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**Jun 12 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

William A. McKinnon, Circuit Court Judge

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Case No. 2020-CP-46-03592

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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 PJJ Construction; and Pedro Villareal-Conception d/b/a CVP Construction, Defendants,

Of which True Homes, LLC, is the Appellant.

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APPELLANT'S FINAL REPLY BRIEF

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June 12, 2023

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## ARGUMENT

Within Respondent's Brief are several misstatements of fact and law and misinterpretations of Appellant's argument. In reply, Appellant seeks to correct these misstatements and clarify the arguments it presents on appeal. As the parties have fully explained the allegations of the Complaint, Appellant does not repeat those allegations here, but reincorporates its statement of the facts from Appellant's Brief.

### **I. Respondent's argument that True Homes "abandoned and conceded" its argument that Respondent's contract is subject to the FAA is unsupported by the record.**

Resorting to attempts at legal "gotcha" rather than addressing the merits of this appeal, Respondent asserts Appellant's arguments on appeal—in essence that the circuit court erroneously found the Federal Arbitration Act does not apply to Respondent's contract—have been abandoned because Appellant decided not to challenge a ruling related to a separate and distinct party. *See Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring) ("I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a "gotcha" game with attorneys . . . ."). This Court should decline Respondent's invitation to avoid the clear issues raised by Appellant's appeal.

It is true, Appellant made a strategic decision not to challenge the circuit court's decision not to compel a non-signatory's claims to arbitration. Appellant clearly decided, however, to challenge the circuit court's decision not to compel Respondent's claims to arbitration.

"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Atkins v. Wilson*, 417 S.C. 3, 17, 788 S.E.2d 228, 235 (Ct. App. 2016) (quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). "The doctrine of the law of the case prohibits issues which have been decided in a prior appeal from

being relitigated in the trial court in the same case.” *Ross v. Medical University of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997).

In *Atkins*, this Court reviewed a motion to dismiss an appeal for failure to include the town of Chapin as a respondent in an appeal of a declaratory judgment action against its mayor and town council. 417 S.C. at 10, 788 S.E.2d 232-33. The town was a defendant in the case below and the Respondents asserted the law of the case doctrine precluded any review of the merits of the appeal because the order was not appealed with respect to the town. *Id.*

This court noted “[g]iven all of the surrounding circumstances under which Respondents ask us to apply the law-of-the-case doctrine, we conclude such an application is inappropriate.” *Id.* at 18, 788 S.E.2d at 236. The court noted “[t]o hold otherwise would place form over substance when doing so would not further the interests of justice.” *Id.*

Respondent asserts that because Appellant decided not to “[m]ake 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” this issue with respect to Mr. Fuentes’ contract.<sup>1</sup> Such an argument is illogical. Respondent’s argument would have this Court simply ignore the issues plainly raised with respect to Mr. Fuentes’ separate and distinct contract. Appellant is no longer seeking to compel Ms. Hagy’s claims to arbitration. There was no need to appeal the court’s rulings related to her contract. Appellant is seeking to compel Mr. Fuentes’ claims to arbitration and has accordingly raised the issues applicable to Mr. Fuentes’ contract. Accepting

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<sup>1</sup> Interestingly, Respondent appears to agree that the court’s interpretation of one contract should not preclude the court’s review of other contracts. Specifically, footnote 1 of Respondent’s brief, spanning over a page in length, argues any ruling related to Respondent’s purchase agreement cannot be said to affect “similarly situated class members.” Appellant does not seek to compel claims, which have not been brought, to arbitration. If no claims exist, there is no need to arbitrate.

Respondent's argument would likewise place form over substance and would not further justice.

**II. True Homes' Memorandum in Support of its Motion to Compel includes reference to the FAA provisions within the arbitration agreement and includes the agreement itself as an exhibit; thus, True Homes is not attempting to introduce a new issue at this stage.**

Respondent asserts "Appellant raised the issue of a purported agreement for the FAA to apply for the first time in its motion to reconsider." (Respondent's Final Brief at 12). Respondent's assertion is demonstrably wrong.

