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, LLC, is ……Respondent,

And

TAMKO Building Products, LLC is ……Appellant.

REPLY BRIEF OF APPELLANT, TAMKO BUILDING PRODUCTS, INC.

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December 12, 2022

Columbia, South Carolina

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"A nonparty cannot both have his contract and defeat it too." *In re Weekley Homes, L.P.,* 180 S.W.3d 127 (Tex. 2005). In their briefs, Respondents ignore the formation of a contract of sale under the UCC and the inclusion of that contract's terms as part of the product sold. Petersen's claim against TAMKO for breach of implied warranty and Donnix's claims for breach of both implied and express warranty depend entirely on the existence of a sale under the UCC.[1] TAMKO's express warranty, which includes the arbitration clause at issue, is an integral part of that sale. *See Brooks v. GAF Materials, Corp.,* 41 F.Supp.3d 474, 480 (D.S.C. 2014) ("In South Carolina, a seller of a product may create an express warranty in a number of ways, including by '[a]ny affirmation of fact or promise, …made by the seller to the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain.'") (citing S.C. Code Ann. § 36-2-313(1) (2003) (emphasis added). As such, its terms cannot be avoided by Respondents.

Petersen's and Donnix's contractual claims against TAMKO bear a "significant relationship" to TAMKO's express warranty, and are clearly covered by its scope. Both Petersen and Donnix derive "direct benefits" from the sale of the underlayment, including the ability to make a claim against TAMKO for breach of implied warranty, should the product not perform as warranted. Contrary to Respondents' assertions, both Petersen and Donnix had at least constructive notice of the existence of TAMKO's limited express warranty, and are third-party beneficiaries of the contract for the sale of goods and accompanying express warranty. Under controlling South Carolina law – *Wilson v. Willis,* 426 S.C. 326, 827 S.E.2d 167 (S.C. 2019); *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.,* 418 S.C. 51, 791 S.E.2d 286

[1] S.C. Code Ann. §§ 36-2-314 & 36-2-315 specify that a claim for breach of implied warranty requires an underlying sale.

(S.C. Ct. App. 2016); and *Pearson v. Hilton Head Hospital,* 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012) – Petersen and Donnix must arbitrate these claims.

I. The Substance of Petersen's and Donnix's Claims Invoke the Arbitration Clause.

The allegations in Petersen's and Donnix's complaints reveal the actual scope of their claims, primarily founded in contract. Donnix's crossclaim against TAMKO alleges that "TAMKO expressly and/or impliedly warranted to Defendant that [sic] all materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or specific purpose" (Crossclaim ¶ 128), and that TAMKO "breached its implied and/or express warranties of merchantability, workmanlike service and/or fitness for a particular or intended purpose in the construction of the project." Crossclaim ¶ 129. Donnix specifically alleges that the express warranty is part of its agreement with TAMKO: "TAMKO breached the contract by failing to provide appropriate construction materials to the Residence, by failing to provide goods and services that resulted in a quality building free from defects and otherwise in conformance with all agreements…." Crossclaim ¶ 138 (emphasis added). Donnix goes so far as to adopt and assert TAMKO's express warranty as an affirmative defense to Petersen's claims: "Plaintiff's claims are barred by the limitation of express and implied warranties" (XVIII Defense), "Plaintiff's claims are barred in whole or in part, by the disclaimer of warranties" (XIX Defense), "Plaintiff's claims are barred in whole or in part, because to the extent any warranties existed, all such warranties have expired" (XX Defense), and "Plaintiff's claims are barred in whole or in part, because to the extent any warranties existed, [Petersen] failed to file a claim within the applicable warranty period." XXI Defense, Crossclaim p. 18. Donnix also expressly incorporates in its Answer all of TAMKO's affirmative defenses, which includes the arbitration clause in its express

warranty. *See* Crossclaim p. 15 (IX Defense). To the extent Donnix now argues it is not seeking to rely on benefits from TAMKO's express warranty, its own allegations refute this argument.

