

WILLIAMS MULLEN

Richard H. Willis, Esquire
Direct Dial: 803.567.4611
rwillis@williamsmullen.com

July 25, 2022

RECEIVED
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SC Court of Appeals

Via Electronic Mail

Ms. Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

Re: Denise M. Petersen v. DCTCL, L.P.
Appellate Case No.: 2022-000938

Dear Ms. Kitchings:

Attached please find correspondence and the Transcript of Record we received from the Court Reporter at 10:55 p.m. on July 22, 2022, regarding the above-referenced matter.

Sincerely,



Richard H. Willis

RHW/ddt

Enclosure: As referenced.

Cc: All counsel of record (*via e-mail only*).

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) 2021-CP-10-01973

DENISE M. PETERSEN, individually)
and as TRUSTEE OF THE DENISE)
M. PETERSEN 2005 REVOCABLE TRUST)
DATED NOVEMBER 9, 2005, as)
TRUSTEE OF THE 601 OCEAN BOULEVARD)
RESIDENCE TRUST DATED)
NOVEMBER 30, 2012, and as TRUSTEE)
OF THE 601 OCEAN BOULVEARD)
RESIDENCE TRUST II DATED)
DECEMBER 7, 2012,)

Plaintiff,) Transcript of Record

vs.)

DCTCL, L.P. d/b/a BUFFINGTON HOMES,)
L.P., DONNIX CONSTRUCTION, LLC,)
HUNT BROTHERS CONSTRUCTION, INC.,)
ISLAND EXTERIORS AND SIDING, INC.,)
PLASTERING SURFACES, LLC, A UNIQUE)
DESIGN, INC., BERKELEY HEATING AND)
AIR CONDITIONING, INC., ENERGYONE)
AMERICA, LLC, AQUA BLUE POOLS OF)
CHARLESTON, INC., SUNNYSIDE FARMS,)
INC., TAMKO BUILDING PRODUCTS, LLC,)
HADDIGAN ELECTRICAL CONTRACTORS,)
LLC, and JOHN DOE CONTRACTORS 3)
THROUGH 50,)

Defendant.)

Charleston, South Carolina
June 2, 2022

B E F O R E:

The Honorable Benjamin H. Culbertson

A P P E A R A N C E S:

Mr. Jesse Kirchner, Esquire
Mr. Happel Scurry, Esquire
Attorneys for the Plaintiff

Mr. Scott Winograd, Esquire
Attorney for the Defendant, Eneryone America

Mr. Ford Thrift, Esquire
Mr. Trey Watkins, Esquire
Attorneys for the Defendant, Aqua Blue Pools of
Charleston, Inc.

Ms. Jessica Stratta, Esquire
Attorney for the Defendant, Donnix Construction, LLC

Mr. Cameron Berthelsen, Esquire
Ms. Madison Alger, Esquire
Attorneys for the Defendant, Island Exterior and
Siding, Inc.

Mr. Jenkins Wilson, Esquire
Attorney for Defendant, A Unique Design, Inc.

Mr. Adam Ribock, Esquire
Attorney for Defendant, Buffington Homes

Mr. Richard Willis, Esquire
Attorney for Defendant, Tamko Building Products, Inc.

Ms. Katie Walker, Esquire
Attorney for Defendant, Berkeley Heating and Cooling,
Inc.

Recorded by: WebEx

Transcribed by: Lisa Carter, Court Reporter

I N D E X

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WITNESSES

PAGE

(NO WITNESSES INTRODUCED DURING HEARING)

(EXHIBITS INTRODUCED DURING HEARING)

1 THE COURT: All right. This is 2021-CP-10-
2 01973. Denise M. Petersen and other others versus DCTC LLP
3 and others. According to my roster the matter is before the
4 court on the motion for protection to stay discovery, a
5 motion to compel discovery, and a motion to dismiss and
6 compel arbitration. We'll need to go around, everybody will
7 need to give their names, the capacity in which they're
8 appearing at this hearing and where they are physically
9 located.

10 My name is Judge Ben Culbertson. I'm the circuit judge
11 assigned to this term of Common Pleas Non-Jury for
12 Charleston County. During this hearing I am physically
13 located in Courtroom 3-E of the Charleston County
14 Courthouse.

15 All right. Mr. Kirchner, if you would go next.

16 MR. KIRCHNER: Yes sir. Thank you, judge. Jesse
17 Kirchner I represent the plaintiff, Denise Petersen. For
18 this hearing I'm physically located in my office here in
19 Charleston on 15 Middle Atlantic Wharf.

20 THE COURT: All right. Mr. Ribock?

21 MR. RIBOCK: Good morning, judge. My name is Adam
22 Ribock. I represent the general contractor, Buffington
23 Homes in this matter. I'm located in my office in Columbia,
24 South Carolina.

