V. THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE AMBIGUOUS.

A. The arbitration provisions contain an unambiguous agreement to arbitrate disputes.

The circuit court erred in finding the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants, and the Deeds are ambiguous as to whether they are governed by either the FAA, or the SCUAA.

The circuit court found the arbitration provisions in the Purchase and Sale Agreement, and the Lennar Warranty are ambiguous because the notice provisions in those agreements state that the agreements are subject to arbitration pursuant to the SCUAA while the arbitration provisions themselves state that any dispute shall be submitted to binding arbitration pursuant to the FAA. (R. 17-22).

The court in *Zabinski v. Bright Acres Associates* addressed a similar issue. 346 S.C. at 594, 553 S.E.2d at 117. In *Zabinski*, a partnership agreement contained a notice provision at the top of the first page that did not satisfy the technical requirements of the SCUAA, but stated that the “partnership agreement shall be governed by, and construed and enforced in accordance with the laws of the State of South Carolina.” *Id.* The partnership agreement’s arbitration clause stated:

If any controversy or claim arising out of this partnership agreement cannot be settled by the partners, the controversy shall be settled by arbitration in accordance with the rules of the American Arbitration Association then in effect, and judgment on the award may be entered in any court having jurisdiction.

Id. at 588, 553 S.E.2d at 114. The court found the notice provision (that it referred to as a “governing law clause”) does not require the application of state, rather than federal, arbitration law, because these statutorily required provisions simply indicate the parties’ intention to have the validity and construction of their contract determined by arbitrators. *Id.* at 594, 553 S.E.2d at

117. The court also found that notice provisions such as these are frequently required by state arbitration statutes; however, state laws are preempted by the FAA to the extent they would invalidate the arbitration agreement. *Id.* at 593, 553 S.E.2d at 116-17; *see also Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Therefore, the court noted that in instances where a contract attempts to comply with a state law requiring certain language in a notice provision, a party's efforts to comply with a state law requiring a notice provision may not invalidate an agreement to arbitrate because the FAA preempts a state law to the extent it invalidates an agreement to arbitration. *Id.* at 594, 553 S.E.2d at 117. Therefore, a court may not invalidate an arbitration agreement simply based on a party's simultaneous efforts to comply with a state law requiring an arbitration notice provision.

Here, the Purchase and Sale Agreement and the Lennar Warranty each contain a notice provision stating that the agreement is subject to binding arbitration pursuant to the SCUAA and each of those documents contains an arbitration provision stating that the agreement is governed by the FAA. As discussed in *Zabinski*, an effort to comply with a state law notice provision may not invalidate an agreement to arbitrate. The circuit court erred in finding a notice provision that is required by state law creates an ambiguity that invalidates an agreement to arbitrate. Accordingly, this Court should reverse the circuit court and find the notice provision and the arbitration provision do not create an ambiguity that renders the arbitration provision unenforceable.

B. An ambiguity does not affect the enforceability of the arbitration provisions.

As discussed above, it is an error of law to consider any language outside of an arbitration provision when determining whether an arbitration provision is valid and enforceable. A notice provision is not a part of an arbitration provision, and the circuit court should not have

relied on the notice provision in an effort to create an ambiguity. However, even if the notice provisions and arbitration provisions in the Owners' agreements with Lennar are construed to create an ambiguity, each agreement evidences the Owners' and Lennar's clear and unambiguous intent to arbitrate any claim arising from their agreement.

It is well established that the primary rule of contract interpretation is that courts should construe contracts "to give them effect and carry out the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (citation omitted); *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988); *D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc.*, 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). The parties' intentions must—in the first instance—be derived from the language of the contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). Furthermore, a contract is "interpreted according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015) (quoting *Stanley v. Atlantic Title Ins. Co.*, 377 S.C. 405, 414, 661 S.E.2d 62, 67 (2008)).

In *Osborne v. Marina Inn at Grande Dunes, LLC*, No. CIV.A. 4:08-CV-0490, 2009 WL 3152044, at *6 (D.S.C. Sept. 23, 2009) the court analyzed a contract containing a notice provision that stated the following:

**PORTIONS OF THIS AGREEMENT ARE SUBJECT TO
ARBITRATION PURSUANT TO THE SOUTH CAROLINA
UNIFORM ARBITRATION ACT, § 15-48-10, S.C. CODE OF
LAWS OF 1976, AS AMENDED.**

Osborne at *2. The arbitration provision at issue in *Osborne* stated that any dispute that could not be resolved by mediation "SHALL BE SETTLED BY BINDING ARBITRATION

ADMINISTERED BY THE AAA IN ACCORDANCE WITH ITS COMMERCIAL ARBITRATION RULES. . . .” *Id.* The appellant argued that the arbitration agreement was ambiguous because the notice provision on the first page stated that the SCUAA applied while the arbitration agreement stated that the rules of the American Arbitration Association (AAA) applied. *Id.* at *5-6. The court held that “even if the agreement was ambiguous, that alone would not make the arbitration provision unenforceable.” *Id.* at *6. The court found that even if the contract was ambiguous, judicial construction permits it to determine the parties’ intent and “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Id.* (citation and internal quotation marks omitted). The court stated that in construing the parties’ agreement in light of the “clear federal policy in favor of arbitration . . . the parties entered into a facially valid agreement to arbitrate and the claims asserted are within the scope of the agreement.” *Id.* Therefore, the court concluded that regardless of potentially ambiguous language regarding whether the SCUAA or the AAA applied to the parties’ agreement to arbitrate, the parties’ contract evidenced a clear and unambiguous intent to arbitrate disputes arising from the agreement. *Id.*

If differences in the notice provisions and the arbitration provisions create an ambiguity, then the circuit court erred in failing to find the plain language of each agreement expresses the parties’ undeniable intent to arbitrate any dispute arising from the transaction. Like the contract in *Osborne*, each of the documents expresses a plain and unambiguous intent to arbitrate claims arising between the parties. A potential ambiguity does not invalidate the parties’ intentions, and the language of the agreements demonstrates an overwhelming intent to arbitrate claims between the Owners and Lennar. Therefore, the circuit court erred in finding an ambiguity invalidated the Owners’ and Lennar’s intent to arbitrate their disputes. Accordingly, the Court should reverse the circuit court’s opinion and find that regardless of whether an ambiguity exists the

agreements evidence the parties' clear and unambiguous intent to arbitrate their disputes.

VI. THE CIRCUIT COURT ERRED IN FAILING TO COMPEL THE OWNERS TO ARBITRATION PURSUANT TO THE COVENANTS.

The circuit court found the Purchase and Sale Agreements and the Lennar Warranty did not comply with the SCUAA's notice provision requirements. However, because the Covenants do comply with the SCUAA's notice provision requirements, the circuit court again erred when it found the Covenants' arbitration provision was unenforceable on the grounds that the Covenants violate public policy. (R. 19-20). There is no basis in the law to support the circuit court's holding that the Covenants' arbitration provision is unenforceable because the Covenants violate public policy. Therefore, the circuit court erred in failing to compel the Owners and Spring Grove Development to arbitration pursuant to the terms of the Covenants' arbitration provision.

For an arbitration provision to be valid and enforceable under the SCUAA, the contract containing the provision must contain a notice that the contract is subject to arbitration pursuant to the SCUAA and that notice must be typed in underlined capital letters on the first page of the contract. S.C. CODE ANN. § 15-48-10.

The top of the first page of the Covenants states the following:

**THIS AGREEMENT IS SUBJECT TO BINDING
ARBITRATION PURSUANT TO THE SOUTH CAROLINA
UNIFORM ARBITRATION ACT (S.C. CODE ANN. § 15-48-
10 ET SEQ., AS AMENDED**

(R. 2315). The circuit court properly found the Covenants complied with the SCUAA's notice provision. (R. 19-20).

Even though the Covenants comply with the SCUAA and contain an arbitration provision that contains no unconscionable terms, the circuit court refused to enforce the arbitration agreement because it reasoned the Covenants were not enforceable as a matter of public policy.

The circuit court's finding that the Covenants' arbitration provision is void as a matter of public policy does not comport with the applicable precedent in this state. A generalized statement that the Covenants' arbitration provision is unenforceable as a matter of "public policy" is not a recognized basis for refusing to compel arbitration. To invalidate a contract on the basis of public policy in South Carolina, the contract must violate a public policy expressed in a constitutional provision, a statutory law, or a judicial decision. *See White v. J.M. Brown Amusement Co, Inc.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004). The circuit court did not refer to any public policy expressed in a constitutional provision, statutory law, or judicial decision in support of its holding, and none exists.

Contrary to the circuit court's finding, the General Assembly and our courts have expressed an overwhelming public policy in favor of the enforceability of covenants and arbitration agreements. *See S.C. CODE ANN. § 15-48-10; Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) ("There is a strong policy in favor of the validity of arbitration agreements because of the strong policy favoring arbitration."). Moreover, arbitration agreements in deeds or covenants are binding and enforceable. *See Roberson v. Cliffs Communities, Inc.*, No. 6:09-2701-HMH, 2010 WL 2721030 (D.S.C., July 8, 2010) (compelling arbitration based on arbitration provisions in a deed and declaration of covenants).

The courts of South Carolina have recognized it is a common practice for a property owner to create covenants related to a horizontal property regime. *See SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 83-84, 781 S.E.2d 115, 121 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016). Therefore, the circuit court's refusal to compel arbitration on the basis that covenants which contain an agreement to arbitration violate public policy is misguided. Such an a conclusion, in fact, violates the generally recognized policies favoring arbitration.

Accordingly, this Court should reverse the circuit court's finding that the Covenants' arbitration provision is void as a matter of public policy and compel the Owners' to arbitrate their claims.

VII. THE CIRCUIT COURT ERRED IN FAILING TO PERFORM ANY ANALYSIS OF THE ARBITRATION AGREEMENT(S) APPLICABLE TO SPRING GROVE DEVELOPMENT AND THE SUBCONTRACTORS.

The circuit court failed to provide any basis for denying Lennar's motion to compel Spring Grove Development and the Subcontractors to arbitration. Furthermore, it is clear that analysis of the agreements to arbitrate for the Owners have no application to the arbitration agreements applicable to Spring Grove Development and the Subcontractors.

A. Spring Grove Development

The circuit court's reasoning related to the application of the Covenants does not apply to Spring Grove Development, because Spring Grove Development is the entity that drafted and filed the Covenants. All of the circuit court's analysis related to the enforceability of the Covenants related to a mistaken concern regarding public policy and the fact that the Covenants were created and attached to the individual lots before the Owners purchased their individual lots. Even if those concerns were valid, the circuit court's concerns are not applicable to Spring Grove Development as the party that drafted and filed the Covenants. The circuit court provided no independent analysis regarding Lennar's request to compel Spring Grove Development to arbitration. Therefore, this Court should reverse the circuit court and compel Spring Grove Development to arbitrate its dispute with Lennar pursuant to the valid and enforceable arbitration provision in the Covenants.

B. The Subcontractors

The circuit court also failed to provide any analysis or basis for denying Lennar's motion to compel the Subcontractors to arbitration.

Lennar contracted with each of the Subcontractors to perform work on The Abbey. The

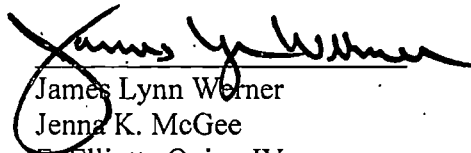
Subcontractors entered into at least one of the following six contracts with Lennar: (1) the Subcontractor Base Agreement; (2) the Subcontract Agreement; (3) the Master Trade Partner Agreement; (4) the General Agreement for Consulting Services; (5) the Business Partner Agreement; and (6) the Supplier Base Agreement. (R. 888-1669). Each of the respective contracts contains an agreement to arbitrate that is segregated from the other provisions, designated by an individually numbered paragraph, that is bold and underlined. (R. 888-1669). Furthermore, the contracts' respective arbitration provisions do not contain cross-references to other sections or intertwining language like the arbitration provision in *D.R. Horton*.

The circuit court denied Lennar's motion to compel arbitration in its entirety without performing any analysis or making any findings regarding Lennar's individual contracts with the Subcontractors. In fact, the circuit court provided no information to support a conclusion it had reviewed or considered the agreements to arbitrate between Lennar and the Subcontractors at all. Lennar filed a Motion to Alter or Amend the circuit court's order and requested the circuit court address the arguments related to the Subcontractors. The circuit court denied the Motion to Alter or Amend, without explanation, in a Form 4 Order. (R. 3). Therefore, the circuit court erred in denying Lennar's Motion to Compel the Subcontractors to arbitration without providing any reasonable basis or explanation. Accordingly, this Court must, at a minimum, remand the circuit court's arbitrary and baseless ruling and order the circuit court to consider each of the Subcontractors' agreements to arbitrate individually and in a manner that complies with the applicable method of reviewing an agreement to arbitrate.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Lennar's Motion to Compel Arbitration. It was error for the circuit court to declare the arbitration provisions in the four agreements unenforceable and unconscionable because neither the law, nor the facts, support the

circuit court's determination that the terms of any of those arbitration provisions are one-sided or oppressive. Therefore, Lennar respectfully requests the Court (a) reverse the circuit court; (b) hold the Owners must submit to arbitration pursuant to the Purchase and Sale Agreement, or alternatively the Lennar Warranty, the Covenants, or the Deeds; (c) hold that Spring Grove Development must submit to arbitration pursuant to the Covenants; (d) find that the Subcontractors must submit to arbitration pursuant to their contracts with Lennar; and (e) remand for entry of an order compelling arbitration.



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September 1, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

RECEIVED

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SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others
similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg,
Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis
Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew
Collins,
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, Costal 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

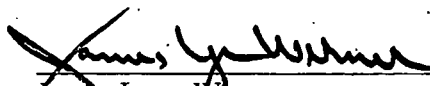
Decor Corporation, Fourth Party Plaintiff,

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 Betio Pereira, 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 CERTIFICATE OF COUNSEL

The undersigned hereby certifies on September 1, 2017, that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants.

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BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS,
JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND,
LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S
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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE WHOLE OF (1) THE PURCHASE AND SALE AGREEMENT, (2) THE LENNAR WARRANTY, (3) THE COVENANTS, AND (4) THE DEEDS SHOULD BE READ IN CONJUNCTION WITH EACH OTHER AND COLLECTIVELY AS THE ARBITRATION AGREEMENT.**
- II. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE UNCONSCIONABLE.**
- III. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE FEDERAL ARBITRATION ACT DOES NOT APPLY TO THE PURCHASE AND SALE AGREEMENT, THE LENNAR WARRANTY, OR THE DEEDS.**
- IV. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE AMBIGUOUS.**
- V. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS ARE NOT SEVERABLE FROM THE OTHER PROVISIONS OF THEIR RESPECTIVE AGREEMENTS.**
- VI. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO COMPEL THE OWNERS TO ARBITRATION PURSUANT TO THE COVENANT.**
- VII. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO PERFORM ANY ANALYSIS OF THE ARBITRATION AGREEMENT(S) APPLICABLE TO SPRING GROVE DEVELOPMENT AND THE SUBCONTRACTORS.**

STATEMENT OF THE CASE

A. Introduction

This is a defective construction suit by the Homeowners at The Abbey located in Spring Grove Plantation, individually and on behalf of others similarly situated. The Abbey consists of approximately Sixty-Nine (69) homes in the Spring Grove Plantation neighborhood located in Berkeley County, South Carolina. Upon information and belief, the houses were constructed from 2010 to present. Plaintiff/Respondents have alleged that construction defects exist which have resulted in water intrusion, component and structural degradation, and extensive

consequential damages. Additionally, there are other unsuitable and/or improperly installed components.

B. The Sales Contract(s)

The residences were originally constructed and sold by Appellant/Defendant Lennar. Although Patricia Damico, Joshua and Brettany Buetow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, and Matthew Collins, Bryan and Cynthia Camara, are homeowners directly at issue in this case, other homeowners are not original homeowners and have not signed similar sales agreements. (R. p. 2437 ¶ 2).

The contracts at issue are a “Purchase and Sale Agreement” and a “Warranty”, not a construction contract. (R. pp. 2454–2521 and pp. 2522–2530. respectively). The sales contracts do not contain an arbitration agreement that complies with South Carolina Law (or a state arbitration warning). S.C. Code § 15-48-10. Specifically, in order for an arbitration provision to be enforceable/valid it “shall be typed in underlined capital letters...” The contracts fail to comply with the South Carolina Statute as they are not underlined. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518, 2522). Pursuant to S.C. Code § 15-48-10, an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the SCUAA’s express provisions.

The “Lennar Warranty” disclaims all “other warranties, express or implied, including but not limited warranty of habitability, are hereby expressly disclaimed and waived”. (R. p. 2529, ¶ 2). In addition, it states “Lennar’s total financial obligations under the Lennar Limited Warranty are limited to the original sales price of your Home”. (R. p. 2529, ¶ 3). Further, the Lennar Warranty states “Consequential Damages Not Covered. Lennar shall not be liable for, and you

expressly waive recovery of, any consequential damages..., including but not limited to: any diminution in value...; lost profits; damages to personal property; any personal injury of any kind..., any medical or hospital expenses; costs of food, moving and storage, relocation expenses, or rental value of the Home or any other costs due to loss of use..." (R. p. 2529, ¶ 4). Both the Sales Contract and the Warranty (discussed below) are standard, nonnegotiable, Lennar form contracts. (R. p. 2438; p. 218, line 16 to line 24; p. 219, line 11 to line 17).

C. Lennar's (non) Warranty

Ostensibly, the Lennar Warranty purports to provide relief to aggrieved homeowners. However, a detailed reading of the Warranty shows that its true purpose is to provide temporal limits on Lennar's responsibility for shoddy construction. After one to two years, the Warranty only provides a remedy for rare, load bearing, structural defects. (R. p. 2529, ¶ 9). All other remedies of any kind for any other defect - no matter how egregious - are excluded. Even the "structural warranty" is a misnomer - the only structural components covered are those that Lennar deems are structured components. (R. p. 2523) Stated differently, the Lennar Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, termite-infested homes at The Abbey.

If there was any uncertainty left as to the lack of remedy of any kind available to the homeowners under the Warranty, one only has to go to pages 6 through 9 of the Warranty, which prohibits any coverage or remedy for:

1. Damage to land, landscaping (including sodding, seeding, shrubs, trees, and planting), sprinkler systems, outbuildings, carports, or any other appurtenant structure or attachment to the dwelling, or other additions or improvement not a part of your Home;
2. Loss of use of all or a portion of your Home;
3. Any loss or damage that is caused or made worse by any of the following causes: microorganisms, fungus, decay, wet rot, dry rot, soft rot, rotting of any kind, and mold;
4. Any and all exclusions set forth in the Workmanship Systems and Structural Standards;

5. Except as prohibited by law of the state in which the Home is located, all other warranties express or implied, including but not limited to any implied warrant of habitability, are hereby expressly disclaimed and waived;

6. Lennar shall not be liable for, and you expressly waive recovery of any consequential damages that may result from the condition of any component of the Home, including but not limited to: any diminution in value of the Home before or after repairs are performed; lost profits; damages to personal property; any hospital expenses; cost of food, moving and storage relocation expenses, or rental value of the Home or any other costs due to loss of use, inconvenience or annoyance during repair. (R. pp. 2527-2528).

D. Covenants

The Covenants were filed with the register of deeds, according to Lennar, “prior to the sale of the residences.” (R. p. 2541 ¶ 2). Accordingly, Plaintiff/Respondents could have no input into those restrictions. Plaintiff/Respondents were never consulted and were never provided the opportunity to negotiate those terms.

Indeed, Plaintiffs had no choice and zero input as to any aspect of Lennar’s Purchase and Sales Agreement, Warranty, Covenants, or Deed, including their respective arbitration and legal remedies provision.

FACTS/PROCEDURAL HISTORY

This is a defective construction suit by the Homeowners at The Abbey located in Spring Grove Plantation, individually and on behalf of others similarly situated. (R. pp. 26-41). On October 30, 2014, Plaintiff/Respondents commenced this action by Complaint, which asserted a number of claims including negligence/gross negligence, breach of warranty, and strict liability against Defendant/Appellant Lennar. (R. pp. 26-41). Lennar answered the Complaint on February 17, 2015. (R. pp. 42-74).

On June 1, 2015, over, seven (7) months after the Complaint was filed, Lennar filed a Motion requesting that the Court Compel Arbitration based upon purported arbitration provisions contained the Lennar Purchase and Sale Agreement and Lennar Limited Warranty. (R. pp. 257-

261).

On November 23, 2015, Plaintiff/Respondents filed an Amended Complaint. (R. p.75-108). On November 25, 2015, Defendant/Appellant Lennar filed its Answer to the Amended Complaint, Cross-claims, and Third-Party Complaint. (R. pp. 109-164).

On March 30, 2016, Lennar amended its Motion to Compel Arbitration. (R. pp. 262-1288). On April 7, 2016, Plaintiff/Respondents filed Plaintiff's Memorandum in Opposition to Defendant Lennar's Motion to Compel Arbitration. (R. pp. 2434 -2530) A hearing on the Motion was held on April 11, 2016. (R. p. 4).

On September 19, 2016, the Circuit Court issued an order denying the Motion to Compel, finding, among other things that the arbitration provision is unconscionable and unenforceable. (R. pp. 4-23). Appellant thereafter moved the Circuit Court pursuant to Rule 59(e), SCRCP, to reconsider its prior order. (R. pp. 2553-2572). The Circuit Court entered the Order denying Appellant's Motion for Reconsideration on October 26, 2016. (R. p. 3). This appeal follows.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo review*." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT

The Circuit Court found the arbitration provision was unenforceable, and upon

reconsideration of Appellant's arguments, re-affirmed its initial conclusion. As set forth herein, the Circuit Court correctly determined the issues before it and properly found the arbitration agreement was, among other things, unconscionable and unenforceable.

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ARBITRATION PROVISIONS IN (1) THE PURCHASE AND SALE AGREEMENT, (2) THE LENNAR WARRANTY, (3) THE COVENANTS, AND (4) THE DEEDS MUST BE READ AS A WHOLE TO COMPRISE THE ARBITRATION AGREEMENT.

The Circuit Court did not, as Appellant contends, find that "the whole of (1) The Purchase and Sale Agreement, (2) the Lennar Warranty, (3) the Covenants, and (4) the Deeds should be read in conjunction with each other and collectively as the arbitration agreement." Rather, the Circuit Court properly determined that the *arbitration provisions* (not the entire agreements) must be read as a whole to comprise the arbitration agreement. (R. p. 8 ¶ 1-2). Specifically, the Court found that "the arbitration provisions as set forth below in all four documents, including the entire Lennar Limited Warranty, must be read as a whole to comprise the arbitration 'agreement' due to the 'cross-references to one another' and 'intertwining paragraphs.'" (Citing *Smith v. D.R. Horton*, S.Ct. Opinion No. 27645) (Filed July 6, 2016). (R. p. 8, ¶ 2)

In limiting its decision to the arbitration provisions at issue, the Circuit Court properly considered and applied the U.S. Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, (holding that courts may only consider the threshold question of whether the arbitration agreement is fraudulently induced and thus invalid, not whether the contract as a whole is invalid) 388 U.S. 395, 406 (1967), and the Supreme Court of South Carolina's decision in *Smith v. D.R. Horton*, which reiterated that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement

itself, and not those of the whole contract.” S.Ct. Opinion No. 27645 (filed July 6, 2016). (R. p. 8 ¶ 1-2).

Just as the South Carolina Supreme Court did in *Smith*, the Circuit Court provided a thorough analysis of the arbitration provisions at issue, specifically citing all relevant “cross-references” and “intertwining paragraphs,” which it considered in reaching its decision. Plaintiff/Respondents hereby incorporate the Court’s thorough analysis, which is contained in the Order Denying Defendant Lennar’s Motion to Compel Arbitration. (R. pp. 7-11).

Accordingly, Appellants’ contention that the Circuit Court read the whole of the four agreements as the arbitration agreement is incorrect and not supported by the Circuit Court’s Order or the record.

II. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE COLLECTIVE ARBITRATION PROVISIONS ARE UNCONSCIONABLE AS A WHOLE.

A. South Carolina Law and Prevailing Equitable Principles Invalidate Lennar’s Arbitration Provisions.

In South Carolina, a party may effectively challenge the arbitrability of a given claim based upon general contract defenses, including fraud, duress and unconscionability. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (noting general contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause governed by the FAA.)

When such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a matter should be resolved through arbitration. *See Oxford Health Plans, LLC v. Sutter*, 569 U.S. __ (2013). This determination involves a two—step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive

scope of the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) (noting where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.) “When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look at the state law that ordinarily governs the formation of contract in determining whether a valid arbitration agreement arose between the parties...” *Smith v. DR. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), affirmed by S. Ct. Opinion No. 27645 (Filed July 6, 2016); *see also* S.C. Code § 15-48-20 (a) (providing arbitration will be denied if a court determines no agreement to arbitrate exists).

B. Lennar’s Warranty Provisions are Unconscionable, and thus Unenforceable.

Unconscionability is defined as “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson v. MSA of Myrtle Beach*, 373 S.C. 14, 25 644 S.E.2d 663, 668-69 (2007) (citing *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 SC. 544, 606 S.E.2d 752, 757 (2004)) Unconscionability must be evaluated under both prongs: (1) lack of meaningful choice; and (2) oppressive terms.

1. Absence of Meaningful Choice

“Absence of meaningful choice on the part of one part generally speaks to the fundamental fairness of the bargaining process in the contract at issue.” *Id.* (citations omitted). In determining whether a contract was ‘tainted by an absence of meaningful choice,’ the Court should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the

parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2e at 669 (citations omitted). "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Id.* at 373 S.C. at 26-27, 644 S.E.2d at 669.

In circumstances involving adhesion contracts, an absence of meaningful choice is readily apparent based upon the lack of bargaining power. Accordingly, adhesion contracts, such as commercial sales agreements and manufacturer warranties, are subject to "considerable skepticism" due to the disparity in bargaining positions of the parties. *Id.* at 27, 644 S.E.2d at 669. Consequently, "the presumption in favor of arbitration is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id.* at 26, 644 S.E.2d at 669 (citations omitted).

Most recently, in *Smith v. D.R. Horton*, the South Carolina Supreme Court issued an Order affirming the denial of a Motion to Compel Arbitration and finding the arbitration provisions unconscionable. *Smith v. D.R. Horton*, S.Ct. Opinion No. 27645 (July 6, 2016). In the analysis of the lack of meaningful choice, the Supreme Court highlighted that it had previously "taken judicial cognizance of the fact that the modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." *Id.* (citing *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E. 2d 730, 735-36 (1989) (other internal citations omitted). Here, as in *Smith*, "there is no indication (...) that the [Plaintiffs] enjoyed a substantially stronger bargaining position against [Lennar] than the average homebuyer, or that

they were represented by independent counsel.” *Id.*

Plaintiffs had no choice and zero input as to any aspect of Lennar’s Purchase and Sales Agreement, Warranty, Covenants, or Deed, as for each Agreement entered into by the Plaintiff/Respondents, they all contain the same sections and same language, including the arbitration and legal remedies provisions. (R. pp. 2454–2521; 2522–2530; 296-713; 2315-2366; 2388-89).

Lennar argued that the Covenants bolster their arbitration clause; however, the Circuit Court properly disagreed. The Covenants were filed with the register of deeds, according to Lennar, “prior to the sale of the residences”; therefore, Plaintiff/Respondents could have no input into those restrictions. (R. p. 2541 ¶ 2). Plaintiff/Respondents were never consulted and were never provided the opportunity to negotiate those terms. (R. p. 214, lines 12 to 24). Given Plaintiff/Respondents are not business entities, are unsophisticated, and lacking in bargaining power, it only supports the supposition that Plaintiff/Respondents were presented with Lennar’s Purchase and Sales Agreement, Warranty, and Restriction on a take it or leave it basis and that clearly there was an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998).

As such, the Circuit Court properly determined that it could not ignore the “adhesive” nature of these provisions—nonnegotiable provisions which were drafted by Lennar, and which functioned to contract away certain significant rights and remedies otherwise lawfully available to Plaintiff/Respondents. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. (R. p. 14, lines 16-19)

2. Oppressive/One—Sided Terms

Specifically as to oppressive terms, the South Carolina Supreme Court in affirming the early rulings by the Court of Appeals and trial court in *Smith v. D.R. Horton*, found that

“attempts to disclaim implied warranty claims and prohibit monetary damages are clearly one-sided and oppressive.”

The trial court in *Smith*, originally confronted with a motion to compel arbitration brought by D.R. Horton, viewed the warranties and arbitration section of the purchase contract as a *whole*, finding it “referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies.” *Id.* Per its review, the trial court held the sections’ collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id.* The trial court further found “perhaps even more stark [were] the provisions in the Limitations of Liability...” in which D.R. Horton claimed it could not be liable for monetary damages of any kind. *Id.* Based upon the foregoing, the trial court concluded, and the Court of Appeals and Supreme Court subsequently affirmed, that the arbitration provision was wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions. *Id.*

The Circuit Court’s review of Lennar’s Warranty revealed strikingly similar warranty limitations and disclaimers to those addressed, and ultimately rejected, by the *Smith* Court. The Warranty eliminates most remedies after the structure is two years old. (R. pp. 2523, 2527-2530). Lennar’s arbitration and remedial-related provisions result in (a) the loss of the right to a jury trial (b) the loss of the ability to maintain a class action .; and (c) the loss of other certain remedies otherwise allowed by South Carolina law including the recovery of monetary damages (R. p. 2525-2526; 2529-2530) . Lennar further attempts to disclaim all implied warranties. (R. p. 2529 ¶ 2).

Under South Carolina state law principles of contract interpretation, such limitations offered through an adhesion contract, and which effectively deprive substantial rights and

eviscerate all means of recovering any damages, are oppressive.

As applied to The Abbey, Lennar's Warranty provisions create an internal inconsistency within the Warranty itself by negating all meaningful warranty coverage for the primary risk associated with said Warranty - damage arising out of or to the residences that Lennar built. Like the defendants in both *Smith* and *Simpson*, Lennar takes the position its Warranty relieves *Lennar of all liability for this very damage under any conceivable set of circumstances*. (R. pp. 2527-2529; 128 ¶ 140). This renders the arbitration provisions, and thus the entire Warranty (a) void of its essential purpose; (b) lacking in mutuality; and (c) procedurally and substantively unconscionable.

Irrespective of whether the FAA or SCUAA apply, the Circuit Court properly determined that the collective arbitration provisions are oppressive and that the Plaintiff/Respondents had no meaningful choice when entering into the adhesion Contracts. *Id. citing* S.C. Code§ 36-2-302(l) (2003) ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result...."). (R. p. 16).

III. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE WARRANTY PROVISIONS ARE NOT SEVERABLE.

While Courts are permitted to "sever" unconscionable, contractual provisions, the purported agreement between Plaintiff/Respondents and Lennar is not a proper candidate for the application of this remedy. South Carolina courts, and a host of other courts throughout the nation, "recognize severability is not always an appropriate remedy for an unconscionable provision... '[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts...'" *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673; *D.R. Horton, supra*, ("We conclude the arbitration clause in this case should not be severed

from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages") (internal citations omitted) (emphasis added); *see also, Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yam Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights the Court finds that the better course of action in this case is to excise the arbitration clauses altogether").

