IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2011-CP-46-00796

Ralph Wayne Parsons, Jr. and Louise C. Parsons, ... Respondents,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A.,..... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant.

PETITION FOR REHEARING AND REHEARING *EN BANC* BY APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.

Pursuant to Rule 221(a), SCACR, Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH") hereby petitions for rehearing of the Court's unpublished decision in this appeal of an order denying arbitration. See Parsons v. John Wieland Homes, Op. No. 2013-UP-296 (Ct. App. filed June 26, 2013), withdrawn, substituted and refiled Aug. 28, 2013.

On June 26, 2013, this Court entered an unpublished opinion affirming the circuit court's order denying arbitration on two bases, concluding (1) the subject arbitration provision did not apply to the claims asserted against JWH by Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons (the "Parsons"); and (2) the Parsons alleged conduct that was unanticipated and unforeseeable by a reasonable consumer.

On July 10, 2013, JWH petitioned for rehearing and for rehearing *en banc*. On August

28, 2013, this Court granted rehearing and entered a substituted opinion. The August 28, 2013 opinion affirms the circuit court's order denying arbitration solely on the basis that the subject arbitration provision does not apply to the Parsons' claims against JWH. The Court refused to address whether the Parsons alleged conduct that was unanticipated and unforeseeable by a reasonable consumer. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

With respect to the Court's August 28, 2013 opinion, JWH respectfully asserts that rehearing is appropriate because the opinion overlooks, misapprehends, or fails to address the following particular points at issue in this appeal: (1) The applicable standard of review for this appeal, which involves only legal issues, not factual ones; (2) The language of the arbitration provision at issue, which expressly includes the claims asserted against JWH; and (3) JWH's argument that the circuit court erred in interpreting the warranty provisions instead of the arbitration provision in the subject purchase contract. In addition, JWH respectfully asserts that the Court overlooked or failed to address the following additional particular points in this appeal: (1) The inapplicability of Aiken and Partain to this case; and (2) JWH's argument in its supplemental citation to authorities that Aiken and Partain have been abrogated by Landers.

Pursuant to Rule 219, SCACR, JWH also respectfully requests that rehearing be granted *en banc*. Rehearing *en banc* is appropriate where, as here, the Court's decision apparently conflicts with other panels' decisions in Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) and York v. Dodgeland of Columbia, Inc., Op. No. 5169 (Ct. App. filed Sept. 4, 2013), and where, as here, the proceeding involves questions of exceptional importance, including the application of recent decisions by the Supreme Court of South

Carolina and the United States Court of Appeals for the Fourth Circuit.

Based on the foregoing, JWH respectfully requests that the Court grant rehearing and further requests that rehearing occur *en banc*.

Factual and Procedural Background

JWH develops and sells real property, including real property located in South Carolina. **R.pp.111, ¶1, p.113, ¶12.** On November 27, 2002, JWH purchased approximately 65 acres of real property in Lancaster County, South Carolina, from Springs Industries, Inc. ("Springs") for the purpose of developing and selling single-family residential lots in a community which became known as Bridgemill. **R. p.8, ¶7; R.p.112, ¶7.** Springs previously used a portion of the 65-acre tract for textile storage and fabric cutting. **R.p.112, ¶8.**

On June 30, 2007, Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons executed a contract (the "Agreement") to purchase the subject property (the "Property"), utilizing earnest monies they previously paid toward a separate property they had agreed to purchase from JWH pursuant to an identical contract with an identical arbitration provision. **R.pp.126-31, ¶3; R.pp.57-61.**

Paragraph 21 of both agreements provides, in pertinent part:

> 21. **Warranty and Arbitration**. Purchaser and Seller hereby agree that, in connection with the sale contemplated by this agreement, Purchaser will be enrolled in the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program, booklet revision date 04/06 (JWH Warranty), *the JWH Warranty being incorporated herein by reference . . . . PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. . . .*

R.p.59, ¶21; R.p.130, ¶21 (emphasis added in italics). The Parsons initialed under this

Paragraph 21 in both agreements. **R.p.59, ¶21; R.p.130, ¶21.** Both agreements provide that this paragraph survives closing or termination of the pertinent agreement. **R.p.60, ¶34; R.p.131, ¶34.**

The JWH Warranty attached to both agreements is also more or less identical. **R.pp.62-95; R.pp.137-166.** Section V, Paragraph O in the JWH Warranty provides, in relevant part:

