THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001144
Case No. 2020-CP-46-03592

Summerlake Townhomes Homeowners' Association, Inc. and Susan Hagy and Karin Fuentes, individually and on behalf of all others similarly situated, Respondents,

v.

True Homes, LLC; Carolina Development Services, LLC; Summerlake Properties, LLC; RJB Legacy Company f/k/a Barefoot & Company; BMC East, LLC; Airtron, Inc.; MPK Grading and Erosion Control, LLC; Southend Exteriors, LLC; McGee Brothers Company, Inc.; Alpha Omega Construction Group, Inc.; Pender-Pettus Insulating, Inc.; Charlotte Lanehart Electric Company, Inc.; C&C Plumbing, Inc.; Associated Materials, LLC a/k/a Alside, Inc.; T & A Excavating, LLC; Callahan Excavating, LLC a/k/a Callahan Grading & Hauling, Inc. a/k/a Callahan Grading, LLC; AHR Construction, Inc.; JJS Commercial Construction, Inc.; CDJ Construction, Inc.; Jimenez Contractors, LLC; J. Cov Roofing, LLC; Ayalas Window Installations, LLC; Atlanta Flooring Design Centers, Inc.; Pedro DeJesus Lopez d/b/a PJL Construction; and Pedro Villareal-Conception d/b/a CVP Construction, Defendants,

of which True Homes, LLC, is the Appellant.

BRIEF OF RESPONDENT(S)

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STATEMENT OF THE CASE

On November 25, 2020, Respondent Karin Fuentes ("Respondent" or "Fuentes") and two other plaintiffs—Summerlake Townhomes Homeowners' Association, Inc. (the "Association") and Susan Hagy ("Hagy")—filed this action in the York County Court of Common Pleas asserting claims for defects in the townhomes and common elements in the Summerlake Townhomes development. [1] (R. p. 28) Respondent and Hagy asserted their claims on behalf of themselves and

[1] Appellant inconsistently uses both "Respondent" and "Respondents" in its Notice of Appeal and Brief and is ambiguous as to who it contends is the "Respondent" or are the "Respondents" in this appeal. In the caption on the Notice of Appeal, Appellant refers to the multiple plaintiffs—"Summerlake Townhomes Homeowners Association, Inc., et al."—using the singular "Respondent." (Not. of App.) In the caption and the body of its Brief, Appellant refers to "Plaintiffs Susan Hagy and Karin Fuentes, individually and on behalf of others similarly situated along with the Summerlake Townhomes Homeowners' Association, Inc." as "collectively 'Respondents.'" (Appellants' Br. 1.) Appellant's statement of "Arguments" in its Brief refers to "RESPONDENT," stating: "BECAUSE BOTH APPELLANT AND RESPONDENT AGREED THEIR CONTRACT . . . ." (Appellants' Br. at i.) As Appellant acknowledges, Appellant did not move to compel the Association's claims into arbitration, and the motions and the circuit court's orders below did not consider or decide any legal rights of the Association. (Appellant's Br. 1–4; R. pp. 2–13 & 137–40.) Appellant's arguments concern only Fuentes and do not contain any contention that the circuit court erred in relation to the Association or Hagy. Accordingly, to the extent Appellant contends this appeal includes any issue other than whether Plaintiff Fuente's claims are subject to arbitration, any such other issue has been abandoned and conceded. *See, e.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (holding that the failure to argue error in an alternative basis for a trial court's ruling is abandonment of the issue because "[f]ailure to argue is an abandonment of the issue and precludes consideration on appeal"); *State v. Black*, 319 S.C. 515, 518 n.2, 462 S.E.2d 311, 313 n.2 (Ct. App. 1995) ("[A]n exception to the trial court's ruling will be deemed abandoned where the appellant fails to specifically argue it in his brief."). Accordingly, the term "Respondent" is used herein to refer to Fuentes, but to the extent the Association, Hagy, or any other plaintiff is a proper party to this appeal, this brief is submitted on behalf of all such "Respondents" or plaintiff parties, and the arguments herein are the arguments of all "Respondents" or plaintiff parties.

Additionally, Appellant requests the Court "remand this matter with instruction to enter an order staying this matter until the claims by Mr. Fuentes, *and the similarly situated putative class members*, are determined through arbitration." (Appellant's Br. 14 (emphasis added)) The circuit court's orders should not be reversed and a remand for the arbitration of Respondent's claims would be erroneous for the reasons stated herein. However, even were there a basis for reversing the circuit court's order—which there is not—the circuit court did not make any ruling as to

a putative class of all other owners of a townhome in the Summerlake Townhomes development. (R. pp. 30, 32, & 36–38) On March 25, 2021, Respondent and the other plaintiffs served Appellant in this action. (R. p. 589)

On May 20, 2021, Appellant moved to dismiss or stay the case pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwellings Defects Act, S.C. Code Ann. §§ 40-59-810, *et seq.* (the "Act"). (R. p. 135) Appellant contended that to satisfy the Act and be permitted to proceed with this suit, Respondent and the other plaintiffs were required to provide Respondent's and Hagy's townhomes for inspections as well as all the putative class members' townhomes. (R. p. 135) On June 23, 2021, the Honorable Daniel D. Hall heard Appellant's motion to dismiss or stay, and Judge Hall stayed the case until October 1, 2021, to provide the parties with

whether the claims of "similarly situated putative class members" are subject to binding, enforceable arbitration agreements, and because there is no certified class yet in this case, neither the circuit court nor this Court has power at this procedural juncture to make any ruling as to the legal rights of "similarly situated putative class members." *See, e.g.*, *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011) (stating the argument that an unnamed class member is a party to a class action before the class is certified is a "novel and surely erroneous argument"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel."); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (holding that notice of a particular nature is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality" as to absent persons); *In re Checking Account Overdraft Litig.*, 780 F.3d 1031, 1036–37 (11th Cir. 2015) (holding that an unnamed class member is not a party to class-action litigation before the class is certified); *Rolo v. City Inv. Co. Liquidating Tr.*, 155 F.3d 644, 659 (3d Cir. 1998) (holding that until the putative class action is certified, the action is between the individual plaintiffs and the defendants); *Zepeda v. U.S. Immigr. & Naturalization Serv.*, 753 F.2d 719, 727 (9th Cir. 1983) (holding court could not issue an injunction concerning putative class members before class certification because the putative class members were not parties before the court); *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 457–59, 661 S.E.2d 81, 89–91 (2008) (discussing the due process requirements for class actions to be binding on absent class members); *Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 654–55, 591 S.E.2d 611, 616–17 (2004) (discussing the due process requirements for class actions to be binding on absent class members).

the opportunity to conduct inspections and resolve their dispute regarding the application of the Act. (R. p. 14)

The parties negotiated a resolution of the stay and inspection issue, and on September 20, 2021, the circuit court entered the parties' proposed consent order providing that the inspection of twenty-five randomly selected townhomes would fully and finally satisfy the requirements of the Act in this case. (R. p. 16) Pursuant to that consent order, on September 21, 22, and 23, 2021, Appellant and the other defendants inspected twenty-seven townhomes in the Summerlake Development—Respondent's and Hagy's townhomes and twenty-five randomly selected townhomes. (R. pp. 413–19)

On November 17, 2021, Appellant served a subpoena on the community manager for the Summerlake Townhomes development, and subsequently received 1,552 pages of documents in response to the subpoena. (R. pp. 420–45)

On February 15, 2022—which is 327 days after it was served in this action—Appellant moved to compel Respondent's and Hagy's claims into arbitration (the "Arbitration Motion"). (R. p. 137) Appellant did not move to compel the Association's claims into arbitration.

On May 10, 2022, Respondent and the other plaintiffs filed a motion to amend their First Amended Complaint and a proposed second amended complaint. (R. p. 255) Included as an exhibit to the motion to amend was the proposed second amended complaint which would remove Hagy as a plaintiff and add two new plaintiffs—Robin Daniel and Lisa Sher. (R. p. 258)

On May 17, 2022, the Honorable William A. McKinnon heard the Arbitration Motion. (R. p. 3)

On June 9, 2022, Judge Hall heard Respondent and the other plaintiffs' motion to amend. (R. p. 22) On June 14, 2022, Judge Hall granted the motion to amend and ordered that the plaintiffs

could file the proposed second amended complaint. (R. p. 22) On June 15, 2022, Respondent and the other plaintiffs filed their Second Amended Complaint which removed Hagy as a plaintiff and added Robin Daniel and Lisa Sher as plaintiffs. (R. p. 75)

On June 20, 2022, Judge McKinnon entered an order denying the Arbitration Motion as to both Respondent and Hagy (the "June 20 Order"). (R. p. 2) On June 30, 2022, Appellant filed a motion for reconsideration of the June 20 Order, asserting reasons it contended the June 20 Order should be reconsidered as to Respondent. (R. p. 471) The motion for reconsideration does not assert any reason Appellant contended should cause the June 20 Order to be reconsidered as to Hagy and does not mention Hagy. On August 1, 2022, Judge McKinnon entered a Form 4 Order denying the motion for reconsideration. (R. p. 25) On August 10, 2022, Appellant filed its Notice of Appeal.