25 THE COURT: All right. Mr. Berthelsen?

1 MR. BERTHELSEN: Good morning, Your Honor. I
2 represent Island Exteriors, one of the subcontracts in this
3 and co-counsel with Madison Alger and I'm located at this
4 time in my office in Mount Pleasant, South Carolina in
5 Charleston County.

6 THE COURT: All right. Mr. Cleveland? I'm sorry,
7 you're muted.

8 MR. CLEVELAND: I'm sorry, Your Honor. I'm David
9 Cleveland. I represent the subcontractor Sunnyside Farms.
10 I'm located in my office in Charleston.

11 THE COURT: All right. Mr. Thrift?

12 MR. THRIFT: Good morning, Your Honor. I'm here on
13 behalf of Plastering Surfaces today. I am located in my
14 office downtown Charleston.

15 THE COURT: All right. Mr. Scurry?

16 MR. SCURRY: Good morning, Your Honor. I'm located
17 in Charleston ---

18 THE COURT: I'm sorry, I can not hear -- you're
19 breaking up, Mr. Scurry. You're audio isn't working.
20 (Whereupon, the attorney works on getting his audio
21 working)

22 THE COURT: I still cannot hear you.

23 MR. KIRCHNER: Judge, Happel is with me. He's here in
24 our office here in Charleston. He also represents the
25 plaintiff, but I'll be doing the talking.

1 THE COURT: All right.

2 MR. SCURRY: I apologize, Your Honor, can you hear
3 me?

4 THE COURT: Mr. Wilson?

5 MR. WILSON: Good morning, Your Honor, Jenkins
6 Wilson here for A Unique Design. I'm at my house in
7 Charleston.

8 THE COURT: All right. Ms. Stratta?

9 MS. STRATTA: Good morning, Your Honor. My name is
10 Jessica Stratta. I represent Donnix Construction, LLC which
11 is a subcontractor in this case. I'm located at my office
12 in Charleston, specifically, in Daniel Island, 146
13 Fairchild Street.

14 THE COURT: Ms. Walker?

15 MS. WALKER: Good morning, Your Honor. I represent
16 Berkeley Heating and Air and I'm located in my office in
17 Mount Pleasant, South Carolina.

18 THE COURT: Ms. Alger?

19 MS. ALGER: Good morning, Your Honor. My name is
20 Madison Alger and co-counsel for Island Exteriors with Mr.
21 Berthelsen and I'm located at my home on Daniel Island.

22 THE COURT: Okay. Mr Willis?

23 MR. WILLIS: Good morning, Your Honor. I'm with --
24 this is Richard Willis. I'm with Williams Mullen in
25 Columbia. I'm in my office here. With me is Derek Tarver,

1 who's an associate on the case. I'll be speaking on behalf
2 of Tamko who is the manufacturer of the underlayment to the
3 material on the roof.

4 THE COURT: Mr. Winograd?

5 MR. WINOGRAD: Good morning, Your Honor. My name is
6 Scott Winograd. I represent Energyone America and I'm here
7 in my office in Mount Pleasant, South Carolina.

8 THE COURT: All right. Mr. Watkins?

9 MR. WATKINS: Goo morning, Your Honor. Trey Watkins
10 here on behalf of Aqua Blue Pools and I'm in my office in
11 Charleston, South Carolina.

12 THE COURT: All right. The first, let's see, the
13 motion filed on November 24, 2021, motion to dismiss and
14 compel arbitration, whose is that?

15 MS. WILLIS: That's my motion, Your Honor, on behalf
16 of
17 Tamko and we're ready to proceed.

18 THE COURT: All right. Mr. Willis, let me hear from
19 you.

20 MR. WILLIS: So, Your Honor, I represent Tamko.
21 They're a company out of Joplin, Missouri. They manufacture
22 a number of different kinds of building materials. They're
23 sort of a bulk manufacturer of building materials primarily
24 roofing materials, shingles, underlayment, membranes, and
25 that sort of thing. This is actually the second time in

1 South Carolina that their arbitration clause has been
2 subject to adjudication. The One Bell Hall case that we
3 mentioned in our memorandum of law which went up to the
4 South Carolina Court of Appeals, is the other one.