> **Mandatory Binding Arbitration**. Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them. . . .
>
> *Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland* (if any), this warranty, the Home *and/or property on which it is constructed*, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. This applies only to claims or disputes that arise after the later of: (a) the issuance of the final certificate of occupancy for the Home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). *This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.*
>
> . . . .
>
> WIELAND AND HOMEBUYER(S) HEREBY ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSING OF THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUYER(S). WIELAND AND HOMEBUYER(S) HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN EQUITY OR OTHERWISE WHICH MIGHT OTHERWISE HAVE BEEN AVAILABLE TO THEM IN CONNECTION WITH ANY SUCH DISPUTES.

R.p.75, §V, ¶O (emphasis added in italics).

JWH conveyed the Property to the Parsons on October 31, 2007. **R.p.9, ¶13.** According

to the Parsons, in July 2008, the Parsons were performing routine irrigation maintenance for a suspected leak in their backyard when they discovered a 4-inch PVC pipe buried on the Property. **R..10, ¶18.** Further investigation revealed a buried 2-inch PVC pipe, and both buried PVC pipes ran the entire width of the backyard. **R.p.10, ¶18.** Beginning in mid-yard, the buried PVC pipes were encased in concrete and were attached to a metal box, also encased in concrete. **R.p.10, ¶18.** The 4-inch PVC pipe and the metal box contained a black sludge. **R.p.10, ¶18.**

The Parsons contacted JWH, which arranged for the removal of the pipes and the sludge. **R.p.10, ¶19.** Testing and analysis revealed that the black sludge constituted a hazardous substance. **R.p.10, ¶19.** Consequently, the South Carolina Department of Health and Environmental Control ("DHEC") was contacted in August 2008. **R.p.10, ¶20.**

In October 2008, JWH entered into a voluntary cleanup contract with DHEC and undertook the remediation of the hazardous substances and other materials from the Parsons' yard. **R.p.11, ¶22.** A buried 12-inch, cast iron pipe was also discovered during this process. **R.p.11, ¶22.** The tasks spelled out in the voluntary cleanup contract were carried out and paid for by JWH. **Resps.' Br., p.1; R.p.116, ¶28.**

On February 24, 2011, the Parsons filed the present lawsuit against JWH. **R.pp.7-16.** The substantive allegations of the Parsons' complaint allege JWH breached the Agreement by "failing to accurately and fully disclose latent defects with the property"; "selling property that was environmentally contaminated"; and "selling property with known underground pipes, rendering the home worth substantially less than the Plaintiffs [sic] purchase price." **R.p.11, ¶25; R.p.12, ¶30.** As a result, the Parsons requested that the Agreement be rescinded or, in the alternative, that the Parsons be awarded damages for the alleged breach. **R.p.12, ¶¶27, 31.** The Parsons further allege that JWH breached implied warranties of habitability and workmanlike

construction in their conveyance of the Property to the Parsons, again requesting damages for the breach of these warranties. **R.pp.15-16, ¶¶57-60.**

The Parsons also aver that JWH "knew or reasonably should have known that Plaintiffs' home had been constructed upon industrial pipes, including hazardous waste and materials" prior to the sale of the Property to the Parsons, that JWH intentionally or negligently concealed these facts from the Parsons, and that the Parsons are entitled to recover damages for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence as a result thereof. **R.pp.12-15, ¶¶32-56.**

JWH moved to dismiss the Parsons' complaint and compel arbitration on the basis of the arbitration provision referenced and incorporated into the Agreement. **R.pp.55-56.** On October 10, 2011, the circuit court entered an order denying the motion to compel arbitration on two grounds. **R.pp.2-6.** First, the court held: "Because the Warranty does not apply to, and specifically excludes, the claims asserted by Plaintiffs, I find and conclude that the arbitration clause contained therein is also inapplicable." **R.p.5.** Second, the court ruled that "[n]either Plaintiffs, nor reasonable consumers, can be held to have expected the arbitration provisions at issue to apply to such a situation." **R.p.6.** This appeal followed.

Law/Analysis

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885). "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court

must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220(b), SCACR.

