THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Appellate Case No. 2022-000938

Denise M. Petersen, individually and as Trustee of the Denise M. Petersen 2005 Revocable Trust Dated November 9, 2005, as Trustee of the 601 Ocean Boulevard Residence Trust Dated November 30, 2012, and as Trustee of the 601 Ocean Boulevard Residence Trust II Dated December 7, 2012, ……Respondent,

v.

DCTCL, L.P., d/b/a Buffington Homes, L.P., Donnix Construction, LLC, Hunt Brothers Construction, Inc., Island Exteriors and Siding, Inc., Plastering Surfaces, LLC, a Unique Design, Inc., Berkeley Heating and Air Conditioning, Inc., Energyone America, LLC, Aqua Blue Pools of Charleston, Inc., Sunnyside Farms, Inc., TAMKO Building Products, LLC, Haddigan Electrical Contractors, LLC and John Doe Contractors 3 through 50, ……Defendants,

Of Which

Donnix Construction, LLC, is ……Respondent,

And

TAMKO Building Products, LLC is ……Appellant.

FINAL INITIAL BRIEF OF APPELLANT,
TAMKO BUILDING PRODUCTS, INC.

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July 26, 2023

Columbia, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. Whether the arbitration clause in TAMKO's express limited warranty requires Plaintiff Petersen and Defendant/Crossclaimant Donnix (together, "Respondents"), as non-signatories to the warranty, to arbitrate their claims against Defendant TAMKO Building Products, LLC ("TAMKO").

II. Whether the arbitration clause in TAMKO's express limited warranty requires a direct, written contract signed by Respondents in order to be enforceable against them.

III. Whether TAMKO's arbitration clause is otherwise enforceable against Respondents under its terms.

STATEMENT OF THE CASE

This controversy arises from a construction defects lawsuit brought by Plaintiffs/Respondents Denise Petersen, individually and as a trustee of the Denise M. Petersen 2005 Revocable Trust dated November 9, 2005, as trustee of the 601 Ocean Boulevard Residence Trust dated November 30, 2012, and as trustee of the 601 Ocean Boulevard Residence Trust II dated December 7, 2012, (collectively, "Petersen") against eleven named defendants, including Defendant/Appellant TAMKO Building Products, LLC ("TAMKO"), and forty-eight "John Doe Contractors." The Third Amended Complaint, filed April 28, 2022, alleges multiple construction defects at Petersen's multi-million-dollar beach house at Kiawah Island, South Carolina. *See generally* Third Amend. Compl. ("Compl."). TAMKO manufactured the roofing underlayment, "TAMKO TW Metal and Tile Underlayment," installed by roofing subcontractor Defendant/Crossclaimant/Respondent Donnix Construction, LLC ("Donnix").[1] Compl. ¶ 30 (R. p. 022).

Petersen has sued TAMKO under theories of negligence/gross negligence, strict products liability and breach of warranty, claiming the underlayment was defectively designed and manufactured, because the polymer in the underlayment oozed out from under the shingles and stained the soffits and fascia board. Compl. pp. 9-17 (R. pp. 023 – 031). On May 10, 2022, Donnix crossclaimed against TAMKO for negligence/gross negligence, breach of implied contract, breach of express and implied warranties, equitable indemnity, and contribution, alleging essentially the same facts as alleged by Petersen. *See generally* Donnix Crossclaim (R. pp. 056 – 061).

[1] Underlayment is a synthetic fabric that is installed on top of a plywood roof deck, between the shingles or metal roofing materials and the deck, to provide a secondary layer of protection from the elements.

On May 11, 2022, TAMKO moved to dismiss both Petersen's claims and Donnix's crossclaims and to compel arbitration, seeking to enforce the arbitration clause that is part of the express limited warranty provided with the underlayment. *See* TAMKO Motion to Dismiss (R. pp. 073 – 086).

On June 2, 2022, the Honorable Benjamin Culbertson heard arguments on TAMKO's motion. *See generally* Transcript of Oral Argument (R. pp. 162 – 192). At the hearing, the parties argued primarily over whether a contract exists between TAMKO and Donnix and between TAMKO and Petersen. *Id.* Although both Petersen and Donnix allege causes of action for breach of warranty arising from the sale of goods under the South Carolina Uniform Commercial Code, they nonetheless contend that they have no contract with TAMKO, and therefore cannot be compelled to arbitrate their claims.

