

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

RECEIVED

APR 16 2014

S.C. Supreme Court

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.

APPENDIX

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

Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.
Hamilton Martens & Ballou, LLC
PO Box 10940
Rock Hill, SC 29731
Attorneys for Respondents

INDEX

	<u>Page</u>
Record on Appeal	1
Appellant's Final Brief	185
Respondents' Final Brief	209
Appellant's Final Reply Brief	232
Court of Appeals Order Affirming the Circuit Court Ruling	261
Appellant's Petition for Rehearing	264
Court of Appeals Order Granting Petition for Rehearing	285
Court of Appeals Order Affirming the Circuit Court Ruling	287
Appellant's Petition for Rehearing	289
Court of Appeals Order Denying the Petition for Rehearing	311

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.

RECORD ON APPEAL

Ian W. Freeman
G. Trenholm Walker
Daniel S. McQueeney, Jr.
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2243
Attorneys for Appellant

Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.
Hamilton Martens & Ballou, LLC
PO Box 10940
Rock Hill, SC 29731
Attorneys for Respondents

Index

Order filed Oct. 10, 2011	1
Plt.'s Compl. filed Feb. 24, 2011	7
Tr. of Hr'g dated Sept. 15, 2011	17
Def.'s Mot. to Compel Arbitration filed June 10, 2011	55
Purchase and Sale Agreement dated June 30, 2007 (Exhibit 1 to Def.'s Mot. to Compel Arbitration)	57
JWH Warranty (Exhibit 2 to Def.'s Mot. to Compel Arbitration).....	62
Def.'s Mem. in Support of Mot. to Compel Arbitration filed Sept. 15, 2011	96
Compl. in Case No. 0:11-cv-01589-JFA (Exhibit 1 to Plt.'s Response in Opp. to Def.'s Mot. to Compel Arbitration).....	111
Aff. of Andrew W. McCoy filed Sept. 15, 2011.....	120
Aff. of Chris Davis filed Sept. 15, 2011	122
Homeowner Handbook Receipt Confirmation dated June 30, 2007 (Exhibit A to Davis Aff.) ..	125
Aff. of Kevin Clarke filed Sept. 15, 2011	126
Purchase and Sale Agreement dated March 22, 2006 (Exhibit 1 to Clarke Aff.).....	128
JWH Warranty (Exhibit 2 to Clarke Aff.)	137
Homeowner Handbook Receipt Confirmation dtd. March 22, 2006 (Exhibit 3 to Clarke Aff.) ..	167
Notice of Appeal with Certificate of Service.....	168
Aff. of Ralph Wayne Parsons dated Sept. 12, 2011.....	171
Certificate of Appellant.....	182

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP4600796

Ralph Wayne Parsons Jr vs. John Wieland Homes and Neighborhoods of the Carolinas Inc

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

ORDER

Dated at York, South Carolina, this 3rd day of October, 2011.

Court Reporter:

S/S Jackson Kimball

PRESIDING JUDGE - S. Jackson Kimball

This judgment was entered on the 10th day of October, 2011, and a copy mailed first class this 10th day of October, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Herbert W. Hamilton Hamilton Martens Ballou
& Sipe, LLC P.O. Box 10940 Rock Hill, SC
29731

Ian Wesley Freeman Pratt-Thomas Epting &
Walker Pa P.O. Drawer 22247 Charleston, SC
29413-2247

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF YORK

) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL CIRCUIT
)

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

)
) Case Number: 2011-CP-46-00796
)

) Plaintiffs,
)

) v.
)

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

) Defendants.
)

ORDER

FILED-RECEIVED
2011 OCT 10 PM 4:15
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

This matter came before me on September 15, 2011, upon a Motion to Dismiss and to Compel Arbitration filed by the Defendant, John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH"). Present and representing the parties at the hearing were Herbert W. Hamilton and Christi P. Cox for Plaintiffs; and, Ian W. Freeman for JWH. Based on the record presented and the arguments of counsel, I find and conclude as follows.

STATEMENT OF CASE

This dispute concerns the discovery of underground piping and hazardous waste on a single family residential lot ("Property") located in a subdivision. JWH owned and developed the subdivision, and later sold the "Property" to the Plaintiffs. In their Complaint, Plaintiffs allege that JWH was aware, or should have been aware, of the presence of the pipes and hazardous waste prior to conveying the Property, and that it failed to disclose the condition to Plaintiffs. The Complaint specifically asserts, among other causes of action, Fraud, Negligent Misrepresentation, and Unfair Trade Practices against JWH.

JWH acknowledges that contamination was discovered on the Property, and that it has previously assumed responsibility for remediation of the contamination. Because of this motion, it has not yet filed an Answer addressing Plaintiffs' allegations.

JWH filed this motion to compel arbitration of Plaintiffs' claims based upon a "Warranty and Arbitration" clause contained in the sales contract. Plaintiffs assert that they never agreed to arbitrate claims of the kind asserted in their complaint, and further assert that the claims asserted are based on conduct, concerning which arbitration may not be compelled, as a matter of law.

mm
15

STATEMENT OF ALLEGED FACTS

The pertinent facts underlying the Plaintiffs' claims, which treated as true for the purposes of this motion, are summarized as follows.

In November, 2002, JWH purchased approximately 65 acres of land located in Lancaster County for development of a residential subdivision. Prior to JWH's purchase, the property was owned by Springs Industries, Inc. ("Springs"), which had conducted industrial activities on the property. Following its purchase, JWH demolished the former Springs building on the property, and removed all visible evidence of the building. JWH also removed some underground pipes, valves and tanks remaining from Springs' former operations. Thereafter, JWH subdivided the property and developed The Woods at Bridgemill Subdivision (the "Subdivision"), which consisted primarily of single family, "spec" homes.

After removing all visible evidence of the Springs operation, JWH began selling lots and "spec" homes in the second phase of the Subdivision. On October 31, 2007, JWH sold a home and lot to Plaintiffs. Plaintiffs paid \$621,102 for the home. At the time of their purchase, Plaintiffs were unaware that any portion of the Subdivision was previously an industrial site, and had no reason to attempt discovery of that fact. JWH did not disclose to Plaintiffs that any portion of the Subdivision had previously been used as an industrial site, and did not disclose to Plaintiffs that numerous underground pipes, valves and tanks had been located on the property.

In July, 2008, Plaintiffs were performing maintenance on a suspected leak in their backyard when they discovered a metal lined concrete box buried on their property, as well as PVC piping. When the box was opened, they found a black sludge in the box. The sludge was determined to be hazardous waste. The sludge was also found in the PVC pipe, and the concrete foundation of the home had actually been poured over and around the pipe such that the pipe ran through the foundation.

Plaintiffs contacted the South Carolina Department of Health and Environmental Control ("DHEC"). DHEC performed testing and analysis of the sludge. The testing confirmed that the sludge was hazardous waste. In October, 2008, JWH entered a "voluntary clean-up contract". JWH undertook voluntary remediation efforts to remove the hazardous waste and other buried materials from Plaintiffs' property. Despite these efforts, Plaintiffs assert that the value of their home has been permanently affected, and the home has been stigmatized by the presence of hazardous waste on the property. This action has resulted.

M
2

DISCUSSION

As discussed below, JWH's motion to dismiss and compel arbitration is largely controlled by the cases of *Partain v. Upstate Auto Group*, 386 S.C. 488, 689 S.E.2d 502 (2010); and, *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 644 S.E. 2d 705 (2007).

I. The arbitration agreement does not control adjudication of Plaintiffs' claims.

While state and federal policy favors arbitration, the initial inquiry is whether the parties actually agreed to arbitrate the particular dispute or issue. *Sydnor v. Conseco Fin. Serv. Corp.*, 252 F.3d 302 (4th Cir. 2001), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement." *Fallaous v. Anderson Ocean Club Dev., LLC*, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (2010).

In determining whether the parties executed an enforceable arbitration agreement, ordinary state-law principles governing contract formation apply. *Id.*, citing *First Options v. Kaplan*, 514 U.S. 938, 944 (1995); see also *Unisun Ins. Co. v. Hertz Rental Corp.*, 312 S.C. 549, 551-52, 436 S.E.2d 182 (Cl. App. 1993).

Whether an arbitration clause encompasses a particular claim, depends upon whether the factual allegations underlying the claim are within the scope of the broad arbitration clause. *Zabinski v. Bright Acres Associates*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001.) A claim is within the scope of an arbitration clause if it is encompassed by the language of the clause or "if a significant relationship exists between the claim and the contract." *Partain, supra*, 386 S.C. at 492, 689 S.E.2d at 604 (2010). Neither condition exists in this case.

Plaintiffs' Complaint and the causes of action asserted therein, allege JWH's failure to disclose the presence of underground piping and hazardous waste on the Property of which it was, or should have been, aware. However, the arbitration agreement, fairly read, applies only to claims of defects in the design and construction of the home. Arbitration was not contemplated as to a claim or condition predating the parties' agreement, and not pertaining directly to the suitability or fitness of the house. Thus, I find and conclude that the arbitration provisions are inapplicable to the claims asserted in this case.

The arbitration clause, found in Paragraph 21 of the Purchase Agreement under the heading "Warranty and Arbitration", nowhere refers to "fraud", "environmental contamination",

MWK
153

or disclosure of preexisting conditions. Rather, the clear intent of the paragraph is to deal with warranty issues and disclaimers related to the actual construction of the home.

As to arbitration, Paragraph 21 merely provides that "... purchaser consents to the terms [of the JWH Extended Warranty], including the binding arbitration provision contained therein."¹ By its terms and context, the JWH Warranty, "... including the binding arbitration provision contained therein ..." only deals with defects or deficiencies in the construction of the Home. Further, the terms of the Warranty specifically provide that it does not apply to:

Loss or damage not caused by a defect or deficiency in the design or construction of the Home by Wieland or Wieland's employees, agents or subcontractors;²

Additionally, the warranty does not apply to: Damage to real property that is not part of the Home;³ Loss of Market value... or any and all consequential loss or damages;⁴ or, ... Pollution or toxic substances of any kind.⁵

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.

II. The claims asserted are not subject to arbitration as a matter of law.

The claims asserted against JWH involve alleged outrageous tortious conduct, namely, intentional failure to disclose concealed environmental contamination on the Property. Such conditions are unanticipated and unforeseeable to reasonable consumers purchasing a home. Consequently, Plaintiffs' claims are excluded from arbitration pursuant to *Aiken* and *Partain*.

In *Aiken, supra*, the Court stated, "... this Court will 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." 373 S.C. at 151, 644 S.E.2d at 709. The Court held that the theft of personal information in connection with a loan transaction was "... outrageous conduct that [plaintiff] could not possibly have foreseen when he agreed to do business with [finance company]." *Id.*

In *Partain, supra*, the Court enlarged this pronouncement, holding that such illegal and

¹ The JWH Extended Warranty is a 27-page booklet, which was JWH asserts was incorporated by reference into the purchase agreement. The Parties dispute when the Parsons were actually provided a copy of the warranty booklet. Because this Court finds that Plaintiff's claims are not covered by the terms of the arbitration clause or the terms of the Warranty Booklet in any event, it is not necessary to resolve this disputed issue of fact.

² JWH Extended Warranty, Paragraph IV(J).

³ JWH Extended Warranty, Paragraph IV(B). The term "Home" is defined in the Warranty as "the dwelling." Paragraph V(B), JWH Extended Warranty.

⁴ JWH Extended Warranty, Paragraph IV(G).

⁵ JWH Extended Warranty, Paragraph IV(M).

Handwritten signature and number 4

outrageous acts are not subject to arbitration even when the claim is arguably encompassed by the broad language of the arbitration clause. 386 S.C. at 493, 689 S.E.2d at 604-605.

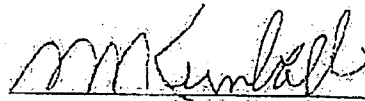
Plaintiffs have alleged that JWH knew or should have known that the Property was contaminated prior to the execution of the sale agreement. It is incontestable that JWH knew the property was previously an industrial site prior to the sale to Plaintiffs; yet, it never disclosed such condition to Plaintiffs. Further, the underground pipes containing hazardous waste were discovered during the construction process, and JWH intentionally installed the home's foundation over and "around" them. Neither Plaintiffs, nor reasonable consumers, can be held to have expected the arbitration provisions at issue to apply to such a situation. Thus, I find and conclude that the conduct complained of in this case meets the standard established by *Aiken* and *Partain*, and JWH cannot compel arbitration under the parties' agreements.

ORDER

Based on the discussion herein, it is ordered that JWH's motion to dismiss and to compel arbitration be denied.

AND IT IS SO ORDERED.

October 3, 2011



S. Jackson Kimball
Special Circuit Court Judge
York County



STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTHTEENTH JUDICIAL CIRCUIT

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

C/A No. 2011-CP-46-00796

Plaintiffs,

v.

COMPLAINT
(Jury Trial Demanded)

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

Defendants:

DAVID J. HAMILTON
C.L.P. & G.S.
YORK COUNTY, SC

2011 FEB 24 PM 1:48

FILED-RECEIVED

Plaintiffs Ralph Wayne Parsons, Jr. and Louise C. Parsons (together, "Plaintiffs"
or "the Parsons"), complaining of the defendants, would respectfully allege and show as
follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs are citizens and residents of Lancaster County, South Carolina.
2. On information and belief, Defendant John Wieland Homes and

Neighborhoods of the Carolinas, Inc. ("John Wieland") is a Georgia corporation that is
authorized to transact business in South Carolina, and which at all relevant times owned
property and transacted business in York County, South Carolina.

3. On information and belief, Wachovia Bank, N.A. is a national banking
association that owns property and transacts business in York County, South Carolina.
Also on information and belief, Wells Fargo has or may claim an interest in this litigation
by reason of Wells Fargo's status as Plaintiffs' mortgagee.

4. On information and belief, South Carolina Bank & Trust, N.A. is a national banking association that owns property and transacts business in York County, South Carolina. Also on information and belief, South Carolina Bank & Trust, N.A. has or may claim an interest in this litigation by reason of South Carolina Bank & Trust, N.A.'s status as Plaintiffs' mortgagee.

5. Wells Fargo and South Carolina Bank & Trust are named as defendants solely by reason of their mortgages upon the property that is the subject of this action and Plaintiffs' claim for rescission.

6. This court has jurisdiction over the parties and over the subject matter of this litigation. Venue is proper in York County.

FACTS

7. In or about November 2002, John Wieland or one of its affiliated companies purchased approximately 65 acres of land located in the Indian Land region of Lancaster County for purposes of development.

8. Prior to John Wieland's purchase of that property, the property was owned by J. P. Stevens from 1971 until 1985, when Springs Industries, Inc. purchased the property. On information and belief, the Property contained a large industrial building, lift house, above ground storage tanks, waste treatment pond, fire pond with a pump house, underground pipes, valves and numerous wells which, on information and belief, were utilized by J. P. Stevens and Springs Industries, Inc. in connection with industrial operations on the property.

9. On information and belief, following its purchase of the property in 2002, John Wieland demolished the former Springs Industries' industrial building, lift house

and pump house. All visible evidence of the buildings was removed. The waste pond and fire pond were treated and dirt filled. On information and belief, John Wieland also removed some, but not all, of the underground pipes, valves and tanks from the property.

10. John Wieland then subdivided the property and developed The Woods at Bridgemill Subdivision (the "Subdivision"), which consisted primarily of single family "spec" homes.

11. On information and belief, John Wieland developed the Subdivision in two phases. The first phase of development included that portion of the property where the former Springs building had been located. Consequently, by the time John Wieland had completed developing the first phase of the Subdivision, there was no remaining visible evidence that Springs Industries' facility had been located on the property, and no visible evidence that the property had once been an industrial site.

12. At some time between 2002 and 2007, John Wieland began selling lots and "spec" homes in the second phase of the Subdivision.

13. On October 31, 2007, John Wieland Homes and Neighborhoods of the Carolinas, Inc. sold lot 279 and home, within the second phase of the Subdivision, to the Parsons.

14. The Parsons paid \$621,102 for their lot and home. The Parsons financed a portion of their purchase through a mortgage with South Carolina Bank & Trust, which mortgage was assigned to Wells Fargo. SCB&T provided an equity line of credit by way of a second mortgage.

15. The Parsons fully satisfied their purchase contract.

16. At the time the Parsons purchased their home they were not aware that any portion of the Subdivision had previously been used as an industrial site, and had no reason to discover that fact through reasonable due diligence.

17. John Wieland did not disclose to the Parsons that any portion of the Subdivision had previously been used as an industrial site, and did not disclose to the Parsons that numerous underground pipes, valves and tanks had been located upon the property.

18. In approximately July 2008, the Parsons were performing routine irrigation maintenance for a suspected leak in their back yard when they discovered a buried four inch PVC pipe buried on their property. Further investigation revealed a two inch PVC pipe. Both PVC pipes ran the entire width of the back yard running toward the house. Beginning in mid-yard, the PVC pipes became encased in concrete. Both PVC pipes were attached to a metal box, also encased in concrete. The four inch PVC pipe and the metal box contained a thick black sludge liquid.

19. The Parsons contacted Wieland, who arranged for removal of the pipes and sludge. Testing and analysis showed the black sludge constituted hazardous waste.

20. The Parsons contacted South Carolina's Department of Health and Environmental Control ("SCDHEC") on or about August 2008. SCDHEC conducted additional testing and concluded that chemical vapors were entering the crawl space of the home.

21. DHEC's testing revealed that the sludge constituted hazardous waste.

22. In or about October 2008, John Wieland undertook remediation efforts in an effort to remove the hazardous waste and other buried materials from the Parsons' yard. While excavating the plastic piping, a 12" cast iron pipe was discovered.

23. Despite John Wieland's remediation efforts, the Parsons' home and foundation has been compromised with the need for more than ten Helical Piers, due to the removal of contaminated soil and pipes in the crawl space of the home. Pipes, some containing hazardous waste, were found encased in the foundation and several still remain. The home has been stigmatized by the presence of hazardous waste on the property. On information and belief, the home is considerably less valuable than it would be if the pipes and hazardous waste had not been found upon the property.

FOR A FIRST CAUSE OF ACTION
(Rescission)

24. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

25. John Wieland breached the parties' purchase contract in one or more of the following particulars:

- (a) In failing to accurately and fully disclose latent defects with the property;
- ~~(b) In selling property that was environmentally contaminated;~~
- (c) In selling property with known underground pipes, rendering the home worth substantially less than the Plaintiffs purchase price;
- (d) In such other particulars as shall be proven at trial.

26. John Wieland's breaches, as set forth above, constitute material and complete breaches of the parties' contract.

27. Based upon John Wieland's material breaches of the parties' contract, Plaintiffs are entitled to rescind the purchase contract, and are also entitled to rescind the mortgage transactions with Wells Fargo and SCB&T.

28. Plaintiffs are also entitled to recover additional incidental and consequential damages from John Wieland Homes.

FOR A SECOND AND ALTERNATIVE CAUSE OF ACTION
(Breach of Contract)

29. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

30. As set forth above, John Wieland breached the parties' purchase contract.

31. As a direct and proximate result of John Wieland's breach of the parties' contract, Plaintiffs have suffered actual damages in amounts to be proven at trial, together with additional incidental and consequential damages.

FOR A THIRD CAUSE OF ACTION
(Fraud)

32. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

33. At the time John Wieland marketed and sold Plaintiffs' home to them, John Wieland knew or reasonably should have known that Plaintiffs' home had been constructed upon industrial pipes, including hazardous waste and materials.

34. John Wieland intentionally concealed from Plaintiffs that the home had been constructed upon industrial pipes, including hazardous waste and materials.

35. Plaintiffs did not know that the home they purchased had been constructed upon industrial pipes, including hazardous waste and materials and could not have discovered that fact through the exercise of reasonable diligence.

36. Plaintiffs relied upon John Wieland and its agents to convey accurate and complete information concerning the property to Plaintiffs.

37. As a direct and proximate result of John Wieland's intentional failure to disclose accurate and complete information concerning the property, Plaintiffs have suffered actual damages in such sums as will be proven at trial.