Rehearing in the present case is supported by the following alternative grounds:

1. The Court's decision misapprehends the applicable standard of review. This issue was raised in JWH's brief, as well as its first petition for rehearing. The Court's August 28, 2013 opinion, like the June 26, 2013, respectfully does not address the issue or explain the Court's reasoning as to this issue.

The Court's most recent decision, parenthetically relying on Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012), suggests that this Court should defer to the factual findings of the circuit court. This portion of the Court's decision respectfully misapprehends the standard of review applicable to the present appeal because (1) unlike in Bradley, this appeal involves no factual dispute; and (2) unlike in Bradley, the circuit court here expressly refused to make any findings of fact. Consequently, this Court owes no deference to the circuit court. The standard of review is de novo.

The Supreme Court of South Carolina's decision in Bradley addressed the single issue of whether the Federal Arbitration Act ("FAA") applied to a contract involving the sale of real property in the absence of an obligation by the seller to construct a dwelling on the property as part of the contract. Id. While the Supreme Court in Bradley articulated a deferential standard of appellate review regarding issues of fact, it has long been recognized in South Carolina that the determination of whether a transaction involves interstate commerce is inherently factual. See Thornton v. Trident Med. Ctr., L.L.C., 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2003) ("In all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case.").

In this case, there is no factual issue regarding the applicability of the FAA because (1) the Agreement expressly includes JWH's construction of the subject home; and (2) the Agreement specifically states that the FAA applies. See Bradley, 398 S.C. at 458, 730 S.E.2d at 318 ("We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA."); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) ("[T]he arbitration agreement, which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.").

Unlike in Bradley, the Court here has been asked to review the circuit court's determination of whether the broad arbitration provision in the Agreement encompasses the factual allegations against JWH. As discussed *infra*, JWH contends the arbitration provision in the Agreement unambiguously encompasses the factual allegations in the Parsons' complaint, and the construction of an unambiguous contract is an issue of law, not fact. See Towles v. Un. HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute."); S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("The construction of a clear and unambiguous contract presents a question of law for the court.").

Nevertheless, even if there were an ambiguity in the arbitration provision, this Court, like the circuit court, respectfully must construe the ambiguity in favor of arbitration, not treat the issue as factual. See Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118-

19 (2001) ("A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute."); Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration."). Another panel of this Court recently emphasized this well-recognized rule. See York v. Dodgeland of Columbia, Inc., Op. No. 5169 (Ct. App. filed Sept. 4, 2013) ("[A]rbitration should be ordered unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute.").

Likewise, if there were any question about whether the Parsons' factual allegations fell within the scope of the arbitration provision in the Agreement, this Court, sitting de novo, respectfully must resolve the question in favor of arbitration, not defer to the circuit court as if the determination were a finding of fact. See S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 563-64, 437 S.E.2d 22, 25 (1993) ("To decide whether an arbitration agreement encompasses a dispute a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitration should be resolved in favor of arbitration."); Zabinski, 346 S.C. at 596, 553 S.E.2d at 118 ("[I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.").

Finally, even if there had been issues of fact to be resolved by the circuit court, the circuit court in the present proceeding expressly declined to make any factual findings. **R. p. 5, note 1.** Instead, the circuit court relied on the allegations of the Parsons' complaint and the language of

the Agreement, mistakenly focusing on the language of the warranty provisions incorporated into the Agreement instead of the separate arbitration provision. **R. pp.4-5.**

Based on the foregoing, the Court respectfully misapprehended the applicable standard of review by suggesting that the Court should defer to the circuit court regarding the issues on appeal.

2. The Court's decision overlooks the plain language of the arbitration provision, which expressly and specifically includes the claims asserted against JWH. Again, JWH raised this issue both in briefing to the Court and in its initial petition for rehearing. The Court's opinions have not addressed the issue or explained the Court's reasoning as to this issue, thus also warranting rehearing.

This Court's most recent decision, like the Court's initial opinion and the circuit court's order denying arbitration, overlooks the arbitration provision in the Agreement entirely. In fact, neither this Court's decision nor the circuit court's order cites to *any* clause within the parties' arbitration provision despite JWH's continued assertions that the plain language of this provision unequivocally encompasses the Parsons' factual allegations against JWH. While the Court parenthetically relies upon Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012) and Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 47-48, 693 S.E.2d 434, 435 (Ct. App. 2010), the arbitration provisions in those cases are not similar to the one at issue in the present appeal. A separate analysis of the arbitration provision in this case is therefore necessary.