Similar to *Simpson* and *D.R. Horton*, Lennar's arbitration clause is "made unconscionable" by oppressive provisions which pervade each of the arbitration provisions within the Documents, thereby rendering "severability" impractical, if not impossible. Thus, in line with South Carolina jurisprudence, each arbitration provisions contained in Lennar's Purchase and Sales Agreement (§§16 and 17, and Rider B), Lennar's Limited Warranty in its entirety, Arbitration provision in the Covenants and Restriction and Deed, were "excise(d) (...) altogether," and properly rejected by the Circuit Court. *Id.*

IV. THE CIRCUIT COURT PROPERLY DETERMINED THAT, IN THE ALTERNATIVE TO BEING UNCONSCIONABLE, THE ARBITRATION PROVISIONS ARE AMBIGUOUS AND NOT GOVERNED BY THE FAA.

Appellant Lennar argued that the Purchase and Sale Agreement, the Limited Warranty, the Covenants and Restriction, and the deed all contain arbitration provisions which are governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq*, or in the alternative the South Carolina

Uniform Arbitration Act, but that under either Act, the arbitration provisions are proper and enforceable. (R. 215, line 13 to 16).

Plaintiff/Respondents argued that the arbitration provisions should be governed by the SCUAA and not the FAA, and that the arbitrations provisions thus do not comply with the SCUAA's notice requirements. (R. p. 208, line 5 to 23; p. 222, line 2 to page 29, line 9). The Circuit Court properly determined that the arbitration provisions are unconscionable, and thus unenforceable. (R. p. 18).

In the alternative, the Circuit Court found that the arbitration provisions are ambiguous. (R. p. *Id.*) Ambiguities are to be more strictly construed against the drafter of a document. Therefore, the Circuit Court analyzed whether the agreements are subject to interstate or intrastate commerce. (R. p. *Id.*) The Court found that the SCUAA applies to the arbitration provision and that notice is not in compliance with the statute. (R. p. *Id.*) For these alternative reasons, the Court also denied to Lennar's Motion to Enforce the arbitration provisions. (R. p. *Id.*)

Where an arbitration agreement selects the FAA or a state arbitration statute as the applicable law, that law governs regardless of whether the contract involves intrastate or interstate commerce. This principle has repeatedly been recognized by the United States Supreme Court and the South Carolina Supreme Court. In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University*, the United States Supreme Court addressed the impact of parties' choice-of-law in their contract on the question of whether the arbitration required by the contract was governed by the FAA or state law. *Volt*, 489 U.S. 468 (1989). The Court found determinative the fact that the FAA's purpose is only to require courts to enforce "agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* at 478. The

Court thus held that courts must enforce contractual provisions specifying the law governing contractually required arbitration of disputes. *Id.* at 479. The court recently reiterated this point in *DIRECTV, Inc. v. Imburgia*, providing that "parties to an arbitration contract [have] considerable latitude to choose what law governs some or all of its provisions." *Imburgia*, 136 S.C. 463, 468 (2015). The South Carolina Supreme Court applied these principles to hold that where an arbitration agreement provides that it is governed by the FAA, the FAA applies irrespective of whether there is interstate commerce. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001).

In reviewing the arbitration provisions at issue, the Circuit Court properly determined that ambiguous terms as to the choice of law are within each of the agreements Lennar claims to contain arbitration provisions. (R. p. 19).

The Purchase and Sales Agreement states on the front of the document that the arbitration notice is being provided pursuant to the South Carolina Code of Laws and pursuant to Section 15-48-10. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518). However, Section 16 later states that 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.)." (R. pp. 2458, 2473, 2483, 2491, 2501, 2512).

Lennar's Limited Warranty provides the same sentence as in Section 16 of the Purchase Agreement and states that the FAA applies (R. p. 2525 ¶ 1; p. 831 ¶ 1) however, on page 14, the Warranty specifies that the agreement is subject to arbitration pursuant to the Uniform Arbitration Act, Section 15-48-10 (sic), et. seq. Code of Laws of South Carolina, 1976, as

Amended. (R. p. 839). The Disclaimer of Implied Warranties on page 11 of the Warranty refers to and states an intention to comply “with the laws of the state in which the Home is located.” (R. p. 836).

On the front page of the Amended and Restated Declaration of Covenants, the words **“THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (S. C. CODE ANN §15-48-10 ET. SEQ, AS AMENDED.”** (R. p. 2315). The Covenants go on to state that the “developer expressly reserves the right to amend or restate this declaration without the consent of an owner.” (R. p. 2315). The Deed refers to the Covenants and incorporates the same (R. p. 2388), but the Deed does not have a separate arbitration provision. Lennar admits that the Covenants were recorded in 2007, years prior to the construction and sale of Plaintiffs residences. (R. p. 2541 ¶ 2).

Therefore, the Circuit Court correctly found that the terms when viewed collectively are ambiguous as they refer to both the FAA and the SCUAA as written. (R. p. 20 ¶ 1). The Court has already found that the contract is one of adhesion with oppressive terms, the Covenant is an even more extreme case of adhesion, as it was written, agreed to, recorded and may be changed by Lennar without notice. (R. p. 2315). The Circuit Court properly noted that it is not the Court's prerogative to rewrite the arbitration provisions, but the agreements contain ambiguities on the choice of law. (R. p. 20 ¶ 1).

Therefore the Circuit Court examined whether the contract involves interstate or intrastate commerce. The Respondents argued that the sales transactions for the homes located at Spring Grove did not involve interstate commerce; and therefore, that the arbitration clause does not properly invoke application of the Federal Arbitration Act, but rather the South Carolina

Uniform Arbitration Act. (R. pp. 2441-2443; p. 222, line 2 to p. 226 line 11; p. 254, line 3 to page 255, line 17). The Circuit Court agreed finding that the subject-matter sales transactions involve intrastate commerce, as opposed to interstate commerce. (R. p. 20 ¶ 2).

The Supreme Court of South Carolina has held that “to ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” *Zabinski* at 117, 553 S.E.2d at 594 citing *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). The United States Supreme Court utilizes a “commerce in fact” test to determine if the transaction involves interstate commerce for the FAA to apply. *Zabinski*, at 115, 553 S.E.2d at 591 quoting *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 274 (1995). The transaction must turn out, in fact, to have involved interstate commerce. *Id.* citing *Roberson v. Money Tree of Ala., Inc.*, 954 F.Supp. 1519 (M.D. Ala. 1997). “Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration.” *Id.* at 115-6, 553 S.E.2d at 591 citing *Volt Info. Scis. Inc. v. Bd. of Trs.*, 489 U.S. 468 (1989).

As it applies to cases involving real estate, the Supreme Court of South Carolina has held that “interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) citing *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994).

Thus, while interstate commerce may be implicated in certain transactions, our Supreme Court adheres to the view that real estate purchase contracts only implicate intrastate commerce because “the development of land within South Carolina's borders is the quintessential example

of a purely intrastate activity.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) quoting *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117-18. The Court further confirmed its prior rulings that the sale of a residence is inherently *intrastate*. *Id.*

The Circuit Court properly found that the Plaintiff/Respondents’ Agreements for Sale evidence that they purchased homes in Berkeley County, South Carolina. The homes were sold by Lennar, who was/is located at 1941 Savage Road, Suite 100C, Charleston, SC 29407. (R. p. 2412). The General Contractor for the project, Lennar Carolinas, LLC, is a corporation organized in the State of South Carolina. (R. p. 80 ¶ 22; p.116 ¶ 22) Each of the above evidences intrastate commerce. Defendants have not satisfied their burden of proof to negate the well-established South Carolina precedent respecting the inherent intrastate nature of the sale of a home. Based on the above, the Federal Arbitration Act does not apply to the transaction or this matter.

V. THE CIRCUIT COURT PROPERLY DETERMINED THAT IN THE ALTERNATIVE TO BEING UNCONSCIONABLE, THE ARBITRATION PROVISIONS DO NOT COMPLY WITH THE SCUAA.

The Circuit Court reviewed the *arbitration provisions* as a whole, and found them unconscionable. (R. p. 22). In the alternative, the Circuit Court found that the arbitration provisions do not comply with the SCUAA, as “Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.” (R. p.22). The arbitration provisions in the Purchase and Sales agreement, the Warranty, nor the deed are underlined. (R. pp. 2454, 2467, 2479, 2487, 2497, 2508, 2518, 2522; The arbitration provision in the Warranty and Deed does not appear on the first page, and is not in capital letters. (R. pp. 2522 and 2388). The Covenants document

does comply with the SCUAA, however, the Circuit Court properly determined that the adhesive nature of the document and the fact that it was not presented to each homeowner to be persuasive and against public policy. (R. p. 2315; p. 22)). Under the SCUAA, an arbitration provision must be properly disclaimed, and failure to do so, renders the arbitration provision unenforceable under the Act's express provisions. S.C. Code § 15-48-10. Therefore, the Arbitration provisions are unenforceable under the SCUAA.

VI. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE HOME OWNERS MAY NOT BE COMPELLED TO ARBITRATE BASED ON THE COVENANTS

As noted above under Argument IV, the Circuit Court properly determined that the Owners may not be compelled to arbitrate based on the Covenants.

Lennar argued that the Covenants bolster their arbitration clause (R. p. 214, line 12 to page 13, line 4); however, the Circuit Court properly disagreed (R. p. 22). The Covenants were filed with the register of deeds, according to Lennar, “prior to the sale of the residences”; therefore, Plaintiff/Respondents could have no input into those restrictions (R. p. 2541 ¶ 2). Plaintiff/Respondents were never consulted and were never provided the opportunity to negotiate those terms. (R. p. 2541 ¶ 2). Given Plaintiff/Respondents are not business entities, are unsophisticated, and lacking in bargaining power, it only supports the supposition that Plaintiff/Respondents were presented with Lennar’s Purchase and Sales Agreement, Warranty, and Restriction on a take it or leave it basis and that clearly there was an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998).

As such, the Circuit Court properly determined that it could not ignore the “adhesive” nature of these provisions—nonnegotiable provisions which were drafted by Lennar, and which

sought to contract away certain significant rights and remedies otherwise lawfully available to Plaintiff/Respondents. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69. (R. p. 14).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the ruling of the Circuit Court and remand this action for further proceedings and, ultimately, a trial by jury in the Circuit Court.



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ENGLAND, LENNA LUCAS, AND DANNY AND
ELLEN DAVIS MORROW***

September 5, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

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SC Court of Appeals

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

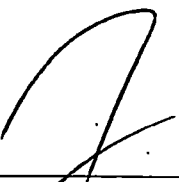
Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY
BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS,
JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND,
LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S
CERTIFICATION OF FINAL BRIEF

I, John C. Hayes, IV, do hereby certify that the Final Brief of Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglas, Czarra and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby certifies that the Final Briefs comply with the Supreme Court Order of April 15, 2014.

[Signature on Following Page]

Respectfully submitted,



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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, 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,

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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 Betio Pereira, 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.

**APPELLANT'S FINAL REPLY BRIEF
TO RESPONDENTS' BRIEF**

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INTRODUCTION

This appeal arises out of the circuit court's refusal to compel the Owners, Subcontractors, and Spring Grove Plantation Development, LLC to arbitration pursuant to their respective agreements with Lennar Carolinas, LLC ("Lennar"). In response to Lennar's Initial Brief, the Owners¹, along with various Subcontractors² and Spring Grove Plantation Development, LLC, submitted several briefs. In the interest of efficiency Lennar has elected to reply to the various arguments in this Consolidated Reply Brief. Thus, the reply arguments herein are collective responses to opposing briefs when possible and responses to individual arguments only when it seemed necessary. The first section of this Consolidated Reply Brief addresses certain arguments of the Owners. The second section of this Consolidated Reply Brief addresses arguments contained in more than one Subcontractor brief and certain unique arguments made by only one Subcontractor or another.

ARGUMENTS

I. Reply to Owners' Arguments

A. Each separate agreement containing an arbitration provision should have been considered and enforced individually.

In deciding Lennar's Motion to Compel Arbitration, the circuit court had a well-defined and straightforward task; namely, the court was legally obligated to identify the arbitration provision within each of the four agreements at issue between Lennar and the Owners ((1) Purchase and Sale Agreement; (2) Lennar Warranty; (3) Covenants; and (4) Deeds) and to determine whether the respective arbitration provisions were valid and enforceable. In

¹ The following Owners submitted a joint Respondents' Brief: Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Mathew Collins, Jonathan and Teresa Douglass, Czara and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow.

² The following Subcontractors submitted individual Respondent's Briefs: (1) Alpha Omega Construction, Inc.; (2) Guaranteed Framing, LLC; (3) DVS, Inc.; (4) Décor Corporation; and (5) Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

performing this analysis, the circuit court was limited to a review of only the arbitration provision in each agreement—not the agreement as a whole. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967) (finding that a court’s analysis of the enforceability of an arbitration provision is restricted to that provision alone). In this case, because there were four separate agreements between Lennar and the Owners, if any one of those agreements contained a valid and enforceable arbitration provision, the circuit court was obligated to compel the case to arbitration.

B. The Purchase and Sale Agreement required the circuit court to compel arbitration.

The circuit court’s analysis should have begun and ended with a review of Section 16 of the Purchase and Sale Agreement between Lennar and the Owners. Section 16 of that Agreement undeniably and unequivocally sets forth a valid and enforceable agreement to arbitrate.

Section 16 is separately and clearly labeled “**Mediation/Arbitration of Disputes.**” (R. 300). Section 16 is separately and uniquely identified not only by the aforementioned bold and underlined heading, but also within the numbering structure of the Agreement as sections 16.1 through 16.10. (R. 300-301). No other agreement, document or section of the Purchase and Sale Agreement is incorporated by reference into Section 16 or even mentioned in Section 16.

Section 16 of the Purchase and Sale Agreement provides:

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).

There can be no valid finding that Section 16 contains a "cross-reference" to any other provision or section within the Purchase and Sale Agreement or to any other agreement. Likewise, there can be no valid finding that Section 16 is "intertwined" with any other provision or section of the Purchase and Sale Agreement or any other agreement. There is no physical, numerical, spatial or verbal "intertwining" in any form or fashion.

Indeed, neither the circuit court in its Order, nor the Owners in their Brief, cited to any "cross-referencing" or "intertwining" within Section 16. It is abundantly clear that both the circuit court and the Owners adopted a view that the decision in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), could be a basis for supporting their desired outcome of denying Lennar's Motion and refusing to compel arbitration, and each of them chose to parrot the findings of fact from *D.R. Horton* and adopt them in this case as though they were conclusions of law requiring no basis in fact specific to this case. Thus, neither the circuit court, nor the Owners ever link the buzz words—"due to the cross-references to one another" or "intertwining paragraphs"—to any factual support or justification in this Record.

In their effort to justify the contention that the arbitration provision of the Purchase and Sale Agreement (Section 16) contained cross-references and was intertwined with other provisions, the circuit court and Owners assert that the language in Section 16 which clarifies the scope of disputes which would be subject to arbitration—to include all disputes "whether contract, warranty, tort, statutory or otherwise"—justifies the contention that every other provision which refers to or deals with warranty matters may be read as though it is part and

parcel of the arbitration provision. (R. 7-11). Indeed, in the attempt to expand the analysis of the arbitration provision to include some term which the circuit court and the Owners could argue might be unconscionable, they seek to read all, or portions of Sections 3, 5, 17, 28, 30 and Rider B of the Purchase and Sale Agreement as though they are part and parcel of Section 16, the arbitration provision. (R. 8-10). In fact, they seek to have the wholly separate Lennar Warranty document treated as though it is an indistinguishable part of the arbitration provision. These efforts by the circuit court and the Owners are improper.

No fair or justifiable reading of Section 16, or those other sections or agreements, will support a conclusion that they cross-reference each other or are intertwined. The attendant facts and circumstances which allowed the court in *D.R. Horton* to 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. The error of the circuit court's and Owner's position in this case is further evident by reviewing the decision in *One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Company*, 418 S.C. 51, 56, 791 S.E.2d 286, 289 (Ct. App. 2016). In *One Belle Hall*, which was decided after *D.R. Horton*, the court analyzed an arbitration provision in a warranty agreement between a shingle manufacturer and a buyer. The arbitration provision stated that it covered claims "relating to or arising out of the shingles or [the] limited warranty . . . regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory." *One Belle Hall*, 418 S.C. at 51, 791 S.E.2d at 289. While the buyer in that case sought to expand the scope of review of the arbitration provision by, as the circuit court and Owners wish to do here, blurring the lines of the arbitration provision and including within it the various other terms, the Court of Appeals rejected those attempts. *Id.*, 418 S.C. at 64, 791

S.E.2d at 293. In fact, this Court found that the circuit court in that case erred when it considered terms outside of the identifiable arbitration provision to analyze the issues. *Id.*

C. The Lennar Warranty is not included in the Purchase and Sale Agreement's arbitration provision.

The Lennar Warranty is a separate and distinct agreement from the Purchase and Sale Agreement. Although the Lennar Warranty provides an additional basis for compelling arbitration in this case, it is not necessary to the decision where it is clear that arbitration is already required by virtue of Section 16 of the Purchase and Sale Agreement.

There is certainly no basis to conclude that the arbitration provision in the Purchase and Sale Agreement is intermingled or cross-referenced with the arbitration provision in the Lennar Warranty merely because the language in the two separate agreements is "almost verbatim." Yet, this was the justification by the circuit court and the argument by the Owners. Reliance on the theory that provisions in separate agreements are similar or "almost verbatim" to justify a conclusion that the separate agreements and separate provisions may be read together because they are deemed "cross-referenced" or "intermingled" has no basis in law (or fact). *See One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293. (R. 10-11). The decision of the circuit court based on such a finding or conclusion is clear error.

D. Jury Trial and Class Action Waivers are not Unconscionable.

Any conclusion by the circuit court, or contention by the Owners, that the arbitration provision in the Lennar Warranty is unconscionable because it contains a jury trial and class action waiver is unsupportable. As a matter of law, jury trial and class action waivers are not unconscionable terms in an arbitration provision. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding a class action waiver in an arbitration agreement is not unconscionable); *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91-94, 749 S.E.2d 139, 151-

53 (Ct. App. 2013) (upholding a class action waiver in an arbitration agreement under the FAA); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 670 (2007) (“The loss of the right to a jury trial is an obvious result of arbitration.”). Therefore, the circuit court erred in relying on commonly accepted contract terms to find the arbitration provisions at issue in this case to be unconscionable.

E. The “remedial-related provisions” are not included in any of the arbitration provisions.

The circuit court sought to justify its finding that the arbitration provision of the Lennar Warranty was unconscionable by reading other “remedial-related provisions” of the Lennar Warranty into the arbitration provision, and then holding that those remedial-related provisions were unconscionable. (R. 12-16). The “remedial-related provisions” are in the fifth section of the Lennar Warranty. (R. 836). The fifth section of the Lennar Warranty is not a part of the Lennar Warranty’s arbitration provision, which separately and distinctly constitutes the third section of the document. (R. 831). It is a reversible error to rely upon purportedly unenforceable disclaimers and limitations of remedies provisions in sections of a contract other than the arbitration provision to find the arbitration provision is unenforceable. *See One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293 (“Upon our review of the arbitration agreement, we hold the circuit court erred in finding the purportedly unenforceable disclaimers and limitations within the “Legal Remedies” paragraph contributed to the unconscionability of the arbitration agreement.”). Therefore, the circuit court’s reliance upon such provisions is reversible error that should be undone by this Court.

F. The arbitration provisions may be severed from their respective contracts.

The circuit court erred in finding that the arbitration provisions (whether in the Purchase and Sale Agreement or the Lennar Warranty) could not be severed from other terms in the

agreements, and the Owners misrepresented the *D.R. Horton* decision as legal authority for the circuit court's error.

Generally, an arbitration provision is severable from a contract in which it is embedded. See *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001). A court's ability to sever unconscionable terms is limited essentially to when the removal of the terms would effectively require the court to rewrite the contract. *York*, 406 S.C. at 90-91, 749 S.E.2d at 151. In determining if the severing of terms would effectively require a rewrite, the test is whether the unconscionable terms are so intertwined with the arbitration provision that the court is unable to separate out a reasonable arbitration provision without rewriting the contract. See *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674.

In this case, the only purported unconscionable provisions are asserted to be in the Lennar Warranty. Therefore, those terms are not part of the arbitration provision in the Purchase and Sale Agreement. "Severing" them from the arbitration provision is readily accomplished by not conflating them in the first instance and there is no need for any rewriting of the arbitration provision in the Purchase and Sale Agreement. The alleged unconscionable terms are in a wholly separate and distinct document and "severing" the two requires no revision of the standalone agreement.

Even within the Lennar Warranty, severing the arbitration provision of the document from other provisions does not require any rewriting of the arbitration section because they are separate and distinct in every way—distinctly headed and labeled and topically and spatially separated. In addition, the only terms within the Lennar Warranty's arbitration provision alleged to be unconscionable are the jury trial and class action waivers. As discussed above, jury trial and class action waivers are not unconscionable. Therefore, it is obvious that the purported

unconscionable terms do not “pervade each of the arbitration provisions” so as to prevent this Court from severing the arbitration provisions from their respective contracts. (R. 16-17).

Furthermore, the *D.R. Horton* decision has no applicability to the issue of severability in this case—let alone providing legal authority for that decision in this case. In *D.R. Horton*, the court declined to analyze whether the unconscionable terms were severable because the *D.R. Horton* contract did not contain a severability provision. *D.R. Horton*, 417 S.C. at 50 n.6, 790 S.E.2d at 5 n.6.; see also *One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293 (“unlike the arbitration agreement in *D.R. Horton*, the legal remedies paragraph contains a severability clause.”). Therefore, in the absence of a severability provision, the *D.R. Horton* court found that the parties did not intend for unconscionable terms to be struck from their arbitration agreement. *Id.* However, the arbitration provisions in the Purchase and Sale Agreement and the Lennar Warranty each contain an express severability provision—something the contract at issue in *D.R. Horton* lacked. (R. 301; 831-832). Accordingly, the circuit court erred in finding the purported unconscionable provisions are not severable from the arbitration provisions in the Purchase and Sale Agreement and the Lennar Warranty.

G. No Argument that the Covenants are Unconscionable.

The Owners argue the arbitration provision in the Covenants is unenforceable because the Covenants are an adhesion contract. However, “[t]here are many cases in this jurisdiction and others involving the enforceability of arbitration contracts in adhesion contracts. . . .” *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669. If the Court finds a contract is an adhesion contract, then it must determine whether the terms embedded in the arbitration provision are unconscionable. *Id.* The Owners do not argue, and the circuit court did not find, that the actual terms of the Covenants are unconscionable. Therefore, the circuit court’s analysis is incomplete and provides no justification for finding that the arbitration provision in the Covenants is unenforceable. The

circuit court should be reversed because an arbitration provision in an adhesion contract is not per se unenforceable.

H. The Purchase and Sale Agreement's arbitration provision is not ambiguous.

The arbitration provision in the Purchase and Sale Agreement is not ambiguous. The Purchase and Sale Agreement, Section 16, states that the parties agree to submit their disputes to "binding arbitration as provided by the Federal Arbitration Act." (R. 300). The mere notice provision on the top of the first page is not contradictory, and it creates no ambiguity. The statement at the top of the first page merely provides notice to review Section 16 which sets forth the arbitration provision. That notice statement provides:

PURSUANT TO SECTION 15-48-10, SOUTH CAROLINA CODE OF LAWS, 1976, AS AMENDED THIS SHALL CONSTITUTE WRITTEN NOTICE THAT THIS AGREEMENT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO SECTION 16 OF THIS AGREEMENT.

(R. 296).

It is a well-established principle of law that, when interpreting a contract, a court should recognize that the specific language of a contract trumps the general language. *See Aetna Cas. & Sur. Co. v. Holsten*, 100 F.3d 950 (4th Cir. 1996) "[W]hen interpreting a contract, a court should follow the interpretive philosophy that specific language trumps general text." (citation omitted)); 11 Williston on Contracts § 32:10 (4th ed.) ("Even absent a true conflict, specific words will limit the meaning of general words if it appears from the whole agreement that the parties' purpose was directed solely toward the matter to which the specific words or clause relate."); Restatement (Second) of Contracts § 203 (1981) ("[S]pecific terms and exact terms are given greater weight than general language").

The notice at the top of the first page of the Purchase and Sale Agreement indicates the contract is subject to binding arbitration as set forth specifically in Section 16. It does not state that Section 16 is governed by S.C. CODE ANN. § 15-48-10. In Section 16, the specific language of the arbitration provision states plainly and unambiguously that the parties agree to submit to “binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§1 et. seq.).” (R. 300). The specific language of the arbitration provision governs its terms, and Section 16 states that the arbitration is governed by the FAA. Section 16 makes no reference to the South Carolina Code.

I. The Owners agreed the Purchase and Sale Agreement and Lennar Warranty involve interstate commerce.

The Purchase and Sale Agreement arbitration provision (Section 16), and for that matter the specific arbitration provision in the Lennar Warranty, expressly state, “[t]he parties to this Agreement specifically agree that this transaction involves interstate commerce”

Pursuant to Section 2 of the FAA, a “written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, . . .” 9 U.S.C. § 2 (emphasis added).

In South Carolina, an arbitration provision stipulating that it is governed by the FAA is in fact governed by the FAA. *See Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64.

Here, the Purchase and Sale Agreements, and the Lennar Warranty, provide unequivocally an agreement that the transactions involve interstate commerce. (R. 300; 831). Therefore, the Court is required to find that the contract evidences a transaction involving interstate commerce and to enforce it under the FAA.

II. Reply to Subcontractors' Arguments

A. The Subcontractors are only required to arbitrate the claims at issue in this case if the Owners are compelled to arbitrate their claims against Lennar.

The Subcontractors agreed to arbitrate in the event that Lennar is a party to an arbitration action in which it believes that the Subcontractors are liable in whole or in part for the claims being arbitrated. (R. 888-1669).

The Subcontractors individually entered into one, or more, of the following agreements with Lennar: (1) Contractor Base Agreement, (2) Subcontract Agreement, (3) Master Trade Partner Agreement, (4) Master Trade Partner Agreement (Labor and Supply), (5) General Agreement for Consulting Services, (6) Business Partner Agreement, or (7) Supplier Base Agreement. In those agreements the Subcontractors agreed to arbitrate claims if Lennar is a party to an arbitration action with a third-party. In such circumstances, the Subcontractors agreed to participate in the arbitration. (R. 888-1669).

As discussed above, the Owners' claims with Lennar are subject to arbitration. Therefore, under the plain language of the aforementioned subcontracts, each of the Subcontractors agreed to participate in arbitration with Lennar in this case where Lennar is involved in arbitration with the Owners. The Subcontractors must be compelled to arbitration, and any doubt the Court has in compelling the Subcontractors to arbitration should be resolved in favor of arbitration. See *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013).

B. Lennar properly preserved its argument that the circuit court erred in failing to compel the Subcontractors to arbitration.

The argument by some Subcontractors that Lennar did not properly preserve its appeal rights based on the circuit court's error in refusing to compel the Subcontractors to arbitration fails because Lennar properly raised its argument to the circuit court (1) in its motion to compel

arbitration, (2) in the memorandum in support of the motion to compel arbitration, (3) at the hearing on the motion to compel arbitration, and (4) in its Rule 59(e) Motion to Alter or Amend.

The purpose of issue preservation rules is to provide the circuit court with a fair opportunity to rule on the issues, and to provide the court of appeals with a platform for meaningful appellate review. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006). An issue is preserved for appellate review if it is raised to and ruled upon by the circuit court, or if a party files a Rule 59(e) motion asserting issues that were raised to but not ruled upon by the circuit court. *Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633 S.E.2d 505, 510-11 (2006); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the circuit court).

In *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) this Court found that reference in a Rule 59(e) motion to an argument that was not ruled upon by the circuit court is sufficient to preserve the argument for appellate review. In *Chastain*, the appellant raised a due process argument under Rule 7(b)(1) of the South Carolina Rules of Civil Procedure to the circuit court; however, the circuit court did not rule on the motion. *Chastain*, 381 S.C. at 515, 673 S.E.2d at 829. The appellant then filed a motion to alter or amend, pursuant to Rule 59(e), on the grounds the circuit court did not rule on the appellant's "SCRCP 7(a) Due Process Argument." *Id.* On appeal, the appellant specifically based its argument on Rule 7(b)(1), SCRCP. *Id.* at 515-16, 673 S.E.2d at 829. Nonetheless, the respondent argued the issue was not preserved because the appellant did not specifically assert an argument pursuant to Rule 7(b)(1) in the Rule 59(e) motion to alter or amend. This Court held that the argument was preserved, and stated that it would "not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue." *Id.* at 516, 673 S.E.2d at 829.

In the instant case, Lennar properly raised in its Amended Motion to Compel Arbitration the argument that the Subcontractors should be compelled to arbitration pursuant to the terms of their subcontracts with Lennar. (R. 888-1669). In its Amended Motion to Compel Arbitration, Lennar identified each subcontractor and the documents containing the arbitration clauses that governed the disputes at issue in this case. (R. 277-294). The argument was clearly presented to the circuit court, but the circuit court's order only addressed the issue of arbitration between Lennar and the Owners. (R. 4-22). Therefore, Lennar filed a Rule 59(e) motion requesting the circuit court alter or amend its order denying its Motion to Compel Arbitration. (R. 2553). In its Motion to Alter or Amend, Lennar requested the court specifically address its request to compel the Subcontractors to arbitration, and Lennar relied on the reasons previously articulated in its motion, its supporting memoranda, and then presented at the hearing on the motion. (R. 2571-2572; 245-251). The circuit court's order in response to the Rule 59(e) Motion still contains no reference to an analysis or decision regarding the Subcontractors. (R. 3). Therefore, Lennar's arguments are clearly preserved for appellate review and the Subcontractor's arguments to the contrary are without merit.

C. Lennar neither waived, nor abandoned, its argument in favor of compelling the Subcontractors to arbitration.

Lennar neither waived, nor abandoned, its argument in favor of compelling the Subcontractors to arbitration. While the Subcontractors argue that Lennar failed to satisfy South Carolina Appellate Court Rule 208 because Lennar did not restate the citations to authority about the error by the circuit court in the subsection of the brief addressed at the Subcontractor decision, Lennar did, in fact, cite authority in support of its argument that the Subcontractors should be compelled to arbitration pursuant to their contracts with Lennar. First, Lennar's standard of review argument in the Initial Brief is applicable to each of its briefing issues, and

establishes first and foremost that there is presumption in favor of the enforceability and application of arbitration agreements to disputes. Lennar also cited authority that the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. (Lennar's Brief p. 9) (citing *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986)). In the introduction to its arguments, Lennar cited authorities establishing the clear and unquestionable policy, of both South Carolina and the United States, favoring the arbitration of disputes. (Lennar's Brief p. 10) (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). Given these arguments and citations are applicable to each subsequent section and argument in the brief, repeated citation in each section is unnecessary and redundant. Lennar cited numerous authorities supporting its arguments that a party who agrees to arbitrate a dispute should be compelled to arbitrate that dispute. *See, e.g., One Belle Hall*, 418 S.C. at 64, 791 S.E.2d at 293; *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012); *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct. App. 2008); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399 S.E.2d 864, 865 (Ct. App. 2000).

Moreover, the circuit court orders appealed from failed to provide any reasoning for denying Lennar's Motion to Compel Arbitration as it related to the Subcontractors. Without a stated basis for the Motion having been denied, Lennar's argument is effectively limited to its original assertion that it has an agreement to arbitrate the disputes and, based upon the authorities cited above, the circuit court erred in failing to compel the Subcontractors to arbitration. Lennar's brief provides ample citation of authority in support of its argument that Subcontractors should be compelled to arbitration. Therefore, the Subcontractors' arguments that Lennar failed to cite authority in support of its argument should be disregarded and this Court should consider the merits of Lennar's arguments on appeal.