STATEMENT OF FACTS

The Summerlake Townhomes development is a 101-townhome development in Fort Mill, South Carolina, with the townhomes all constructed by and sold to individual homeowners by Appellant. (R. pp. 55–56) The Association is the homeowners association for the Summerlake Townhomes development. (R. pp. 55 & 348) Per the Declaration of Covenants, Conditions, and Restrictions for Summerlake Townhomes (the "Covenants"), the individual townhome owners in the development own in fee simple their respective townhomes and the land below it with the property line passing through the middle of the party wall between each townhome. (R. pp. 352–53 & 358) The Association is responsible for maintaining, repairing, replacing, and caring for the roofs, exteriors, and other exterior improvements of the townhomes, as well as the common elements in the community. (R. pp. 357–58)

Respondent owns the townhome located at 2006 Firefly Lane in the Summerlake Townhomes development, and purchased the townhome from Appellant. (R. pp. 56 & 141–59) In purchasing the townhome from Appellant, Respondent entered into a "Home Purchase Agreement" contract with Appellant (the "Purchase Agreement"), which provides in part:

> 23. Warranty Policy and Dispute Resolution. Seller will purchase shortly following Closing, and provide to Buyer, the Warranty Policy in materially the same form as the sample booklet provided herewith ("Warranty Policy"). All capitalized terms used in this document that are not defined in the Purchase and Sale Agreement shall refer to the defined term in the Warranty Policy. Buyer acknowledges a receipt of the sample Warranty Policy provided at the point of contract. . . . The parties agree to abide by the Mediation and Arbitration provisions contained in the Warranty Policy. . . . 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.
>
> 24. Warranty Term. . . . Seller's only obligation under the Warranty is to correct the Defect as provided by the Warranty Policy, and has no liability for any consequential or incidental damage resulting therefrom. . . .
>
> 26. Disclaimer of Implied Warranties. THE LIMITED WARRANTY PROVIDED IN THE Warranty Policy IS ACCEPTED BY THE BUYER IN LIEU OF ALL OTHER WARRANTIES EXPRESSED AND/OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED WARRANTY OF WORKMANLIKE CONSTRUCTION, IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE, THE IMPLIED WARRANTY OF HABITABILITY AND ALL WARRANTIES THAT COULD BE CONSTRUED TO COVER THE PRESENCE OF RADON OR OTHER ENVIRONMENTAL POLLUTANTS. ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, ARE WAIVED BY REASON OF THE PROMISES AND AGREEMENTS HEREIN CONTAINED. Buyer also waives the right to recover from seller all consequential, incidental, punitive, or exemplary damage, including emotional distress, pain and suffering, lost profits, depreciation or other statutory damages. The only warranties seller provides to the Buyer are those contained in the Warranty Policy. Buyer recognizes that by accepting the express seller's warranties and the Seller's insurance covering those warranties for the periods of time provided in the contract that Buyer is waiving the right to any claim for implied warranties which may be greater than the express warranties. Seller has no liability for any consequential damages, including

> without limitation, lost wages or opportunity, lost or damaged household items, housing or medical expenses.

(R. p. 143)

After experiencing numerous problems from defective construction throughout the development—including water intrusion and damage at front and rear townhome doors, roof leaks, HVAC systems that would not heat or cool certain rooms, and ponding water and potholes on roads—the Association, Respondent, and Hagy investigated the defects and filed this action. The experts retained to evaluate the construction of the development found defects in the portions of the development that the townhome owners are responsible for repairing, in addition to defects in the portions the Association is responsible for repairing. (R. pp. 387–412) Additionally, all three experts found defects that will require contractors to access and alter the interiors of the townhomes to complete the repairs. (R. pp. 387–412) Given the exterior and interior defects and repairs, this action includes claims by the Association and claims by individual townhome owners including Respondent on behalf of a class of all the townhome owners.

STANDARD OF REVIEW

"The determination of whether a claim is subject to arbitration is subject to *de novo* review." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). "[A] circuit court's factual findings [on whether a claim is subject to arbitration] will not be reversed on appeal if any evidence reasonably supports the findings." *Id.*

ARGUMENT

In South Carolina, arbitration agreements can be enforceable under either the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. §§ 15-48-10, *et seq.*, or the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq*. With limited exceptions not at issue in this case, the SCUAA applies to any arbitration agreement, regardless of whether it is part of a transaction

in intrastate or interstate commerce, unless the application of the SCUAA is preempted by the application of the FAA. *See* S.C. Code Ann. § 15-48-10; *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539–40, 542 S.E.2d 360, 364 (2001) (holding that where the FAA applies, it preempts the SCUAA). The SCUAA provides that an arbitration agreement is only enforceable if the first page provides notice in underlined, capital letters that the agreement is subject to arbitration, and if a contract does not comply exactly with that notice requirement, an arbitration provision in the contract is not enforceable. S.C. Code Ann. § 15-48-10(a); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001); *Soil Remediation Co. v. Nu-Way Env't, Inc.*, 323 S.C. 454, 457, 476 S.E.2d 149, 151 (1996).

Given the federal government's limited powers, including the power to regulate interstate commerce, the FAA only applies if an arbitration agreement is in "a contract evidencing a transaction involving interstate commerce." 9 U.S.C. § 2. Additionally, the FAA can apply to an arbitration agreement if the agreement explicitly provides that the FAA applies. *See Munoz*, 343 S.C. at 539, 542 S.E.2d at 363–64. Unlike the SCUAA, the FAA does not require any notice for an arbitration provision to be enforceable and provides that arbitration agreements subject to the FAA are generally enforceable with the only exception being "such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2; *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 339 (2011) ("This savings clause [in section 2(a) of the FAA] permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (internal quotations omitted)).

While Appellant claims the circuit court erred in holding the Purchase Agreement is subject to the SCUAA, and not the FAA, the Court need not and should not reach that issue because

Appellant's arguments are barred by the law of the case. Were the Court to consider the substance of Appellant's arguments, there is no dispute that the Purchase Agreement does not satisfy the notice requirements of the SCUAA, and therefore, the arbitration provision in the Purchase Agreement is not enforceable under the SCUAA. (R. p. 201) Seeking to avoid the application of the SCUAA and make the FAA applicable, Appellant argues the arbitration provision is in a contract evidencing a transaction in interstate commerce and the circuit court erred in ruling to the contrary. As discussed in detail below, Appellant's argument is primarily a complaint as to the circuit court's weighing of the evidence, and such an argument is foreclosed by the any evidence standard of review applicable to the circuit court's factual findings. The circuit court considered the evidence presented, made a factual finding that the arbitration provision is in a contract for the sale of a residential structure, and applying the holding in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312, (2012), that a contract for the sale of a residence is a transaction in intrastate commerce, ruled the arbitration provision is in a contract for intrastate commerce and the FAA does not apply.

Under the any evidence standard of review applicable to the circuit court's factual findings, if there is any evidence in the record to support the circuit court's factual findings, those findings are not subject to reversal. Given the existence of ample evidence supporting the circuit court's factual findings, the any evidence standard of review necessitates an affirmance of the circuit court's conclusions that the transaction at issue is an intrastate transaction not subject to the FAA. Moreover, while barred by the applicable standard of review, even were the Court to conduct its own weighing of the evidence and the intrastate versus interstate nature of the transaction, the evidence in the record and the applicable law would compel the Court to reach the same conclusions reached by the circuit court below.

In addition to the request that this Court ignore the applicable standard of review and second-guess the circuit court's factual findings as to the intrastate nature of the transaction, Appellant argues the FAA applies because the parties explicitly agreed for it to apply to the arbitration provision. Appellant's argument as to an agreement for the FAA to apply fails for a number of reasons. Appellant failed to properly raise the issue and preserve it for appellate review. Also, the language Appellant relies on for this argument is not contained in the Purchase Agreement that Appellant claims is the agreement requiring arbitration of Respondent's claims. Finally, the language Appellant relies on for this argument does not provide for the FAA to govern the enforceability of the arbitration provision.

Unable to avoid the application of the SCUAA given the evidence in the record and applicable law, Appellant resorts to a request that this Court set aside binding precedent, namely the *Bradley v. Brentwood* decision. It is elementary that this Court is bound by the precedent of the South Carolina Supreme Court, and Appellant offers no explanation as to how this Court can set aside the binding precedent of the Supreme Court. Moreover, Appellant's arguments as to why *Bradley v. Brentwood* should be set aside are conclusory and unavailing as explained in detail *infra*.

While Appellant's arguments should be rejected and the circuit court's denial of the motion affirmed for the reasons previously stated and stated in detail *infra*, even were Appellant able to identify any error in the circuit court's ruling that the FAA does not apply, an affirmance would still be necessary. The intrastate nature of the transaction, applicability of the SCUAA, and the Purchase Agreement's failure to comply with the SCUAA's notice requirements is only one of the six reasons presented by Respondent as requiring the denial of Appellant's motion to compel

arbitration.[2] While the circuit court did not need to reach the remaining five reasons that Respondent's claims cannot be compelled into arbitration given the outcome determinative finding that the SCUAA applied and the Purchase Agreement does not satisfy the requirements to be enforceable under the SCUAA, those five reasons are additional sustaining grounds. Specifically, even were the FAA applicable—which it is not for the reasons stated herein—the arbitration provision would still not be enforceable against Respondent due to the unconscionability of the arbitration provision, the claims being outside the scope of the arbitration provision, the lack of a meeting of the minds as to the terms of the arbitration provision, the merger of the Purchase Agreement into the deed, and Appellant's waiver of its right to compel arbitration.