While Petersen's allegations are more artfully pled, Petersen also asserts contractual claims tied to the performance of the product. It is *sine qua non* that warranties are part of a contract for the sale of goods. *See* S.C. Code Ann. §§ 36-2-314 (merchantability) & 36-2-316 (fitness for a particular purpose). Petersen's claims against TAMKO for breach of implied warranty (Count II) and breach of the warranty of merchantability and fitness for a particular purpose (Count IV) bear a "significant relationship" to TAMKO's warranty (whether express or implied), because absent this contract of sale, these warranty claims could not exist.

In *Wilson,* petitioners asserted the Court of Appeals erred in enforcing the arbitration clause in the contract between Southern Risk and respondents for four reasons: (1) petitioners were neither parties nor signatories to the contract; (2) petitioners sought no benefits under the contract; (3) the claims were not within the scope of the contract's arbitration clause; and (4) the claims bore no significant relationship to the contract. *See Wilson v. Willis,* 426 S.C. 326, 335, 827 S.E.2d 167, 172 (S.C. 2019). The South Carolina Supreme Court, in addressing petitioner's appeal, stopped its analysis at the "direct benefits test" (factor 2 above) after finding that petitioners did not directly benefit from the terms of a contract they were strangers to. Respondents here ask the Court to do the same. But the facts of this case are much different. Here, Respondents are not strangers to the contract containing the arbitration clause. Instead, they are direct beneficiaries of it, and they seek to rely on these benefits.

In *Wilson,* the South Carolina Supreme Court declined to enforce the arbitration clause in the contract because "general principles of South Carolina law formed the basis for most of petitioners' claims" of unfair trade practices, fraud, and conversion. 426 S.C. at 342, 827 S.E.2d

at 176. The Court explained, "[f]or example, [p]etitioners' allegations that [r]espondents possibly conspired with Willis and others to commit fraud is misconduct that does not arise from the contract." *Id.* In *Wilson,* the arbitration clause was part of an insurance agency agreement, requiring the parties to that agreement to arbitrate "any claims arising 'in connection with the interpretation of the [contract], its performance or nonperformance.'" *Id*. at 333, 827 S.E.2d at 171. The Supreme Court recognized that the plaintiffs were not "parties" to the agency agreement and asserted no direct benefit accruing to them from it.

Here, however, the opposite is true. Petersen's and Donnix's claims clearly fall within the scope of the arbitration clause, because it is tied to the *product* they contend is unmerchantable.

> EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY.

TAMKO Warranty p. 2 (additional emphasis added). Their claims bear a "significant relationship" to this sales contract, because without that contract these claims could not exist. They are both enabled and limited by the contract's term. And their claims fall within the scope of the arbitration clause, regardless of how they are denominated (in contract or in tort).

II. Both Petersen and Donnix are Estopped because they Directly Benefit from the TAMKO Contract.

Under South Carolina law, whether Respondents as nonsignatories are estopped from avoiding the terms of an express warranty depends on whether they received a "direct benefit" from the contract for the sale of goods. "A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect 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 167 (internal citations and quotations omitted). Here, both Petersen and Donnix received direct benefits from the contract for the sale of goods, which included TAMKO's express warranty. The "direct benefits" the contract has provided to Petersen include: (1) title to the underlayment; (2) exclusive use of the underlayment; and (3) the right to assert claims against TAMKO for breach of the implied warranty of merchantability and fitness for a particular purpose, as well as for breach of express warranty, if she had chosen to assert this claim.

Similarly, Donnix has also reaped direct benefits from the contract, which includes TAMKO's express warranty. The contract also provided Donnix with: (1) title to the underlayment, which was passed on to Petersen; (2) exclusive use of the underlayment, which was passed on to Petersen; (3) the ability to assert claims against TAMKO for breach of express warranty, which it has brought; and (4) at least four affirmative defenses Donnix asserts as to Petersen's claims for construction defects in the roof.

