THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Appellate Case No. 2022-000938

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 Boulevard Residence Trust II dated December 7, 2012, Respondent,

v.

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, Defendants,

of which Donnix Construction is the Respondent and TAMKO Building Products, LLC is the Appellant.

INITIAL BRIEF OF RESPONDENT, 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 BOULEVARD RESIDENCE TRUST II DATED DECEMBER 7, 2012

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INTRODUCTION

Through this appeal, Appellant Tamko Building Products, LLC ("TAMKO"), urges this Court to ignore the well-settled principle that no party may be compelled to arbitrate a claim without his or her consent. As the record below reveals, the circuit court properly determined that TAMKO failed to meet its burden to prove that Respondent Denise M. Petersen[1] should be compelled to arbitrate her claims against TAMKO for the simple reason that Ms. Petersen never agreed to do so. Ms. Petersen had no agreement whatsoever with TAMKO, never dealt with TAMKO at all, never sought to enforce the limited warranty that contains the arbitration provision (because she did not know it existed), and she did not assert any contract-based claims against TAMKO based on its supposed limited warranty.

Ignoring these plain facts, TAMKO argues the doctrine of equitable estoppel requires Ms. Petersen to arbitrate her claims against it. As shown herein, there is simply no basis in law or fact to compel Ms. Petersen to arbitrate her claims against TAMKO, which arise by operation of law from its product's complete failure.

[1] Ms. Petersen brought this action individually and in her capacity 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 Boulevard Residence Trust II dated December 7, 2012. For convenience, these parties are collectively referred to herein as "Ms. Petersen."

ISSUE ON APPEAL

I. DID THE CIRCUIT COURT PROPERLY DENY TAMKO'S MOTION TO COMPEL ARBITRATION WHERE MS. PETERSEN NEVER AGREED TO ARBITRATE AND NEVER AVAILED HERSELF OF ANY BENEFITS OF TAMKO'S PURPORTED LIMITED WARRANTY TO JUSTIFY THE APPLICATION OF EQUITABLE ESTOPPEL?

RELEVANT FACTS AND PROCEDURAL POSTURE

This appeal arises from a residential construction defect lawsuit. Denise M. Petersen hired DCTCL, L.P. d/b/a Buffington Homes, L.P. ("Buffington")[2] as her general contractor to construct her residence on Kiawah Island in Charleston County. (Complaint, ⁋⁋ 1, 20). Buffington, in turn, subcontracted with Donnix Construction, LLC ("Donnix") to install the roof, related flashing, and waterproofing components used in the roofs and decks at the residence. (Complaint, ⁋ 21).

TAMKO is a bulk manufacturer of building materials, primarily involving shingles, underlayments and membranes. (Trans., p. 7). TAMKO manufactured a TW Metal and Tile Underlayment (the "Underlayment"), a material that goes under shingles and metal roofs. (Trans., p. 8). During the course of construction, Donnix purchased TAMKO's Underlayment from a third-party distributor and later incorporated it into the roof of Ms. Petersen's residence. (Complaint, ¶ 21) (Petersen Memo. in Opp, p. 2) (App. Brief, p. 4). Post-construction, TAMKO's Underlayment began to fail, causing it to ooze[3] from beneath the shingles, pooling on the surface of the roof and dripping onto the home's exterior. (Petersen Memo. in Opp, pp. 2-3) (Trans., pp. 8-9).

[2] Buffington is not a party to this Appeal. Numerous other parties are named in the action, but they also are unaffected by this appeal.

[3] TAMKO's counsel acknowledged the problem with the Underlayment. ("[T]his is an issue that that Tamko has had with a couple, with some of the batches of underlayment that it manufactured. The polymer was changed and it didn't work and so they went back to the old polymer. And so this particular underlayment falls, probably falls within that batch."). (Trans., pp. 8-9).

TAMKO asserts that it includes a limited warranty containing an arbitration clause as part of the bulk sale of its products. (Trans., p. 12; Motion to Compel). Because TAMKO does not sell its products directly to consumers, like Ms. Petersen, it does not know who its limited warranty ultimately goes to. (App. Brief, p. 5) (Trans., p. 27). When TAMKO receives an order, the product is shipped to the distributor's location, not the home where it will be installed. (App. Brief, p. 5). Thus, it is only *after* the Underlayment is purchased—by Donnix in this instance— through the third-party distributor, that the product is delivered to the homesite, purportedly with the limited warranty included. (Trans., pp. 16, 18-19).

According to Donnix, it was unaware of TAMKO's limited warranty and its arbitration provision until the Underlayment had been purchased and delivered to the residence. (Trans., pp. 18-19). TAMKO acknowledges that a homeowner, like Ms. Petersen, would not see the limited warranty on the product packaging received by Donnix. (Trans., p. 16) ("No sir. The homeowner doesn't see this."). In fact, TAMKO is aware that homeowners, like Ms. Petersen, frequently do not even know a warranty exists. (Trans., pp. 12-13). Despite admitting that Ms. Petersen had no knowledge of TAMKO's limited warranty at the time the purchase of the Underlayment is made by Donnix through TAMKO's third-party distributor, TAMKO still contends a homeowner like Ms. Petersen "has no choice" but to be bound to its limited warranty, and the arbitration provision therein, which TAMKO admits is a contract of adhesion. (Trans., p. 13).

Ms. Petersen brought this action in the Charleston County Court of Common Pleas alleging serious construction defects and resulting damages to her residence. Among the named Defendants were Appellant TAMKO and Respondent Donnix. Ms. Petersen's Third Amended Complaint sets forth causes of action against all named Defendants for negligence, gross negligence, and breach of implied warranties. (Third Amended Complaint, pp. 9-13). Against TAMKO only, Ms. Petersen

asserted additional claims arising in products liability relating to its defective Underlayment. (Third Amended Complaint, pp. 13-17).