38. Plaintiffs are also entitled to recover punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Negligent Misrepresentation)

39. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

40. John Wieland had a pecuniary interest in the sale of Plaintiffs' home.

41. John Wieland had a duty to convey accurate and complete information to Plaintiffs concerning their home and the condition of Plaintiffs' property.

42. John Wieland breached its duty to Plaintiffs in one or more of the following particulars:

(a) In failing to disclose the Plaintiffs' property had once been used as an industrial site;

(b) In failing to disclose to Plaintiffs that their property contained industrial pipes, including hazardous waste;

(c) In such other particulars as shall be proven at trial.

43. As a direct and proximate result of John Wieland's misrepresentations, Plaintiffs have suffered actual damages in such sums as will be proven at trial.

44. Plaintiffs are also entitled to recover punitive damages.

FOR A FIFTH CAUSE OF ACTION
(Unfair Trade Practices)

45. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

46. John Wieland is engaged in a trade or business within South Carolina.

47. John Wieland's actions and practices, as described in this complaint, were intentionally unfair and deceptive.

48. John Wieland's actions and practices, as described in this complaint, have an impact upon the public at large, and are capable of repetition.

49. John Wieland's unfair and deceptive practices have caused Plaintiffs to suffer an ascertainable loss of money and/or property.

50. Plaintiffs are entitled to recover treble damages as well as attorney's fees.

FOR A SIXTH CAUSE OF ACTION
(Negligence & Gross Negligence)

51. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

52. John Wieland owed a duty to the public generally, and to Plaintiffs specifically, to refrain from selling homes located upon environmentally contaminated property.

53. John Wieland breached its duty in one or more of the following particulars:

(a) In failing to accurately identify and remove industrial pipes and hazardous waste from the property that would eventually be sold to Plaintiffs;

(b) In failing to disclose to Plaintiffs that their property had once been used as an industrial site;

(c) In failing to properly clean and remediate the property that would eventually be sold to Plaintiffs;

(d) In offering contaminated property for sale to Plaintiffs;

(e) In such other particulars as shall be proven at trial.

54. John Wieland's breaches, as described in this complaint, were negligent and grossly negligent.

55. As a direct and proximate result of John Wieland's negligence and gross negligence, Plaintiffs have suffered damages in such sums as will be proven at trial.

56. Plaintiffs are also entitled to recover additional punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Implied Warranties)

57. The allegations of Paragraphs 1 through 23 are incorporated herein by reference as if fully set forth.

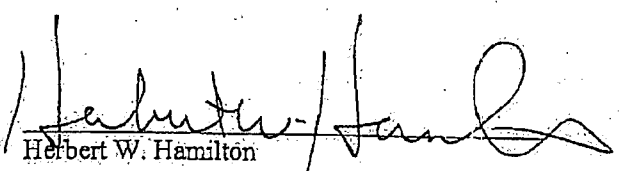
~~58. By constructing Plaintiffs' home and placing it in the stream of commerce~~
John Wieland impliedly warranted that the home would be habitable and constructed in a workmanlike manner.

59. Plaintiffs' home does not comply with John Wieland's implied warranties, in that it was situated on a lot containing industrial piping and hazardous waste. Further, the house was not completed in a workmanlike manner in the particulars.

60. Plaintiffs have suffered actual damages as a result of John Wieland's breach of its implied warranties, and are entitled to recover actual, incidental and consequential damages in such sums as will be proven at trial.

WHEREFORE, Plaintiffs pray for rescission of their contract, and for additional actual, incidental, consequential, statutory and punitive damages against John Wieland Homes in such sums as will be proven at trial; for attorney's fees; for the costs of this action; and for such other and further relief as the court deems just and proper. Plaintiffs demand a jury trial.

February 23, 2011.



Herbert W. Hamilton
Tracy T. Vann
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7620

ATTORNEY FOR THE PLAINTIFFS

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

2011-CP-46-00796

Ralph Wayne Parsons, Jr.,
And Louise C. Parsons,

Plaintiffs,

v.

Transcript of Record

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

Defendants.

September 15, 2011
York, South Carolina

B E F O R E:

The Honorable S. Jackson Kimball, Judge

A P P E A R A N C E S:

Herbert Hamilton, Esquire.
Attorney for the Plaintiff

Ian W. Freeman, Esquire
Attorney for the Defendant

Hilda M. Jordan, CVR
Circuit Court Reporter

I N D E X

WITNESS/DESCRIPTION

PAGE NO.

Motions Hearing

EXHIBITS:

No exhibits were marked to this proceeding.

Certificate of Court Reporter 38

1 THE COURT: All right, Mr. Hamilton.

2 MR. FREEMAN: May it please the Court, I've got some
3 materials I'd like to hand up to you.

4 THE COURT: Please do.

5 MR. FREEMAN: I thought our hearing was at 9:00 a.m., so
6 I didn't -- I came straight here and I didn't --

7 THE COURT: I noticed you've been around a while.

8 MR. FREEMAN: -- I didn't take these to the Clerk for
9 filing.

10 THE COURT: That's all right.

11 MR. FREEMAN: Mr. Hamilton has a copy and when I leave
12 I'll take this set.

13 THE COURT: Well, I'll take it. You don't need to do
14 that.

15 MR. FREEMAN: Well, I'll give you the originals then,
16 too. That's a courtesy set for you, Your Honor.

17 THE COURT: Bear with me a minute.

18 All right, Mr. Freeman, it's your Motion to Compel
19 Arbitration.

20 MR. FREEMAN: Yes, Your Honor.

21 I represent John Wieland Homes and Neighborhoods, Inc.,
22 of the Carolinas and I will refer to them as Wieland. And
23 as you'll see in the brief that I've handed up to you the
24 acronym JWH there.

25 THE COURT: Right.

1 MR. FREEMAN: For Wieland.

2 The plaintiffs, Mr. and Mrs. Parsons purchased a lot
3 and home from Wieland in June of 2007 --

4 THE COURT: Let me say this to maybe shorten that a
5 little bit, lessen your burden a little bit. I've read the
6 file twice. This thing was set once before, if I remember
7 right. I understand the plaintiffs bought a house in a
8 subdivision, turns out the house and lot are built across
9 some sludge lines or some sort of waste lines from an old
10 Springs Mill that used to be there. They've discovered that
11 and hence this lawsuit.

12 MR. FREEMAN: That's somewhat of a synopsis, Your Honor.
13 A Springs supplied warehouse that was situation there --

14 THE COURT: Okay.

15 MR. FREEMAN: -- there were some conduit lines that were
16 found in Mr. Parson's back yard that did have -- were found
17 to have some sludge in them. Wieland entered into a
18 voluntary clean-up contract with South Carolina DHEC and the
19 property has been re-mediated, and the Parson's indicate in
20 their pleadings -- Wieland's spent over a half-million
21 dollars doing that.

22 THE COURT: Right.

23 MR. FREEMAN: What we're here about today is the
24 purchase agreement and warranty that were provided to the
25 Parson's in June of 2007, when they purchased the property

1 have express arbitration provisions in them that we contend
2 take jurisdiction away from this Court to hear this suit and
3 that the Parson's should have their disputes heard and
4 resolved by the neutral mediators called for in the
5 contract. The contract calls for Construction Arbitration
6 Associates or the American Arbitration Association,
7 alternatively, to resolve any disputes by mandatory binding
8 arbitration.

9 And if you look at our Brief and also attached is
10 Exhibit A and B to the motion papers that we previously
11 submitted to the Court you will find the purchase of the
12 contract as Exhibit A and Paragraph 21 of the purchase
13 contract Exhibit A, is entitled Warranty and Arbitration,
14 and it refers to and incorporates by reference the John
15 Wieland Homes Warranty, which is attached as Exhibit B, and
16 in the general provisions, Subsection 5, Paragraph O is the
17 binding arbitration provisions within that warranty, and I
18 want to talk just a little bit about those.

19 The Paragraph 21 of the purchase agreement entitled
20 Warranty and Arbitration provides, in part, that the JWH
21 warranty is also given by seller and accepted by the
22 purchaser in lieu in all other rights and remedies the
23 purchaser has or may have at law or in equity against seller
24 relating to the property. Construction on the property and
25 the conditions and circumstances existing on the property,

1 including but not limited to any right based on negligence
2 construction, misrepresentation, any untoward violation of
3 any code, statute or rule, breach of contract, express or
4 implied, or --

5 THE COURT: Are you reading me the whole thing?

6 Just read me -- I've read the whole thing. Just read
7 me the part about arbitration., if you want to put that in
8 the record --

9 MR. FREEMAN: Okay.

10 THE COURT: Because this is just all about arbitration.

11 MR. FREEMAN: Or breach -- Other than terms of the
12 warranty, and also other rights and remedies expressly
13 waived by purchaser.

14 The purchaser acknowledges that the purchaser has
15 received and read a copy of the current JWH warranty and
16 consents to the terms thereof including without limitation
17 in the mandatory binding arbitration provisions contained
18 therein.

19 Mr. Parsons signed and initialed, and his wife signed
20 and initialed that paragraph indicating that they had
21 received the John Wieland Homes warranty that includes
22 additional provisions about the arbitration. The reason I
23 point that out, Your Honor, read that to you, in the
24 plaintiff's opposition, the Parson's are now contending that
25 they didn't read the warranty at the time they signed this

1 contract, and although it's provided to them in a handbook,
2 John Wieland Homes Handbook, which they also signed an
3 acknowledgment of receipt on the very same day that they
4 signed the contract on June 30, 2007.

5 I believe that the plaintiffs are arguing that this
6 arbitration provision didn't become in some part a basis of
7 their bargain, that they wouldn't have agreed to it, Your
8 Honor.

9 THE COURT: All right, now, I'm confused. Which
10 arbitration -- are you talking about the arbitration
11 agreement not in the contract --

12 MR. FREEMAN: Yes.

13 THE COURT: -- but in the warranty?

14 MR. FREEMAN: In the contract, Paragraph 21, they signed
15 and initialed --

16 THE COURT: I see that. I've got it.

17 MR. FREEMAN: Then the handbook, which -- the warranty
18 handbook, which is attached as Exhibit 2 --

19 THE COURT: Yes, sir.

20 MR. FREEMAN: -- to the motion papers.

21 THE COURT: Yes, sir.

22 MR. FREEMAN: They're contending, in Mr. Parson's
23 affidavit that I just received this week, that although it
24 was given to them that day, they didn't read it. And --

25 THE COURT: And what is -- where is the provision --

1 what is the provision in the warranty that they didn't read?

2 MR. FREEMAN: Okay. Let me go to that, Your Honor. I'm
3 sorry, it's Exhibit B, I believe -- It's Exhibit 2 at
4 Paragraph O.

5 THE COURT: Exhibit 2 --

6 MR. FREEMAN: Any and all unresolved claims or disputes
7 of any kind or nature between Wieland and home buyers
8 arising out of or relating in any manner to any purchase
9 agreement with Wieland, if any, this warranty, the home, and
10 or property on which it is constructed or otherwise, shall
11 be resolved by final and binding arbitration conducted in
12 accordance with this provision, and such resolution shall be
13 final. This specifically includes without limitations
14 claims related to any representations --

15 THE COURT: Get me to the right page, please.

16 MR. FREEMAN: Oh, I'm sorry. May I approach the bench,
17 Your Honor.

18 THE COURT: Well, it does not have a page number on it?

19 MR. FREEMAN: I believe that if you look at Page 10,
20 Your Honor --

21 THE COURT: -- Ten --

22 MR. FREEMAN: -- of Exhibit 2.

23 THE COURT: Page 10. All right.

24 MR. FREEMAN: See Subparagraph O, --
25

1 THE COURT: I do.

2 MR. FREEMAN: -- binding arbitration?

3 THE COURT: Yes, sir.

4 MR. FREEMAN: If you look at that paragraph there at the
5 bottom of the page.

6 THE COURT: Uh-huh.. (Affirmative response.)

7 MR. FREEMAN: That's what I was reading, Your Honor. And
8 it spills over onto Page 11, as well.

9 THE COURT: Yes, sir. All right.

10 MR. FREEMAN: It goes on and provides, you know,
11 procedures for how the arbitration disputes are to be
12 initiated. Further down on the next to the last paragraph
13 down at the bottom of Page 11, it says whether questions of
14 whether issues are abitratable and the actual
15 interpretation of terms needing definition of terms in order
16 to arbitrate an issue shall be determined by the arbitrator.

17 Last week, John Wieland filed an arbitration against
18 the Parsons' asking that the very disputes that are at issue
19 in this lawsuit be decided by the arbitrators at
20 Construction Arbitrators and Associates. And that's been
21 served on the Parsons and been provided to Mr. Hamilton.

22 Now, while although, Mr. Parsons, just this week has
23 come out and claimed that he did not receive the warranty
24 language or he did not read the warranty language on the day
25 he signed this contract, I would point out to the Court and

1 I've supplied affidavits there for you from Mr. Kevin Clark,
2 attaching the same John Wieland Homes contract and same John
3 Wieland Homes warranty that was provided to and entered,
4 signed and agreed upon and entered by the Parsons the very
5 year before in March of 2006, when they contracted with
6 Wieland to buy a home and lot in the Ridge Hampton
7 subdivision.

8 Ultimately, they didn't go through with that contract,
9 and they decided to purchase, instead, in the Bridge Mill
10 (sp) subdivision and some portion of the earnest money paid
11 for the Bridge Hampton (sp) lot and home was put towards the
12 Bridge Mill lot and home. So they actually entered, not
13 one, but two contracts with Wieland and were provided, not
14 one, but two handbooks with the same warranties and
15 mandatory arbitration provisions with Wieland. So I don't
16 think that Mr. --

17 THE COURT: Let's assume for a moment that he's required
18 to have read, he's assumed to have read it, tell me where we
19 go from there?

20 MR. FREEMAN: He's assumed to have read it, and I
21 believe he is presumed to have read it, he signed and
22 acknowledged that he's read it. He's bound by this
23 arbitration clause. This arbitration clause in the contract
24 specifically provides that it involves -- the contract
25 involves interstate commerce, this arbitration provision is

1 governed by the Federal Arbitration Act, FAA. And under the
2 FAA there's a --

3 THE COURT: And the contract says that?

4 MR. FREEMAN: Yes, sir.

5 THE COURT: Where is that?

6 MR. FREEMAN: If you will look on Page 11 in the middle
7 of the page of the warranty.

8 THE COURT: Oh, the warranty, not the contract?

9 MR. FREEMAN: The warranty, Your Honor, and the warranty
10 is incorporated by reference into the contract.

11 THE COURT: Page 11?

12 MR. FREEMAN: Page 11, middle of the page. The last
13 sentence, as the purchase agreement with Wieland --

14 THE COURT: I see it.

15 MR. FREEMAN: Okay. Also, Your Honor, I've submitted
16 the affidavit of Mr. Andrew McCoy. I did not believe that
17 it was disputed by the Parsons that the contract provided
18 that the -- that it would implicate interstate commerce.
19 They --

20 THE COURT: I'm sorry?

21 MR. FREEMAN: I did not believe that the Parsons
22 disputed that this contract implicated interstate commerce,
23 however --

24 THE COURT: The FAA?

25 MR. FREEMAN: -- in the opposing papers, Mr. Parsons

1 affidavit, he stated that he does dispute that. We have
2 submitted amongst the papers that I handed up to you at the
3 outset of the hearing, an affidavit from Mr. Andrew McCoy,
4 who oversaw the development and construction of the Bridge
5 Mill subdivision. He indicates that numerous subcontractors
6 and suppliers from outside of South Carolina furnished goods
7 and services and work and materials for the construction of
8 the Bridge Mill subdivision including the property purchased
9 by the Parsons and that the operations were actually managed
10 out of John Wieland's Charlotte Division Headquarters, and
11 John Wieland is a Georgia corporation. We believe that
12 interstate commerce is implicated here and the FAA applies,
13 and therefore South Carolina law, which is invoked by Mr.
14 Hamilton's papers is preempted. They claim that the South
15 Carolina Uniform Arbitration Act required to have --

16 THE COURT: And you served upon the plaintiffs
17 affidavits to that effect?

18 MR. FREEMAN: Yes, Your Honor.

19 THE COURT: Okay.

20 MR. FREEMAN: But Your Honor, there is a strong -- there
21 is a liberal policy in favor of enforcing arbitration
22 agreements under the FAA and any ubiquity concerning the
23 application and scope of the arbitration agreement should be
24 decided and resolved in favor of arbitration under the FAA.

25 THE COURT: I understand that.

1 MR. FREEMAN: Bottom the causes of action alleged in the
2 Parsons complaint each and every one of them involves the
3 alleged sales transaction, and what they complain -- their
4 complaint is that they complain that Wieland failed to
5 disclose information about the condition of property at the
6 time the sales transaction under the purchase agreement and
7 that Wieland breached the agreement.

8 Each and every one of the causes of action has a
9 significant relationship with the sales transaction and the
10 property and under the broad terms of the arbitration clause
11 each and every one of the causes of action is assumed by and
12 is a dispute within the meaning of the arbitration clause.

13 I would add, too, that the complaint is devoid of
14 really any factual allegations stating with particularity as
15 is required by South Carolina Rules of Civil Procedure, 9(b)
16 to support a claim for fraud against Wieland.

17 And if you look at the complaint, Your Honor, really
18 the only allegation about Wieland is Paragraph 17 of the
19 Complaint is, John Wieland did not disclose to the Parsons
20 that any portion of the subdivision had been previously used
21 as an industrial site and did not disclose to the Parsons
22 that numerous underground pipes, valves and tanks had been
23 located on the property.

24 There is no allegation that Wieland knew or should have
25 known of any contamination. In fact, Wieland did a Phase I

1 Environmental Study that came back claiming that there
2 wasn't any suspected contamination on the property.

3 THE COURT: Well, it's not about contamination. It's
4 about what was on the property.

5 MR. FREEMAN: Well --

6 THE COURT: Previously been used as an industrial site
7 and did not disclose to the Parsons that numerous
8 underground pipes, valves and tanks had been located upon
9 the property. It doesn't say anything about contamination.

10 MR. FREEMAN: But I don't think there's anything wrong
11 with their being an industrial site having been there.

12 THE COURT: The question is whether or not that's
13 material to the contract. It's an issue of fact. But -- go
14 ahead.

15 MR. FREEMAN: But in any respect, any representation
16 about the condition of the site is subsumed in the purchase
17 agreement and relates to the purchase agreement and the
18 sales transactions and representations made in the purchase
19 agreement and therefore it's subsumed in the arbitration and
20 involves disputes that should be decided by CAA and the now
21 pending arbitration filed by Wieland.

22 THE COURT: There's an old, old case. C&S National Bank
23 is on one side of it. I can't remember the other party --
24 Lawson or Lawton, in which C&S was the trustee of the
25 subdivision property, held it as trustee and didn't know

1 anything about it and the Court ultimately held that they
2 were liable for fraud in failing to disclose the condition
3 of the property which they knew or should have known.

4 MR. FREEMAN: I'm not familiar with that case, Your
5 Honor, but --

6 THE COURT: It's as old as I am, probably or old as Bob
7 McKenzie.

8 MR. FREEMAN: I would say that in cases governed by the
9 FAA the Courts must treat the arbitration clause as separate
10 from other portions of the contract from which it appears
11 and thus apply the clause to all disputes within its scope,
12 and under the plain terms and plain meaning of the
13 arbitration clause I've read for you, it encompasses all
14 claims that the Parsons have concerning the property, not
15 just the dwelling, as Mr. Hamilton's papers argue. Mr.
16 Hamilton's papers argue, misconstrue and misapply the
17 warranty exclusions to the scope of the arbitration clause
18 and the arbitration clause is not so limited, Your Honor.

19 Again, as I've indicated, the plaintiffs read,
20 received, and acknowledged having read and received the
21 purchase agreement and warranty, not once, but twice. I've
22 submitted Mr. Clark's affidavit, and to the extent that they
23 claim that they didn't receive the handbook with the
24 warranty on June 30, 2007, the day they signed this purchase
25 agreement, I've also submitted Mr. Davis's affidavit.

1 indicating that it's his practice to give the perspective
2 homeowners the contract and the warranty handbook for them
3 to review simultaneously, and indeed attached to his
4 affidavit is a receipt where Mr. Parsons signed on June 30,
5 2007 for the warranty handbook.

