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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

Case No. 2020-CP-46-03592

Summerlake Townhomes Homeowners Association, Inc., et al.

Respondent,

v.

True Homes, LLC, et al.,

Appellant.

INITIAL BRIEF OF APPELLANT

September 26, 2022

WOLFE, CAMPBELL, GUNST & HINSON, PLLC

Brian E. Wolfe (SC State Bar No. 77463)
Robert C. Gunst, Jr. (SC State Bar No. 102957)
Joshua R. Hinson (SC State Bar No. 102270)
215 Queens Road, Suite 200
Charlotte, NC 28204
P: (704) 827-3774
F: (252) 408-6859
bwolfe@wolfe-campbell.com
rgunst@wolfe-campbell.com
jhinson@wolfe-campbell.com

Attorneys for Appellant True Homes, LLC

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5. **Did the circuit court err where the reasoning in *Bradley* is no longer supported by the obvious affects regional homebuilders have on interstate commerce?**

STATEMENT OF THE CASE

On November 25, 2020, Plaintiffs Susan Hagy and Karin Fuentes, individually and on behalf of others similarly situated along with the Summerlake Townhomes Homeowners' Association, Inc. (collectively "Respondents"), filed a Summons and Complaint against True Homes, LLC and several other defendants, alleging there are construction defects at the Summerlake Townhomes in York County, South Carolina. (R. ___). Respondents subsequently filed an Amended Complaint on January 31, 2022. (R. ___).

On February 15, 2022, True Homes filed a Motion to Stay and Compel Arbitration of the individual plaintiffs', pursuant to purchase agreements between the property owners and True Homes. (R. ___). On May 17, 2022, the Honorable William A. McKinnon held a hearing on Appellant's motion. (R. ___). The Court denied Appellant's motion by order dated June 20, 2022. (R. ___). Appellant timely filed and served a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on June 30, 2022. (R. ___). The Court denied Appellants Motion for Reconsideration by Form-4 Order dated August 1, 2022. (R. ___).

Appellant timely served its Notice of Appeal on August 10, 2022. (R. ___).

STANDARD OF REVIEW

"Whether a claim is arbitrable 'is an issue for judicial determination, unless the parties provide otherwise.'" *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 573, 828 S.E.2d 82, 85 (Ct. App. 2019) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "The appellate court reviews the circuit court's determination of whether a claim is arbitrable under a de novo standard." *Id*. "'However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings.'" *Id*. (quoting *Timmons v. Starkey*, 380 S.C. 590, 595, 671 S.E.2d 101, 104 (Ct. App. 2008)).

FACTS

True Homes is a residential homebuilder serving communities in North and South Carolina. (R. ____). True Homes is a Delaware corporation, with its principal place of business in Monroe, North Carolina. (R. ____). Beginning in June 2013, True Homes began purchasing lots and constructing townhomes in a project now known as Summerlake Townhomes ("the Project"). (R. ____). By 2016, True Homes completed 101 units at the Project using several different subcontractors to complete the construction. (R. ____). Many of those subcontractors are incorporated and do business outside of South Carolina. (R. ____). Additionally, True Homes supervised its subcontractors using employees from its office in Monroe, North Carolina and provided additional support from that office during and after construction, including providing warranty support to its customers. (R. ____).

True Homes is a successful builder, in part because of the quality of its construction. However, True Homes relies upon its ability to resolve any rare disputes with its customers in a cost-efficient manner when it prices its homes. (R. ____). Purchasers of townhomes in the Project agreed to a cost-efficient alternative dispute process, namely arbitration, when they

purchased their respective townhomes. Plaintiff Fuentes signed an agreement which includes the following applicable provisions:

1. "This agreement is a negotiated document and shall be deemed to have been drafted jointly by the parties, and no rule of construction or interpretation shall apply against any particular party." (R. ___).
2. "Buyer acknowledges receipt of the sample Warranty Policy provided at the point of contract." (R. ___).
3. "The parties agree to abide by the Mediation and Arbitration provisions contained in the Warranty Policy." (R. ___).
4. "SELLER AND BUYER KNOWINGLY AND VOLUNTARILY AGREE TO SUBMIT ANY WARRANTY DISPUTES FOR RESOLUTION IN ACCORDANCE WITH THE PROCESS DESCRIBED IN THE LIMITED WARRANTY BOOKLET, INCLUDING WITHOUT LIMITATION, BINDING ARBITRATION, AND, AS TO SUCH DISPUTES, BUYER AND SELLER EACH WAIVES THEIR RESPECTIVE RIGHT TO TRIAL BEFORE A JUDGE OR JURY." (R. ___).