Donnix answered and asserted cross-claims against TAMKO for negligence/gross negligence, products liability (for breach of express and implied warranty), equitable indemnity, breach of implied contract, and contribution. (Donnix Answer).

TAMKO, on the other hand, moved to dismiss the lawsuit, arguing Ms. Petersen and Donnix must arbitrate their respective claims against TAMKO. (Mot. to Compel). TAMKO included a blank copy of the purported limited warranty with its motion. (Motion to Compel, Ex. A). None of the designated lines of the form are filled out with respect to Ms. Petersen' project, nor did Ms. Petersen sign in the space provided. Information regarding purchase dates, application dates, and product information is wholly lacking. (Motion to Compel, Ex. A).

TAMKO also submitted an affidavit of Gerry Ross, stating in relevant part that TAMKO has no records of a direct sale of the Underlayment to Ms. Petersen's residence. It is undisputed that Ms. Petersen never sought any benefits under the limited warranty. In his affidavit, Mr. Ross confirmed that TAMKO never received any warranty claims related to its Underlayment at Ms. Petersen's residence. (Ross Affidavit).

Donnix opposed TAMKO's motion to compel arbitration, challenging the enforceability of TAMKO's purported arbitration provision. (Donnix Memo. in Opp.). Ms. Petersen likewise opposed TAMKO's motion and submitted her own memorandum of law. (Petersen Memo. in Opp.). Ms. Petersen also provided a sworn statement that she never saw a copy of TAMKO's limited warranty prior to TAMKO attaching it to the motion to compel. (Petersen Affidavit).

TAMKO'S motion was heard before the Honorable Benjamin Culbertson, who after considering the arguments, record, and briefs, entered an order finding that neither Ms. Petersen

nor Donnix should be compelled to arbitration. (Order). TAMKO then moved for reconsideration pursuant to Rule 59(e), SCRCP. (Mot. to Reconsider). While that motion to reconsider was pending, TAMKO filed an Answer to the Third Amended Complaint, denying[4] all the claims asserted against it. (TAMKO Answer).

The circuit court denied TAMKO'S motion for reconsideration without a hearing. (Order Denying Mot. for Reconsideration). 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). The Court of Appeals reviews the circuit court's determinations of arbitrability *de novo*, "but will not reverse a circuit court's factual findings reasonably supported by the evidence." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020).

"Whether an arbitration agreement may be enforced against a nonsignatory to the agreement is a matter subject to *de novo* review by an appellate court." *Wilson v. Willis*, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id*.

ARGUMENT AND CITATION OF AUTHORITY

This appeal confronts the narrow issue of when, and under what circumstances, a nonsignatory may nevertheless be compelled to participate in arbitration. It is uncontested that Ms. Petersen never saw the limited warranty containing TAMKO's arbitration provision prior to

[4] TAMKO's blanket denials seem at odds with its admission on the record that its new polymer "didn't work." (Trans., pp. 8-9).

TAMKO moving to dismiss her claims against it. Nevertheless, TAMKO asserts the doctrine of equitable estoppel binds Ms. Petersen to arbitrate her claims against it.

As the proponent of arbitration, TAMKO has the burden to establish the existence of an agreement to arbitrate Ms. Petersen's claims against it or grounds to justify why equitable estoppel should apply. However, TAMKO failed to do so, and the circuit court's order denying TAMKO's motion to compel arbitration should be affirmed. (Order).

I. TAMKO RELIES ON ARGUMENTS AND MATERIALS THAT ARE NOT PRESERVED FOR APPEAL.

Rules of issue preservation are "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000). It was therefore incumbent upon TAMKO to timely introduce whatever evidence and arguments it wished for the circuit court to consider prior to the circuit court deciding the matter.

For context, when TAMKO moved for reconsideration of the Order denying its motion to compel arbitration, its motion correctly explains that Rule 59 allows "a party one final chance not only to call the court's attention to a possible misapprehension of **an earlier** argument, but also to **revisit a previously raised argument**. (Mot. to Reconsider, p. 2) (citing *Elam v. S.C. DOT*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004)) (emphasis added). Thus, Rule 59 allowed TAMKO to ask the circuit court to *reconsider* arguments and points it *previously* made. However, Rule 59 does not permit TAMKO to introduce *new* arguments and evidence.

"A party cannot use Rule 59(e), SCRCP, to present to the trial court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (1990). *Accord Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994); *Commercial Credit Loans, Inc., v. Riddle*, 334 S.C. 176, 512 S.E.2d 123 (Ct.

App. 1999). Yet, this is precisely what TAMKO has done. Several of TAMKO's arguments, and certain exhibits relating to them, were not presented to the circuit court until *after* it entered an order denying TAMKO's motion to compel. This is improper.

First, on page 11 of its Brief, TAMKO contends that Ms. Petersen had "constructive notice" of TAMKO's limited warranty by virtue of her contract with Buffington, and Buffington's subcontract with Donnix, which TAMKO belatedly claims assigned its limited warranty to Ms. Petersen. However, TAMKO never raised this argument in its motion, during the hearing, or prior to the circuit court denying its motion to compel. It was not until after the circuit court issued its Order that TAMKO first raised this argument via its motion to reconsider. Furthermore, TAMKO did not furnish the court with copies of Buffington's contract, Donnix's subcontract, and the purported purchase orders until they were attached to TAMKO's Rule 59 motion. (Mot. to Reconsider, Exs. A, B, and C). Thus, these arguments and materials were not timely raised and should not be considered. *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482.