"Generally, any arbitration agreement affecting interstate commerce, such as the one at issue, is subject to the FAA." Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). "Once it is determined that the FAA applies to a dispute, federal substantive

law regarding arbitrability controls." Id. "An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." Towles v. Un. HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

"Whether a party has agreed to arbitrate an issue is a matter of contract interpretation and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Landers, 402 S.C. at 108, 739 S.E.2d at 213. "Although the intention of parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." Id. at 108-09, 739 S.E.2d at 213.

"The policy of the United States and South Carolina is to favor arbitration of disputes." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." Id. at 597, 553 S.E.2d at 118. "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Landers, 402 S.C. at 109, 739 S.E.2d at 213. "Such a presumption is strengthened when an arbitration clause is broadly written." Id. "Therefore, unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute . . . arbitration must generally be ordered." Id.

"A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." Id. at 109, 739 S.E.2d at 213; Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). "Courts have held that such

broad clauses are capable of an expansive reach." Landers, 402 S.C. at 109, 739 S.E.2d at 214. "Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained." Id. "Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract." Id. at 109-10, 739 S.E.2d at 214; J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988).

"Certainly, arbitration is only required where the parties have contracted for it . . . ." Landers, 402 at 111, 739 S.E.2d at 214. "However, under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." Id. If the factual allegations in the complaint establish any link between a plaintiff's contractual claim and the plaintiff's remaining tort claims, the tort claims will be subject to arbitration. See id. at 114, 739 S.E.2d at 216 ("Similarly here, Landers' pleadings link the alleged illegal proxy solicitation to his wrongful termination and the resulting breach of the Agreement. Thus, we conclude his illegal proxy solicitation claim is significantly related to the Agreement.").

The arbitration provision in the present case plainly includes "[a]ny and all unresolved claims or disputes of any kind or nature" between the parties "arising out of or relating in any manner to" the Agreement, the warranty incorporated into the Agreement, the home, *or* the Property. **R.p.75, §V, ¶O.** In addition, the arbitration provision "specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any

implied warranties; any personal injury; and any property damage." **R.p.76, §V, ¶O.**

As to this issue, the Court's decision summarily cites to Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 47-48, 693 S.E.2d 434, 435 (Ct. App. 2010), an opinion grounded primarily on the Court's conclusions that the arbitration provision at issue was narrowly limited in scope and that, by its terms, the arbitration provision failed to encompass claims arising from the subject contract.

In Faltaous, 388 S.C. at 47-48, 693 S.E.2d at 435, the Court block-quoted and analyzed the arbitration provision within the parties' agreement, concluding:

> The introductory words to the arbitration clause are broad, stating '[a]ny and all claims.' However, following these words, *the clause is drawn specifically and limits the matters that can be arbitrated to disputes that result 'from the development, design, construction, condition, merchantability, habitability, fitness for a particular purpose or any other implied or express warranty for the common elements of or the individual units at the [condominium] . . . .' Disputes that arise out of the contract itself, as Seller's counterclaims do, are absent from the arbitration clause's reach.*

Id. at 49-50, 693 S.E.2d at 436 (emphasis and double emphasis added).

Here, neither the circuit court nor this Court quoted or expressly analyzed the arbitration provision at issue. Further, in the present case, unlike in Faltaous, the arbitration provision expressly applies to disputes that arise out of the contract itself and contains no words limiting the causes of action to which the provision applies: "Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) *arising out of or relating in any manner to any purchase agreement with Wieland* (if any), this warranty, the Home and/or *property on which it is constructed*, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final." **R.p.75, §V, ¶O** (double emphasis added).

The Court's present opinion respectfully fails to include any express analysis of the arbitration provision at issue, which indisputably contains completely different language than the arbitration provision in Faltaous. Consequently, this Court should respectfully grant JWH's petition for rehearing because the Court's decision overlooks the express terms of the subject arbitration provision.

3. The Court's decision fails to address JWH's argument that the circuit court erred in interpreting the warranty provisions incorporated into the Agreement instead of the separate arbitration provision. JWH raised this issue both in briefing to this Court and in its first petition for rehearing. The issue has never been addressed by this Court.