I. APPELLANT'S ARGUMENTS ARE BARRED BY THE LAW OF THE CASE.

The circuit court held that the purchase agreements entered into by both Respondent and the original purchaser of Hagy's townhome were agreements in intrastate commerce and subject to the SCUAA rather than the FAA. (R. pp. 7–11) The Order notes that the purchase agreement for the two townhomes was a "standard purchase agreement" used by Appellant for the sale of homes. (R. p. 7) The Order first analyzes the two purchase agreements and concludes they are both contracts for the purchase of real property subject to the SCUAA. (R. pp. 8–9) The Order then considers facts specific to Respondent's Purchase Agreement as additional reasons supporting the conclusion that it is a contract in intrastate commerce, and immediately after that additional

[2] Respondent's Memorandum in Opposition to the Arbitration Motion, submitted by Respondent and Hagy, identified eight reasons the motion should be denied, but two of those reasons were as to why subsequent purchasers of townhomes who were not in privity of contract with Appellant could not be compelled into arbitration. Those reasons applied to Hagy who is not a party to this appeal, but do not apply to Respondent who contracted with and purchased his townhome from Appellant.

analysis, states that "[t]he same analysis applies to the purchase agreement entered into between [Appellant] and the original purchaser of Hagy's townhome." (R. p. 9)

As permitted, Appellant opted to file a motion for reconsideration of the June 20, 2022 Order rather than immediately file a notice of appeal. However, in its motion for reconsideration, Appellant only requested reconsideration of the circuit court's ruling that Appellant cannot compel *Respondent's claims* into arbitration. (R. pp. 471–87) Appellant did *not* request reconsideration of the circuit court's use of the "same analysis" to arrive at the same ruling that Plaintiff Hagy's claims could not be compelled into arbitration because the purchase agreement between the original purchaser of her townhome and Appellant is for an intrastate transaction, is not subject to the FAA, and does not meet the requirements of the SCUAA. Additionally, Appellant does not state any issue or raise any argument in this appeal that the circuit court erred in employing the "same analysis" to arrive at the same result that Hagy's claims could not be compelled into arbitration because the original purchase agreement for her townhome was in a transaction in intrastate commerce.

By failing to state as an issue or make any argument that the circuit court erred in ruling that Hagy's claims could not be compelled into arbitration because the original purchase agreement for her townhome was a contract in intrastate commerce, Appellant abandoned and conceded any such issue. *See McLean*, 314 S.C. at 363, 444 S.E.2d at 514; *Biales*, 315 S.C. at 168, 432 S.E.2d at 484; *Black*, 319 S.C. at 518 n.2, 462 S.E.2d at 313 n.2. Having abandoned and conceded that issue, it is the law of the case that Appellant's form purchase agreement is a contract in intrastate commerce and subject to the SCUAA. Under the law of the case doctrine, "[a]n unappealed ruling is the law of the case and requires affirmance." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013). In short, Appellant conceded the propriety of the

circuit court's analysis in relation to the purchase agreement for Hagy's townhome, and Appellant cannot now attack that same analysis in relation to Respondent's Purchase Agreement. Therefore, the Court can and should affirm the circuit court's ruling as required by the law of the case doctrine.

II. THE PARTIES DID NOT AGREE THAT THE ARBITRATION AGREEMENT IS SUBJECT TO THE FEDERAL ARBITRATION ACT.

Appellant failed to raise and preserve the argument that the parties agreed the FAA applies, and therefore, that argument is not properly before this Court and cannot be considered on appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Here, Appellant raised the issue of a purported agreement for the FAA to apply for the first time in its motion to reconsider, and raising an issue for the first time in a Rule 59(e), SCRCP, motion for reconsideration is insufficient to raise an issue to the trial court and preserve it for appellate review. *See, e.g.*, *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not."); *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct. App. 2009) ("Father's Form 2106-EZ appears only as an attachment to his Rule 59(e) motion. Accordingly, it cannot be considered on appeal."); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Therefore, whether there was an agreement between Appellant and Respondent for the FAA to apply to the arbitration agreement is not preserved and is not properly before the Court.

Even were the issue of an agreement for the FAA to apply properly preserved and before the Court, the argument would be unavailing. Appellant fails to identify any language in the

Purchase Agreement that it contends references the FAA, much less language that provides that the arbitration agreement is subject to the FAA. Rather, the language Appellant relies on in support of this argument is language in a warranty application signed by Respondent and language in a limited warranty booklet which Appellant contends—without any evidence to support the contention—applies to Respondent. Appellant's reliance on the warranty application and the warranty booklet fails for several reasons.

First, the warranty application and warranty booklet are *not* the agreement that Appellant relies on in moving to compel arbitration, and terms contained in documents outside the arbitration agreement are immaterial to whether Respondent's claims can be compelled into arbitration. Appellant contends the purchase agreement between it and Respondent is the contract containing an arbitration provision enforceable against Respondent, *not* the warranty application or warranty booklet. (R. pp. 138–39 & 189) Appellant asserted that it provided, as Exhibit B to its motion, the entire contract on which it relies in seeking to compel Respondent's claims into arbitration. (R. pp. 188–89) Not being part of the contract which Appellant contends provides for arbitration, the warranty application and warranty booklet cannot contain an agreement that the FAA applies to Appellant's attempt to compel Respondent's claims into arbitration.

Second, even were the terms of any warranty booklet relevant to whether the parties agreed that the FAA applied to an arbitration agreement, the uncontradicted evidence in the record is that Respondent did not receive any warranty booklet until after he closed on the townhome. (R. p. 457 at ¶¶11-13) Respondent cannot have agreed to a provision in a warranty booklet when he did not receive any warranty booklet until after he entered into the Purchase Agreement. In other words, because Respondent did not receive any warranty booklet until after closing on the home, there cannot have been a meeting of the minds as to any provisions of the warranty booklet, and a

meeting of the minds is a necessary element for there to have been an agreement between the parties as to those provisions. *See Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (stating that for an enforceable agreement to exist "there must have been a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement").

Third, Appellant failed to make any showing that the warranty booklet it provided below and on which it relies is the actual limited warranty booklet provided to and purportedly applicable to Respondent. The warranty booklet submitted by Appellant is a sample warranty booklet as evidenced by the booklet having a watermark on the cover page reading "SAMPLE." (R. pp. 217–53 & 509–21) The warranty booklet submitted by Appellant does not contain Respondent's signature or any other indication that the warranty booklet is the actual warranty booklet provided to Respondent. In other words, Appellant has not made any showing that the terms in the sample warranty booklet it provided are applicable to Respondent. Lacking any basis for concluding the sample warranty booklet provided by Appellant is applicable to Respondent, the terms of the sample warranty booklet are immaterial to whether Respondent's claims can be compelled into arbitration.

Fourth, even were the warranty application and the warranty booklet part of the arbitration agreement, were agreements reflecting a meeting of the minds, and were applicable to Respondent—all of which are not the case—the warranty application and warranty booklet do not establish an agreement between the parties for the FAA to apply to an arbitration agreement. Neither the warranty application nor the warranty booklet provides that the FAA governs any arbitration agreement between Respondent and Appellant. The warranty application language cited by Appellant covers only the "rules and procedures" by which an arbitration hearing is to be "conducted," not whether the arbitration agreement itself is subject to the FAA. (R. pp. 213 &

508) This reference to the FAA is materially different from the agreement for the FAA to apply at issue in the *Damico v. Lennar Carolinas, LLC* decision on which Appellant relies and in which the arbitration agreement provided:

> The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq.*) and not by or in a court of law or equity . . . .

Damico, 430 S.C. 188, 195, 844 S.E.2d 66, 70 (Ct. App. 2020), *rev'd on other grounds* 437 S.C. 596, 879 S.E.2d 746 (2022). There, the contract provided that a dispute would be "submitted" to arbitration "as provided by" the FAA, thereby evidencing the parties' agreement that the enforceability of the arbitration agreement was governed by the FAA. In Appellant's warranty application there is no such language. Rather, the warranty application merely provides that once a dispute has been submitted to arbitration, the arbitration hearing is to be "conducted in accordance with the rules and procedure" provided by the FAA.

Additionally, while limited to the "rules and procedures" applicable to the arbitration hearing, the warranty application does not even provide that the FAA supplies the applicable rules and procedures for the arbitration hearing. Rather, the warranty application provides that the applicable rules and procedures shall be those "applicable to the arbitration organization hearing the dispute" and then, only "where those rules are silent," the rules and procedures of the FAA apply. (R. pp. 213 & 508) The warranty application cannot be an agreement for the FAA to govern where the application explicitly states the FAA does not apply unless another set of rules is silent.