Second, TAMKO argues that its limited warranty contains a disclaimer of implied warranties to the extent allowed by law. (App. Brief, p. 10). As Ms. Petersen understands TAMKO's argument, it contends she is somehow bound by the terms of TAMKO's express warranty and the arbitration provision contained therein because she asserted claims for breach of *implied* warranties arising by operation of law, which TAMKO claims its limited warranty purports to disclaim. Setting aside the fact this irrelevant[5] argument is the epitome of the tail

[5] The sole issue before the court is a question of arbitrability. TAMKO's purported disclaimer of limited warranties is, at best, an affirmative defense that TAMKO is attempting to rely on (not Ms. Petersen). Regardless, South Carolina Courts adopt the view that "a disclaimer printed on a label or other document and given to the buyer at the time of delivery of the goods is ineffective if a bargain has already arisen." *Gold Kist, Inc. v. Citizens & S. Nat'l Bank*, 286 S.C. 272, 277, 333 S.E.2d 67, 70 (Ct. App. 1985). Here, the circuit court observed that "Tamko itself admits the

wagging the dog, TAMKO never raised this argument prior to the circuit court issuing its ruling denying the motion to compel. Because TAMKO did not timely make this point to the circuit court, it should not be considered. *Hickman,* 301 S.C. at 456, 392 S.E.2d at 482.

II. MS. PETERSEN NEVER AGREED TO ARBITRATE HER CLAIMS AGAINST TAMKO, AND THERE IS NO BASIS IN LAW OR FACT TO COMPEL HER TO ARBITRATION.

It is well settled that "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." *Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *accord Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 299, 130 S. Ct. 2847, 2857 (2010) ("Arbitration is strictly a matter of consent"); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("arbitration is a matter of contract law and is available only when the parties involved contractually agree to arbitrate."); *Weaver v. Brookdale Senior Living, Inc*., 431 S.C. 223, 230, 847 S.E.2d 268, 272 (Ct. App. 2020) (arbitration is predicated on an agreement to arbitrate "because parties are waiving their fundamental right to access to the courts.").

Importantly, as the party seeking to compel arbitration, TAMKO had the burden of establishing the existence of a valid arbitration agreement with Ms. Petersen. *Cf. Landers v. FDIC*, 402 S.C. 100, 116-17, 739 S.E.2d 209, 217 (2013) (commenting on the burden of proof imposed on the party seeking to compel arbitration); *Krusch v. TAMKO Bldg. Prods.*, 34 F. Supp. 3d 584, 588 (M.D.N.C. 2014)[6] ("The party seeking to compel arbitration must show . . . a written

limited warranty containing the arbitration clause was only delivered to Defendant Donnix *after* it completed the purchase of the Tamko product, and TAMKO does not contest [Petersen's] assertion that she never received the limited warranty." (Order, p. 3). The validity of TAMKO's purported disclaimer is not before the court at this juncture.

[6] TAMKO relies heavily upon *Krusch* in this appeal.

agreement that includes an arbitration provision purporting to cover the dispute that is enforceable under general principles of contract law . . . .").

Because arbitration is a matter of contract, the evaluation of the enforceability of an alleged arbitration agreement is guided by general principles of contract law. *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). Here, Ms. Petersen denies ever agreeing with TAMKO to arbitrate claims between them. "[W]here 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." *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667.

"Whether the parties have formed an agreement to arbitrate is determined by applying South Carolina contract law." *Lampo v. Amedisys Holding, LLC*, 877 S.E.2d 486, 489 (S.C. Ct. App. 2022) (citing *Wilson*, 426 S.C. at 336 827 S.E.2d at 173). For a valid contract to exist under South Carolina law, the three elements of offer, acceptance, and consideration must be present. *Hennes v. Shaw*, 397 S.C. 391, 399, 725 S.E.2d 501, 505 (Ct. App. 2012); *see also Lampo,* 877 S.E.2d at 489-90 ("A party cannot assent to something he does not know about, so the law in general requires that for an offer to be effective, the responding party must have reasonable notice of the offer's terms."). "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 contract." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (applying general contract principles to determine whether an agreement to arbitrate existed between the parties).

A. In South Carolina, the law presumes that Ms. Petersen did not agree to arbitrate claims against TAMKO.

Although TAMKO attempts to bolster its position by claiming public policy favors arbitration of claims, it fundamentally misapplies the law. (App. Brief, p. 15). First, TAMKO is

just wrong. In *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021), the Supreme Court of South Carolina addressed this common misperception, making clear that, "There is, however, no public policy—federal or state—'favoring' arbitration." *Id.* at 639, 856 S.E.2d at 153. Rather, judicial statements that the law "favors arbitration" simply mean that courts should respect and enforce a contractual provision to arbitrate as it respects and enforces all other contractual provisions. *Id*.; *see also Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584 (2003) (noting, "[t]here is no federal policy favoring arbitration") (citing *Volt Information Servs., Inc. v. Board of Trustees of Leland Stanford Univ*., 489 U.S. 468, 477-478, 109 S. Ct. 1248, 1255 (1989)).

Regardless, whatever remains of the so-called policy "favoring" arbitration, it "does not kick in until the court determines a valid agreement to arbitrate exists." *Weaver*, 431 S.C. at 229, 847 S.E.2d at 271. Of particular importance to this appeal is that it is undisputed that Ms. Petersen did not sign the limited warranty, and there is no evidence she ever received it. This matters, because in South Carolina,

> [T]he presumption in favor of arbitration applies to the scope of an arbitration agreement; it does not apply to the existence of such an agreement *or to the identity of the parties who may be bound* to such an agreement. [] **In fact, if the party resisting arbitration is a nonsignatory, a presumption against arbitration arises**.

