THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Opinion No. 2013-UP-296 (S.C. Ct. App. filed Aug. 28, 2013)

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 ..... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Ian W. Freeman (S.C. Bar #72736)
G. Trenholm Walker (S.C. Bar #5777)
Daniel S. McQueeney, Jr. (S.C. Bar #6802)
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2243
Attorneys for Petitioner

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on March 14, 2014.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals commit an error of law in deferring to the circuit court's findings of fact where, as here, the underlying motion involved no factual dispute and where, as here, the circuit court expressly refused to make any such findings?

II. Did the Court of Appeals, like the circuit court, commit an error of law in overlooking the plain language of the arbitration provision, which expressly and specifically includes the claims asserted by the Parsonses against John Wieland Homes?

III. Did the Court of Appeals commit an error of law in failing 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?

IV. Did the Court of Appeals commit an error of law in failing to address JWH's argument that the circuit court erred in finding that the underlying claims alleged outrageous torts which were unforeseeable to a reasonable consumer instead of analyzing the claims under the "significant relationship" test set forth in Landers?

STATEMENT OF THE CASE

Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes" or "JWH") developed and sold real property, including real property located in South Carolina. **App. p.113, ¶1; App. p.115, ¶12.** On November 27, 2002, John Wieland Homes 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. **App. p.10, ¶7; App. p.114, ¶7.** Springs previously used a portion of the 65-acre tract for textile storage and fabric cutting. **App. p.114, ¶8.**

On June 30, 2007, Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons (the "Parsonses") executed a contract (the "Agreement") to purchase certain real property located at 4270 Rochard Lane in Fort Mill, South Carolina (the "Property") from John Wieland Homes, utilizing earnest monies the Parsonses previously paid toward a separate property they had agreed to purchase from John Wieland Homes under an identical contract with an identical arbitration provision. **App. pp.128-33, ¶3; App. pp.59-63.**

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. . . .*

App. p.61, ¶21; App. p.132, ¶21 (emphasis added in italics). The Parsonses initialed under this Paragraph 21 in both agreements. **App. p.61, ¶21; App. p.132, ¶21.** Both agreements provide that this Paragraph 21 survives closing or termination of the pertinent agreement. **App. p.62, ¶34; App. p.133, ¶34.**

The JWH Warranty attached to both agreements is also more or less identical. **App. pp.64-97; App. pp.139-168.** 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.

App. p.77, §V, ¶O (emphasis added in italics).

John Wieland Homes conveyed the Property to the Parsonses on October 31, 2007. **App. p.11, ¶13.** According to the Parsonses, in July 2008, the Parsonses were performing routine irrigation maintenance for a suspected leak in their backyard when they discovered a 4-inch PVC pipe buried on the Property. **App. p.12, ¶18.** Further investigation revealed a buried 2-inch PVC pipe, and both buried PVC pipes ran the entire width of the backyard. **App. p.12, ¶18.** Beginning

in mid-yard, the buried PVC pipes were encased in concrete and were attached to a metal box, also encased in concrete. **App. p.12, ¶18.** The 4-inch PVC pipe and the metal box contained a black sludge. **App. p.10, ¶18.**

The Parsonses contacted John Wieland Homes, which arranged for the removal of the pipes and the sludge. **App. p.12, ¶19.** Testing and analysis revealed that the black sludge constituted a hazardous substance. **App. p.12, ¶19.** Consequently, the South Carolina Department of Health and Environmental Control ("DHEC") was contacted in August 2008. **App. p.12, ¶20.**

In October 2008, John Wieland Homes entered into a voluntary cleanup contract with DHEC and undertook the remediation of the hazardous substances and other materials from the Parsonses' yard. **App. p.13, ¶22.** A buried 12-inch, cast iron pipe was also discovered during this process. **App. p.13, ¶22.** The tasks spelled out in the voluntary cleanup contract were carried out and paid for by John Wieland Homes. **App. p.212; App. p.118, ¶28.**