Moreover, while the warranty application plainly does not state an agreement for the FAA to govern the enforceability of an arbitration provision, even were the language ambiguous on the issue, because the Purchase Agreement and warranty application are forms drafted by Appellant

(R. pp. 138 at ¶1; 201–05; 213–53; & 456 at ¶¶6–9), any ambiguity must be resolved in Respondent's favor. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010) ("[E]ven if the language creates an ambiguity, a court will construe any doubts and ambiguities in an agreement against the drafter of the agreement.").

Similarly, the warranty booklet language cited by Appellant is limited to the enforcement of an arbitration award and does not state an agreement for the FAA to apply generally to or govern the enforceability of an arbitration provision. The warranty booklet provides:

> The 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 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. pp. 217–53) Again, like the warranty application, this language only provides for application of the FAA where the rules of the arbitration organization hearing the dispute are silent. Again, like the warranty application, this language only provides for the applicability of the FAA to a narrow issue—whether an arbitration award can be modified or vacated—rather than providing that the FAA is generally applicable to an arbitration provision or that the FAA governs the enforceability of an arbitration provision.

For the foregoing reasons and most importantly because there is no language in any agreement with Respondent providing that the FAA governs the enforceability of the arbitration agreement, Appellant's argument that there was an agreement between the parties for the FAA to govern the arbitration agreement is erroneous.

III. The Circuit Court Correctly Found the Purchase Agreement Between Appellant and Respondent Was for a Transaction in Intrastate Commerce and Therefore Not Subject to the FAA.

The second and third issues presented by Appellant concern whether the circuit court erred in making the factual finding that the Purchase Agreement was a contract for the sale of a residence

and thus a transaction in intrastate commerce, rather than a contract for the construction of a residence and thus a transaction in interstate commerce.

A. Under the Applicable Any Evidence Standard of Review, the Circuit Court's Factual Finding that the Purchase Agreement is a Contract for the Sale of a Residence Must Be Affirmed Because there is Evidence in the Record Supporting that Finding.

The parties do not dispute, and South Carolina law is clear, that a circuit court's factual findings made in relation to determining whether a plaintiff's claim must be compelled into arbitration are subject to an any evidence standard of review. (Appellant's Br. 2) Under that standard, the circuit court's factual findings are not subject to challenge on appeal unless there is no evidence in the record that could reasonably support the findings. *See Chassereau*, 373 S.C. at 171, 644 S.E.2d at 720.

Here, the June 20 Order identifies evidence in the record supporting the circuit court's finding that the Purchase Agreement is a contract for the purchase of real property. Specifically, the June 20 Order identifies the title of the document, Appellant's representations in its filings, the issuance of a building permit for the townhome three months prior to when Respondent signed the Purchase Agreement, and the affidavit of Respondent as evidence supporting the finding that the Purchase Agreement is a contract for the purchase of real property, rather than a contract for construction of a residence. (R. pp. 8–9) Notably, Appellant represented to the circuit court in its motion that Appellant "*sells homes* to members of the public *using a standard purchase agreement*." (R. p. 138 at ¶1 (emphasis added)) Appellant also represented to the circuit court in the affidavit of its general counsel Nick Bacon that the Purchase Agreement is a "purchase agreement[]," rather than an agreement for the construction of a residence. (R. p. 199 at ¶21.) Those items of evidence constitute some evidence in the record reasonably supporting the circuit court's finding, and therefore, the circuit court's finding that the Purchase Agreement is a contract

for the sale of a residence, rather than for construction, must be affirmed under the applicable any evidence standard of review.

B. Even Were the Court to Weigh the Evidence Presented, Appellant Failed to Satisfy its Burden of Proof and There is No Evidence from Which a Court Could Conclude the Purchase Agreement Was a Contract in Interstate Commerce.

Not only does that evidence satisfy the applicable any evidence standard of review, even were there a reason to examine the circuit court's factual finding further, Appellant has not identified or submitted any evidence from which a court could conclude the Purchase Agreement is a contract for construction of a residence or a contract for construction and sale of a residence. Appellant, as the party moving to compel arbitration, bears the burden of proving the transaction involved interstate commerce, and Appellant failed to satisfy that burden.

Appellant contends that language in the Purchase Agreement providing that Appellant "will build or has built a home" for Respondent indicates that the contract was for construction. That conclusion does not follow from the language cited. The language plainly indicates that Appellant may have "built a home" for Respondent, meaning the construction was completed prior to Respondent signing the Purchase Agreement. Similarly, Appellant contends that terms permitting Respondent to inspect the townhome prior to closing somehow indicate the Purchase Agreement was a contract for construction. Inspections of property after entering into a purchase contract and prior to closing are standard for real estate transactions, and the availability of an inspection does not indicate a contract is a contract for construction as opposed to a contract for the sale of real estate. *See, e.g.*, *McLaughlin v. Williams*, 379 S.C. 451, 455, 665 S.E.2d 667, 669 (Ct. App. 2008) (pursuant to terms of agreement to purchase real estate, purchaser had inspection of property performed after entering into a purchase agreement and prior to closing); *Svenningsen*

v. Knight, 286 S.C. 299, 301, 333 S.E.2d 78, 79–80 (Ct. App. 1985) (contract for sale of real estate providing for inspection by purchaser after entering into agreement and prior to closing).

Appellant contends Respondent "could choose to add blinds, add appliances, or add a garage door opener if he wished to do so." (Appellant's Br. 8) Appellant cites to the "Integrity/Elements/Tribute Inventory Home Change Addendum" document in Exhibit A to the Motion as the evidence supporting that contention, but a review of the cited document indicates the document does not support that contention. The first numbered paragraph of that document provides: "The Home is sold as an Inventory home with existing structural, color and style selections. Changes to this Home may only be made per the terms described below, and could delay completion of the home." (R. p. 146) Therefore, the document indicates the townhome Respondent purchased was an "Inventory home" which Appellant had constructed or was constructing for sale to a consumer regardless of whether Respondent contracted to purchase it. The document also therefore indicates that changes to the townhome were only permitted "per the terms described below." Farther down the document there are three boxes that Appellant could select to indicate what changes could be made to the townhome. (R. p. 146) The top box, entitled "HOME HAS ALREADY FRAME STARTED," does provide that if that box is selected Appellant "has reviewed all selections with Buyer, and Buyer is accepting the home as selected other than the addition of applies, garage door openers and/or window blinds." (R. p. 146) However, none of the three boxes are selected. Instead, towards the top of the document is written "NO SHOWROOM-NO CHANGES." (R. p. 146) In other words, the document indicates Respondent was not permitted to make any changes to the townhome and was purchasing the townhome as constructed.

Additionally, even if any of the foregoing language was indicative of some construction that Appellant had to perform after Respondent signed the Purchase Agreement, none of the language identified by Appellant would alter the validity of the circuit court's conclusion that the Purchase Agreement is a contract for sale of a residence. *Bradley v. Brentwood* instructs that when determining whether a contract is for an intrastate or interstate transaction, a court is to examine the "essential character" of a contract containing an arbitration provision. *Bradley v. Brentwood*, 398 S.C. at 459, 730 S.E.2d at 318. As the circuit court held in its June 20 Order, "[t]he determinative consideration when analyzing whether a contract involved interstate or intrastate commerce in relation to a structure is what obligations the parties were contractually agreeing to undertake." (R. p. 9) In a construction contract, one party agrees to construct a specified structure for the other party in exchange for consideration. *See, e.g.*, Black's Law Dictionary 343 (8th ed. 2004) (defining a "construction contract" as: "A contract setting forth the specifications for a building project's construction."). In a contract for the sale of real property, one party agrees to transfer ownership of the real property, typically including the improvements on the property, to the other party in exchange for consideration. *See, e.g.*, 42 C.J.S. *Improvements* § 4 ("[I]mprovements to realty are considered part of the real property and ownership of the improvements follows title to the land.").

Here, Appellant's contractual obligation was limited to transferring ownership of the townhome property to Respondent. Paragraph 1 of the Purchase Agreement provides Appellant's contractual obligation: "to sell . . . the homesite." (R. p. 142 at ¶1) Unlike a construction contract, the Purchase Agreement did not require Appellant to construct any particular structure to any particular specifications. Instead, unlike a construction contract, the Purchase Agreement provided that Appellant could modify the structure without any approval from or even consultation with

Respondent. Paragraph 12 of the Purchase Agreement provides that Respondent "can make no changes to the Home other than as agreed on the Effective Date," but Appellant "may make changes to the Home" including changes to "improve design, or to maintain competitive pricing." (R. p. 143 at ¶12) Paragraph 12 further provides that Respondent "agrees to accept any change to the Home specifications that does not materially impact the Home's value." (R. p. 143 at ¶12) Additionally, paragraph 16 of the Purchase Agreement provides that Appellant could make numerous and substantial changes to the site conditions without any approval from or consultation with Respondent. (R. p. 143 at ¶16)

These terms are fundamentally different from a construction contract. In a construction contract, the builder is obligated to construct a structure according to certain specifications and cannot deviate unless the counterparty agrees. Here, Appellant's Purchase Agreement is the opposite. To the extent Appellant had any construction to complete at the time Respondent signed the Purchase Agreement, Appellant had control over what it constructed, and Respondent was required to accept Appellant's decisions or terminate the agreement. The inescapable result is that the essential character of the Purchase Agreement is a contract for the sale of real property, not a contract for the construction of a residence.