D. Arbitration agreements may apply retroactively.

Contrary to the arguments put forth by Guaranteed Framing, LLC (“Guaranteed Framing”) and Alpha Omega Construction, Inc. (“Alpha Omega”), a party may be subject to arbitration for a claim that occurred prior to the execution of the arbitration agreement when the agreement to arbitrate is sufficiently broad so as to govern the general relationship between the parties and not merely a specific transaction.

Courts have retroactively applied arbitration clauses to disputes arising under prior contracts when there is a broadly worded arbitration clause which governed the overall relationship between the parties. *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 207-08, 588 S.E.2d 136, 139 (Ct. App. 2003); *see also Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 568-71 (4th Cir. 1998) (finding a broad arbitration clause which called for arbitration of “[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship” established that the clause was intended to apply to all conflicts between the parties and not only to conflicts arising under the specific contract containing the arbitration clause); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 331-33 (10th Cir. 1993) (holding the parties were required to submit their claims to arbitration where the dispute predated the execution of the arbitration clause because the clause provided for the arbitration of “any controversy . . . arising out of your business or this agreement”); *Rand Bond of N. Am., Inc. v. Saul Stone & Co.*, 726 F.Supp. 684, 687-88 (N.D.Ill.1989) (finding arbitrable a dispute arising prior to the execution of the arbitration agreement where the arbitration clause provided that the agreement extended to “[a]ny controversy or claim arising out of or relating to your accounts”); *B.G. Balmer & Co. v. United States Fid. & Guar. Co.*, 1998 WL 764669 (E.D. Pa. 1998) (noting that where an arbitration clause speaks in terms of relationships and not timing, it applies to disputes even if the claim

arose before the agreement was executed). The common theme in the courts' opinions finding that arbitration provisions may apply to disputes arising prior to the execution of the agreement was that in each case "the parties expressly agreed that all controversies between them, not just those appurtenant to the contract containing the clause, were to be submitted to arbitration." *Id.*

In *Vestry*, the court found the following arbitration provision required the parties to arbitrate disputes that arose prior to the party's agreement to arbitrate:

The [Church] and Terminix agree that all matters in dispute between them, including but not limited to (i) any controversy or claim between them arising out of or relating to this Agreement, (ii) any wood destroying insect report with respect to the described property or (iii) the described property in any way, in any such case whether by virtue of contract, tort or otherwise, shall be settled exclusively by arbitration.

Vestry, 356 S.C. at 212, 588 S.E.2d at 141. The court interpreted this language and found that "[t]he fact that the dispute accrued prior to the execution of the . . . contract is not dispositive where, as here, the terms of the agreement are susceptible to an interpretation which covers any dispute existing between the parties." *Id.*, 356 S.C. at 213, 588 S.E.2d at 141-42.

In 2015, Guaranteed Framing and Alpha Omega each entered into Master Trade Partner Agreements with Lennar. (R. 1218; 937). The Agreements were amended several times, and the third amendment amended their respective agreements to arbitrate. (R. 1236-1237; 961-962). The arbitration agreement in their respective agreements states the following:

15. ARBITRATION: If any claim or controversy that arises out of or relates to, directly or indirectly, this Agreement or any dealings between the parties cannot be settled by the parties with sixty (60) days after Contractor is first provided with written notice of the claim or controversy by the Subcontractor. . . the claim or controversy shall be resolved by final and binding arbitration pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association. . . . Should a claim or controversy arise between Contractor and a buyer of a residence regarding

materials supplied or work performed by or through Subcontractor, Subcontractor agrees to participate as a party in, and be bound by, any mediation and arbitration proceedings between Contractor and the buyer.

(R. 1236-1237; 961-962) (emphasis added).

The language “any dealings between the parties” clearly indicates an agreement to arbitrate *all* controversies that may arise between either Guaranteed Framing or Alpha Omega and Lennar. Furthermore, the arbitration provision makes no temporal distinction as to the timing in which the dispute must have arisen. Therefore, it is clear that Guaranteed Framing and Alpha Omega each agreed to arbitrate any dispute between them and Lennar.

E. Challenges to the enforceability of the entire agreement are to be decided by the arbitrator.

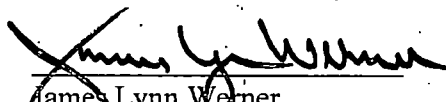
Décor Corporation, DVS Inc., and the Subcontractors who adopted the arguments raised in the other Respondents’ Briefs, challenge the enforceability of their contract as a whole in an effort to avoid being compelled to arbitration.

When a party files a motion to compel arbitration the court is limited to consideration of challenges to the arbitration clause itself, and issues of a contract’s validity are to be considered by the arbitrator. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006) (“[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”). The court’s review of the validity of an arbitration provision is restricted to that provision alone. *Prima Paint*, 388 U.S. at 406. The legality and enforceability of a contract is an issue for the arbitrator to decide. *The Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338-39, 588 S.E.2d 617, 622-24 (Ct. App. 2003) (holding because a party did not directly challenge the arbitration agreement in either of the two contracts, the legality and enforceability of the contracts is an issue for the arbitrator to decide).

Certain Subcontractors challenge the enforceability of the arbitration provisions on the grounds that the contract is not enforceable due to the lack of a "Purchase Order" or an attached "Schedule A." These arguments seek to challenge the validity of the contract as a whole. It is well established that challenges to the enforceability of the agreement, and not the arbitration provision, are to be resolved by the arbitrator and not the court. *See Buckeye Check Cashing*, 546 U.S. at 445-46. Therefore, Subcontractors' arguments as to the enforceability of the contract are not ripe for the Court's consideration at this time.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Lennar's Motion to Compel Arbitration. Neither the law, nor the facts, support a finding that the terms of any of the contracts at issue in this case contain unenforceable agreements to arbitrate and, therefore, Lennar respectfully requests this Court reverse the circuit court's order denying Lennar's Motion to Compel Arbitration.


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September 1, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case, No. 2016-2339
Case No. 2014-CP-08-2424

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SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
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, Costal 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

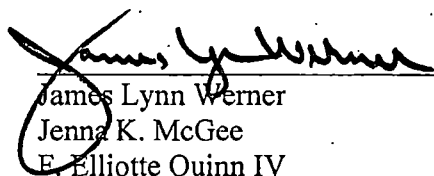
Decor Corporation, Fourth Party Plaintiff,

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 Betio Pereira, 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 CERTIFICATE OF COUNSEL

The undersigned hereby certifies on September 1, 2017, that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
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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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants.

**RESPONDENT ALPHA OMEGA CONSTRUCTION, INC.'S
FINAL BRIEF**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT IMPLICITLY DENY APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA CONSTRUCTION GROUP, INC.?
- II. SHOULD THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA CONSTRUCTION GROUP, INC. BE AFFIRMED BECAUSE THE *ONLY* CONTRACT BETWEEN THE PARTIES WAS ENTERED INTO AFTER ALPHA OMEGA CONSTRUCTION GROUP, INC. COMPLETED ITS WORK ON THE PROJECT?
- III. IF THIS COURT FINDS THE POST-DATED CONTRACT APPLICABLE, WHICH ALPHA OMEGA CONSTRUCTION GROUP, INC. DENIES, SHOULD THE CIRCUIT COURT'S DENIAL OF APPELLANT'S MOTION TO COMPEL ARBITRATION BE AFFIRMED BECAUSE THE ARBITRATION PROVISION IS DERIVATIVE IN NATURE AND FAILS TO COMPLY WITH THE NOTICE PROVISION REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT?

COUNTERSTATEMENT OF THE CASE

This appeal arises out of a construction defect lawsuit in which the general contractor, Appellant Lennar Carolinas, LLC (hereinafter "Lennar" or "Appellant"), moved to compel the Plaintiff homeowners (hereinafter "Plaintiffs" or "Owners"), as well as co-defendants and third-party defendant subcontractors, to arbitrate the claims arising in this suit. The Circuit Court denied Lennar's motion to compel arbitration, and Appellant has appealed the Circuit Court's denial to this Court. Respondent Alpha Omega Construction Group, Inc. (hereinafter "Alpha Omega"), one of the third-party defendant subcontractors, hereby files this brief in opposition to the Appellant's appeal and argues the Circuit Court correctly denied Appellant's motion to compel arbitration with respect to its claims against Alpha Omega.

As discussed in more detail below, compelling Alpha Omega to arbitration is patently unjust and contrary to South Carolina law considering, among other things: (1) Plaintiffs will likely bring direct claims against Alpha Omega subjecting it to inconsistent findings of fact, liability, and judgments; (2) the *only* contract between the Appellant and Alpha Omega post-dates Alpha Omega's work on the Project; (3) assuming, *arguendo*, the Post-Dated Contract is

applicable, the plain language of the “Dispute Resolution” provision in the Post-Dated Contract is derivative in nature and precludes compelling Alpha Omega to arbitration unless and until the Appellant is successful in compelling the Plaintiffs to arbitration; and (4) finally, assuming, *arguendo*, the Post-Dated Contract is applicable, the “Dispute Resolution” provision in the Post-Dated Contract is unenforceable because it fails to comply with the notice provision requirements of the South Carolina Uniform Arbitration Act.

This is a construction defects lawsuit wherein individual homeowners sued the Appellant for various defects related to the construction of their homes (hereinafter the “Project”) in a development known as The Abbey, located in Berkeley County, South Carolina. (R. pp. 75-108). On November 23, 2015, Plaintiffs filed their first amended complaint against Appellant and others alleging various construction defects. (*Id.*). As is typical in most construction defect lawsuits, Appellant, in turn, answered the Plaintiffs’ first amended complaint and asserted third-party claims against Alpha Omega and the other subcontractors purportedly involved in the Project. (R. pp. 111-164). Alpha Omega is alleged to have performed limited roofing work on some of the homes in The Abbey. (*Id.* at p. 140, ¶ 211). On January 13, 2016, Alpha Omega timely filed its Answer to Appellant’s third-party complaint. (R. pp. 177-201).

On June 1, 2015, Appellant filed a motion to compel arbitration asserting the Plaintiffs’ claims were subject to arbitration. (R. pp. 259-261). On March 30, 2016, Appellant filed an amended motion to compel arbitration, wherein it moved to compel the Plaintiffs’ claims and its third-party claims against the third-party defendants to arbitration. (R. pp. 262-269). Specifically, in its amended motion to compel arbitration, Appellant asserted each subcontractor is subject to arbitration pursuant to the arbitration provisions in their respective contracts with the Appellant. (*Id.* at 267). With respect to Alpha Omega, Appellant based its argument on a contract dated

August 7, 2015 (hereinafter the “Post-Dated Contract”), which was entered into after Alpha Omega completed its work on the Project and applies to separate and distinct projects.¹ (*R. p.* 953, § 21). If this Court finds the Post-Dated Contract applicable, which Alpha Omega denies, the “Dispute Resolution” provision provides Alpha Omega is only required to submit to arbitration if the Appellant is successful in forcing the Plaintiffs to arbitrate their claims. (*See id.*). In relevant part, the “Dispute Resolution” provision provides:

If Lennar is involved in or becomes involved in litigation, arbitration, judicial reference or other alternative dispute resolution procedure (“ADR”) with a third party and Lennar or any other party joins Subcontractor as a party to such ADR, then the disputes between Lennar and Subcontractor relative to the claims involved in the ADR proceeding shall be resolved in such proceeding. In the event that Lennar is required, by law or by contract, to resolve a dispute with a third party in an ADR forum, Subcontractor agrees to participate in and be bound by such procedure.

(*Id.*).

Alpha Omega, along with the Plaintiffs and several other subcontractors, filed memoranda in opposition to Appellant’s motion to compel arbitration. The Honorable J.C. Nicholson, Jr. heard arguments on the Appellant’s motion at a hearing on April 11, 2016. (*See generally* *R. pp.* 203-255). On September 19, 2016, the Circuit Court issued a formal order (hereinafter the “Order”) denying Appellant’s motion. (*R. pp.* 4-23). The Order contained a thorough analysis of its ruling denying Appellant’s motion to compel arbitration as to the Plaintiffs but was silent as to the arguments presented between the Appellant and Alpha Omega, as well as the other subcontractors. (*Id.*).

¹ Appellant submitted vendor payment records as evidence Alpha Omega performed some work on the Project. (*See* *R. pp.* 1671-2241). These vendor payment records indicate Alpha Omega completed its work for the Appellant by August 2014 at the latest. (*Id.*). In addition, Alpha Omega’s Operations Director has searched the company records and is unable to find any contract between the Appellant and Alpha Omega that predates the work referenced in the invoices for the subject neighborhood. (*See* *R. p.* 2909, ¶ 8).

Appellant filed a motion to reconsider, amend and/or alter the Order denying the Appellant's motion to compel arbitration pursuant to *South Carolina Rule of Civil Procedure* 59(e). (R. pp. 2553-2572). Likewise, Alpha Omega, and several other sub-contractors, filed motions to reconsider, amend and/or alter the Order. (*See generally* R. pp. 2882-2887). On October 26, 2016, the Circuit Court, without any further discussion, reasoning, or explanation, issued a Form 4 Order denying all motions to reconsider. (R. p. 3). This appeal followed.

STANDARD OF REVIEW

"Arbitration determinations are subject to de novo review." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1 (2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012)). "However, a circuit court's factual finding will not be reversed on appeal if any evidence reasonably supports the finding." *Id.* An order refusing to compel arbitration is immediately appealable. *Cape Roman Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121, 747 S.E.2d 461, 463-64 (2013).

ARGUMENT

I. THE CIRCUIT COURT IMPLICITLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALL SUBCONTRACTORS, INCLUDING ALPHA OMEGA, AND THEREFORE, THE ISSUE IS PROPERLY PRESERVED FOR APPELLATE REVIEW.

Appellant's assertion that this Court must "remand the circuit court's . . . ruling . . . to consider each of the Subcontractors' agreements to arbitrate individually" is misplaced. (App. Brief, p. 36). The parties thoroughly presented the facts, law, and their respective arguments in written motions, memoranda, and oral argument. A review of the hearing transcript, coupled with the written motions, memoranda, and resulting Order, demonstrate the Circuit Court, in denying Appellant's motion to compel arbitration in its entirety, considered and ultimately

rejected Appellant's argument to compel arbitration as to all parties, including Alpha Omega and the other subcontractors.

As an initial matter, to preserve an issue for appellate review, it must have been raised to and ruled upon by the circuit court. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912 (Ct. App. 2004); *see also Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 171 S.E.2d 398, 399 (Ct. App. 2003) (holding arguments are not preserved for appeal if they are raised at the circuit court level, but are not ruled on by the circuit court judge). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). However, when a trial court is presented with several interrelated issues and arguments regarding the same fundamental question, this Court has found, in certain circumstances, an issue is properly preserved for appellate review when the trial court's findings implicitly rule on an issue. *See Rogers*, at 648, 511 S.E.2d at 97 (finding the issue of willfulness at a revocation hearing was raised to and ruled upon by the circuit court because the essence of the defendant's argument was "that the violation was not willful because [the probationer] believed his probationary period had terminated" and the judge ruled "that the violation was 'intentional'"); *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009) (finding the family court implicitly ruled on whether it was proper to impute income to the husband because the court ruled on the issue of underemployment, which goes hand in hand with the imputation of income). In *Gartside*, this Court found, after a careful review of the trial court record, the issue of income imputation was properly preserved for appellate review because the Wife's counsel directly raised and the trial court directly ruled on the issue of underemployment. *Id.* at 43, 677 S.E.2d at 625–26. This Court reasoned that, because income imputation goes hand in

hand with underemployment, the trial court could not have made its ruling on underemployment without also considering income imputation. *Id.* at 43–44, 677 S.E.2d at 626.

Here, Appellant’s amended motion to compel arbitration, memorandum in support of said motion, and oral argument to the Circuit Court directly raised and thoroughly addressed its argument to compel arbitration as to each subcontractor. (R. p. 267; R. pp. 245-251). Likewise, Alpha Omega, and numerous other subcontractors, filed memoranda in opposition to Appellant’s motion to compel arbitration and raised those arguments to the Circuit Court. (*See* R. pp. 231-244). While the Appellant is correct in its assertion that the Order fails to explicitly address each individual arbitration agreement in relation to each individual subcontractor, it is abundantly clear from the record that the Circuit Court, in denying the Appellant’s motion in its entirety, carefully considered and ultimately rejected the Appellant’s argument to compel arbitration as to all parties, including each individual subcontractor.

Moreover, a review of the “Dispute Resolution” provision in the Post-Dated Contract² between Alpha Omega and the Appellant demonstrates the provision is derivative—i.e., Alpha Omega cannot be compelled to arbitration unless and until the Appellant is successful in compelling the Plaintiffs to arbitration. (R. p. 953, § 21). Accordingly, similar to the trial court’s implicit ruling on the issue of income imputation in *Gartside*, the Circuit Court implicitly ruled on the issue of arbitration as to Alpha Omega by denying arbitration as to the Plaintiffs. Once the Circuit Court denied Appellant’s motion to compel arbitration as to the Plaintiffs, there was no need for it to undertake an extensive analysis as to whether Alpha Omega was required to submit to arbitration. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to address the remaining issues where a prior issue was dispositive). Accordingly, this Court should affirm the Circuit Court’s denial of Appellant’s

² Alpha Omega denies the Post-Dated Contract is applicable in this matter, as discussed in more detail below.

motion to compel Alpha Omega to arbitration because it implicitly ruled on the issue when it denied Appellant's motion as to the Plaintiffs.

II. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALL PARTIES, INCLUDING ALPHA OMEGA.

a. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE IT IS FUNDAMENTALLY UNFAIR AND CONTRARY TO SOUTH CAROLINA LAW TO RETROACTIVELY APPLY THE "DISPUTE RESOLUTION" PROVISION FROM A CONTRACT ENTERED INTO AFTER ALPHA OMEGA COMPLETED ITS WORK ON THE PROJECT.

"Arbitration is a matter of contract, and the court can only compel arbitration if the parties have agreed to arbitrate." *Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 569 (D.S.C. 1997) (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S. Ct. 1920, 1923–24 (1995)). Under South Carolina law, a contract must demonstrate the parties' meeting of the minds as to all essential and material terms of the agreement. *Davis v. Greenwood Sch. Dist.*, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005); *see also Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978) (holding that it is well settled in South Carolina that a binding contract requires a mutual manifestation of assent to the terms). Furthermore, "[a] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960). To decide whether an arbitration agreement covers a particular dispute, "the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement . . ." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

While South Carolina courts have, in limited circumstances, retroactively applied arbitration provisions to disputes arising *under prior contracts*, the common theme underlying those cases "is that the parties expressly agreed that all controversies between them, not just

those appurtenant to the contract containing the clause, were to be submitted to arbitration.” *Vestry and Church Warden of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 208, 588 S.E.2d 136, 139 (Ct. App. 2003) (emphasis added). In *Vestry*, this Court addressed whether an arbitration provision would retroactively apply to cover the Plaintiff’s claim that arose under a prior contract executed before the signing of the arbitration agreement. *Id.* at 207–13, 588 S.E.2d at 138–42. This Court noted that “[c]ourts have retroactively applied arbitration clauses to disputes arising *under prior contract*, but, in doing so, the courts have generally found the existence of *a broadly worded clause* which governed the overall relationship between the parties.” *Id.* at 207–08, 588 S.E.2d at 139 (emphasis added) (citing *Cara’s Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 568–71 (4th Cir. 1998) (finding a broad arbitration clause which called for arbitration of “[a]ny controversy or claim arising out of or relating to . . . any aspects of the relationship” established that the clause was intended to apply to all conflicts between the parties)). This Court ultimately denied the Plaintiff’s request to retroactively apply the arbitration provision finding its claim arose under prior, unrelated contracts and the arbitration provision failed to include sufficiently broad language to expand coverage to all claims arising between the parties. *Id.* at 211, 588 S.E.2d at 141. Moreover, even when an arbitration provision is broadly-worded, the South Carolina Supreme Court has held retroactive application of an arbitration provision when the dispute does not arise under the governing contract is appropriate only “when a ‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained.” *Zabinski*, 326 S.C. at 598, 553 S.E.2d at 119.

Retroactive application of the arbitration provision in the Post-Dated Contract between Alpha Omega and the Appellant fails to meet the requirements set forth in *Vestry* and *Zabinski* in

b. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE PLAINTIFFS WILL LIKELY BRING DIRECT CLAIMS AGAINST IT SUBJECTING IT TO INCONSISTENT FINDINGS OF FACT, LIABILITY, AND JUDGMENTS.

Given the typical course of action in a construction defect lawsuit, there is a strong likelihood Plaintiffs will bring direct claims against Alpha Omega. Because there is no contract between the Plaintiffs and Alpha Omega, neither party would be required to arbitrate those claims. If this Court were to find the Circuit Court erred in denying Appellant's motion to compel arbitration as to Alpha Omega—i.e., if Alpha Omega is compelled to arbitrate with the Appellant, but not compelled to do so with the Plaintiffs—it subjects Alpha Omega to the possibility of inconsistent decisions rendered by different deciders of fact and law, who sit in different arbitral tribunals or courts, and whose decisions on appeal would be constrained by different standards and scopes of appellate review. By way of example, under the South Carolina Uniform Arbitration Act, the grounds for vacating an arbitration award are limited to arbitrator misconduct, exceeding powers, corruption, fraud, and the like. *See* S.C. Code Ann. § 15-48-130(a). Such grounds are far more limited than those available for judicial appellate review of judgments on the merits, such as errors of law or correction of other substantive or procedural legal deficiencies. In an effort to avoid dual proceedings resulting in inconsistent findings of fact, liability, and judgments, Alpha Omega respectfully requests this Court affirm the Circuit Court's denial of Appellant's motion to compel arbitration as to all parties, including Alpha Omega.

III. IN THE ALTERNATIVE, IF THIS COURT FINDS THE POST-DATED CONTRACT APPLICABLE, WHICH ALPHA OMEGA DENIES, THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA.

a. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE THE POST-DATED CONTRACT'S "DISPUTE RESOLUTION" PROVISION UNAMBIGUOUSLY PROVIDES ALPHA OMEGA IS NOT REQUIRED TO ARBITRATE WITH THE APPELLANT UNLESS AND UNTIL THE PLAINTIFFS ARE REQUIRED TO DO SO.

It is well established that the primary rule of contract interpretation is that courts should construe contracts "to give them effect and carry out the intention of the parties." *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC*, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App. 2007) (citations omitted); *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 370, 372 (1984). If a written contract's "language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and [its] language determines the instrument's force and effect." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). Courts must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect. *Superior Auto Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973).

Section 21, entitled "Dispute Resolution," of the Post-Dated Contract provides in relevant part:

If Lennar is involved in or becomes involved in litigation, arbitration, judicial reference or other alternative dispute resolution procedure ("ADR") with a third party and Lennar or any other party joins Subcontractor as a party to such ADR, then the disputes between Lennar and Subcontractor relative to the claims involved in the ADR proceeding shall be resolved in such proceeding. In the event that Lennar is required, by law or by contract, to resolve a dispute with a

third party in an ADR forum, Subcontractor agrees to participate in and be bound by such procedure.

(R. p. 953, § 21). As applied to the circumstances of this case, the foregoing provision unambiguously demonstrates Alpha Omega and the Appellant agreed to resolve their disputes in the same forum in which disputes between the Appellant and “a third party” are resolved. Thus, if the Appellant is unsuccessful in its efforts to enforce its arbitration provisions against the Plaintiffs, it is precluded from independently compelling Alpha Omega to submit to arbitration because the foregoing provision is derivative and, therefore, does not provide for arbitration without a third party claim being adjudicated in the same action. *See Faltaous v. Anderson Ocean Club Dev., LLC*, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (observing arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit). In light of the provision’s derivative nature, as it relates to Alpha Omega, Appellant’s motion to compel arbitration must fail unless and until it successfully compels the Plaintiffs to arbitration. Accordingly, Alpha Omega respectfully requests this Court affirm the Circuit Court’s denial of Appellant’s motion to compel arbitration as to Alpha Omega.

b. THE CIRCUIT COURT PROPERLY DENIED APPELLANT’S MOTION TO COMPEL ARBITRATION AS TO ALPHA OMEGA BECAUSE THE “DISPUTE RESOLUTION” PROVISION FAILS TO COMPLY WITH THE NOTICE PROVISION REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT.

For an arbitration provision to be valid and enforceable under the South Carolina Uniform Arbitration Act (“SCUAA”), the contract containing that provision is subject to certain notice provision requirements set forth in Section 15-48-10(a). *See* S.C. Code Ann. § 15-48-10. Section 15-48-10(a) provides in relevant part:

Notice that a contract is subject to arbitration pursuant to this chapter *shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.*

S.C. Code Ann. § 15-48-10(a) (emphasis added). The South Carolina Supreme Court has held these elements are to be strictly adhered to in order to satisfy the notice requirements. *Zabinski*, 346 S.C. at 588–89, 553 S.E.2d at 114.

Assuming, *arguendo*, this Court finds the Post-Dated Contract applicable, which Alpha Omega denies, this Court should still affirm the Circuit Court’s Order denying arbitration as to Alpha Omega because the arbitration provision in the Post-Dated Contract clearly fails to meet the requirements of Section 15-48-10(a). The arbitration clause is not capitalized, bolded, underlined, or rubber stamped. (*See* R. p. 953, § 21). Moreover, the arbitration clause is buried on the seventeenth page of the Post-Dated Contract. (*Id.*). Accordingly, the arbitration clause is unenforceable and Alpha Omega respectfully requests this Court affirm the Circuit Court’s denial of Appellant’s motion to compel arbitration as to Alpha Omega because it fails to comply with the notice provision requirements of the SCUAA.

CONCLUSION

For the foregoing reasons, Alpha Omega respectfully requests this Court affirm the ruling of the Circuit Court denying Appellant’s motion to compel Alpha Omega to submit this matter to arbitration.

[Signature on next page]

Respectfully Submitted,

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Charleston, South Carolina

Dated: 08/24/17

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of Common Pleas

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

Case No. 2014-CP-08-2424

RECEIVED

AUG 28 2017

SC Court of Appeals

Patricia Damico, and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Johnathan 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, 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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC, are

Respondents,

**RESPONDENT ALPHA OMEGA CONSTRUCTION, INC.'S
CERTIFICATION OF FINAL BRIEF**

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I, Mary S. Willis, do hereby certify that the Final Brief of Respondent Alpha Omega Construction Group, Inc. complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby certifies that the Final Briefs comply with the Supreme Court order of April 15, 2014.

Respectfully submitted,

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Charleston, South Carolina

Dated: 8/24/2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No.: 2014-CP-08-2424
Appellate Court Case No. 2016-2339

RECEIVED

SEP 06 2017

SC COURT OF APPEALS

Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource Southeast Group, LLC, are also Respondents,

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No.: 2014-CP-08-2424
Appellate Court Case No. 2016-2339

Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource Southeast Group, LLC, are also Respondents,

And

Décor 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, Isidni Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

**RESPONDENTS COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL
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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. Spring Grove Plantation Development Inc. ("Spring Grove Development") was the original owner of the land on which the homes are currently located. Spring Grove Development sold the land which now is known as The Abbey to Lennar Carolinas, LLC ("Lennar"). Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC are alleged to have manufactured and delivered ready mix concrete pursuant to a Supplier Base Agreement with Lennar, during the construction The Abbey ("Project").

On December 12, 2014, 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/owners") of the homes initiated a lawsuit against Lennar, Spring Grove Development and others. (R. pp.24-41). On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. pp. 42-74). Lennar filed a Motion to Compel Arbitration on June 1, 2015. (R. pp. 257-261).

The owners filed an Amended Complaint on November 23, 2015. (R. pp. 75-108). Lennar amended its Motion to Compel Arbitration on March 30, 2016, wherein it requested the circuit court to compel the owners, Spring Grove Development, and the subcontractors to arbitration. (R. pp. 262-270).

Spring Grove Development filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration and a hearing on Lennar's Motion to Compel Arbitration was held on April 11, 2016. (R. pp. 2587-2593). The Circuit Court heard arguments from all interested parties and duly considered the same. (R. p. 3). The Circuit Court then issued an order denying

Lennar's Motion to Compel on September 19, 2016. (R. pp. 4-23).

Lennar filed a motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 3, 2016. (R. pp. 2553-2572). Spring Grove Development also filed a Rule 59(e) motion asking the court to address Lennar's motion as it related to the alleged arbitration agreement between Lennar and Spring Grove Development. (R. pp. 2594-2599). On October 26, 2016, the Circuit Court issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3) This appeal followed.

This appeal concerns whether Plaintiffs/Owners must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC (collectively "Coastal Concrete Southeast") must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to Coastal Concrete Southeast and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, Coastal Concrete Southeast may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of Coastal Concrete Southeast's work on the project, (B) if Plaintiffs/Owners and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

Coastal Concrete Southeast II, LLC entered into a Supplier Base Agreement with Lennar on January 1, 2008. (R. pp. 1035-1043). The assets of Coastal Concrete Southeast, LLC were purchased by Coastal Concrete Southeast II, LLC on November 12, 2009. Coastal Concrete Southeast did not enter into an Agreement with Lennar (R. pp. 2828-2830). The Supplier Base Agreement ("Supplier Agreement") includes the following arbitration

provision contained on page seven:

19. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, AND AFTER CONSULTING WITH LEGAL COUNSEL OF THEIR OWN CHOOSING, SUPPLIER AND LENNAR, ON BEHALF OF THEMSELVES AND ANY PERSON OR ENTITY ACTING BY, THROUGH OR UNDER THEM, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY AGREE TO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR ANY OTHER RIGHTS OR OBLIGATIONS BETWEEN LENNAR, SUPPLIER AND ALL PERSONS ACTING BY, THROUGH OR UNDER LENNAR OR CONTRACTOR. . . . NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT SUPPLIER IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND SUPPLIER AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY. LENNAR AND SUPPLIER SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

Operating under the terms of the Supplier Agreement, Coastal Concrete Southeast, II, LLC manufactured and delivered ready mix concrete to the Project from November 12, 2012 through March 12, 2013 (R pp. 2828-2830). No work was performed on the Project by Coastal Concrete Southeast, II, LLC.

ARGUMENT

I. **LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL CONCRETE SOUTHEAST II, LLC.**

While Lennar addressed the Circuit Court's ruling denying the motion to compel arbitration as to Coastal Concrete Southeast and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Coastal Concrete Southeast in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

Coastal Concrete Southeast agrees with Lennar's procedural concern that the Order does not make specific findings based on the arguments presented between Lennar and Coastal Concrete Southeast. In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Coastal Concrete Southeast and other subcontractors. (R. pp. 1035-1043). These motions were denied in the Form 4 Order. (R. p. 3).

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. See Ion, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Although it could be argued Lennar fulfilled its

duty to bring its substantive arguments as to Coastal Concrete Southeast before the circuit court in its Motion to Reconsider by referencing the "the reasons previously articulated in writing and at the hearing on the Motion," this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. p. 2572.) In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against Coastal Concrete Southeast are subject to arbitration along with citations to supporting case law. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to Coastal Concrete Southeast nor does it contain applicable references to supporting authority. In fact, Lennar's brief even fails to specify which of the several agreements it mentions form the basis for its assertion that its claims against Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Coastal Concrete Southeast to arbitrate the claims in this matter. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.")

II. IF THIS COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL CONCRETE SOUTHEAST II, LLC MUST ARBITRATE, THE COURT SHOULD FIND THAT LENNAR MAY COMPEL COASTAL CONCRETE SOUTHEAST, LLC AND COASTAL CONCRETE SOUTHEAST II, LLC TO ARBITRATE THIS ACTION ONLY: (A) PURSUANT TO THE SUPPLIER AGREEMENT, (B) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE, AND (C) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the Circuit Court properly denied Lennar's motion to compel Coastal Concrete Southeast to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. Arbitration Agreements

are required to meet the basic tenets and requirements of contract law. Towles v. United HealthCare Corp., 338 S.C. 29, 37, 529 S.E.2d 839, 844 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). Under South Carolina common law, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

With these guiding principles, the Court must examine the Agreements to determine the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

- A. **Lennar may compel Coastal Concrete Southeast, LLC and Coastal Concrete Southeast II, LLC to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.**

The Supplier Agreement, which, for the reasons set forth below, is the only arbitration provision governing Coastal Concrete Southeast's materials supplied to the Project, unambiguously provides that Lennar may only compel Coastal Concrete Southeast to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT SUPPLIER IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE

LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT SUPPLIER IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND SUPPLIER AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY.