Weaver, 431 S.C. at 230, 847 S.E.2d at 272 (quoting *Wilson*, 426 S.C. at 337-38, 827 S.E.2d at 173) (bold emphasis added, italics in original, internal quotation omitted). In other words, Ms. Petersen is entitled to a presumption *against* arbitration, not the other way around as TAMKO suggests.

The only evidence proffered by TAMKO of an alleged arbitration agreement is its blank limited warranty, which Ms. Petersen never signed and TAMKO acknowledges she never received

prior to this litigation. (Petersen affidavit) (Order, p. 3) ("Tamko does not contest Plaintiff's assertion she never received the limited warranty."). On these facts, state law controls whether TAMKO's arbitration provision contained in its limited warranty may be enforced against Petersen, who did not sign it.[7] *Weaver,* 431 S.C. at 230, 847 S.E.2d at 272; *Wilson*, 426 S.C. at 338, 827 S.E.2d at 173-74; *see also Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 630 n.5, 129 S. Ct. 1896, 173 L. Ed. 2d 832 (2009) (observing state law is applicable to determine which contracts are binding under section 2 of the FAA).

In light of the above authorities, it is presumed that Ms. Petersen did not agree to arbitrate her claims against TAMKO, placing the burden on TAMKO to overcome this presumption. *Lampo*, 877 S.E.2d at 489-90 ("A party cannot assent to something he does not know about, so the law in general requires that for an offer to be effective, the responding party must have reasonable notice of the offer's terms."). Here, TAMKO has failed to overcome this presumption.

B. There is no basis to apply equitable estoppel to bind Ms. Petersen to arbitrate her claims against TAMKO.

Certainly, a party can consent to arbitration by means other than personally signing a contract containing an arbitration clause, and South Carolina recognizes several theories[8] under which a nonsignatory can be bound by an arbitration agreement. In this appeal, TAMKO relies on <u>just one</u> of these theories: equitable estoppel. (App. Brief, pp. 8-12). Ignoring the facts in the

[7] TAMKO's contention in footnote 4 of its Brief that federal law determines the applicability of TAMKO's arbitration clause to Ms. Petersen is wrong. Both the United States Supreme Court and the Supreme Court of South Carolina have determined that State law governs this issue. "Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law." *Wilson*, 426 S.C. at 338, 827 S.E.2d at 173-74 (*citing Arthur Andersen LLP*, 556 U.S. at 630-31, 630 n.5).

[8] These theories include (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174.

record and the authorities it cites, TAMKO contends that equitable estoppel requires Ms. Petersen to arbitrate her claims because she brought a claim for breach of an *implied* warranty. (App. Brief, p. 9). The law says otherwise.

"Equitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly." *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. It "precludes a party from asserting rights he otherwise would have had against another when **his own conduct** renders assertion of those rights contrary to equity." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160 (4th Cir. 2004) (emphasis added).

From these core underpinnings has arisen an exception to the premise that a nonsigner cannot be compelled to arbitration. The "equitable estoppel" theory—also known as direct benefits estoppel in the context of arbitration—essentially:

> estops a nonsigner from refusing to comply with an arbitration provision of a contract if (1) the nonsigner's claim arises from the contractual relationship, (2) the nonsigner has exploited other parts of the contract by reaping its benefits, and (3) the claim relies solely on the contract terms to impose liability.

Weaver, 431 S.C. at 230, 847 S.E.2d at 272 . The rationale is simple: it is inequitable for a claimant to have its cake and eat it, too. Cases applying equitable estoppel to bind a nonsignatory to arbitration do so because it is unfair for a claimant to seek remedies under the terms of an express warranty, but then deny being bound by an arbitration provision contained within its terms. The three elements of the doctrine echo this core concern, requiring that TAMKO prove Ms. Petersen's claim arises from a contractual relationship with TAMKO (which it does not), that Ms. Petersen exploited other parts of TAMKO's warranty (which she has not), and that Ms. Petersen's claim relies solely on the limited warranty's terms to impose liability (which it does not—her claims

sound in products liability theories, not contract).[9] In other words, TAMKO fails to meet any of the required elements to justify use of equitable estoppel against Ms. Petersen. There is no evidence in the record that *Ms. Petersen's conduct* renders her claims against TAMKO in circuit court "contrary to equity."

It does not carry the day for TAMKO to conflate Ms. Petersen's actual claims with different remedies (and corresponding duties) that Petersen has not pursued in this litigation.

The Supreme Court of South Carolina has explained:

> When a claim depends on the contract's existence and cannot stand independently—**that is, the alleged liability arises solely from the contract or must be determined by reference to it**—equity prevents a person from avoiding the arbitration clause that was part of that agreement. **But when the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law, direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen 'but for' the contract's existence**.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (internal quotations omitted) (emphasis added). That is precisely the case here, as Ms. Petersen's products liability claims (*i.e.*, strict liability, negligence/gross negligence, and codified implied[10] warranty claims) do not arise solely from any contractual relationship with TAMKO. This is fatal to TAMKO's theory. *See e.g.*, *Samson v.*

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[9] TAMKO conflates Ms. Petersen's *actual* claims (for products liability) with its false assertion that she is somehow actually suing under the limited warranty. The Court shot down similar tactics in *Malloy v. Thompson*, 409 S.C. 557, 562, 762 S.E.2d 690, 692-93 (2014). The Court observed: "Merrill Lynch's argument that a derivative 'duty' from the CRAs binds Malloy, a non-signatory to the CRAs, conflates the duties created by the CRA contracts and general tort duties. Malloy does not claim that Merrill Lynch breached a duty created by the CRAs, but rather that it breached the duty owed by all persons not to intentionally interfere with another's expected inheritance. The contractual duties between Decedent and Merrill Lynch are irrelevant to whether Merrill Lynch intentionally interfered with Malloy's expected inheritance." *Id.*, at 562, 762 S.E.2d at 692-93.