On June 9, 2022, Judge Culbertson adopted in full the proposed Order submitted by Petersen and Donnix, and denied TAMKO's Motion to Dismiss. *See* Order Denying Motion to Dismiss (R. p. 001). On June 17, 2022, TAMKO moved under Rules 52(b), 59(e) and 60(b), SCRCP, for the trial court to reconsider, alter or amend its Order Denying TAMKO's Motion to Dismiss and Compel Arbitration. *See* TAMKO Motion to Reconsider (R. pp. 106 – 117). The court denied TAMKO's motion by Form Order.[2] *See* Order Denying Motion to Reconsider (R. p. 012).

[2] At the hearing, the Court requested proposed Orders from the Parties. Petersen and Donnix submitted essentially identical proposed Orders on June 8, 2022. *See* Petersen and Donnix proposed Orders (R. pp. 193 – 199). TAMKO's proposed Order was submitted on June 9, 2022. *See* TAMKO proposed Order (R. pp. 200 – 212). On the same day that TAMKO's proposed Order was filed, the Court adopted Petersen and Donnix's Order verbatim, including typographical errors and misstatements of the record. *Id.* (R. pp. 001 – 008). This was pointed out by TAMKO in its Motion to Reconsider, to no avail (R. pp. 106 – 117).

In so ruling, the trial court ignored the Federal Arbitration Act, controlling South Carolina case law, and common sense in order to find TAMKO's arbitration clause cannot be enforced against Donnix and Petersen (together, "Respondents"). The trial court's primary error was in failing to acknowledge that the enumerated reasons for enforcing the arbitration clause against non-signatories exists in this common commercial setting. The practical effect of the trial court's ruling is that an arbitration clause in an express warranty (that this very Court has previously upheld as enforceable)[3] which accompanies the sale of a product used in the construction of a dwelling can never be enforced against a non-signatory to the arbitration clause. This is manifestly not the law in South Carolina. Accordingly, TAMKO timely served its Notice of Appeal on July 7, 2022 (R. p. 150).

FACTS

On July 18, 2015, Petersen entered into a written contract with DCTCL, L.P. d/b/a Buffington Homes, L.P. ("Buffington") to build her residence. *See generally* July 18, 2015, Limited Warranty Contract between Buffington and Petersen ("Buffington Contract") (R. pp. 223 – 231). Buffington was the general contractor, and subcontracted with Donnix to install the roof and related flashings and waterproofing. *See generally* March 9, 2016 Subcontract Agreement between Donnix and Buffington ("Subcontract Agreement") (R. pp. 236 – 244). Donnix purchased and installed the TAMKO underlayment which Petersen alleges is defective. Compl. ¶ 21 (R. p. 021). These tiered relationships are typical in residential construction. The general contractor hires subcontractors for particular aspects of the construction. The subcontractors order materials needed for their respective piece of the construction from a building supply company (the distributor). The distributor orders the material (as the case is here – TAMKO underlayment)

[3] *See One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Co.,* 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016).

from the manufacturer. Payment works the same way. The subcontractor pays the distributor, which in turn pays the manufacturer. The subcontractor bills the general contractor, and the general contractor bills the property owner, or includes the materials in the overall contract price.

Here, Donnix purchased the TAMKO underlayment in three separate purchases from ABC Supply Co., Inc. *See* ABC Supply Co. Purchase Order Invoices, Invoice Nos. 52062460, 51973240, 52102388 (together, the "Purchase Order Invoices") (R. pp. 245 – 251). Each invoice expressly states in the "Purchase Agreement Terms and Conditions of Sale" that the distributor will "assign or transfer to [Donnix] any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied." *Id.* p. 2, ¶ 11 (R. pp. 247, 249, 251).

Similarly, the contract between Petersen and Buffington specifically states that all warranties relating to building materials used in the construction of the house are transferred to the homeowner: "Buffington Homes assigns the owner all such manufacturers' guarantees and/or warranties." Buffington Contract p. 5 (R. p. 227, § VI). Petersen is a signatory to that contract. *Id.* p. 7 (R. p. 228). Accordingly, the warranty accompanying the underlayment is specifically passed on to Donnix and ultimately to Petersen.