Additionally, Fuentes signed an application on October 24, 2014 with Professional Warranty Service Corporation to register a warranty provided by True Homes. That application included a provision indicating

> I/we acknowledge and agree all disputes under and relating to the Builder's Limited Warranty (including disputes on which issues shall be submitted to arbitration; alleged breach of the Builder's Limited Warranty; and alleged violations of statutes or regulations relating to consumer protection or unfair trade practices) shall be submitted to binding arbitration before an independent third party arbitration organization. I/we agree the decision of the arbitrator(s) shall be binding on all parties. Any such binding arbitration(s) shall be conducted in accordance with the rules and procedures applicable to the arbitration organization hearing the dispute or, where those rules are silent, the United States Arbitration Act (9 U.S.C. § et seq.). (R. ____).

Mr. Fuentes is one of two named plaintiffs asserting these construction defect claims on behalf of a putative class of all townhome owners in Summerlake.[1] It is True Homes' understanding that the claims asserted by Ms. Fuentes are solely the claims asserted for damage

[1] Plaintiff has filed a notice of voluntary dismissal of claims brought by Ms. Hagy and has added several new individual plaintiffs to this matter.

to elements owned by Mr. Fuentes, individually. The Summerlake Townhomes Owners Association is also asserting claims against True Homes and others for damage to common elements at the Project. (R. ___). True Homes denies these allegations and has asserted various defenses to them.

True Homes now seeks the benefit of its bargain with Mr. Fuentes by asking this court to compel his individual claims to arbitration. Plaintiff seeks to enforce rights which arise from the contract itself—he should not be allowed to circumvent portions of the contract with which they no longer agree.

ARGUMENTS

"The policy of the United States and South Carolina is to favor arbitration of disputes." *Zabinsky v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The Federal Arbitration Act "makes arbitration agreements 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1426 (2017) (quoting 9 U.S.C.A. § 2). "That statutory provision establishes an equal-treatment principle: A court may invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability, but not on legal rules that 'apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.'" *Id.* (quoting *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). "[T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his or her right of access to the courts and right to a trial by jury." *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 566-67, 813 S.E.2d 292, 304 (Ct. App. 2018).

Here, the circuit court determined, as a matter of law, that "the Federal Arbitration Act ("FAA") does not apply because True Homes' purchase agreement at issue here is a transaction involving intrastate, rather than interstate commerce as required for the FAA to apply." The

circuit court erred as a matter of law in so determining.

1. **Did the circuit court err in finding the FAA did not apply where the Parties expressly agreed it would?**

A great deal of the briefing to the circuit court prior to the hearing on True Homes' motion dealt with how True Homes' construction and sales activities affect interstate commerce; however, it is important to note that the *Damico* Court had two bases for its decision that the FAA applied to the arbitration agreement at issue: (1) out-of-state contractors and suppliers were involved in the construction of the home; and (2) the parties "specifically agree[d] that [the] transaction involves interstate commerce." *See Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020), *overruled on other grounds, Damico v. Lennar Carolinas, LLC,* Op. No. 28114 (S.C. Sup. Ct. filed Sept. 14, 2022) (Howard Adv. Sh. No. 33 at 87).[2] Similarly, the Order analyzes whether the contract is for the construction of a home but fails to recognize the arbitration agreement Mr. Fuentes signed specifically references the FAA. In fact, the Order indicates, "[h]ere, True Homes' purchase agreement does not mention the FAA." (R. ___).

In signing the PA, Mr. Fuentes "acknowledge[d] a receipt of the sample Warranty Policy provided at the point of contract." (R. ___).[3] He further agreed "to abide by the Mediation and Arbitration provisions contained in the warranty policy." (R. ___). In two separate places, that

[2] Importantly, the Supreme Court did not find this Court erred in finding the arbitration agreement at issue in Damico involved interstate commerce, rather, the court noted "[t]he transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes." See Damico, (Howard Adv. Sh. No. 33 at 95).

[3] In his brief in opposition to the motion to compel, Mr. Fuentes asserted the purchase agreement merged into the deed and is no longer enforceable. Mr. Fuentes ignores Section 17 of the PA, where the parties agreed "The terms of this Agreement will survive the Closing." (R. ___). *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) ("Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing."

warranty policy notes the applicability of the FAA.