In its Memorandum in Support of the Motion to Compel, Appellant argued Respondent agreed "to abide by the Mediation and Arbitration provisions contained in the warranty policy." (R. p. 189). Further, Appellant noted "In signing the P.A., Mr. Fuentes 'acknowledge[d] a receipt of the sample Warranty Policy provided at the point of contract.'" (R. p. 189). Moreover, Appellant argued that in signing the warranty application, Mr. Fuentes agreed:

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

(R. p. 190). Appellant further included the warranty booklet which indicated:

"[t]he award of the arbitrator will be final, binding and enforceable as to both YOU and US or OUR insurer, except as modified, or vacated in accordance with the applicable rules and procedures of the designated arbitration organization, or, in their absence, the United States Arbitration Act (9 U.S.C. § 1 et seq.).

(R. p. 223). The argument that Appellant raised this issue for the first time in a Rule 59 motion is clearly erroneous.

Furthermore, simply because Respondent chooses to ignore the plain language of his agreement with Appellant does not mean this Court should. As noted *infra*, the arbitration agreement Mr. Fuentes signed specifically references a sample Warranty Policy which he acknowledged he received. That sample Warranty Policy and the Warranty Application he executed both contemplate the FAA would be applicable to the arbitration between the two parties.

Even in the face of Respondent's own acknowledgment to the contrary, Respondent indicates "the uncontradicted evidence in the record is that Respondent did not receive any warranty booklet until after he closed on the townhome." (Respondent's Final Brief at 13). Respondent would have this Court believe, based solely on his self-serving affidavit, which could not be cross-examined, that Respondent did not receive the warranty booklet containing the very arbitration agreement he challenges, when he agreed at the time he purchased the home that he received "the sample Warranty Policy provided at the point of contract."<sup>2</sup> Respondent's averments to the contrary are, again, demonstrably incorrect.

Respondent makes additional arguments related to the interpretation of the various provisions of the arbitration provisions noted above. These arguments are also unavailing. Respondent asserts that incorporating the Federal Arbitration Act rules and procedures into the arbitration agreement is different from an agreement that the Federal Arbitration Act applies. Respectfully, Respondent's assertion is a distinction without a difference. By agreeing that the Federal Arbitration Act has any applicability to the contractual relationship between the two

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<sup>2</sup> Because the circuit court declined to pass judgment on the truthfulness of Mr. Fuentes' affidavit, it would be inappropriate for this Court to consider that issue for the first time on appeal. Rather, the issue should be remanded to the circuit court for an evidentiary hearing to determine whether Mr. Fuentes' contradicting affidavit is entitled to any semblance of credibility. *See McMaster v. Dewitt*, 411 S.C. 138, 149, 767 S.E.2d 451, 456 (2014) (recognizing a court "may exclude an affidavit when it was submitted 'to contradict that party's own prior sworn statement' in 'an attempt to create a sham issue of material fact'").

parties, Respondent has agreed to be governed by that Act. This court should honor that agreement. *See Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We must enforce this agreement like any other contract term.”) *overruled on other grounds by Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022).

**III. Respondent conflates the applicable standard of review applicable to the basis upon which the circuit court denied Appellant’s motion.**

It is clear from both the transcript of the hearing and the circuit court’s order that Judge McKinnon felt bound by the decision in *Bradley* to rule in the manner he did. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012). On the record, the circuit court noted “I’m gonna rule for the plaintiff on this. I’m gonna--on the *Bradley versus Brentwood* issue on this case on this issue.” (R. p. 132). The circuit court’s order similarly found “In *Bradley v. Brentwood Homes, Inc.*, the South Carolina Supreme Court rejected [Appellant’s] argument, holding that ‘ancillary factors’ like a national warranty and out-of-state financing do not result in a transaction involving interstate commerce.” (R. p. 11).

Appellant asserts the circuit court made an error of law in determining that *Bradley* controls this case. The appellate courts of this state “appl[y] de novo review to questions of law, so [they] need not defer to the determination of the court below.” *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022). The question of law here is whether *Bradley* applies to these facts. Appellant asserts it does not. Appellant stands by the bases for this argument which have been laid out in its opening brief, and, for the sake of brevity, does not repeat them in full here. Rather, Appellant simply asserts the facts of the case, including the immense number of out-of-state contractors, employees, and businesses involved in the development, sale, and warranty responses involved in this case distinguish these facts from those of *Bradley* to the extent that reliance upon that case to decide this one amounts to an error of law.