TAMKO is a manufacturer and supplier of roof shingles and related products, supplying them throughout the United States and internationally to independent distributors, which then sell the products to roofing contractors. Aff. of G. Ross, ¶¶ 3-6 (R. p. 216). TAMKO does not sell products directly to consumers. *Id.* (R. p. 216, § V). TAMKO's underlayment is manufactured in Joplin, Missouri. *Id.* Distributors who wish to purchase the product must submit a purchase order to TAMKO's Customer Services Department in Joplin. *Id.* When TAMKO receives an order for the underlayment, the product is packaged in Joplin and shipped to the distributor's location. *Id.*

As is the case with any TAMKO product sold into South Carolina, the sale of the underlayment at issue necessarily involves both the product and payment crossing state lines because there are no TAMKO manufacturing facilities, warehouses, or distribution centers in the State. *Id.* ¶ 7 (R. p. 217). Thus, TAMKO's sale of the underlayment implicates interstate commerce.

The TAMKO underlayment is accompanied by a limited warranty, the terms of which are available to customers at the time of sale on TAMKO's website, and printed on the wrapper of each package of underlayment. *Id.* ¶ 8 (R. p. 217). The limited warranty includes an express provision requiring all disputes related to the underlayment to be submitted to mandatory binding arbitration:

> **MANDATORY BINDING ARBITRATION:**
> EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE PRODUCT SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT www.adr.com OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

Id.; see also TAMKO Warranty p. 2 (R. p. 214) (emphasis in original).

The limited warranty also expressly disclaims implied warranties to the extent allowed by state law:

> **LEGAL REMEDIES: EXCEPT WHERE PROHIBITED BY LAW, THE OBLIGATION CONTAINED IN THIS LIMITED WARRANTY IS EXPRESSLY IN LIEU OF ANY AND ALL OTHER OBLIGATIONS, GUARANTEES, WARRANTIES AND CONDITIONS EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OR CONDITIONS**

> **OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND OF ANY OTHER OBLIGATION OR WARRANTY ON THE PART OF TAMKO.**

TAMKO Warranty p. 2 *Id.* (emphasis in original). The limited warranty provides that it extends to the building owner, and has a term of one year from the date of purchase. *Id.* It also contains a savings clause that explains that the terms of the limitations are enforceable only to the extent permitted by applicable state law:

> SOME STATES AND PROVINCES DO NOT ALLOW EXCLUSION OR LIMITATION OF IMPLIED WARRANTIES AND CONDITIONS OR INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE LIMITATIONS OR EXCLUSIONS MAY NOT APPLY TO YOU. NO ACTION FOR BREACH OF THIS LIMITED WARRANTY OR ANY OTHER ACTION RELATING TO OR ARISING OUT OF THE PRODUCT, ITS PURCHASE OR THIS TRANSACTION SHALL BE BROUGHT LATER THAN ONE YEAR AFTER ANY CAUSE OF ACTION HAS ACCRUED. IN JURISDICTIONS WHERE STATUTORY CLAIMS OR IMPLIED WARRANTIES AND CONDITIONS CANNOT BE EXCLUDED, ALL SUCH STATUTORY CLAIMS, IMPLIED WARRANTIES AND CONDITIONS AND ALL RIGHTS TO BRING ACTIONS FOR BREACH THEREOF EXPIRE ONE YEAR (OR SUCH LONGER PERIOD OF TIME IF MANDATED BY APPLICABLE LAWS) AFTER THE DATE OF PURCHASE. SOME STATES AND PROVINCES DO NOT ALLOW LIMITATIONS ON HOW LONG IMPLIED WARRANTIES AND CONDITIONS LAST, SO THE ABOVE LIMITATION MAY NOT APPLY TO YOU.

Id. (emphasis in original).

Petersen alleges that the underlayment installed on her residence "prematurely fail[ed] and deteriorates and allows water to intrude into the building." Compl. ¶ 60 (R. p. 029). Donnix casts full blame on TAMKO, alleging that Petersen's damages "were dule solely to the actions of TAMKO…." Crossclaim ¶ 133 (R. p. 058). Neither Petersen nor Donnix initiated arbitration in accordance with this arbitration clause and refuse to arbitrate their claims.