5 So this is a little bit of a deja vu issue for us.
6 This underlayment is basically the, the sort of fabric
7 material that goes under the shingles and under the copper
8 roof on Ms. Petersen's house. This is a large and beautiful
9 house that was built on the front beach of Kiawah and as,
10 Your Honor, can see from the various people on the call
11 there were a number of problems associated with it. Tamko
12 is only interested in issues associated with the roof. And
13 so when Mr. Scurry joined Tamko as a defendant, we
14 immediately moved to dismiss on the grounds that there's an
15 arbitration clause contained in the warranty that is issued
16 when this product is sold. That warranty accrues to the
17 benefit of Ms. Peterson the homeowner under the terms of
18 the warranty and we moved to compel arbitration. There --
19 the alleged problem with the underlayment is that under
20 heat and pressure the polymer and the underlayment can come
21 out of the fabric and drip and there are some photos that
22 Mr. Scurry has that show that dripping associated with the,
23 the underlayment. It's primarily under the shingles. Our
24 understanding from an inspection that occurred I believe
25 yesterday or two days ago that there, there is no dripping

1 of the underlayment under the copper portion of the roof,
2 but there is under the shingles.

3 And this is an issue that that Tamko has had with a
4 couple, with some of the batches of underlayment that it
5 manufactured. The polymer was changed and it didn't work
6 and so they went back to the old polymer. And so this
7 particular underlayment falls, probably falls within that
8 batch.

9 Your Honor, I want to -- I'll get to the merits of the
10 motion, but having argued before you before I know you are
11 as interested in the practicalities of the circumstances as
12 the, as the legal doctrine. And so let me sort of skip to
13 the last chapter of the book and talk very briefly about
14 practicality. As Your Honor is probably aware a motion to
15 enforce an arbitration, if that motion is granted then the
16 case goes to arbitration. And in my experience with these
17 arbitrations involving this particular product, it gets
18 resolved pretty quickly within three, three to five months
19 usually by some sort of settled resolution. That doesn't
20 always happen, but it tends to happen with this product and
21 that takes Tamko out of the case. And so that's the reason
22 why we moved for arbitration. It's faster. It's cheaper. I
23 think it benefits everyone, frankly, as opposed to us
24 getting involved as one of a dozen defendants in a large
25 construction case. If, Your Honor, grants that motion we'll

1 go with arbitration in this case, at least, this aspect of
2 the case will be resolved.

3 If, Your Honor, denies the motion then, as you're
4 probably aware under the South Carolina Arbitration Act
5 it's immediately appealable. And there's a recent case
6 called Huskins versus Mungo Homes out of the South Carolina
7 Court of Appeals that talks about that appealability issue.
8 That's what happened in the One Bell Hall case which is the
9 other case involving similar arbitration clause in a bulk
10 sales contract and on shingles Tamko manufacturers. And so
11 I don't know about the other folks on the call, but I
12 currently have an appeal in front of the South Carolina
13 Court of Appeals, it's been pending for three years. And so
14 that's the long solution to the problem and the arbitration
15 is the short solution to the problem. But either way this
16 case will either be going to arbitration or will be going
17 up on an appeal. And I'm not sure that really benefits
18 anyone other than the lawyers, frankly. So that's the,
19 that's the practicality of what we're asking the court to
20 do. And we've had conversations with Mr. Scurry and
21 conversations with Mr. McDonald. I've tried to persuade
22 them this is the right thing to do and I have failed at
23 that. So we are, hence, arguing the motion in front, in
24 front of you.

25 I want to talk about three things on the merits of the

1 motion, Your Honor. First, I want to briefly go over the
2 analysis that the Court of Appeals and the Supreme Court
3 has set down for deciding when to enforce an arbitration
4 clause as part of a commercial sales transaction. I want to
5 touch briefly on some of the arguments that the
6 plaintiff's, Ms. Petersen, represented by Mr. Scurry, made
7 as to why they shouldn't be required to arbitrate. And as
8 well as the arguments that Donnix, who is the among other
9 things at the, at the home the company that installed the
10 roof, why they should not be required to arbitrate. I'll
11 talk briefly about that. And then, Your Honor, I want to
12 explain to the court what we're asking you to do. So those
13 are sort of the three phases of my argument.

14 As, as the court is aware, the analysis that it must
15 follow in determining whether to enforce an arbitration
16 clause is first, is the transaction or the claim associated
17 with interstate commerce. Clearly here it is, it's, these
18 shingles were manufactured in Missouri. They were sold
19 through a distributor in South Carolina to Donnix. So that
20 box is checked and no one disputes that.

21 The second issue that the court has to decide is
22 whether or not the claims that are made in the underlying
23 lawsuit fall within the arbitration clause or are closely
24 enough related to the arbitration clause that it's fair to
25 send them to arbitration, and that arbitration clause and

1 the entire warranty, Your Honor, are attached to our brief
2 as Exhibit A. It's a very broad arbitration clause and it,
3 basically, requires any claims associated with the
4 underlayment to be submitted to mandatory binding
5 arbitration. So we believe clearly the these claims are
6 covered by the arbitration agreement.