The circuit court incorrectly interpreted the warranty provisions incorporated into the Agreement in lieu of the separate arbitration provision. In fact, the circuit court's ruling that the Parsons' claims fell outside the scope of the broad arbitration provision rested primarily on this error of law: "Because the Warranty does not apply to, and specifically excludes, the claims asserted by the Plaintiffs, I find and conclude that the arbitration clause contained therein is also inapplicable." **R.p.5.** The Court's decision overlooks this issue on appeal, supporting rehearing.

"Arbitration clauses are separable from the contracts in which they are imbedded." Jackson Mills, Inc. v. BT Capital Corp., 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 411 (1967) ("The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses 'separable' and valid."). In Muriithi v. Shuttle Exp., Inc., 712 F.3d 173 (4th Cir. 2013), the United States Court of Appeals for the Fourth Circuit reversed the district court's refusal to compel arbitration, emphasizing, among other things, that the district court erred in

analyzing a separate provision limiting the plaintiffs' remedies instead of looking to the arbitration clause itself.

The Fourth Circuit explained: "The issue whether a dispute is arbitrable presents primarily a question of contract interpretation, requiring that we give effect to the parties' intentions as expressed in their agreement." Id. at 179. "Any uncertainty regarding the scope of arbitrable issues agreed to by the parties must be resolved in favor of arbitration." Id. "A party challenging the enforceability of an arbitration clause under Section 2 of the FAA must rely on grounds that relate specifically to the arbitration clause and not just to the contract as a whole." Id. at 183. "Thus, a challenge specific to an arbitration clause is considered by the court in a motion to compel, while a challenge relating to the entire contract is heard only after the merits of a case have been referred to an arbitrator or have been retained for decision by the court." Id. at 184.

Like the district court in Muriithi, instead of turning to the arbitration clause contained in Section V, Paragraph O of the JWH Warranty to determine the claims subject to arbitration, the circuit court in the present proceeding mistakenly looked to the exclusions from the warranty, contained in Section IV of the JWH Warranty. Neither the Agreement nor the JWH Warranty states that the exclusions from the warranty also constitute exclusions from mandatory arbitration.

As discussed *supra*, the arbitration provision in the Agreement here plainly provides that it applies to more expansive claims than the warranty, as it specifically includes tort claims, claims for personal injury, and claims for implied warranties, all of which are expressly excluded from the warranty. This misinterpretation of the Agreement is an error of law warranting reversal on appeal, a point which this Court respectfully overlooked by failing to address. See S.C. Dep't

of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("The construction of a clear and unambiguous contract presents a question of law for the court.").

4. The Court's decision overlooks JWH's argument regarding the inapplicability of Aiken and Partain to this case. This issue was raised by JWH in briefing to the Court and in its first petition for rehearing. It was not addressed by the Court in its most recent opinion because the Court found it unnecessary to address the issue based on its alternative ruling. JWH respectfully contends that, because the Court's opinion overlooks or misapprehends JWH's other arguments, the Court should have addressed this issue in its most recent opinion.

In this appeal, JWH asserts, as it did in the circuit court, that the Parsons' factual allegations rely upon a purported duty of JWH to discover, remediate, and disclose hazardous substances on the Property. In other words, the Parsons allege a failure to act, or omission, by JWH. Unlike the allegations in the present case, Aiken and Partain include factual allegations seeking to impose liability on defendants who intentionally committed outrageous and unforeseeable torts. See Aiken v. World Fin. Corp., 373 S.C. 144, 147, 644 S.E.2d 705, 707 (2007) (involving misappropriation of personal financial information); Partain v. Upstate Auto. Group, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010) (involving a "bait and switch").

In addition, as JWH argued to the circuit court and on appeal, Aiken and Partain together stand for the proposition that only allegations of outrageous or fraudulent conduct which is "legally distinct from the contractual relationship between the parties" will not be subject to arbitration under a broad arbitration clause. The Parsons' allegations of fraud in this case are founded solely on an alleged nondisclosure of latent defects in the Property, about which the Parsons allege JWH knew or should have known. **R.pp.7-16.** While nondisclosure may be

fraudulent when there is a duty to speak, the only duty to speak in this case is directly premised on the contractual relationship between the parties—the relationship of buyer and seller. See, e.g., Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993) ("Nondisclosure is fraudulent when there is a duty to speak."); May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986) ("[A] buyer has the right in South Carolina to rely on a seller of a home to disclose latent defects or hidden conditions which are not discoverable on a reasonable examination of the property and of which the seller has knowledge.").