STANDARD OF REVIEW

The trial court's denial of TAMKO's Motion to Compel Arbitration is immediately appealable. *Towles v. United Healthcare Corp.,* 338 S.C. 29, 35, 524 S.E.2d 839, 842 (Ct. App. 1999). The question of arbitrability of a claim is an issue for judicial determination, *de novo*. *One Belle Hall Property Owners Association, Inc. v. Trammell Crow Residential Co.,* 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016).

ARGUMENT

I. Respondents, Non-Signatories to TAMKO's Express Limited Warranty, are Required to Arbitrate their Claims Pursuant to the Warranty's Arbitration Clause.

In determining whether to enforce an arbitration clause, the trial court must first determine whether there is an agreement to arbitrate between the parties that covers the claims asserted in the lawsuit. *See, e.g., U.S. ex rel. Coastal Roofing Co, Inc. v. P. Browne & Assoc., Inc.,* 585 F.Supp.2d 708, 712 (D.S.C. 2007) ("A district court therefore has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview.") (citing *United States v. Bankers Inc. Co.,* 245 F.3d 315, 319 (4th Cir. 2001)). Here, the trial court accepted Respondents' contention that because there is no direct, signed contract between TAMKO and Petersen, and TAMKO and Donnix, that the analysis ends there. But the analysis cannot end there – indeed, it does not even start there. As both the Fourth Circuit and South Carolina courts have consistently held, non-signatories can be required to arbitrate their claims even when there is no direct written agreement between the parties.

A. Equitable Estoppel Binds Respondents to the Arbitration Provision in TAMKO's Express Limited Warranty.

Federal Circuit Courts (including the Fourth Circuit), applying the Federal Arbitration Act, have recognized five theories which provide a basis for binding nonsignatories to arbitration agreements: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil piercing/alter

ego; and (5) estoppel." *International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH,* 206 F.3d 411, 416-17 (4th Cir. 2000) (citing cases).[4]

Equitable estoppel requires Respondents arbitrate their claims because they have sued TAMKO for, among other things, breach of express (Donnix's crossclaim) and implied (Petersen's claim) warranties:

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

International Paper Co., 206 F.3d at 418 (internal quotations and citations omitted). "The very essence of equitable estoppel is to prevent a party from taking one position when it is to that party's advantage, and taking the opposite position when it is to that party's disadvantage." *U.S. ex rel. Coastal Roofing Co.,* 585 F.Supp.2d at 715. Despite TAMKO pointing this out in its Motion to Dismiss, its reply, at the hearing, in its proposed Order, and in its Motion to Reconsider, the Court accepted Respondents' assertion that "no contract existed" between each of them and TAMKO, while ignoring that each of their causes of action for breach of contractual duties can only exist if there are express and implied warranties to begin with.

Donnix has crossclaimed against TAMKO for breach of both express and implied warranty. It is manifestly inequitable to permit Donnix to both claim that TAMKO is liable to Donnix for its alleged failure to perform under warranty theories, and at the same time deny that

[4] Federal law applies to determine the applicability of TAMKO's arbitration clause to Respondents. *See International Paper Co.,* 206 F.3d at 417 n. 4 ("[S]tate law determines questions concerning the validity, revocability, or enforceability of contracts generally, but the Federal Arbitration Act…creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").

Donnix is a party to the express warranty in order to avoid arbitration of claims clearly within the ambit of the arbitration clause. *See* Crossclaim ¶ 128 (R. p. 057) ("TAMKO expressly and/or impliedly warranted to [Donnix] that [sic] any materials and/or services designed, supplied or sold by them for use on the project would be merchantable and fit for their intended or specific purpose.").

