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IN THE STATE OF SOUTH CAROLINA  
In The Supreme Court

MAY 20 2014

APPEAL FROM YORK COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

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 .....Petitioner

RETURN TO PETITION  
FOR WRIT OF CERTIORARI

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INDEX

Statement of the Case .....1

Arguments

1. THE PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY.....1
2. THE COURT OF APPEALS PROPERLY DEFERRED TO THE CIRCUIT COURT’S DETERMINATION THAT THE ARBITRATION CLAUSE DID NOT COVER THE PARSON’S CLAIM (Questions I, II, and III).....4
3. THE DECISION BY THE COURT OF APPEALS TO REFRAIN FROM CONSIDERING THE TRIAL COURT’S ALTERNATIVE RULING DOES NOT PRESENT AN IMPORTANT ISSUE JUSTIFYING DISCRETIONARY REVIEW (Question IV).....6

Conclusion .....9

The Respondent files this Return to the Petition for Writ of Certiorari filed by the Petitioner. Rule 242 of the Appellate Court Rules provides that a Writ of Certiorari is not a matter of right but of sound discretion. The Writ will be granted only where special and important reasons exist, justifying discretionary review.

While not intended to be exhaustive, Rule 242 lists several situations which indicate the nature of the reasons for review 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.

Respondents submit that none of the circumstances described in the rule, or of the nature of the circumstances described in the rule, exist here. Respondent submits that the issues raised by the Respondent are not “Special or Important” so as to justify discretionary review by this Court.

#### STATEMENT OF THE CASE

For the limited purpose of the Return to the Petition for Writ of Certiorari, the Respondent adopts the Petitioner’s Statement of the case with the following additions:

John Wieland Homes (“JWH”) filed a Motion to Compel Arbitration and a Motion to Dismiss pursuant to Rule 12(b) of the Rules of Civil Procedure. As the Court was required to do, the court accepted the allegations of the complaint as true in ruling on the Motion to Dismiss and Compel Arbitration.

#### ARGUMENT

##### I. THE PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY

The Court of Appeals' decision in this case was filed on June 26, 2013. (App., p. 261) The Appellant filed a Petition for Rehearing and Rehearing en banc on July 10, 2013. (App., p. 284). On August 28, 2013, the Court of Appeals granted the Petition for Rehearing, withdrew its previous opinion and issued a revised opinion. (App., p.285).

The Appellant filed a second Petition for Rehearing and Rehearing en banc on September 11, 2013. The Court of Appeals denied the second Petition for Rehearing on March 14, 2014. (App., p. 311).

The Court of Appeals' first Opinion contained two substantive Paragraphs establishing the basis for the Court's affirmation of the Trial Court's Order. The second Opinion issued by the Court of Appeals on rehearing contained the identical first Paragraph. The second Paragraph was changed by omitting any substantive analysis and, in its place, stating that the Appellate Court need not address remaining issues on appeal when disposition of a prior issue is dispositive. (App., p. 288).

The second Order on Rehearing, issued by the Court of Appeals, made no substantive change to the analysis of the Court of Appeals in the first Order. The basis for the Court's ruling as contained in the first Paragraph was identical to the first Paragraph in the second Order. (See App. p. 262; p. 288).

The alternative basis for the Court's decision as stated in Paragraph 2 in the first Order was removed from the second Order. It is apparent that the Court of Appeals concluded that the alternative grounds for affirming the Court's opinion was not necessary.

Appellate Court Rule 242 states that a Petition for Certiorari must be served and filed within thirty (30) days after a Petition for Rehearing is finally decided by the Court

of Appeals. Here, the Appellants' Petition for Rehearing was "finally decided" on August 28, 2013, when the first Order on rehearing was filed. (App., p. 285) The primary basis for the Court's ruling on rehearing did not change from the first Order to the refiled Order on Rehearing (App., p. 287). There is no provision in the Rules for a second rehearing.

The Respondent has been unable to locate case law on the issue of repetitive Petitions for Rehearing on appeal. However, there is authority addressing repetitive motions pursuant to Rule 59(e) of the Rules of Civil Procedure. The Appellant submits that the analysis of the cases dealing with repetitive Rule 59 motions is applicable to repetitive Petitions for Rehearing.

In Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 SE2d 772 (2004), the Supreme Court held that a second Rule 59 motion which raises the same arguments and issues made in a previous Rule 59(e) motion does not toll the time to appeal:

"..." allowing subsequent motions to repeatedly toll the filing period for a notice of appeal would encourage frivolous motions and undermine a fundamental canon of our legal system to promote the finality of judgments..." Id. p.777.