First, in signing the warranty application on the day he closed on his new townhome, Mr. Fuentes agreed

> I/we acknowledge ad agree that all disputes under and relating to the Builder's Limited Warranty (including disputes on which issues shall be submitted to arbitration; alleged breach of the Builder's Limited Warranty; and alleged violations of statutes or regulations relating to consumer protection or unfair trade practices) shall be submitted to binding arbitration before an independent third party arbitration organization. I/we agree the decision of the arbitrator(s) shall be binding on all parties. *Any such binding arbitration(s) shall be conducted in accordance with the rules and procedures applicable to the arbitration hearing the dispute or, where those rules are silent, the United States Arbitration Act (9 U.S.C. § et seq.).* (emphasis added)

(R. ____). Similarly, in the Builder's Limited Warranty booklet he received at the point of contract, he agreed "[t]he award of the arbitrator will be final, binding and enforceable as to both YOU and US or OUR insurer, except as modified, or vacated in accordance with the applicable rules and procedures of the designated arbitration organization, or, in their absence, the United States Arbitration Act (9 U.S.C. § 1 et seq.)". R. _____).

Based on the language in this agreement, the parties both intended the rules and procedures of the FAA would apply. That contractual term should be honored.

The *Damico* court's analysis supports True Homes' position. Prior to evaluating the actual effects on interstate commerce, the Damico court held the parties had already agreed the FAA would apply and found "[w]e must enforce this agreement like any other contract term." *Damico*, 430 S.C. at 196, 844 S.E.2d at 70. The contractual term in *Damico* included the following: "[t]he parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute . . . shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provide by the Federal Arbitration Act . . . ." Id. at 195, 844 S.E.2d at 70.

Mr. Fuentes and True Homes specifically incorporated the FAA into their agreement. Now, True Homes seeks the benefit of that bargain. Just as in *Damico*, this court should reconsider its previous ruling and compel arbitration of this dispute.

2. Did the circuit court err in finding the plain language of the Purchase Agreement (PA) assumes the townhome was completed, where no evidence supports such a finding?

The circuit court also found that the PA focuses on the sale of a home, which forecloses the applicability of the FAA to this transaction. The Order focuses on one term from the PA to support its conclusion—that the document is entitled "HOME PURCHASE AGREEMENT." Reliance upon this one term to find the contract is one for the sale of real estate, rather than the construction and sale of a home, ignores the remainder of the document, which specifically contemplates the home may not be constructed at the time of contracting. *Buice v. WMA Securities, Inc.*, 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct. App. 2008) ("[I]n determining the intent of the contracting parties, the court should construe the contract as a whole, and read together different provisions dealing with the same subject matter.").

For example, the PA's first section provides "Seller agrees to Sell and Buyer agrees to purchase the homesite below subject to all restrictions, covenants and easements (the "Homesite") and all buildings or improvements *to be constructed or installed* thereon according to this Agreement." (emphasis added). (R. ___). Under the heading "**Construction**" True Homes agreed it "will build or has built a home for Buyer according to this Agreement and Seller's standard procedure" (R. ___) and even contemplates a delayed closing because of construction issues (R. ___). The PA noted Mr. Fuentes had the right to inspect the home with True Homes employees prior to closing and may employee a third-party inspector to provide an inspection. (R. ___). Finally, the PA anticipates there may be requested punch work up to and following closing. "Incomplete items may be completed at Seller's expense post-Closing if necessary, so long as the Home is materially complete, as evidenced by the certificate of occupancy and

availability of power, gas, and water." (R. ___). Although "showroom changes" were not available, Mr. Fuentes could choose to add blinds, add appliances, or add a garage door opener if he wished to do so. (R. ___).

The Order does not analyze this language in its discussion of the character of the contract. Instead, the Order concludes, based on the title of the agreement and the fact that the home was under construction when the PA was signed is conclusive evidence that the essential character of the PA was strictly for the sale of real estate rather than the construction of an improvement to real property. (R. ___). No case in South Carolina can be found to stand for that proposition. However, as noted above, the PA contemplates that a home would need to be constructed in order for it to be sold. This document is not a standard residential purchase agreement for a pre-existing structure. This PA, by its plain terms, includes both the construction and sale of a home.