Petersen has (perhaps artfully) sued TAMKO for breach of implied warranty, as well as tort claims – strict liability and negligence. *See* Compl. ¶¶ 52-73 (R. pp. 027 – 031). Petersen's argument that she is not suing TAMKO for breach of express warranty does not allow her to duck the terms of the express warranty that limits the implied warranty she is suing under. *See* TAMKO Warranty p. 2 (R. p. 214) ("LEGAL REMEDIES: EXCEPT WHERE PROHIBITED BY LAW, THE OBLIGATION[] CONTAINED IN THIS LIMITED WARRANTY IS EXPRESSLY IN LIEU OF ANY AND ALL OTHER OBLIGATIONS GUARANTEES, WARRANTIES AND CONDITIONS EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES…."). If all Petersen had to do to avoid any disclaimer of implied warranty or any other terms of the express warranty she did not like was to sue only for breach of implied warranty, no limitations of implied warranty would ever be enforceable. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.,* 843 F.Supp. 1027, 1036-40 (D.S.C. 1993) (applying South Carolina law, holding that the Uniform Commercial Code clearly provides for express disclaimers of implied warranties).

The facts presented here are remarkably similar to those in *Krusch v. TAMKO Building Products, Inc.,* 34 F.Supp.3d 584 (M.D.N.C. 2014).[5] In *Krusch,* plaintiff Edward Krusch purchased TAMKO shingles from Roofing Supply Group for his roof. Soon after installation, the

[5] Although *Krusch* was decided under North Carolina law, the analysis applies the Uniform Commercial Code (which is the same as South Carolina's), and the Federal Arbitration Act (which also must be applied here).

shingles began to discolor and deteriorate. An express fifty-year limited warranty accompanied the shingles, which Krusch alleged he did not know about and never signed. Krusch sued TAMKO for breach of implied and express warranties. TAMKO and Roofing Supply Group moved to stay the action and compel arbitration based on the warranty's arbitration provision. Krusch argued he could not be compelled to arbitrate because he never agreed to the limited warranty. TAMKO contended Krusch agreed to the arbitration provision in the limited warranty, even though it was undisputed neither Krusch nor anyone on his behalf ever signed it. TAMKO asserted agreements to arbitrate need not be signed to be accepted, and that Krusch agreed to the arbitration provision in the limited warranty because he had notice of the warranty (both personally and through his contractor), made repeated purchases of the shingles, and subsequently sued TAMKO for breach of the limited warranty. The Court agreed with TAMKO, noting that "as a preliminary matter, the lack of Krusch's signature on the limited warranty is not dispositive of whether he agreed to it. Arbitration agreements must be in writing, but they need not be signed to be enforceable." *Krusch,* 34 F.Supp.3d at 589 (additional citations omitted). The Court correctly focused on "the crucial question [which is] whether Krusch agreed to the limited warranty, which included the arbitration provision." *Id.* TAMKO produced evidence that Roofing Supply Group gave Krusch's contractor a sample shingle which contained notice of TAMKO's limited warranty on each shingle.[6] The Court held Krusch assented to the arbitration: "Krusch, having constructive notice of the limited

[6] The notice on each shingle read as follows: "PURCHASE OF THIS PRODUCT IS SUBJECT TO THE TERM, CONDITIONS AND LIMITATIONS OF A LIMITED WARRANTY WHICH IS INCORPORATED INTO THE PURCHASE TRANSACTION. THERE ARE NO OTHER WARRANTIES, EXPRESS OR IMPLIED FOR THIS PRODUCT. FOR A COPY OF THE LIMITED WARRANTY OR THE INSTALLATION INSTRUCTIONS, CONTACT YOUR TAMKO DISTRIBUTOR. CALL TAMKO AT 1-800-641-4691, OR VISIT WWW.TAMKO.COM."

warranty, which included an arbitration provision, agreed to purchase shingles that were expressly subject to that arbitration provision." *Id.* at 589-90.

Here, Respondents had constructive notice of TAMKO's express limited warranty, through the terms of the subcontractor agreements and purchase orders among the parties for the construction of Petersen's residence, and the provisions in the respective sales documents and contracts assigning all manufacturers' warranties. *See* Purchase Order Invoices p. 2 (R. pp. 247, 249, 251); Buffington Contract p. 5 (R. p. 227). Donnix knew the TAMKO limited warranty was being passed to it by the distributor. Donnix knew it was passing the warranty on to Buffington. Petersen knew she was getting all material warranties from Buffington. *See Id.* Respondents have also tacitly admitted to such notice, as did Krusch, by asserting claims arising from the very same express warranty they now try to disavow.