Furthermore, section 27-50-40(A)(6) of the South Carolina Code supports JWH's assertions that issues regarding the non-disclosure of hazardous substances on real property are reasonably foreseeable in residential real estate transactions. Section 27-50-40(A)(6) is part of the Residential Property Condition Disclosure Act (the "Disclosure Act"), codified at sections 27-50-10 to -270 of the South Carolina Code.[1] Section 27-50-40(A) provides, in pertinent part: "The owner of the real property shall furnish to a purchaser a written disclosure statement." "The disclosure statement must include, but is not limited to, the following characteristics and conditions of the property:

> (1) the water supply and sanitary sewage disposal system;
> (2) the roof, chimneys, floors, foundation, basement, and other structural components and modifications of these structural components;
> (3) the plumbing, electrical, heating, cooling, and other mechanical systems;
> (4) present infestation of wood-destroying insects or organisms or past infestation, the damage from which has not been repaired;

[1] Although section 27-50-40 does not apply to the sale in the present case, this section would apply to a subsequent sale of the real property by the Parsons, clearly establishing that environmental disclosures are part and parcel of residential real estate transactions. It is therefore foreseeable that a claim arising from the breach of any such disclosure would be subject to a broad arbitration provision in a real estate sales contract and outside the scope of both Aiken and Partain.

> (5) the zoning laws, restrictive covenants, building codes, and other land- use restrictions affecting the real property, any encroachment of the real property from or to adjacent real property, and notice from a governmental agency affecting this real property;
> (6) *presence of* lead-based paint, asbestos, radon gas, methane gas, underground storage tank, *hazardous material or toxic material, buried or covered, and other environmental contamination*; or
> (7) existence of a rental, rental management, vacation rental, or other lease contract in place on the property at the time of closing, and, if known, any outstanding charges owed by the tenant for gas, electric, water, sewerage, or garbage services provided to the property the tenant leases."

Id. (emphasis added).

"The disclosure statement must give the owner the option to indicate that the owner has actual knowledge of the specified characteristics or conditions, or that the owner is making no representations as to any characteristic or condition." § 27-50-40(B). "The rights of the parties to a real estate contract in connection with conditions of the property of which the owner has no actual or constructive knowledge are not affected by this article." § 27-50-40(C).

This statutory provision clearly establishes that issues relating to hazardous substances and environmental contamination, like issues relating to "the water supply," "sanitary sewage disposal system," "the roof, chimneys, floors, foundation, basement, and other structural components and modifications of these structural components," "the plumbing, electrical, heating, cooling, and other mechanical systems," are part and parcel of a standard residential real estate transaction. It is difficult to see how such issues, though part of the standard residential real estate disclosures in South Carolina, could not be reasonably foreseeable or anticipated by a homebuyer.

5. This Court's decision respectfully fails to address JWH's argument in its supplemental citation to authorities that Aiken and Partain have been abrogated by

Landers. JWH raised this issue in a citation to supplement authorities because the decision in Landers was issued after written briefing and oral arguments. JWH also raised the issue in its first petition for rehearing. The Court has never addressed the issue.

In Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 261, 743 S.E.2d 868, 874 (Ct. App. 2013), a separate panel of this Court relied exclusively on Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013), to conclude that a broad arbitration provision in a purchase contract for real property encompassed the plaintiff's tort claims for defective construction. Unlike the panel in Carlson, the Court's decision in the present appeal fails to address Landers. Likewise, a third panel of this Court recently relied on Landers to concluded that a claim of "illegal documentation fees" against an automobile dealership fell within the scope of a broad arbitration clause. See York v. Dodgeland of Columbia, Inc., Op. No. 5169 (Ct. App. filed Sept. 4, 2013).