To the extent Appellant could show that any construction remained to be completed when Respondent signed the Purchase Agreement, that construction was ancillary to the essential character of the Purchase Agreement which was to sell real property. The *Bradley v. Brentwood* decision provides that "ancillary factors" of interstate commerce are insufficient to transform the intrastate transaction of selling real property into an interstate transaction. *See Bradley*, 398 S.C. at 459 ("Finally, if the utilization of out-of-state financing or a national warranty was sufficient to constitute interstate commerce, then every transaction that involved these ancillary factors would

be subject to the FAA. We believe a decision to this effect would eviscerate the well-established real estate exception to the FAA."). A holding otherwise would be contrary to and eviscerate the *Bradley* holding. Were the fact that any physical alteration of a structure—*i.e.*, construction work—to be performed after two parties entered into a contract sufficient to turn the essential character of that contract into a transaction in interstate commerce, then any contract for the sale of a residence in which the seller agreed to repair a part of the residence as a condition of the sale would be a transaction in interstate commerce.

IV. Appellant's Purported Written Warranty Does Not Change the Intrastate Character of the Purchase Agreement.

Appellant conflates two unrelated issues in arguing that Respondent "availing himself of the warranty provision within his agreement" transforms the Purchase Agreement into a contract in interstate commerce. In *Bradley v. Brentwood*, the seller of the home argued that the purchase agreement including provisions that a warranty would be provided by a national warranty company and that claims under the warranty were to be submitted to an office in another state resulted in the purchase agreement involving interstate commerce. *Bradley*, 398 S.C. at 456, 730 S.E.2d at 316. The Supreme Court concluded the inclusion of the national warranty did not result in the transaction involving interstate commerce because the plaintiff homeowner did not name the national warranty company as a defendant and did not make a claim under the express warranty provided by the purchase agreement. *Id.* at 459, 730 S.E.2d at 318. The Supreme Court also rejected that argument because if the inclusion of an express warranty "was sufficient to constitute interstate commerce, then every transaction that involved these ancillary factors would be subject to the FAA" and that "would eviscerate the well-established real estate exception to the FAA." *Id.*

The relevant facts here are identical to those in *Bradley v. Brentwood*. Here, Respondent did not name any warranty company as a defendant and did not assert a claim for breach of any

express warranty. Respondent asserted a claim for breach of the implied warranties of habitability and workmanship, but that is immaterial to whether an express warranty from an out-of-state warranty company converts a transaction into one in interstate commerce. In *Bradley v. Brentwood*, the plaintiff homeowner asserted a breach of implied warranty claim, but not a claim for breach of the express warranty, and the Supreme Court held the transaction was one in intrastate commerce. Applying the holding in *Bradley v. Brentwood*, the result is that the Purchase Agreement here providing for an express warranty from an out-of-state warranty provider does not result in a transaction involving interstate commerce, and the Court need go no further to reject Appellant's argument and affirm.

Appellant asks the Court to go further on the basis that Respondent "has a history of availing himself of the warranty provision within his agreement" (Appellant's Br. 12), but that argument is not preserved and is erroneous both factually and legally. First, Appellant did not raise the issue of purported requests for warranty services by Respondent until Appellant's motion for reconsideration and did not submit the materials on which it relies in support of the argument until the motion for reconsideration. Appellant cites two emails and a work order in support of its argument that Respondent availed himself of a warranty provision in the Purchase Agreement.[3]

[3] Appellant also cites to paragraph 19 in the Affidavit of Nick Bacon, which was submitted as an exhibit to the Arbitration Motion, as evidence that Respondent "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." (Appellant's Br. 12) However, neither paragraph 19 of the Affidavit of Nick Bacon nor any other paragraph in that affidavit provides any evidence that Respondent availed himself of a warranty provision in the Purchase Agreement. Paragraph 19 of the Affidavit of Nick Bacon states: "True Homes employees in North Carolina supported the Summerlake project by providing design services, accounting services, legal services, and warranty services." (R. p. 199 at ¶19) The only mention of Respondent in the affidavit is an assertion that Respondent "signed the arbitration agreement with True Homes." (R. p. 199 at ¶22) Neither paragraph 19, nor any other paragraph in the affidavit, contains any assertion that Respondent availed himself of a warranty provision in the Purchase Agreement, called a North

(Appellant's Br. 12) Those two emails and the work order were not introduced until submitted as Exhibits E and F to Appellant's Memorandum in Support of Motion to Reconsider. (R. pp. 533–49) An issue raised for the first time in a motion for reconsideration was not properly raised to the trial court and not preserved for appellate review. *Stevens*, 409 S.C. at 567, 762 S.E.2d at 695; *Spreeuw*, 385 S.C. at 69, 682 S.E.2d at 855; *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482.

Second, even if whether Respondent availed himself of the express warranty was relevant to whether the FAA applies and had been properly raised to the circuit court, Appellant's argument fails under the applicable burden of proof and standard of review. As the party moving to compel arbitration, Appellant bore the burden of submitting evidence showing the applicability and enforceability of an arbitration provision. *See Brentwood*, 398 S.C. at 458, 730 S.E.2d at 317–18. Additionally, whether there was evidence before the circuit court showing that Respondent availed himself of the express warranty is a factual determination for the circuit court subject to the any evidence standard of review on appeal. *See Chassereau*, 373 S.C. at 171, 644 S.E.2d at 720. As discussed *infra*, Appellant failed to present any evidence showing Respondent availed himself of an express warranty, and there is no evidence in the record from which the circuit court could have found Respondent availed himself of the express warranty. Therefore, the Court should reject this argument both because Appellant failed to satisfy its burden of proof and because the circuit court's decision is supported by the evidence in the record.

Third, Appellant's contention that Respondent availed himself of a warranty provision in the Purchase Agreement is not supported by the record. As discussed, Appellant cites to two emails and a work order as supporting its argument. (Appellant's Br. 12) Appellant has not

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Carolina call center to make requests under a warranty provision in the Purchase Agreement, or used repair contractors from another state to evaluate and fix items pursuant to a warranty provision in the Purchase Agreement.

presented any evidence or explanation as to how any of the cited items is a warranty request under a warranty provision in the Purchase Agreement. Appellant first cites to an October 14, 2016 email from Respondent. There are three October 14, 2016 emails from Respondent to a Don Brzozowski, presumably an employee of Appellant given the "@truehomesusa.com" email address, and Appellant does not specify which of the three emails it is citing to. (R. pp. 533–34) In the first of the three emails, the email sent by Respondent at 9:04 AM on October 14, 2016, Respondent makes no mention of any warranty. Rather, Respondent is notifying Appellant of a construction problem with his townhome which Appellant would be responsible for under South Carolina's negligence and implied warranty law for residential construction regardless of whether an express warranty was provided in the Purchase Agreement. *See, e.g.*, *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 561, 658 S.E.2d 80, 88–89 (2008) (recognizing implied warranties for residential structures); *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) (recognizing negligence for construction defects in residential structures). Additionally, the first October 14, 2016 email is preceded by an August 1, 2016 email from Appellant's employee Don Brzozowski regarding repairs that Appellant apparently undertook in August of 2016 at Respondent's townhome. (R. p. 534) Appellant failed to provide any earlier communications between Respondent and Appellant to show that the August 2016 work resulted from Respondent "availing himself of the warranty provision" in the Purchase Agreement (Appellant's Br. 12), and therefore, the Court has no means of determining the context that gave rise to the October 14, 2016 email from Respondent.

In response to that first October 14, 2016 email, Brzozowski made the first mention of any written warranty. (R. p. 534) Therefore, Appellant—*not* Respondent—raised the issue of a written warranty. Moreover, Brzozowksi's communications regarding a warranty eliminate Appellant's

argument that these communications constitute Respondent "availing himself of the warranty provision" in the Purchase Agreement. Brzozowksi stated that the work done in response to Respondent's previous communications was done "as a customer service gesture since you are out of warranty." (R. p. 534) Therefore, Appellant took the position that the work it performed on the home prior to October 14, 2016, and the work it performed on the home after October 14, 2016, cannot be work performed pursuant to a warranty obligation because Respondent was "out of warranty."

The same reasoning applies to the second and third October 14, 2016 emails sent by Respondent to Brzozowski. There, Respondent stated an issue had previously been reported during "that warranty period" but not addressed and that he was not aware of any warranty when reporting the issue, stating: "[t]his is ridiculous and ludicrous I am even having to bring it up a 3rd time just to get told about some warranty period." (R. p. 533) In response, Brzozowski sent an email to what appear to be email addresses for other employees of Appellant and not to Respondent, again stating Appellant's position that the issue was not being addressed under any warranty in the Purchase Agreement because Respondent was "out of warranty." (R. p. 533) Therefore, all the emails in the exhibit cited by Appellant establish that Respondent was not requesting repairs to his townhome under any written warranty and Appellant's position was that there was no applicable warranty in the Purchase Agreement requiring Appellant to perform the work already completed or any future work on the townhome.