7 And then the third issue, Your Honor, is whether or
8 not it's, whether or not the arbitration agreement is
9 conscionable. Whether or not it's fair. Mr. Happel and Mr.
10 McDonald don't raise that issue. I'm not sure that whether
11 they think it's fair or not, but anyway, that, that issue
12 hasn't been, it isn't part of their opposition. But just
13 for the record the South Carolina Court of Appeals has
14 already found that this, essentially, identical mandatory
15 arbitration clause is fair. It's not unconscionable. It's
16 equitable. And it's not one sided. It's fair to both sides.
17 So that issue is really not in front of the court.

18 And so if it is involved with interstate commerce, if
19 it's covered by the arbitration clause and the arbitration
20 clauses conscionable, we believe, Your Honor, really
21 doesn't have a choice in the matter, you have to enforce
22 arbitration. But in every case like this, you get issues
23 that pop up. Because this arbitration clause is part of the
24 bulk sale of material that's incorporated into a home.
25 Frequently, the homeowner doesn't even realize that they

1 have a warranty. And so they -- when we raised the
2 arbitration clause, the first thing the homeowner says, is
3 well, I don't have a contract with you. Well, yes you do.
4 You may not know it, but you do have one and that is the
5 warranty that accompanies the sale of the product is
6 transferred to the homeowner under the terms of the
7 warranty. And, of course, anytime there is a sale of
8 material under the UCC there is also an implied warranty
9 that accompanies that sale. And so that's a, that's
10 contract as well. So there is a contract.

11 THE COURT: Excuse me for interrupting and I hate
12 interrupt, but the warranty compels arbitration. If a
13 homeowner doesn't want to enter into that contract, how did
14 they say, no, I don't agree to that.

15 MR. WILLIS: It's a contract of adhesion, Your
16 Honor. It's not one that they can disagree with. They can,
17 the buyer of the installer of the material could decide
18 well we don't want to install a material that contains a
19 binding arbitration clause. But, but once that decision is
20 made then, as as a practical matter the homeowner has no
21 choice. They've not arbitrated ---

22 THE COURT: But even ---

23 MR. WILLIS: --- they have a claim.

24 THE COURT: But, I mean, in this case you don't
25 have a homeowner coming and sign and saying I want to get

1 this product to go under my shingles. You probably got a
2 subcontractor that's buying the product and making the
3 decision for the homeowner.

4 MR. WILLIS: That's correct, Your Honor. The
5 homeowner is, is a non-signatory to the arbitration clause
6 as, as his Donnix as a matter of just practicality. So
7 this, so this issue involves when an arbitration clause can
8 be enforced against the non-signatory.

9 THE COURT: I mean, issue been addressed on appeal?

10 MR. WILLIS: Yes, sir, Your Honor. There's a lot of
11 law on that. The leading case which we cited in our brief
12 is a case called Pearson versus Hilton Head Hospital. That,
13 that issue was also sort of behind the scenes in One Bell
14 Hall case. Mr. Lucey (ph) didn't challenge that issue in
15 that case. But, essentially, the law is that an arbitration
16 clause can be enforced against a non-signatory, if that
17 non-signatory's lawsuit involves claims such as breach of
18 warranty, breach of implied warranty, even negligence and
19 strict liability claims or unfair trade practices claims,
20 because they essentially arise out of the sale of the
21 product which has been covered by the UCC which is then
22 covered by both express warranty and the implied warranty.

23 So I'd urge the court to review that Pearson case.
24 It's a, it's a fairly extensive case and it talks about the
25 various circumstances under which non-signatories can be

1 compelled to arbitrate. It talks -- a good bit of federal
2 law involved in that as well, Your Honor. Because as you
3 know the Federal Arbitration Act preempts state law to the
4 extent that state law might be inconsistent.

5 So both the plaintiff and Donnix have sued Tamko under
6 claims of breach of warranty. The plaintiff's claim is
7 breaching implied warranty. They've avoided the express
8 warranty possibly because they either didn't know about it
9 or they don't want to have to arbitrate or they don't like
10 limitations. Donnix, on the other hand, I think knew about
11 it when they filed their cross-claim. They allege in their
12 cross-claim that there is a contract between Donnix and
13 Tamko. That's in Paragraph 121 of their, of their answer
14 and a cross-claim. And then they bring in a claim against
15 Tamko for file, for breach of express warranty and breach
16 of implied warranty. So that's the reason why there is a
17 contract and that's the reason why the arbitration clause
18 should bind the non-signatories.

19 So the issues that the opponents to the motion raise
20 is, you know, first, as I said there's no contract. Well,
21 there is, in fact, a contract both implied in law and an
22 express contract and the express warranty.