On February 24, 2011, the Parsonses filed the present lawsuit against John Wieland Homes. **App. pp.9-18.** The substantive allegations of the Parsonses' complaint allege that John Wieland Homes 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." **App. p.13, ¶25; App. p.13, ¶30.** As a result, the Parsonses requested that the Agreement be rescinded or, in the alternative, that the Parsonses be awarded damages for the alleged breach. **App. p.14, ¶¶27, 31.** The Parsonses further alleged that John Wieland Homes breached implied warranties of habitability and workmanlike construction in their conveyance of the Property to the Parsonses, again requesting damages for the breach of

these warranties. **App. pp.15-16, ¶¶57-60.**

The Parsonses also averred that John Wieland Homes "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 Parsonses, that John Wieland Homes intentionally or negligently concealed these facts from the Parsonses, and that the Parsonses were entitled to recover damages for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence as a result thereof. **App. pp.14-17, ¶¶32-56.**

John Wieland Homes moved to dismiss the Parsonses' complaint and compel arbitration on the basis of the arbitration provision referenced and incorporated into the Agreement. **App. pp.57-58.** On October 10, 2011, the circuit court entered an order denying the motion to compel arbitration on two grounds. **App. pp.4-8.** 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." **App. p.7.** 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." **App. p.8.**

John Wieland Homes received written notice of entry of the circuit court's order denying its motion to compel on October 13, 2011. **App. p.170.** On October 19, 2011, John Wieland Homes served and filed its notice of appeal of the circuit court's decision. **App. pp.170-172.**

Pursuant to Rule 220(b), SCACR, on June 26, 2013, the Court of Appeals issued an unpublished decision, summarily affirming the circuit court's order on the following grounds: (1) the circuit court's findings on whether the arbitration provision applied to the Parsonses' claims were entitled to deference; (2) the arbitration provision did not apply to the Parsonses' allegations; and (3) the failure to disclose hazardous substances on the Property amounted to

conduct that was unanticipated and unforeseeable by a reasonable consumer. **App. pp.261-263.**

John Wieland Homes timely served and filed a petition for rehearing of the June 26, 2013 opinion of the Court of Appeals. **App. pp. 264-284.** On August 28, 2013, the Court of Appeals granted the petition and issued a re-filed, unpublished decision, again affirming the circuit court's decision pursuant to Rule 220(c), SCACR. **App. pp.277-278.** While the Court of Appeals once more ruled that the appellate court's standard of review compelled it to affirm the circuit court's decision and that the Parsonses could not be required to submit to arbitration any dispute that they had not agreed to arbitrate, the Court of Appeals refused to address the issue of whether JWH's failure to disclose hazardous substances on the Property amounted to conduct that was unanticipated and unforeseeable to a reasonable consumer. **App. pp.277-278.**

John Wieland Homes timely served and filed a second petition for rehearing, which the Court of Appeals denied on March 14, 2014. Pursuant to Rule 242(b), SCACR, this writ follows.

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. "The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

> (1) Where there are novel questions of law.
> (2) Where there is a dissent in the decision of the Court of Appeals.
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
> (4) Where substantial constitutional issues are directly involved.
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

Id.

In the present case, as discussed in more detail *infra*, John Wieland Homes contends that

several "special and important reasons," specifically relating to the appropriate standard of review of arbitrability determinations, the framework for such determinations, and the impact of this Court's recent decision in Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013), support certiorari review of the opinion of the Court of Appeals in this matter.

In the context of these issues, the opinion of the Court of Appeals respectfully demonstrates that this Court should grant certiorari review to clarify the existing arbitrability framework, to address novel issues of law, *and* to correct direct conflicts between the underlying decision and prior precedent of this Court and, as to federal questions, the Supreme Court of the United States.

ARGUMENT

I. The Court of Appeals committed an error of law in deferring to the circuit court's findings of fact where, as here, the underlying motion involved no factual dispute and where, as here, the circuit court expressly refused to make any such findings.

The unpublished opinion of the Court of Appeals affirms the circuit court's decision that the arbitration provision in the Agreement did not require the parties to arbitrate the Parsonses' claims, stating, in pertinent part:

> We affirm pursuant to Rule 220(b), SCACR, and the following authorities:
>
> 1. As to whether the trial court erred in finding the arbitration agreement did not apply to the Parsonses' claims: Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 215 (2012) (noting although arbitrability determinations are subject to de novo review, the trial court's factual findings will not be reversed if reasonably supported by any evidence.) . . . .