The South Carolina Supreme Court further explained the relationship between the claims brought by petitioners in *Wilson* and the contract containing the arbitration clause, which supports TAMKO's position in this case:

> Direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen "but for" a contract's existence.
> ---
> 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 have arisen "but for" the contract's existence.

426 S.C. at 343, 827 S.E.2d at 176 (quoting *Jody James Farms, JV v. Altman Group, Inc.,* 547 S.W.3d 624, 637 (Tex. 2018)).

Here, each warranty claim assert by the Respondents not only depends on the existence of the underlying contract, but exists exclusively as part of the contract. This is because under South Carolina's Commercial Code, express and implied warranties arise from and exist only as part of a contract for sale of goods.[2] *See* S.C. Code Ann. 36-2-314, 315; *Herring v. Home Depot, Inc.*, 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002) ("Breach of warranty is an action affirming the contract."). Absent a contract for sale of the underlayment, no warranties can arise.

Jody James is not unlike *Wilson,* in that Jody James' causes of action for tort and DTPA duties were independent of the contract (an insurance policy) which contained the arbitration provision. The Texas Supreme Court held that direct benefits estoppel did not apply because Jody James' complaint premises the nonsignatories' liability on general, non-contract obligations. *See Jody James,* 547 S.W.3d at 638 ("To establish a fiduciary relationship, Jody James must prove a relationship between the parties involving a 'high degree of trust and confidence…prior to, and apart from' the insurance contract. A fiduciary duty generally 'arises from the relationship of the parties and *not* from the contract.' Likewise… 'a DTPA claim for misrepresentation is considered

[2] South Carolina Code § 36-2-314, which governs the creation of every implied warranty of merchantability attaching to a "good," provides: "Unless excluded or modified (§ 36-2-316), a warranty that the goods shall be merchantable is implied *in a contract for their sale* if the seller is a merchant with respect to goods of that kind." (Emphasis added). Similarly, South Carolina Code § 36-2-315, which governs the creation of every implied warranty of fitness for a particular purpose, provides that such an implied warranty is included in a contract for the sale of goods "[w]here the seller *at the time of contracting* has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods," unless otherwise excluded from the contract or modified under § 36-2-316. "A contract may of course *include* both a warranty of merchantability and one of fitness for a particular purpose." S.C. Code Ann. § 36-2-315, Official Comment 2 (emphasis added). A seller may "*exclude*" these implied warranties from the contract under S.C. Code Ann. § 36-2-316(b); *see also* § 36-2-314, Comment 11 (addressing exclusion of implied warranty of merchantability *"from the contract*").

separate and distinct from any breach of contract.'"). The Court further explained, "[t]his is not a case of mere artful pleading…. Instead of enforcing expectations created by contract, any liability is necessarily extra-contractual. Accordingly, direct-benefits estoppel has not been shown here." *Id.* at 638-39. This makes sense. Claims for deceptive trade practices, fraud, and conversion (*Jody James* and *Wilson*) are substantively not contractual claims. But claims for breach of implied contract and express warranty (Donnix) and breach of implied warranty (Petersen) clearly are contractual claims. The direct benefits test gets around artful pleading designed to take advantage of the existence of a contract, but avoid the terms the party does not like.

The mention of "artful pleading" in *Jody James* cross references to *In re Weekley Homes,* 180 S.W.3d 127 (Tex. 2005), which *is* a case of artful pleading, and which is analogous to the facts here. *See Jody James,* 547 S.W.3d at n. 80. In *Weekley Homes,* the homebuilder (Weekly) moved to compel arbitration of a personal injury claim brought by the nonparty daughter (Von Bargen) of the purchaser of the home (Forsting), after numerous problems arose with the home after completion. In analyzing whether Von Bargen received any "direct benefits" from the home sale contract that included an arbitration clause, the Court listed a number of benefits to Von Bargen, such as she: "directed how Weekly should construct many of its features, repeatedly demanded extensive repairs to 'our home,' personally required and received financial reimbursement for expenses [she] incurred while those repairs were made, and conducted settlement negotiations with Weekly about moving the family to a new home." *Id.* at 133. The Texas Supreme Court, agreeing with the federal courts, concluded that "when a nonparty [or nonsignatory] consistently and knowingly insists that others treat it as a party, it cannot later 'turn its back on the portions of the contract, such as the arbitration clause, that it finds distasteful.'" *Id.*