6 I'll also indicate to you that there's the Munoz verses
7 Green Tree Financial case, 542 SE2d 360, and the recent
8 Herron verses Century BMW case, 693 SE2d 394 that indicates
9 that the buyers alleged failure to read the arbitration
10 clauses are do not in any way invalidate the enforceability
11 of the arbitration clause or the agreement.

12 To the extent that Mr. Parsons has come out and said in
13 his affidavit, well, the sales representative told me that
14 the arbitration clause related only to warranty claims and
15 nothing else. He doesn't say nothing else, but related to
16 warranty claims. I would indicate to you, as well, the
17 purchase contract has Paragraph 30 and that's Exhibit No. 1,
18 that's Paragraph 30 as a merger clause that bars reference
19 made to statements before the contract was entered.

20 Moving along, Mr. Hamilton's papers content that --

21 THE COURT: Let's deal with your position. I'll let him
22 deal with his position and give you an opportunity to
23 respond.

24 MR. FREEMAN: Okay. Our position is that the Parsons
25 disputes should be resolved by the Construction Arbitration

1 Associates in the pending arbitration that's been filed with
2 them and that all claims in their complaint are subsumed in
3 the -- in the scope of the arbitration clause that they've
4 agreed to and entered, Your Honor.

5 THE COURT: All right.

6 Mr. Hamilton.

7 MR. HAMILTON: Your Honor, please the Court.

8 The Parsons paid \$600,000 for this house. They found
9 contaminated pipes in the backyard and their entire
10 investment is at risk here today.

11 Let me correct two or three things about counsels
12 argument about our position. Number one, we didn't argue
13 that it wasn't implicated in interstate commerce, we argued
14 there was nothing in the record that indicated that it did.
15 And we didn't receive any affidavits until today. If the
16 affidavits are proper that's our position. It's not that he
17 didn't do it, it's their burden to prove it and until today
18 we didn't have anything to suggest that it was.

19 THE COURT: I understand.

20 MR. HAMILTON: Secondly, Mr. Parsons has never contended
21 he didn't read the document, and that's not asserted as a
22 defense in any way about this. He factually stated how it
23 came about. In fact, the contract, he discussed the
24 arbitration provision in the contract not in the warranty
25 with the realtor at the closing -- at the signing of the

1 contract --

2 THE COURT: Now the warranty was given when?

3 MR. HAMILTON: The warranty --

4 THE COURT: At the closing?

5 MR. HAMILTON: -- the warranty -- the warranty book was
6 delivered to him and that -- it is included as a part of the
7 homeowner's handbook, and that's the homeowner's handbook.

8 THE COURT: But was it delivered before or after the
9 closing?

10 MR. HAMILTON: It was delivered after the closing or
11 contract.

12 THE COURT: It wouldn't make any sense for it to be
13 delivered --

14 MR. PARSONS: I signed the contract in the sales office.

15 MR. HAMILTON: After the closing or the contract?

16 MR. PARSONS: After the contract signing we were given
17 the handbook afterwards.

18 MR. HAMILTON: Right.

19 It came -- I think that's what the affidavit says, it
20 was given to him after the contract was signed.

21 We're not asserting that. That's a factual matter.
22 We've asserted it as a fact. We don't assert that as a
23 defense in any regard.

24 And the third thing I want to correct before I get to
25 my main argument is that the complaint does allege that

1 Wieland marketed and sold plaintiffs home to them and they
2 knew or reasonably should have known that it had been
3 constructed on top of industrial pipes with hazardous waste
4 in them. So those allegations are in the pleading contrary
5 to what counsel said.

6 We contend that there are four different -- well, if
7 you get past the interstate commerce, we get -- we contend
8 that there are three different reasons why this --

9 THE COURT: Let me say this, if the agreement was not --
10 well, if they were relying only upon the state statute,
11 neither the contract nor the warranty meet the requirements
12 to enforce such an arbitration provision.

13 MR. HAMILTON: Correct.

14 THE COURT: I -- that's clear.

15 MR. HAMILTON: And I -- Munoz case was my case. I
16 understand the Federal Arbitration Act.

17 THE COURT: I know.

18 MR. HAMILTON: Our contention is there was no evidence
19 in the record until today that interstate commerce was
20 implicated.

21 THE COURT: Well, how would we deal with that?

22 MR. HAMILTON: I suppose that you have to look at their
23 affidavits and conclude that they establish, if they carry
24 the defendants burden indicating that it is.

25 THE COURT: Okay. If the FAA does apply, go forward

1 from there?

2 MR. HAMILTON: It preempts -- It preempts --

3 THE COURT: Oh, I understand that.

4 MR. HAMILTON: That's the end of it. But if the FAA
5 applies, it's there. We --

6 THE COURT: But it doesn't --

7 MR. HAMILTON: It doesn't end the enquiry. We've got
8 three other positions --

9 THE COURT: That's what I'm trying to say. I understand
10 how the interaction of the FAA and all that.

11 MR. HAMILTON: Yes, sir. I know you do.

12 THE COURT: Go on to the rest of it.

13 MR. HAMILTON: We have three other grounds upon which we
14 believe any one of which is sufficient to deny the
15 enforcement of this arbitration clause.

16 One is, the contract itself specifically says it
17 doesn't apply to this kind of claim, and I'll get to the
18 specifics of that in a minute.

19 The second one is based on the Aiken and Partain case
20 in which the Supreme Court said that in cases of egregious
21 tortuous conduct, we're not going to enforce arbitration
22 clauses like this, because folks are not going to be deemed to
23 have foreseen this kind of activity when they signed an
24 arbitration agreement.

25 And the third grounds is the unconscionability of this

1 warranty provision in light of the Simpson case, which we've
2 cited in our memorandum, the Supreme Court refused to
3 enforce an arbitration agreement in that circumstance.

4 Now, the argument incorporates some of the facts. I
5 really would like if Your Honor would allow me to beef the
6 facts up a little bit with you, if you will permit me to do
7 that.

8 THE COURT: I have read all the recitations of facts
9 that are in the file, but if you want to add something,
10 that's fine.

11 MR. HAMILTON: Well, all I want to be sure we understand
12 is the significance of what happened when they discovered
13 this and what had to happen to the backyard of the Parsons
14 house. And I brought these charts just to be clear what we
15 were trying to say occurred here. And these charts are
16 taken from the consulting --

17 THE COURT: Tax maps or something?

18 MR. HAMILTON: No, sir. These charts are done by the
19 consultant that were hired by Wieland to do the remediation.

20 THE COURT: All right.

21 MR. HAMILTON: They show the area where the Springs
22 plant used to be. This is the area where the Parsons lot
23 is, and that's the relationship to them. This shows, in
24 fact, they discovered one four inch and one two inch PVC
25 pipe underground, running the entire length of the Parsons

1 lot over into their neighbors lot. There was a metal box
2 encased by concrete in the backyard that they discovered.
3 When they started investigating what was in there they
4 discovered this black sludge.

5 To make a long story short, it was tested both by
6 Wieland and by DHEC, determined to be hazardous waste. The
7 euphemistically called, voluntary clean-up, contract was
8 signed by Wieland. They spent half a million dollars, and
9 I've included in our memorandum photographs of, just a few
10 photographs, to show the extent of the destruction that
11 occurred when they went to dig up these lines. They went to
12 dig the lines up, and in the process of removing the PVC
13 pipe they found a 12 inch cast iron pipe that ran the whole
14 length of the lot right next to the PVC pipes. Now, it
15 stopped out here and didn't go any further.

16 THE COURT: Now, out here is on the street?

17 MR. HAMILTON: On the street next to the neighbors lot.

18 THE COURT: All right.

19 MR. HAMILTON: It was determined to be hazardous, they
20 had to get a program and get it approved and get it removed
21 and in the process of doing that they found that the pipes
22 actually went under the house and through the foundation of
23 the property. So --

24 THE COURT: Through the footing?

25 MR. HAMILTON: Through the footing, and they are

1 actually there as we speak. They could not remove it
2 because it would effect the footing of the house.

3 THE COURT: They built the house --

4 MR. HAMILTON: They built the house around it.

5 THE COURT: I mean, Wieland built the house and sold the
6 lot?

7 MR. HAMILTON: Yes, sir.

8 THE COURT: House and lot?

9 MR. HAMILTON: Had it sold. I think Wieland owned it
10 and contracted to have the houses built and sold.

11 THE COURT: And the pipe went through the footing that
12 was poured?

13 MR. HAMILTON: Through the footing, through the footing
14 of the house.

15 THE COURT: All right.

16 MR. HAMILTON: And, in fact, they had to leave some of
17 it there because the foundation was compromised if they
18 pulled it out of there. That resulted in having to put in
19 10 helical piers that are there right now to support the
20 house. So as we speak today, when the Parsons decide they
21 want to sell this house they've got a disclosure form where
22 they'd going to say, yeah, this house was subject to
23 contaminated property. They had contaminated dirt. They
24 had pipes that go through the foundation. We've got helical
25 piers and how much are you going to pay me for that house.

1 That's what they've got to do when they sell this.

2 Now, --

3 THE COURT: And that's what will have to be determined
4 either in arbitration or by trial.

5 MR. HAMILTON: That's the damages that we're talking
6 about. It's a \$600,000 investment.

7 Now, the contract that was signed, as counsel
8 indicated, Paragraph 21 of that contract talks about
9 warranty and arbitration, and as Your Honor indicated, when
10 he started reading to you that whole paragraph talks about
11 nothing but warranty with one sentence exception, and that
12 one sentence says: Purchaser acknowledges that purchaser has
13 received a copy of the current JWH warranty and consents to
14 its terms thereof including without limitation mandatory
15 binding arbitration provision contained there.

16 So according to their contract the arbitration
17 provision is included in the warranty. That's the words
18 they chose. Now, when you go to the warranty, it is one
19 paragraph of several provisions. It's called General
20 Provisions. It's Paragraph O and there are a whole bunch of
21 other ones under Paragraph O, which is on Page 9 of that
22 warranty provision. Before that, there are exclusions that
23 say this specifically --

24 THE COURT: What page are the exclusions?

25 MR. HAMILTON: I'm on Page 5, now of the warranty.

1 THE COURT: All right. Okay.

2 MR. HAMILTON: It says, this warranty does not apply to

3 --

4 THE COURT: Hang on. I'm not finding that.

5 MR. HAMILTON: It's --

6 THE COURT: Okay, it starts on Page 4.

7 MR. HAMILTON: Page 5, Section 4.

8 THE COURT: Yes, yes.

9 MR. HAMILTON: Okay?

10 THE COURT: Yes, sir.

11 MR. HAMILTON: This warranty does not apply to,
12 Subsection J next page, loss or damage not caused by a
13 defect or deficiency in the design or construction of the
14 home by Wieland or Wieland's employees, agents or
15 subcontractors.

16 This warranty does not apply to this claim at all,
17 according to their own contract. This claim has nothing to
18 do with a defect or deficiency in the design or construction
19 of this home. This all occurred prior to the sale of this
20 house, prior to -- during the construction of it and during
21 the development of it. It had nothing to do with the design
22 -- it has to do completely with the failure of Wieland to
23 disclose what we believe we're going to be able to prove,
24 they knew or should have known what was underground behind
25 this house..

1 There is an affirmative obligation to disclose latent
2 defects in sub --

3 THE COURT: But hence the arbitration provision doesn't
4 apply to loss or damage not caused by deficiency, defect or
5 deficiency in design?

6 MR. HAMILTON: Correct. And I'm not going through the
7 others. There are several others that we cited in the
8 memorandum of these exclusions that apply to the same thing.
9 Loss of value of the property is excluded from this
10 warranty. There -- the memorandum addresses that and I'm
11 not going to go through all those things specifically.

12 So our first argument if you get past interstate
13 commerce is the contract itself, which the Court is
14 obligated to interpret even before -- even if it says
15 questions of the scope of this contract are to be turned to
16 arbitration, the Court has the duty to determine, in the
17 first instance, whether there is a contract that applies to
18 a warranty agreement, that applies to the issue, and we
19 contend that according to their own language this contract,
20 this arbitration clause, does not apply to this claim.

21 The third provision, the third argument we have against
22 enforcement of this arbitration clause is based on the Aiken
23 and the Partain cases which we've cited to Your Honor. We
24 have copies for you, if you wish to have them. In those
25 cases, the Aiken case was where --

1 THE COURT: World Finance?

2 MR. HAMILTON: World Finance. They had a consumer,
3 employees of the finance company stole basically the
4 personal information of the plaintiff and used it for
5 improper purposes, and there was an arbitration clause in
6 the initial application and they moved to enforce
7 arbitration and the Court said, we're not going to enforce
8 an arbitration clause in a situation where the action that
9 is complained of is so egregious that no one could have
10 foreseen that that would have been part of what they were
11 agreeing to arbitrate.

12 THE COURT: Or in other words, was outside any
13 contemplated arbitration provision?

14 MR. HAMILTON: Yes, sir. And in Aiken it is suggested
15 that because of that it was outside the scope of that
16 arbitration provision.

17 The Partain case came after that. Affirmed Aiken, but
18 went further than that, and specifically said, we agree with
19 Aiken, but we're also going to say that even if it is
20 considered to be within the scope of the arbitration clause
21 if it is so egregious that no one would have contemplated
22 it, we're not going to enforce it.

23 THE COURT: Public policy.

24 MR. HAMILTON: Public policy. So Aiken and Partain
25 stand for the proposition that where we have asserted

1 intentional or at least negligence and recklessness in
2 failing to disclose this information. We have alleged in
3 the pleading that they knew or should have known it was
4 there, and the sale of this property subject to this kind of
5 contamination and defect we believe is the kind of egregious
6 conduct that no one would consider agreeing to have
7 arbitrated at the time they were closing the sale of the
8 purchase of a house. I mean, this is just not something --
9 you contemplate the roof might leak. You contemplate the
10 floors might not be right. You contemplate there might be
11 problems with the foundation. You don't contemplate you're
12 going to find pipes buried in your backyard with hazardous
13 waste in them.

14 So our third basis for asserting a defense that this
15 arbitration provision is the Aiken and the Partain cases.

16 The final basis is unconscionability. In the Simpson
17 case that we've cited in our memorandum, the Court
18 acknowledged that our courts have determined, and there's a
19 statute that specifically says, 2-302, that the Courts will
20 not enforce an unconscionable contract. They talk in
21 Simpson case about all the various aspects, the definition
22 of unconscionability and those things that go toward
23 determining unconscionability, all of which are applicable
24 in this case. The lack of negotiating power, the --
25 disparity --

1 THE COURT: Was it based entirely on 302, 2-302?

2 MR. HAMILTON: No, sir. Simpson?

3 THE COURT: Uh-huh. (Affirmative response.)

4 MR. HAMILTON: No, sir. I think it was based -- they
5 cite to 302.

6 THE COURT: Okay. That'd be just partial --

7 MR. HAMILTON: They actually cite 2-302 as the basis for
8 allowing for talking about doing additional discovery toward
9 -- to determine the issue of unconscionability, which that
10 section deals with, but it's more of a common law argument
11 that where there's a disparity of arguing power, where they
12 look at things like the nature of the damages, the relative
13 sophistication of the parties, the manner in which the
14 arbitration clause is present, and if you look -- if you
15 look at the contract, you can hardly read the warranty and
16 arbitration clause it's so small. It's one sentence in
17 there, and then that sentence doesn't tell you anything. It
18 refers to the handbook, which you've got to go read that to
19 see whatever it calls for.

20 All of the elements of unconscionability that are cited
21 in Simpson are here. This arbitration clause, as in Simpson,
22 requires the Parsons to waive their rights to statutory
23 requirements such as treble damages under the Unfair Trade
24 Practices Act, and Simpson say the Courts are not going to
25 enforce those kinds of provisions.

1 Those are the four bases by which we think this
2 arbitration clause should not be enforced. Should the Court
3 get -- might believe that any one of those is enough to bar
4 them at this stage, we would ask the Court for the
5 opportunity to do some discovery to turn toward the issue of
6 unconscionability, which is specifically provided for in 2-
7 302, and we -- in terms of there's concern about the
8 viability of this group that is specified as the arbitration
9 administrator in the contract.

10 THE COURT: CAA?

11 MR. HAMILTON: CAA. We received yesterday a notice of
12 an appointment of an arbitrator and we received the day
13 before that the demand for arbitration, which provides that
14 we must file a motion to stay or an injunction to stop that
15 arbitration if Your Honor doesn't believe that this
16 arbitration clause ought to be enforced.

17 The notice that we received yesterday appointing an
18 arbitrator appoints someone who we have concerns about
19 having a prior relationship to Wieland.

20 THE COURT: Well, let's don't deal with that. This
21 motion is entirely whether or not to compel arbitration?

22 MR. HAMILTON: Yes, sir. But I say that only to ask if
23 Your Honor gets past any of these defenses to arbitration
24 that we've raised I would like the opportunity to do some
25 discovery on the question of unconscionability.

1 THE COURT: Okay.

2 MR. FREEMAN: Your Honor, if I may reply?

3 THE COURT: Briefly, very briefly.

4 MR. FREEMAN: Okay. Quickly. We do believe that the
5 Federal Arbitration Act applies, and that South Carolina law
6 --

7 THE COURT: Skip over that.

8 MR. FREEMAN: Okay. Jumping to his first argument about
9 the warranty. The mandatory arbitration provision in the
10 warranty found at Page 10 is not limited to the warranty,
11 and it specifically provides that Wieland the home buyers
12 will cooperate with one another in resolving any disputes
13 between them, not just warranty claims. And if you look at
14 that paragraph at the bottom of Page 10 that we read
15 earlier, it's any and all unresolved disputes and claims of
16 any kind or nature arising out of the transaction, the home,
17 the property. It's not just warranty claims, Your Honor.

18 And the exclusions that he was referring to in the
19 other section of the warranty are really irrelevant and
20 under the FAA and the case of Granite Rock verses
21 International Brothers and Teamsters, 130 S. Ct. 2847, the
22 arbitration clause is a separate and independent clause that
23 has a life of its own separate and apart from any other
24 provision of the contract. That's United States Supreme
25 Court last year.

1 With respect to the Aiken and Partain and the --

2 THE COURT: That has nothing to do with whether the
3 contract may be construed to say that the contract applies
4 to a warranty or some ambiguity to that effect.

5 MR. FREEMAN: But if you look at the plain language of
6 Paragraph O at the bottom of Page 10 --

7 THE COURT: I did.

8 MR. FREEMAN: -- it -- it does not in any way -- the
9 plain meaning, the plain language of that in no way limits
10 the scope of the arbitration provision just to warranty
11 claims.

12 THE COURT: What about the exclusionary language, does
13 that not at least create an ambiguity?

14 MR. FREEMAN: I don't think it does, Your Honor. It's
15 in a completely separate section of the contract.

16 THE COURT: That doesn't matter. It's in the contract.

17 MR. FREEMAN: It's in a completely separate section. It
18 is not intertwined in the mandatory arbitration provision,
19 and even further in the mandatory arbitration provision at
20 the bottom of Page 12; it goes on to say --

21 THE COURT: Well, you've had a chance to tell me about
22 Mr. Hamilton's case when you argued to begin with. Let's be
23 very brief in responding.

24 MR. FREEMAN: Okay. Well, let me -- I was going to move
25 on to the Aiken and Partain cases that he's relying on.

1 Your Honor, I believe those cases are distinguishable on
2 their facts. The focus of each one of those cases the
3 Courts focus was on the uncivilized and outrageous torts,
4 intentional infliction of emotional distress, fraud
5 supported by detailed factual allegations.