App. p.288.

Here, as to the issue of arbitrability, the circuit court was asked to determine whether the arbitration provision, construed in favor of arbitration, covered the Parsonses' allegations,

without addressing the merits of those allegations. There was no room for fact-finding, and the circuit court expressly refused to find facts as to this issue. Consequently, the Court of Appeals owed no deference to the circuit court and committed an error of law in failing to apply a *de novo* review of the circuit court's arbitrability determination. See Jordan v. Holt, 362 S.C. 201, 208, 608 S.E.2d 129, 132 (2005) (reversing Court of Appeals' decision applying a purely equitable standard of review to a lawsuit seeking both legal and equitable relief).

This error warrants certiorari review because it stands in direct contrast to binding precedent of this Court and binding precedent of the Supreme Court of the United States. Moreover, certiorari review is necessary to clear up confusion regarding the appropriate circumstances under which an appellate court should defer to the circuit court in making an arbitrability determination.

In Liberty Bldrs., Inc. v. Horton, 336 S.C. 658, 661, 521 S.E.2d 749, 751 (Ct. App. 1999), the South Carolina Court of Appeals first addressed the standard of review applicable to an order denying a motion to stay an action pending arbitration, explaining: "While we found no South Carolina case specifically addressing the standard of review applicable to an order denying a motion to stay an action pending arbitration, we believe the circuit judge's factual findings should be given some deference." In Horton, however, the Court of Appeals expressly acknowledged that the circuit court found facts on the issue of whether the party seeking to compel arbitration waived its right to do so. Id. Therefore, it was unnecessary for the Court in Horton to address whether the arbitration provision applied to the underlying claims in the first place. Id.

In a similar vein, this Court'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. at 453, 730 S.E.2d at 315. 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, unlike in Horton, the circuit court did not address whether John Wieland Homes waived its right to compel arbitration.[1] Likewise, unlike in Bradley, the circuit court did not address whether the Agreement fell within the scope of the FAA.[2] Here, the Court of Appeals was asked to review the circuit court's determination of whether the broad arbitration provision in the Agreement encompasses the factual allegations against John Wieland Homes.

As discussed *infra*, John Wieland Homes contends the arbitration provision in the Agreement unambiguously encompasses the factual allegations in the Parsonses' 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.

[1] The Parsonses never argued waiver to the circuit court.

[2] The FAA clearly applied 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.").

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, an appellate 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.").

The Supreme Court of the United States, recognizing that federal law applies to this determination, utilizes the same analysis: "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983)."). "[I]t has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT & T Technologies, Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986) (citations and internal quotation marks omitted). "Doubts should be resolved in favor of coverage." Id.

Similarly, if there were any question about whether the Parsonses' factual allegations fell within the scope of the arbitration provision in the Agreement, an appellate court, sitting *de novo*,

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."); AT & T Technologies, 475 U.S. at 649 ("The third principle derived from our prior cases is that, in 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. **App. p. 7, note 1.** Instead, the circuit court relied on the allegations of the Parsonses' 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. **App. pp.6-7.**

Based on the foregoing, the Court of Appeals respectfully misapprehended the applicable standard of review by suggesting that the Court should defer to the circuit court regarding the issues on appeal. This error warrants certiorari review and, ultimately, reversal.

II. The Court of Appeals, like the circuit court, committed an error of law in overlooking the plain language of the arbitration provision, which expressly and specifically includes the claims asserted by the Parsonses against John Wieland Homes.

The Court of Appeals, like the circuit court, entirely ignores the arbitration provision in

the Agreement. In fact, neither the Court of Appeals nor the circuit court cites to *any* clause within the parties' arbitration provision, despite JWH's continued assertions that the plain language of this provision unequivocally encompasses the Parsonses' factual allegations against John Wieland Homes. Once again, this error establishes confusion regarding the proper framework for arbitrability determines and stands in direct conflict with binding decisions of both this Court and the Supreme Court of the United States. Thus, this error warrants certiorari review.