(R. p. 1041). (emphasis added).) As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates Coastal Concrete Southeast and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel Coastal Concrete Southeast to submit to arbitration, because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without a third-party claim being adjudicated in the same action. Thus, as it relates to Coastal Concrete Southeast, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

B. Lennar may compel Coastal Concrete Southeast to arbitration only pursuant to the Federal Arbitration Act, because the arbitration provisions in the Supplier Agreement do not meet the requirements of the South Carolina Arbitration Act.

Under the South Carolina Uniform Arbitration Act ("SCUAA"), notice that a contract is subject to arbitration "shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. See Soil Remediation Co. v. Nu-Way Envtl., 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding that an arbitration provision

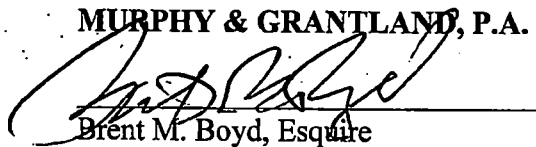
which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)). The Supplier Agreement does not include arbitration provisions on the first page of the agreement as required by § 15-48-10(a). (R. p. 1035.) Accordingly, the Supplier Agreement does not contain an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel Coastal Concrete Southeast to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, Coastal Concrete Southeast respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Coastal Concrete Southeast to submit this matter to arbitration.

Respectfully submitted,

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September 6, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No.: 2014-CP-08-2424
Appellate Court Case No. 2016-2339

Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource Southeast Group, LLC, are also Respondents,

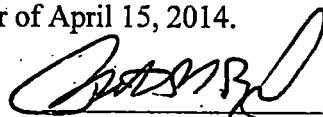
And

Décor 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, Isidni Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

CERTIFICATE OF COUNSEL

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



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Attorneys for Respondent

September 6, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J.C. NICHOLSON, JR.
CIRCUIT COURT JUDGE

RECEIVED

SEP 05 2017

SC Court of Appeals

APPELLATE CASE NO. 2016-002339
CIVIL ACTION NO. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

RESPONDENTS,

versus

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 the

RESPONDENTS.

And

Lennar Carolinas, LLC,

APPELLANT,

versus

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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource-Southeast Group, LLC are also the

RESPONDENTS.

And

Décor Corporation,

FOURTH PARTY PLAINTIFF,

versus

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 Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4,

FOURTH-PARTY DEFENDANTS.

FINAL BRIEF OF RESPONDENT DÉCOR CORPORATION

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Appellant Lennar failed to preserve for appellate review any argument that the Trial Court erred in denying its motion to compel arbitration as to Respondent Décor.
- II. Appellant Lennar waived and abandoned its argument that the Trial Court erred in denying its motion to compel arbitration as to Respondent Décor.
- III. The Trial Court did not err in failing to address Appellant Lennar's motion to compel arbitration as to Respondent Décor in light of the Trial Court's findings that the Plaintiff Homeowners were not required to arbitrate their claims against Lennar.
- IV. Even if the Plaintiff Homeowners are required to submit to arbitration, Appellant Lennar cannot compel Respondent Décor to submit to arbitration because there is no arbitration agreement between Lennar and Décor with respect to the project at issue.

COUNTERSTATEMENT OF THE CASE

This appeal arises out of a construction defect lawsuit in which the general contractor, Appellant Lennar Carolinas, LLC (“Lennar”), moved to compel the Plaintiff Homeowners as well as the Co-Defendants and Third-Party Defendant subcontractors to arbitrate the claims arising in the suit. The Trial Court denied Lennar’s motion to compel arbitration, and Lennar has appealed the Trial Court’s denial to this Court. Respondent Décor Corporation (“Décor”), one of the Third-Party Defendant subcontractors, hereby files this brief in opposition to Lennar’s appeal and argues that the Trial Court correctly denied Lennar’s motion to compel arbitration with respect to its claims against Décor.

The Plaintiff Homeowners commenced this action on October 30, 2014 in the Berkeley County Court of Common Pleas against Lennar, Spring Grove Plantation Development, Inc., Volkmar Consulting Services, LLC, and Manale Landscaping, LLC, alleging various construction defects in their homes. [R.pp. 24-41; Compl.] The homeowners each reside in a residential community known at The Abbey at Spring Grove Plantation located in Berkeley County, South Carolina. [R.p. 26; *Id.* at ¶ 1.] The Abbey consists of approximately sixty-nine (69) homes, and the homes were constructed from 2010 to the present. [R.p. 5; Order, p. 2.]

On February 17, 2015, Lennar filed its Answer to the Plaintiffs’ Complaint, as well as Cross-Claims against the Co-Defendants and a Third-Party Complaint against certain subcontractors [which did not include Décor at this time]. [R.pp. 42-74; Answer, Cross-Claim, Third-Party Compl.] On June 1, 2015, Lennar filed a Motion to Compel Arbitration. [R.pp. 259-261; Mtn.]

On November 23, 2015, the Plaintiff Homeowners filed an Amended Complaint. [R.pp. 75-108; Am. Compl.] Lennar thereafter responded to the Amended Complaint on November 25, 2015, answering the Plaintiffs' amended allegations and asserting its Cross-Claims against the Co-Defendants and a Third-Party Complaint against certain subcontractors, including Décor. This was the first allegations by Lennar against Décor since the commencement of the suit. Lennar alleged that Décor provided work, services, and materials for the development and construction of The Abbey and the residences therein which included finish flooring materials and installation of finish floors including all associated and related components. [R.pp. 111-164; Answer to Am. Compl., Cross-Claim, Third-Party Compl., ¶¶ 204-205, 218-242, 269-280.]

On February 1, 2016, Décor filed its Answer to Lennar's Third-Party Complaint. Décor additionally filed a Fourth-Party Complaint against certain flooring subcontractors. [R.pp. 165-176; Answer and Fourth-Party Compl.]

Lennar filed an Amended Motion to Compel Arbitration on March 30, 2016 which sought to compel the Plaintiffs, the Defendants, and the Third-Party Defendants, including Décor, to submit to mandatory, binding arbitration. [R.pp. 263-269; Am. Mtn.] With respect to Décor, Lennar submitted to the Trial Court a Contractor Base Agreement entered into on June 26, 2007 by Lennar and Décor (the "Contractor Base Agreement"). [R.pp. 1122-1159; Agreement (Ex. 39 to Robert Mauch Aff.)] The Contractor Base Agreement provided that Décor would provide labor, materials, equipment, and other services in such locations and under such terms and conditions as Lennar would deem necessary upon receipt of a Purchase Order from Lennar. Any issued Purchase Order for a particular project would become a part of the Contractor

Base Agreement. [R.p. 1123; Id.] The Contractor Base Agreement also included the following arbitration provision:

15. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, AND AFTER CONSULTING WITH LEGAL COUNSEL OF THEIR OWN CHOOSING, CONTRACTOR AND LENNAR, ON BEHALF OF THEMSELVES AND ANY PERSON OR ENTITY ACTING BY, THROUGH OR UNDER THEM, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY AGREE TO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR ANY OTHER RIGHTS OR OBLIGATIONS BETWEEN LENNAR, CONTRACTOR AND ALL PERSONS ACTING BY, THROUGH OR UNDER LENNAR OR CONTRACTOR...

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

[R.p. 1129; Id.]

With respect to alleged work performed by Décor at The Abbey, Lennar has not produced any Purchase Order issued in accordance with the Contractor Base Agreement.

A hearing on the Amended Motion to Compel Arbitration was held before the Honorable J.C. Nicholson, Jr. on April 11, 2016. [R.pp. 203-258; Hearing Tr.]

On September 19, 2016, the Trial Court issued its Order denying Lennar's Amended Motion to Compel Arbitration in its entirety. [R.pp. 4-23; Order.] On October 3, 2016, Lennar filed a Motion to Reconsider the Order Denying Its Motion to Compel Arbitration, seeking, with respect to the Third-Party Defendants, including Décor, "clarification and confirmation that the Order denies the Motion as to these Defendants and Third-Party Defendants and the basis for the denial." [R.p. 2572; Mtn., p. 20.] Lennar also argued that it was requesting reconsideration of the Order's denial of its motion to compel arbitration as to the Third-Party Defendants, including Décor, because "for the reasons previously articulated in writing and at the hearing on the Motion, the claims by and against the Defendants and Third-Party Defendants are subject to mandatory and binding arbitration pursuant to valid and enforceable arbitration provisions." [R.p. 2572; Id.] On October 26, 2016, the Trial Court issued a Form 4 Order denying Lennar's Motion to Reconsider. [R.p. 3; Order.]

On or about November 16, 2016, Lennar appealed the Trial Court's Orders denying its Motion to Compel Arbitration and its Motion to Reconsider.

ARGUMENT

I. Appellant Lennar Failed to Preserve for Appellate Review Any Argument That the Trial Court Erred in Denying Its Motion to Compel Arbitration as to Respondent Décor.

The Trial Court denied Lennar's motion to compel arbitration in its entirety, which included its motion as to all subcontractors, including Décor. [R.pp. 4-23; Order.] Thereafter, Lennar filed a motion to reconsider which merely requested the Trial Court to clarify whether its order denied the motion to compel arbitration as to the subcontractors, including Décor, and noted it was seeking reconsideration of the Trial Court's denial of the motion to compel with respect to the subcontractors, including Décor, for reasons "previously articulated." [R.p. 2572; Mtn., p. 20.] Lennar set forth no substantive argument in its motion for reconsideration to the Trial Court as to why the court erred in denying the motion to compel arbitration as to Décor and offered no basis for the Trial Court to reconsider its ruling. [R.p. 2572; Id.]

To preserve an issue for appeal, "[t]he losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." Id. The imposition of this preservation requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all the relevant facts, law, and arguments." Id.

Here, once the Trial Court denied Lennar's motion to compel arbitration in its entirety, Lennar did not make any specific arguments to the Trial Court as to why it erred in denying the motion to compel arbitration as to the subcontractors, including Décor. Lennar's motion for reconsideration failed to provide the Trial Court with any relevant facts, law, or arguments as to why the Trial Court may have erred in denying the motion to compel arbitration as to Décor. The broad assertions made by Lennar in its motion for reconsideration failed to preserve for appellate review any argument that the Trial Court erred in denying the motion to compel arbitration as to Décor. See Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 54-55 (Ct. App. 2006) (holding where wife failed to specifically raise any issues regarding the valuation of the marital property in her Rule 59(e) motion and instead only generally asserted that the divorce degree was unsupported by the evidence, these broad assertions failed to preserve her arguments for appellate review).

In this appeal, Lennar broadly argues that the Trial Court erred in denying the motion to compel arbitration as to the subcontractors without providing any analysis for the denial, and Lennar seeks a remand to the Trial Court. However, Lennar never argued below to the Trial Court with any particularity as to why the court's denial of the motion to compel arbitration as to the subcontractors was in error. Accordingly, the Trial Court's order denying Lennar's motion to compel arbitration as to Décor should be affirmed where Lennar failed to preserve for appellate review any argument that the Trial Court erred in denying its motion to compel arbitration as to Décor.

II. Appellant Lennar Waived and Abandoned Its Argument that the Trial Court Erred in Denying Its Motion to Compel Arbitration as to Respondent Décor.

In its appeal against the subcontractors, including Décor, Lennar broadly argues that the Trial Court erred in denying the motion to compel arbitration because the Trial Court did not perform any analysis. The appellate brief of Lennar contains no specific argument as to Décor or any argument that Lennar has an enforceable arbitration agreement with Décor. Lennar's appellate brief as to Décor is also not supported by any authority.

An issue is deemed abandoned on appeal "if the argument in the brief is not supported by authority or is only conclusory." Jones v. Builders Inv. Group, LLC, 415 S.C. 321, 331, 781 S.E.2d 737, 742-43 (Ct. App. 2015) (internal citation omitted). Because Lennar has cited no authority in the section of its appellate brief against Décor and its argument against Décor is largely conclusory, Lennar has abandoned on appeal any argument that the Trial Court erred in denying its motion to compel Décor to arbitrate.

III. The Trial Court Did Not Err in Failing to Address Appellant Lennar's Motion to Compel Arbitration as to Respondent Décor in Light of the Trial Court's Findings that the Plaintiff Homeowners Were Not Required to Arbitrate Their Claims Against Lennar.

On appeal, Lennar argues that the Trial Court erred in failing to provide any analysis or basis for denying Lennar's motion to compel the subcontractors, including Décor, to arbitration. The Trial Court did not err in denying the motion to compel arbitration as to the subcontractors, including Décor, without providing a detailed analysis of the reason for the denial. A cursory review of the Contractor Base Agreement between Lennar and Décor easily demonstrates why Lennar's motion to

compel Décor to arbitration was denied by the Trial Court in light of the Trial Court's ruling that the Plaintiff Homeowners were not required to submit to arbitration.

To the extent the Contractor Base Agreement is applicable to any work performed by Décor at The Abbey, which Décor denies, the Agreement unambiguously provides that Lennar may only compel Décor to arbitrate if Lennar and the Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY.

[R.p. 1129; Agreement (underline emphasis added).]

The Plaintiff Homeowners have thus far successfully defeated Lennar's attempt to have their disputes with Lennar submitted to arbitration. Lennar is therefore required to litigate the Plaintiffs' claims against it before a jury. Lennar cannot independently compel Décor to submit to arbitration because the above arbitration provision is derivative and does not provide for arbitration without there being a third party claim being adjudicated in the same action. See Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (observing arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she

has not agreed to submit). Once the Trial Court denied Lennar's motion to compel arbitration as to the Plaintiffs, there was no need for it to have undergone an extensive analysis of whether Décor was required to submit to arbitration when it was clear that the above provision had not been triggered. If the Plaintiffs continue to prevail in this appeal and their claims against Lennar are tried before a jury, Décor's disputes with Lennar, per the terms of the above provision, will also be heard before a jury and Décor will not be required to submit its disputes with Lennar to arbitration.

IV. Even if the Plaintiff Homeowners are Required to Submit to Arbitration, Appellant Lennar Cannot Compel Respondent Décor to Submit to Arbitration Because There is No Arbitration Agreement Between Lennar and Décor With Respect to the Project at Issue.

If this Court determines that Lennar is entitled to compel the Plaintiff Homeowners to submit to arbitration, Lennar is still nevertheless not entitled to require Décor to submit to arbitration because there is no arbitration agreement between Lennar and Décor with respect to any work performed by Décor at The Abbey.

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001)). "In determining whether an agreement to arbitrate exists, the court should apply ordinary state-law principles that govern the formation of contracts." Towles v. United Health Care Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (internal citations omitted).

In the present case, the Contractor Base Agreement produced by Lennar that allegedly binds Décor to arbitration is dated June 26, 2007. The work at The Abbey, however, did not begin until at least 2010. [R.p. 5; Order, p. 2.] The Contractor Base Agreement relied upon by Lennar does not specifically reference The Abbey or any other construction project in either the arbitration provision at issue or in any other section of the contract. Rather, the Contractor Base Agreement is a general contract which by its terms only becomes binding on a particular project when the requisite project-specific “Purchase Order” referenced and attached as “Schedule A” to the Contractor Base Agreement is executed. [R.pp. 1123-1132; Agreement.]

The “Purchase Order” cited and attached as “Schedule A” to the Contractor Base Agreement is a separate one-page contract which provides the project name, project address, project scope of work and price/payment to the contractor. [R.p. 1132; Id.] It is clear from the scope of work provision in the Contractor Base Agreement that the Agreement only becomes binding on a particular project when a “Purchase Order” is issued:

1. **SCOPE OF WORK:** Contractor shall provide labor, material, equipment or other services in such location(s) and under such terms and conditions as Lennar shall deem necessary (the “Work”) upon receipt of a Purchase Order from Lennar. When issued, the Purchase Order (see Schedule A) shall become part of this Agreement. The location(s) where the Work is to be performed shall be known as the job site or Project site and may be more fully described in Exhibit “A” to the Purchase Order. . . .

[R.p. 1123; Id.]

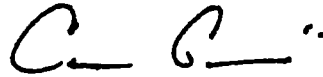
The Contractor Base Agreement contains all the basic material terms desired by Lennar for all of its projects; however, only when a Purchase Order is executed is Décor bound to the terms of the Contractor Base Agreement with respect to a particular project.

Lennar has not produced any such Purchase Order relating to Décor's work at The Abbey. Therefore, there is no contractual document binding Décor to the terms of the Contractor Base Agreement with respect to The Abbey project in particular. The terms of the Contractor Base Agreement were never triggered for the performance of Décor's work at The Abbey. Accordingly, Décor is not bound to the arbitration provision contained within the Contractor Base Agreement for any disputes with Lennar for any work performed at The Abbey project site. The Trial Court's Order denying Lennar's motion to compel Décor to submit to arbitration should be denied even if this Court determines that the claims of the Plaintiff Homeowners are arbitrable.

CONCLUSION

For the reasons set forth herein, Respondent Décor Corporation respectfully submits that the Trial Court properly denied Appellant Lennar Carolinas, LLC's motion to compel arbitration with respect to its disputes with Décor.

Respectfully submitted,



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**ATTORNEYS FOR RESPONDENT
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September 5, 2017.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent Décor Corporation complies with Rule 211(b), SCACR.

Respectfully submitted,



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September 5, 2017.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

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Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
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 IUI, 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

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
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Defendants,

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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 IUI, 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 Construct, 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, are also Respondents.

And

Décor 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 Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1 – 4, Fourth-Party Defendants.

RESPONDENT DVS, INC.'S FINAL BRIEF

August 23, 2017
Columbia, SC

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STATEMENT OF THE CASE

The owners filed this lawsuit against Lennar and others based upon alleged construction defects, Lennar asserted Cross-Claims against Co-Defendants and third-party claims against subcontractors.

Lennar subsequently filed a Motion to Compel Arbitration and an Amended Motion to Compel Arbitration requesting the circuit court to issue an order compelling the owners to arbitrate pursuant to the purchase sale agreement, the Lennar warranty, the covenants, and the deeds. Lennar's Motion also requested the Circuit Court to compel Spring Grove Development to arbitrate pursuant to covenants and the subcontractors to arbitrate based upon their alleged individual contracts with Lennar associated with the construction of the houses.

A hearing was held on Lennar's Motion to Compel Arbitration and the circuit court denied their Motion to Compel Arbitration by the owners. The court did not address in its order motions to compel arbitration with Spring Grove Development nor the subcontractors.

Lennar filed a Motion to Alter or Amend which was denied pursuant to a Form 4 Order.

FACTS/PROCEDURAL HISTORY

On December 12, 2014, the Owners filed a Complaint against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC based upon alleged construction defects in the houses. (R. 24). On February 17, 2016, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. 42). On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. 257).

On November 23, 2015, the Owners filed their Amended complaint (the "Amended Complaint"). (R. 75). On November 25, 2015, Lennar timely filed its Answer to Plaintiff's Amended Complaint, Cross-Claims, and Third-Party Complaint. (R. 109).

On March 30, 2016, Lennar amended its Motion to Compel Arbitration requesting the circuit Court issue an order compelling the Owners to arbitration pursuant to the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds. (R. 262). Lennar's Amended Motion to Compel Arbitration (the "Motion") also requested the circuit court compel

DVS, Inc. filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration filed May 6, 2016. (R. 2573).

A hearing on the Motions were held on April 11, 2016. (R. 203).

On September 19, 2016, the circuit court issued an order denying the Motion compelling the owners to arbitrate. The Circuit Court made the following findings: (1) the Purchase and Sale Agreements, the Lennar Warranty, the Covenants and the Deeds should be read together as a single arbitration provision; (2) the agreements are adhesion contracts; (3) the Lennar Warranty's terms are unconscionable; (4) the Lennar Warranty's terms are not severable from the arbitration provision; (5) the arbitration provisions are ambiguous because they contain references to both the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.* ("*SCUAA*"), and the *Federal Arbitration Act*, 9 U.S.C. § 1, *et seq.* ("*FAA*"); (6) the *FAA* does not apply to the Owners' Contracts with Lennar because they only involve intrastate commerce; and (7) the arbitration provisions fail to comply with the *SCUAA*'s notice requirements. (R. 4). The circuit Court made no specific or separate findings regarding the arbitration agreements between either Lennar and the individual subcontractors.

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, arguing the circuit court erred in:

1. Failing to follow the *Prima Paint* doctrine by relying on terms outside of each document's arbitration provision to find the provisions unconscionable;
2. Relying on terms in the Lennar Warranty to find the arbitration provisions in the Purchase and Sale Agreement, the Lennar Warranty, the Covenants and the Deeds unconscionable;
3. Failing to give effect to the arbitration agreements; severability provisions;
4. Finding the Lennar Warranty's arbitration provision contains oppressive and one-sided terms;
5. Finding the arbitration provision are ambiguous;
6. Failing to find that regardless of any potential ambiguity the parties clearly demonstrated an intent to arbitrate any dispute arising from their transaction;
7. Failing to consider evidence that the parties' agreement for the construction and sale of a house involves interstate commerce;
8. Finding Lennar – a Delaware company – is organized in South Carolina;
9. Finding the Covenants Comply with the SCUAA but failing to compel arbitration under its terms; and
10. Ruling on the motion to compel the Subcontractors to arbitration without considering or analyzing of Lennar's agreements to arbitrate with the Subcontractors.

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).

STANDARD OF REVIEW

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). A circuit court's factual findings for which there is reasonable evidentiary support should not be reversed on appeal. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 3 (2016), *reh'g denied* (Sept. 4, 2016) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

“[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Id.* (quoting *Green Tree Fin. Corp. – Ala v. Randolph*, 531 U.S. 79, 91 (2000)). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (internal quotation marks and citation omitted). In other words, there is a presumption in favor of the enforceability and application of arbitration agreements to disputes, and the party resisting arbitration bears the burden of proving an arbitration agreement does not apply. *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986); *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013).

ARGUMENT

I. THE CIRCUIT DID NOT ERR IN FAILING TO ADDRESS LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SUBCONTRACTORS IN LIGHT OF ITS FINDINGS REGARDING FAILURE OF THE ARBITRATION AGREEMENT AS TO THE PLAINTIFF.

Defendant DVS, Inc. believes the Court did not err in its findings. While DVS, Inc. denies that the base agreement is applicable to this project, assuming *arguendo* that DVS is bound by the arbitration provision contained in the Contractor Base Agreement, there is nevertheless an exception contained in the arbitration provision that, if “LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL

SHALL NOT APPLY[.]” The Plaintiff in the present lawsuit has prevailed in denying the Appellant a right to arbitration and to have this case heard by a jury. Since the Plaintiff was successful in opposing Lennar’s motion to compel arbitration, then Lennar would be required to litigate the Plaintiff’s claims against it before a jury and the cited exception to the arbitration provision would apply preventing DVS, Inc. from being required to submit to arbitration. Therefore, DVS, Inc. argues that, if the Plaintiff successfully opposes Lennar’s motion, then DVS, Inc. will also avoid arbitration by the terms of the disputed arbitration provision. DVS, Inc. is not subject to arbitration.

II. IF THE CIRCUIT COURT ERRED IN FINDING THAT THE PLAINTIFF IS ENTITLED TO A JURY TRIAL, IT STILL MUST FIND NO ARBITRATION AGREEMENT BETWEEN APPELLANT AND DVS, INC.

Assuming *arguendo*, the Appellate Court determines that the Appellant is entitled to compel arbitration with the Plaintiff, on remand the Court below must still find that there is no arbitration agreement between Appellant and DVS, Inc.

Under the Federal Arbitration Act as interpreted by the South Carolina Supreme Court, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which it has not agreed to submit. Zabinski v. Bright Acres Associates, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). In the present case, the Contractor Base Agreement produced by Lennar that allegedly binds DVS to arbitration is dated June 26, 2007. However, DVS’ scope of work at The Abbey did not begin until 2011. The Contractor Base Agreement relied upon by Lennar does not specifically reference The Abbey or any other construction project in either the arbitration provision at issue or any other section of the contract. Rather, the Contractor Base Agreement is a general contract which by its own terms only becomes binding on a particular project when the requisite project-specific “Purchase Order” template referenced and attached as

“Schedule A” to the Contractor Base Agreement is executed. (R. 2579). No such agreement was executed.

Pursuant to the Federal Arbitration Act, challenges must be made to the arbitration provision itself and not to the contract generally because arbitration provisions are separable from the contracts in which they are included. South Carolina Pub. Serv. Auth. v. Great W. Coal, 312 S.C. 559, 562, 437 S.E.2d 22, 24 (1993). Because the arbitration provision at issue only applies to projects within the purview of the Contractor Base Agreement, it is necessary to analyze the scope of work provision under the Contractor Base Agreement to determine if indeed the arbitration provision binds DVS to arbitration for its work at The Abbey.

The specific “Purchase Order” referenced in the Contractor Base Agreement is not to be confused with a particular company’s purchase order or invoice sheet. The “Purchase Order” cited and attached as Schedule A to the Contractor Base Agreement is in fact a separate one-page contract which provides the project name, project address, project scope of work, and price/payment for the subcontractor for the project. (R 2586). It is clear from the scope of work provision in the Contractor Base Agreement that the Base Agreement only becomes binding on a particular project when the Schedule A “Purchase Order” contract form is issued.

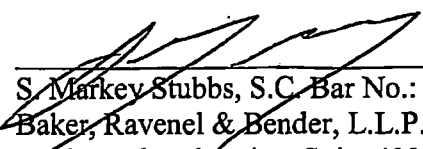
SCOPE OF WORK: Contractor shall provide labor, material, equipment or other services in such location(s) and under such terms as conditions as Lennar shall deem necessary (the “Work”) upon receipt of a Purchase Order from Lennar. When issued, the Purchase Order (see Schedule A) shall become part of this Agreement. The location(s) where the Work is to be performed shall be known as the job site or Project site and may be more fully described in Exhibit “A” to the Purchase Order. Unless otherwise provided, the term “Subcontractor” shall include all persons or entities of all tiers, whether contracting directly with Contractor, or any person acting by, through or under Contractor, that are providing labor, materials, equipment, supplies, and/or supervision to satisfy the requirement of Contractor’s Work.

Upon review of the cited "Purchase Order" template attached as Schedule A to the Contractor Base Agreement, the intent of the Contractor Base Agreement becomes evident: the Contractor Base Agreement contains all the basic material terms desired by Lennar for all of its projects and then the one-page "Purchase Order" agreement binds DVS to the terms of the Contractor Base Agreement for each subsequent project in which a Schedule A Purchase Order form is completed. However, Lennar did not issue the Schedule A Purchase Order form with DVS, Inc. as described in the Contractor Base Agreement with regards to The Abbey. Therefore, there is no contractual document binding DVS, Inc. to the terms of the Contractor Base Agreement with respect to The Abbey project in particular. Assuming the 2007 Contract could apply, it does not as no Purchase Order Form was issued.

CONCLUSION

If the Court upholds the denial of arbitration agreement as it applies to the owners, the claim for arbitration as applies to this subcontractor is rendered moot by the agreement relied upon by the Appellant. If the Court finds the arbitration agreement with the owners is enforceable, the case should be remanded to the trial court for determination of the enforceability of the base agreement in light of the failure of this project to be made a part of the base agreement or have a binding arbitration agreement. The Trial Court should be upheld and in the event the Trial Court is overturned, this case should be remanded for determination of the obligation of subcontractors under any alleged contracts.

Respectfully Submitted,



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Attorneys for Respondent DVS, Inc.

Columbia, South Carolina

August 22, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
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 IUI, 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 Construct, 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, are also Respondents.

And

Décor Corporation, Fourth Party Plaintiff,

v.

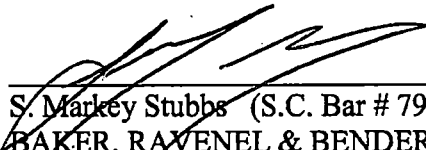
Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidru Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Richardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1 – 4, Fourth-Party Defendants.

RESPONDENT DVS, INC.'S CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent complies with Rule 211(b),

SCACR.

Respectfully Submitted,



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August ²³22, 2017
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

RECEIVED

Court of Appeals Case No. 2016-002339
Lower Court Case No. 2014-CP-08-02424

SEP 05 2017

SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins..... 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, Inc. 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, Inc. 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, 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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are Respondents.

And

Décor 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 Betio Pereira, 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.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER LENNAR HAS WAIVED AND ABANDONED THE ISSUE THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO GUARANTEED BY FAILING TO INCLUDE ITS ARGUMENTS AND SUPPORTING CASE LAW ADDRESSING THE ISSUE IN ITS APPEAL BRIEF.**
- II. TO THE EXTENT THE ISSUE HAS NOT BEEN WAIVED, WHETHER THE TRIAL COURT'S DENIAL OF LENNAR'S MOTION TO COMPEL AS TO GUARANTEED SHOULD BE UPHELD BECAUSE THE ARBITRATION PROVISION IN THE ONLY APPLICABLE CONTRACT IS DERIVATIVE.**

STATEMENT OF THE CASE

This appeal is about whether Plaintiffs must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against Guaranteed Framing, LLC ("Guaranteed") must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to Guaranteed and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, Guaranteed may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of Guaranteed's work on the project, (B) if Plaintiffs and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

I. Factual Background

Plaintiffs are a putative class of owners of single family residences in a development known as The Abbey at Spring Grove Plantation ("The Abbey"). (R. p. 26, ¶1.) Guaranteed is alleged to have been a framing and roofing subcontractor of the general contractor, Lennar, during the construction (the "Project") of Plaintiffs' residences. (R. p. 138, ¶197.)

On May 15, 2007, Guaranteed entered a Contractor Base Agreement with Lennar (the "2007 Agreement"). (R. pp. 1194-1216.) The 2007 Agreement includes the following arbitration provision contained on page six:

16. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, AND AFTER CONSULTING WITH LEGAL COUNSEL OF THEIR OWN CHOOSING, CONTRACTOR AND LENNAR, ON BEHALF OF THEMSELVES AND ANY PERSON OR ENTITY ACTING BY, THROUGH OR UNDER THEM, KNOWINGLY, VOLUNTARILY AND INTENTIONALLY AGREE TO WAIVE THE RIGHT TO

TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR ANY OTHER RIGHTS OR OBLIGATIONS BETWEEN LENNAR, CONTRACTOR AND ALL PERSONS ACTING BY, THROUGH OR UNDER LENNAR OR CONTRACTOR. ...

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

(R. p. 1199, ¶16.)

Operating under the terms of the 2007 Agreement, Guaranteed provided certain framing work at The Abbey from September of 2011 through April 2015. (R. p. 2600, ¶4.) No work was performed on the Project by Guaranteed after April 2015. (R. p. 2600, ¶5.)

On August 6, 2015, several months after Guaranteed's work on the Project was completed, Guaranteed entered into a Master Trade Partner Agreement with Lennar (the "2015 Agreement"). (R. pp. 2600, ¶6; 1218-1259.) The 2015 Agreement serves as the base terms under which Lennar was able to later submit purchase orders to contract for work on future projects.