23 Then they say, well, we didn't agree to it and we
24 didn't or we didn't sign it. And, unfortunately, that by
25 virtue of the sale, they're deemed to have agreed to it and

1 they don't need to sign it. They're non-signatory to the
2 contract. In a sense, Your Honor, they're a third-party
3 beneficiaries of the terms and conditions of the warranty.
4 But the courts tend to address this on a estoppel grounds,
5 equitable estoppel as opposed to third-party beneficiary,
6 but they're similar and that Pearson case talks about that.

7 Then they take the position that the warranty is not
8 authentic. I think that arises from a case that Donnix's
9 counsel cites called Nelson which comes out of Missouri.
10 This warranty has been authenticated. It's authenticated by
11 the, by the affidavit that we submitted along with our
12 motion. And this warranty is available online and it also
13 appears on the packaging for each roll of underlayment
14 that's installed at the site.

15 THE COURT: Yeah, but I mean, you know, the
16 homeowner is not going to see that.

17 MR. WILLIS: No, sir. The homeowner doesn't see
18 this. This is -- Your Honor, this is no different than any
19 warranty a homeowner would get with the purchase of a home.
20 You know, the piping might be warranted. The flooring might
21 be warranted. Not dissimilar to warranties do you get, you
22 know, when you buy a car. Your tires are warranted. Your
23 hoses are warranted. Those are different from the overall
24 warranty associated with the house. It's so frequently the
25 homeowner doesn't see it.

1 Other arguments are is the warranty doesn't say what
2 it applies to. Well, it actually does clearly say what it
3 applies to in terms of the warranty. It applies to a number
4 of things including the underlayment and it appears on the
5 underlayment.

6 I think Donnix raises the issue of the blanks in the
7 warranty aren't filled in. They don't need to be filled in
8 for the warranty to be effective. That's just a way for the
9 installer to inform Tamko that underlayment has been put on
10 this particular structure and that it doesn't have to be
11 filled in for the warranty to be effective.

12 THE COURT: But is there case law that says that or
13 that's just your position?

14 MR. WILLIS: Your Honor, it's pretty clear from the
15 terms of the warranty.

16 THE COURT: Okay.

17 MR. WILLIS: It's not a warranty where you have to
18 fill it out and send in a warranty card. It just companies
19 the cell of the product. And similarly an implied warranty
20 would accompany the sale of the product whether it's signed
21 or not, it's not or filled out, it's just has nothing to do
22 with the effectiveness of the warranty or the arbitration
23 clause.

24 And so finally, Your Honor, what we're asking the
25 court to do pretty clear from our motion is dismiss the

1 case and order arbitration. And if the court does that, my
2 prediction is that our aspect of this will be resolved
3 pretty quickly. If the court does not do that then, we'll
4 be, unfortunately, having to take it up on appeal.

5 THE COURT: All right.

6 MR. WILLIS: Happy to answer -- I'll be happy to
7 answer any questions that, Your Honor, might have.

8 THE COURT: I'm fine. Thank you.

9 MR. WILLIS: Thank you.

10 THE COURT: All right. Does anybody other than
11 plaintiff's counsel have an argument in favor or against
12 arbitration, if so, raise your hand.

13 MS. STRATTA: Your Honor, this is Jessica Stratta. I
14 represent Donnix and I have arguments against Tamko's
15 motion.

16 THE COURT: Okay. Let me hear from you.

17 MS. STRATTA: Okay. Thank you, Your Honor. May it
18 please, the Court?

19 I mentioned I represent Donnix Construction LLC. And
20 Donnix Construction LLC was hired by the general contractor
21 to install the roof, flashings and water (inaudible) into
22 it plaintiff's residence. Now, Donnix never entered into a
23 contract specifically with Tamko for the underlayment
24 install at the residence. Donnix placed an order with a
25 building supplier in which the building suppliers delivered

1 the product to plaintiff's residence. And at that point and
2 only after the product has been paid for and delivered to
3 the residence, was this limited warranty continuing the
4 arbitration clause first visible to Donnix. It was not
5 discussed specifically between Tamko and Donnix during the
6 sale that was facilitated by the supplier and the Donnix
7 never consented to the arbitration clause contained within
8 this on authenticated limited warranty.

9 THE COURT: And I -- excuse me for interrupting
10 you, Ms. Stratta, but according to Mr. Willis this Pearson
11 decision that he references says that doesn't matter.

12 MS. STRATTA: Yes, Your Honor.

13 THE COURT: I haven't read the case so I don't know
14 what the case says, but, I mean, either it does mean you're
15 wrong and he's right or else it doesn't say what he's
16 saying it said so which one is it?