While the Court of Appeals summarily and parenthetically relies upon Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 47-48, 693 S.E.2d 434, 435 (Ct. App. 2010), the arbitration provision in that case is 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. **App. p.77, §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." **App. p.78, §V, ¶O.**

As to this issue, the Court of Appeals in the present case 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 appellate court's conclusion 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 of Appeals 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 the Court of Appeals 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." **App. p.77, §V, ¶O** (double emphasis added).

The opinion of the Court of Appeals 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 a writ of certiorai because the Court of Appeals overlooked the express terms of the subject arbitration provision, misapplying the framework articulated by this Court in Landers.

III. The Court of Appeals committed an error of law in failing 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.

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

Parsonses' 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." **App. p.5.**

John Wieland Homes raised this issue both in briefing to this Court and in its petitions for rehearing. **App. pp.196-203, 275-277, 302-304.** The Court of Appeals never addressed this issue.

"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 provision 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 the arbitration provision 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 the Court of Appeals 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.").

IV. The Court of Appeals committed an error of law in failing to address JWH's argument that the circuit court erred in finding that the underlying claims alleged outrageous torts which were unforeseeable to a reasonable consumer instead of analyzing the claims under the "significant relationship" test set forth in Landers.

The Court of Appeals refused to address this issue in its re-filed opinion because the Court found it unnecessary to address the issue based on its alternative ruling. **App. p.288.** This issue was raised by John Wieland Homes in written briefing and in its petitions for rehearing.

App. pp.203-207, 277-280, 304-306. John Wieland Homes respectfully contends that, because the Court's opinion overlooked or misapprehended JWH's other arguments, the Court of Appeals should have addressed this issue in its re-filed opinion.

In Aiken v. World Fin. Corp., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007), this Court held that it would "refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." "In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration." Id. at 152, 644 S.E.2d at 709. "For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate." Id. "We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Id.; see also Partain v. Upstate Auto. Grp., 386 S.C. 488, 493-94, 689 S.E.2d 602, 605 (2010) (reiterating these rulings from Aiken).

The circuit court in the present action relied upon Aiken and Partain to conclude the Parsonses' alleged claims which were unforeseeable to a reasonable consumer. **App. p.8.** On appeal, John Wieland Homes initially argued that Aiken and Partain were distinguishable, and that the Parsons failed to allege any outrageous torts unforeseeable to the reasonable consumer. **App. pp.203-207.**

For instance, the Parsonses' factual allegations rely upon a purported duty of John Wieland Homes to discover, remediate, and disclose hazardous substances on the Property. In other words, the Parsonses allege a failure to act, or omission, by John Wieland Homes. 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, 373 S.C. at 147, 644 S.E.2d at 707 (involving misappropriation of personal financial information); Partain, 386 S.C. at 490, 689 S.E.2d at 603 (involving a "bait and switch").

In addition, as John Wieland Homes 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 Parsonses' allegations of fraud in this case are founded solely on an alleged nondisclosure of latent defects in the Property, about which the Parsonses allege John Wieland Homes knew or should have known. **App. pp.9-18.** 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.").

Moreover, the decision of the Court of Appeals respectfully ignores that Aiken and Partain have been abrogated by Landers. John Wieland Homes raised this issue in a citation to supplemental authorities because the decision in Landers was issued after written briefing and oral arguments. John Wieland Homes also raised the issue in its petitions for rehearing. **App. pp.280-282, 306-308.** The Court of Appeals never addressed the issue.

In Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 115, 739 S.E.2d 209, 217 (2013), 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." "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).[3]

The Supreme Court's decision in Landers appears to collapse 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. 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 the Court of Appeals relied exclusively on Landers 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 decision by the Court of Appeals in the present case fails to address Landers. Moreover, a third panel of the Court of Appeals recently relied on Landers to conclude 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

[3] 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.

Columbia, Inc., 406 S.C. 67, 96, 749 S.E.2d 139, 154 (Ct. App. 2013).

As previously discussed, each of the Parsonses' claims in the present case bears a significant relationship to the Agreement. Under Landers, they were therefore foreseeable to the Parsonses at the time of the Agreement's execution. The Court of Appeals refused to address this issue, warranting certiorari review. Certiorari review would also serve the important purpose of clarifying the impact of Landers on Aiken and Partain, thus addressing a novel issue of law.