(R. pp. 1218-1259.) While §1 of Amendment No. 3 to the 2015 Agreement calls in part for binding arbitration of claims or controversies that arise out of or relate to the 2015 Agreement or the dealings between the parties, this provision is not retroactive and does not to apply to prior completed work, (R. pp. 1236-1237, §1.) Therefore, the only applicable arbitration provision as to Guaranteed and Lennar is the clause contained in the 2007 Agreement which states that Guaranteed is required to submit to arbitration only if Lennar is successful in forcing Plaintiffs to arbitrate their claims.

II. Procedural History

Plaintiffs sued Lennar and others alleging various construction deficiencies in their residences. (R. pp. 75-106.) In turn, in Lennar's Answer to Plaintiffs' First Amended Complaint, Lennar asserted third-party claims against Guaranteed and other subcontractors for the Project. (R. pp. 133-154.)

On June 1, 2015, Lennar filed a Motion to Compel Arbitration asserting that Plaintiffs' claims were subject to ADR. (R. pp. 259-261.) On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's Motion to Compel"), wherein it sought to compel arbitration of its claims against Guaranteed. (R. pp. 263-269.) Attached to Lennar's Motion to Compel Arbitration were both the 2007 and 2015 Agreements. (R. pp. 1194-1216; 1218-1259.)

On April 11, 2016, Guaranteed submitted its Memorandum of Law in Response to Lennar's Motion to Compel. (R. pp. 2810-2816.) That same day, at the hearing on Lennar's Motion to Compel, Guaranteed joined numerous other parties in oral argument. (R. pp. 237-239.) Guaranteed later submitted a Supplemental Memorandum of Law in Response to Lennar's Amended Motion Compel, dated April 25, 2016. (R. pp. 2817-2822.)

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel. (R. pp. 4-23.) While it contained detailed findings supporting its ruling denying Lennar's motion to compel arbitration as to Plaintiffs, the Order was silent as to the arguments presented between Lennar and Guaranteed, as well as the other subcontractors. (*Id.*) Accordingly, on September 29, 2016, Guaranteed filed a Motion to Alter or Amend, wherein it respectfully requested the Order be amended to add findings proffered by Guaranteed. (R. pp. 2823-2827.) Likewise, on October 3, 2016, Lennar filed its Motion to Reconsider Order Denying its Motion to Compel Arbitration. (R. pp. 2553-2572.) In its Motion to Reconsider, Lennar acknowledged that the trial court's Order encompassed a ruling denying Lennar's motion as to Guaranteed and the other subcontractors, but sought clarification on that point from the trial court. (R. pp. 2571-2572, § XII.)

On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3.) This appeal followed.

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO GUARANTEED.

While it addressed the lower court's ruling denying the motion to compel arbitration as to Guaranteed and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Guaranteed in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing

Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

Guaranteed agrees with Lennar's procedural concern that the Order does not make specific findings based on the arguments presented between Lennar and Guaranteed. In fact, Guaranteed moved the circuit court to amend the Order to address the arguments and offered proposed findings. (R. pp. 2823-2827.) In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Guaranteed and the subcontractors. (R. pp. 2571-2572, § XII .) These motions were denied in the Form 4 Order. (R. p. 3.)

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (“The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.”). Although it could be argued Lennar fulfilled its duty to bring its substantive arguments as to Guaranteed before the circuit court in its Motion to Reconsider by referencing the “the reasons previously articulated in writing and at the hearing on the Motion,” this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. p. 2572, ¶1.) In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against Guaranteed are subject to arbitration along with citations to supporting case law. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to Guaranteed nor does it contain applicable references to supporting authority. In fact, Lennar's brief even fails to specify which of the several agreements it mentions form the basis for its assertion that its claims against

Guaranteed must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Guaranteed to arbitrate the claims in this matter.

II. IF THIS COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS GUARANTEED MUST ARBITRATE, THE COURT SHOULD FIND THAT LENNAR MAY COMPEL GUARANTEED TO ARBITRATE THIS ACTION ONLY: (A) PURSUANT TO THE 2007 AGREEMENT, (B) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE, AND (C) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the circuit court properly denied Lennar's motion to compel Guaranteed to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. "Arbitration agreements are required to meet the basic tenets and requirements of contract law." Towlers v. United Health Care Corp., 338 S.C. 29, 529 S.E.2d 839 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 439 (2009). Under South Carolina common law, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of SC, 373 S.C. 144, 644 S.E.2d 705 (2007).

With these guiding principles, the Court must examine the Agreements to determine the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

- A. Lennar may compel Guaranteed to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.**

The 2007 Agreement, which, for the reasons set forth below, is the only arbitration provision governing Guaranteed's Project work, unambiguously provides that Lennar may only compel Guaranteed to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN STRICT ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR JURY.

(R. p. 1199, ¶16 (emphasis added).) As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates Guaranteed and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel Guaranteed to submit to arbitration because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without there being a third party claim being adjudicated in the same action. Thus, as it relates to Guaranteed, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

- B. If Lennar may compel Guaranteed to arbitrate, it may do so only pursuant to the terms of the 2007 Agreement, because the Project does not fall within the purview of the 2015 Agreement, which post-dates the Project and is not retroactive.**

Although the parties were operating under the 2007 Agreement at all times that the work on the Project was accomplished, Lennar appears to assert that the 2015 Agreement governs the arbitration obligations in this case. The parties did not enter into the 2015 Agreement until August 6, 2015, several months after Guaranteed's work on the Project was completed. (R. p. 2600, ¶6.) The 2015 Agreement looks to future projects and serves as the base terms under which Lennar is able to later submit purchase orders to contract for additional work. (R. 1218-1259.) While §1 of Amendment No. 3 to the 2015 Agreement calls in part for binding arbitration of claims or controversies that arise out of or relate to the 2015 Agreement or the dealings between the parties, there is no evidence in the record that the provision is retroactive and or that it applies to prior completed work or projects. (R. pp. 1236-1237, §1.)

"A broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 598, 553 S.E.2d 110, 119 (Ct. App, 2008). While South Carolina courts have retroactively applied arbitration clauses to disputes arising under prior contracts, they did so on the basis of the significant relationship between the subject of the prior contract and the new contract. *See Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 588 S.E.2d 136 (Ct. App. 2003).

In the Holy Cross case, the court held that an arbitration clause in a later contract did not apply to claims involving Orkin's treatment of other real property owned by the church, finding no evidence of an intent to apply the clause to prior-completed projects. 356 S.C. at 210, 588 S.E.2d at 141-142. The court noted that, although the arbitration clause in Orkin's new contract did not expressly limit the application to future projects, it also contained no language expanding

its coverage to prior-completed projects. Id. It observed that Orkin could have included such language in the subsequent contract if that truly was the intent of the parties, but did not. In so finding, the court explained that to view the general principle that doubtful interpretations of language are to be resolved in favor of arbitration to allow a party to “insulate itself from pre-existing claims by failing to say so in explicit terms” would be “a fundamental distortion of the principle.” 356 S.C. at 211, 588 S.E.2d at 141 (quoting Hendrick v. Brown & Root, Inc., 50 F. Supp.2d 527, 535 (E.D.Va. 1999)).

Like the contract in Holy Cross, the 2015 Agreement does not evidence an intention to apply the clause to claims concerning projects completed under a prior contract or which were completed prior to the 2015 Agreement. The arbitration clause does not mention any prior projects or work. If it were the intent of Lennar to include earlier projects within the scope of the 2015 Agreement, it could have so stated.

Rather, the arbitration provision looks to future projects and contemplates that there will be actions that Guaranteed would need to undertake going forward that it could not perform retrospectively: “Subcontractor shall incorporate provisions in all agreements with its lower tier subcontractors executed by Subcontractor with respect to the Work requiring any affected lower tier subcontractor to participate in, and be bound by, such arbitration.” (R. p. 1237, ¶1.) Moreover, there is no evidence of any correlation between the subject matter of the 2015 Agreement and the claims in The Abbey.

For these reasons, the Court should find that Lennar cannot compel Guaranteed Framing to arbitrate claims concerning The Abbey based on the arbitration provisions contained in the 2015 Agreement and that the circuit court properly denied Lennar’s motion on that ground.

- C. Lennar may compel Guaranteed to arbitration only pursuant to the Federal Arbitration Act, because the arbitration provisions in both the 2007 and the 2015 Agreements do not meet the requirements of the South Carolina Arbitration Act.**

Under the South Carolina Uniform Arbitration Act ("SCUAA"), notice that a contract is subject to arbitration "shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. *See Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)).

Neither the 2017 nor the 2015 Agreements include arbitration provisions on the first page of the agreement as required by § 15-48-10(a). (R. pp. 1194; 1218.) Accordingly, neither agreement contains an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel Guaranteed to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, Guaranteed respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Guaranteed to submit this matter to arbitration.

[signatures on following page]

Respectfully submitted,



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This 1st day of September, 2017

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Court of Appeals Case No. 2016-002339
Lower Court Case No. 2014-CP-08-02424

RECEIVED

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SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins..... 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, Inc. 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, Inc. 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, 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, Décor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, are Respondents.

And

Décor 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 Betio Pereira, 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.

RESPONDENT GUARANTEED FRAMING, LLC'S CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent Guaranteed Framing, LLC complies with Rule 211(b), SCACR.

Respectfully submitted,



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Attorneys for Respondent, Guaranteed Framing, LLC

This 1st day of September, 2017

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No.: 2014-CP-08-2424
Appellate Court Case No. 2016-2339

RECEIVED

SEP 07 2017

SC Court of Appeals

Patricia Damico; and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource Southeast Group, LLC, are also Respondents,

And

Décor 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, Isidni Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

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AND KNIGHT'S REDI-MIX, INC.'S
FINAL BRIEF**

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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. Spring Grove Plantation Development Inc. ("Spring Grove Development") was the original owner of the land on which the homes are currently located. Spring Grove Development sold the land which now is known as The Abbey to Lennar Carolinas, LLC ("Lennar"). Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc. ("Knight's Redi-Mix") are alleged to have manufactured and delivered ready mix concrete pursuant to a Business Partners Agreement with Lennar, during the construction The Abbey ("Project").

On December 12, 2014, 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/owners") of the homes initiated a lawsuit against Lennar, Spring Grove Development and others. (R. pp. 24-41). On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. pp. 42-74). Lennar filed a Motion to Compel Arbitration on June 1, 2015. (R. pp. 257-261).

The owners filed an Amended Complaint on November 23, 2015. (R. pp. 75-108). Lennar amended its Motion to Compel Arbitration on March 30, 2016, wherein it requested the circuit court to compel the owners, Spring Grove Development, and the subcontractors to arbitration. (R. pp. 262-270).

Spring Grove Development filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration and a hearing on Lennar's Motion to Compel Arbitration was held on April 11, 2016. (R. pp. 2587-2593). The Circuit Court heard arguments from all interested

parties and duly considered the same. (R. p. 3). The Circuit Court then issued an order denying Lennar's Motion to Compel on September 19, 2016. (R. pp 4-23).

Lennar filed a motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 3, 2016. (R. pp. 2553-2572). Spring Grove Development also filed a Rule 59(e) motion asking the court to address Lennar's motion as it related to the alleged arbitration agreement between Lennar and Spring Grove Development. (R. pp. 2594-2599). On October 26, 2016, the Circuit Court issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3) This appeal followed.

This appeal concerns whether Plaintiffs/Owners must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against Knight's Redi-mix must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to Knight's Redi-mix and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, Knight's Redi-mix may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of Knight's Redi-mix's work on the project, (B) if Plaintiffs/Owners and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

Knight's Redi-mix entered into a Business Partners Agreement with Lennar on March 13, 2008. (R. pp. 1288-1299). The Business Partners Agreement includes the following arbitration provision contained on page seven:

**14. ARBITRATION: IF A CONTROVERSY OR CLAIM
ARISES OUT OF OR RELATED TO THIS AGREEMENT**

AND THE PARTIES CANNOT RESOLVE THE MATTER BETWEEN THEMSELVES WITH SIXTY (60) DAYS AFTER CONTRACTORS IS FIRST PROVIDED WRITTEN NOTICE OF THE CLAIM OR CONTROVERSY BY BUSINESS PARTNER, THE PARTIES AGREE TO TRY IN GOOD FAITH TO RESOLVE THE DISPUTE BY MEDIATION UNDER THE CONSTRUCTION INDUSTRY MEDIATION RULES OR THE AMERICAN ARBITRATION ASSOCIATION. IF NOT RESOLVED BY MEDIATION, THE DISPUTE SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION, AND JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATOR(S) MAY BE ENTERED IN ANY COURTS HAVING JURISDICTION THEREOF. SHOULD A DISPUTE ARISE BETWEEN CONTRACTOR AND A BUYER OF A RESIDENCE REGARDING MATERIALS SUPPLIED OR WORK PERFORMED BY THE BUSINESS PARTNER, BUSINESS PARTNER AGREES TO PARTICIPATE IN, AND BE BOUND BY, ARBITRATION PROCEEDINGS BETWEEN CONTRACTOR AND THE BUYER.

Operating under the terms of the Business Partner Agreement, Knight's Redi-mix manufactured and delivered ready mix concrete to the Project

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO KNIGHT'S REDI-MIX.

While Lennar addressed the Circuit Court's ruling denying the motion to compel arbitration as to Knight's Redi-mix and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Knight's Redi-mix in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106

n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

Knight's Redi-mix agrees with Lennar's procedural concern that the Order does not make specific findings based on the arguments presented between Lennar and Knight's Redi-mix. In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Knight's Redi-mix and other subcontractors. (R. pp. 1035-1043). These motions were denied in the Form 4 Order. (R. p. 3.)

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Although it could be argued Lennar fulfilled its duty to bring its substantive arguments as to Knight's Redi-mix before the circuit court in its Motion to Reconsider by referencing the "the reasons previously articulated in writing and at the hearing on the Motion," this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. p. 2572). In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against Knight's Redi-mix are subject to arbitration along with citations to supporting case law. Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to Knight's Redi-mix nor does it contain applicable references to supporting authority. In fact, Lennar's brief even fails to specify which of the several agreements it

mentions form the basis for its assertion that its claims against Knight's Redi-mix must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Knight's Redi-mix to arbitrate the claims in this matter. See Rule 208(b)(1)(B) ("Ordinarily, no point will be considered which is not set forth in the statement of issues on appeal.")

II. IF THIS COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS KNIGHT'S REDI-MIX MUST ARBITRATE, THE COURT SHOULD FIND THAT LENNAR MAY COMPEL KNIGHT'S REDI-MIX TO ARBITRATE THIS ACTION ONLY: (A) PURSUANT TO THE BUSINESS PARTNER AGREEMENT, (B) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE, AND (C) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the Circuit Court properly denied Lennar's motion to compel Knight's Redi-mix to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. Arbitration Agreements are required to meet the basic tenets and requirements of contract law. Towles v. United HealthCare Corp., 338 S.C. 29, 37, 529 S.E.2d 839, 844 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). Under South Carolina common law, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

With these guiding principles, the Court must examine the Agreements to determine

the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

- A. **Lennar may compel Knight's Redi-mix to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.**

The Business Partner Agreement, which, for the reasons set forth below, is the only arbitration provision governing Knight's Redi-mix's materials supplied to the Project, unambiguously provides that Lennar may only compel Knight's Redi-mix to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

THE DISPUTE SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION

(R. p. 1294). (emphasis added).) As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates Knight's Redi-Mix and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel Knight's Redi-mix to submit to arbitration, because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without a third-party claim being adjudicated in the same action. Thus, as it relates to Knight's Redi-mix, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

- B. **Lennar may compel Knight's Redi-mix to arbitration only pursuant to the Federal Arbitration Act, because the arbitration provisions in the Business Partner Agreement do not meet the requirements of the South Carolina Arbitration Act.**

Under the South Carolina Uniform Arbitration Act ("SCUAA"), notice that a contract is subject to arbitration "shall be typed in underlined capital letters; or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. See Soil Remediation Co. v. Nu-Way Envtl., 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding that an arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)). The Business Partner Agreement does not include arbitration provisions on the first page of the agreement as required by § 15-48-10(a). (R. p. 1035.) Accordingly, the Business Partner Agreement does not contain an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel Knight's Redi-mix to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, Knight's Redi-mix respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Knight's Redi-mix to submit this matter to arbitration.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to read 'R. Harrell III', written over a horizontal line.

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**Attorney for Knight's Concrete Products, Inc.
and Knight's Redi-mix**

September 6, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

RECEIVED

SEP 07 2017

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Appellate Court Case No. 2016-2339

SC Court of Appeals

Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated,
Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony
and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia
Camara, and Matthew Collins 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
onstructors, 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, Geometries Consulting, LLC,
Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete
Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete
Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators
Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez
Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders
FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ...
..... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Décor 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

Décor 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, Isidni Mejia, Juan Perez, Ernesto M. Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Betio Pereira, 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.

CERTIFICATE OF COUNSEL

In accordance with Rule 210(c), SCACR, the undersigned certifies that the Final Brief of Respondent complies with the Supreme Court Order of April 15, 2014.


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September 6, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED

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

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Patricia Damico, and Lerma Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource-Southeast Group, LLC, and Low Country Renovations and Siding, LLP, ... Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc.,

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Judge

RECEIVED

SEP 21 2017

Appellate Case No. 2016-002339

SC Court of Appeals

Circuit Court Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Teresa 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, Paragon Site Constructors, Inc., 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, 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

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Circuit Judge

Appellate Case No. 2016-002339

Circuit Court Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Teresa 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, Paragon Site Constructors, Inc., 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, 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, Décor Corporation, DVS, INC., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders FirstSource -Southeast Group, LLC are.....**Respondents**

INITIAL BRIEF OF RESPONDENT MANALE LANDSCAPING, LLC

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September 18, 2017
Charleston, South Carolina

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<u>Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp.</u> , 413 S.C. 630, 776 S.E.2d 434, (Ct. App. 2015).....	6

STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court err in denying Lennar's Motion to Compel without substantive analysis?
- II. Has Lennar waived its Appeal of the Motion to Compel as to Manale by failing to preserve its substantive arguments for appeal?

STATEMENT OF THE CASE

The Homeowners at the Abbey located in the Spring Grove development (the "Plaintiffs") filed this lawsuit against Lennar and others based on alleged construction defects, Lennar asserted Cross-Claims against Co-Defendants and third-party claims against subcontractors. There are sixty-nine (69) single family homes in the Abbey located in the Spring Grove development (the "Subject Property" or the "Abbey").

Initially, the Plaintiff's complaint contained claims against Lennar, Spring Grove Development, Volkmar Consulting Services, LLC, and Manale Landscaping, LLC ("Manale") based on allegations of deficiencies in the site grading and drainage of the specific to a portion of the Plaintiffs. Manale is alleged to have been a landscaping subcontractor of the general contractor, Lennar, during the construction (the "Project") of Plaintiffs' residences. (R. p. 24-43.) On November 23, 2015 an amended complaint was filed and the case was expanded to include all Plaintiffs at the Subject Property alleging wide ranging defects in the general construction of the Subject Property. (R. p. 75-108.) In turn, in Lennar's Answer to Plaintiffs' Complaint, Lennar asserted cross-claims and third-party claims against additional subcontractors for the Project: (R. p. 42-74.)

On June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. p. 257-261.) On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's

Motion to Compel"), wherein it sought to compel arbitration of its claims against newly added subcontractor defendants as well. (R. p. 262-2434.)

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel. (R. p. 4-23.) While it contained detailed findings supporting its ruling denying Lennar's motion to compel arbitration as to Plaintiffs, the Order was silent the subcontractors. (R. p.4-23.) Accordingly, multiple parties filed a Motion to Alter or Amend. (R. p. 2553-2572; 2594-2599; 2844-2881; 2936-2940.) In its Motion to Reconsider, Lennar acknowledged that the trial court's Order encompassed a ruling denying Lennar's motion as to Manale and the other subcontractors, but sought clarification on that point from the trial court. On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. p. 3.) This appeal followed.

STATEMENT OF FACTS

Plaintiffs are a putative class of owners of single family residences in a development known as the Abbey. (R. p. 75-80.) Lennar alleges that on September 22, 2008, Manale entered a Contractor Base Agreement with Lennar (the "Contract"). (R.286-267;1395-1408.) However, Lennar has produced no admissible evidence of a written contract. (R. 1395-1408.) Moreover, the documents Lennar produced as evidence of a contract does not indicate that it applied to this Project. (R. 1395-1408.) Therefore, there is no applicable arbitration provision as to Manale and Lennar in the record at this time. Despite not having a legible copy of the Contract, Lennar contends that Manale is

party to an Arbitration clause. However assuming that the alleged arbitration clause in the alleged Contract is the same as those of other subcontractors, the full sentence states¹:

NOTWITHSTANDING THE FOREGOING, IF (A) LENNAR IS A PARTY TO A LAWSUIT, IS REQUIRED TO TRY THE DISPUTE BEFORE A JURY, AND BELIEVES THAT CONTRACTOR IS LIABLE, INWHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE LAWSUIT, THEN THIS WAIVER OF JURY TRIAL SHALL NOT APPLY; OR (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATORIS), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR END CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR BY JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

In short, Lennar, purportedly, binds its subcontractors to the same type of action it faces.

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENTS THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO MANALE.

While it addressed the lower court's ruling denying the motion to compel arbitration as to Manale and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to Manale in its appeal brief. However, the Court below denied Lennar's motion outright. (R. p. 3;4-23). "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without

¹ Lennar omitted the underlined portion of the alleged arbitration clause from its Motion to Compel Arbitration arguments made as to Manale.

supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citations omitted).

Manale disagrees with Lennar's procedural concern that the Order does not make specific findings as to the portion of Lennar's Motion to Compel directed at subcontractors as the alleged arbitration clause in the Contract as is outlined below. However, several subcontractor Defendants moved the circuit court to amend the Order to address the arguments and offered proposed findings. (R. p. 2594-2599; 2844-2881; 2936-2940.) In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to Guaranteed and the subcontractors. (R. p. 2571-72.) These motions were denied in the Form 4 Order. (R. p. 3.)

"The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). The filing of the Rule 59(e) motion, although an important first step, is not the only step a party must take to preserve an issue for appeal.

Lennar may argue it preserved its substantive arguments in its Motion to Reconsider by referencing the "the reasons previously articulated in writing and at the hearing on the Motion", but this general statement is not sufficient to preserve the arguments in the appeal. *See Fields* at 106 n.3, 285 n.3 (R. p.2572.). In order to preserve the issue for appeal before this Court, Lennar was obligated to put forth each of its substantive arguments as to why its claims against Manale are subject to arbitration along with citations to supporting case law. *Id.* Lennar's brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration

clauses, but it does not specifically set forth any arguments as to Manale nor does it contain applicable references to supporting authority. *Id.* Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel Manale to arbitrate the claims in this matter.

II. THE CIRCUIT COURT DID NOT ERR IN FAILING TO RULE ON LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SUBCONTRACTOR DEFENDANTS AS THE ARBITRATION CLAUSE WAS NOT TRIGGERED IN LIGHT OF THE COURT'S RULING THAT THE PLAINTIFFS COULD NOT BE COMPELLED INTO ARBITRATION

Manale contends that the Circuit Court did not err in its ruling below. However, assuming *in arguendo* that Manale is bound by the alleged arbitration provision, it is a conditional provision. The provision alleged by Lennar to be applicable to Manale in its Motion to Compel Arbitration begins with "IF...". Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IF ... (B) LENNAR IS A PARTY TO AN ARBITRATION ACTION, IS REQUIRED TO TRY THE DISPUTE BEFORE AN ARBITRATOR(S), AND BELIEVES THAT CONTRACTOR IS LIABLE, IN WHOLE OR IN PART, FOR THE CLAIMS BEING MADE IN THE ARBITRATION, THEN LENNAR AND CONTRACTOR AGREE THAT THE DISPUTES BETWEEN THEM WILL BE FULLY AND FINALLY RESOLVED IN SUCH ARBITRATION AND IN ACCORDANCE WITH THE ARBITRATION ACT AND ARBITRATION RULES THEN GOVERNING THE ARBITRATION, AND NOT BY JUDGE OR BY JURY. LENNAR AND CONTRACTOR SPECIFICALLY AGREE THAT THIS AGREEMENT INVOLVES INTERSTATE COMMERCE, AND THAT ANY ARBITRATION SHALL BE GOVERNED BY THE FEDERAL ARBITRATION ACT.

(R. 1415² (emphasis added.)) As applied to this case, the foregoing provision unambiguously demonstrates Lennar intended to drag their subcontractors into the same forum in which the disputes between Lennar and Plaintiffs are resolved. Thus, if Lennar

² Manale notes that the contract language quoted is from the alleged Contract between Myers Landscaping. The record on appeal does not contain a legible, or therefore, enforceable, copy of the alleged contract between Manale and Lennar.

is unable to enforce its arbitration provisions against Plaintiffs, it cannot compel Manale to submit to arbitration because the arbitration provision in the alleged Contract is conditional and, as to Manale, Lennar's Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

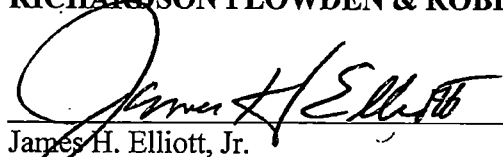
III. LENNAR HAS NOT ARGUED ON APPEAL THAT MANALE SHOULD BE COMPELLED TO ARBITRATION THUS THAT ISSUE IS NOT PROPERLY BEFORE THE COURT

“Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.” Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Builders FirstSource-Se. Grp., 413 S.C. 630, 642, 776 S.E.2d 434, 441 (Ct. App. 2015), citing Rule 208(b)(1)(B), SCACR. Here Lennar has not argued on appeal that its alleged arbitration provision with Manale is enforceable, thus that issue is not presently before the court on appeal.

CONCLUSION

For the foregoing reasons, Manale respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel Manale to submit this matter to arbitration.

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ATTORNEYS FOR MANALE LANDSCAPING, LLC

September 18, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

RECEIVED

SEP 25 2017

SC Court of Appeals

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico, and Lenna Lucas, Individually and on behalf of all other similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,

Respondent

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, Inc. and Rick Bryant,

Of which Lennar Carolinas, LLC is

Appellant

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, Inc. are

Lennar Carolinas, LLC

Appellant

v.

The Earthworkers Group, Inc., Volkmar Consulting Services, LLC, Geometrics Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's 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-Southwest Group, LLC and Low Country Renovations and Siding, LLP,

Of which A.C.&A., Concrete, Inc., Alpha Omega Construction Group, Inc., Builders FirstSource-Southeast Group, LLC, Coastal Concrete of Southeast, LLC, Coastal Concrete of Southeast II, LLC, Construction Applicators of Charleston, LLC, Décor Corporation, DVS, Inc., Guaranteed Framing, LLC, Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., LA New Enterprises, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., Ozzy Construction, LLC, Raul Martinez Masonry, LLC, South Carolina Exteriors, LLC and Volkmar Consulting Services, LLC are

Respondents.

RESPONDENT MYERS LANDSCAPING, INC.'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

**I. WHETHER THE LOWER COURT ERRED IN DENYING LENNAR HOMES'S
MOTION TO COMPEL ARBITRATION AGAINST PLAINTIFFS**

**II. WHETHER THE LOWER COURT ERRED IN DENYING LENNAR HOMES'S
MOTION TO COMPEL ARBITRATION AGAINST MYERS LANDSCAPING, INC.**

STATEMENT OF APPEAL

This appeal arises from the Circuit Court's Order denying Lennar Carolinas, LLC's (hereinafter Lennar) Motion to Compel Arbitration of construction defect claims from Plaintiff against Lennar. By extension, Lennar Homes has also attempted to compel arbitration of the Third Party claims against Respondents. Myers Landscaping, Inc. would assert that the lower court did not err in denying the Motion to Compel Arbitration against Plaintiffs or Third Party Defendants. However, even if the Appellate Court were inclined to reverse the lower court, they must not compel arbitration against Respondents that never entered into contractual arbitration agreements with Lennar Homes, including Myers Landscaping, Inc.

FACTS AND PROCEDURAL POSTURE

This action arises out of allegations of defective construction by the homeowners at The Abbey located in Spring Grove Planation, a subdivision consisting of sixty nine single family homes in Berkeley County. (R. 24). On October 30, 2014, Plaintiffs commenced this action by Complaint which asserted a number of claims against Lennar Homes of the Carolinas and associated Defendants, including negligence, breach of warranty, and others pertaining to the construction of their homes. (R. 24). Lennar Homes filed an Answer to the Plaintiff's Complaint along with Cross-Claims and a Third-Party Complaint on February 17, 2015. (R. 42). Appellant alleges that Myers provided grading work for the construction and development of the Abbey. (R. 136).

Lennar subsequently filed the Motion to Compel Arbitration that is the subject of

this appeal on June 1, 2015. (R. 257). In response, Lennar amended their Motion to Compel Arbitration on March 30, 2016, while also requesting the court to compel Spring Grove Development and named Third Party subcontractors to arbitration as well. (R. 265). Judge Nicholson denied the Motion to Compel against homeowners and subcontractors on September 19, 2016. (R. 4). Lennar Homes initiated this current appeal on November 18, 2016.

STANDARD OF REVIEW

"Arbitration determinations are subject to de novo review." Smith v. D.R. Horton, Inc., 417 S.C. 42, 47, 742 S.E.2d 1 (2016). "However, a circuit court's factual finding will not be reversed on appeal if any evidence reasonably supports the finding." Id. An order refusing to compel arbitration is immediately appealable. Cape Roman Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 121, 747 S.E.2d 461, 463 (2013).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DENYING LENNAR HOME'S MOTION TO COMPEL ARBITRATION AGAINST PLAINTIFF.

Whether a claim is subject to arbitration is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). A circuit court's factual findings for which there is reasonable evidentiary support should not be reversed on appeal. Smith v. D.R. Horton, Inc., 417 S.C. at 48.

Myers Landscaping joins in the arguments of other Respondents on the subject of the denial of Appellant's Motion to Compel Arbitration against the Plaintiffs in this case. Myers would assert that the Circuit Court had ample factual basis to find the Arbitration clauses in the contracts between Lennar Homes and Plaintiff did not comply

with the South Carolina law and were unconscionable. See, S.C. Code Ann. § 15-48-20(a); Smith v. D.R. Horton, *supra*.

Respondent would further assert that the denial of Appellant's motion to compel Plaintiff to arbitrate should defeat any attempt by Lennar Homes to compel arbitration between them and any subcontractor for claims arising out of the Plaintiff's claims. Compelling arbitration against subcontractors when it is not ordered between the Plaintiff and Lennar would create a jurisdictional and procedural issue with the same claims being adjudicated in different courts. All Third Party Defendants, including Myers Landscaping, are now exposed to direct allegations from Plaintiff, and if arbitration is compelled against Myers for the allegations from Lennar Homes, but Plaintiff is not required to arbitrate, Myers would be required to defend against Circuit Court allegations, as well as those in arbitration.

Review of other subcontractor's arguments indicates that even those with an agreement with Lennar, which Myers Landscaping never entered, have Dispute Resolution provisions that are derivative and based upon Lennar compelling arbitration against the Plaintiffs. Therefore, if the Circuit Court denied Lennar's request to compel arbitration against Plaintiff, the subcontractors that are contractually bound with Lennar cannot be compelled to arbitrate either. Once the Circuit Court made the determination to deny Lennar's Motion to Compel Arbitration against the Plaintiffs, there was no need for it to analyze the merits of compelling subcontractors to arbitration. See, Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613 518 S.E.2d 591, 598 (1999).

Further, there is most certainly no agreement between Myers Landscaping and the Plaintiffs to arbitrate claims directly or through Lennar Homes, so compelling Myers

to arbitrate would be in error.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING LENNAR HOME'S MOTION TO COMPEL ARBITRATION AGAINST THIRD PARTY DEFENDANTS, INCLUDING RESPONDENT MYERS LANDSCAPING.