[10] As it must, TAMKO conceded at the hearing that Ms. Petersen brought a claim for breach of implied warranty, not express warranty. (Trans., p. 15).

Greenville Hosp. Sys., 297 S.C. 409, 410, 377 S.E.2d 311, 311 (1989) (noting S.C. Code Ann. § 15-73-10 is based on Section 402A of the Restatement (Second) of Torts and imposes strict liability in tort upon the suppliers of defective products); S.C. Code Ann. § 36-2-314 (implied warranty of merchantability created by statute); S.C. Code Ann. § 36-2-315 (implied warranty of fitness for particular purpose created by statute); *Malloy*, 409 S.C. at 562, 762 S.E.2d at 692-93 (finding Merrill Lynch's contractual duties owed to decedent were irrelevant to whether Merrill Lynch intentionally interfered with decedent's expected inheritance, which is an action in tort).

Simply, equitable estoppel does not apply here. This is because there is no evidence that Ms. Petersen ever sought to exploit other parts of the limited warranty by reaping any of its purported benefits, and she has not asserted a claim against TAMKO for breach of its *express* limited warranty. This shortcoming is fatal to TAMKO's position, and this Court should affirm the circuit court's denial of TAMKO's motion to compel arbitration.

C. Ms. Petersen received no benefits from TAMKO's purported limited warranty.

Once again ignoring the settled fact that Ms. Petersen has not brought any claim against TAMKO seeking to enforce the limited warranty,[11] TAMKO nonetheless cites *Pearson v. Hilton Head Hospital,* 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), for the proposition that Ms. Petersen somehow benefited from TAMKO's limited warranty and therefore must arbitrate her claims. This argument strains credibility.

[11] Ignoring the basic fundamentals of contract law, and blatantly misrepresenting the claims *actually* asserted against it in this action, TAMKO concludes, "Respondents have not alleged any other relationship between themselves and TAMKO from which a contractual duty may arise. As such, Respondents' contract claims arise solely from the underlayment's express limited warranty." (App. Brief, p. 13). This conclusion is pure *non sequitur*. Ms. Petersen need not allege "any other relationship" from which a "contractual duty" might arise because the duties upon which her implied warranty claims are based arise solely by operation of law, not by contract.

To avoid confusion, Ms. Peterson's implied warranty claims are brought pursuant to Section 36-2-314 (implied warranty of merchantability) and Section 36-2-315 (implied warranty of fitness for particular purpose). (Third Amend. Comp.). These statutory claims arise independently by operation of law, and Ms. Petersen has made no claim that is dependent upon TAMKO's purported limited warranty. TAMKO boldly claims its limited warranty "itself is the 'benefit'" as if its mere printed existence is determinative. (App. Brief, p. 12). This self-serving statement ignores both the substance of Ms. Petersen's actual claims and, for that matter, the law of this State on the issue of direct benefits versus indirect benefits—an issue TAMKO failed to address in its Brief.

"It is important to distinguish direct benefits from indirect benefits **because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled**." *Wilson,* 426 S.C. at 343, 827 S.E.2d at 176 (emphasis added). "A benefit is direct if it flows directly from the agreement." *Id*. By contrast, an indirect benefit derived from an agreement occurs "where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself." *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176.

TAMKO failed to present any evidence that Ms. Petersen received a direct benefit from its limited warranty, or even and indirect benefit for that matter. Considering TAMKO argues the limited warranty itself "is the 'benefit,'" it is hoisted by its own petard when acknowledging through an affidavit that "Tamko has not received warranty claims related to this property and so has not opened a warranty claim file for this property." (Ross Aff. ¶¶ 9-10).

TAMKO's assertion that *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411 (4th Cir. 2000) supports its position overlooks the very foundation of the court's analysis. In *Int'l Paper Co.*, the court observed (and TAMKO quoted):

> In the arbitration context, the doctrine [of equitable estoppel] recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause **when he has consistently maintained that other provisions of the same contract should be enforced to benefit him**. To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.

Int'l Paper Co., 206 F.3d at 418 (emphasis added) (internal quotations and citations omitted). The fatal flaw in TAMKO's argument is that it overlooks its own failure to demonstrate that Ms. Petersen ever once "maintained that other provisions" of TAMKO's limited warranty "should be enforced to benefit [her]," which is of no surprise considering she never knew it existed.

Ms. Petersen asserted no claim against TAMKO for breach of express warranty—a point TAMKO readily concedes. (Third Amended Complaint) (Trans., p. 15) (App. Brief, p. 10). Further, TAMKO admitted through Mr. Ross' affidavit that no warranty claims were submitted by Ms. Petersen. Thus, it is impossible to conclude that Ms. Petersen has somehow consistently maintained that other provisions of TAMKO's limited warranty should be enforced to her benefit. In this way, TAMKO fails to meet the very standard it relies on.

Nothing in the analysis of *Int'l Paper Co.* would lead to the absurd conclusion that a party who had never even seen the contract, had never relied on the contract or sought to enforce any part of its terms, and never asserted a claim dependent upon the existence and terms of the contract, would nevertheless be bound through equitable estoppel to comply with an arbitration provision contained therein.[12] *See Int'l Paper Co.,* 206 F.3d at 418 (citing to *Deloitte Noraudit A/s v. Deloitte*

[12] As the Fourth Circuit explained, International Paper alleged in its amended complaint that Schwabedissen "**failed to honor the warranties in the Wood-Schwabedissen contract**," and International Paper "sought damages, revocation, and rejection **in accordance with that contract**." *Int'l Paper Co.*, 206 F.3d at 418. Thus, "**International Paper's entire case hinges on**

Haskins & Sells, 9 F.3d 1060, 1064 (2d Cir. 1993)), for its holding that a nonsignatory bound to arbitrate "**when it knew of the arbitration agreement and 'knowingly accepted the benefits of" that agreement"**) (emphasis added). Similar facts are absent here, where TAMKO admits that Ms. Petersen never received the limited warranty and made no claim to enforce its terms.