B. Respondents Directly Benefit from TAMKO's Express Limited Warranty.

In South Carolina, the Supreme Court has expressly recognized that a non-signatory to a contract can be compelled to arbitrate under an arbitration clause, if the non-signatory is a direct beneficiary of the contract and seeks to enforce it. *See Pearson v. Hilton Head Hospital,* 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). The Fourth Circuit in *International Paper* found the non-signatory party seeking to avoid arbitration (International Paper) "directly benefited" from the contract between the distributor (Wood) and manufacturer (Schwabedissen) because that contract "provides part of the factual foundation for every claim asserted by International Paper against Schwabedissen." *International Paper,* 206 F.3d at 418. Similarly, the warranties under which Respondents sue are a "direct benefit" arising from TAMKO's express limited warranty. They do not arise from any other source. Petersen's counsel told the court in the hearing on TAMKO's Motion to Dismiss that they did not "benefit" from the TAMKO warranty because it

was more limited in scope than the implied warranty. *See* Transcript of Oral Argument p. 25, l. 3-7 (R. p. 186). This is not how the law works. Any suit based on breach of warranty, express or implied, arises from and is limited by the express warranty. The warranty itself is the "benefit." Just as International Paper was estopped from refusing to arbitrate its dispute, Respondents are estopped from suing for breach of express and implied warranty while at the same time disavowing the arbitration clause of the express warranty.

C. Respondents Need Not Be in Privity of Contract with TAMKO for the Express Warranty to Apply to Them.

"A seller's warranty, whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty." S.C. Code Ann. § 36-2-318 (2003). The South Carolina Supreme Court has explained that "[t]he plain language of the foregoing section dispenses with the necessity of privity as to any natural person who may be expected to use, consume or be affected by the product, and extends third party beneficiary protection to this class of person[.]" *Gasque v. Eagle Mach. Co., Ltd.,* 270 S.C. 499, 503, 243 S.E.2d 831, 832 (S.C. 1978). Respondents have not alleged any other relationship between themselves and TAMKO from which a contractual duty may arise. As such, Respondents' contract claims arise solely from the underlayment's express limited warranty, and thus the legal relationship between Respondents and TAMKO is controlled by the language of the warranty. If this Court affirms the trial court's conclusion that TAMKO's express limited warranty somehow does not apply to Respondents, it also must instruct the trial court to dismiss Respondents' claims against TAMKO due to lack of privity, and restore the requirement of privity rejected by this Court and South Carolina statute long ago. *See JKT Co. v. Hardwick,* 274 S.C. 413, 417-18, 265 S.E.2d 510, 512-13 (1980) ("The erosion of the concept of privity has been a legal phenomenon for more than a decade, and this Court has not been reluctant

to contribute to its demise….Lack of privity as a defense to a cause of action has been of questionable vitality in South Carolina. Today, we seek to still all whispers of its continued existence."). In essence, Respondents argued and the trial court agreed that because there is no privity between themselves and TAMKO, the arbitration clause in the warranty is unenforceable. But there is never privity in these types of transactions between a construction materials manufacturer and the subcontractor who installed the material, or the property owner to whom the warranty is transferred.

II. A Contract for the Sale of Goods Exists Between TAMKO and its Distributor.

The trial court denied TAMKO's Motion to Dismiss primarily on the basis that "no contract exists" between TAMKO and Petersen, and between TAMKO and Donnix. *See* Order (R. pp. 004 – 007). The Order indicates a misunderstanding by the trial court of the purpose for and application of the Uniform Commercial Code to this controversy. Under Article 2 of the South Carolina Uniform Commercial Code, a contract for the sale of goods existed between TAMKO and its distributor, ABC Supply Co., Inc. This "contract" – the terms of which include TAMKO's express limited warranty – was then passed on to Donnix when it purchased the underlayment from ABC Supply Co., and from Donnix to Buffington when Buffington subcontracted with Donnix to install the underlayment, and then eventually to Petersen, as the homeowner and final end-user of the product. This is how the law must operate; otherwise, no homeowner could ever have a breach of warranty claim against a manufacturer.