The language in the decision denying Appellant's Motion to Compel Arbitration focuses mainly on the agreements between Appellant and the Plaintiff in this matter. There is little to no discussion of the denial of the entire motion, which included a request to compel arbitration against named subcontractors and Third Party Defendants as well. Appellant's Motion to Compel Arbitration included an Affidavit from Robert Mauch detailing the relationships of several subcontractors. The Affidavit of Robert Mauch and the contracts submitted by Appellant in their Motion do not include Myers Landscaping. Therefore, the Circuit Court did not err in denying Lennar's Motion to Compel Arbitration against Respondent Myers Landscaping.

The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration is a matter of contract, and a party cannot be required to submit to arbitration of any dispute which they have not agreed to submit. Id. The policy of the United States and South Carolina is to favor arbitration of disputes. Tritech Elec., Inc. v. Frank M. Hall & Co., 343 S.C. 396 (Ct. App. 2000). Regardless, a party cannot be required to submit to arbitration of any dispute which they have no agreed to submit. Aiken v. World Fin. Corp. of SC, 373 S.C. 144 (2007). Arbitration agreements are required to meet the basic tenets and requirements of contract law. Towlers v. United Health Care Corp., 338 S.C. 29 (Ct. App. 1999). The necessary -

elements of a contract are an offer, acceptance, and valuable consideration. Clardy v. Bodolosky, 383 S.C. 418 (Ct. App. 2009).

The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. S.C. Code Ann. § 15-48-20(a)(2005). See also, Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22-23, 644 S.E.2d 663, 667 (S.C. 2007). If no agreement is found to exist, the court must deny any application to arbitrate. Id. In the absence of a written Arbitration Clause in a contract, there must be clear and unmistakable evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clauses' validity. Id. at 24.

Here, there is no agreement to arbitrate between Lennar and Myers Landscaping. The contracts Lennar attempted to compel arbitration for are Purchase and Sale Agreement and Warranty with original buyers of the homes in the development and now Plaintiffs in an action against them. Lennar also moved in their Amended Motion to Compel Arbitration to include all Third Party defendants, ostensibly based upon subcontract agreements. However, there is no evidence in the record that Lennar Homes has ever executed a contract with Respondent Myers Landscaping, much less a contract that contains an enforceable arbitration clause. Appellant provided multiple contracts and agreements with homeowners and other subcontractors, but did not include a contractual agreement with an arbitration clause with Myers Landscaping.

In addition, Appellant has provided no argument that there was ever any non-written contractual relationship between them and Myers Landscaping upon which to

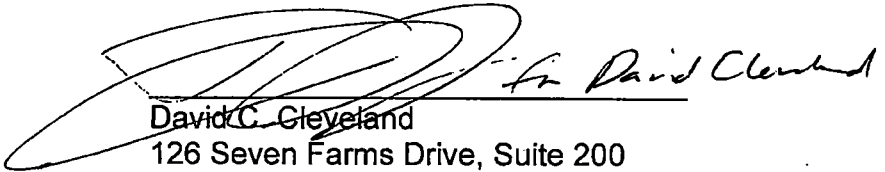
form an agreement to arbitrate disputes. Appellant's argument against the lower court's decision in their Initial Brief merely laments the lack of analysis given to their request to compel arbitration of the subcontractors, but offers no case law or substantive arguments as to why the subcontractors should be compelled. They reference six contracts with Lennar Homes, but again, none of the referenced documents pertain to Respondent Myers Landscaping. Respondent Myers Landscaping is not obligated to arbitrate disputes based upon contractual agreements between Lennar and Plaintiff or contractual agreements between other subcontractors and Lennar. See, Simpson, supra.

Even if the Appellate Court is inclined to overturn the lower court's decision concerning the arbitration between Plaintiff and Appellant, they should not overturn the lower court's decision to deny the motion to compel arbitration between Appellant and Third Party Defendants.

CONCLUSION

In addition to the grounds set forth above, Myers Landscaping incorporates by reference all arguments set forth by other Defendants and Third Party Defendants, in which Myers Landscaping joins. This Court should affirm the Circuit Court's decision to deny Lennar Home's Motion to Compel Arbitration for the reasons herein, but if the Court finds Lennar is entitled to arbitration for the claims asserted by the Plaintiffs, they should still find that Lennar is not entitled to arbitration of the Third Party claims against Myers Landscaping.

CLAWSON AND STAUBES, LLC

A large, stylized handwritten signature in black ink, appearing to read "David C. Cleveland".

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Charleston, South Carolina
September 20, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Court Case No. 2016-2339
Case No.: 2014-CP-08-2424

Patricia Damico, and Lenna Lucas, Individually and on behalf of others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins

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,

Of which Lennar Carolinas, LLC is

Appellant,

and

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,

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 Red-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,

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SC COURT OF APPEALS

LLC, Builders FirstSource-Southeast Group, LLC, and Lowcountry 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., Knights Concrete Products, Inc., Knights 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, are

Respondents,

South Carolina Exteriors, LLC, Fourth-Party Plaintiff,

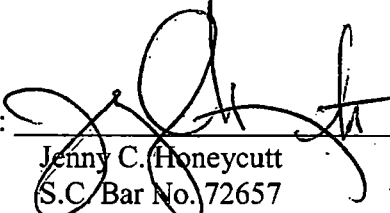
Respondent,

v.

Juan Garza Ramos d/b/a Juan Constructors, Fourth Party Defendants.

RESPONDENT SOUTH CAROLINA EXTERIORS, LLC'S FINAL BRIEF

BEST HONEYCUTT, P.A.

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September 5, 2017
Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER LENNAR HAS WAIVED AND ABANDONED THE ISSUE THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SOUTH CAROLINA EXTERIORS BY FAILING TO INCLUDE ARGUMENTS AND SUPPORTING CASE LAW ADDRESSING THE ISSUE IN ITS APPEAL BRIEF.
- II. TO THE EXTENT THE ISSUE HAS NOT BEEN WAIVED, WHETHER THE TRIAL COURT'S DENIAL OF LENNAR'S MOTION TO COMPEL AS TO SOUTH CAROLINA EXTERIORS SHOULD BE UPHELD BECAUSE THE ARBITRATION PROVISION IN THE ONLY APPLICABLE CONTRACT IS DERIVATIVE.

STATEMENT OF THE CASE

This appeal is about whether Plaintiffs must arbitrate their construction defect claims against Lennar Carolinas, LLC ("Lennar") and, by extension, whether Lennar's third-party claims against South Carolina Exteriors, LLC ("South Carolina Exteriors") must be arbitrated. By failing to raise its substantive arguments in support of its motion to compel arbitration as to South Carolina Exteriors and the other subcontractors in its issues on appeal or in the arguments in its brief, Lennar abandoned the issue. Nonetheless, to the extent this Court elects to consider and rule on the matter, South Carolina Exteriors may be compelled to arbitrate only: (A) pursuant to the agreement in place at the time of South Carolina Exteriors' work on the project, (B) if Plaintiffs and Lennar must also arbitrate the disputes between them, and (C) pursuant to the Federal Arbitration Act.

FACTS AND PROCEDURAL HISTORY

I. Factual Background

Plaintiffs are a putative class of owners of single family residences in a development known as The Abbey at Spring Grove Plantation ("The Abbey"). (R. 24). The motion for class certification has not been granted and there are currently nine residences at issue in the suit. (R. 75). South Carolina Exteriors is alleged to have been a roofing subcontractor providing related waterproofing, flashings and components of the general contractor, Lennar, during the construction (the "Project") of Plaintiffs' residences. (R. 109). According to SC Exteriors' records, it performed work at The Abbey through its subcontractor Juan Garza Ramos d/b/a Juan Contractors on three of the subject residences between February and April 2013. (R. 2862).

On April 12, 2010, South Carolina Exteriors entered a Subcontract Agreement with Lennar (the "2010 Agreement"). (R. 1490). The 2010 Agreement includes the following arbitration provision contained on page eight:

14. WAIVER OF JURY TRIAL/ARBITRATION: TO THE FULLEST EXTENT ALLOWED BY APPLICABLE LAW, THE SUBCONTRACTOR AND THE CONTRACTOR HEREBY EXPRESSLY COVENANT AND AGREE TO WAIVE THE RIGHT TO TRIAL BY JURY IN CONNECTION WITH ANY LITIGATION OR JUDICIAL PROCEEDING RELATING TO OR CONCERNING, DIRECTLY OR INDIRECTLY, THIS AGREEMENT OR THE CONDUCT, OMISSION, ACTION, OBLIGATION, DUTY, RIGHT, BENEFIT, PRIVILEGE OR LIABILITY OF A PARTY, THIS WAIVER OF RIGHT TO TRIAL BY JURY IS SEPERATELY GIVEN AND IS KNOWINGLY, INTENTIONALLY AND VOLUNTARILY MADE BY THE SUBCONTRACTOR AND THE CONTRACTOR, AND BOTH ACKNOWLEDGE THAT SEPARATE AND GOOD AND VALUABLE CONSIDERATION HAS BEEN PROVIDED BY EACH FOR THIS WAIVER. THE SUBCONTRACTOR AND THE CONTRACTOR HAVE HAD AN OPPORTUNITY TO SEEK LEGAL COUNSEL CONCERNING THIS WAIVER. THIS WAIVER IS INTENDED TO AND DOES ENCOMPASS EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A JURY TRIAL WOULD OTHERWISE ACCRUE, THE SUBCONTRACTOR AND THE CONTRACTOR FURTHER CERTIFY AND REPRESENT TO EACH OTHER THAT NO PARTY, REPRESENTATIVE OR AGENT OF THE SUBCONTRACTOR OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THEIR RESPECTIVE COUNSEL) HAS REPRESENTED, EXPRESSLY OR OTHERWISE TO THE SUBCONTRACTOR OR THE CONTRACTOR OR TO ANY AGENT OR REPRESENTATIVE OF THE SUBCONTRACTOR OR THE CONTRACTOR (INCLUDING, BUT NOT LIMITED TO, THEIR RESPECTIVE COUNSEL) THAT THEY WILL NOT SEEK TO ENFORCE THIS WAIVER OF RIGHT TO JURY TRIAL, THIS WAIVER SHALL APPLY TO THIS AGREEMENT AND ANY FUTURE AMENDMENTS, SUPPLEMENTS OR MODIFICATIONS OF THIS AGREEMENT. NOTWITHSTANDING THE FOREGOING, IN THE EVENT A CLAIM OR CONTROVERSY ARISES BETWEEN CONTRACTOR AND ANY THIRD PARTY REGARDING MATERIALS SUPPLIED AND/OR WORK PERFORMED BY OR THROUGH SUBCONTRACTOR, AND SUCH CLAIM OR CONTROVERSY IS SUBJECT TO BINDING ARBITRATION BETWEEN CONTRACTOR AND THE THIRD PARTY, SUBCONTRACTOR AGREES TO PARTICIPATE AS A PARTY IN ANY MEDIATION OR ARBITRATION, AND TO BE BOUND BY ANY ARBITRATION PROCEEDINGS OR ARBITRATION RULING IN SUCH ARBITRATION.

(R. 1497).

Operating under the terms of the 2010 Agreement, South Carolina Exteriors provided roofing work at The Abbey from February 2013 to April 2013. (R. 2863-2875). Therefore, the only applicable arbitration provision as to South Carolina Exteriors and Lennar is the clause contained in the 2010 Agreement which states that South Carolina Exteriors is required to submit to arbitration only if Lennar is successful in forcing Plaintiffs to arbitrate their claims.

II. Procedural History

Plaintiffs sued Lennar and others alleging various construction deficiencies in their residences. (R. 24). In turn, in Lennar's Answer to Plaintiffs' First Amended Complaint, Lennar asserted third-party claims against South Carolina Exteriors and other subcontractors for the Project. (R. 109).

On June 1, 2015, Lennar filed a Motion to Compel Arbitration asserting that Plaintiffs' claims were subject to ADR. (R. 259). On March 30, 2016, Lennar filed an Amended Motion to Compel Arbitration ("Lennar's Motion to Compel"), wherein it sought to compel arbitration of its claims against South Carolina Exteriors. (R. 263). Attached to Lennar's Motion to Compel Arbitration was the 2010 Agreement. (R. 1490).

On April 11, 2016, South Carolina Exteriors submitted its Memorandum of Law in Response to Lennar's Motion to Compel. (R. 2837). That same day, at the hearing on Lennar's Motion to Compel, South Carolina Exteriors joined numerous other parties in oral argument. (R. 203).

On September 19, 2016, the circuit court entered an Order (the "Order") denying Lennar's Motion to Compel. (R. 4). While it contained detailed findings supporting its ruling denying Lennar's motion to compel arbitration as to Plaintiffs, the Order was silent as to the arguments

presented between Lennar and South Carolina Exteriors, as well as the other subcontractors. (R. 4). Accordingly, on September 29, 2016, South Carolina Exteriors filed a Motion to Alter or Amend, wherein it respectfully requested the Order be amended to add findings proffered by South Carolina Exteriors. (R. 2844). Likewise, on October 3, 2016, Lennar filed its Motion to Reconsider Order Denying its Motion to Compel Arbitration. (R. 2553). In the last section of its Motion to Reconsider, Lennar sought "clarification and confirmation" as to whether the Order denied Lennar's Motion to Compel as to the subcontractors including South Carolina Exteriors.

On October 26, 2016, the circuit court, without further discussion, reasoning or explanation, issued a Form 4 Order (the "Form 4 Order") denying all motions to reconsider. (R. 3). This appeal followed.

ARGUMENT

I. LENNAR HAS WAIVED AND ABANDONED ITS ARGUMENT THAT THE CIRCUIT COURT ERRED IN DENYING LENNAR'S MOTION TO COMPEL ARBITRATION AS TO SOUTH CAROLINA EXTERIORS.

While it addressed the lower court's ruling denying the motion to compel arbitration as to South Carolina Exteriors and the other subcontractors on a procedural basis, Lennar failed to make any substantive arguments or provide citations to case law in support of its motion as to South Carolina Exteriors in its appeal brief. "[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority." Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106 n.3, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993) (citing Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989); Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991)).

South Carolina Exteriors agrees with Lennar's procedural concern that the Order did not make specific findings based on the arguments presented between Lennar and South Carolina

Exteriors. In fact, South Carolina Exteriors moved the circuit court to amend the Order to address the arguments and offered proposed findings. (R. 2844). In its Rule 59(e) motion, Lennar also asked the trial court to articulate the basis for its decision as to South Carolina Exteriors and the subcontractors. (R. 2572). These motions were denied in the Form 4 Order. (R. 3).

The filing of the Rule 59(e) motion, although an important first step, is not the only action a party must take in preserving an issue on appeal. See Ion, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (“The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred.”). Although it could be argued Lennar fulfilled its duty to bring its substantive arguments as to South Carolina Exteriors before the circuit court in its Motion to Reconsider by referencing the “the reasons previously articulated in writing and at the hearing on the Motion,” this broad, general statement is not sufficient to preserve the arguments in the appeal. (R. 2572). In order to bring the issue before this Court, Lennar was obligated to put forth each of its substantive arguments why its claims against South Carolina Exteriors are subject to arbitration along with citations to supporting case law. Lennar’s brief contains only some cursory assertions that the subcontractors entered into various contracts which contain arbitration clauses, but it does not specifically set forth any arguments as to South Carolina Exteriors nor does it contain applicable references to supporting authority. In fact, Lennar’s brief even fails to specify which of the several agreements it mentions form the basis for its assertion that its claims against South Carolina Exteriors must be submitted to arbitration. Accordingly, this Court should find that Lennar has waived and abandoned the issue as to whether it can compel South Carolina Exteriors to arbitrate the claims in this matter.

II. IF THE COURT ELECTS TO RULE ON WHETHER AND UNDER WHAT TERMS SOUTH CAROLINA EXTERIORS MUST ARBITRATE, THE COURT

SHOULD FIND THAT LENNAR MAY COMPEL SOUTH CAROLINA EXTERIORS TO ARBITRATE THIS ACTION ONLY: (A) IF LENNAR AND PLAINTIFFS MUST ALSO ARBITRATE AND (B) PURSUANT TO THE FEDERAL ARBITRATION ACT.

If the Court finds that Lennar has not abandoned the issue, the Court should find that the circuit court properly denied Lennar's motion to compel South Carolina Exteriors to arbitrate the claims when it denied Lennar's motion as to Plaintiffs. "Arbitration agreements are required to meet the basic tenets and requirements of contract law." Towlers v. United Health Care Corp., 338 S.C. 29,529 S.E.2d 839 (Ct. App. 1999). Additionally, arbitration is a matter of contract, and a court's evaluation of the enforceability of an arbitration agreement is guided by the principles of contract law. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 439 (2009). Under South Carolina common law, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989). A party cannot be required to submit to arbitration any dispute which he has not agreed to submit. Aiken v. World Fin. Corp. of SC, 373 S.C. 144,644 S.E.2d 705 (2007).

With these guiding principles, the Court must examine the Agreement to determine the limited circumstances under which the parties agreed to submit any dispute between them to arbitration.

A. Lennar may compel South Carolina Exteriors to arbitrate only if Plaintiffs are required to arbitrate their claims against Lennar.

The 2010 Agreement is the only arbitration provision governing South Carolina Exteriors' Project work, unambiguously provides that Lennar may only compel South Carolina Exteriors to arbitrate if Lennar and Plaintiffs must arbitrate. Specifically, the arbitration provision provides as follows:

NOTWITHSTANDING THE FOREGOING, IN THE EVENT A CLAIM OR CONTROVERSY ARISES BETWEEN CONTRACTOR AND ANY THIRD PARTY REGARDING MATERIALS SUPPLIED AND/OR WORK PERFORMED BY OR THROUGH SUBCONTRACTOR, AND SUCH CLAIM OR CONTROVERSY IS SUBJECT TO BINDING ARBITRATION BETWEEN CONTRACTOR AND THE THIRD PARTY, SUBCONTRACTOR AGREES TO PARTICIPATE AS A PARTY IN ANY MEDIATION OR ARBITRATION, AND TO BE BOUND BY ANY ARBITRATION PROCEEDINGS OR ARBITRATION RULING IN SUCH ARBITRATION.

(R. 1497). As applied to the circumstances in this case, the foregoing provision unambiguously demonstrates South Carolina Exteriors and Lennar agreed to resolve their disputes in the same forum in which the disputes between Lennar and “any third party” are resolved. Thus, if Lennar is unable to enforce its arbitration provisions against Plaintiffs, it cannot independently compel South Carolina Exteriors to submit to arbitration because the arbitration provision in the applicable contract is derivative and, therefore, does not provide for arbitration without there being a third party claim being adjudicated in the same action. Thus, as it relates to South Carolina Exteriors, Lennar’s Motion to Compel fails unless it successfully compels Plaintiffs to arbitrate.

B. Lennar may only compel South Carolina Exteriors to arbitrate pursuant to the Federal Arbitration Act, because the arbitration provision of the 2010 Agreement does not meet the requirements of the South Carolina Arbitration Act.

Under the South Carolina Uniform Arbitration Act (“SCUAA”), notice that a contract is subject to arbitration “shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.” S.C. Code Ann. § 15-48-10(a). These requirements are enforced strictly and literally. See Soil Remediation Co. v. Nu-Way Envntl., 323 S.C. 454, 456-58, 476 S.E.2d 149, 150-51 (1996) (finding arbitration provision which was not underlined did not meet the requirements of S.C. Code Ann. § 15-48-10(a)).

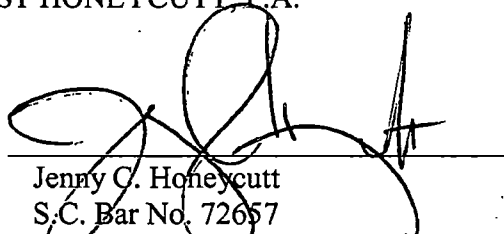
The 2010 Agreement entered into by Lennar and South Carolina Exteriors does not include arbitration provisions on the first page of the agreement as required by § 15-38-10(a). (R. 1490). Accordingly, the agreement does not contain an arbitration provision enforceable under the SCUAA. Thus, in the event Lennar and Plaintiffs must arbitrate, Lennar may compel South Carolina Exteriors to arbitrate only pursuant to the FAA.

CONCLUSION

For the foregoing reasons, South Carolina Exteriors respectfully submits that the Court should affirm the ruling of the trial court denying Lennar's motion to compel South Carolina Exteriors to submit this matter to arbitration.

Respectfully submitted,

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***Attorneys Respondent for South Carolina
Exteriors, LLC***

September 5, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM BERKELEY COUNTY
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J.C. Nicholson, Jr., Circuit Court Judge

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Patricia Damico, and Lenna Lucas, Individually and on behalf of others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins

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v.

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Of which Lennar Carolinas, LLC is

Appellant,

and

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

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Lennar Carolinas, LLC,

Appellant,

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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 Red-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,

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SC Court of Appeals

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Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A Concrete, Inc., Knights Concrete Products, Inc., Knights 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, are

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South Carolina Exteriors, LLC, Fourth-Party Plaintiff,

Respondent,

v.

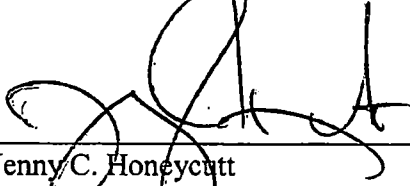
Juan Garza Ramos d/b/a Juan Constructors, Fourth Party Defendants.

**RESPONDENT SOUTH CAROLINA EXTERIORS, LLC'S
CERTIFICATION OF FINAL BRIEF**

I, Jenny C. Honeycutt, do hereby certify that the Final Brief of Respondent South Carolina Exteriors, LLC complies with Rule 211(b) SCACR. Additionally, the undersigned hereby certifies that the Final Brief complies with the Supreme Court Order of April 15, 2014.

Respectfully Submitted,

BEST HONEYCUTT, P.A.

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September 5, 2017
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THE STATE OF SOUTH CAROLINA

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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 IUI, 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 Construct, 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, are also Respondents.

And

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

**RESPONDENT SPRING GROVE PLANTATION DEVELOPMENT, INC.'S FINAL
BRIEF**

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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. Spring Grove Plantation Development Inc. ("Spring Grove Development") was the original owner of the land on which the homes are currently located. Spring Grove Development sold the land which now is known as The Abbey to Lennar Carolinas, LLC ("Lennar"). Specifically, by deeds dated May 20, 2011 and September 26, 2012, Spring Grove conveyed numerous lots to Lennar. (R. pp. 2388-2433). Thereafter, on December 12, 2014, the plaintiffs/owners of the homes initiated a lawsuit against Lennar, Spring Grove Development and others. (R. p. 24). On February 17, 2015, Lennar filed its Answer, Cross-Claims, and Third-Party Complaint. (R. p. 42). Then, on June 1, 2015, Lennar filed a Motion to Compel Arbitration. (R. p. 259).

The owners filed an Amended Complaint on November 23, 2015. (R. p. 75). Lennar then amended its Motion to Compel Arbitration on March 30, 2016, wherein it requested the circuit court to compel the owners, Spring Grove Development, and the subcontractors to arbitration. (R. p. 262).

Spring Grove Development filed a Memorandum in Opposition to the Amended Motion to Compel Arbitration and a hearing on Lennar's Motion to Compel Arbitration was held on April 11, 2016. (R. p. 2587). The court below heard arguments from all interested parties and duly considered the same. (R. p. 203). The circuit court then issued an order denying Lennar's Motion to Compel on September 19, 2016. (R. p. 4).

Lennar filed a motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 3, 2016. (R. p. 2553). Spring Grove Development also filed

a Rule 59(e) motion asking the court to address the Lennar's motion as it related to the alleged arbitration agreement between Lennar and Spring Grove Development. (R. p. 2594).

ARGUMENT

I. SPRING GROVE DEVELOPMENT AND LENNAR DID NOT ENTER INTO AN ARBITRATION AGREEMENT AND THEREFORE, THE CIRCUIT COURT DID NOT ERR IN FAILING TO PERFORM ANY ANALYSIS OF AN ALLEGED ARBITRATION AGREEMENT BETWEEN LENNAR AND SPRING GROVE DEVELOPMENT

Unless the parties provide otherwise, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118-19 (2001). Although it is well known that the policy of this State is to favor arbitration of disputes, arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.*; *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718, 720 (2007). Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement. *Id.*

The Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Spring Grove Plantation Community ("Covenants") was signed only by Spring Grove Development on April 10, 2007. (R. pp. 2315-2366). This is the only document that purports to have an arbitration provision between Lennar and Spring Grove Development.

However, the Covenants are not a contract or an agreement between Lennar and Spring Grove Development. Lennar admits that Lennar entered into an agreement for the Purchase and Sale of subdivision lots with Spring Grove Development on October 22, 2010, three years after the Covenants were signed by Spring Grove Development. (R. p. 231). South Carolina courts

have held that broadly-worded arbitration clauses or agreements apply to disputes only in which a “significant relationship” exists between the claims and the contract. *Zabinski*, at 598, 119. The Covenants do not include in “the range of issues that can be arbitrated” the alleged construction deficiencies in this matter. Furthermore, Lennar’s argument to compel arbitration shall be restricted by the terms of the agreement.

To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. *Hinson v. Jusco Co.*, 868 F.Supp. 145 (D.S.C. 1994).

In order to compel arbitration pursuant to the Federal Arbitration Act, a party must establish all of four threshold factors: 1) the existence of a dispute between the parties, 2) a written agreement that includes an arbitration provision which purports to cover the dispute, 3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and 4) the failure, neglect or refusal of the defendants to arbitrate the dispute. *American General Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) and *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. LEXIS 103638 (D.S.C. 9/13/2011).¹

Spring Grove Development did not exercise any control or authority over Lennar during construction of Plaintiffs’ homes. Lennar designed, developed, constructed and sold the homes in The Abbey. Any reference by Lennar to other documents which may or may not contain an arbitration clause is inapplicable to Spring Grove Development. Rather, Lennar attempts to “sweep” Spring Grove into arbitration with other defendants on the basis of the arbitration clause

¹ Although South Carolina law is referenced in the Covenants, Lennar has moved to compel under both state and federal law. Under both laws, the provision in the Covenants does not amount to an agreement between Lennar and Spring Grove Development to compel arbitration.

contained in the Covenants. However, under both South Carolina and federal law, this arbitration language does not encompass the underlying dispute in this matter.

The Covenants are strictly an agreement between the developer and the homeowners. The Covenants set forth design criteria, maintenance of common lands, and creates a homeowners' association. However, an ordinary homeowner would not have contemplated defects related to the construction of their home. The Covenants cannot be extended to cover construction deficiencies alleged by homeowners.

II. IF THE CIRCUIT COURT ERRED IN FINDING SOME CLAIMS ARE ENTITLED TO BE DECIDED BY A JURY, IT STILL MUST FIND THERE IS NO BINDING ARBITRATION AGREEMENT BETWEEN LENNAR AND SPRING GROVE DEVELOPMENT

Lennar seeks to compel arbitration against all Plaintiffs, Defendants, and Third-Party Defendants. However, a party cannot be compelled to arbitrate a dispute it has not agreed to arbitrate. If the court finds some claims may be subject to arbitration, this Court has the power to stay the Lennar/Spring Grove Development claims until those issues against other parties subject to arbitration, if any, are decided. Section 15-48-20 of the South Carolina Code provides:

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is *no agreement to arbitrate*. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration...

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is *severable*, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

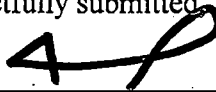
S.C. Code Ann. 15-48-20 (emphasis added) (comparing to §15-48-60: Joinder of parties to arbitration). Consolidation under §15-48-60 is appropriate only among parties who have agreed

to arbitrate. *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631 (1977) (affirming consolidated arbitration except for party who did not sign arbitration agreement). Because Spring Grove Development did not agree to arbitrate the claims alleged in this matter, it cannot be forced into joining other parties in arbitration, if any. To compel Spring Grove Development to arbitrate when Plaintiffs will likely bring direct claims against Spring Grove Development will subject Spring Grove Development to inconsistent findings of fact, liability and judgments.

CONCLUSION

In addition to the grounds set forth herein, Spring Grove Development incorporates by reference those arguments set forth by other Defendants/Third Party Defendants/Fourth Party Defendants, in which Spring Grove Development joins. For the reasons stated above, this Court should affirm the circuit court. However, if the Court finds Lennar is entitled to arbitration as it pertains to the claims asserted by the owners, this matter should be remanded to the trial court for determination of Spring Grove Development's obligation to arbitrate under the Covenants or any other claimed agreement to arbitrate between Spring Grove Development and Lennar.

Respectfully submitted,



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September 1, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

RECEIVED

SEP 01 2017

SC Court of Appeals

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins,
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 IUI, 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 Construct, 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, are also Respondents.

And

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

**RESPONDENT SPRING GROVE DEVELOPMENT PLANTATION, INC.'S
CERTIFICATION OF FINAL BRIEF**

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I, J. Adam Ribock, do hereby certify that the Final Brief of Respondent Spring Grove Development Plantation, Inc. complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby certifies that the Final Brief complies with the Supreme Court Order of April 15, 2014.

Respectfully submitted,



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September 1, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

RECEIVED

SEP 05 2017

SC Court of Appeals

Appellate Case No. 2016-2339

Case No. 2014-CP-08-2424

Patricia Damico, and Lenna Lucas, individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins Respondent.

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, Inc. and Rick Bryant,

Of which Lennar Carolinas, LLC is.....Appellant.

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, Inc. are.....Respondents.

Lennar Carolinas, LLC.....Appellant.

v.

The Earthworkers 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,

Of which A.C. & A. Concrete, Inc., Alpha Omega Construction Group, Inc., Builders FirstSource-Southeast Group, LLC, Coastal Concrete of Southeast, LLC, Coastal Concrete of Southeast II, LLC, Construction Applicators of Charleston, LLC, Décor Corporation, DVS, Inc., Guaranteed Framing, LLC, Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., LA New Enterprises,

LLC, Land/Site Services, Inc., Myers Landscaping, Inc., Ozzy Construction, LLC, Raul Martinez Masonry, LLC, South Carolina Exteriors, LLC, and Volkmar Consulting Services, LLC are Respondents.

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August 30, 2017
Charleston, South Carolina

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STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE CIRCUIT COURT PROPERLY DENIED APPELLANT’S REQUEST TO COMPEL THE SUBCONTRACTORS TO ARBITRATE

STATEMENT OF THE CASE

This appeal arises from the circuit court’s order filed September 21, 2016 that denied Appellant Lennar Carolinas, LLC’s (“Appellant”) Motion to Compel Arbitration and the circuit court’s October 26, 2016 order that denied multiple parties’ Motion to Alter or Amend.

On December 12, 2014, Patricia Damico, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglas, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins (collectively the “Owners”) filed the Complaint, both individually and derivatively as the Spring Grove Plantation Development Homeowners Association, alleging defective construction of their single family homes located in The Abbey at Spring Grove Plantation, Berkeley County, South Carolina (the “Abbey”). On February 17, 2015, Appellant filed its Answer, Cross-Claims and Third-Party Complaint. Appellant directed its third-party claims against its alleged subcontractors, including claims against Respondent Super Concrete of SC, Inc. (“Super Concrete”).

On April 10, 2015, Super Concrete answered Appellant’s Third-Party Complaint. On April 14, 2015, Appellant amended its Answer, Cross-Claims and Third-Party Complaint. Super Concrete answered this amended pleading on May 5, 2015.