The second item Appellant cites to is an October 27, 2016 email from Respondent. (Appellant's Br. 12; R. pp. 538–39) There are two emails sent by Respondent on October 27, 2016, and Appellant does not identify which email it is referring to, but neither email makes any mention of a warranty. (R. pp. 538-39) Moreover, the October 27, 2016 emails postdate the

October 14, 2016 email from Brzozowski in which he stated Appellant was not addressing the issue under any warranty and that any warranty had expired. (R. p. 534)

The third item Appellant cites to is what appears to be Appellant's internal log of issues and repairs for Respondent's townhome. (R. pp. 542–49) Appellant did not submit any affidavit or testimony to explain what the document is or how it is relevant to whether Respondent "avail[ed] himself of the warranty provision" in the Purchase Agreement. (Appellant's Br. 12) Regardless of the nature of the document, there is no indication in the document that Respondent made any request pursuant to a warranty provision in the Purchase Agreement.[4]

V. The Court Cannot and Should Not Disregard *Bradley v. Brentwood*.

Within Appellant's fifth issue, Appellant raises two separate grounds on which it contends the Court should disregard, overrule, or otherwise not apply the *Bradley v. Brentwood* decision: that the decision "is no longer supported" due to changes in South Carolina and that the decision treats arbitration provisions differently from other contract provisions. Both arguments fail for the reasons set forth below. However, a threshold issue barring Appellant's argument for disregarding *Bradley v. Brentwood*, is that the decision is binding precedent of the South Carolina Supreme Court.

[4] Additionally, while presumably immaterial given the lack of any evidence that Respondent made a request for any service pursuant to any warranty provision in the Purchase Agreement, Appellant also makes two assertions related to the purported warranty requests that misstate the record. Specifically, Appellant states that Respondent made warranty requests "utilizing the North Carolina call center True Homes has established to handle warranty requests" and that Respondent "began contacting True Homes employees in North Carolina seeking assistance with warranty items." (Appellant's Br. 12) In support of those factual assertions, Appellant cites to the emails and internal log previously discussed and paragraph 19 of the affidavit of Appellant's general counsel Nick Bacon. None of those documents provide any evidence that Respondent called a North Carolina call center or that any of Appellant's employees that Respondent communicated with were communicating from or conducting business from North Carolina. (R. pp. 198–99 & 533–49)

A. This Court Cannot Disregard or Overrule the *Bradley v. Brentwood* Decision.

Precedential decisions of the South Carolina Supreme Court are binding on this Court, and this Court does not have the authority to overrule or disregard such precedent. S.C. Const. art. V, § 9 ("The decisions of the Supreme Court shall bind the Court of Appeals as precedents."); *see also State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) ("[T]his court lacks the authority to rule against prior published precedent from our supreme court, but is bound by decisions of the supreme court."). The *Bradley v. Brentwood* decision is prior published precedent applicable here, and the Court cannot overrule or disregard it as Appellant requests.

B. Appellant's Argument that Changed Conditions Warrant Overruling or Disregarding the *Bradley v. Brentwood* Decision is Conclusory, Unpreserved, and Not Supported by Any Evidence.

Appellant makes a one sentence, conclusory argument that the *Bradley v. Brentwood* decision should be overruled or disregarded due to a purported "increase in home construction by regional and national homebuilders in the last ten years." (Appellant's Br. 12–13) Appellant fails to provide any legal authority, evidence, or explanation in support of this argument, and the argument can therefore be rejected as conclusory. *See, e.g.*, *McLean*, 314 S.C. at 363, 444 S.E.2d at 514; *State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Appellant's failures in this regard include the failure to explain to this Court and the circuit court *how* an increase in home construction by regional and national homebuilders would undermine the reasoning in *Bradley*, and Respondent submits that the reasoning in *Bradley* would remain valid even were every new home in South Carolina constructed by a non-South Carolina homebuilder.

Appellant also presented this argument for the first time in its motion for reconsideration. Appellant therefore failed to properly raise the issue to the circuit court, and the issue is not preserved for appellate review. *Stevens*, 409 S.C. at 567, 762 S.E.2d at 695; *Spreeuw*, 385 S.C. at 69, 682 S.E.2d at 855; *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482.

Moreover, even were the argument preserved and not conclusory, the argument is a factual argument for which Appellant failed to present any supporting evidence. The argument rests on the assumption that there has been an "increase in home construction by regional and national homebuilders in the last ten years." While unclear whether this a reference to an increase nationally or in South Carolina, Appellant has not presented evidence of an increase either nationally or in South Carolina. Therefore, even were the argument not erroneous for the reasons previously stated, the Court must reject the argument as a factual argument not supported by any evidence in the record.

C. The *Bradley v. Brentwood* Decision Does Not Treat Arbitration Provisions Differently from Other Contract Provisions.

Appellant also argues that "the *Bradley* decision creates a different treatment for arbitration provisions" and such "disparate treatment has been specifically prohibited by both the South Carolina Supreme Court and the United States Supreme Court." (Appellant's Br. 13) Appellant's disparate treatment argument fails for two reasons.

First, Appellant contends that the United States Supreme Court and the South Carolina Supreme Court have "specifically prohibited" any "different treatment for arbitration provisions," but Appellant fails to acknowledge that those holdings arise from the FAA and are limited to contracts to which the FAA applies. In the South Carolina Court of Appeal's decision in *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (1998), relied on by Appellant for this assertion, the Court of Appeals first found the contracts at issue were subject to the FAA "because,

as the parties stipulate, they each represent a transaction in commerce."[5] 330 S.C. at 396, 498 S.E.2d at 902. Only then did the Court of Appeals go on to discuss the United States Supreme Court's decisions providing that the FAA requires courts to treat arbitration provisions the same as other contract provisions. *Id.* at 397, 498 S.E.2d at 903.

In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996)—the decision of the United States Supreme Court relied on by the Court of Appeals in *Lackey* for the language quoted by Appellant—the United States Supreme Court considered "whether Montana's [arbitration statute] is compatible with the federal Act" when applied to a contract governed by the FAA. 517 U.S. at 683. The Court looked to Section 2 of the FAA which provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In language indicating the Court's analysis and holding was limited to arbitration agreements subject to the FAA, the Court stated that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Casarotto*, 517 U.S. at 687. Again indicating the Court's analysis and holding were limited to arbitration agreements subject to the FAA, the Court reasoned that "[b]y enacting § 2 . . . Congress precluded States from singling out arbitration provisions for suspect status." *Id.* Finally, again indicating the decision was limited to arbitration agreements subject to the FAA, the Court held: "The FAA thus displaces the Montana statute *with respect to arbitration agreements covered by the Act.*" *Id.* (emphasis added).

[5] Appellant contends that the "disparate treatment" of arbitration agreements "has been specifically prohibited by . . . the South Carolina Supreme Court," and cites the *Lackey* decision as a decision of the South Carolina Supreme Court, but *Lackey* is a decision of the South Carolina Court of Appeals. Appellant cites no other South Carolina appellate decisions in support of this contention.

Therefore, *Casarotto* is not an expansive holding applicable to all arbitration agreements as Appellant asserts. *Casarotto* is a decision limited to arbitration agreements subject to the FAA.

Decisions of the United States Supreme Court before and after *Casarotto* make clear that the requirement that states treat arbitration agreements equally to other contracts arises from Section 2 of the FAA and only applies to arbitration agreements governed by the FAA. For example, in the United States Supreme Court's decision in *Perry v. Thomas*, 482 U.S. 483 (1987)—cited by the Court in *Casarotto* as precedent compelling the result reached there—the Court stated that "Section 2 [of the FAA] . . . embodies a clear federal policy of requiring arbitration *unless the agreement to arbitrate is not part of a contract evidencing interstate commerce* or is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (emphasis added) (quoting 9 U.S.C. §2). Therefore, *Perry* acknowledges that Section 2 and its requirement that states treat arbitration agreements equally to other contractual provisions applies only if the arbitration agreement is governed by the FAA. Similarly, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), the United States Supreme Court recognized that its "first question" was whether the agreement at issue was an agreement governed by the FAA. *Prima Paint*, 388 U.S. at 401. Only after "[h]aving determined that the contract in question is within the coverage of the [FAA]," did the Court turn to the application of the FAA to the dispute. *Id.*at 402.