The circuit court in the present action relied upon Aiken v. World Fin. Corp., 373 S.C. 144, 644 S.E.2d 705 (2007), and Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602 (2010), to conclude the claims asserted by the Parsons were unforeseeable to a reasonable consumer. **R.p.6.** On appeal, JWH argued that Aiken and Partain were distinguishable, and that the Parsons failed to allege any outrageous torts unforeseeable to the reasonable consumer. **JWH Br., pp.16-20.**

In Landers, the Supreme Court of South Carolina held that tort claims such as slander and intentional infliction of emotional distress are foreseeable if they have a "significant relationship" to the subject contract: "Landers has essentially pled himself into a corner with respect to each of his claims." Id. at 115, 739 S.E.2d at 217. "Indeed, he has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to

perform the employment Agreement and the alleged breach thereof, such that *all of his causes of action bear a significant relationship to the Agreement.*" Id. (emphasis added). "Thus, we reverse the trial court with respect to Landers' remaining four causes of action and hold that each is to be arbitrated." Id. "In doing so, *we also reject the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.*" Id. at 115-16 (emphasis added).[2]

Thus, the Supreme Court's decision in Landers collapses the "foreseeability" determination in Aiken and Partain into the discrete issue of whether the causes of action bear a significant relationship to the contract containing a broad arbitration provision. As previously discussed, each of the Parsons' claims in the present case bears a significant relationship to the Agreement. Under Landers, they were therefore foreseeable to the Parsons at the time of the Agreement's execution. This Court's decision overlooked this argument, warranting rehearing.

6. This Court's decision appears to conflict with other decisions of separate panels of this Court, and this appeal involves exceptional issues arising from recent state Supreme Court and federal case law. JWH's petition for rehearing *en banc* should therefore also be granted.

"A hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Under Rule 219(a)(1), SCACR, rehearing *en banc* is necessary to secure and maintain

[2] Like the circuit court here, the trial court in Landers held that Aiken and Partain applied to remove plaintiff's claim from the scope of the broad arbitration clause at issue. See Landers v. Fed. Deposit Ins. Corp., 2010 WL 9472160 (S.C. Com. Pl. filed Sept. 8, 2010). The Supreme Court thus reversed the trial judge's decision in this regard.

uniformity in the decisions of this Court. On June 12, 2013, a separate panel of this Court issued a published opinion in Carlson v. S.C. State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), recognizing that an arbitration provision in a purchase contract for real property covering "every controversy or claim arising out of or relating to this Agreement, or the breach thereof," included the purchasers' tort claims under the "significant relationship" test emphasized by the Supreme Court of South Carolina in Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013). The Panel in Carlson also expressly relied upon the Supreme Court's determination in Landers that "plaintiff's tort claims for slander and intentional infliction of emotional distress arising from his employment with the defendant were encompassed by an arbitration clause in his employment contract." Id. Similarly, a third panel of this Court relied on the "significant relationship" test emphasized in Landers to conclude that a claim against a car dealer for "illegal documentation fees" would be subject to arbitration. See York v. Dodgeland of Columbia, Inc., Op. No. 5169 (Ct. App. filed Sept. 4, 2013).

In the present case, the arbitration provision in the subject purchase contract is even more broad than the arbitration clause at issue in Carlson: "Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final." **R.p.75, §V, ¶O** (emphasis added in italics).

Nevertheless, the circuit court summarily concluded that this more expansive arbitration provision does not apply to the claims against JWH for rescission, breach of contract, negligence/gross negligence, negligent misrepresentation, breach of warranty, fraud, and unfair

trade practices. As in Carlson, Landers, and York, these claims unequivocally arise out of and relate to the contractual relationship between the parties. Therefore, this Court should grant rehearing *en banc* to address the apparent conflict between Carlson, Landers, and York, on the one hand, and the present decision.

Pursuant to Rule 219(a)(2), SCACR, as discussed *infra*, the issues in this appeal are also of exceptional importance given the recent decisions of the Supreme Court of South Carolina in Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013), and the United States Court of Appeals for the Fourth Circuit in Muriithi v. Shuttle Exp., Inc., 712 F.3d 173 (4th Cir. 2013). At the very least, the application of these recent decisions to the issues in this case, which were raised by JWH but unaddressed in this Court's unpublished decision, further warrants rehearing *en banc*.

Conclusion

For the foregoing reasons, the Court should respectfully grant rehearing, and such rehearing should occur *en banc*.

Respectfully Submitted,

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September 11, 2013
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Kimball Jackson, Circuit Court Judge

Case No. 2011-CP-46-00796

Ralph Wayne Parsons, Jr. and Louise C. Parsons, ... Respondents,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the ..... Appellant.

PROOF OF SERVICE

I hereby certify that a true and correct copy of Petition for Rehearing and Rehearing *en banc* by Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. was served on this 11th day of September, 2013 via Federal Express upon the following counsel of record:

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