A fundamental principle of contract law under the Uniform Commercial Code is that a contract involving the sale of good exists without the necessity of a literal written contract signed by both parties. *See* S.C. Code Ann. § 36-2-201(3)(c) (2003) ("A contract which does not satisfy the requirements of subsection 1 [statute of frauds] but which is valid in other respects is

enforceable…with respect to goods for which payment has been made and accepted or which have been received an accepted."). An express warranty is part of a contract for the sale of goods. *See* S.C. Code Ann. § 36-2-313 (2003). Thus, it logically follows that a "breach of warranty [claim] is an action affirming the contract." *Herring v. Home Depot, Inc.,* 350 S.C. 373, 379, 565 S.E.2d 773, 776 (Ct. App. 2002). TAMKO's express warranty extends to Petersen under the terms of the Uniform Commercial Code. *See* S.C. Code Ann. § 36-2-318 ("A seller's warranty, whether expressly or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty.").

The trial court's finding that "no contract exists" between Donnix and TAMKO is further belied by Donnix's Purchase Order invoices. A purchase order and/or an invoice between merchants is considered a confirmatory writing of an agreement for the sale of goods under Section 2-201 of the Uniform Commercial Code. *See, e.g., Howard P. Foley Co. v. Phoenix Engineering & Supply Co.,* 819 F.2d 60, 64 (4th Cir. 1987); *Bazak Intern. Corp. v. Mast Industries, Inc.,* 73 N.Y.2d 113, 538 N.Y.S.2d 503 (1989) (applying New York law). Donnix's purchase order invoices with the distributor of TAMKO's product contain specific item descriptions for the TAMKO underlayment. *See* ABC Supply Co. Purchase Order Invoices, Invoice Nos. 52062460 (R. p. 245), 51973240 (R. p. 248), 52102388 (R. p. 250), p. 1 on each, "Item Number" and "Item Description." Each invoice expressly states in the "Purchase Agreement Terms and Conditions of Sale" that the distributor will "assign or transfer to [Donnix] any assignable or transferable manufacturer's warranties, if any, applicable to the purchase, in lieu of all other warranties, express or implied." *Id.* p. 2, ¶ 11 (R. pp. 247, 249, 251). Thus, TAMKO's express warranty is part of the contract for the sale of goods between TAMKO and its distributor under Article 2 of the South Carolina Uniform Commercial Code, which is then transferred and assigned to Donnix and

ultimately, to Petersen. There is nothing unique about this process. This is the way it works in all home construction settings.

III. TAMKO's Arbitration Clause is Enforceable.

"The policy of the United States and South Carolina is to favor arbitration of disputes." *One Belle Hall,* 418 S.C. at 59, 791 S.E.2d at 291. "Unless the parties have contracted otherwise, the Federal Arbitration Act applies in federal or state courts to any arbitration agreement involving interstate commerce." *Id.* "The FAA provides that a written arbitration provision in a contract involving interstate commerce 'shall be valid, irrevocable, and enforceable' save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* (citing 9 U.S.C. § 2 (2012)). Courts may only invalidate arbitration agreements on general state law defenses such as fraud, duress, and unconscionability, none of which have been asserted.

In *One Belle Hall*, this Court previously held a virtually identical TAMKO arbitration clause applicable to shingles was enforceable*,* acknowledging: (1) the warranty is an adhesion contract which is "not *per se* unconscionable;" (2) the terms were not oppressive because they were severable from the contract as a whole; and (3) the clause facilitated an "unbiased decision by a neutral decisionmaker in the event of a dispute" because it "anticipates actions from purchasers that sound in warranty, contract, statute, or any other legal or equitable theory." 418 S.C. at 63-64, 791 S.E.2d at 293-94 (internal citations and quotations omitted). TAMKO's arbitration clause in *One Belle Hall* is the same in all material respects to the arbitration clause at issue in this appeal.[7] It is enforceable, and should be enforced against Donnix and Petersen.