TAMKO's reliance on *Krusch v. TAMKO Bldg. Prods.*, 34 F. Supp. 3d 584 (M.D.N.C. 2014), is misplaced for the same reason. In *Krusch*, the homeowner himself, Mr. Krusch, purchased TAMKO's defective shingles on several occasions. *Krusch*, 34 F. Supp. 3d at 587. Mr. Krusch also "sent TAMKO a warranty claim with accompanying documentation, pursuant to [TAMKO's] express limited warranty[]"—a claim TAMKO denied within days. *Id.* Mr. Krusch asked TAMKO to reconsider its decision on his warranty claim, which TAMKO also refused. *Id*. Only after TAMKO rejected his express warranty claim did Mr. Krusch file suit.[13]

The District Court in *Krusch* was presented unrefuted evidence that Mr. Krusch's contractor, acting as his agent, was given a sample shingle which included notice of the limited warranty (which in turn included the arbitration provision). Only *after* this information was furnished to his agent did Mr. Krusch purchase the shingles himself directly from the distributor on several occasions, and he apparently installed them himself. *Id*. at 587-89, fn 1. Applying agency principles,[14] the District Court concluded that Mr. Krusch was charged with the knowledge

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its asserted rights under the Wood-Schwabedissen contract[.]" *Id*. (emphasis added). On those facts, it made perfect sense that International Paper could not avoid the arbitration provision while simultaneously seeking to enforce other terms within the same contract. The dispositive facts in this appeal bear no relation to those in *Int'l Paper Co.*

[13] Mr. Krusch's lawsuit included a claim for breach of *express* warranty against TAMKO—something Ms. Petersen has not done.

[14] TAMKO relies solely upon its "equitable estoppel" theory, never advancing an agency theory.

furnished to his contractor agent, and therefore he had "constructive knowledge" of the limited warranty terms when he later purchased the shingles. *Id*. at 589-90.

Precisely none of the dispositive facts from *Krusch* are present here. As an initial point, the District Court in *Krusch* anchored its finding of "constructive knowledge" in agency principles, not equitable estoppel. Donnix is a subcontractor to Buffington and is not Ms. Petersen's agent. Moreover, Donnix purchased TAMKO's defective Underlayment, not Ms. Petersen. TAMKO admits Ms. Petersen submitted no warranty claims. There is simply no logic to TAMKO's argument that Ms. Petersen had constructive notice (akin to that present in *Krusch*). If anything, reasoning applied in *Krusch* demonstrates why Ms. Petersen cannot be compelled to arbitrate.

As noted, TAMKO illogically contends that Ms. Petersen had constructive notice of TAMKO's limited warranty by virtue of her contract with Buffington and its subcontracts. Regardless of whether this issue is preserved, this untimely argument makes no sense. Unlike the notice stamped on the defective shingles[15] in *Krusch*, Buffington's contract does not incorporate TAMKO's limited warranty by reference to it or any term or provision contained therein. When TAMKO claims that "Respondent**s**" (noting the plural use of the word) tacitly admitted having constructive knowledge of its limited warranty "by asserting claims arising from the very same express warranty they now try to disavow[,]" TAMKO cannot be speaking about Ms. Petersen, because TAMKO admits she did not assert a claim for breach of its express warranty. (App. Brief, pp. 10, 12) (Trans., p. 15) (Third Amended Complaint).

TAMKO relies heavily on *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 791 S.E.2d 286 (Ct. App. 2016), presumably because TAMKO

[15] The notice in *Krusch* incorporated TAMKO's limited warranty by express reference and was communicated to Mr. Krusch's agent **before** he purchased the shingles on several occasions.

prevailed in that action. However, different facts produce different outcomes, and *One Belle Hall* does nothing to help TAMKO's cause in this case.

In *One Belle Hall*, defective shingles manufactured by TAMKO were installed in a condominium project. TAMKO covered the shingles with a twenty-five-year "repair or replace" limited warranty. *One Belle Hall Prop. Owners Ass'n*, 418 S.C. at 56, 791 S.E.2d at 289. Importantly, prior to filing a lawsuit, a developer of the project reported a warranty claim to TAMKO, thus relying on the express limited warranty. Following its standard warranty procedure, TAMKO provided a "warranty kit" and requested proof of purchase, [16] samples of the allegedly defective shingles, and photographs. TAMKO later closed the warranty claim when the developer did not provide TAMKO with the requested information. In the lawsuit that followed, the amended complaint included a claim against TAMKO's warranty. *One Belle Hall Prop. Owners Ass'n*, 418 S.C. at 58, 791 S.E.2d at 290.