The Order, however, indicates the court's decision in *Bradley v. Brentwood Homes, Inc.*, 398 SC. 730 S.E.2d supports a finding that "'ancillary factors' like a national warranty and out-of-state financing do not result in a transaction involving interstate commerce where the plaintiff does not assert claims under the national warranty." (R. ___). The Court's analysis, respectfully, was misguided. The Order itself reflects some of the ways this case differs from *Bradley*. "True Homes contends that it is a non-South Carolina entity, True Homes' employees located outside South Carolina were used to perform warranty work, and in other ways the provision and performance of the warranty involved interstate commerce." (R. ___). It is not simply the provision of a warranty document which is important here. Mr. Fuentes availed himself of the warranty process following closing. (R. ____).

Additionally, the entity seeking to enforce the arbitration agreement in *Bradley* acted solely as the seller, not the contractor. It is self-evident a contract to sell real estate, entered into with an entity which did not construct the home, was not involved in any repairs to the home, and did not communicate with the homeowner regarding warranty requests, does not affect

interstate commerce. However, that is simply not the case before this Court.

The United States District Court for the District of South Carolina has analyzed *Bradley* and found a contract similar to True Homes' PA affects interstate commerce. *See Bernstein v. Pulte Home Company, LLC*, c/a 0:19-cv-02805-JFA (D.S.C. December 23, 2019) (R. ____). The plaintiffs in *Pulte* made the same arguments advanced here and adopted in the Order—"the essential character of the Purchase Agreement is that of a real estate transaction because the agreement was titled 'Home Purchase Agreement' and included statements such as: "Seller agrees to sell and Buyer agrees to purchase a single family home (the 'Home') located on the lot described below (the 'Lot'). (R. ___). Additionally, the *Pulte* plaintiffs asserted "the Limited Warranty is likewise not subject to the FAA because it merely offers for repairs to be provided by Pulte to South Carolina homes and thus does not affect interstate commerce." (R. ___).

Judge Anderson distinguished *Bradley* and compelled the plaintiffs to arbitrate their dispute with Pulte. Judge Anderson noted several provisions of the purchase agreement which support finding an effect on interstate commerce, including: (1) the purchase agreement "clearly states '[t]he Home will be constructed by Pulte Home Corporation;" (2) "[Pulte] would be pleased to show Buyer homes under construction in the community;" (3) the Plaintiffs could "select options and upgrades." These contract terms were sufficient to call into doubt whether the essential character of the Pulte agreement was solely for the purchase of an already complete home. (R. ___). .

Judge Anderson then noted the overwhelming evidence that the actual construction of the home did involve interstate commerce through the use of out-of-state suppliers and contractors. (R. ___). Further, the *Pulte* Court noted there was "further, albeit unnecessary, support [for finding an effect on interstate commerce] . . . when considering that all homeowners are from states different than Pulte; mortgage funding came from out-of-state lenders; and title agents and realtors were located outside of South Carolina." (R. ___). Based on these facts,

Judge Anderson compelled arbitration.

The facts here are similar. As noted above, the contract language demonstrates the homes were sold prior to their completion. Mr. Fuentes had the opportunity to tour his home during construction and have a third-party inspection prior to closing. Mr. Fuentes made requests for repairs and those repairs were performed by out-of-state contractors. (R. ___). Mr. Fuentes used an out-of-state attorney to close his loan and financing was provided from out-of-state lenders. (R. ___). True Homes is a North Carolina corporation and used contractors and suppliers from outside of South Carolina. (R. ___). Accordingly, the purchase agreements at issue here are not "strictly for the purchase of a completed residential dwelling" and the FAA should apply.

3. Did the circuit court err where the Undisputed Facts Show Mr. Fuentes actually entered into the initial agreement with True Homes prior to completion of his townhome?

The Order indicates that, based solely on the fact that True Homes had begun constructing Mr. Fuentes' home prior to Mr. Fuentes signing an agreement to purchase the home, the essential character of the PA must have been for the sale of the home, not the construction of the home. (R. ___). This analysis drastically extends the Court's holding in *Bradley* and is unsupported by any South Carolina case law.

Initially, it is important to note the contract Mr. Fuentes signed to purchase lot 71 at the Project, was not the only contract he signed to purchase a home in Summerlake. (R. ___). In fact, one month prior to signing the contract for Lot 71, Mr. Fuentes signed a contract for the purchase of Lot 7. (R. ___). When Mr. Fuentes signed that first contract on July 19, 2014, the townhome he eventually purchased had not yet passed inspections for Rough Framing, Rough Electrical, Rough Plumbing, Rough Mechanical, House Wrap, Insulation, or any Final Inspections. (R. ___). It is unlikely a customer would mistake a home which had no siding on it for a completed structure.