CONCLUSION

John Wieland Homes establishes several "special and important reasons" for granting certiorari review in this case. The Court of Appeals misapplied the standard of review, and this Court should grant certiorari to clarify the application of the standard of review in cases similar to the present one, as well as to address the conflict between the decision of the Court of Appeals and binding precedent of both this Court and the Supreme Court of the United States with respect to this issue.

The Court of Appeals, like the circuit court, also ignored binding precedent of this Court and the Supreme Court of the United States, by omitting any reference to or interpretation of the arbitration provision at issue in this appeal. Instead, the circuit court, like the Court of Appeals, mistakenly applied exclusions from a separate warranty provision.

Finally, the Court of Appeals failed to address JWH's contention that the circuit court erred in finding that, given the underlying transaction in this case, it was foreseeable to a reasonable person that the Parsonses' claims would be subject to the arbitration provision in the Agreement. In this respect, this Court's recent decision in Landers abrogates the analytical framework in Aiken and Partain, collapsing an arbitrability determination into the single issue of whether the claims bear a significant relationship to the underlying contract. Certiorari review is

necessary to clarify the impact of Landers and to address what appears to be a novel issue of law.

For the foregoing reasons, John Wieland Homes respectfully requests that this Court GRANT its petition for writ of certiorari.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA

Ian W. Freeman (S.C. Bar #72736)
G. Trenholm Walker (S.C. Bar #5777)
Daniel S. McQueeney, Jr. (S.C. Bar #6802)
P.O. Drawer 22247 (29413-2247)
16 Charlotte Street
Charleston, SC 29403
Phone: (843) 727-2200
Email: iwf@p-tw.com

April 14, 2014
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

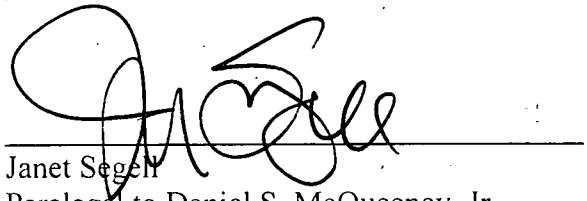
John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., ... Defendants,

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

PROOF OF SERVICE

I hereby certify that true and correct copies of John Wieland Homes and Neighborhoods of the Carolinas, Inc.'s Petition for Writ of Certiorari and Appendix were served on this 14th day of April, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.
Hamilton Martens Ballou and Carroll, LLC
130 E. Main Street
Rock Hill, SC 29730



Janet Segell
Paralegal to Daniel S. McQueeney, Jr.

PRATT-THOMAS | WALKER

PROFESSIONAL ASSOCIATION

16 CHARLOTTE STREET
CHARLESTON, SC 29403

PO DRAWER 22247
CHARLESTON, SC 29413-2247

PHONE: 843.727.2200
FAX: 843.727.2238

WWW.P-TW.COM

(843) 727-2256 (direct dial)
(843) 727-2238 (fax)
dsm@p-tw.com (e-mail)

ATTORNEYS AT LAW

E. DOUGLAS PRATT-THOMAS
G. TRENHOLM WALKER
W. ANDREW GOWDER, JR.
JON L. AUSTEN
LINDSAY K. SMITH-YANCEY (SC, NC)
THOMAS H. HESSE (SC, GA)
IAN W. FREEMAN (SC, CA)
DANIEL S. McQUEENEY, JR.
KATHLEEN FOWLER MONOC
JOHN P. LINTON, JR.

OF COUNSEL
THOMAS P. GRESSETTE, JR. (SC, USVI)

April 14, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Parsons v. John Wieland Homes
Appellate Case Tracking No. 2011201528
Our File No. 1895-012

Dear Ms. Kitchings:

Please find enclosed John Wieland Homes and Neighborhoods of the Carolinas, Inc.'s Petition for Writ of Certiorari in the above-referenced matter. As evidenced by the enclosed Proof of Service, I am serving adverse counsel with a copy of the Petition.

Thank you for your courtesies. If you have any questions, please do not hesitate to contact me at (843) 727-2256.

Yours truly,

PRATT-THOMAS WALKER, P.A.

Daniel S. McQueeney, Jr.

DSM/jas
enclosures

c: Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.