The *Bradley* decision that Appellant challenges carried out the same analysis. The *Bradley* decision reasoned that "in order to activate the application of the FAA, the commerce involved in the contract must be interstate or foreign." *Bradley*, 398 S.C. at 315–16, 730 S.E.2d at 454. If the arbitration agreement was not in a contract involving interstate commerce, the FAA did not apply to the agreement, and the agreement would have to comply with the requirements of the SCUAA

to be enforceable. *Id.* at 315–16, 730 S.E.2d at 453–54. Similarly, in *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, the South Carolina Supreme Court recognized that only "[i]f the arbitration agreement in the instant controversy is covered by the FAA, then *Casarotto* directly controls, and the FAA preempts [the SCUAA's notice requirement for an arbitration provision to be enforceable]." *Soil Remediation*, 323 S.C. at 459, 476 S.E.2d at 152. The Court went on to reason that because the SCUAA's notice requirement "singles out arbitration agreements, it directly conflicts with section 2 of the FAA" and the FAA therefore preempts the SCUAA notice requirement "if the agreement is covered by the [FAA]." *Id.*

Therefore, Appellant is putting the proverbial cart before the horse in asserting that *Bradley* impermissibly treats arbitration agreements differently from other contract provisions. Section 2 of the FAA requires that arbitration agreements subject to the FAA be treated the same as other contractual provisions, but Section 2 of the FAA only applies to arbitration agreements subject to the FAA. States are free to treat arbitration agreements that are not subject to the FAA—arbitration agreements not in a contract involving interstate commerce—differently from other contract provisions. The South Carolina General Assembly made the policy decision that arbitration provisions should be treated differently from other contract provisions by enacting the SCUAA with a requirement that an arbitration agreement have a specific notice at the top of the first page for the arbitration agreement to be enforceable. *See* S.C. Code Ann. § 15-48-10(a).

As employed by the United States Supreme Court and the South Carolina Supreme Court in the foregoing decisions, the required analysis begins with whether a particular arbitration agreement is governed by the FAA. If an arbitration agreement is not governed by the FAA, then the agreement can only be enforceable if it satisfies the notice requirements and other requirements of the SCUAA. If, and only if, an arbitration agreement is subject to the FAA does the analysis

proceed to the next step for a determination of whether a ground asserted as rendering an arbitration agreement unenforceable is a ground applied differently to arbitration agreements as compared to other contract provisions. Where the FAA does not apply, there is no requirement that an arbitration agreement be treated the same as other contract provisions.

Therefore, the holding in *Bradley* cannot be a state law that treats arbitration agreements subject to the FAA differently from other contract provisions, because the holding in *Bradley* is a determination of when an arbitration agreement is contained in a contract in intrastate commerce and not subject to the FAA versus contained in a contract in interstate commerce and subject to the FAA. Only after the intrastate commerce versus interstate commerce issue addressed by *Bradley* is resolved can there be an application of a state law to invalidate an arbitration agreement governed by the FAA.

Finally, even were the *Bradley* decision a holding applicable to arbitration agreements governed by the FAA—in other words, even were *Bradley* a state law applicable to an arbitration agreement *after* the arbitration agreement had been determined to be subject to the FAA—*Bradley* would not be a state law subjecting arbitration agreements to different treatment from other contract provisions. The holding in *Bradley* is that a contract "for the purchase of a completed residential dwelling" is a contract "involv[ing] intrastate commerce." *Bradley*, 398 S.C. at 459, 730 S.E.2d at 318. That holding would apply to any contract and determine whether any federal law turning on Congress's Commerce Clause powers over interstate commerce applied to the particular contract.

VI. Additional Sustaining Grounds Necessitate the Affirmance of the Result Below.

Appellant's arguments are unavailing, and the Court should reject them for the reasons stated *supra*. However, even were there some error in the circuit court's ruling that Respondent's

claims are not subject to arbitration due to the intrastate nature of the transaction, the Court should reach the same result and affirm the circuit court's order on one or more of the five additional sustaining grounds present in the record. In addition to affirming due to the intrastate commerce nature of the transaction and the arbitration agreement's failure to comply with the SCUAA's notice requirements, the Court should also affirm the circuit court's ruling that the arbitration provision in the Purchase Agreement is not enforceable on the following additional sustaining grounds: (1) the arbitration agreement is unconscionable and therefore unenforceable, (2) the claims in this action are outside the scope of the arbitration provision, (3) there was no meeting of the minds as to the terms of the arbitration agreement and it is therefore unenforceable, (4) the arbitration provision in the Purchase Agreement merged into the deed and is therefore no longer enforceable, and (5) Appellant waived its right to compel arbitration.

After the circuit court issued the orders on appeal here, the South Carolina Supreme Court issued *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022), which further establishes that Appellant's arbitration agreement is unconscionable and unenforceable. Accordingly, the *Damico* decision and the unconscionability additional sustaining ground are addressed in detail below. The remaining additional sustaining grounds are addressed *infra* and in more detail in Respondent's briefing below.

A. The Arbitration Agreement is Unconscionable and Therefore Unenforceable.

An agreement is unconscionable where a party lacked a meaningful choice in entering into the agreement and the agreement contains oppressive, one-sided terms. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668-69 (2007). On the first requirement that a party lacked a meaningful choice, a court considers "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties'

bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. The fact that a contract is an adhesion contract entered into by a consumer and is for a necessity both weigh in favor of finding a lack of meaningful choice and result in such a contract being reviewed with "considerable skepticism." *Damico*, 437 S.C. at 613, 879 S.E.2d at 756; *Simpson*, 373 S.C. at 26–27, 644 S.E.2d at 669.

The Supreme Court's *Damico* decision further elucidates the fact that the Purchase Agreement is a contract of adhesion and Respondent lacked a meaningful choice. On the unconscionability of an arbitration agreement, the facts in *Damico* are nearly identical to this case. In *Damico*, the Court found it "manifest" that the contract was a contract of adhesion because it was a form contract given to all homebuyers with only a few blanks to be filled in and with the printed terms non-negotiable. *Damico*, 437 S.C. at 614, 879 S.E.2d at 756. As set forth in detail in Respondent's briefing below and established by the materials in the record, the Purchase Agreement here is the same— a form contract with non-negotiable printed terms and blanks left to write in the purchasing party's name and the details of the lot and purchase price—and therefore a contract of adhesion. (R. pp. 142–43)

The *Damico* decision also concluded the purchasers lacked a meaningful choice in entering into the arbitration agreement because "the sophistication of Petitioners, as individual homebuyers, pales in comparison to Lennar" because the petitioners there were individual consumers who "will likely only purchase, at best, a handful of homes in their entire lifetime," whereas the homebuilder seller "has sold thousands of homes in the Carolinas." *Id.* Again, as set forth in detail in Respondent's briefing below and established by the materials in the record, the relative positions of Respondent and Appellant here are the same. Appellant identifies itself as "one of the

Carolina's largest homebuilders" and as having "more than 60 great new home communities in the Carolinas." (R. pp. 457 at ¶16 & 463–64) Respondent is an individual consumer with no education, training, or professional experience in law, real estate, or construction. (R. p. 456 at ¶4) Additionally, while *Damico* indicates those facts alone necessitate a conclusion that Respondent lacked a meaningful choice in agreeing to the arbitration provision in the Purchase Agreement, here the arbitration provision is also inconspicuous which is an additional fact not present in *Damico* and that further requires the conclusion that Respondent lacked a meaningful choice.

On the second element of unconscionability—oppressive, one-sided terms—Paragraph 23 of Appellant's Purchase Agreement provides that "[t]he parties agree to abide by the Mediation and Arbitration provisions contained in the Warranty Policy" and that "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 . . . ." (R. p. 143 at ¶23)

While Appellant produced a "Builder's Limited Warranty" document which it claims is the "warranty documentation" setting out the arbitration process (R. pp. 194 & 217–53), Appellant presented no evidence that the "Builder's Limited Warranty" document was ever given to Respondent or is the "limited warranty booklet" referenced in the Purchase Agreement. Moreover, it is clear from the face of the "Builder's Limited Warranty" document that it is not a warranty document given to Respondent and is not the "limited warranty booklet" referenced in the Purchase Agreement, because each page of the document has a "SAMPLE" watermark.

Even were there some evidence from which a court could find the Builder's Limited Warranty document is the applicable warranty booklet—which there is not, the Builder's Limited Warranty and the Purchase Agreement contain terms found oppressive and one-sided in *Damico*. Moreover, unlike the arbitration provisions at issue in *Damico*, here the arbitration provisions, the express limited warranty, and the disclaimers and limitations on liability are all intertwined and inseparable. Both the Purchase Agreement and the Builder's Limited Warranty provide, in a contract of adhesion and without any bargaining with Respondent, that the express limited warranty is Respondent's sole remedy for any defective construction or other damages arising from his townhome. (R. pp. 143 at ¶¶23, 24; & 217–18) The *Damico* decision found oppressive and one-sided a contract provision purporting to waive the implied warranty of habitability. *Damico*, 437 S.C. at 617, 879 S.E.2d at 758. The Purchase Agreement also provides that it "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. p. 143 at ¶22.) In *Damico*, the Supreme Court recognized a substantially identical provision as "a blatant falsehood" and an oppressive, one-sided provision. *Damico*, 437 S.C. at 617, 879 S.E.2d at 758.