6 I don't think that those allegations are involved here.
7 Aiken, we're talking about theft of financial information.
8 Partain, a bait and switch. The Parsons got the home they
9 selected here. There's no bait and switch --

10 THE COURT: Did they select a home with sludge pipes
11 through the footing?

12 MR. FREEMAN: Well, it's our position Judge we didn't
13 know there were sludge pipes --

14 THE COURT: Did John Wieland Homes sell them the
15 property?

16 MR. FREEMAN: They did sell them the property.

17 THE COURT: Did they develop the property?

18 MR. FREEMAN: They developed the property.

19 THE COURT: Did they build the house?

20 MR. FREEMAN: They built the house.

21 THE COURT: Okay.

22 MR. FREEMAN: But in the Partain case the seller
23 actually, you know, switched out the vehicle, intentionally
24 switched out the vehicle, after the homeowner selected and
25 sold them a different vehicle. In the Aiken case we're

1 dealing with theft. In the Chasero (sp) case it was
2 intentional infliction of emotional distress from hounding
3 the plaintiff about debt collection issues. Here each and
4 every ones of the claims that the plaintiffs are making
5 including for example Mr. Hamilton's indication about the
6 pipe going through the footing relates to the construction
7 of the house. Relates to the sales transaction at issue
8 here. In those cases, Partain, Aiken and Chasero (sp) the
9 Court found there wasn't a significant relationship between
10 the purchase agreement and the arbitration --

11 THE COURT: Tell me this, what would the defendant have
12 to do not to be able to enforce his arbitration agreement
13 and fall under the World Finance case?

14 MR. FREEMAN: What would they have to do?

15 THE COURT: Yeah. What would the scope of what they
16 would have to do?

17 MR. FREEMAN: If there was extreme and outrageous
18 conduct where John Wieland's sales rep or somebody went and
19 berated the Parsons and engaged in intentional infliction of
20 emotional distress and outrageous tort, uncivilized conduct,
21 stole something from them.

22 THE COURT: Aiken was just stealing an identity,
23 essentially.

24 MR. FREEMAN: The actions that are described in the
25 plaintiffs complaint here don't rise to that level.

1 THE COURT: All right.

2 MR. FREEMAN: More over, second part of it is each and
3 every --

4 THE COURT: All right.

5 MR. FREEMAN: -- one of the claims has a significant
6 relationship to the transaction at issue.

7 THE COURT: Everything you're telling me goes back to
8 the proposition that every possible -- every possible
9 problem arising from this property is subject to arbitration
10 regardless of its origin?

11 MR. FREEMAN: Of the claims they've alleged, Your Honor.

12 THE COURT: And you've distinguished the cases Mr.
13 Hamilton cited. That's all I need to hear. I don't need to
14 hear any more.

15 MR. FREEMAN: Your Honor, I would like to say something
16 about the unconscionability argument that he's raised. The
17 Simpson case is also distinguishable. There is mutuality of
18 arbitration. John Wieland is bound to arbitrate with the
19 plaintiffs. The plaintiffs are bound to arbitrate with John
20 Wieland. The Simpson case, that wasn't true, and that was a
21 very important factor for the Court. The defendant in that
22 case, the seller, retained the right to file its own court
23 action against the purchasers. That's not the case here.

24 I would also indicate, that, you know, the focus under
25 Hooters of America verses Phillips for the Fourth Circuit is

1 determined whether or not the provisions of the arbitration
2 are geared at a neutral and unbiased decision by an
3 arbitrator. And here the procedure set forth in John
4 Wieland Homes warranty and arbitration provision are just
5 that. They're not one-sided. John Wieland is paying for
6 the initial outset at the filing of the arbitration. The
7 plaintiffs are not claiming --

8 THE COURT: I understand your argument about Simpson.

9 MR. FREEMAN: And that the Court in Simpson, as well,
10 expressed the holding there --

11 THE COURT: I understand your argument about Simpson.

12 MR. FREEMAN: Thank Your Honor. Again, I indicate that
13 we don't believe there's the need for discovery on an
14 unconscionability claim.

15 THE COURT: Well, I'm not going to address that.

16 All right. I'm going to deny the motion. I find that
17 this delict essentially arose out of something that the --
18 that the defendant knew pre-contract, failed to disclose.
19 Had a duty to disclose. So it's outside the scope of the
20 contract, in the first place.

21 Secondly, I do believe it is of the type of injury that
22 would be contemplated by the World Finance case and the
23 Partain case.

24 I do not make any ruling about the FAA. I don't need
25 to based upon what I've just said.

1 Mr. Hamilton, if you will email me an order to that
2 effect, I'll review it, edit it, and sign it.

3 MR. HAMILTON: Thank you, sir.

4 THE COURT: Thank you.

5 MR. FREEMAN: Thank Your Honor.

6 (This proceeding was concluded.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C-E-R-T-I-F-I-C-A-T-E

I, THE UNDERSIGNED HILDA M. JORDAN, CVR, OFFICIAL COURT
REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF
SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
MOTIONS HEARING OF THE CAPTIONED CAUSE, IN THE CIRCUIT COURT
FOR YORK COUNTY, SOUTH CAROLINA, ON THE 15TH DAY OF
SEPTEMBER, 2011.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL,
NOR INTEREST IN ANY PARTY HERETO.

Hilda M. Jordan, CVR

January 4, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF YORK)

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

Plaintiffs,)

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

Defendants.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C/A NO.: 2011-CP-46-00796

DEFENDANT JOHN WIELAND HOMES
AND NEIGHBORHOODS OF THE
CAROLINAS, INC.'S MOTION TO COMPEL
ARBITRATION AND TO DISMISS

FILED RECEIVED
JUN 14 AM 11:32
CLERK OF COURT
YORK COUNTY, SC

Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes") hereby moves, before this Honorable Court, to dismiss the above-entitled lawsuit to compel arbitration. The allegations of the Complaint all arise out of the purchase of a home sold by John Wieland Homes to the Plaintiffs. Paragraph 21 of the Purchase Contract (attached hereto as Exhibit 1) contains a mandatory arbitration provision, agreed to by Plaintiffs. Paragraph 21 references the JWH Warranty (attached hereto as Exhibit 2) and further that the parties consent to the terms of the Warranty including, without limitation, the mandatory binding arbitration provision contained therein.

Despite the clear agreement between the parties to have arbitration serve as the mechanism for any and all disputes arising out of the property at issue, the Parsons, in complete disregard for said strict arbitration provision, filed the above-entitled matter in Circuit Court. Because there is no question that the parties agreed that all of these disputes would be decided by arbitration, this Defendant moves to compel arbitration and to dismiss all claims made in this suit pursuant to Rule 12 (b) of the South Carolina Rules of Civil Procedure.

The South Carolina Supreme Court strongly favors arbitration on claims made or significantly related to an agreement containing an arbitration clause. "Arbitration is required when 1) an arbitration clause specifically encompasses the asserted claims; or 2) there exists a significant relationship between

the asserted claim and the parties' contract." Zabinsky v. Bright Acres Associates, 346 SC 580, 53 S.E.2d 210 (2001).

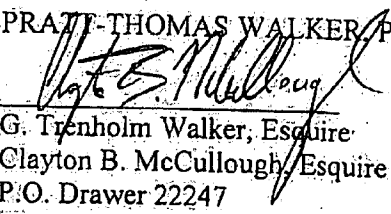
Here the arbitration clause encompasses all disputes arising out of or relating to the Purchase Contract and the property at issue. The factual allegations Plaintiffs offer in support of each of the causes of action further demonstrate that the claims arise out of or relate to the purchase of the home and contract arising out of said purchase. Consequently, all claims in this case are within the scope of the arbitration provision as expressed in the Purchase Contract and John Wieland Homes' Warranty information, particularly given the well-established judicial mandate that all doubts be resolved in favor of arbitration. This Court must therefore compel Plaintiffs to arbitrate these claims. Because Plaintiffs' claims are arbitrable, those claims should be dismissed with prejudice. See Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161 (5th Circuit 1992)(The weight of authority clearly supports dismissal of the case when all of the issues raised in the District Court and must be submitted to arbitration).

CONCLUSION

Based on the foregoing, Defendant John Wieland Homes of the Carolinas, Inc. respectfully requests this Court enter an Order compelling Plaintiffs to arbitrate these claims and dismissing Plaintiffs' claims with prejudice.

Respectfully submitted,

PRATT THOMAS WALKER, P.A.


G. Trenholm Walker, Esquire
Clayton B. McCullough, Esquire
P.O. Drawer 22247
Charleston, S.C. 29403-2247
(843) 727-2200

June 10, 2011
Charleston, South Carolina

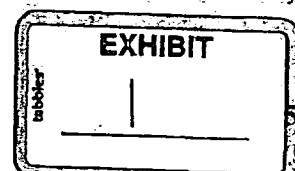
Attorneys for Defendant John Wieland Homes and
Neighborhoods of the Carolinas, Inc.

PURCHASE AND SALE AGREEMENT
 8325-D Ariowidge Boulevard, Charlotte, NC 28273
 (704) 522-9200

06/30/07
 (Date of Purchaser's Offer)

The Property and Financial Terms

1. **Agreement to Buy and Sell Property.** The undersigned Purchaser, Ralph W. Parsons, Jr. and Louise C. Parsons, agrees to buy, and the undersigned Seller agrees to sell, all that tract or parcel of land lying and being in Lancaster County, South Carolina; Being Lot 279 of Block n/a of BridgeMill - Woods Neighborhood; Being more commonly known as 4270 Rochard Lane, Fort Mill, SC 29707 (street address, city, state, zip); Being recorded in Lancaster County Records, Plat Book 2006, Page 603.
 (The foregoing land and the improvements constructed or to be constructed thereon by Seller are referred to herein as the "Property.")
 Purchaser acknowledges that the neighborhood/subdivision name and/or street names may change, and Purchaser agrees to accept any such changes.
2. **Purchase Price and Purchase Deposit.** The Purchase Price of the Property shall be Six Hundred Six Thousand Six Hundred Ninety Eight Dollars, \$606,698.00, to be paid to Seller in immediately available funds at closing. Purchaser has paid Seller \$15,000.00 (0) cash (x) check as a "purchase deposit," which shall be applied as partial payment of the Purchase Price of the Property at closing. Purchaser further agrees as follows: (a) Broker shall have no liability for the purchase deposit since Seller is holding the same, (b) Seller may deposit the purchase deposit in an interest-bearing account, with all interest earned on the purchase deposit being retained by Seller and not becoming a part of the purchase deposit; and (c) Seller may, at its discretion, use the purchase deposit as working capital or for any other purpose. The purchase deposit shall be non-refundable unless Seller is unable or unwilling to close, and Purchaser hereby acknowledges that the purchase deposit and any interest thereon is a part of Seller's liquidated damages upon Purchaser's default prior to closing.
3. **Additional Deposits.** Purchaser acknowledges that Seller reserves the right to require additional non-refundable deposits for the installation of extras not included as a standard feature for the neighborhood in the amount of at least twenty-five (25%) percent of the total charge for such item(s) (Seller may require larger deposits in its discretion). Such non-standard items are determined in Seller's sole discretion and may include, without limitation, basement finishing, skylights, additional fireplaces, custom tile or marble, retaining walls and structural framing and foundation modifications. These additional deposits may be required in the above instances regardless of Purchaser's mortgage downpayment requirements but shall be credited to Purchaser at closing. Such deposits shall be non-refundable unless Seller is unable or unwilling to close, and Purchaser hereby acknowledges that such deposits and any interest thereon are a part of Seller's liquidated damages upon Purchaser's default prior to closing. Purchaser's initials RWP
4. **Brokers.** BSI ("Broker") has entered into a client relationship with Seller and acted as agent for the Seller in this transaction. Re/Max Executive Realty ("Selling Broker") has entered into a client relationship with Purchaser and has acted as agent for the Purchaser in this transaction. Any Agency Disclosure form attached hereto is made a part hereof. Purchaser acknowledges that Broker's representation of Seller has been disclosed to Purchaser in a timely manner and that there is no brokerage or agency relationship between Broker and Purchaser, even though Broker may perform ministerial acts for the benefit of Purchaser. Purchaser acknowledges that Purchaser has not relied upon the advice or representations, if any, of Seller or Broker, or their respective representatives, relative to the purchase and ownership of the Property and any matters related thereto. Purchaser acknowledges that if such matters are or have been of concern to Purchaser, Purchaser has sought and obtained independent advice relative thereto. Except as set forth in this agreement, Purchaser and Seller represent and warrant that they have not dealt with, and have not been and are not represented by, any other agent or broker, or other person or entity, in connection with the sale of the Property, and they agree to indemnify and hold each other harmless from any and all claims, losses, damages, costs and expenses, this transaction made by the other or by an agent or broker, or other person or entity, claiming to represent the other. Real estate commission rates or fees are not fixed by law or custom and are not controlled, suggested, recommended or maintained by any board of Realtors or any multiple listing service within South Carolina. Compensation for services rendered is solely a matter of negotiation between the broker/agent and the client. No broker to this transaction shall owe any duty to Purchaser or Seller greater than is set forth under South Carolina law. Seller and Purchaser acknowledge that if they have entered into a client relationship with a broker, that broker has disclosed on a prior basis (a) the types of brokerage relationships offered by the broker and (b) any other brokerage relationship which would conflict with the client's interest. In this agreement, the term "broker" shall mean a licensed South Carolina real estate broker and the broker's affiliated licensees.
5. **Title.** Seller shall convey good and marketable title to the Property to Purchaser by general warranty deed subject only to (a) zoning ordinances affecting the Property, (b) general utility and right-of-way easements serving the Property, (c) subdivision restrictions of record and items reflected on the recorded plat as of the closing date, and (d) other restrictions and encumbrances herein specified (see Stipulation #1/a). Purchaser shall have a reasonable time after the effective date of this agreement in which to examine title and in which to furnish Seller with a written statement of objections (other than the foregoing) which materially and adversely affect the marketability of title. Purchaser and Seller agree that marketable title shall mean title which a reputable title insurance company, licensed to do business in the State in which the Property is located, will insure at its regular rates. Seller shall have until closing to satisfy all valid objections and if Seller fails to satisfy such valid objections, then Purchaser may terminate this agreement by written notice to Seller, the purchase deposit and other deposits made hereunder shall be returned to Purchaser, and the parties shall have no further rights or obligations hereunder.
6. **Covenants.** Purchaser acknowledges that the Property is or will be subject to recorded protective covenants, that Purchaser has received a copy of such covenants or substantially similar covenants, and that Purchaser and the Property shall be bound by the recorded covenants. Purchaser agrees that Purchaser has read and fully understands the recorded protective covenants referenced herein, and that Purchaser is fully and solely responsible for compliance with said recorded protective covenants. Furthermore, Purchaser acknowledges that only Purchaser, and not the developer, builder or sales agent, is fully responsible for Purchaser's home and the Property after construction. Purchaser acknowledges that only the neighborhood association having jurisdiction over the Property is authorized to approve architectural alterations and exterior changes. Approval or assistance of any type provided by any sales agent, builder representative or other person or entity shall not be sufficient to authorize any architectural alteration or exterior change and shall not prejudice the rights of such association to enforce the architectural control provisions of the recorded protective covenants. The recorded protective covenants obligate Purchaser to submit plans for all architectural alterations and exterior changes to home and site for prior approval by the association. Purchaser acknowledges that the neighborhood association having jurisdiction over the Property is mandatory and Purchaser shall be a member. Purchaser shall pay dues levied by such association, including dues to be paid at closing based on the date of closing and the schedule provided by such association. If the Property is not shown on a recorded plat as of the effective date of this agreement, Purchaser acknowledges that the boundaries of the Property as finally planted may vary slightly from preliminary boundaries. Purchaser also acknowledges that the final boundaries of the Property shall be as per latest recorded plat thereof as of date of closing (and not as on any lot survey or other document provided at closing or otherwise). Boundaries are not established by landscaping, fences, fencing, Purchaser assumptions or other action, or anything other than the latest recorded plat as of the date of closing, and Seller shall have no obligation, responsibility or liability whatsoever for issues arising out of the foregoing. Purchaser's initials RWP
7. **Loan.** A written loan application shall be made by Purchaser within 10 days after the date of Purchaser's offer (as filed in the upper right-hand corner of the first page of this agreement). Within 30 days after the effective date of this agreement, Purchaser shall obtain a lender commitment letter with all conditions fully

Seller's initials LPPurchaser's initials RWP

disclosed and acceptable to Seller and provide a copy of such letter to Seller. If Purchaser fails to obtain and provide a copy of such letter within such 30 day period, Seller may at any time thereafter terminate this agreement and retain the purchase deposit and all other deposits hereunder as liquidated damages. In addition, if Purchaser fails to make timely written loan application, or fails at any time to supply the necessary information on a timely basis to allow for loan processing, or fails at any time to diligently pursue loan approval in good faith, all as determined in Seller's reasonable discretion, Seller may at any time terminate this agreement and retain the purchase deposit and all other deposits hereunder as liquidated damages. Upon termination of this agreement and payment of monies pursuant to this paragraph, the parties shall have no further rights or obligations hereunder. Purchaser's initials Red and Seller's initials Red Wieland Financial Services is familiar with the building practices of Seller and the unique attributes, including the protective covenants, applicable to the Property. As a result, Seller requests, but does not require, the use of Wieland Financial Services for loan application and processing to benefit both Purchaser and Seller.

Construction Matters

8. **Materials:** If items or materials are not available when needed, Seller may substitute items or materials of equal or better grade, in Seller's reasonable discretion. Seller may also make substitutions of equal or better grade where such substitutions would be consistent with Seller's general practice. Purchaser acknowledges that the color and grade of certain materials used in the home may vary from the selections made by Purchaser due to factors beyond the control of Seller. Purchaser agrees that industry standards, as determined in the reasonable exercise of Seller's discretion, shall govern the acceptability of any particular variance. For example, the colors of exterior siding and interior stain and the color and size of brick and stone may be slightly different than that selected by Purchaser. If Seller reasonably determines that any such variation is within industry standards, Purchaser shall be bound by such determination. Purchaser further acknowledges that Seller shall not be required to obtain Purchaser's consent for changes, deviations or omissions to the home during construction which do not adversely affect the value of the home and which are necessitated by: action of governmental authorities; lender, FHA or VA requirements; or particular job-site conditions.
9. **Selections:** Purchaser shall have the following, within stated allowances, if not already installed:
 - (a) \$2,700 lighting fixtures allowance.
 - (b) \$3,500 Design Allowance (allowed items contingent on stage of construction).
 If Purchaser does not spend/utilize the full amount of an allowance, there shall be no refund or credit of any kind for the unused portion. If Purchaser's selections exceed stated allowances, Purchaser shall pay Seller the difference in cash at the time of selection. The charges for other items added by an addendum must be paid by Purchaser by cash or check to Seller at the time of selection if the items on that addendum total \$500.00 or less. If the items on an addendum total more than \$500.00, Purchaser shall pay Seller a non-refundable deposit of twenty-five percent (25%) of the addendum total, by cash or check at the time of selection. The balance of charges for items added by such an addendum may be added to the Purchase Price if Purchaser's lender approves; if Purchaser's lender does not so approve, the balance of charges for the items on that addendum must be paid by Purchaser by cash or check to Seller at the time of selection. Any payments made pursuant to this paragraph are non-refundable and are a part of Seller's liquidated damages upon Purchaser's default prior to closing. The Design Selection Checklist executed by Purchaser is incorporated herein by this reference and made a part of this agreement. IF PURCHASER REFUSES TO SCHEDULE AN APPOINTMENT TO MAKE DECORATING SELECTIONS FOR THE PROPERTY WITHIN 14 DAYS OF THE DATE OF PURCHASER'S OFFER (AS NOTED IN THE UPPER RIGHT-HAND CORNER OF THE FIRST PAGE OF THIS AGREEMENT), PURCHASER SHALL BE IN DEFAULT. ANY DELAY BY PURCHASER IN MAKING DECORATING SELECTIONS WILL DELAY THE CLOSING DATE.
10. **Alarm System:** The alarm system shall include all first floor operable windows (lower windows only) and doors, including basement level windows (lower windows only) and doors.
11. **Insulation:** Insulation will be installed in the exterior walls and upper-level ceilings as follows:
 - ☒ (a) Exterior walls of first and second floor heated living areas will be insulated with fiberglass insulation to a thickness of three and one-half (3 1/2) inches, which thickness, according to the manufacturer, will yield an R value of 13, or 7/16 inch Oriented Strand Board (or similar) sheathing which thickness, according to the manufacturer, will have an R value of 0.57, or
 - ☒ (b) Upper-level ceilings above all heated living areas with sufficient head room to allow for blown insulation will be insulated with blown fiberglass insulation yielding an R value of 30 and a thickness as required by the manufacturer to achieve the R value designated, which thickness shall be posted in the attic, or
 - ☒ (c) Upper-level ceilings above all heated living areas that do not allow for blown insulation will be insulated with fiberglass batt insulation having a thickness of eight and one-half (8 1/2) inches or nine and one-quarter (9 1/4) inches, which thickness, according to the manufacturer, will yield an R value of 30.
 Purchaser acknowledges that the above R value information is based solely upon information supplied by the manufacturer or installer and Seller does not warrant the accuracy of this information. Purchaser further acknowledges that R value may vary based upon normal construction variances in insulation thickness and openings in walls.
12. **Seller's Approval of Certain Matters:** Seller reserves the right to approve the lot, house placement, driveway location, number of deck steps included in Purchase Price and all exterior colors. No structural or mechanical changes will be made to the Property once framing is complete, unless otherwise provided in this agreement.
13. **Sewer and Water Service:** Seller represents that the improvements on the Property are served by ☒ public sanitary sewer, ☐ septic tank. Seller represents that the improvements on the Property are served by ☒ public water, ☐ well system, ☐ other. Purchaser's initials Red
14. **Non-Interference by Purchaser:** Neither Purchaser nor Purchaser's agents may do any work on the Property or enter the Property prior to closing without prior written permission of Seller, which permission may be withheld for any reason. Purchaser may visit the Property prior to closing, but shall not interrupt or interfere with sales or construction in the neighborhood. Purchaser, on behalf of Purchaser and Purchaser's family, guests, invitees, successors and assigns, hereby releases, covenants not to sue, indemnifies and holds harmless Seller and its affiliates, related companies and predecessors, and their respective directors, officers, shareholders, members, partners, agents and employees, from, due to and against any and all damages and claims of every kind and nature, known and unknown, foreseen and unforeseen, including, without limitation, negligence, related directly or indirectly to work performed on the Property by or on behalf of Purchaser and/or to Purchaser's presence at or visitation to the Property. Purchaser further agrees that all communications regarding the Property are to be with Seller or its agents and that any communication with Seller's subcontractors relating to the Property shall be through Seller.