The issue presented in this appeal is straightforward. According to TAMKO, the "issue involves when an arbitration clause can be enforced against the non-signatory." (Trans., p. 14). The decision in *One Belle Hall* does not address how or why the claimant was bound to arbitrate its claims against TAMKO. Importantly, counsel for TAMKO informed the circuit court in this case, "that issue was behind the scenes in *One Belle Hall* case. Mr. Lucey [plaintiff's counsel] did

[16] TAMKO does not explain how it would be possible for Ms. Petersen, who did not purchase the Underlayment, to provide proof of purchase *even if* she knew of the limited warranty and wanted to file a warranty claim. The text provides, "Claims under this limited warranty will require proof of purchase **by the Owner**. TAMKO shall not be responsible for any claims without such proof of purchase." (Mot. to Compel, Ex. A, p. 1) (emphasis added). *One Belle Hall* proves TAMKO will inactivate its warranty plan if it does not receive required information. *One Belle Hall Prop. Owners Ass'n*, 418 S.C. at 58, 791 S.E.2d at 290. The potential for a "gotcha" moment is evident under these circumstances.

not challenge that issue in that case." (Trans., p. 14). Very simply, this exchange explains why *One Bell Hall* provides no guidance here—the very issue at the heart of this appeal is not even addressed in *One Belle Hall*, per TAMKO's own argument to the circuit court. Ms. Petersen vehemently challenges that issue, here. Yet, there is more.

Unlike the *facts* in *One Belle Hall*, Petersen never relied upon the limited warranty by submitting a claim to TAMKO, nor did she ever assert any cause of action seeking to enforce the limited warranty. TAMKO overlooks these key points, even though the cases it relies upon most all turn on these very facts. *See Int'l Paper Co.*, 206 F.3d at 418 (where International Paper's entire case hinged on its asserted rights under the very contract that included the arbitration provision it sought to avoid); *Krusch* 34 F. Supp. 3d at 587-90 (where Krusch was informed of the limited warranty through his agent before purchasing the shingles himself on several occasions, and where Krusch submitted a claim against the express warranty); *Pearson*, 400 S.C. at 296-97, 733 S.E.2d ay 605 (where plaintiff received a benefit due to the contract through his employment, received payment for his work, and asserted a claim for breach of contract); *One Belle Hall Prop. Owners Ass'n*, 418 S.C. at 58, 791 S.E.2d at 290 (noting a prior warranty claim was filed and the amended complaint asserted a warranty claim against TAMKO).

At bottom, none of the arguments and authorities relied upon by TAMKO require Ms. Petersen to arbitrate her claims against TAMKO because the facts of this case bear no resemblance to proper cases where a nonsignatory is nevertheless bound to an arbitration agreement. TAMKO has failed to meet its burden to prove the existence of a valid arbitration agreement, and there is no basis to assert Ms. Petersen should be equitably estopped from denying that she ever agreed to arbitrate disputes with TAMKO. Simply put, TAMKO failed to overcome the presumption against arbitration that arises because Ms. Petersen denies agreeing to arbitrate and did not sign the limited

warranty, and never knew it existed. *Wilson*, 426 S.C. at 337-38, 827 S.E.2d at 173. Accordingly, this Court should affirm the decision below.

D. TAMKO's "privity" argument improperly conflates the potential availability of a warranty claim arising by operation of law with the actual assertion of an express warranty claim sounding in contract for purposes of its flawed estoppel theory.

No one disputes that S.C. Code Ann. § 36-2-318 *permits* a consumer using a seller's product to enforce that seller's express or implied warranty in the event the product is defective, dispensing with the necessity of privity.[17] In an argument that is confusing at best, TAMKO appears to extrapolate from this settled principle intended to protect consumers that because TAMKO could not use a lack of privity as a defense *had* Ms. Petersen asserted a limited warranty claim (which she certainly did not), that somehow means Ms. Petersen's products liability claim is actually a claim to enforce TAMKO's limited warranty that she did not even know existed. (App. Brief, p. 13). TAMKO writes,

> Respondents have not alleged any other relationship between themselves and TAMKO from which a contractual duty may arise. As such, Respondents' contract claims arise solely from the underlayment's express limited warranty, and this the legal relationship between Respondents and TAMKO is controlled by the language of the warranty.

(App. Brief, p. 13).

[17] It is unclear whether TAMKO is contending Ms. Peterson is bound to arbitration as a third-party beneficiary. (App. Brief, p. 13) (Trans., p. 16). If so, this assertion lacks merit. *See, e.g., Dickerson v. Longoria*, 414 Md. 419, 453, 995 A.2d 721, 742 (2010) ("a third-party beneficiary to an arbitration agreement **cannot be required to arbitrate** a claim **unless** the third party is attempting to enforce the contract containing the arbitration agreement.") (emphasis added). Ms. Petersen has not attempted to enforce the limited warranty against TAMKO. *See also Aiken*, 373 S.C. at 149, 644 S.E.2d at 708 (explaining a third-party beneficiary will only be bound by the terms of the underlying contract where a "significant relationship" exists between the claims asserted by that beneficiary and the contract in which the arbitration clause is contained). Moreover, as TAMKO recognizes, courts tend to address third-party beneficiary considerations under the equitable estoppel theory discussed herein. (Trans., p. 16).

For numerous reasons, this assertion is nonsensical. Lumping "Respondents" together is disingenuous because Ms. Petersen's claims are distinct, and different, from Donnix's claims. Contrary to TAMKO's misrepresentation, Ms. Petersen did not assert *any* "contract claims" against TAMKO. It appears TAMKO is arguing over claims Ms. Petersen never brought.

The issue is whether Ms. Petersen engaged in some conduct that supports applying equitable estoppel—fundamentally a conduct-based doctrine—to require her to arbitrate claims against TAMKO. Here, the record is completely devoid of *any* such evidence. For the reasons discussed herein, this Court should affirm the circuit court's denial of TAMKO's motion to compel arbitration, which was unaffected by error.

III. THAT THERE WAS A CONTRACT FOR THE SALE OF GOODS BETWEEN TAMKO AND ITS THIRD-PARTY DISTRIBUTOR DOES NOT SUPPORT TAMKO'S CLAIM THAT MS. PETERSEN IS OBLIGATED TO ARBITRATE HER PRODUCTS LIABILITY CLAIMS.