This is the law in South Carolina as well. "Nonparties face a choice when they may plead in either contract or tort, but pleading the former invokes an arbitration clause broad enough to cover both." *Id.,* 180 S.W.3d at 132, cited favorably in the *Wilson* case. Petersen alleges the underlayment was not "merchantable" (Compl. ¶ 70) and that she relied on TAMKO to furnish a product that was appropriate for use (Compl. ¶ 71). These are claims wholly dependent on a contract for sale of a product that includes an express warranty. Donnix likewise invokes direct benefits from the express warranty, and incorporates its limitations and exclusions by reference as affirmative defenses. Crossclaim p. 18. Direct benefits estoppel precludes *both* Petersen and Donnix from asserting their nonsignatory status in an attempt to avoid arbitration of their claims. Because Petersen and Donnix have pursued claims "on the contract," they cannot simultaneously turn their backs on the portions of the contract they find distasteful.

III. Petersen, as a Third-Party Beneficiary of the Contract, is Bound by its Terms, Which Includes the Arbitration Clause.

South Carolina law is clear that homeowners are third-party beneficiaries of the contracts entered into by their contractors for the construction of their homes. In *Brooks v. GAF Materials Corp.,* 41 F.Supp.3d 474 (D.S.C. 2014), class plaintiffs sued GAF Materials for, among other things, breach of express and implied warranties, alleging the shingles installed on their roofs were defective. GAF's limited warranty was printed on the packaging of every bundle of shingles. *Brooks,* 41 F.Supp.3d at 479. GAF moved for summary judgment on the basis that plaintiffs were bound to the disclaimers in GAF's limited warranty as third-party beneficiaries to the bargain, even though they did not purchase the shingles and only became aware of any alleged limitations after installation of the shingles. *Id.* In addressing this issue, the District Court (Judge Childs) held that plaintiffs were bound by the limited warranties disclaimer as third-party beneficiaries of the bargain between Mays, the independent contractor who purchased the shingles, and GAF. *Id.* at

483. The same is true here. Petersen is a third-party beneficiary of the contract for the sale of goods, for the reasons explained above.

IV. Donnix Had Actual Notice and Petersen Had Constructive Notice of the Arbitration Clause.

Petersen and Donnix take apparent umbrage at TAMKO's noting that both were on notice of the existence of TAMKO's limited express warranty. Yes, in *Krusch v. TAMKO Bldg. Prod.,* 34 F.Supp.3d 584 (M.D.N.C. 2014), the homeowner purchased the TAMKO shingles himself, and filed a warranty claim. But those facts are not dispositive. In *Krusch,* the homeowner did not know about the express limited warranty "until later," after the shingles were installed and began to deteriorate. 34 F.Supp.3d at 587. He also did not sign the limited warranty, nor did anyone on his behalf, including his contractor who also purchased the shingles. *Id.* at 588. Notwithstanding this, the arbitration clause in the express limited warranty was enforced.

Similarly, even though Petersen did not bring a claim for breach of *express* warranty, she learned of the express limited warranty after the underlayment was installed and allegedly began to deteriorate. Neither Petersen nor her general contractor who purchased the underlayment on her behalf signed the limited warranty. The express limited warranty is printed on the wrapper of each package of underlayment, and published on the TAMKO website. *See* Aff. of G. Ross, ¶ 8. Petersen is incorrect in her statement that Buffington's contract does not incorporate TAMKO's limited warranty by reference to it or any term or provision contained therein. Buffington's contract specifically states that all warranties relating to building materials (which includes the TAMKO underlayment) used in the construction of her beach house are transferred to Petersen: "Buffington Homes assigns the owner all such manufacturers' guarantees and/or warranties." Buffington Contract p. 5. Petersen signed this contract.