Pre-Closing Issues

15. **Inspection:** Purchaser, at Purchaser's expense, may have the Property and all improvements inspected prior to closing by a mutually agreeable independent property inspector. If such an inspection is made, the inspector shall diligently and comprehensively evaluate all aspects of the Property and all improvements. If the inspection report discloses items which do not comply with applicable building or health codes, Seller shall immediately proceed to correct such items and diligently pursue correction to completion. Items other than such code violations shall be resolved in accordance with Seller's standard pre-closing and post-closing warranty work procedures. Prior to commencement of the inspection, Purchaser and Seller shall agree upon the inspection in writing. The inspector must be licensed under South Carolina law, but shall nonetheless not be subject to prior approval by Seller. Any written report prepared by the inspector shall be

Seller's initials Red

Purchaser's initials Red

delivered to Seller not later than fifteen (15) days prior to closing and prior to New Home Orientation. FAILURE TO FOLLOW THE ABOVE MENTIONED PROCEDURE WILL NECESSITATE THE POSTPONEMENT OF ANY AGREED UPON CLOSING DATE. Purchaser's initials RWP Seller's initials [Signature]

Closing

16. **Closing.** THE SALE SHALL BE CLOSED NOT LATER THAN 7 DAYS AFTER COMPLETION OF THE HOME (New Home Orientation walk-through items excepted). THIS IS A FIRM CONTRACT. Notwithstanding anything to the contrary herein, Seller shall complete construction of the home on the Property within two (2) years after the effective date of this agreement. Possession of the Property shall be granted by Seller to Purchaser no later than closing.
17. **Closing Costs.** Seller shall pay the recording fee, which is calculated based on the value of the Property. Purchaser shall pay prepaid items including any prepaid interest and provide a paid-up insurance policy at closing. Purchaser shall pay closing costs, closing attorneys' fees, loan costs and discount points (see Stipulation # n/a). Purchaser shall pay mortgage insurance down payment, if any, as required by Purchaser's lender. Purchaser shall reimburse Seller at closing \$325.00 for the cost of the survey (THE SURVEY WILL BE ORDERED BY SELLER AND WILL BE DONE BY A SURVEYOR OF SELLER'S CHOICE). Taxes shall be prorated at closing based on the best available tax information, and based on a 4% assessment ratio for a primary residence (6% assessment ratio for a non-primary residence), regardless of any assessment ratio shown on a tax bill. If the closing is held after a final tax bill has been issued for the year of closing, prorations at closing based on the foregoing shall be final. If the proration is based on an estimate or temporary tax bill, instead of the final tax bill, Purchaser and Seller agree to re-prorate when the final tax bill is available, based on a 4% assessment ratio for a primary residence (6% assessment ratio for a non-primary residence), regardless of any assessment ratio shown on a tax bill, and Purchaser and Seller agree to make refund payments to each other upon demand as appropriate based on the re-proration.
- The parties acknowledge that taxes may increase significantly if the Property is located in a county that undergoes property tax reassessment. If the county in which the Property is located has passed a 15% tax cap ordinance as allowed by SC Code Section 12-37-223A(A), the parties acknowledge that there may be an additional, substantial increase in property taxes for the tax year following closing. Purchaser and Seller agree that should any inadvertent errors or omissions later be discovered in any documents executed, or with any money paid or owed, before or at closing, Purchaser and Seller shall promptly execute such corrective documents and remit such sums as may be required to adjust or correct such errors or omissions upon demand. Any payments due pursuant to this Section not paid when due shall incur a late fee of 10% of the amount due, if not paid within 30 days after demand for payment is made, and shall bear interest at 12% per annum from 30 days after demand for payment is made until paid. Seller may suspend warranty work until Purchaser makes any tax re-proration payment or other payment pursuant to this Section requested by Seller.
18. **Closing Attorney and Documents.** Seller reserves the right to select the closing attorney. Any closing costs incurred at the request or for the special benefit of Purchaser, including, but not limited to, courier, express mail or unusual copying requirements, shall be the expense of Purchaser. Both parties shall execute and deliver all documents necessary to close.
19. **Termites.** Seller shall deliver to Purchaser at closing a certificate stating that the Property has been treated against termite infestation by a termite control agency.
20. **Extras and Appraisal.** All charges for extras added by Purchaser not already paid and not already paid, if any, shall be payable in certified funds acceptable to Seller at closing. If the Property does not appraise at an amount at least equal to the final Purchase Price, Purchaser shall pay any additional amount needed to close in certified funds acceptable to Seller.
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. THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE PROPERTY AND IMPROVEMENTS (INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE), EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY SELLER OTHER THAN AS EXPRESSED IN THE JWH WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY SELLER. THE JWH WARRANTY IS ALSO GIVEN BY SELLER AND ACCEPTED BY PURCHASER IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT PURCHASER HAS OR MAY HAVE AT LAWR IN EQUITY AGAINST SELLER RELATING TO THE PROPERTY, CONSTRUCTION ON THE PROPERTY, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING ON THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THE JWH WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY PURCHASER. 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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. Certain appliances and other consumer products sold as part of the improvements are covered by manufacturers' warranties. Purchaser is entitled to examine those warranties upon request to the Seller. Purchaser's initials RWP Seller's initials [Signature]
- Post-Closing Matters
22. **Trees and Drainage.** Seller shall have no obligation, responsibility or liability whatsoever for: (1) trees and/or shrubbery that Seller would have removed, or had planned to remove, during construction but which Purchaser specifically requested not be removed, (2) natural areas left undisturbed by Seller, including, without limitation, drainage in such areas, (3) site drainage other than as stated in the JWH Warranty, and (4) trees of any kind whatsoever.
23. **Heating and Cooling Systems.** Purchaser acknowledges that different people have different expectations and operating practices regarding the heating and cooling systems for a home and that the performance of such systems can be affected by the orientation of a room or home in relation to the sun. The heating and cooling systems for the Property have been sized and designed in accordance with industry standards for the type and size of home to be constructed. If the heating and cooling systems operate in accordance with industry standards, Purchaser shall not make any claim against Seller with respect thereto.
24. **CHANGES IN DEVELOPMENT PLANS AND AMENITIES.** PURCHASER ACKNOWLEDGES THAT CURRENT DEVELOPMENT PLANS FOR THIS NEIGHBORHOOD ARE SUBJECT TO CHANGE WITHOUT NOTICE AND NO GUARANTEES ARE MADE THAT ANY OF THE COMPONENTS PRESENTLY PROPOSED WILL BE A PART OF THE NEIGHBORHOOD, OR THAT ADDITIONAL COMPONENTS WILL NOT BE ADDED TO THE NEIGHBORHOOD. IF SOME OR ALL OF SUCH COMPONENTS ARE PROVIDED, NO GUARANTEES ARE MADE AS TO THE DATE OF AVAILABILITY FOR USE OR THAT CURRENT PLANS WILL ACCURATELY REFLECT ACTUAL CONSTRUCTION OR LOCATION OF SUCH COMPONENTS.
25. **Construction Easement.** Purchaser grants to Seller a grading and construction easement, 5 feet in width from adjacent property, onto the Property for temporary access for construction on other property which lies adjacent to the Property; provided, such easement shall not interfere with Purchaser's use of the Property, and any damage to the Property shall be repaired by Seller. Such easement shall exist only during the period of construction upon adjacent property. Purchaser shall keep unobstructed all drainage structures and easements as shown on the recorded plat and the survey which will be provided at closing.
26. **Photography of Property.** Purchaser grants Seller the right to obtain and use photography of the Property for publication and advertising purposes.

Seller's initials [Signature]

Purchaser's initials RWP

General

27. **Default Prior to Closing.** If Purchaser defaults under this agreement prior to closing, Seller may elect to receive the purchase deposit and all other deposits as agreed-upon liquidated damages, in which event this agreement shall terminate, and Purchaser and Seller shall have no further rights or obligations hereunder. Alternatively, Seller may elect to seek enforcement of this agreement by specific performance. If Seller defaults under this agreement prior to closing and such default is the sole cause of this transaction not closing, Purchaser may elect to receive a refund of all deposits, in which event this agreement shall terminate, and Purchaser and Seller shall have no further rights or obligations hereunder. Alternatively, Purchaser may elect to seek enforcement of this agreement by specific performance. In no event shall any party have the right to seek damages from another party upon default prior to closing, except the recovery of liquidated damages pursuant to this agreement.
28. **Termination Prior to Closing.** If, prior to closing, a dispute arises between Purchaser and Seller concerning construction, boundaries, consideration or any other matter relating to this transaction and such dispute cannot be resolved within 10 days after the dispute has arisen by both parties acting reasonably and in good faith, Seller shall have the right to terminate this agreement upon written notice (by certified mail, return receipt requested, or personal delivery) to Purchaser. Upon termination, Seller shall pay to Purchaser the sum of \$100.00 and shall, in addition, return all monies paid by Purchaser pursuant to this agreement, together with simple interest on such monies at the rate of 6 percent per annum from the date of deposit of Purchaser's payments. Upon termination, the parties shall have no further rights or obligations hereunder and such termination shall not be a default by any party. For the purposes of this provision, a tender of the monies by Seller to Purchaser will be sufficient, whether or not accepted by the Purchaser.
29. **Force Majeure.** Notwithstanding anything to the contrary contained herein, Seller shall be excused for the period of delay occasioned by circumstances beyond the control of Seller, including, without limitation, delay caused by the Purchaser, any labor strike or unrest affecting performance of work hereunder, failure of Seller's suppliers of materials to deliver requested materials, delay and/or failure due to computer viruses, "bugs" or other computer-related disruptions, riots, and acts of God, including, but not limited to, fire, windstorm, flood, tornadoes, earthquakes, lightning or other casualty. Seller shall not be liable for any inconvenience or expense to Purchaser caused by events beyond Seller's control.
30. **Entire Agreement and Disclosures.** This agreement constitutes the sole and entire agreement between the parties hereto and no modification of this agreement shall be binding unless attached hereto and signed by, at a minimum, Purchaser and Seller (any parties other than Purchaser and Seller not being necessary parties to the execution of any modifications to this agreement unless such modifications adversely affect another party hereunder). NO REPRESENTATION, PROMISE, OR INDUCEMENT NOT INCLUDED (WHETHER MADE BY AN AGENT OR REPRESENTATIVE OF SELLER OR OTHERWISE) IN THIS AGREEMENT SHALL BE BINDING UPON ANY PARTY HERETO, INCLUDING, WITHOUT LIMITATION, REPRESENTATIONS REGARDING PROPERTY BOUNDARIES, ADJACENT PROPERTY, OR AMENITIES. Purchaser acknowledges the following:
- (a) any association budget that may be provided to Purchaser (Seller being under no obligation to provide any such budget) is based on estimated expenses only, and assessments may increase or decrease significantly when the actual expenses of the association become known;
 - (b) the Property is located adjacent to or in the vicinity of thoroughfares which could be improved or widened in the future;
 - (c) property adjacent to or in the vicinity of the Property, both inside and outside the neighborhood in which the Property is located, may be developed and built in a variety of ways, which may or may not be consistent with development or construction on the Property or in the neighborhood in which the Property is located (however, this is not a guarantee or obligation by anyone to develop or build on any property); such development and construction could result in, without limitation, changes in the views from the Property, roads and driveways being constructed near the Property and otherwise, and any open areas not remaining in their current state; more generally, views from the Property can change over time for many reasons, including, among other things, additional development and the removal or addition of landscaping. Purchaser's initials *RL*
 - (d) no representations are made regarding zoning of adjacent property, and the zoning category to which adjacent property is subject may change;
 - (e) no representations are being made regarding which schools may now or in the future serve the Property;
 - (f) since in every neighborhood there are conditions which different persons may find objectionable, Purchaser acknowledges that there may be conditions outside of the Property which Purchaser finds objectionable and that it shall be the sole responsibility of Purchaser to become acquainted with neighborhood conditions which could affect the Property;
 - (g) no representations are made that the Property and/or home/unit thereon is or will be soundproof or that sound may not be transmitted from one property and/or home/unit to another; and
 - (h) any floor plans, renderings, drawings and the like, whether furnished by Seller to Purchaser or otherwise obtained or viewed by Purchaser, which purport to depict the Property, or any portion thereof, or any building containing the same, are merely approximations and do not necessarily reflect the actual as-built conditions of the same; and that the decorations, furniture, furnishings, wallpaper, appliances, fixtures and the like contained in any model home are for demonstrative purposes only and are not included in the Property.
31. **Time of Essence.** Time is of the essence of this agreement.
32. **Liquidated Damages.** In all cases where a party is entitled to receive liquidated damages hereunder, the parties acknowledge that such damages cannot be determined with certainty, the amount to be paid represents the parties' best estimate of such damages, and such payment shall not constitute a penalty.
33. **Assignment Miscellaneous.** Neither party may assign this agreement, or have this agreement assumed, without the prior written consent of the other party, which consent may be given or withheld in such party's sole discretion; provided, however, Seller may assign this agreement incident to Seller's financing without the consent of Purchaser. Each provision of this agreement is severable from every other provision and if any provision is determined to be unenforceable, the parties shall be bound by the remaining provisions. No provision of this agreement shall be construed more strictly against a party because that party or its agent prepared or is deemed to have prepared such provision. The failure of any party to exercise any right hereunder at any particular time shall not be deemed a waiver of such party's rights. Titles or captions of sections contained in this agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this agreement or the intent of any provisions hereof. References to the singular shall mean, where applicable, the plural. This agreement shall not be binding until both Purchaser and an authorized representative of Seller have both executed the same copy of this agreement. However, some time periods hereunder begin to run from the date of Purchaser's offer (as noted in the upper right-hand corner of the first page of this agreement). A signature transmitted by facsimile machine shall be treated as an original signature.
34. **Survival.** The terms and conditions contained herein shall not survive closing or termination of this agreement and shall merge upon delivery of the warranty deed, except for the provisions of the last sentence of Section 1 and Sections 2, 3, 4, 6, 7, 8, 11, 17, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34, which shall survive closing or termination of this agreement and shall not merge upon delivery of the warranty deed.

THE EFFECTIVE DATE FOR THIS AGREEMENT SHALL BE THE DATE THAT IT IS LAST EXECUTED BY PURCHASER OR SELLER.

Seller's initials *J*

Purchaser's initials *RL*

2002

John Feezor 7/3/07
Seller: John Wieland Homes and Neighborhoods
of the Carolinas, Inc.

Print Name: John Feezor

Title: Vice President

Date Executed *Ralph W. Parsons Jr.*
Purchaser

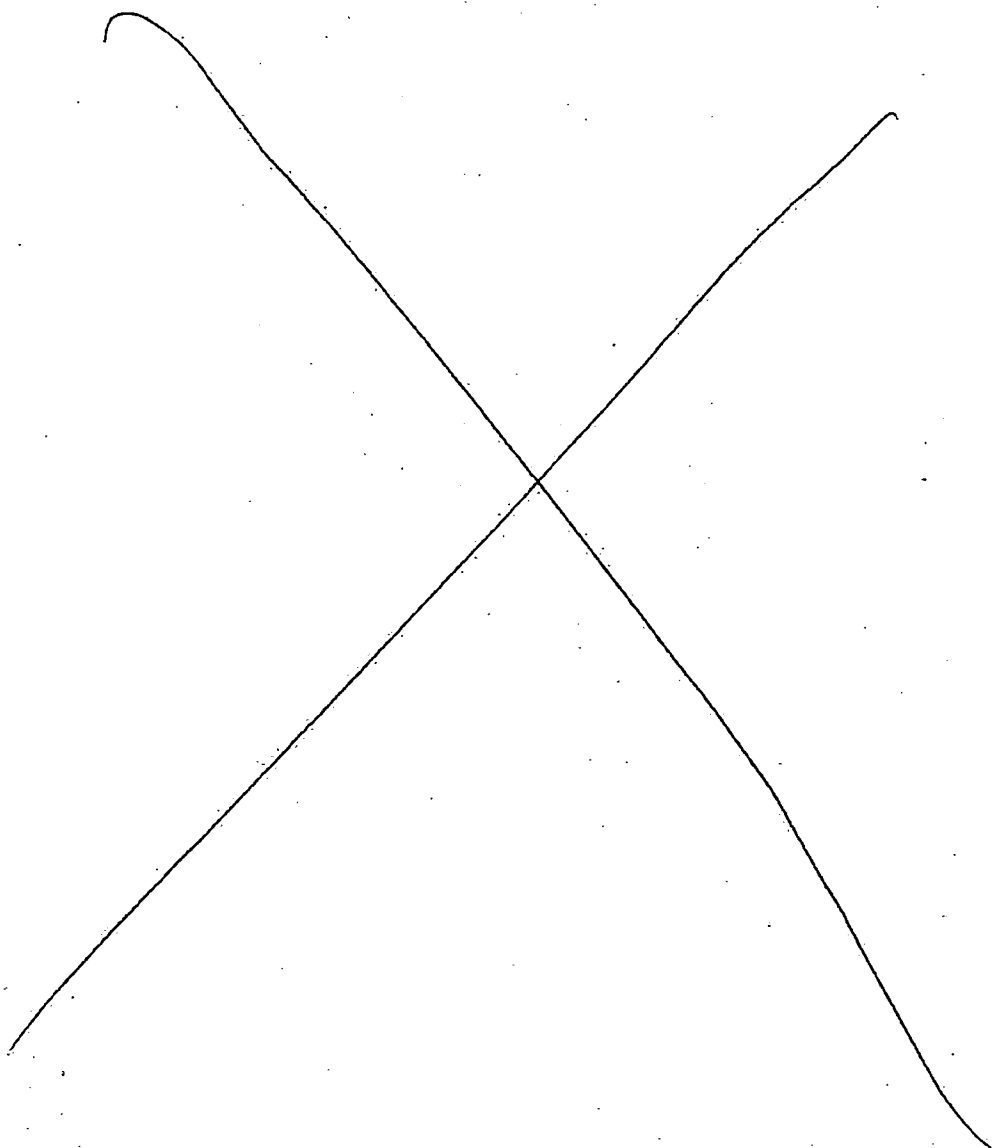
6-30-07
Date Executed

Print Name: Ralph W. Parsons, Jr.