The foregoing are only the oppressive, one-sided terms present both here and in *Damico*, and as set forth in Respondent's briefing below, the Purchase Agreement and Builder's Limited Warranty contain terms more oppressive and more one-sided than those present in *Damico*. Briefly, such terms include a disclaimer of all implied warranties—rather than just a disclaimer of the warranty of habitability mentioned in *Damico*. (R. p. 143 at ¶¶23, 24, & 26) Such terms also include a limitation of liability and remedies to Appellant performing repair work as set out in the Builder's Limited Warranty, with Respondent unable to recover any monetary damages and unable to obtain repairs on any item not within the limited warranty's narrow terms. (R. p. 143 at ¶¶23,

24, & 26) Accordingly, while *Smith v. D.R. Horton*, 417 S.C. 42, 790 S.E.2d 1 (2016), and the other decisions cited in Respondent's briefing below establish that the arbitration agreement at issue here is unconscionable, the recent *Damico* decision further cements the conclusion that the arbitration agreement here is unconscionable and unenforceable.

B. Respondent's Claims are Not Within the Scope of the Arbitration Agreement.

Even were the arbitration provision in the Purchase Agreement enforceable—which it is not for the reasons discussed *supra* and *infra*—the arbitration provision does not apply to Respondent's claims, and therefore, Respondent's claims cannot be compelled into arbitration. The arbitration provision in the Purchase Agreement only applies to "WARRANTY DISPUTES," providing: "SELLER AND BUYER . . . AGREE TO SUBMIT ANY *WARRANTY DISPUTES* FOR RESOLUTION IN ACCORDANCE WITH THE PROCESS DESCRIBED IN THE LIMITED WARRANTY BOOKLET . . . ." (R. p. 143 at ¶23 (emphasis added)) The reference in that sentence to the "limited warranty booklet" and the preceding sentences in paragraph 23 of the Purchase Agreement establish that the "warranty" referred to is an express warranty provided in a "limited warranty booklet." Respondent does not assert any claims in this action under any express warranty provided by Appellant. (R. pp. 30–103)

Additionally, the Purchase Agreement references a separate document—the "LIMITED WARRANTY BOOKLET"—and does not define what constitutes a "WARRANTY DISPUTE" covered by that document. As the party seeking to compel arbitration, Appellant bore the burden of proof, including proving that an arbitration provision in the Purchase Agreement covers Respondent's claims. As discussed previously, Appellant failed to introduce the limited warranty booklet referenced in the arbitration provision and failed to present any evidence that the terms of

the sample limited warranty booklet offered in support of the motion were the same as the terms of any limited warranty booklet provided to Respondent.

Even assuming the sample warranty booklet that Appellant offered in support of its motions was provided to Respondent or has the same terms as a warranty booklet provided to Respondent, the terms of that sample warranty booklet establish that any arbitration provision in the warranty booklet would not cover Respondent's claims. The sample warranty only provides for the arbitration of "disputes . . . related to or arising from this BUILDER'S LIMITED WARRANTY . . ." (R. p. 222) The sample warranty further provides that any arbitration thereunder is for a determination of "rights and obligations under this BUILDER'S LIMITED WARRANTY." (R. p. 223) The sample warranty also provides that arbitration can be initiated only by submitting the "binding arbitration request form" included within the sample warranty booklet, and that form limits the issues to be decided in the arbitration to whether a defect is covered by the "Builder's Limited Warranty." In relation to stating the issues to be arbitrated, the form directs the homeowner to state, and only state, "the deficiencies which you think *are covered by the Builder's Limited Warranty*." (R. p. 252 (emphasis added)) The form also has the homeowner sign below the statement that the homeowner is "requesting [the warranty company] to initiate an arbitration *to determine the builder's obligations with respect to the existence of alleged deficiencies under the Builders Limited Warranty* and under applicable federal, state, and local law *regarding the Builder's Limited Warranty*." (R. p. 252 (emphasis added))

In conclusion, the Purchase Agreement and the sample warranty booklet both provide that disputes over whether a deficiency must be repaired by Appellant under the terms of an express warranty must be decided in arbitration. But neither the Purchase Agreement nor the sample warranty booklet provide that claims for defective construction asserted on legal grounds other

than an express warranty must be decided in arbitration. To the contrary, the unambiguous terms of the Purchase Agreement and sample warranty provide that claims asserted on grounds other than an express warranty are not subject to an arbitration provision.[6]

C. The Arbitration Provision Lacks a Meeting of the Minds on the Terms and is Therefore Unenforceable.

In determining whether an arbitration provision is enforceable, courts are to "ensure a meeting of the minds to arbitrate existed." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 145 (Ct. App. 2013). For an enforceable arbitration agreement to exist, "there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." *Player,* 299 S.C. at 105, 382 S.E.2d at 893.

Appellant seeks to enforce an arbitration provision requiring arbitration in accordance with "the process described in the limited warranty booklet." (R. p. 143 at ¶23 (changed to lower case text)) However, Fuentes did not receive any "warranty booklet" prior to or when he entered into the Purchase Agreement, (R. p. 457 at ¶¶11–13), and there cannot have been a meeting of the minds on the terms of a contract where one of the parties to the contract did not know of those terms. Additionally, even if the sample warranty booklet introduced by Appellant were a warranty booklet provided to Respondent prior to or when he entered into the Purchase Agreement, there still would not be a meeting of the minds as to the material terms. The sample warranty booklet provides that the warranty company has the sole right to select the arbitration organization and the rules and procedures governing the arbitration. (R. p. 223 ("Any binding arbitration will be

[6] Moreover, even were there some ambiguity as to whether the arbitration provision covers Respondent's claims, like the interpretation of any other contract provision, that ambiguity must be resolved against Appellant as the drafter and in favor of Respondent and his ability to exercise his constitutional rights to have claims resolved in a court by a jury. *See Mathis*, 389 S.C. at 309, 698 S.E.2d at 778.

conducted by an independent arbitration organization designated by PWC or OUR insurer. The rules and procedures followed will be those of the designated arbitration organization."). There cannot have been a meeting of the minds on the material terms of an agreement to arbitrate where Respondent did not and could not know who would conduct the arbitration and the rules and procedures under which the arbitration would be conducted.

D. The Arbitration Provision is Unenforceable Under the Merger Doctrine.

Under the merger doctrine, the Purchase Agreement merged into the deed transferring ownership of Respondent's townhome from Appellant to Respondent. The merger doctrine provides that "[a] deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract." *Charleston W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 505, 99 S.E.2d 187, 193 (1957). "[T]he party denying merger has the burden of proving by clear and convincing evidence that merger was not intended." *Hughes v. Greenville Country Club*, 283 S.C. 448, 451, 322 S.E.2d 827, 828 (Ct. App. 1984).

The deed from Appellant to Respondent does not mention arbitration and does not mention the Purchase Agreement, much less provide that the Purchase Agreement survives the deed or incorporate the terms of the Purchase Agreement into the deed. (R. pp. 447–48) To the contrary, the deed provides that Appellant transfers the property to Respondent with "all the rights, members, hereditaments and appurtenances whatsoever to the said premises" and only subject to "the rights, conditions and restrictions that constitute covenants running with the land which are set forth or referred to herein or which may otherwise appear of record." (R. p. 447) Appellant therefore conveyed the property to Respondent with all rights, including the right to pursue legal claims in court for defects in the construction of the property, and the only limits on Respondent's rights in relation to the property are the recorded covenants.

E. Appellant Waived its Right to Compel Arbitration.

Even were there a valid, enforceable agreement to arbitrate that covered Respondent's claims—which does not exist for all the reasons previously stated—Appellant waived its right to compel arbitration through delay and availing itself of the judicial process. A party waived its right to compel arbitration where the party delayed in demanding arbitration and that delay imposed a burden on the opposing party. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003). While there is no set amount of delay that creates a waiver of arbitration rights and the analysis depends on the facts of the case, South Carolina courts generally consider the following factors: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007); *see also Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). Less than a year delay can be sufficient for waiver. *See Rhodes*, 374 S.C. at 128, 647 S.E.2d at 252. The prejudice determination considers whether the opposing party incurred "unnecessary litigation expenses" including discovery and appearances before the court. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 514, 788 S.E.2d 216, 219 (2016).

Appellant engaged in substantial delay in moving to compel arbitration, having been served in this action on March 25, 2021, and waiting until just shy of a year later, February 15, 2022, to move to compel arbitration. Over the nearly one year delay in moving to compel arbitration, Appellant availed itself of the judicial process, took actions that would not be available to it in

arbitration, and subjected Respondent to otherwise avoidable litigation expenses. For example, Appellant moved to stay the case, had a hearing by the circuit court on the motion, entered into a consent order resolving the motion, and inspected townhomes pursuant to that consent order entered by the circuit court. (R. pp. 14–21 & 135–36)

Appellant also availed itself of the judicial process by serving a subpoena on the management company for the Association and Respondent's counsel expended significant time reviewing and producing the responsive records. (R. pp. 421–45) Moreover, because a party compelling claims into arbitration has no right to use the judicial process to conduct inspections and subpoena documents, Respondent and the other plaintiffs would not have agreed to the inspections and produced documents in response to the subpoena had Appellant timely indicated its intent to compel claims into arbitration. Therefore, Appellant engaged in substantial delay in moving to compel arbitration, prejudiced Respondent through that delay, and waived its right to compel arbitration.

CONCLUSION

For the reasons set forth herein, the Court should affirm.

Respectfully submitted,

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