On June 1, 2015, Appellant filed a Motion to Compel Arbitration. On November 23, 2015, the Owners filed a First Amended Complaint, therein substituting their derivative claims for claims of a putative class and including direct claims against Super Concrete. On November 25, 2015, Appellant answered the First Amended Complaint, including therein reassertions of its cross-

claims and third-party claims. On December 11, 2015, Super Concrete answered the First Amended Complaint and on December 14, 2015 answered Appellant's cross-claims and third-party claims.

Appellant amended its Motion to Compel Arbitration on March 30, 2016. Super Concrete served a memorandum in opposition on April 7, 2016. The circuit court heard arguments on April 11, 2016 and denied the motion by order filed September 21, 2016. On October 3, 2016, Appellant moved pursuant to Rule 59(e), SCRCP to alter or amend the circuit court's order. Multiple other parties also moved to alter or amend the circuit court's order. The circuit court denied all motions to alter or amend by Form 4 order filed October 26, 2016. Appellant served its Notice of Appeal on November 16, 2016 and Amended Notice of Appeal on November 18, 2016.

STATEMENT OF FACTS

Appellant based its demand that Super Concrete arbitrate this matter on the nonbinding May 8, 2007 Contractor Base Agreement that Appellant never signed and on the June 10, 2008 Subcontract Agreement and the Supplier Base Agreement between Super Concrete and Appellant's Myrtle Beach division. (R. p. 260, Exhibit 22 to Lennar's Motion; p. 289-290; p. 1542-1563) These agreements pertained to certain projects in Horry County. Approximately three years later, in May 2011, Appellant purchased from Spring Grove Plantation Development the residential lots in Berkeley County that would become the Abbey.¹ Appellant constructed residences, including the Owners' residences, on these lots between 2011 and 2013. (R. p. 2832; p. 2243-2432) Appellant alleges that Super Concrete provided grading, foundation slabs and footings, flatwork and formwork for the construction of the Owners' residences. (R. p. 66, ¶163; p. 134, ¶169)

¹ See, Title to Real Estate, recorded in the Berkeley County RMC Office on May 20, 2011 in Book 8943, Page 1.

STANDARD OF REVIEW

“Arbitration determinations are subject to *de novo* review.” Smith v. D.R. Horton, Inc., 417 S.C. 42, 47, 790 S.E.2d 1 (2016), citing, Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012). “However, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings.” Id.

Arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate. Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718, 720 (2007), citing, Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Whether an enforceable or valid arbitration agreement exists between the parties is a question of state contract law. *See*, First Options of Chicago, Inc. V. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920 (1995). The constraint on courts to resolve disputes in favor of arbitration is not an absolute truism intended to replace careful judicial analysis. Chassereau, 644 S.E.2d at 721. The judicial inquiry is not focused solely on an examination of contractual formation defects such as lack of mutual assent and want of consideration but also on such grounds as exist at law or in equity for the revocation of any contract. Hooters of America, Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DENIED APPELLANT’S REQUEST TO COMPEL SUPER CONCRETE TO ARBITRATE

Appellant contends that the circuit court failed to perform any analysis of Appellant’s individual contracts with its subcontractors. Appellant’s motion, supporting memorandum, and statements to the circuit court set forth its arguments as to the subcontractors. The circuit court considered Appellant’s arguments, found them wanting, found the arguments of Super Concrete

compelling, and denied Appellant's motion accordingly. On appeal, Appellant does not address the circuit court's adoption of the arguments set forth by Super Concrete.

Appellant alleged to the circuit court that the Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement pass the requirements of both the South Carolina Arbitration Act (S.C. Code Section 15-48-10, et. seq.) and the Federal Arbitration Act (9 U.S.C. Section 1, et. seq.). In fact, with respect to the Abbey, the agreements cannot satisfy the requirements of either statute.

A. The Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement Fail the Notice Requirements of the South Carolina Arbitration Act

The South Carolina Arbitration Act, Section 15-48-10(a) provides:

Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

Courts strictly construe the notice requirement of S.C. Code Section 15-48-10(a). Zabinski, 346 S.C. at 588. The terms of this section are clear and must be applied according to their literal meaning. Id. at 588-589, citing, Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). No variation is acceptable. Id. at 599.

Even had the circuit court applied the Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement to the Abbey, which Super Concrete denies, the first page of these agreements are silent as to arbitration. (R. p. 260, Exhibit 22 to Lennar's Motion; p. 1542 and 1551). As a result, these agreements fail the statutory requirements as set forth in Zabinski to compel Super Concrete to arbitration pursuant to the South Carolina Arbitration Act.

B. The Contractor Base Agreement, the Subcontract Agreement and the Supplier Base Agreement Fail to Comply with the Federal Arbitration Act

The Federal Arbitration Act requires compliance with four threshold factors to compel arbitration. These factors include: “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” American General Life and Accident Insurance Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) and THI of S.C. at Columbia, LLC v. Wiggins, 2011 U.S. Dist. LEXIS 103638 (D.S.C. 9/13/2011), citing, Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 87, 87 (4th Cir. 2005). In deciding the second threshold factor, courts consider whether (1) a valid arbitration agreement exists and (2) whether the dispute falls within the substantive scope of the arbitration agreement. THI, citing, AT&T Tech. v. Commc’ns Workers of Am., 475 U.S. 643, 651 (1986).

- i. *The Contractor Base Agreement fails the second threshold factor, because it is not a valid agreement and, even if it were, this dispute is not within the substantive scope of the agreement.*

The unsigned Contractor Base Agreement failed to identify the entity with whom Super Concrete allegedly contracted. (R. p. 260, Exhibit 22 to Lennar’s Motion) Instead the agreement contained form fields to be completed at a later time by Appellant or one of its affiliated entities not a party to this matter. (Id.) Section 21.15 of the agreement required a signature in order for each party to certify the necessary authority to bind the party to the agreement. (Id.) Without both signatures, no contract and no arbitration clause existed to bind Super Concrete.

Assuming *arguendo* that the Court finds the Contractor Base Agreement constituted a valid contract between Super Concrete and Appellant, the current dispute over the alleged construction defects at the Abbey does not fall within the scope of the arbitration clause. The arbitration clause

only applies to projects governed by the agreement. The entire agreement, including the arbitration clause, did not specifically reference the Abbey or any other construction project. As a mere general contract, the Construction Base Agreement only became binding as to a particular project as follows:

SCOPE OF WORK: [Super Concrete] shall provide labor, materials, equipment and other services in such location(s) and under such terms and conditions as Lennar shall deem necessary (the “Work”) upon receipt of a Purchase Order by Lennar. When issued, the Purchase Order (see Schedule A) shall become a part of this Agreement. The location(s) where the Work is to be performed shall be known as the job site or Project site, and may be more fully described in Exhibit “A” to the Purchase Order. (Id.)

The blank “Schedule A - Purchase Order” referenced above, as attached to the Contractor Base Agreement, did not mention the Abbey or the Owners and its basic terms purported to be a separate contract that specifically identified each project name, scope of work, and payment terms. (Id.) Until Appellant and Super Concrete executed a “Schedule A - Purchase Order” specifically identifying a particular project, the Contractor Base Agreement (and the arbitration clause therein) could not apply to a particular project. Appellant did not issue a “Schedule A – Purchase Order” for the Abbey; therefore, the Contractor Base Agreement and its arbitration clause did not apply to the Abbey.

Additionally, Section 21.11 of the Contractor Base Agreement states:

The venue for any disputes between Lennar and [Super Concrete] shall be as follows: (1) Third Party Actions – if Lennar is involved in litigation or arbitration with a third party and Lennar or any other party joins [Super Concrete] as a party to the litigation or arbitration, [Super Concrete] consents to be joint in the same venue; (2) Other Actions or Disputes – in all other situations, venue shall be in the state or federal court located in the state and county where the Project is located. (Id.)

The circuit court properly denied Appellant's Motion to Compel Arbitration as to the Owners and the proper venue for this matter is the circuit court in Berkeley County.² As a result of Section 21.11, the Contractor Base Agreement requires the Owners' claims and Appellant's claims against Super Concrete to be heard in the same venue. To the extent Appellant alleges claims against Super Concrete independent of the Owners "third-party action," Section 21.11 requires Appellant to litigate those claims in the state court where the project is located (i.e. the circuit court of Berkeley County).

- ii. *The Subcontract Agreement and the Supplier Base Agreement fail the second threshold factor, because they lack an arbitration provision that purports to cover the dispute.*

Super Concrete executed a Subcontract Agreement and a Supplier Base Agreement nearly three years before Appellant owned any real property relating to the Abbey. These 2008 agreements contemplated projects in Horry County, not the Abbey in Berkeley County. Also, the agreements contained no reference to the Abbey and no subsequent agreement specifically incorporates those agreements with respect to the Abbey. As a result, no valid arbitration agreement exists between Appellant and Super Concrete as to the Abbey and the Owners.

In addition, the alleged dispute does not fall within the substantive scope of these agreements. These agreements did not specify the scope of labor and/or materials supplied by Super Concrete. Neither the Owners nor Appellant have produced any documentation or expert report to support their claims of construction deficiencies or the relation of the deficiencies to Super Concrete.

² Super Concrete incorporates the Owners' memorandum of law and oral arguments in opposition to Appellant's Motion to Compel Arbitration and their brief herein.

Section 14 of the Subcontract Agreement and Section 19 of the Supplier Base Agreement limit Super Concrete to arbitrate claims or controversies between Appellant and third-parties subject to binding arbitration. (R. p. 1549 and 1557) The circuit court correctly ruled that an enforceable arbitration agreement does not exist between the Owners and Appellant. (R. p. 4-23) Without such an enforceable arbitration agreement, Appellant cannot trigger Section 14 of the Subcontract Agreement and Section 19 of the Supplier Base Agreement.

iii. *The Subcontract Agreement and the Supplier Base Agreement contain invalid arbitration clauses.*

In South Carolina a valid and enforceable contract exists when there is a meeting of the minds between parties with regard to all essential elements and material terms of the contract. THI of S.C. at Columbia, LLC v. Wiggins, 2011 U.S. Dist. LEXIS 103638 (D.S.C. 9/13/2011), citing, Players v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). “The ‘meeting of the minds’ required to make a contract is not based on secret purpose or intent on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known.” Players, 299 S.C. at 105. The designation of a specific arbitral forum is among the material and essential terms of an arbitration clause. *See generally*, Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009).

Neither the Subcontract Agreement nor the Supplier Base Agreement define the third-party arbitration agreement referenced to therein or the forum for arbitration. The circuit court correctly rejected Appellant’s argument that the arbitration clauses in the covenants, recorded deeds, the Owners’ purchase and sale agreements, and contracts with other subcontractors are all applicable to Super Concrete. (R. p. 4-23) Some of these agreements were entered prior to and some after

Appellant's agreements with Super Concrete. The arbitration clauses within these documents vary in both form, substance, and procedural requirements.

Section 17 of the Subcontract Agreement stated that the entire agreement between Super Concrete and Appellant was contained in that agreement and the "Work Notification Forms," as defined in Section 1.6, for each project. (R. p. 1549) Section 21.4 of the Supplier Agreement stated that the entire agreement between Super Concrete and Appellant was contained within that agreement, the attached "Schedules," and the "Purchase Orders" issued by Appellant. (R. p. 1557) No "Schedules" were attached to the agreement. Section 17 and Section 21.4 did not incorporate the covenants for Spring Grove, the Appellant's contracts with other subcontractors, or the purchase and sale agreements with the Owners.

Appellant's demand for arbitration is based on ambiguous terms in these agreements from other projects and its attempt to improperly incorporate ambiguous and conflicting terms from Appellant's agreements with others. Appellant cannot resolve this ambiguity by rewriting the Subcontract Agreement and the Supplier Base Agreement for its benefit. Appellant failed to convince the circuit court of, and does not present on appeal, evidence to establish the existence of a meeting of the minds in which Super Concrete agreed to arbitrate this dispute involving this Berkeley County project. The circuit court correctly denied Appellant's motion and this Court should deny the appeal.

CONCLUSION

As set forth above, the circuit court properly denied Appellant's Motion to Compel Arbitration against Super Concrete, because the alleged agreements fail to comply with either federal or state statutory requirements. Super Concrete respectfully requests the Court uphold the circuit court's order and remand this matter to the circuit court for discovery and trial.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

RECEIVED

SEP 05 2017

SC Court of Appeals

Patricia Damico, and Lenna Lucas, individually and on behalf of all others similarly situated,
Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony
and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia
Camara, and Matthew Collins Respondent.

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, Inc. and Rick Bryant,

Of which Lennar Carolinas, LLC is.....Appellant.

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, Inc.
are.....Respondents.

Lennar Carolinas, LLC.....Appellant.

v.

The Earthworkers 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,

Of which A.C. & A. Concrete, Inc., Alpha Omega Construction Group, Inc., Builders FirstSource-
Southeast Group, LLC, Coastal Concrete of Southeast, LLC, Coastal Concrete of Southeast II,
LLC, Construction Applicators of Charleston, LLC, Décor Corporation, DVS, Inc., Guaranteed
Framing, LLC, Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., LA New Enterprises,

LLC, Land/Site Services, Inc., Myers Landscaping, Inc., Ozzy Construction, LLC, Raul Martinez
Masonry, LLC, South Carolina Exteriors, LLC, and Volkmar Consulting Services, LLC are
.....Respondents.

**RESPONDENT SUPER CONCRETE OF SOUTH CAROLINA, INC.'S
CERTIFICATION OF FINAL BRIEF**

I, Michael E. Wright, do hereby certify that the Final Brief of Respondent Super Concrete
of South Carolina, Inc. complies with Rule 211(b), *SCACR*. Additionally, the undersigned hereby
certifies that the Final Brief complies with the Supreme Court Order of April 15, 2014.

Respectfully submitted,

ROBERTSON HOLLINGSWORTH MANOS & RAHN, LLC

By: 

Michael E. Wright
550 King Street, Suite 300
Charleston, South Carolina
Phone: 843-723-6470

Attorney for Respondent Super Concrete of South Carolina, Inc.

Charleston, South Carolina
September 1, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2016-002339

Appeal From Berkeley County

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

Opinion No. 5730

Heard February 19, 2020 – Filed June 10, 2020

REVERSED AND REMANDED

James Lynn Werner and Katon Edwards Dawson, Jr., both of Parker Poe Adams & Bernstein, LLP, of Columbia, and Jenna Brooke Kiziah McGee, of Parker Poe Adams & Bernstein, LLP, of Charleston, all for Appellant.

Thomas Frank Dougall, William Ansel Collins, Jr., and Michal Kalwajtys, all of Dougall & Collins, of Elgin, for Respondent Ozzy Construction, LLC.

Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC.

Steven L. Smith, Zachary James Closser, and Samuel Melvil Wheeler, all of Smith Closser, PA, of Charleston; and Rogers Edward Harrell, III, of Murphy & Grantland, PA, of Columbia, all for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Ronald G. Tate, Jr., and Robert Batten Farrar, both of Gallivan, White & Boyd, PA, of Greenville, for Respondent Volkmar Consulting Services, LLC.

Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.

David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson & Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.

John Calvin Hayes, IV, of Hayes Law Firm, LLC, Jesse Sanchez, of The Law Office of Jesse Sanchez, both of Charleston; Michael J. Jordan, of The Steinberg Law Firm, LLP, of Goose Creek; and Catherine Dunn Meehan, of The Steinberg Law Firm, LLP, of Charleston, all for Respondents Patricia Damico, Joshua Buetow, Brettany Buetow, Bryan Camara, Cynthia Camara, Matthew Collins, Ellen Davis Morrow, Jonathan Douglass, Theresa Douglass, Czara England, Chad England, Lenna Lucas, and Danny Morrow.

Brent Morris Boyd, Timothy J. Newton, and Rogers Edward Harrell, III, all of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC, and Coastal Concrete Southeast II, LLC.

David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC.

Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, P.A., of Beaufort, for Respondents LA New Enterprises, LLC, and Raul Martinez Masonry, LLC.

Christine Companion Varnado, of Seibels Law Firm, PA, of Charleston; and Alan Ross Belcher, Jr., and Derek Michael Newberry, both of Hall Booth Smith, PC, of Mt. Pleasant, all for Respondent Guaranteed Framing, LLC.

Stephen Lynwood Brown and Catherine Holland Chase, both of Young Clement Rivers, of Charleston; and Preston Bruce Dawkins, Jr., of Aiken Bridges Elliott Tyler & Saleeby, P.A., of Florence, all for Respondent Alpha Omega Construction Group, Inc.

David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, and Everett Augustus Kendall, II, and Brian Lincoln Craven, both of Murphy & Grantland, PA, of Columbia, all for Respondent Construction Applicators Charleston, LLC.

Shanna Milcetch Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.& A. Concrete, Inc.

Robert Trippett Boineau, III, Heath McAlvin Stewart, III, and John Adam Ribock, all of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc.

Bachman S. Smith, IV, of Haynsworth Sinkler Boyd, PA, of Charleston, for Respondent Southern Green, Inc.

John Elliott Rogers, II, of The Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA, of Columbia, and Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Mt. Pleasant for Respondent Decor Corporation.

Jenny Costa Honeycutt, of Best Honeycutt, P.A., of Charleston, for Respondent South Carolina Exteriors, LLC.

Michael Edward Wright, of Robertson Hollingsworth Manos & Rahn, LLC, and Michael Wade Allen, Jr., and R. Patrick Flynn, both of Pope Flynn, LLC, all of Charleston, all for Respondent Super Concrete of SC.

Francis Heyward Grimball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mt. Pleasant, for Respondent Manale Landscaping, LLC.

Kathy Aboe Carlsten, of Copeland, Stair, Kingma & Lovell, LLP, and Keith Emge, Jr., of Resnick & Louis, P.C., both of Charleston, for Respondent Civil Site Environmental, Inc.

HILL, J.: Certain homeowners in a Berkeley County development sued the general contractor Lennar Carolinas, LLC (Lennar), the developer, and various subcontractors, alleging defective construction. Lennar impleaded other subcontractors as third party defendants and moved to compel arbitration of the entire dispute. The circuit court denied the motion, finding the arbitration agreement included not just the arbitration section of the parties' sales contract but also sections from a separate warranty agreement (as well as parts of the deeds and covenants), and that the arbitration agreement was unconscionable. The circuit court further found the South Carolina Uniform Arbitration Act (SCUAA) applied, not the Federal Arbitration Act (FAA), and there had not been compliance with the SCUAA's conspicuous notice requirements. Lennar now appeals. We conclude the FAA, rather than the SCUAA, applies, and the circuit court erred in not considering the arbitration section as an independent arbitration agreement. We further hold the arbitration section constituted a valid agreement to arbitrate, which the FAA requires us to enforce.

I.

All of the Respondent homeowners, except Lenna Lucas, purchased new homes to be constructed in the development. As part of the transaction, they signed a ten page Purchase and Sales Agreement (PA) containing an arbitration section. Lucas is the second owner of a home, but in her amended complaint, she alleges a breach of contract cause of action based upon the PA. Section 16 of the PA is entitled "Mediation/Arbitration," and begins as follows:

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. . . .

Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability de novo but will not reverse a circuit court's factual findings reasonably supported by the evidence. *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016).

A. Whether the FAA Applies

We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA provides the parties "specifically agree that this transaction involves interstate commerce." We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce). Second, the transaction involved commerce in fact. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Id.* at 538, 542 S.E.2d at 363. In deciding whether a transaction involves "commerce in fact" sufficient to trigger the FAA, we examine the agreement, the complaint, and the surrounding facts. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999). The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Commerce Clause grants Congress the power to regulate (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce or persons or things in interstate commerce, and (3) activities having a substantial relation to interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

In general, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), but here the transaction also involved the construction of residential homes. As *Bradley* acknowledged, "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; see also *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). The affidavit of Lennar's Controller states the construction involved interstate commerce, specifically the use of out-of-state contractors and materials and equipment manufactured outside South Carolina. See *Cape Romain Contractors*, 405 S.C. at 123, 747 S.E.2d at 465 (holding FAA applied where out of state materials used in dock construction were "instrumentalities of interstate commerce" and parties' contract specifically invoked FAA). We hold the transaction here involved interstate commerce, and the FAA therefore applies.

B. Whether the Arbitration Agreement is valid and enforceable

We next consider whether there was a valid arbitration agreement. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."). Because an arbitration provision is often one of many provisions in a contract, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (arbitrator rather than court must decide claim that underlying contract in which arbitration provision was contained was fraudulently induced, but if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement and § 4 of the FAA requires the court to "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue'"). Building from *Prima Paint*, the United States Supreme Court has developed a body of federal substantive law interpreting the FAA that applies in State and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Two of these substantive laws are central to our decision here, and they reaffirm *Prima Paint*:

First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (citation omitted); see *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.").

In deciding whether the parties have a valid agreement to arbitrate we must therefore isolate the arbitration clause from the rest of the contract. If the arbitration agreement is valid, any issues as to the validity of other parts of the contract go to the arbitrator, not the court. Accordingly, a party cannot duck arbitration unless it makes a specific, pinpoint (and successful) challenge to the validity of the arbitration provision itself; attacking the validity of the contract as a

whole is not enough. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) ("We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause."). We admit this is an artificial, abstract way to view the issue, but the lens has been fixed by federal substantive law and we are not free to adjust it.

The circuit court acknowledged this lens but sought to widen the scope, bringing the multiple arbitration and warranty provisions in other documents into the frame. It then found the provisions so comingled as to be inseparable and declared all of the comingled provisions to be "the" arbitration agreement. This was not in keeping with *Prima Paint*. Nor was it, as the circuit court stated, consistent with *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48–49, 790 S.E.2d 1, 4 (2016), where a 3–2 majority held an arbitration clause found in one subsection of a contract paragraph was so "intertwined" with other subsections of the same paragraph that the entire paragraph constituted the arbitration provision for purposes of the *Prima Paint* analysis. Unlike the contract in *D.R. Horton*, the arbitration agreement here was contained in a distinct, separate section of the PA. The circuit court's finding that the arbitration provision encompassed more than this section lacks adequate factual support. We therefore conclude the circuit court erred by considering the contract as a whole rather than, as *Prima Paint* demands, focusing only on the discrete arbitration provision. *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) (reversing circuit court's denial of motion to compel arbitration where circuit court violated *Prima Paint* by considering separate warranty provision as part of arbitration agreement). Because the parties' arbitration provision is valid, § 2 of the FAA requires that we enforce it.

That ends our inquiry into Lennar's motion to compel the homeowners to arbitrate. There is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed and the Covenants. The PA's arbitration provision states, "All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)." Whether the disputes alleged in this lawsuit are covered by the PA's arbitration provision is therefore a question the parties clearly and unmistakably delegated to the arbitrator. *Schein*, 139 S. Ct. at 530 ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an

arbitrator."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding delegation of questions of arbitrability to arbitrator must be "clear and unmistakable").

Accordingly, we reverse the order of the circuit court denying the motion to compel arbitration. We express no view as to the validity or enforceability of other sections of the PA or any other documents at issue as those questions are for the arbitrator. 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.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

RECEIVED

Jun 25 2020

SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY
BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS,
JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND,
LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S
PETITION FOR REHEARING

Respondents, above-named, hereby petition this Honorable Court for a rehearing pursuant to Rule 221(a), SCACR, in connection with its decision entered herein on June 10, 2020 reversing the Circuit Court's finding that the arbitration provisions contained in the subject Purchase and Sale Agreement, Limited Warranty, Covenants, and Deeds must be read as a whole to comprise the "Arbitration Agreement" due to the "cross-references to one another" and "intertwining paragraphs". (R. p. 8). Respondents respectfully submit that the following points

have been overlooked or misapprehended by the Court:

STANDARD OF REVIEW

On appeal from the Circuit Court, this Court reviews arbitrability determinations *de novo*. Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However, a Circuit Court’s factual findings will not be reversed on appeal if **any** evidence reasonably supports the findings. [Emphasis added] *Id.* at 453, 730 S.E.2d at 315. See also, Smith v. D.R. Horton, Inc., 417 S.C. 42, 47 790 S.E.2d 1, 3 (2016).

In the present case, evidence considered by the Circuit Court reasonably supports its finding that the arbitration provisions set forth in the Purchase and Sale Agreement, Limited Warranty, Covenants, and Deed “must be read as whole to comprise the arbitration ‘agreement’ due to the ‘cross-references to one another’ and ‘intertwining paragraphs’”. (R. p. 8). In rendering its decision, however, this Court has failed to consider all the evidence examined by the Circuit Court, instead, finding “there is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed, and the Covenants.” This limited analysis falls short of the standard of review set forth in Bradley and comparable cases. Respondents respectfully submit that a review of the evidence relied upon by the Circuit Court will reasonably support its finding that the arbitration provisions should be read together to constitute the entire Arbitration Agreement.

I. Cross-Referenced and Intertwining Paragraphs Constitute the Entire Arbitration Agreement.

In Smith v. D.R. Horton, Inc., the South Carolina Supreme Court held that, in applying the *Prima Paint* doctrine, separate subparagraphs must be read together to constitute the entire arbitration provision due to “numerous cross-references to one-another, intertwining the subparagraphs so as to constitute a single provision.” 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016).

Similarly, in the present case, the evidence reasonably supports that the arbitration paragraphs contained in the Purchase and Sale Agreement, Limited Warranty, Covenants, and Deeds must be read together to constitute a single provision due to the cross-references to each other. For example, the arbitration provision contained in the Deeds—which includes unsegregated arbitration language and warranty disclaimers—expressly incorporates by reference all the terms of the Purchase and Sale Agreement and cross-references the Lennar Warranty. (R. Vol. 5, p. 2252, and p. 2264):

ALL DISPUTES IN CONNECTION WITH THIS DEED, THE UNDERLYING PURCHASE AGREEMENT AND DISPUTES CONCERNING THE SALE AND CONSTRUCTION OF THE HOME ARE **SUBJECT TO FINAL AND BINDING ARBITRATION.**

ALL OF THE TERMS AND CONDITIONS OF THE PURCHASE AGREEMENT FOR THE SALE AND PURCHASE OF THE HOUSE AND LOT ARE HEREBY INCORPORATED BY REFERENCE AS IF SET FORTH IN FULL AND SHALL NOT BE MERGED WITH THIS DEED AND REMAIN VALID AND SHALL SURVIVE THE CLOSING AND THE EXECUTION AND FILING OF THE DEED. ALSO THE PURCHASER HEREBY ACKNOWLEDGES AND ACCEPTS THAT THE LIMITED WARRANTIES PROVIDED IN THE BUILDER'S WRITTEN WARRANTY DOCUMENTS PROVIDE IT WITH ITS SOLE REMEDY AT LAW OR IN EQUITY IN LIEU OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION AND THE IMPLIED WARRANTY OF HABITABILITY. PURCHASER HEREBY AGREES TO WAIVE SUCH OTHER WARRANTIES AS THEY ARE FULLY AND COMPLETELY DISCHARGED HEREIN. [Emphasis Added in Bold]

As noted above, the arbitration provision and warranty disclaimers contained in the Deeds are (1) unsegregated by distinct headings, (2) expressly incorporate by reference all the terms and conditions of the Purchase and Sale Agreement, (3) make express reference to builder's written

warranty documents (i.e. Lennar's Warranty), noting that said documents provide homeowners with their "sole remedy at law or in equity", (4) and expressly disclaim the Implied Warranty of Workmanlike Construction and the Implied Warranty of Habitability. In other words, the arbitration language contained in the Deeds—with its cross-references to other documents—reasonably supports the Circuit Court's finding that the arbitration provisions "must be read as a whole" so as to constitute a single provision. (R. p. 8), citing Smith v. D.R. Horton, Inc., 417 S.C. at 48, 790 S.E.2d at 4.

In addition, Paragraph 16.1 of the Purchase and Sale Agreement, titled "Mediation/Arbitration of Disputes" defines disputes to include "contract, *warranty*, tort, or otherwise" and, again, makes reference to claims arising out of "warranties." (R. Vol. 1, p. 300). The paragraph is also a nearly verbatim regurgitation of the same-titled section located in Lennar's Limited Warranty. (R. Vol. 6, p. 2525). Accordingly, based on each of the foregoing, there was evidence to reasonably support the Circuit Court's finding that the arbitration provisions must be read as a whole. Respondent Homeowners, therefore, respectfully request that this Court grant a rehearing and affirm the lower court's finding that the arbitration provisions, "must be read as a whole" so as to constitute a single provision.

It is also worth noting that Lennar—a sophisticated developer of residential homes throughout the country—drafted the problematic language, which incorporates by reference other documents in their entirety, expressly disclaims warranties, and sets limitations on liability. Ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981). "After all, the drafting party has the greater opportunity to prevent mistakes in meaning. It is responsible for any ambiguity and should be the one to suffer from its

shortcomings.” Bazzle v. Green Tree Financial Corp., 351 S.C. 244, 262, 569 S.E.2d 349, 358 (2002), vacated on other grounds, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003). As the architect if its own problem, Lennar should not be permitted avoid review of all the evidence considered by the Circuit Court and cherry-pick which one of its documents this Court reviews.

II. The Arbitration Agreement is Unconscionable, and thus Unenforceable.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007).

A. Lack of Meaningful Choice

In the present case, Respondent Homeowners lacked meaningful choice. Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. Gladden v. Boykin , 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting Simpson , 373 S.C. at 25, 644 S.E.2d at 669). Thus, parties frequently allege they lacked a meaningful choice when the dispute involves an adhesion contract. See Munoz v. Green Tree Fin. Corp. , 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (defining adhesion contracts as “standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable”). While adhesion contracts are not unconscionable per se, courts tend to look upon them with “considerable skepticism” because they give rise to “considerable doubt that any true agreement ever existed to submit disputes to arbitration.” Id. at 26–27, 644 S.E.2d at 669–70 (quotation marks omitted). In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, inter alia, the relative disparity in the parties’ bargaining power,

the parties' relative sophistication, whether the parties were represented by independent counsel, and whether " 'the plaintiff is a substantial business concern.' " *Id.* (quoting *Simpson* , 373 S.C. at 25, 644 S.E.2d at 669).

In *Smith v. D.R. Horton, Inc.*, the South Carolina Supreme Court took "judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller." 417 S.C. at 50, 790 S.E.2d at 4., quoting *Kennedy v. Columbia Lumber & Mfg. Co.* , 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) ; cf. *Sapp v. Ford Motor Co.* , 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (stating that South Carolina's "courts have shifted from following the doctrine of caveat emptor ('let the buyer beware') to the doctrine of caveat venditor ('let the seller beware')").