Louise C. Parsons
Purchaser

06/30/07
Date Executed

Print Name: Louise C. Parsons



Seller's initials *JF*

Purchaser's initials *RWP*

John Wieland
5-20
WARRANTY

John Wieland
JOHN WIELAND HOMES
AND NEIGHBORHOODS

*JOHN WIELAND HOMES
AND NEIGHBORHOODS*

THE WIELAND 5-20
EXTENDED WARRANTY

THE WIELAND 5-20 EXTENDED WARRANTY

IN GEORGIA:

Customer Service Department, 1950 Sullivan Road, P. O. Box 87363, Atlanta, GA 30337
Phone: (770) 907-3400 Fax: (770) 907-3440
Website: www.jwcustomercare.com

IN TENNESSEE:

Customer Service Department, 300 Seaboard Lane, Suite 3, Franklin, TN 37067
Phone: (615) 790-3090 Fax: (615) 790-0075
Website: www.jwcustomercare.com

IN CHARLOTTE, NORTH CAROLINA:

Customer Service Department, 8325-D Arrowridge Boulevard, Charlotte, NC 28273
Phone: (704) 522-9200 Fax: (704) 522-9040
Email: customerservice.charlotte@jwhomes.com
Website: www.jwcustomercare.com

IN RALEIGH, NORTH CAROLINA:

Customer Service Department, 107-A Quail Fields Court, Morrisville, NC 27560
Phone: (919) 481-3309 Fax: (919) 481-9157
Website: www.jwcustomercare.com

IN CHARLESTON, SOUTH CAROLINA:

Customer Service Department, 496 LaMesa Drive, Mt. Pleasant, SC 29464
Phone: (843) 849-8787 Fax: (843) 849-8877
Website: www.jwcustomercare.com

IN KENTUCKY:

Website: www.jwcustomercare.com

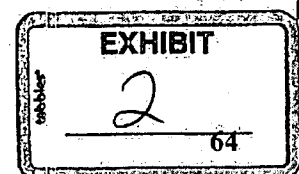


TABLE OF CONTENTS

LIMITED WARRANTY

I.	What is Covered.....	1
A.	One Year (Workmanship).....	1
B.	Two Years (Systems).....	1
C.	Five Years (Extended Items).....	1
D.	Twenty Years (Structural).....	2
II.	What Wieland Will Do	3
III.	What the Homebuyer(s) Must Do	4
IV.	Exclusions.....	5
V.	General Provisions	9

LEGAL NOTICES	13

CONSTRUCTION QUALITY STANDARDS

I.	Site Work	14
II.	Cast-in-Place Concrete.....	15
III.	Masonry	16
IV.	Carpentry.....	16
V.	Thermal and Moisture Protection.....	17
VI.	Doors and Windows.....	19
VII.	Finishes	21
VIII.	Fireplaces	23
IX.	Cabinetry.....	24
X.	Plumbing Systems.....	24
XI.	Heating and Air Conditioning System	26
XII.	Electrical System.....	27

LIMITED WARRANTY

I. What is Covered

- A. Workmanship. During the first year of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from defects in materials or workmanship, as defined in the Construction Quality Standards, except as they apply to defects in fixtures and equipment which are covered in accordance with the manufacturer's warranty.
- B. Systems. During the first two (2) years of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from defects in the electrical, plumbing and mechanical systems, as defined in Sections X, XI and XII of the Construction Quality Standards, to include the wiring, piping and ductwork portions of the systems. This coverage applies to the HVAC system only if Homebuyer(s) document that the HVAC system has been professionally maintained (i.e., by a company or individual who is licensed as necessary and who is currently in the business of providing such residential maintenance service) per manufacturer's standards/instructions at least once per year. Defects in any of the systems resulting from failures in a fixture or piece of equipment which are covered by a manufacturer's warranty are not covered by this warranty.
- C. Extended Items. During the first five (5) years of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from the following, as defined in the Construction Quality Standards:
1. Verified leaks, due to defects in materials or workmanship, at roof penetrations made in the course of construction.
 2. Verified active flow of exterior surface water into the basement or so as to create standing water in the crawl space for at least forty-eight (48) consecutive hours, so long as the active flow is due solely to acts or omissions of Wieland. Wieland must receive written notice of any covered claim within ten (10) days of the date of discovery by Homebuyer(s). Wieland will not be responsible for anything caused by (a) breaks, leaks or bursting of water mains or pipes; (b) any grading done by or on behalf of Homebuyer(s) which causes water to flow toward the outside foundation wall; (c) failure to maintain the grade initially established by Wieland for the Home; (d) prolonged direction of water against the outside foundation wall from water spigots, sprinklers, hoses, or broken or clogged gutters; (e) bent, broken, or clogged downspouts; (f) landscaping improperly installed by or on

behalf of Homebuyer(s); and (g) an irrigation system that was not installed by Wieland.

3. Verified plumbing leaks in the exterior water service line, plumbing pipes and fittings, tubs, sinks, faucets, and toilets. Tarnishing and pitting of faucets is excluded.
4. Defects in materials or workmanship in only the following appliances selected from the Wieland selections: Oven, Range, Range Hood, Dishwasher, Garbage Disposal, Built-In Microwave, and Water Heater. After expiration of any manufacturer's warranty, Wieland will cover materials and labor as would be covered by the manufacturer's warranty.
5. Verified interior gas line piping leaks.
6. Defects in materials or workmanship in the electrical main breaker panel, electrical service disconnect, interior wiring, switches, and outlets.
7. Failure of the HVAC compressor pump and condenser coil, heat exchanger, and thermostats installed by Wieland. After expiration of any manufacturer's warranty on the above components, Wieland will replace the above components as would be covered by the manufacturer's warranty. This coverage applies only if Homebuyer(s) document that the above components have been professionally maintained (i.e., by a company or individual who is licensed as necessary and who is currently in the business of providing such residential maintenance service) per manufacturer's standards/instructions at least once per year.
8. Breaks in the hermetic seal of insulated windows, and defects in materials and workmanship in sash tracks and sash locks, as defined in the manufacturer's warranty. After expiration of any manufacturer's warranty, Wieland will cover materials as would be covered by the manufacturer's warranty.
9. Verified sewer service line leaks due to defects in materials or workmanship.

D. Structural. During the first twenty (20) years of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from "Structural Defects."

A "Structural Defect" is (i) actual physical damage (ii) to only the following designated load-bearing elements of the Home (iii) caused by failure of such load-bearing elements which affect their load-bearing function (iv) to the extent that the

Home becomes unsafe or unsanitary. The following elements, if load-bearing, constitute the designated elements: 1. foundation systems and footings; 2. beams; 3. girders; 4. lintels; 5. columns; 6. walls and partitions; 7. floor systems; and 8. roof framing systems. All four (4) parts of the definition must be satisfied in order for a condition to qualify as a Structural Defect. This is designed to be coverage only for catastrophic failure of load-bearing elements of the Home.

Examples of elements not covered by this warranty which are deemed not to have Structural Defect potential are: 1. nonload-bearing partitions and walls; 2. wall tile, wall paper, etc.; 3. plaster, laths, or drywall; 4. flooring and subflooring material; 5. stucco, synthetic stucco, brick or stone veneer; 6. any type of exterior siding; 7. roof shingles, sheathing and felt paper; 8. heating, cooling, ventilating, plumbing, electrical and mechanical systems; 9. appliances, fixtures or items of equipment; 10. doors, trim, cabinets, hardware, insulation, paint and stains; 11. basement slabs and other interior floating, ground-supported concrete floor slabs; and 12. water intrusion, including, without limitation, leaks in walls, roofs, plumbing, basements and crawl spaces.

II. What Wieland Will Do

- A. Notwithstanding any language herein to the contrary, if a defect occurs in a warranted item during the applicable period of this warranty, Wieland will repair, replace or pay the Homebuyer(s) the reasonable cost of repairing or replacing the defective item. The choice to repair, replace, pay or combination thereof is solely that of Wieland. Wieland will also repair (or pay for the repair of) any item needing to be damaged or destroyed in order to make the warranted repair, except for improvements added after the completion of Wieland's original construction, which are the responsibility of Homebuyer(s) to remove or repair.
- B. With regard to Structural Defects, Wieland will repair and/or replace the Structural Defects or make arrangements for such repairs and/or replacement. Wieland shall have complete discretion as to the methods and manners for repairing and/or replacing Structural Defects. The repair of a Structural Defect is limited to: 1. the repair of damage to the load-bearing portions only as necessary to restore the load-bearing ability of such load-bearing portions; and 2. the repair of those items of the Home damaged by the Structural Defect which make the Home unsafe or unsanitary.
- C. Notwithstanding anything herein to the contrary, where Wieland shall become responsible to pay the reasonable costs of repair or replacement for Structural Defects arising at any time during the applicable period of this warranty and amounting to \$2,500 or more, payment shall be made to or on behalf of the Homebuyer(s) and the mortgagee or successor mortgagees who have notified Wieland in writing of their security interest in the Home on or prior to the date of payment of the claim, as their respective interests may appear.

- D. Before Wieland repairs or pays for the repair of a claim, there must be an assignment to Wieland of any rights that may exist against any other person or entity with respect to the claim. No repairs, replacements or payments made under the terms and conditions of this warranty shall act to extend this warranty or any time periods hereunder.
- E. Notwithstanding anything herein to the contrary, if an item is on or in the common elements of a condominium or is otherwise under the ownership or maintenance control of a homeowners, neighborhood or condominium association, and such association refuses to allow Wieland to perform work on the item, Wieland shall be relieved of any obligation to perform work on the item, and the item shall be deemed excluded from this warranty.

III. What the Homebuyer(s) Must Do

If the Homebuyer(s) should have a complaint on any item covered by this warranty during the applicable period of this warranty, the Homebuyer(s) must send a clear and specific written complaint to Wieland (dating the defect occurrence). This written notice must be received no later than 30 days after the expiration of the applicable coverage period for such item under this warranty (except where a shorter time period is specified). The written notice must be sent to the Wieland Customer Service Department at the address listed on the Table of Contents page of this warranty. In case of an emergency problem, the Homebuyer(s) must notify Wieland immediately in order that further damages can be mitigated. The Homebuyer(s) should take reasonably immediate action if circumstances dictate the need.

However, Wieland is entitled to assess claimed defects and decide on an appropriate repair plan. Wieland is also entitled to choose to repair or replace, or to pay the fair value of the repair or replacement of, a covered defect. If Homebuyer(s) repair (or cause the repair of) the claimed defect before Wieland has an opportunity to inspect the claimed defect, it is impossible for Wieland to assess whether the defect was covered by this warranty, whether the repair made was cost-effective, necessary, and effective, and whether Wieland would have been able to solve the problem in another way. For these reasons, Wieland will not accept, nor will arbitrators be able to award to Homebuyer(s), any claimed defect which Homebuyer(s) have had replaced or repaired, except for an emergency repair which was authorized by Wieland. If Wieland is unavailable for emergency authorization, Homebuyer(s) must make minimal repairs so that further damages can be mitigated and report the emergency to Wieland as promptly as possible. Repairs will not be reimbursed unless, at a minimum, the above procedures have been followed.

IV. Exclusions

This warranty does not apply to:

- A. Defects in outbuildings, including, without limitation, detached garages and detached carports (except finished space over garages and outbuildings that contain or are served by the plumbing, electrical, heating, cooling or ventilation systems serving the Home); built-in refrigerators; home theatres/entertainment components; other non-standard "extras" in the Home; swimming pools and other recreational facilities; driveways, walkways, decks and porches; patios (attached or detached), stoops and steps (except as specifically stated herein); boundary walls, retaining walls and bulkheads (except where boundary walls, retaining walls and bulkheads are necessary for the structural stability of a covered building); fences; landscaping of any kind (except as specifically stated herein); irrigation and fire suppression sprinkler systems; or any other improvements not a part of the Home; and in addition:

Any and all aspects of any "tankless" water heating system and the installation thereof, and anything else related thereto, are excluded. The foregoing specifically excludes, without limitation, (a) repair, replacement and any other aspect of such water heating system, and (b) any damage or problems with any other aspect of the Home resulting from such water heating system, including, without limitation, structural damage or matters;
- B. Damage to real property that is not part of the Home;
- C. Damage to or defects in concrete floors of attached or detached garages or attached or detached patio slabs that are built separate from foundation walls or other structural elements of the Home;
- D. Bodily or personal injury of any kind (including physical or mental pain and suffering and emotional distress); medical, hospital, rehabilitation or other incidental or consequential expenses; attorneys' fees, court costs, experts' fees and other such expenses; or damage to any property of others;
- E. Any loss or damage which the Homebuyer(s) has not taken appropriate action to minimize as soon as practicable;
- F. Any defect in, or caused by, alterations made by or on behalf of Homebuyer(s), or material or work supplied by anyone other than Wieland or Wieland's employees, agents or subcontractors;
- G. Loss of use, loss of opportunity, loss of market value, loss of rental value or any and all consequential loss or damages;

- H. Defects in any property not included in the original Home delivered for the original final sales price;
- I. Any damage to the extent it is caused or made worse by:
1. Negligence, improper maintenance, lack of maintenance or improper use or operation by anyone other than Wieland or Wieland's employees, agents or subcontractors;
 2. Failure by the Homebuyer(s) to give prompt and proper notice to Wieland of any defects;
 3. Changes of the grading of the ground that do not comply with accepted grading practices, including changes in, and failure to maintain, grades, swales, drainage structures, stabilized soil, and sodded, seeded and landscaped areas;
 4. Changes in the level of underground water table which were not reasonably foreseeable at the time of construction of the Home;
 5. Subsidence or soil movement which was not reasonably predictable through reasonable soil testing or other geological investigation at the time of construction of the Home (this does not apply to any Home with an original FHA loan still in effect);
 6. Dampness, condensation, mold/mildew or any other condition arising due to the failure to maintain adequate ventilation and/or adequately low humidity levels; or
 7. Failure by the Homebuyer(s) or by anyone other than Wieland or Wieland's employees, agents or subcontractors to comply with the warranty requirements of manufacturers of appliances, equipment or fixtures;
- J. Loss or damage not caused by a defect or deficiency in the design or construction of the Home by Wieland or Wieland's employees, agents or subcontractors;
- K. Loss or damage externally caused, including, but not limited to: acts of God; riot or civil commotion; hurricane, tornado or other windstorm; fire; explosion; smoke; water; mold/mildew; hail; lightning; falling trees or other objects; aircraft; vehicles; flood; mud slides; earthquakes; volcanic eruption; radon or other natural or introduced gases; abuse or use of the Home, or any part thereof, beyond the reasonable capacity of such part for such use; conditions or occurrences beyond Wieland's control; or by any other external cause (including, without limitation, criminal acts);

- L. Any loss, damage, defect, cost or expense which is caused, in whole or in part, by any peril or occurrence for which compensation is provided in whole or in part by legislation, by class action or other lawsuit settlement, or which is covered by other insurance or public funds;
- M. Rotting of any kind; mold/mildew; the presence of mold/mildew anywhere in the Home, including, without limitation, in any crawl space, unfinished basement or other unfinished or finished space (all aspects of mold/mildew, including cleaning or otherwise addressing, are the responsibility of the Homebuyer(s) as part of maintenance of the Home); the presence of radon or other natural or introduced gases; insect damage; and damage due to vermin, radiation, pollution or toxic substances of any kind;
- N. Any loss or damage which arises while the Home or any portion thereof is being used for nonresidential purposes;
- O. Any condition which does not result in actual physical damage to the Home;
- P. Costs of shelter, transportation, food, moving, storage, or other incidental expenses related to relocation during repair, or any other costs due to loss of use, inconvenience or annoyance;
- Q. Any complaint or claim on an item reported to Wieland after an unreasonable delay or later than 30 days after the expiration of the applicable coverage period for such item under this warranty (or later than any shorter time period herein specified); or loss or damage resulting from failure to comply with manufacturers' warranty requirements;
- R. Normal wear and deterioration;
- S. Failure of Wieland to complete construction;
- T. Glass breakage and exterior hardware;
- U. Failure of Wieland to perform any washing, cleaning or clean-up of any kind;
- V. Structural slab foundation systems that have experienced some movement but are within the foundation's design performance criteria; separation, settlement or movement of concrete slabs within the structure at control joints (joint material maintenance is not the responsibility of Wieland);
- W. Violations of local, state or national building codes, ordinances or standards;
- X. Pre-existing conditions the Homebuyer(s) were aware of before closing on the Home

and knowingly accepted (waived), such as "punch list" or "orientation" items, whether or not appearing on a punch list or orientation checklist;

- Y. Outside hosebibs and other hose connections;
- Z. Loss or damage resulting from any failure to comply with federal, state, local or other elevation requirements, including, but not limited to: 1. failure of the lowest floor elevation of the Home to meet or exceed the base flood elevation established by the Federal Emergency Management Agency and applicable community floodplain management ordinances; and 2. errors in connection with the collection and certification of elevation information, whether committed by Wieland, an agent of Wieland or by any person authorized by state or local law or ordinance to provide floodplain management information, or by any other person;
- AA. Damage due to weather conditions which exceed the specifications for any covered item;
- BB. Damage to any personal property;
- CC. Damage caused by any alteration to a covered item;
- DD. Any aspect whatsoever related to light fixtures and fans, except as noted in Section 12.2 of the Construction Quality Standards;
- EE. Performance of any covered item; operation only is covered by this warranty;
- FF. Persistent failure of any covered item in many homes such that the item is considered defective as made or manufactured, as reasonably determined by Wieland; and
- GG. ALL CONSEQUENTIAL DAMAGE OF ANY KIND.

V. General Provisions

- A. Time is of the essence. The time limits contained in this warranty are a material condition of this warranty.
- B. Homebuyer(s) means any and all record owners of the Home (stated in the warranty certificate applicable to the Home, if the initial Homebuyer(s)) and Home means the dwelling described in the warranty certificate applicable to the Home. Builder or Wieland means John Wieland Homes and Neighborhoods, Inc., in Georgia, Tennessee and Kentucky, and means John Wieland Homes and Neighborhoods of the Carolinas, Inc., in North Carolina and South Carolina.
- C. A warranted defect must first occur during the applicable designated portion of the warranty for that warranted defect in order to be covered as provided in this warranty. Therefore, per Section IV.X of this warranty, any pre-existing conditions the Homebuyer(s) knew about before closing on the Home and knowingly accepted (waived), such as "punch list" or "orientation" items, are not covered.
- D. No one is authorized to change, alter or add to this warranty without the express written consent of Wieland.
- E. The maximum amount payable under this warranty by Wieland for all claims submitted is the original final sales price of the Home shown on the warranty certificate applicable to the Home, which includes the parcel of land on which the Home was constructed.
- F. This warranty is independent of any contractual arrangement between the Homebuyer(s) and Wieland for the construction of the Home and/or its sale, if any. Nothing contained in any such contract or any other contract between Wieland and the Homebuyer(s) can restrict or override the provisions of this warranty. The contractual arrangement includes, but is not limited to, Builder substitutions or changes in plans, specifications or materials.
- G. If Wieland's performance of any of its obligations is delayed by any event not resulting from Wieland's own conduct, Wieland will be excused from performing until the effects of that event are remedied. Examples of such events are acts of God or the common enemy, labor strikes, shortages of materials, war, riot, civil commotion, sovereign conduct, or acts of persons who are not parties to this warranty.
- H. Wieland and Wieland's employees, agents, contractors and subcontractors must be allowed access to the Home and areas around or attached to the Home during normal business hours when claim servicing is required and to inspect, repair and correct tests as, in Wieland's judgment, may be required. It is Homebuyer(s) responsibility to ensure this access. This warranty shall be void if this access is not permitted.