Under South Carolina law, this reference puts Petersen on constructive notice of TAMKO's express limited warranty. "Constructive notice is when a party has information or knowledge of certain extraneous facts which of themselves do not amount to actual notice, but which are sufficient to put a reasonably prudent person upon inquiry…if these facts are pursued with due diligence, they would lead to other undisclosed facts." Anderson, S.C. Requests to Charge, Criminal, § 1-15 (2nd Ed. 2012); *see also Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn,* 348 S.C. 58, 70-73, 558 S.E.2d 902, 908-910 (S.C. 2001) (finding homeowners had constructive notice of the extent of a recorded easement because "notice of a deed is notice of its whole contents… and it is also notice of whatever matters one would have learned by any inquiry which the recitals of the instrument made it one's duty to pursue."). All Petersen had to do was ask what "manufacturers' warranties" Buffington had assigned to her.

Donnix, which purchased the underlayment itself, essentially admits it had actual notice of TAMKO's express limited warranty, by suing under it. This is further supported by the Purchase Order Invoices for the underlayment, which expressly state that the distributor will "assign or transfer to [Donnix] any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied." *See* ABC Supply Co. Purchase Order Invoices, Invoices Nos. 52062460, 51973240, 52102388.

The South Carolina District Court, in *Brooks, supra,* was not persuaded by plaintiffs' argument that they "were not bound by GAF's limited warranty because it was not agreed to prior to the sale of the goods and they only became aware of any alleged limitations after installation of the shingles." 41 F.Supp.3d at 479 (internal quotations omitted). In analyzing this issue, the Court found the express warranty was part of the basis of the bargain:

> In South Carolina, a seller of a product may create an express warranty in a number of ways, including by [a]ny affirmation of fact or promise, …made by the seller to

> the buyer, whether directly or indirectly, which relates to the goods and becomes part of the basis of the bargain….
>
> In order to establish a cause of action for breach of an express warranty, a plaintiff must show the existence of the warranty, its breach by the failure of the goods to conform to the warranty description, and damages proximately caused by the breach.

Id. at 480 (emphasis added) (internal citations and quotations omitted). Notably, knowledge of the express warranty by the plaintiff is not an element for breach of express warranty. *See id.*

V. This Court is Not Bound by Clearly Erroneous Factual Statements in the Trial Court's Order, which TAMKO Brought to the Trial Court's Attention at its Earliest Opportunity.

TAMKO originally brought this issue of arbitration before the trial court through a Rule 12 motion to dismiss and compel arbitration, which is a motion directed to the allegations of the complaint and third-party complaints/crossclaims. Petersen alleges that TAMKO did not preserve certain issues for appeal, by not putting the Buffington contract and the sales related invoices between Donnix and the distributor until TAMKO filed its Motion for Reconsideration. This Court's review is *de novo*; meaning that it may properly consider TAMKO's argument that Petersen had constructive notice of the existence of an express warranty, as well as South Carolina law explaining how a limited, express warranty operates to disclaim implied warranties. *See Wilson v. Willis,* 426 S.C. 326, 335, 827 S.E.2d 167, 172 (S.C. 2019) ("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.").

A motion to dismiss is directed to the allegations of the parties' pleadings, and is subject to *de novo* review. An appellate court should not be bound by clearly erroneous factual statements made only by the lawyer for a prevailing party, and subsequently adopted wholesale by an overly trusting court, which are directly contradicted by Petersen's and Donnix's allegations in their complaints. *See Tri-County Ice and Fuel Co. v. Palmetto Ice Co.,* 303 S.C. 237, 399 S.E.2d 779

(S.C. 1990) (holding that motion for relief from judgment on grounds of mistake will not be disturbed absent abuse of discretion, which arises where trial judge was controlled by error of law or where the order was based on factual conclusions without evidentiary support.).