This evidence demonstrates Mr. Fuentes knew or should have known he was signing a contract for a home not yet built. The Order indicates "True Homes was constructing the townhome regardless of whether that original purchaser signed the purchase agreement, and therefore, the purchase agreement cannot have been a contract for the construction of a townhome." (R. ___). There is no evidence to support this conclusory statement and it makes no difference. The question is whether the agreement was "strictly for the purchase of a completed residential dwelling." Based on these facts, it was not.

4. Did the circuit court err in finding *Bradley* controls where Mr. Fuentes took advantage of warranty services performed by out-of-state contractors?

The Order focuses its attention on the discussion in *Bradley* wherein the court noted the provision of a warranty managed by an out-of-state provider was not sufficient to affect interstate commerce and trigger the FAA. However, as noted during the hearing on True Homes' motion to compel arbitration, Mr. Fuentes has a history of availing himself of the warranty provision within his agreement, utilizing the North Carolina call center True Homes has established to handle warranty requests and several out-of-state repair contractors to evaluate and fix various issues. (R. ___).

In 2016, Mr. Fuentes began contacting True Homes employees in North Carolina seeking assistance with warranty items. (R. ___). Mr. Fuentes reported issues relating to his bathroom plumbing, a lack of caulk around the exterior HVAC exhaust vent, water issues leaks at the front elevation of the home, and repair of drywall and molding. These complaints resulted in several meetings at his home with out-of-state contractors and work orders to fix various items(R. ___).

Mr. Fuentes' use of the warranty process takes this matter outside the Brentwood context. True Homes did not simply provide Mr. Fuentes with a home warranty—True Homes serviced that warranty and provided repairs. Mr. Fuentes' requests and True Homes' responses clearly affect interstate commerce and are sufficient to trigger the FAA.

5. Did the circuit court err where the reasoning in *Bradley* is no longer supported by the obvious affects regional homebuilders have on interstate commerce?

The *Bradley* court pronounced that generally, the development and sale of residential real estate is an intrastate activity that does not implicate the FAA in 2012. *See Bradley*, 398 S.C. at 458, 730 S.E.2d at 317. While a decade is a short time in the history of our state, the increase in home construction by regional and national homebuilders in the last ten years calls into question the continued validity of the court's holding.

As the *Damico* court recognized, "[t]he 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." *Damico*, 430 S.C. at 196, 188 S.E.2d at 70. "In deciding whether a transaction involves 'commerce in fact' sufficient to trigger the FAA, [the court] examine[s] 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 'he functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.'" *Id*. (quoting *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (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." *Id*. (quoting *United States v. Morrison*, 529 U.S. 598, 609, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

In creating a categorical rule that the sale of real estate, no matter the facts, does not affect interstate commerce, the *Bradley* decision creates a different treatment for arbitration provisions within these contracts. That disparate treatment has been specifically prohibited by both the South Carolina Supreme Court and the United States Supreme Court. *See Lackey v. Green Tree*

Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (1998) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996)) ("In construing an arbitration clause, the Supreme Court has also made it clear that states may not treat arbitration clauses differently from other contract provisions. 'Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'")

The home at issue here would not have been built but for the use of out-of-state partners and suppliers. The warranties provided would not have been available for Mr. Fuentes to use if not for out-of-state repair contractors and the North Carolina warranty center. These facts demonstrate the construction and sale of this home, mere miles away from the North Carolina border, affects interstate commerce. To hold otherwise is holding this arbitration provision to a much stricter standard than other contractual provisions.

CONCLUSION

For the reasons stated, this court should reverse the judgment of the circuit court and remand this matter with instructions to enter an order staying this matter until the claims by Mr. Fuentes, and the similarly situated putative class members, are determined through arbitration, as required by their contract with True Homes.

[SIGNATURE PAGE TO FOLLOW]

s/ Joshua R. Hinson

WOLFE, CAMPBELL, GUNST & HINSON, PLLC

Brian E. Wolfe (SC State Bar No. 77463)
Robert C. Gunst, Jr. (SC State Bar No. 102957)
Joshua R. Hinson (SC State Bar No. 102270)
215 Queens Road, Suite 200
Charlotte, NC 28204
P: (704) 827-3774
F: (252) 408-6859
bwolfe@wolfe-campbell.com
rgunst@wolfe-campbell.com
jhinson@wolfe-campbell.com

Attorneys for Appellant True Homes, LLC