17 MS. STRATTA: Yes, Your Honor. The Pearson case dealt
18 with an entirely different set of facts than what we have
19 here. The Pearson case dealt with a former employer who was
20 terminated and sued his employer for wrongful termination.
21 The employer filed a motion to compel arbitration based
22 upon an employment contract with the former employee as the
23 former employee benefitted from the employment contract
24 while he was still employed. And the Court ruled that the
25 former employee in Pearson received a direct benefit from

1 the employment contract. The employee could not, then,
2 dispute that it did not know about the arbitration clause
3 within his employment contract. Here there is not even a
4 contract between Tamko and Donnix. Had there been a
5 contract between the two of them, maybe the arbitration
6 clause would be enforceable. But there was no meeting of
7 the minds which is the first step of even forming a
8 contract.

9 Now, counsel for Tamko also cites the One Bell Hall
10 case and here the court did agree that the arbitration
11 clause within the bulk sale contract for the shingles was
12 enforceable. Here there's no bulk sales contract between
13 Tamko and Donnix. There is this blank limited warranty that
14 was attached to the underlayment where Donnix only became
15 aware of this arbitration clause after purchasing the
16 material. The limited warranty is, it references a number
17 of products. It doesn't specify, specifically, the exact
18 type of underlayment. It has a line for plaintiff to sign.
19 It has a line for the contractor to sign. And it has marked
20 for what specific products that it applies to. There's no
21 way to even tell that this limited warranty applies to the
22 material installed at plaintiff's residence. It's not a
23 bulk sales contract. It is a limited warranty that was
24 provided to Donnix after the sale was completed.

25 Now, as I'm sure you are aware the Federal Arbitration

1 Act requires that arbitration clauses are governed by the
2 principle of contracts formation and here there has been no
3 meeting of the mind between Donnix and Tamko regarding the
4 arbitration clause. Without the meeting of the mind, the
5 arbitration clause cannot be enforced against Donnix. So
6 this is why we are opposing the motions and believe that it
7 would be inequitable and against judicial economy to force
8 Donnix to participate in an arbitration, in an arbitration
9 clause that he did not know about or even consent to until
10 after the product already purchased.

11 THE COURT: All right. Anyone else other than the
12 plaintiff, have an argument against arbitration or in favor
13 of the arbitration, if so, raise your right hand.

14 (Whereupon, no one is raising their hand)

15 THE COURT: All right. Mr. Kirchner, let hear from
16 you.

17 MR. KIRCHNER: Yes, sir. Thank you, judge. And we
18 filed a brief with an affidavit as well. So I'll rely on
19 that for purposes of the record and just try to hit the
20 highlights here.

21 I think you, your questioning, you picked up on
22 exactly the primary reason why we oppose the arbitration in
23 this matter. And if I can read from the Pearson case it
24 says, "Arbitration is a matter of contract and a party
25 cannot be required to submit to arbitration any dispute

1 which he has not agreed to so to submit." And so here, the
2 plaintiff has not agreed to submit any dispute to
3 arbitration. It has no agreement with Tamko whatsoever much
4 less an agreement to arbitrate. And I think the distinction
5 with the Pearson case as Ms. Stratta pointed out was an
6 employment matter where there was actually an employment
7 contract. Here there's no contract at all. And in the
8 Pearson case it talked about the non-signatory being bound
9 by a contract if it participant under the contract or
10 received the benefit of the contract. Here ---

11 THE COURT: Mr. Willis' argument is that there is
12 an appellate decision out there that says since you're
13 bringing in a breach of warranty claim that you're governed
14 by the provisions of the warranty that compel arbitration.

15 MR. KIRCHNER: And I think he's been incorrect in this
16 respect. I believe if we had brought a breach of express
17 warranty or a breach of contract claim, perhaps that
18 argument might fly, although, I disagree with that, but we
19 have not, Your Honor. We've brought a negligence claim, a
20 gross negligence claim, a strict liability claim, and a
21 breach of implied warranty claim. Not the express warranty
22 that he's relying on to try to compel us to arbitration.
23 The warranties that are implied in law such as the warranty
24 of merchantability, the warranty via fitness for a
25 particular purpose does have nothing to do with express

1 warranties or contracts. Those are implied in law. And
2 here, again, I think the distinction in Pearson is there's
3 a difference between non-signatory and a non-party and the
4 example I always give is your insurance policy, right. You
5 are a party to your insurance policy, but you don't sign
6 it. You're not a signatory to the insurance policy, but you
7 have your insurance policy, you pay your premium. If
8 there's a dispute under that insurance policy, you're bound
9 by its terms. But here, we're not a party to a contract
10 that we didn't sign. We're not a party at all period. So
11 we're not only a non-signatory, we're a non party. As Ms.
12 Stratta pointed out the document that they have, that
13 they've put in front of the court to purport a legal
14 requires to arbitrate lists twelve different products, none
15 of which is checked off. There's a blank for where the
16 material was purchased from. That's empty. There's a blank
17 for the owner's name. That's empty. My mind doesn't appear
18 anywhere on that document. There's a blank for the
19 contractors name. That's empty. There's a blank for the
20 contractors address, the city, state, zip. That's empty.
21 And there's a blank for the date that this product was
22 applied to my client's home. That's completely empty. And
23 this document is dated to 2009 some nine years before my
24 client's home was ever even constructed.