**IV. This court should decline Appellant’s invitation to affirm on alternative sustaining grounds.**

Should the Court agree with Appellant that the *Bradley* decision is inapplicable to the facts presented in this case, Respondent presents five alternative sustaining grounds which he asserts would allow this Court to nonetheless affirm the circuit court’s order. Appellant recognizes that South Carolina appellate courts may, “if convinced it is proper and fair to do so, rely on [additional sustaining grounds] or any other reason appearing in the record to affirm the lower court’s judgment.” *I’on, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 723 (2000). However, for the reasons set forth below in response to each of Respondent’s arguments, on which the circuit court expressly declined to rule, this Court should similarly exercise its discretion not to do so. *Id.* (“It is within the appellate court’s discretion whether to address any additional sustaining grounds.”).

a. The arbitration agreement is valid under South Carolina law.

Respondent asserts that this Court, as an issue of first impression, should find that all arbitration agreements in contracts for the construction and sale of a home should be found unconscionable due to their one-sided nature. Respondent cites to our Supreme Court’s recent decision in *Damico*, finding the Lennar arbitration agreement unconscionable as evidence of his position. A simple review of the plain language of the *Damico* decision demonstrates how misguided Respondent’s position is.

Most importantly, this Court must look solely to the arbitration provision itself to determine whether it is unconscionable. *See Damico*, 437 S.C. at 608-09, 879 S.E.2d at 753 (“Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded.”). “As a result, as [the Court] stated in *D.R. Horton*, ‘in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.’”

*Id.* at 609, 879 S.E.2d at 753 (quoting *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48 n.4, 790 S.E.2d 1, 3 n. 4 (2016)).

Respondent ignores the *Prima Paint* requirements, instead searching far and wide for provisions which it claims are one-sided and oppressive. To the extent Respondent claims those provisions are unenforceable, that is a question for the arbitrator, not the court. *Id.* (“The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator.”).

The arbitration agreement in *Damico* “contain[ed] ten, numbered paragraphs setting forth the arbitration agreement.” These ten numbered paragraphs included paragraph 4, providing that Lennar, in its sole discretion, may include its subcontractors and suppliers as parties in the arbitration. *Id.* at 615, 879 S.E.2d at 757. This provision was the basis for the *Damico* Court’s determination that the arbitration provision Lennar drafted was unconscionable. The Court noted a plaintiff is the master of its complaint and “[g]iving Lennar the ‘sole election’ to include or exclude subcontractors in the arbitration proceeding strips Petitioners of that right and overturns a firmly entrenched legal principle.” *Id.*

The arbitration provision at issue here has no such legal infirmities. Rather, the arbitration agreement, contained in Paragraph 23 of the Purchase Agreement simply indicates Appellant would purchase a home warranty policy in the materially same form as the sample booklet provided, that the buyer had received a copy of the sample booklet, the standards governing the construction of the home, and, among other inapplicable provisions, that the parties “knowingly and voluntarily agree” to submit disputes to arbitration. (R. p. 202). Nothing within this provision is even remotely similar to the provision invalidated by the Court in *Damico*, and any argument that this term is unconscionable is unsupported by South Carolina law.

- b. Respondent's claims, all relate to alleged deficiencies to the home and property which is the subject of the contract, thus they are within the agreement's scope.

“It is the policy of this state and federal law to favor arbitration and ‘any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.’” *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)).

The parties have not had an opportunity to provide evidence regarding the scope of the arbitration agreement, as the circuit court below did not address the issue during oral argument or in its Order denying Appellant's motion. Accordingly, the record has not been sufficiently developed on this issue and a decision by this Court for the first time on appeal would be premature. Accordingly, should the Court find the FAA does apply and there are concerns regarding the scope of the agreement, those concerns should first be addressed on remand.