TAMKO was compelled to bring to the attention of the trial court the actual terms of the contracts, which were only alleged *generally* in Petersen's Complaint and Donnix's Third-Party Complaint/Crossclaim, because at the hearing on the Motion, both Petersen and Donnix argued, contrary to the allegations in their pleadings, that they were unaware that an express warranty was part of the sale of the product. In fact, the actual terms of the general contract between Petersen and Buffington, the general contractor, expressly state that all warranties for materials used in the construction of Petersen's house are transferred to her. *See* Buffington Contract p. 15. There is nothing unique about this contractual condition, and Petersen strains its credibility by denying that she was in fact on constructive notice that all construction material warranties were transferred to her. Similarly, Donnix cannot be heard to dispute the specific factual terms of the transaction that it directly alleges and incorporates as defenses in its Answer and Crossclaim.

TAMKO's Motion to Reconsider sought to alert the trial court to mistakes made by the court's wholesale adoption of two proposed orders drafted by Petersen and Donnix, which contain outright misstatements of the record and which, in Donnix's case, directly contradict its own pleadings. *See* TAMKO Motion to Reconsider, pp. 3-10.

No affidavits supporting Donnix's factual assertions were ever submitted to the trial court. Petersen's claim in her affidavit that she "never received the limited warranty" is belied by the provision in the Buffington contract expressly transferring all construction material warranties to her.

The Court made several "mistakes" by signing an order it did not write. It was incumbent on TAMKO to point that out. To the extent that the details of the sale of the underlayment (from TAMKO to the distributor, ABC Supply Inc.; then from ABC to Donnix; then from Donnix through Buffington to Petersen) are relevant to this appeal, they are properly before this Court to be considered.

CONCLUSION

This case asks the Court for guidance on the parameters of enforcement of arbitration clauses by estoppel, and how the "direct benefits" test should be applied in the context of construction materials sold with an arbitration clause as an incorporated term of sale. Like all products of this nature, the express limited warranty is an integral part of the product. It is a contract of adhesion. It is not negotiated or signed by the homeowner, or anyone for that matter. The express warranty is enforceable by the seller (and the buyer and downstream homeowner) regardless of whether the buyer/installer or downstream homeowner has read it, or has actual knowledge of it.

What if the shoe were on the other foot? What if Petersen or Donnix said, after discovering that the product had failed to perform as warranted, "But we have a written warranty that covers this." Can TAMKO say, "Sorry, you did not sign it and send it in, so you don't have a warranty?" Can TAMKO say, "Sorry, but your contract is not directly with us, it is with your builder, go sue him?" No. TAMKO is bound by the terms of its express warranty sold as part of the product. If a plaintiff claims the "benefit" of the sales contract – which includes both the express and implied warranties – it cannot reject the terms of the contract which creates that benefit. Similarly, if all a plaintiff had to do to avoid an arbitration clause in an express warranty, or an exclusion, or a

limitation of duration or remedy – all expressly permitted by the UCC – is to only sue for breach of *implied* warranty, then no limitation would ever be enforceable.

Judicial hostility to arbitration is not new, but it is perplexing. Had this matter been ordered to arbitration, it would already be resolved, by a fair and knowledgeable arbitrator at a fraction of the cost and time to the parties that a complex, multi-party construction case imposes. Appellant TAMKO respectfully requests that this dispute be ordered to arbitration, as the express warranty requires.

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THE STATE OF SOUTH CAROLINA
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Benjamin Culbertson, Circuit Court Judge

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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,

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Of Whom

Donnix Construction, LLC, is ……Respondent,

And

TAMKO Building Products, LLC is ……Appellant.

PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant, TAMKO Building Products, Inc. as the undersigned employee of the law offices of Williams Mullen, attorneys for Appellant, does hereby certify that service of the Reply Brief of Appellant, TAMKO Building Products, Inc. was made on all counsel of record, specified below, by electronically mailing a copy of the same to the following addresses:

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December 12, 2022

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