- I. Anything requiring repair or replacement which cannot be repaired or replaced with items readily available in the standard marketplace will be repaired or replaced with items of similar kind and quality which are so available.
- J. This warranty does not apply to appliances, consumer products, or other pieces of equipment, except as noted in Section I of this warranty.
- K. Any legal action resulting from disputes between the Homebuyer(s) and Wieland that are not the direct result of provisions contained in this warranty are not the responsibility of Wieland.
- L. Each successor in title to the Home, including any mortgagee in possession, in no way affects the coverage under this warranty for its unexpired term. Each such successor is also bound by the provisions of this warranty and the Construction Quality Standards. There is no limit to the number of such successions during the unexpired terms, nor any cost incurred because of such successions.
- M. If, at the time of a claimed loss, there is any valid and collectible insurance, whether primary, excess or contingent, that applies to the losses, defects or claims covered by this warranty, then Wieland shall not be liable for any of said losses, defects or claims.
- N. When repairing or replacing, Wieland will attempt to match and replace with the original choice of colors and materials, except where the item was custom-ordered. Due to manufacturing variances, discontinued items, natural fading, weathering, etc., Wieland cannot and does not guarantee color matches. In addition, Wieland is not accountable for discontinued items, changes in dye lots, colors or patterns, or items ordered outside of the original construction of the Home.
- O. **Mandatory Binding Arbitration.** Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them. Wieland and Homebuyer(s) shall first mediate formally any disputes between them, with the mediation commencing, and the mediator being selected, in the same manner as set forth below for the commencement of arbitration and the selection of an arbitrator (if the parties cannot mutually agree otherwise).
- 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.

The terms and procedures of this warranty shall first apply to any claims or disputes that are within the coverage of this warranty. In order to be able to arbitrate or mediate any warranty claims, Homebuyer(s) must first have complied with all procedures set forth in this warranty within the time limits set forth herein. Failure of Homebuyer(s) to comply with such procedures in a timely manner shall bar any such claims against Wieland.

In order to initiate arbitration for disputes, Wieland or Homebuyer(s) must provide clear and specific written notice (if to Homebuyer(s), at the Home address; if to Wieland, to Wieland's Customer Service Department at the address set forth in this warranty) to the other that such party desires to arbitrate matters in dispute, together with a description of the claim or dispute and of the damages or relief being sought. Arbitrations will be conducted by an independent, neutral, third-party arbitrator, located in the general metropolitan area where the Home is located, selected by Construction Arbitration Associates, Inc., Atlanta, Georgia (CAA) (CAA is not precluded from selecting itself; if CAA is unable or legally precluded from selecting an arbitrator, then the American Arbitration Association (AAA) shall do so (AAA is not precluded from selecting itself). As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law.

Arbitrations will be conducted in accordance with rules provided or determined by the person or entity selecting the arbitrator as provided above; provided, however, if any procedural matters are not covered in those rules, the arbitrator shall decide such matters. The arbitrator will hold a hearing on the claim(s) or dispute(s) and render a decision or award, and such decision or award shall be final and binding on the parties.

If Wieland so chooses, Wieland may have its supplier(s) and contractor(s) whose work or supplies are involved in the dispute included as parties to the arbitration. Questions of whether issues are arbitrable and the actual interpretation of terms needing definition in order to arbitrate an issue shall be determined by the arbitrator.

Judgment upon an award rendered by an arbitrator may be entered in any court having jurisdiction thereof upon the application of Wieland or Homebuyer(s). Wieland shall pay all up front filing fees relating to arbitration or mediation. Each party shall bear its own costs and expenses and an equal share of the arbitrator's fees, the administrative fees of arbitration, and/or fees of mediation.

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.

Any dispute involving Wieland's directors, officers, shareholders, employees, agents, predecessors, affiliates or related companies shall be resolved through the foregoing mediation and arbitration process and not in a court of law. The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section; specifically, if it is validly determined that a particular claim or type of claim is not subject to arbitration hereunder, such determination shall not affect or invalidate the applicability of arbitration or mediation hereunder to any other claim or type of claim.

- P. THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE HOME AND/OR PROPERTY ON WHICH IT IS CONSTRUCTED (INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE), EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY WIELAND OTHER THAN AS EXPRESSED IN THIS WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY WIELAND. THIS WARRANTY IS ALSO GIVEN BY WIELAND AND ACCEPTED BY HOMEBUYER(S) IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT HOMEBUYER(S) HAVE OR MAY HAVE AT LAW OR IN EQUITY AGAINST WIELAND RELATING TO THE HOME AND/OR PROPERTY ON WHICH IT IS CONSTRUCTED, CONSTRUCTION OF THE HOME, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING IN THE HOME AND/OR ON THE PROPERTY ON WHICH IT IS CONSTRUCTED, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THIS WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY HOMEBUYER(S).

LEGAL NOTICES

For Georgia only:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS THAT YOU (HOMEBUYER(S)) MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED OR REPAIRED YOUR HOME. IF APPLICABLE, NINETY (90) DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS, OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

For Kentucky only:

SECTIONS 411.250 TO 411.266 OF THE KENTUCKY REVISED STATUTES CONTAIN IMPORTANT REQUIREMENTS THAT YOU (HOMEBUYER(S)) MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE BUILDER OF YOUR HOME. IF APPLICABLE, YOU MUST DELIVER TO THE BUILDER A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGE ARE DEFECTIVE AND PROVIDE THE BUILDER THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

CONSTRUCTION QUALITY STANDARDS

The following Construction Quality Standards are based on standards that have been developed and accepted by the residential construction industry in general. While it is virtually impossible to develop a construction standard for each possible deficiency, Wieland has attempted to isolate the most common deficiencies that occur and in so doing list the extent of Builder and Homebuyer(s) responsibility. Where a specific deficiency has not been identified, the standard practice of the residential construction industry at the time of construction of the Home will apply.

Homebuyer(s) should be aware that all new homes go through a period of expansion and contraction. During this period, a home may experience some minor material shrinkage, cracking and other events that are unavoidable and considered normal, such as, without limitation, temporary expansion of pipes that then make contact with wall studs or other material, floor squeaks, and other noises and sounds that are part of the settlement of the home. Homebuyer(s) should also be aware that Homebuyer(s) are responsible for proper home maintenance. Damage caused by negligence, lack of maintenance, improper maintenance or changes, alterations or additions by or on behalf of Homebuyer(s), is excluded from the warranty.

The following Construction Quality Standards are expressed in terms of required standards that Wieland's construction must meet. Non-compliance with these standards calls for corrective action. Unless otherwise noted below, all following items identified are One Year (Workmanship) warranted items.

I. SITE WORK

1.1 GROUND SETTLING

•**DEFICIENCY:** Excessive ground settling around the foundation, utility trenches or other areas on the lot that have been excavated and backfilled affecting drainage away from the Home.

•**CONSTRUCTION STANDARD:** Ground settling should not exceed 6 inches from the final landscaping grade established by the Builder and should not impede water drainage away from the Home.

•**BUILDER CORRECTION:** If the Builder provided final landscaping grade, the Builder shall recompact and backfill excessively settled areas affecting drainage away from the Home one time, but only during the first year of the warranty. Any landscaping affected by the repair is not the responsibility of Builder.

1.2 LANDSCAPING

•Builder shall have no obligation, responsibility or liability whatsoever for (1) trees and/or shrubbery that Builder would have removed, or had planned to remove, during construction but which Homebuyer(s) (or predecessor) specifically requested not be removed, (2) natural areas left undisturbed by Builder, including, without limitation, drainage in such areas, (3) site drainage and/or standing or ponding water of any kind or nature whatsoever, and (4) trees of any kind whatsoever, except as specifically stated herein.

•Builder will provide a replacement shrub one time only for any shrub that dies during the first 30 days of the warranty. No labor or other materials will be provided.

•Builder guarantees the survival of at least two-thirds (2/3) of the total number of nursery-grown "B&B" transplanted trees during the first six months of the warranty, so long as they are properly cared for as determined by Builder. Proper care includes: 1) watering: during the spring, summer and early fall, water trees at least once per week, soaking the root ball heavily; 2) fertilizing: in March, May and July, fertilize each tree with 1/3 cup of 10-10-10 fertilizer per inch of trunk diameter; and 3) mulch: maintain pine straw mulch around the base of the tree to a depth of 3" to 4". Any

replacement trees that may be required to meet the minimum two-thirds (2/3) total number will be replanted one time only. Dead trees will be cut flush to the ground where possible. Stumps will be ground only if the tree was in a grassed area of the front yard.

•During the first year of the warranty, Builder warrants that lawns of Bermuda and Zoysia sod that are laid when dormant will come out of dormancy. Areas of 25 contiguous square feet or less are excluded as these will grow over naturally. Areas greater than 25 contiguous square feet will be repaired one time only in the Spring.

•Fescue lawns (seed and sod) are not covered by the warranty.

II. CAST-IN-PLACE CONCRETE

•DEFICIENCY: Excessive basement or foundation wall cracks.

CONSTRUCTION STANDARD: Non-structural cracks are not unusual in concrete foundation walls. Cracks greater than 1/8 inch are considered excessive.

BUILDER CORRECTION: The Builder shall repair non-structural cracks in excess of 1/8 inch by surface patching. If needed, any such work should be done toward the end of the first year of the warranty.

•DEFICIENCY: Excessive cracking of basement floor, attached garage slab or attached patio slab, other than as excluded by Section IV.A and IV.C of the warranty.

CONSTRUCTION STANDARD: Minor cracks are common. Cracks exceeding 1/4 inch in width or 1/4 inch in vertical displacement are considered excessive.

BUILDER CORRECTION: The Builder shall repair cracks exceeding the maximum tolerances by surface patching or other methods, as required.

•DEFICIENCY: Cracks in concrete slab on grade finished floors.

CONSTRUCTION STANDARD: Cracks which significantly impair the appearance or performance of the finish flooring material are not acceptable.

BUILDER CORRECTION: The Builder shall repair cracks as necessary so as not to be apparent when the finish flooring material is in place. Repair or replace finish flooring.

•DEFICIENCY: Uneven concrete floors.

CONSTRUCTION STANDARD: Concrete floors in rooms designed and finished by Builder or habitation should not have pits, depressions or areas of unevenness exceeding 1/4 inch in 32 inches or slope in excess of 1/240 of room width or length. Not applicable to floors designed for specific drainage purposes or to slabs that have experienced some movement but are within design performance criteria.

BUILDER CORRECTION: Builder to repair or replace to meet the above standard. Surface patching shall be acceptable. Repair or replace finish flooring installed by Builder, if any.

•DEFICIENCY: Pitting, scaling or spalling of non-excluded concrete.

CONSTRUCTION STANDARD: Such concrete surfaces should not disintegrate to the extent that the aggregate is exposed and loosened under normal conditions of weathering and use. Not applicable to deterioration caused by salt, chemicals, mechanical implements, normal activities involved in the construction of the Home, and other factors beyond the Builder's control.

BUILDER CORRECTION: Builder to repair or replace to meet the above standard.

•DEFICIENCY: Excessive separation of brick or masonry edging from concrete slab and step.

CONSTRUCTION STANDARD: Cracks or separation is common, but cracks in excess of 1/4 inch are excessive.

BUILDER CORRECTION: The Builder shall grout the crack.

•DEFICIENCY: Cracking, settling, heaving or separating of structurally attached stoops or steps.

CONSTRUCTION STANDARD: Stoops or steps should not settle, heave or separate in excess of 1 inch in relation to the house structure. No cracks except hairline cracks (less than 1/4 inch) are acceptable in structurally attached concrete stoops.

BUILDER CORRECTION: Builder to take corrective action to meet standard. Surface patching shall be acceptable.

III. MASONRY

3.1 BRICK, BLOCK AND STONE

•DEFICIENCY: Excessive cracking in masonry walls.

CONSTRUCTION STANDARD: Small cracks in masonry and mortar due to shrinkage are not unusual. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Repair cracks in excess of 1/8 inch by pointing or patching. It is recommended that this be done toward the end of the first year of the warranty. Horizontal cracks greater than 3/16 inch should be investigated to determine the cause. Horizontal cracks greater than 3/16 inch should be repaired by pointing, patching, reinforcement or replacement of defective area. Color matching is not guaranteed.

•DEFICIENCY: Excessive cracking in masonry walls or veneer above grade.

CONSTRUCTION STANDARD: Small cracks due to shrinkage are not unusual. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Repair cracks in excess of 1/8 inch by pointing. It is recommended that this be done toward the end of the first year of the warranty. Color matching is not guaranteed.

3.2 STUCCO

•DEFICIENCY: Excessive cracking or spalling of finish surface.

CONSTRUCTION STANDARD: Hairline cracks are common. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Clean out area by scraping and fill with stucco. Color, finish and texture matching are not guaranteed.

3.3 HARDCOAT STUCCO

•DEFICIENCY: Excessive cracking in hardcoat stucco wall surfaces.

CONSTRUCTION STANDARD: Hairline cracks are normal in hardcoat stucco wall surfaces. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Builder to repair cracks by filling with a latex filler. Existing color and finish to be matched as closely as possible by using tinted filler or painting the repaired area. Exact matching of the color, finish and texture is not guaranteed.

IV. CARPENTRY

4.1 ROUGH CARPENTRY

•DEFICIENCY: Floor squeak.

CONSTRUCTION STANDARD: Floor areas should not have squeaks that are loud and reasonably objectionable, and the subflooring should be secure to the joists. However, there is no guarantee that floors will not squeak, so isolated floor squeaks are not defects.

BUILDER CORRECTION: Builder should locate and make every reasonable effort to repair, if caused by improper installation.

•DEFICIENCY: Uneven wood framed floors.

CONSTRUCTION STANDARD: Floors should be level within 1/4 inch in 32 inches, measured parallel to floor joists. The overall floor slope should not be in excess of 1/240 of room width or length.

BUILDER CORRECTION: Builder to correct or repair to meet the above standards.

•DEFICIENCY: Bowed stud walls and/or ceilings.

CONSTRUCTION STANDARD: All interior and exterior walls and ceilings have slight variances on

their finished surfaces. Bowing should not be so visible as to detract from the finished surface. Walls and ceilings bowed in excess of $L/240$ of any horizontal or vertical measurement is considered excessive.

BUILDER CORRECTION: Builder to correct or repair to meet the above standards.

DEFICIENCY: Out of plumb wood framed walls.

CONSTRUCTION STANDARD: Walls should be plumb within 1 inch in 8 feet.

BUILDER CORRECTION: Builder to correct or repair to meet the above standards.

DEFICIENCY: Delaminating subflooring.

CONSTRUCTION STANDARD: Subflooring that delaminates on the "finish" side is a defect.

BUILDER CORRECTION: Builder to repair or replace the subflooring and replace the finish materials as needed to match the existing finish as closely as possible. Color, finish and texture matching are not guaranteed.

4.2 FINISH CARPENTRY — INTERIOR

DEFICIENCY: Quality of finished interior trim workmanship.

CONSTRUCTION STANDARD: Joints between moldings and adjacent surfaces should not exceed 1/8 inch.

BUILDER CORRECTION: Repair joints and touch up the finish as needed to match existing as close as possible. Caulking is acceptable.

4.3 FINISH CARPENTRY—EXTERIOR

DEFICIENCY: Quality of finished exterior trim workmanship.

CONSTRUCTION STANDARD: Joints between exterior trim elements should not exceed 3/8 inch. In all cases the exterior trim at masonry and siding shall be capable of performing its function to exclude the elements.

BUILDER CORRECTION: Repair joints and touch up the finish as needed to match existing as close as possible. Caulking is acceptable.

4.4 NAIL HOLES

DEFICIENCY: Exposed nail heads in wood.

CONSTRUCTION STANDARD: Nail holes which have not been filled on finished painted wood are deficiencies. However, material used to fill nail holes may shrink and/or dry up over time, but this is not a deficiency. In addition, some nail holes may not be filled where, because of the product, the surface finish is not conducive or designed to have nail holes filled, and this is not a deficiency.

BUILDER CORRECTION: Fill nail holes as required to meet standard and touch up finish as necessary to match as closely as possible. Color and finish matching are not guaranteed.

V. THERMAL AND MOISTURE PROTECTION

5.1 BASEMENTS AND CRAWL SPACES

DEFICIENCY: Active water flow into basement or so as to create standing water in the crawl space for at least forty-eight (48) consecutive hours.

CONSTRUCTION STANDARD: Leaks resulting in active flow of water through the basement walls or through the basement floor are unacceptable. Leaks resulting in active flow of water that creates standing water in the crawl space for at least forty-eight (48) consecutive hours are unacceptable. Leaks caused by landscaping improperly installed by or on behalf of Homebuyer(s) or by failure to maintain the grades established by Builder are not deficiencies. Dampness in walls and floors may occur in new construction and is not considered a deficiency.

BUILDER CORRECTION: During the first five years of the warranty, the Builder shall take such

action as necessary to correct basement and crawl space leaks as described above, except where the cause is determined to result from action by Homebuyer(s) or someone acting on behalf of Homebuyer(s). Any mold/mildew and/or the presence thereof anywhere in the Home, including, without limitation, in any crawl space, unfinished basement or other unfinished or finished space, is not covered. All aspects of mold/mildew, including cleaning or otherwise addressing, are the responsibility of the Homebuyer(s) as part of maintenance of the Home.

5.2 EXTERIOR SIDING

•DEFICIENCY: Loose siding; delamination, splitting or deterioration of siding.

CONSTRUCTION STANDARD: Siding should be securely fastened to the Home. It should not delaminate, split or deteriorate.

BUILDER CORRECTION: Builder to re-secure or reinstall loose siding. Builder will repair or replace delaminated, split or deteriorated siding matching the existing texture and finish as closely as possible.

NOTE: Any item related in any way to exterior siding (including, without limitation, water intrusion) is covered for one year from the commencement of the warranty.

5.3 SYNTHETIC STUCCO (EIFS)

•DEFICIENCY: Cracks in synthetic stucco wall surfaces.

CONSTRUCTION STANDARD: Cracks are normal in synthetic stucco wall surfaces. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Builder to clean out area by scraping and fill with synthetic stucco to repair cracks as required and touch up the finish to match the existing finish as closely as possible. Color, finish and texture matching are not guaranteed.

NOTE: Any item related in any way to synthetic stucco (including, without limitation, water intrusion) is covered for one year from the commencement of the warranty.

5.4 ROOFING

•DEFICIENCY: Leaks at roof penetrations made in the course of construction.

CONSTRUCTION STANDARD: Roof penetrations made in the course of construction should not leak under normal weather conditions. Leaks resulting from severe weather conditions, such as ice and snow build-up, high winds and driven snow or rains, are not deficiencies. In addition, maintenance/replacement of boots and caulking are Homebuyer(s) maintenance items.

BUILDER CORRECTION: During the first five years of the warranty, Builder shall correct or repair any verified leaks at roof penetrations made in the course of construction.

•DEFICIENCY: Lifted, curled or torn shingles.

CONSTRUCTION STANDARD: Shingles should not lift, curl or tear under normal weather conditions. Accidental loss or damage from, for example, natural causes, fire, aircraft or vehicles is not a deficiency.

BUILDER CORRECTION: Builder to repair and/or replace defective shingles to match the existing shingles as closely as possible.

5.5 SEALANTS

•DEFICIENCY: Leaks in exterior walls due to inadequate caulking.

CONSTRUCTION STANDARD: Joints and cracks in exterior wall surfaces and around openings should be properly caulked to exclude the entry of water and excessive drafts. Properly installed caulking will shrink and must be maintained by Homebuyer(s) during the life of the Home; this is not a deficiency.

BUILDER CORRECTION: If requested by Homebuyer(s), Builder shall repair and/or caulk joints or

cracks in exterior wall surfaces as required to correct the deficiency. It is Homebuyer(s) responsibility to maintain the caulking.

5.6 GUTTERS AND DOWNSPOUTS

•DEFICIENCY: Gutters and/or downspouts leak or have standing water.

CONSTRUCTION STANDARD: Gutters and downspouts should not leak. Gutters should be pitched properly to drain water. Standing water in the gutter that does not exceed 1 inch in depth is acceptable. However, it is the Homebuyer(s) responsibility to keep gutters and downspouts clean so as to assure proper drainage and prevent leaks, overflow or standing water.

BUILDER CORRECTION: Repair leaks and pitch to drain properly.