However, the plain language of the arbitration agreement suggests the parties agreed that arbitration would be sole avenue for resolving their disputes. “The parties agree to abide by the Mediation and Arbitration provisions contained in the Warranty Policy.” (R. p. 202). “In the event a DEFICIENCY occurs during the applicable coverage period,” the parties had certain contractual responsibilities to each other to resolve disputes involving those deficiencies as outlined in the warranty booklet. (R. p. 219). Finally, Respondent agreed “I/we acknowledge and agree that all disputes under and relating to the Builder's Limited Warranty (including disputes on which issues shall be submitted to arbitration; alleged breach of the Builder's Limited Warranty; and alleged violations of statutes or regulations relating to consumer protection or unfair trade practices) shall be submitted to binding arbitration.” (R. p. 213). There is no doubt Respondent asserts there are “Deficiencies” as defined by the warranty booklet. Respondent has agreed to a process through which those issues would be resolved. Respondent should be held to the process upon which he has agreed to pursue these claims.

- c. As previously noted, Respondent acknowledged he received the Warranty Policy, thus his agreement to the policies contained therein is enforceable.

Although Respondent focuses much of its attention on the assertion he did not receive the warranty booklet applicable to this case, he is deemed to have read the contract he signed, which indicates he has, in fact, received the document. *See Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (finding, even though the plaintiff claims she did not understand the concepts within the contract, “no genuine issue of material fact [exists] because one who has signed a contract is presumed to have read, understood, *and assented to its terms.*” (emphasis added)). Respondent cannot now disclaim contract terms he previously assented to.

- d. The Merger Doctrine is inapplicable.

Respondent asserts the purchase agreement merged into the deed and is no longer enforceable. “The party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.” *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260-61, 743 S.E.2d 868, 874 (Ct. App. 2013) (quoting *Hughes v. Greenville Country Club*, 283 S.C. 448, 450-51, 322 S.E.2d 827, 828 (Ct. App. 1984)). Respondent again ignores the plain language of his agreement, specifically Section 17 of the PA, where the parties agreed “The terms of this Agreement will survive the Closing.” *See id.* at 261, 743 S.E.2d at 874 (“Pursuant to the clear and unambiguous terms of the purchase agreement, clear and convincing evidence supports a finding that the parties did not intend for the arbitration clause to be merged into the deed at closing.”). Accordingly, the merger doctrine does not apply.

- e. Appellant has not waived its right to arbitration.

Respondent asserts Appellant has waived its right to arbitrate these claims by waiting “until just shy of a year” after first being served with this lawsuit to move to compel arbitration. Of course, Respondent does not acknowledge that the reason for the delay involved

Respondent's failure to comply with the South Carolina Notice and Opportunity to Cure Act and Respondent's failure to organize an inspection of his property until six months after serving Appellant with the lawsuit and amending the Complaint to add additional parties before Appellant could file its initial responsive pleading in this matter.

Respondent also asserts Appellant invoked the judicial process by serving one subpoena to the townhome owners' association's management company, a party likely to receive such a subpoena from any number of subcontractor defendants.<sup>3</sup> Such action is not sufficient to constitute a waiver of arbitration. *See Toler's Cove Homeowners Ass'n v. Trident Const. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003) (finding a thirteen-month delay where "Respondent had not held any depositions or engaged in extensive discovery requests" were insufficient facts to support a waiver of the right to compel arbitration). No South Carolina court has ever found the service of one subpoena is sufficient to constitute a waiver of the right to arbitration. This Court should not be the first.

### CONCLUSION

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

s/ Joshua R. Hinson \_\_\_\_\_

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<sup>3</sup> This fact is important as Respondent cannot prove any "prejudice" in reviewing information to be produced by the TOA's management company because the review would have been necessary regardless of the party requesting the information.

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of which True Homes, LLC is the Appellant.

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CERTIFICATE OF COMPLIANCE WITH  
RULE 211, SCACR

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The undersigned hereby certifies that Appellant's Final Brief and Appellant's Final Reply Brief comply with Rule 211(b) of the South Carolina Appellate Court Rules.

June 12, 2023

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