See Quality Trailer Products v. CSL Equipment Co., 349 S.C. 216, 562 SEd 615 (2002). ("The time for filing an appeal is not extended by submitting the same motion under different caption"). Coward Hund Construction Co. v. Ball Corp., 336 S.C. 1, 518 SE2d 56 (Ct. App. 1999).

Here, the Appellant's argument in its second Petition for Rehearing is essentially identical to the argument in the first Petition for Rehearing. Under Law/Analysis, the Appellant makes six (6) arguments in both Petitions. Each of the arguments is stated identically. The bodies of the arguments are identical. It does not appear that any new

issues or arguments are raised in the second Petition which were not raised in the first Petition.

Admittedly, the Court granted the first Petition for Rehearing, withdrew its first opinion and substituted another opinion. As discussed previously, the second Opinion is the same as the first with the exception of the omission of a portion of Paragraph 2. The change made to the Court's first Order did not affect the primary basis of the Court's Order as stated in Paragraph 1. The change was not substantive and should not be found to have tolled the time for filing a Petition for Writ of Certiorari. Elam v. South Carolina Department of Transportation, Supra. at p.777.

Appellate Court Rule 242 provides that a Petition for Writ of Certiorari must be filed within thirty (30) days from the date the Court of Appeals finally decides the Petition for Rehearing. Here, the Petition for Rehearing was finally decided on August 28, 2013. The Petition for Writ of Certiorari should have been filed on September 27, 2013. It was not filed until April 14, 2014. The second and virtually identical Petition for Rehearing, filed by the Petitioner, did not toll the time for filing a Petition for Rehearing. The Appellant respectfully submits that the Petition for Writ of Certiorari should be denied as untimely.

II. THE COURT OF APPEALS PROPERLY DEFERRED TO THE CIRCUIT COURT'S DETERMINATION THAT THE ARBITRATION CLAUSE DID NOT COVER THE PARSON'S CLAIM. (Questions I, II AND III)

Arbitration is a matter of contract. A party cannot be forced to arbitrate a dispute he has not agreed to arbitrate. Landers v. Federal Deposit Insurance Corporation, 402 S.C. 100, 739 SE2d 709 (2013). The policy of the United States and South Carolina is to favor arbitration of disputes. However, a party cannot be required to submit a claim to

arbitration which he has not agreed to submit. Zabinski v. Bright Acres Association, 346 SC 580, 553, SE2d 110 (2001).

The Federal Arbitration Act simply requires courts to enforce private agreements to arbitrate according to their terms like other contracts. Volt Info. SCIS., Inc. v. Board of Trustees, 489 U.S. 468 (1989).

“Arbitration rests on the agreement of the Parties and the range of issues that can be arbitrated is restricted by the terms of the agreement. Zabinski v. Bright Acres Associates, 346 SC 580, 553, SE2d 110 (2001).

In order for a Court to decide whether an arbitration agreement encompasses a dispute, the court must determine whether the factual allegations underlying the claim are within the scope of a broad arbitration clause. Partain v. Upstate Automotive Group, 386 S.C. 488, 689, SE2d 602 (2010). Unless the parties have provided otherwise, this is a decision for the Court. (Id., p. 491)

Petitioner correctly states that arbitrability decisions are subject to de novo review. However, the cases are clear that a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings. (Id. p. 490)

The issue addressed by the Trial Court and the Court of Appeals in this case was not the enforceability of the Arbitration Agreement. The issue was whether the claim falls within the scope of the arbitration clause. In determining whether a party has agreed to arbitrate an issue, general rules of contract interpretation are applied. Towles v. Un. Healthcare Corp., 338 S. C. 29, 524 SE2d 839 (Ct. App. 1999). As is the case in any matter involving contract interpretation, the intention of the parties is relevant. Landers vs. Federal Deposit Insurance Corporation, 402 SC 100; 739 SE2d 209, 213 (2013).

Petitioner argues that the Court of Appeals and the Circuit Court “\*\*\*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”.

The only arbitration provision to which the parties agreed is found in Paragraph 21 of the Agreement. (App. p. 61). As the Trial Court noted, Paragraph 21 is predominantly concerned with warranty issues.

One sentence in Paragraph 21 incorporates by reference an arbitration clause in the Wieland General Warranty. The Warranty Arbitration Clause is one of fifteen (15) General Provisions in the Extended Warranty.

The Trial Court noted that arbitration is a matter of contract. (App. p. 6) The Court analyzed the language of the arbitration clause, the language of the contract, and the language of the Extended Warranty to try to determine if the scope of the arbitration provision in the Warranty applied to willful failure to disclose the presence of underground piping and hazardous waste on the property. Acknowledging the requirement that arbitration provisions be liberally construed in favor of arbitration, the Court simply concluded that “the factual allegations underlying the claim” are not within the scope of the broad arbitration clause\*\*\*” Zabinski, 346 S.C. at 596, 553 SE2d at 118.