[7] The clause in *One Belle Hall* contains one additional phrase, underlined and italicized for ease of reference in the quotation below, and replaces the word "product" with "the shingles or this limited warranty." Otherwise, there are no differences between the two TAMKO arbitration clauses: **MANDATORY BINDING ARBITRATION**: EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER *INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION* (EACH AN "ACTION") BETWEEN YOU AND

The trial court accepted Respondents' mischaracterization of the enforceability of TAMKO's arbitration agreement here, attempting to distinguish it from the arbitration clause in *One Belle Hall. See* Order p. 4 (R. p. 004) (noting the arbitration clause at issue in *One Belle Hall* was "contained in a bulk sales agreement that was entered into prior to the purchase [sic] and delivery of the product."). The trial court held *One Belle Hall* was inapplicable because in this case "Petersen was never made aware of the limited warranty nor its arbitration clause and Donnix only became aware of the arbitration clause after purchase of the product was completed and the underlayment delivered to Petersen's residence." *Id.* This is factually incorrect. Both Petersen and Donnix were in fact on constructive notice of the TAMKO warranty accompanying the underlayment, by virtue of the transfer provisions in the purchase orders and contracts. *See* Purchase Order Invoices p. 2 (R. pp. 247, 249, 251); Buffington Contract p. 5 (R. p. 227); Donnix subcontract, Attachment B, p. 2 (R. p. 243).

The facts surrounding the sale of underlayment here and the shingles in *One Belle Hall* are identical in all material respects. In *One Belle Hall,* (1) a subcontractor purchased the TAMKO roofing product (shingles) from a distributor for installation in residential properties; (2) the roofing product allegedly failed (cracked and prematurely deteriorated); (3) despite having no direct contract with TAMKO for the purchase of the shingles, the property owners sued TAMKO

TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF *THE SHINGLES OR THIS LIMITED WARRANTY* SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT www.adr.com OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

in express and implied warranty; and (4) those claims were subject to the warranty's arbitration clause. Both contracts for the sale of goods here and in *One Belle Hall* are valid adhesion contracts that were not negotiated prior to sale, and have been upheld by this Court and the South Carolina Supreme Court. *One Belle Hall,* 418 S.C. at 63, 791 S.E.2d at 293 (citing *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007)).

TAMKO pointed this out to the trial court in its proposed Order and in its Motion to Reconsider, to no avail. *See* TAMKO Proposed Order p. 5 (R. p. 204); Motion to Reconsider pp. 6-7 (R. pp. 111 – 112). The trial court blindly accepted Petersen's and Donnix's incorrect assertions as accurate, and ignored the facts that TAMKO brought to the Court's attention. This is not harmless error. If the trial court is correct, *One Belle Hall* was wrongly decided. It should go without saying that trial courts must follow controlling precedent of an appellate tribunal. Here, the trial court failed to do so.

CONCLUSION

This Court should overrule the Order of the trial court dismissing TAMKO's Motion to Dismiss and Compel Arbitration because under South Carolina law equitable estoppel binds non-signatories to arbitration clauses in express warranties when the non-signatories' causes of action stem from the warranty, regardless of privity of contract between the non-signatory and the manufacturer. TAMKO is well aware that many courts dislike arbitration clauses, despite the mandates of the Federal Arbitration Act and ample controlling case law favoring arbitration of disputes. Had the trial court compelled arbitration here, this relatively minor aspect of this multi-issue case would probably be resolved. Instead, an appeal was necessitated by the trial court's ruling, lest TAMKO be accused of voluntarily waiving an important contractual right.

This appeal poses an important question: Why should a court compel litigants to arbitrate

a matter they would apparently prefer to drag out for years in a costly, multi-party, cumbersome construction case? TAMKO respectfully submits that the answer to these questions can be found in a play written four centuries ago, also involving a lawsuit – The Merchant of Venice. "Bassanio: I beseech you, wrest once the law to your authority. To do a great right, do a little wrong…." But Portia knew better. "Portia: It must not be…Twill be recorded for a precedent, and many an error by the same example will rush into the state."[8]

This is just one minor aspect of a multi-party, multi-claim construction case. But the ability of product manufacturers to require arbitration of disputes arising from the sale and installation of their products is an important matter. This case will not only impact these parties. There is nothing unique or unusual about these facts. If TAMKO's arbitration clause is not enforceable, then no product manufacturer of construction materials can rely on the protections of the Federal Arbitration Act in South Carolina, unless the claimants are actual signatories to the arbitration agreement. With all due respect to the lower court, this is not the law, nor should it be.

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[8] The Merchant of Venice, IV.i.