The bargaining power held by Respondent Homeowners in the present case is identical to the bargaining power held by the homeowners in *Smith v. D.R. Horton, Inc.* As in that case, (1) there is no indication in the Record that any of the Respondent Homeowners "enjoyed a substantially stronger bargaining position" against Lennar, or (2) that they were each represented by independent counsel in negotiating the agreement. 417 S.C. at 50, 790 S.E.2d at 4-5. Further, like the homeowners in *Smith v. D.R. Horton*, Respondent Homeowners were each "single clients" to a corporation that develops and sells houses throughout South Carolina and other states. Accordingly, in applying the South Carolina Supreme Court's analysis in *Smith v. D.R. Horton* to the present case, this Court should affirm the Circuit Court's finding that **Respondent Homeowners lacked a meaningful choice in their ability to negotiate the arbitration agreement.** *Id.*

B. Oppressive Terms

By reading the cross-referenced terms as a whole, like the South Carolina Supreme Court

did in Smith v. D.R. Horton, Inc., it is clear that they are “so oppressive that no reasonable person would make them and no fair and honest person would accept them.” Id., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Specifically, as noted above, the **unsegregated arbitration language** contained in the Deeds, expressly incorporate by reference **all** the terms and conditions of the Purchase and Sale Agreement, make express reference to builder’s written warranty documents (i.e. Lennar’s Warranty), noting that said documents provide homeowners with their “sole remedy at law or in equity”, and expressly disclaim the Implied Warranty of Workmanlike Construction and the Implied Warranty of Habitability. The language also expressly waives “such other warranties as the are fully and completely discharged herein.” (R. Vol. 5, p. 2252, and p. 2264). Here, as in Smith v. D.R. Horton, Inc., Lennar’s “attempts to disclaim implied warranty claims and prohibit any monetary damages are clearly one-sided and oppressive.” Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (S.C. 2016)

A review of the cross-referenced and incorporated provisions further serves to amplify the extreme nature of the oppressive terms:

1. The “Lennar Warranty” disclaims all “other warranties, express or implied, including but not limited warranty of habitability, are hereby expressly disclaimed and waived”. (R. p. 2529, ¶ 2). In addition, it states “Lennar’s total financial obligations under the Lennar Limited Warranty are limited to the original sales price of your Home”. (R. p. 2529, ¶ 3). Further, the Lennar Warranty states “Consequential Damages Not Covered. Lennar shall not be liable for, and you expressly waive recovery of, any consequential damages..., including but not limited to: any diminution in value...; lost profits; damages to personal property; any personal injury of any kind..., any medical or hospital expenses; costs of food, moving and storage, relocation expenses,

or rental value of the Home or any other costs due to loss of use...” (R. p. 2529, ¶ 4). Both the Sales Contract and the Warranty (discussed below) are standard, nonnegotiable, Lennar form contracts. (R. p. 2438; p. 218, line 16 to line 24; p. 219, line 11 to line 17).

2. Ostensibly, the Lennar Warranty purports to provide relief to aggrieved homeowners. However, a detailed reading of the Warranty shows that its true purpose is to provide temporal limits on Lennar’s responsibility for shoddy construction. After one to two years, the Warranty only provides a remedy for rare, load bearing, structural defects. (R. p. 2529, ¶ 9). All other remedies of any kind for any other defect - no matter how egregious - are excluded. Even the “structural warranty” is a misnomer - the only structural components covered are those that Lennar deems are structured components. (R. p. 2523) Stated differently, the Lennar Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, termite-infested homes at The Abbey.

3. If there was any uncertainty left as to the lack of remedy of any kind available to the homeowners under the terms of the Arbitration Agreement, one only has to go to pages 6 through 9 of the cross-referenced Warranty, which prohibits any coverage or remedy for:

1. Damage to land, landscaping (including sodding, seeding, shrubs, trees, and planting), sprinkler systems, outbuildings, carports, or any other appurtenant structure or attachment to the dwelling, or other additions or improvement not a part of your Home;
2. Loss of use of all or a portion of your Home;
3. Any loss or damage that is caused or made worse by any of the following causes: microorganisms, fungus, decay, wet rot, dry rot, soft rot, rotting of any kind, and mold;
4. Any and all exclusions set forth in the Workmanship Systems and Structural Standards;
5. Except as prohibited by law of the state in which the Home is located, all other warranties express or implied, including but not limited to any implied warrant of habitability, are hereby expressly disclaimed and waived;
6. Lennar shall not be liable for, and you expressly waive recovery of any consequential damages that may result from the

condition of any component of the Home, including but not limited to: any diminution in value of the Home before or after repairs are performed; lost profits; damages to personal property; any hospital expenses; cost of food, moving and storage relocation expenses, or rental value of the Home or any other costs due to loss of use, inconvenience or annoyance during repair. (R. pp. 2527-2528).

Accordingly, based on the foregoing, there was sufficient evidence to reasonably support the Circuit Court's finding that the terms Lennar's arbitration agreement was unconscionable, and thus unenforceable. See Smith v. D.R. Horton, Inc., wherein the South Carolina Supreme Court affirmed the Circuit Court and Court of Appeal's holdings that when read together as a single provision, **"the arbitration provision is unconscionable and thus unenforceable."** 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

III. Even When Read in Isolation, the Terms of the Purchase and Sale Agreement are Unconscionable, and thus Unenforceable.

Even if this Court were to disregard Smith v. D.R. Horton and read Section 16 of the Purchase and Sale Agreement in isolation, as it did in rendering its decision, disregarding all of the above cross-referenced and intertwining paragraphs, the arbitration provision would still be unconscionable because it purports that Homeowners have bound their children and other third party occupants to binding arbitration. (R. Vol 1, P. 301).

Specifically, Section 16.1 states:

Disputes (whether contract, **warranty**, tort, statutory or otherwise, shall include, but are not limited to, any and all controversies, disputes, or claims [...] (3) **relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants to the Property, or in the Community. 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 be bound hereby.**

This provision provides (1) no meaningful choice to Homeowners, their children, or third party occupants and is, on (2) its face, so oppressive that no reasonable person would accept being bound as such.

Further, Section 16.4 of the Purchase and Sale Agreement is unconscionable because it gives Lennar unilateral power to include contractors, subcontractors, and suppliers, as well as any warranty company and insurer as part of the Mediation and Arbitration (R. Vol. 1, P. 301]. Specifically, Section 16.4 states:

Buyer and Seller further agree [...] that 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 arbitration; and (3) that the mediation and arbitration will be limited to the parties specified herein.

Again, said provision is one-sided and provides Homeowners with (1) no meaningful choice as to what parties should be involved in arbitration, and (2) is on its face "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson, 373 S.C. at 24–25, 644 S.E.2d at 668.

Accordingly, this Court should affirm the Circuit Court's finding that the terms of the arbitration are unconscionable, and thus unenforceable. Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

IV. Because the Arbitration Agreement is Unconscionable, and thus Unenforceable, the FAA does not apply.

In rendering its decision the present case, this Court held that the FAA applies because "the parties 'specifically agree that this transaction involves interstate commerce'" and "We must enforce this agreement like an other contract term," citing Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001). However, Respondent Homeowners

respectfully submit that the Court's analysis was incomplete. Specifically, in Bradley v. Brentwood Homes, Inc., the South Carolina Supreme Court set forth the standard for enforcing contractual agreements, which purport to evidence an agreement by the parties that a transaction involves commerce:

The FAA provides: "A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract ... shall be valid, irrevocable, and enforceable, **save upon such grounds as exist at law or in equity for the revocation of any contract.**" 9 U.S.C.A. § 2.

[Emphasis added]

Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312 (2012)

As noted by the above-cited language, a provision in a contract purporting to evidence interstate commerce is not enforceable where grounds exist, at law or in equity, for its revocation. As set forth under Arguments II and III, *supra*, equitable and legal grounds exist for revoking the arbitration agreement drafted by Lennar. Specifically, applying the South Carolina Supreme Court's analysis in Smith v. D.R. Horton, Inc. and Simpson v. MSA of Myrtle Beach, Inc., the terms of the arbitration agreement are unconscionable (i.e. the Respondent Homeowners lacked any meaningful choice and the terms are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Smith v. D.R. Horton, Inc., 417 S.C. at 49, 790 S.E.2d at 4, citing Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). Accordingly, **"[T]he arbitration provisions is unconscionable and thus unenforceable."** Smith v. D.R. Horton, Inc., 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

Said differently, this Court should affirm the Circuit Court's finding that the FAA does not apply because sufficient grounds exist for revoking the arbitration agreement. Where a Court

finds any clause of a contract unconscionable, including an arbitration clause, as is the case here, the Court may refuse to enforce the clause or otherwise limit its application so as to avoid an unconscionable result. See S.C. Code§ 36-3-302(1) 2003.¹ Accordingly, this Court should affirm the Circuit Court’s finding that the arbitration agreement is unconscionable and thus unenforceable.

V. Because the Development of Real Estate is an Inherently Intrastate Activity, the FAA does not apply.

“To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 455, 730 S.E.2d 312, 316 (2012), quoting Zabinski v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). In rendering its decision the present case, this Court held that the present case implicates the FAA because “the transaction also involved the construction of residential homes.” Respondent Homeowners respectfully submit, that the present transaction did not involve the construction of residential homes. Rather, like the Homeowners in Bradley v. Brentwood, Homes, Inc., the contracts at issue in this case are a “Purchase and Sale Agreement” and a “Warranty”, **not** construction contracts. (R. pp. 2454–2521 and pp. 2522–2530. respectively). Id. 398 S.C. 447, 458 730 S.E.2d 312, 318 (2012).

¹ As aptly noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to AT&T Mobility, LLC v. Concepcion: “even though contract defenses, e.g., duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States.” 131 S.Ct. 1740, 1760 (2011) (emphasis added); Rent-A-Center, 130 S.Ct. at 2775 (2010) (arbitration agreements “may be invalidated by ‘generally applicable contract defenses’”); Munoz v. Green Tree Financial Corp., 343 S.C. 531,539, 542 S.E.2d 360,363-64 (200 I) (“General contract principles of state law apply to arbitration clauses governed by the FAA”).

In South Carolina, our Supreme Court adheres to the view that real estate purchase contracts only implicate intrastate commerce because “the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity.” Id., 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012) quoting Zabinski, 346 S.C. at 595, 553 S.E.2d at 117-18. The Court further confirmed its prior rulings that the sale of a residence is inherently intrastate. Id. Accordingly, it was error for this Court to find that the transaction involved the “construction of residential homes” involving interstate commerce.

Further, this Court’s reliance on an affidavit by Lennar’s controller that the transaction involved interstate commerce, because it allegedly uses out-of-state contractors and materials and equipment manufactured outside of South Carolina is not dispositive. See Bradley v. Brentwood Homes, wherein the South Carolina Supreme Court found, “[Developer’s] affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing **on the purchase of the completed dwelling.**” 398 S.C. at 458, 730 S.E.2d at 318. [Emphasis added] Lennar’s attestation that the transaction involved interstate commerce does not make it so, particularly when the transaction involves a Purchase and Sale Agreement like we have here and not a Construction Contract. Accordingly, Respondent Homeowners respectfully request that this Honorable Court grant a rehearing and affirm the Circuit Court’s finding that the transaction was purely intrastate in nature and did not implicate interstate commerce.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court grant a rehearing and affirm the Circuit Court’s Order Denying Defendant Lennar’s Motion to Compel Arbitration.

Respectfully submitted,

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DOUGLASS, CZARRA AND CHAD
ENGLAND, LENNA LUCAS, AND
DANNY AND ELLEN DAVIS MORROW

June 25, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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.

Appellate Case No. 2016-002339

Appeal From Berkeley County

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

Opinion No. 5730

Heard February 19, 2020 – Filed June 10, 2020

REVERSED AND REMANDED

James Lynn Werner and Katon Edwards Dawson, Jr., both of Parker Poe Adams & Bernstein, LLP, of Columbia, and Jenna Brooke Kiziah McGee, of Parker Poe Adams & Bernstein, LLP, of Charleston, all for Appellant.

Thomas Frank Dougall, William Ansel Collins, Jr., and Michal Kalwajtys, all of Dougall & Collins, of Elgin, for Respondent Ozzy Construction, LLC.

Stephen P. Hughes, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent Builders Firstsource-Southeast Group, LLC.

Steven L. Smith, Zachary James Closser, and Samuel Melvil Wheeler, all of Smith Closser, PA, of Charleston; and Rogers Edward Harrell, III, of Murphy & Grantland, PA, of Columbia, all for Respondents Knight's Concrete Products, Inc. and Knight's Redi-Mix, Inc.

Ronald G. Tate, Jr., and Robert Batten Farrar, both of Gallivan, White & Boyd, PA, of Greenville, for Respondent Volkmar Consulting Services, LLC.

Sidney Markey Stubbs, of Baker Ravenel & Bender, LLP, of Columbia, for Respondent DVS, Inc.

David Cooper Cleveland and Trey Matthew Nicolette, both of Clawson & Staubes, LLC, of Charleston, for Respondent Myers Landscaping, Inc.

John Calvin Hayes, IV, of Hayes Law Firm, LLC, Jesse Sanchez, of The Law Office of Jesse Sanchez, both of Charleston; Michael J. Jordan, of The Steinberg Law Firm, LLP, of Goose Creek; and Catherine Dunn Meehan, of The Steinberg Law Firm, LLP, of Charleston, all for Respondents Patricia Damico, Joshua Buetow, Brettany Buetow, Bryan Camara, Cynthia Camara, Matthew Collins, Ellen Davis Morrow, Jonathan Douglass, Theresa Douglass, Czara England, Chad England, Lenna Lucas, and Danny Morrow.

Brent Morris Boyd, Timothy J. Newton, and Rogers Edward Harrell, III, all of Murphy & Grantland, PA, of Columbia, for Respondents Coastal Concrete Southeast, LLC, and Coastal Concrete Southeast II, LLC.

David Shuler Black, of Howell Gibson & Hughes, PA, of Beaufort, for Respondent TJB Trucking/Leasing, LLC.

Erin DuBose Dean, of Tupper, Grimsley, Dean & Canaday, P.A., of Beaufort, for Respondents LA New Enterprises, LLC, and Raul Martinez Masonry, LLC.

Christine Companion Varnado, of Seibels Law Firm, PA, of Charleston; and Alan Ross Belcher, Jr., and Derek Michael Newberry, both of Hall Booth Smith, PC, of Mt. Pleasant, all for Respondent Guaranteed Framing, LLC.

Stephen Lynwood Brown and Catherine Holland Chase, both of Young Clement Rivers, of Charleston; and Preston Bruce Dawkins, Jr., of Aiken Bridges Elliott Tyler & Saleeby, P.A., of Florence, all for Respondent Alpha Omega Construction Group, Inc.

David Starr Cobb, of Turner Padget Graham & Laney, PA, of Charleston, and Everett Augustus Kendall, II, and Brian Lincoln Craven, both of Murphy & Grantland, PA, of Columbia, all for Respondent Construction Applicators Charleston, LLC.

Shanna Milcetch Stephens and Wade Coleman Lawrimore, both of Anderson Reynolds & Stephens, LLC, of Charleston, for Respondent A.C.& A. Concrete, Inc.

Robert Trippett Boineau, III, Heath McAlvin Stewart, III, and John Adam Ribock, all of McAngus Goudelock & Courie, LLC, of Columbia, for Respondent Spring Grove Plantation Development, Inc.

Bachman S. Smith, IV, of Haynsworth Sinkler Boyd, PA, of Charleston, for Respondent Southern Green, Inc.

John Elliott Rogers, II, of The Ward Law Firm, PA, of Spartanburg, for Respondent Land/Site Services, Inc.

Carmen Vaughn Ganjehsani, of Richardson Plowden & Robinson, PA, of Columbia, and Samia Hanafi Nettles, of Richardson Plowden & Robinson, PA, of Mt. Pleasant for Respondent Decor Corporation.

Jenny Costa Honeycutt, of Best Honeycutt, P.A., of Charleston, for Respondent South Carolina Exteriors, LLC.

Michael Edward Wright, of Robertson Hollingsworth Manos & Rahn, LLC, and Michael Wade Allen, Jr., and R. Patrick Flynn, both of Pope Flynn, LLC, all of Charleston, all for Respondent Super Concrete of SC.

Francis Heyward Grimbball and James H. Elliott, Jr., both of Richardson Plowden & Robinson, PA, of Mt. Pleasant, for Respondent Manale Landscaping, LLC.

Kathy Aboe Carlsten, of Copeland, Stair, Kingma & Lovell, LLP, and Keith Emge, Jr., of Resnick & Louis, P.C., both of Charleston, for Respondent Civil Site Environmental, Inc.

HILL, J.: Certain homeowners in a Berkeley County development sued the general contractor Lennar Carolinas, LLC (Lennar), the developer, and various subcontractors, alleging defective construction. Lennar impleaded other subcontractors as third party defendants and moved to compel arbitration of the entire dispute. The circuit court denied the motion, finding the arbitration agreement included not just the arbitration section of the parties' sales contract but also sections from a separate warranty agreement (as well as parts of the deeds and covenants), and that the arbitration agreement was unconscionable. The circuit court further found the South Carolina Uniform Arbitration Act (SCUAA) applied, not the Federal Arbitration Act (FAA), and there had not been compliance with the SCUAA's conspicuous notice requirements. Lennar now appeals. We conclude the FAA, rather than the SCUAA, applies, and the circuit court erred in not considering the arbitration section as an independent arbitration agreement. We further hold the arbitration section constituted a valid agreement to arbitrate, which the FAA requires us to enforce.

I.

All of the Respondent homeowners, except Lenna Lucas, purchased new homes to be constructed in the development. As part of the transaction, they signed a ten page Purchase and Sales Agreement (PA) containing an arbitration section. Lucas is the second owner of a home, but in her amended complaint, she alleges a breach of contract cause of action based upon the PA. Section 16 of the PA is entitled "Mediation/Arbitration," and begins as follows:

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. . . .

Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid. *See Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). We review circuit court determinations of arbitrability de novo but will not reverse a circuit court's factual findings reasonably supported by the evidence. *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016).

A. Whether the FAA Applies

We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA provides the parties "specifically agree that this transaction involves interstate commerce." We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding FAA applied because parties had agreed contract involved interstate commerce). Second, the transaction involved commerce in fact. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Id.* at 538, 542 S.E.2d at 363. In deciding whether a transaction involves "commerce in fact" sufficient to trigger the FAA, we examine the agreement, the complaint, and the surrounding facts. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999). The phrase "involving commerce" as used in the FAA is "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). The Commerce Clause grants Congress the power to regulate (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce or persons or things in interstate commerce, and (3) activities having a substantial relation to interstate commerce. *United States v. Morrison*, 529 U.S. 598, 609 (2000).

In general, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 456, 730 S.E.2d 312, 317 (2012), but here the transaction also involved the construction of residential homes. As *Bradley* acknowledged, "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; see also *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977). The affidavit of Lennar's Controller states the construction involved interstate commerce, specifically the use of out-of-state contractors and materials and equipment manufactured outside South Carolina. See *Cape Romain Contractors*, 405 S.C. at 123, 747 S.E.2d at 465 (holding FAA applied where out of state materials used in dock construction were "instrumentalities of interstate commerce" and parties' contract specifically invoked FAA). We hold the transaction here involved interstate commerce, and the FAA therefore applies.

B. Whether the Arbitration Agreement is valid and enforceable

We next consider whether there was a valid arbitration agreement. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."). Because an arbitration provision is often one of many provisions in a contract, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (arbitrator rather than court must decide claim that underlying contract in which arbitration provision was contained was fraudulently induced, but if fraudulent inducement claim went to the arbitration provision specifically, claim would be for court because such a claim goes to the "making" of the arbitration agreement and § 4 of the FAA requires the court to "order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration . . . is not in issue'"). Building from *Prima Paint*, the United States Supreme Court has developed a body of federal substantive law interpreting the FAA that applies in State and federal courts. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). Two of these substantive laws are central to our decision here, and they reaffirm *Prima Paint*:

First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445–46 (2006) (citation omitted); see *Munoz*, 343 S.C. at 540, 542 S.E.2d at 364 ("Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.").

In deciding whether the parties have a valid agreement to arbitrate we must therefore isolate the arbitration clause from the rest of the contract. If the arbitration agreement is valid, any issues as to the validity of other parts of the contract go to the arbitrator, not the court. Accordingly, a party cannot duck arbitration unless it makes a specific, pinpoint (and successful) challenge to the validity of the arbitration provision itself; attacking the validity of the contract as a

whole is not enough. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate."); *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) ("We hold a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause."). We admit this is an artificial, abstract way to view the issue, but the lens has been fixed by federal substantive law and we are not free to adjust it.

The circuit court acknowledged this lens but sought to widen the scope, bringing the multiple arbitration and warranty provisions in other documents into the frame. It then found the provisions so comingled as to be inseparable and declared all of the comingled provisions to be "the" arbitration agreement. This was not in keeping with *Prima Paint*. Nor was it, as the circuit court stated, consistent with *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48–49, 790 S.E.2d 1, 4 (2016), where a 3–2 majority held an arbitration clause found in one subsection of a contract paragraph was so "intertwined" with other subsections of the same paragraph that the entire paragraph constituted the arbitration provision for purposes of the *Prima Paint* analysis. Unlike the contract in *D.R. Horton*, the arbitration agreement here was contained in a distinct, separate section of the PA. The circuit court's finding that the arbitration provision encompassed more than this section lacks adequate factual support. We therefore conclude the circuit court erred by considering the contract as a whole rather than, as *Prima Paint* demands, focusing only on the discrete arbitration provision. *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 64, 791 S.E.2d 286, 293 (Ct. App. 2016) (reversing circuit court's denial of motion to compel arbitration where circuit court violated *Prima Paint* by considering separate warranty provision as part of arbitration agreement). Because the parties' arbitration provision is valid, § 2 of the FAA requires that we enforce it.

That ends our inquiry into Lennar's motion to compel the homeowners to arbitrate. There is no need for us to consider the similar arbitration clauses found in the Lennar Warranty, the Deed and the Covenants. The PA's arbitration provision states, "All decisions respecting the arbitrability of any Dispute shall be decided by the arbitrator(s)." Whether the disputes alleged in this lawsuit are covered by the PA's arbitration provision is therefore a question the parties clearly and unmistakably delegated to the arbitrator. *Schein*, 139 S. Ct. at 530 ("Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an

arbitrator."); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (holding delegation of questions of arbitrability to arbitrator must be "clear and unmistakable").

Accordingly, we reverse the order of the circuit court denying the motion to compel arbitration. We express no view as to the validity or enforceability of other sections of the PA or any other documents at issue as those questions are for the arbitrator. 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.

REVERSED AND REMANDED.

LOCKEMY, C.J., and HUFF, J., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-2339
Case No. 2014-CP-08-2424

RECEIVED

Jun 25 2020

SC Court of Appeals

Patricia Damico and Lenna Lucas, Individually and on behalf of all others similarly situated, Joshua and Brettany Beutow, Edward and Sylvia Dengg, Jonathan and Theresa Douglass, Anthony and Stacey Ray, Danny and Ellen Davis Morrow, Czara and Chad England, Bryan and Cynthia Camara, and Matthew Collins, 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, Geometries Consulting, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, and Low Country Renovations and Siding, LLP, Third-Party Defendants,

Of which Volkmar Consulting Services, LLC, Land/Site Services, Inc., Myers Landscaping, Inc., A.C.&A. Concrete, Inc., Knight's Concrete Products, Inc., Knight's Redi-Mix, Inc., Coastal Concrete Southeast, LLC, Coastal Concrete Southeast II, LLC, Guaranteed Framing, LLC, Ozzy Construction, LLC, Construction Applicators Charleston, LLC, LA New Enterprises, LLC, Decor Corporation, DVS, Inc., Raul Martinez Masonry, LLC, Alpha Omega Construction Group, Inc., South Carolina Exteriors, LLC, Builders Firstsource Southeast Group, LLC, are also Respondents.

And

Decor Corporation, Fourth Party Plaintiff,

v.

Baranov Flooring, LLC, DJ Construction Services, LLC, Creative Wood Floors, LLC, Geraldo Cunha, Ebenezer Flooring, LLC, Emmanuel Flooring and Siding, LLC, Eusi Flooring and Covering, LLC, Nicolas Flores, Alexander Martinez, Isidini Mejia, Juan Perez, N&B Construction, LLC, Jose Dias Rodrigues, Livia Sousa, Jose Paz Castro Hernandez, Divinio Aperecido Corgosinho, Ricardo Chiche, CEBS Construction, Bayshore Siding and Flooring, Sebastio Luiz de Araujo, and John Does 1-4, Fourth Party Defendants.

RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY
BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS,
JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND,
LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW'S
PROOF OF SERVICE

I, the undersigned, certify that I have served *Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglass, Czarra and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow's Petition for Rehearing* on all counsel of record for the above-caption appeal by emailing a copy on June 25, 2020.

Pursuant to the March 20, 2020 Order of the Supreme Court, a copy of the

aforementioned email correspondence is attached.

Respectfully submitted,

THE LAW OFFICE OF JESSE SANCHEZ, LLC

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

The Law Office of Jesse Sanchez, LLC

98 ½ Broad Street, Suite B

Charleston, South Carolina 29401

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ATTORNEY FOR RESPONDENTS

PATRICIA DAMICO, JOSHUA AND

BRETTANY BEUTOW, BRYAN AND

CYNTHIA CAMARA, MATTHEW

COLLINS, JONATHAN AND TERESA

DOUGLASS, CZARRA AND CHAD

ENGLAND, LENNA LUCAS, AND

DANNY AND ELLEN DAVIS MORROW

June 25, 2020

Charleston, South Carolina

From: Jesse Sanchez jesse@jessesanchezlaw.com
Subject: Patricia Damico v. Lennar Carolinas // 2016-002339// Petition for Rehearing
Date: June 25, 2020 at 4:32 PM



To: Ritchie, Sierra siritchie@sccourts.org
Cc: sstephens@arlawsc.com, clawrimore@arlawsc.com, sbrown@yclaw.com, cchase@yclaw.com, pbd@aikenbridges.com, mordan@steinberglawfirm.com, cmeehan@steinberglawfirm.com, jhayes@hayeslaw.org, sphughes@hghpa.com, kcarlsten@carlockcopeland.com, cemge@rlattorneys.com, bboyd@murphygrantland.com, tnewton@murphygrantland.com, rharrell@murphygrantland.com, dcobb@turnerpadget.com, rkendall@murphygrantland.com, bcraven@murphygrantland.com, snettles@richardsonplowden.com, cganjehsani@richardsonplowden.com, mstubbs@brblegal.com, dnewberry@hallboothsmith.com, cvarnado@seibelsfirm.com, alan.belcher@hallboothsmith.com, ssmith@scnlaw.com, zclosser@scnlaw.com, swheeler@scnlaw.com, Dean, Erin erindean@tgdcpa.com, jrogers@wardfirm.com, jennamcgee@parkerpoe.com, jimwerner@parkerpoe.com, katondawson@parkerpoe.com, jelliott@richardsonplowden.com, fhgrimbail@richardsonplowden.com, dcleveland@clawsonandstaubes.com, tnicolette@clawsonandstaubes.com, tdougall@dougallfirm.com, wcollins@dougallfirm.com, mkalwajtys@dougallfirm.com, jenny@besthoneycutt.com, bsmithiv@hsblawfirm.com, trippett.boineau@mgclaw.com, heath.stewart@mgclaw.com, adam.ribock@mgclaw.com, pflynn@popeflynn.com, mallen@popeflynn.com, mew@roblaw.net, dblack@hghpa.com, rlate@gwblawfirm.com, bfarrar@gwblawfirm.com, receptionist1@arlawsc.com, klawrimore@arlawsc.com, pbell@yclaw.com, tbates@yclaw.com, ice@aikenbridges.com, khoward@steinberglawfirm.com, knissen@steinberglawfirm.com, jling@hayeslaw.org, jesse.sanchez@mac.com, bgiles@hghpa.com, ssimpson@carlockcopeland.com, hdemers@rlattorneys.com, bawilson@murphygrantland.com, shughes@murphygrantland.com, cmubarak@murphygrantland.com, mtinsley@murphygrantland.com, eshn@richardsonplowden.com, livory@richardsonplowden.com, jowens@brblegal.com, bellenberger@hallboothsmith.com, emagera@seibelsfirm.com, sfischer@hallboothsmith.com, prochay@scnlaw.com, xingram@tgdcpa.com, ssantana@wardfirm.com, celestemallett@parkerpoe.com, sherrieellison@parkerpoe.com, mreeves@richardsonplowden.com, wbrewer@clawsonandstaubes.com, shossin@clawsonandstaubes.com, michalkalwajtys@gmail.com, sgreen@besthoneycutt.com, efile_bsmithiv@hsblawfirm.com, elizabeth.davison@mgclaw.com, alisha.burns@mgclaw.com, mollie.roche@mgclaw.com, esallee@popeflynn.com, eb@roblaw.net, ltownsend@hghpa.com, kpedersoli@gwblawfirm.com

Dear Counsel,

Attached for service pursuant to the March 20, 2020 Order of the South Carolina Supreme Court, please find the attached Cover Letter and Petition for Rehearing that is being filed momentarily with the Court of Appeals via Electronic One Drive Submission.

Regards,

Jesse Sanchez

On Wed, Jun 10, 2020 at 2:41 PM Ritchie, Sierra <siritchie@sccourts.org> wrote:

Dear Counsel,

Please see the attached correspondence from the South Carolina Court of Appeals.

Sincerely,

Sierra Ritchie

Appeals Specialist I

South Carolina Court of Appeals

1220 Senate Street

Columbia, SC 29201

T: 803-734-1890

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RECEIVED

Jun 25 2020

SC Court of Appeals

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Case No  
2016-2...ing.pdf



Case No  
2016-2...30.pdf



June 25, 2020

VIA ONE DRIVE ELECTRONIC SUBMISSION

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29211

**RECEIVED**

**Jun 25 2020**

**SC Court of Appeals**

**Re: Patricia Damico, et. al. v. Lennar Carolinas, LLC, et al.  
Case No. 2014-CP-08-2424; Appellate Case No. 2016-2339.**

Dear Ms. Kitchings,

Enclosed herewith, please find the following documents for filing:

1. *Respondents Patricia Damico, Joshua and Brettany Beutow, Bryan and Cynthia Camara, Matthew Collins, Jonathan and Teresa Douglass, Czarra and Chad England, Lenna Lucas, and Danny and Ellen Davis Morrow's Petition for Rehearing.*
2. The corresponding *Proof of Service*, evidencing service on all counsel of record for the above-captioned appeal by electronic mail.
3. A copy of Opinion No. 5730, filed June 10, 2020, from which this *Petition for Rehearing* is made.

Thank you for your assistance with this matter. Should you have any questions regarding this submission, please do not hesitate to contact me directly at (843) 814-8181.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez

SC Bar No. 101906

**ATTORNEYS FOR RESPONDENTS PATRICIA DAMICO, JOSHUA AND BRETTANY BEUTOW, BRYAN AND CYNTHIA CAMARA, MATTHEW COLLINS, JONATHAN AND TERESA DOUGLASS, CZARRA AND CHAD ENGLAND, LENNA LUCAS, AND DANNY AND ELLEN DAVIS MORROW**

Cc: All Counsel of Record (Via Email Only)

**THE LAW OFFICE OF JESSE SANCHEZ, LLC**

98½ Broad Street, Suite B, Charleston, SC 29401 P: 843.814.8181 F: 843.284.3953

jesse@jessesanchezlaw.com jessesanchezlaw.com

# The South Carolina Court of Appeals

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.

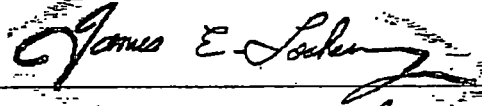
Appellate Case No. 2016-002339

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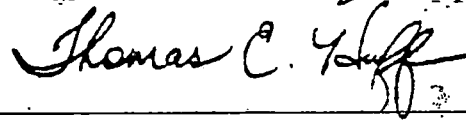
ORDER

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After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Jenna Brooke Kiziah McGee, Esquire  
Michael J. Jordan, Esquire  
Catherine Dunn Meehan, Esquire  
John Calvin Hayes, IV, Esquire  
R. Patrick Flynn, Esquire  
Michael Wade Allen, Jr., Esquire  
Bachman S. Smith, IV, Esquire  
James H. Elliott, Jr., Esquire  
Samia Hanafi Nettles, Esquire  
David Shuler Black, Esquire  
Shanna Milcetic Stephens, Esquire  
Stephen Lynwood Brown, Esquire  
Catherine Holland Chase, Esquire  
Preston Bruce Dawkins, Jr., Esquire  
Stephen P. Hughes, Esquire  
Kathy Aboe Carlsten, Esquire  
N. Keith Emge, Jr., Esquire  
Brent Morris Boyd, Esquire  
David Starr Cobb, Esquire  
Sidney Markey Stubbs, Esquire  
Derek Michael Newberry, Esquire

**FILED**

July 1, 2020

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Zachary James Closser, Esquire  
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