III. THE DECISION BY THE COURT OF APPEALS TO REFRAIN FROM CONSIDERING THE TRIAL COURT’S ALTERNATIVE RULING DOES NOT PRESENT AN IMPORTANT ISSUE JUSTIFYING DISCRETIONARY REVIEW.  
(Question IV)

The Trial Court found that the claim asserted against JWH involved alleged outrageous tortious conduct which would be unforeseeable to a reasonable consumer. Based on this Court’s opinions in Partain v Upstate Auto Group, 386 SC 488, 689 SE2d

602 (2010) and Aiken v. World Fianace Corp. of S.C., 373 SC 144, 644 SE2d 705 (2007), the Court ruled that the claims are not subject to arbitration. (App. p. 6).

The Petitioner argues that the Court of Appeals should have addressed the Trial Court's reliance on Aiken and Partain. Petitioner argues that Aiken and Partain were limited, if not completely reversed, by this Court's decision in Landers v. Federal Deposit Insurance Corporation, 402 S.C. 100, 739 SE2d 209 (2013). Respondent submits that the Petitioner's analysis of Landers is incorrect and that the Trial Court's reliance on Aiken and Partain does not raise an important issue for review by this Court. The Court of Appeals cited Futch v. McAllister Touring of Georgetown, Inc., 335 S.C. 598, 518, SE2d 591 (1999) for the proposition that an Appellate Court need not address remaining issues on appeal when the disposition of a prior issue is dispositive. (App., P. 288).

Landers involved a claim by a corporate executive for breach of his employment contract, constructive termination and slander. All of Landers' claims arose from his employment. The employer sought to enforce the arbitration clause in the employee's employment agreement.

Petitioner argues that Landers reverses Aiken and Partain. Nowhere in the Landers' opinion is there an express statement that the Court in Landers intended to reverse Aiken or Partain. To the contrary, Aiken is not mentioned. Partain is cited once, with approval, for the general proposition that the question of arbitrability is for the Court to decide unless the parties provide otherwise. Partain, supra. at 108.

The Court's reasoning in Landers does not imply a conflict with Aiken or Partain. Based on a "strong policy favoring arbitration, the nature of the agreement and Landers' underlying factual allegations", the Court found that all causes of action asserted by

Landers bore a significant relationship to the employment agreement. In doing so the Court reaffirmed the reasoning of Aiken and Partain;

“...Certainly, we recognize that even the broadest of clauses have their limitations. However, 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...”

Nor does the Landers’ opinion in any way impact the holding in Aiken and Partain, that an arbitration clause will not be enforced where the alleged acts of the Defendant constitute illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings. In Landers, the Court simply rejected the Plaintiffs’ contention that the Plaintiff’s claims, breach of contract, constructive termination, and slander were not foreseeable.

The Aiken and Partain cases, taken together, establish a three step analysis in determining the arbitrability of a claim. The first step is to determine whether a claim falls within the scope of an arbitration clause. If the answer to the “Scope” question is yes, there is no need to go to the next step. The arbitration clause applies.

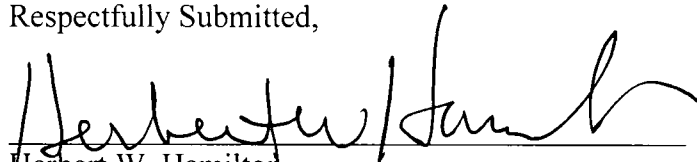
If the answer is no, however, the next step is to determine whether there is a “significant relationship” between the claims and the contract containing the arbitration clause. Partain v. Upstate Automotive Group, 386 S.C. 488, 689 SE2d 602 (2010). Again, if the answer is no, there is no need to go to the last step. If the answer is yes, however, the last step is to consider whether the conduct supporting the claim constitutes “illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings”. Id., p. 493.

CONCLUSION

Respondent submits that the Petitioner has failed to show reasons of the character described in Appellate Court rule 242 justifying discretionary review by this Court. Respondent respectfully requests that the Petition for Writ of certiorari be denied.

May 15, 2014

Respectfully Submitted,



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4822-7797-8650, v. 1

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The Honorable S. Jackson Kimball  
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and South Carolina Bank & Trust, N.A.

Defendants,

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

Appellant.

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CERTIFICATE OF SERVICE

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The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Respondents' Return to Petition for Writ of Certiorari was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

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May 15, 2014

  
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