25 So again, judge, my client has no agreement with Tamko

1 as you mentioned. We have a contract with Buffington owes
2 the builder. And Buffington hired a subcontractor, Donnix
3 who purchased this material that presumably arrived on site
4 by delivery person and was installed on my client's home
5 and there are problems with it. She never, at any
6 agreement, to arbitrate with anyone. Had no agreement at
7 all with, with, with Tamko.

8 And again, even the Pearson case stands for the
9 proposition that in order to compel someone to arbitration
10 the very first inquiry is whether or not there is a valid
11 agreement to arbitrate which is a matter of contract law.
12 And here there's, there's no agreement with Tamko
13 whatsoever much less an agreement to arbitrate. And with
14 respect to One Bell Hall let me just clarify the
15 distinction there too. Ms. Stratta mentioned that there was
16 all sample agreement in that case which we don't have here.
17 The other thing in that case, judge, if you read the
18 opinion, the homeowners association through the developer
19 actually made a warranty claim. So they have problems with
20 their shingles, again this doesn't have anything with
21 shingles, this is the underlayment, it's, essentially,
22 melting, but they made a warranty claim. Tamko came out,
23 did an inspection, provided a warranty kit and then two
24 years later the association sued Tamko and Tamko rely on
25 the warranty that the homeowners had made a claim under. We

1 have no such similar fact here, judge. We didn't even know
2 this warranty existed until Tamko filed it as a part of
3 their motion. No claims ever made under the warranty. But
4 Ms. Petersen has not tried to avail herself under the
5 provisions of the warranty at all and, candidly, they're
6 not a benefit to her. It's very much a restriction on our
7 rights if you read the actual terms of the warranty.

8 So for those reasons, judge, and the reasons in our
9 brief, we don't believe we all need to compel to arbitrate
10 our claims against Tamko.

11 THE COURT: All right. Mr. Willis, anything in
12 reply?

13 MR. WILLIS: Yes sir, Your Honor. You don't need to
14 take my word for it as to what Pearson says, just, just
15 read the case. It makes it very clear that non-signatories
16 can be bound under these circumstances. In fact, it says
17 and I quote, "the rule in the Fourth Circuit is that a
18 broadly in arbitration clause applies to disputes that do
19 not arise under the governing contract when a significant
20 relationship exists between the asserted claims and the
21 contract in which the arbitration clauses contained." So,
22 obviously, there's a significant relationship between the
23 warranty that accompanies the sale of the product and the
24 fact that we're being sued for breach of implied warranty
25 by the plaintiff and breach of express and implied warranty

1 by Donnix. If their position is that there's no contract,
2 Your Honor, than their implied warranty claims and their
3 express warranty claims have to be dismissed. Those are
4 claims that sound in contract to under the UCC. So when
5 there's a sale of goods there is a contract created, a
6 sales contract and that the downstream users of that
7 product are a party to that contract or are third-party
8 beneficiaries of that contract and that's under UCC 36-2-
9 314 through 318. I mean, it's interesting to hear Donnix
10 say there's no contract when they allege affirmatively in
11 their counter, in their cross-claim in Paragraph 121, "upon
12 information and belief Tamko building products contracted
13 with defendant to furnish all materials and then they sue
14 for breach of express warranty which is a contract and
15 breach of implied warranties which is a contract." So, Your
16 Honor, with all due respect there is a contract here. It's
17 a sales contract. Ms. Stratta says, well, there's no bulk
18 sales agreement. Well, that, that's what they, that's what
19 the courts call the sales contracts. There's not a separate
20 agreement. When the way it works is when the -- now, these
21 are all construction lawyers on this call, Your Honor, they
22 know how it works. But when a subcontractor goes to install
23 materials he orders materials from a distributor, those
24 materials are delivered, and they come with a warranty on
25 the materials. So Donnix knew precisely what materials it

1 had purchased from, from, um, through the distributor from
2 Tamko and the warranty, itself, is on the role of
3 underlayment and that appears in our affidavit. It's also
4 on the website. And this warranty was written in 2009. Now,
5 there's not a -- the comment that it was dated in 2009,
6 that just when the warranty was written. There's, there's -
7 - you don't write a separate warranty for each transaction.
8 So, Your Honor, there clearly is a contract and if there's
9 not then, we ought to be dismissed also.