In a roundabout way, TAMKO asserts its "contract" with its distributor,[18] which included the limited warranty, passed to Donnix, then to Buffington, and finally to Ms. Petersen, as the "final end-user of the product" such that Ms. Petersen is bound by the limited warranty and its arbitration provision, despite having never seen it, relied upon it, or consented to it. (App. Brief, p. 14). According to TAMKO, this means Ms. Petersen's products liability claims are somehow "an action affirming the contract.'" (App. Brief, p. 14).[19]

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[18] Whatever "contract" might exist between TAMKO and its distributor, there is no copy of it in the record. *See Williams v. Moore*, 400 S.C. 90, 105, 733 S.E.2d 224, 231 (Ct. App. 2012) (holding the appellant has the burden of providing an adequate record on appeal); *see also* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b) (1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.").

[19] TAMKO's reliance on *Herring v. Home Depot, Inc*., is misplaced because the purchaser in that case (unlike Ms. Petersen) sued upon the manufacturer's express warranty and for revocation of acceptance of the sales' contract. *Herring v. Home Depot, Inc*., 350 S.C. 373, 377, 565 S.E.2d 773, 775 (Ct. App. 2002). These key facts do not exist here.

TAMKO's reasoning is fundamentally flawed because the very purpose of S.C. Code Ann. Section 36-2-318 is to protect consumers, not to limit their fundamental rights to choose their forum for recovery. Section 36-2-318 allows "a plaintiff to recover economic loss from a seller with whom he did not deal and who made no express warranties to him." *JKT Co. v. Hardwick*, 274 S.C. 413, 418, 265 S.E.2d 510, 512 (1980) (emphasis added); *Reynolds v. Ryland Grp., Inc*., 340 S.C. 331, 334, 531 S.E.2d 917, 919 (2000) ("Plaintiffs recognize that the Court has taken a very active role in the construction area to protect innocent purchasers. The most noteworthy step has been the elimination of privity to protect an innocent purchaser who has invested his life savings from latent defects in a mobile society where it is foreseeable that more than the original owner will enjoy a home from a builder.").

TAMKO gives a tortured meaning to these cases, attempting to reverse engineer the logic to mean that Section 36-2-318 was intended to impose contractual limitations, including arbitration provisions, on wholly unsuspecting homeowners who never had the opportunity to know what rights an express limited warranty might strip from them until it is too late to object (or in this case, to even decline the use of the Underlayment, which was already installed).[20] Not a single case cited by TAMKO supports imposing a limited warranty and arbitration provision on a

[20] It cannot be overlooked that TAMKO admits Ms. Petersen, like most homeowners, would not have seen the limited warranty even when the product was delivered. (Trans., pp. 12-13, 16). Conceding its limited warranty is an adhesion contract, TAMKO explained that the only way for a homeowner to avoid its terms would be to choose ***not*** to install a material that includes an arbitration requirement. (Trans., p. 13). The practical and logical flaw in TAMKO's point is that it simply doesn't work. TAMKO admits that a homeowner won't even know there is a limited warranty in place until ***after*** the product is purchased and installed, by which point TAMKO says it is too late for the homeowner to object. (Trans., p. 13). TAMKO fails to explain how Ms. Petersen (or any homeowner for that matter) would know of the option to choose a different product to avoid a limited warranty ***before*** she even knows the limited warranty exists. Once Donnix bought the product—an act Ms. Petersen took no part in—TAMKO says her fate was sealed. If TAMKO has it its way, it will be impossible for homeowners like Ms. Petersen to ever have the ability to make the type of informed decision that TAMKO suggests is available to them.

homeowner ignorant of its existence in the absence of some evidence demonstrating the claimant's decision to avail itself of the terms of the express warranty in question, either prior to filing suit or as a cause of action asserted in its complaint. Not one.

IV. TAMKO'S LIMITED WARRANTY IS NOT AUTHENTICATED AND LACKS MATERIAL TERMS.

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 contract." *Grant*, 383 S.C. at 130, 678 S.E.2d at 438; *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) ("This meeting of minds required to make a contract is not based on secret purpose or intention 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.").

Here, Mr. Ross' affidavit claims the Underlayment at issue was sold with a limited warranty, which he asserts is represented by Exhibit A to TAMKO's motion to compel. At best, however, his affidavit establishes only that Exhibit A represents the limited warranty that TAMKO utilizes in practice. His affidavit confirms TAMKO "does not have records evidencing the direct sale of underlayment in relation to the Property at issue in this case[.]" (Ross Aff.). Exhibit A is unsigned and contains none of the information required on the blanks stated on the form. Authenticating Exhibit A as TAMKO's *generic* warranty form falls short of authenticating it as a copy of the *actual* instrument furnished in connection with this particular transaction, for which TAMKO admits it has no records. *See Williams v. Milling-Nelson Motors, Inc.*, 209 S.C. 407, 409, 40 S.E.2d 633, 634 (1946) ("As a general rule, the execution or authenticity of a private writing must be established before it may be admitted in evidence.") (internal quotations omitted). There is another point.

Although the contracts and purchase orders belatedly attached to TAMKO's motion to reconsider are untimely and should not be considered as noted in Section I, *supra*, it nevertheless remains that these materials likewise have not been authenticated. For example, Mr. Ross' affidavit does not speak to the authenticity of the purchase orders relied upon by TAMKO. (*See* Ross Aff.).

For these additional reasons, this Court should refuse to consider these materials and affirm the circuit court's decision denying TAMKO's motion to compel arbitration.

CONCLUSION

For the reasons set forth herein, Respondent Ms. Petersen respectfully requests this Court to affirm the judgment below.

Respectfully submitted,

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