10 The unauthenticated issue just doesn't make any sense.
11 The document authenticated by the affidavit. It's
12 authentic. And this is the warranty that's on the
13 underlayment that was placed in Ms. Petersen's house. And
14 that for counsel to say, well, we don't know what it
15 applies to, I mean, by its very terms it applies to the
16 underlayment as well as other products. As I said it
17 doesn't need to be filled out. I mean, Tamko doesn't fill
18 this out, Your Honor. They don't know who that goes to.
19 They sell through a distributor, the distributor then
20 supplies it to the worksite. If someone wants to fill out
21 the blanks in the, in the warranty that's up to Donnix to
22 do that. The fact that they didn't do it doesn't matter as
23 to the enforceability of the warranty. The fact that they
24 don't, that the plaintiff's don't sue an expressed
25 warranty, but only an implied warranty, also doesn't

1 matter. You can get around limitations in an implied
2 warranty by not suing on it. And, I guess, Your Honor,
3 probably the best case that explains that is Judge
4 Traxler's very lengthy opinion in The Myrtle Beach pipeline
5 case. I'm happy to supply that to the court, but it
6 explains how that process works. And I'm ---

7 THE COURT: I mean, that was, that was a trial
8 court decision. That wasn't appellate decision, was it?

9 MR. WILLIS: It was a, it was appealed to the
10 Fourth Circuit, Your Honor, and affirm by the Fourth
11 Circuit.

12 THE COURT: Okay.

13 MR. WILLIS: So I can, I can submit that to you. And
14 you've probably read that case. I mean, it's a, it's a,
15 it's a very interesting and long opinion that deals with
16 limited warranties, expressed warranties when they can be
17 enforced, when they can't, and the reason of the Economic
18 Loss Rule Bars Tort Claims like the claims that have been
19 asserted in this case. I mean, that's really not before,
20 Your Honor, but it's an interesting case. And I've actually
21 got it here. I can give you the citation if the court needs
22 it.

23 THE COURT: No. That's all right. What I'm gonna
24 do is I'm gonna have to take this under advisement, do some
25 research myself, read the case y'all've mentioned, check

1 your briefs. I have Mr. Kirchner and Mr. Willis, if both of
2 y'all would submit proposed orders. Certainly Mr. Willis,
3 yours that grant the motion. Mr. Kirchner yours that denies
4 the motion and the basis, while I did my research. And if
5 you could send this to me, email them to me in Word form so
6 if I need to make any changes or anything, I can adapt them
7 as I deem appropriate. But, otherwise, I think I'm just
8 gonna take the motion under advisement, okay.

9 MR. KIRCHNER: We're glad to do that, Your Honor.

10 MR. WILLIS: Thank you.

11 MR. KIRCHNER: Thank you. Thank you for your
12 attention.

13 THE COURT: All right. Next, we have motion to
14 compel discovery, whose motion is that?

15 MR. RIBOCK: Your Honor, this is Adam Ribock. I
16 represent Buffington Homes. I believe that was my motion to
17 compel A Unique Designs discovery responses. They have
18 provided those discovery responses to me and, therefore,
19 the motion can be withdrawn.

20 THE COURT: All right. Now, we have a motion to
21 stay discovery, whose is that? Filed on April 6, 2022,
22 motion for protection to stay discovery. Anybody know
23 whose that it?

24 MR. WILLIS: Your Honor, I believe that's our
25 motion. I apologize for not jumping right in. So we were

1 sent standard discovery requests. And because the case law
2 is pretty strict on voluntary participation in a piece of
3 litigation waives an arbitration clause, we moved to stay
4 that discovery until, Your Honor, could decide ---

5 THE COURT: Oh, okay.

6 MR. WILLIS: --- the motion to arbitrate. And if,
7 Your Honor, denies the motion to arbitrate and we elect not
8 to appeal it, we'll certainly respond to that discovery.
9 It's reasonable and we have no objection to it.

10 THE COURT: All right. Let's do this then, Mr.
11 Willis in your proposed order on the motion to compel
12 arbitration, you would certainly put that the motion for
13 protection is granted. Mr. Kirchner, in yours you would put
14 that the motion for protection for discovery is denied. Am
15 I ---

16 MR. WILLIS: Thank you, Your Honor.

17 THE COURT: Am I understanding that correctly?

18 MR. KIRCHNER: With respect to that motion, judge, we
19 have no objection to it while this decision is pending. We
20 don't expect them to answer our discovery. So we got no
21 objection to that.

22 THE COURT: All right. All right. We'll handle it
23 that way, then. All right. Thank y'all very much.

24 (CONCLUSION OF HEARING HELD ON JUNE 2, 2022)

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Ninth Circuit for Charleston County, South Carolina, on the 2nd day of June, 2022.

That said proceedings are transcribed to the best of my ability from the audio recording and supporting information.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

s/ Lisa S. Carter

Lisa Carter

Circuit Court Reporter

July 22, 2022