VI. DOORS AND WINDOWS

6.1 INTERIOR AND EXTERIOR DOORS

•DEFICIENCY: Warping of interior and exterior doors.

CONSTRUCTION STANDARD: Exterior doors may warp to some degree due to the temperature and moisture differential between the inside and outside faces. Doors that warp so as to prevent normal closing are defective. Warping of 1/4 inch or less, measured from top to bottom, is acceptable.

BUILDER CORRECTION: Repair or replace the doors as needed and finish to match the existing doors as closely as possible.

•DEFICIENCY: Door binds against the frame. Door will not lock.

CONSTRUCTION STANDARD: Doors should operate freely without binding against the frame. The lock should operate smoothly and fit to the keeper.

BUILDER CORRECTION: Builder to adjust the door and keeper to operate freely.

•DEFICIENCY: Door panels shrink showing bare wood.

CONSTRUCTION STANDARD: Panels will shrink and expand, showing raw wood edges, with temperature and humidity changes. This is not a deficiency.

BUILDER CORRECTION: None.

•DEFICIENCY: Split door panel.

CONSTRUCTION STANDARD: Splits that allow visible light penetration through the door are defects.

BUILDER CORRECTION: Repair or replace as needed one time during the first year of the warranty. Finish to match the existing doors as closely as possible.

•DEFICIENCY: Door rubs on the carpet.

CONSTRUCTION STANDARD: The door should not rub the carpet.

BUILDER CORRECTION: Builder to trim the bottom of the door and re-seal the bottom edge.

6.2 GARAGE DOOR(S) ON ATTACHED GARAGE

•DEFICIENCY: Garage door(s) fail to operate properly.

CONSTRUCTION STANDARD: Garage door(s) should operate properly and fit the opening closely. Under heavy weather conditions, there may be some penetration by the elements.

BUILDER CORRECTION: Builder to adjust or replace garage doors as required to operate under normal weather conditions.

6.3 WOOD, METAL AND PLASTIC WINDOWS

•DEFICIENCY: Malfunction of windows.

CONSTRUCTION STANDARD: Windows should operate with reasonable ease. Double hung window sashes are permitted to move within a 2 inch tolerance when in the open position.

BUILDER CORRECTION: Builder to adjust, repair or replace as required. During the first five years of the warranty, Builder to adjust or replace wood double hung window sash tracks if necessary to correct the deficiency.

DEFICIENCY: Condensation and/or frost on windows.

CONSTRUCTION STANDARD: Condensation on interior surfaces is caused by temperature and humidity differences. In cold weather, this will turn to frost. This is not a deficiency.

BUILDER CORRECTION: None.

6.4 SASH LOCK

DEFICIENCY: Sash lock will not operate properly.

CONSTRUCTION STANDARD: The sash lock should be firmly attached to the window frame and close properly so as to lock the window.

BUILDER CORRECTION: During the first five years of the warranty, Builder to adjust, repair or replace the sash lock. Builder to adjust the window if the sashes do not align properly to permit the sash lock to operate.

6.5 STORM DOORS, WINDOWS AND SCREENS

DEFICIENCY: Improper operation of storm doors, windows and screens installed by Builder.

CONSTRUCTION STANDARD: Storm doors, windows and screens should operate and fit so as to provide the protection they are intended to provide.

BUILDER CORRECTION: Builder to adjust or replace as needed.

6.6 WEATHERSTRIPPING AND SEALS

DEFICIENCY: Air or water infiltration around doors and windows.

CONSTRUCTION STANDARD: Air infiltration is generally normal and necessary for proper ventilation of the Home, even in colder or warmer weather. Air infiltration will be noticeable around doors and windows, especially during high winds. There could be some water infiltration during high winds as well.

BUILDER CORRECTION: None. This is not a defect.

6.7 INSULATED WINDOW SEALS

DEFICIENCY: Clouding or condensation between the panes of insulated glass.

CONSTRUCTION STANDARD: The windows should be free of clouding and condensation between the panes of glass.

BUILDER CORRECTION: During the first five years of the warranty, Builder to repair breaks in the hermetic seal of insulated windows to correct the deficiency, as defined in the manufacturer's warranty. After expiration of any manufacturer's warranty, Builder will cover materials as would be covered by the manufacturer's warranty.

VII. FINISHES

7.1 LATH AND PLASTER

•DEFICIENCY: Excessive cracks in surfaces.

CONSTRUCTION STANDARD: Hairline cracks are common. Cracks larger than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Builder to repair cracks and touch up the paint to match as closely as possible, one time only during the first year of the warranty.

7.2 DRYWALL

•DEFICIENCY: Defects caused by poor workmanship such as blisters in tape, excess compound in joints, exposed corner beads, or trowel marks.

CONSTRUCTION STANDARD: Imperfections such as occasional nail pops that do not crack the finish, seam lines and hairline cracks are common to drywall and are not defects. Depressions or slight mounds at nail heads are not defects. Blisters in tape, excess compound in joints, exposed corner beads, trowel marks, excessive nail pops and nail pops that cause cracking of the finish are defects.

BUILDER CORRECTION: Builder to correct defects to acceptable tolerance and touch up the finish to match the existing finish as closely as possible, one time only during the first year of the warranty. Significant repairs may require the entire area to be repainted. An exact color match is not guaranteed.

7.3 HARD SURFACE FINISHES (CERAMIC TILE, MARBLE, FLAGSTONE, QUARRY TILE)

•DEFICIENCY: Finish material (not the mortar or grout joints) cracks and/or becomes loose.

CONSTRUCTION STANDARD: Finish material that cracks or becomes loose is a defect.

BUILDER CORRECTION: Builder to replace any cracked materials and resecure any loose materials. Slight color and pattern variations are normal. Builder is not responsible for discontinued materials by the manufacturer. Unless the defective area is greater than 25% of the finished area, the Builder will not be required to replace the entire area.

•DEFICIENCY: Cracks in mortar or grout joints or at junctions with other material, such as a bathtub.

CONSTRUCTION STANDARD: Cracks are common under normal conditions.

BUILDER CORRECTION: Builder will repair mortar or grout as necessary, one time only in the first year of the warranty. Builder is not responsible for color variations or discontinued color grout.

7.4 HARDWOOD FLOORING

•DEFICIENCY: Cracks between the planks, squeaks and uneven floors.

CONSTRUCTION STANDARD: There are no industry standards for determining an acceptable or excessive crack. Builder will repair cracks that exceed 1/16 inch. But Homebuyer(s) must prevent excessive moisture from getting on the floor and maintain a stable temperature and humidity level in the Home year-round. Floors should be level within 1/4 inch in 32 inches.

BUILDER CORRECTION: Builder will repair cracks that exceed 1/16 inch. Cracks between planks of 1/16 inch to 1/8 inch will be repaired by filling with a color coordinated wood filling compound to match as closely as possible. Cracks that exceed 1/8 inch will be repaired by replacing the planks. Squeaks caused by defective installation will be repaired. Uneven flooring resulting from buckling, swelling, or warping that exceeds 1/4 inch in 32 inches as measured perpendicular to the planks will be repaired if caused by defective workmanship.

7.5 RESILIENT FLOORING

•DEFICIENCY: Nail pops appear on the surface of flooring.

CONSTRUCTION STANDARD: Readily apparent nail pops are a deficiency.

BUILDER CORRECTION: The Builder shall correct nail pops which have broken the surface and repair or replace the floor covering in the affected area only (not the entire floor). Builder is not responsible for discontinued patterns or color variations in tile floor covering.

•DEFICIENCY: Depressions or ridges appear in the flooring due to subfloor irregularities.

CONSTRUCTION STANDARD: Readily apparent depressions or ridges exceeding 1/8 inch should be repaired. The ridge or depression measurement is taken at the gap created at one end of a 6 inch straight edge placed over the depression or ridge with three inches on one side of the depression or ridge held tightly to the floor.

BUILDER CORRECTION: The Builder shall take corrective action as necessary to bring the defect within acceptable tolerances so that it is not readily visible. Builder is not responsible for discontinued patterns or color variations in floor covering.

•DEFICIENCY: Seams or shrinkage gaps show.

CONSTRUCTION STANDARD: Gaps shall not exceed 1/8 inch in width. Where dissimilar materials abut, the gap shall not exceed 3/16 inch.

BUILDER CORRECTION: Builder to correct. If replacement is necessary, the Builder is not responsible for discontinued patterns or color variations in the floor covering.

7.6 CARPETING

•DEFICIENCY: Carpet seams separate, carpet becomes loose or excessive stretching occurs.

CONSTRUCTION STANDARD: Seams that separate due to improper installation are a deficiency. Carpet should not come loose. Carpet should not have excessive stretching. The carpeting material itself is not covered, but is covered solely by the manufacturer's warranty.

BUILDER CORRECTION: Builder to repair seams. Builder to resecure or restretch carpeting as needed one time only during the first year of the warranty.

7.7 PAINTING

•DEFICIENCY: Mildew or fungus on painted surfaces.

CONSTRUCTION STANDARD: Mildew or fungus is a maintenance item. It is not a deficiency.

BUILDER CORRECTION: None.

•DEFICIENCY: Exterior paint or stain peels or deteriorates.

CONSTRUCTION STANDARD: Exterior paints or stains should not fail during the first year of the warranty. Fading is normal and subject to sun and weather exposure. Fading is not a deficiency. Peeling or other deterioration of exterior paint which occurs after the end of the first year of the warranty is not covered, even though some peeling or deterioration of some part of the exterior paint may have occurred during such first year.

BUILDER CORRECTION: Builder shall properly prepare and refinish affected areas only, matching the existing color as closely as possible. Color matching of paint is not guaranteed.

•DEFICIENCY: Painting required as corollary repair because of other work.

CONSTRUCTION STANDARD: Necessary repair of a painted surface under warranty will be refinished to match surrounding areas as closely as possible.

BUILDER CORRECTION: Refinish repaired areas as indicated. Color matching of paint is not guaranteed.

•DEFICIENCY: Deterioration of varnish or lacquer finishes:

CONSTRUCTION STANDARD: Natural finishes on interior woodwork that deteriorate during the first year of the warranty are a deficiency. Exterior varnish-type finishes deteriorate rapidly and are not covered.

BUILDER CORRECTION: Refinish the affected area only, matching the color as closely as possible.

•**DEFICIENCY:** Interior paint application and coverage.

CONSTRUCTION STANDARD: Interior paint shall sufficiently cover wall, ceiling and trim surfaces.

BUILDER CORRECTION: Builder shall repaint affected surfaces only where inadequate paint has been applied. The color shall be matched as closely as possible.

•**DEFICIENCY:** Paint splatters and smears on finish surfaces.

CONSTRUCTION STANDARD: Excessive splatters and smears that detract from the finish, and which can not be removed by normal cleaning methods, are a deficiency. Minor paint splatters that are not readily noticeable are not a deficiency.

BUILDER CORRECTION: Builder to clean/remove paint and restore the surface finish, matching colors as closely as possible.

7.8 WALL COVERING

•**DEFICIENCY:** Peeling of wallpaper.

CONSTRUCTION STANDARD: Peeling of wallpaper, not due to abuse or negligence, is a deficiency. Wallcovering installed by anyone other than Builder is not covered.

BUILDER CORRECTION: Builder to repair or replace defective wallpaper. Builder is not responsible for discontinued patterns or variations in color.

•**DEFICIENCY:** Mismatching in wallcovering pattern originally installed by Builder.

CONSTRUCTION STANDARD: Mismatching pattern due to workmanship over a large area that severely detracts from the appearance is a deficiency. Wallcovering installed by anyone other than Builder is not covered.

BUILDER CORRECTION: Builder to replace mismatched wallcovering. Builder is not responsible for discontinued patterns or variations in color.

VIII. FIREPLACES

8.1 FIREPLACE OPERATION

•**DEFICIENCY:** Fireplace or chimney does not draw properly causing smoke to enter the Home.

CONSTRUCTION STANDARD: The fireplace and chimney should function as intended. High winds can cause temporary negative draft situations. Similar negative draft situations can also be caused by obstructions such as large branches of trees too close to the chimney. In some cases, it may be necessary to open a window slightly to create an effective draft. Builder is not responsible for malfunctions due to natural causes and/or causes beyond Builder's control.

BUILDER CORRECTION: Builder to correct malfunctions caused by improper construction.

8.2 CHIMNEY

•**DEFICIENCY:** Chimney separating from structure to which it is attached.

CONSTRUCTION STANDARD: Newly built fireplaces will often incur slight amounts of separation from the main structure. Separation greater than 1/2 inch from the main structure in any 10 foot vertical measurement is a deficiency.

BUILDER CORRECTION: Builder to correct as required. Grouting or caulking is acceptable for separations up to 1/2 inch.

IX. CABINETRY

9.1 KITCHEN AND VANITY CABINETS

•DEFICIENCY: Cabinet doors and drawers malfunction.

CONSTRUCTION STANDARD: Cabinet doors, drawers and other operating parts should function as designed.

BUILDER CORRECTION: Builder to repair or replace.

•DEFICIENCY: Warping of cabinet doors and drawer fronts.

CONSTRUCTION STANDARD: Warpage that exceeds 1/4 inch (exclusive of any gap created by spacers), measured from the face of the cabinet frame with the door or drawer in the closed position, is a deficiency.

BUILDER CORRECTION: Builder to correct or replace as required.

•DEFICIENCY: Gaps between cabinets and the ceiling or walls.

CONSTRUCTION STANDARD: Gaps should not exceed 1/4 inch.

BUILDER CORRECTION: Adjust cabinets and countertops, or close with suitable moulding to match the finish as closely as possible. Caulking is acceptable.

9.2 COUNTERTOPS

•DEFICIENCY: Surface cracks, delaminations and chips in high pressure laminated vanity and kitchen countertops.

CONSTRUCTION STANDARD: Countertops fabricated with high pressure laminate coverings should not delaminate or have chips or surface cracks. Gaps between joints should not exceed 1/16 inch. Moisture and water build-up in seams will occur if such areas are not properly maintained by Homebuyer(s) so, unless caused by Builder, moisture and water build-up in seams is not a deficiency.

BUILDER CORRECTION: Builder to repair or replace to meet the standard.

X. PLUMBING SYSTEMS

10.1 SEPTIC TANK SYSTEM

•DEFICIENCY: Septic system fails to operate properly.

CONSTRUCTION STANDARD: Septic system should properly handle normal flow of household effluent. It is possible that an overflow can occur due to freezing, soil saturation, changes in the ground water table or excessive use of plumbing or appliances. Periodic pumping of the septic tank is considered a Homebuyer(s) maintenance responsibility and a normal need for pumping is not a deficiency.

BUILDER CORRECTION: During the first two years of the warranty, Builder to repair system to correct malfunction due to improper design or installation. Builder shall not be responsible for malfunctions which occur through negligence or abuse or natural causes (such as freezing or changes in ground water table) and/or conditions that are beyond the Builder's control. The following are considered negligence or abuse:

- A. Excessive use of water, such as overuse of the washing machine and the dishwasher, including their simultaneous use.
- B. Connection of sump pump, roof drains or backwash from water conditioner to the system.
- C. Placing of non-biodegradable items in the system.
- D. Addition of any harsh chemicals, greases or cleaning agents, and excessive amounts of bleaches or drain cleaners.
- E. Use of a food waste disposer not supplied by Builder.
- F. Placement of impervious surfaces over the disposal area.
- G. Allowing vehicles to drive or park over the disposal area.

- H. Failure to periodically pump out the septic tank when required.

10.2 PLUMBING

•DEFICIENCY: Water service line breaks or leaks or fails to deliver water.

CONSTRUCTION STANDARD: Service connections are the Builder's responsibility. The water service line should function as intended. Damage or failure resulting from neglect or abuse or landscaping activities, or from conditions beyond the Builder's control (such as, for example, without limitation, disruption or elimination of sources of water supply), is not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder to repair verified leaks in the line or restore service, if leak or failure is due to defective workmanship or materials, and restore the landscaping in the affected area. The Builder's responsibility for water service lines extends only from the Home to the water meter connection on the property on which the Home is situated.

NOTE: Should a water service line break or leak occur, Homebuyer(s) should immediately shut off the water service at the meter and call the appropriate public utility service.

•DEFICIENCY: Leakage in pipes or fittings. Leakage from pipes freezing and bursting.

CONSTRUCTION STANDARD: No leaks should exist in any plumbing pipes or fittings. Condensation on piping does not constitute leakage. Exterior hose bibs and other hose connections are not covered. Leaks occurring because of neglect or failure to maintain suitable temperatures in the Home to prevent pipes from freezing and bursting are not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder shall repair any leakage from pipes or fittings installed by Builder, except for leakage caused by freezing. During the first two years of the warranty, Builder shall repair any leakage from pipes or fittings installed by Builder caused by freezing.

NOTE: Should a water pipe leak occur, Homebuyer(s) should immediately shut off the water service and call the appropriate public utility service.

•DEFICIENCY: Stopped up sewers, fixtures and drains.

CONSTRUCTION STANDARD: Sewer fixtures and drains should operate properly. Damage, insufficient operation or clogging due to neglect, abuse, improper operation or landscaping activities, or from conditions beyond Builder's control, is not covered.

BUILDER CORRECTION: During the first five years of the warranty, where defective construction is shown to be the cause of the deficiency, the Builder will make the necessary repairs. The Builder's responsibility for sewer lines extends only to the boundary line of the property on which the Home is situated.

•DEFICIENCY: Leakage in a faucet, valve, tub, sink or toilet.

CONSTRUCTION STANDARD: No faucet, valve, tub, sink or toilet should leak due to defects in material or workmanship. Replacement and maintenance of washers and seals are the responsibility of the Homebuyer(s). Leakage due to worn washers or seals is not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder shall repair or replace the leaking faucet, valve, tub, sink or toilet.

•DEFICIENCY: Defective plumbing fixtures or trim fittings.

CONSTRUCTION STANDARD: Fixtures or fittings should operate or perform their intended function properly. Tarnishing and pitting of faucets are not covered, but are covered solely by the manufacturer's warranty. High iron content in the water will cause staining of fixtures. It is the Homebuyer(s) responsibility to treat the water, if necessary. No Builder correction is required.

BUILDER CORRECTION: During the first five years of the warranty, the Builder shall repair or replace any fixture or fitting which is outside of acceptable standards of operation or performance.

10.3 GAS LINE

•DEFICIENCY: Leakage in the interior gas line piping.

CONSTRUCTION STANDARD: No leaks should exist in any gas pipes or fittings. Damage resulting from neglect or abuse, or from conditions beyond the Builder's control (such as, for example, without limitation, disruption or elimination of sources of gas supply), is not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder to repair verified leaks in piping as necessary, if leak is due to defective workmanship or materials.

NOTE: Should a gas pipe leak occur outside the Home, Homebuyer(s) should call the appropriate public utility service immediately. If the leak occurs inside the Home, Homebuyer(s) should shut off the gas service immediately, ventilate the Home, and call the appropriate public utility service immediately.

XI. HEATING AND AIR CONDITIONING SYSTEM

11.1 HEATING

•DEFICIENCY: Inadequate heating.

CONSTRUCTION STANDARD: The heating system shall be capable of producing an inside temperature of 68 degrees Fahrenheit as measured in the center of each room at a height of 3 feet above the floor under local outdoor winter design conditions as specified in the ASHRAE handbook. There may be times when the outdoor temperature falls below the design temperature. When this occurs, the temperature in the Home may be lower than 68 degrees. Rooms located over garages and sunporches will experience a temperature differential due to their exposure, and this is not a deficiency.

BUILDER CORRECTION: Correct the heating system to meet the standard. Builder to balance dampers, registers and make other minor adjustments one time only during the first year of the warranty.

11.2 AIR CONDITIONING

•DEFICIENCY: Inadequate cooling.

CONSTRUCTION STANDARD: If air conditioning is provided, the cooling system shall be capable of maintaining an inside temperature of 78 degrees Fahrenheit as measured in the center of each room at a height of 5 feet above the floor under local outdoor summer design conditions as specified in the ASHRAE handbook. There may be times when the outdoor temperature rises above the design temperature. When this occurs, the temperature in the Home may be higher than 78 degrees. When the outdoor temperature exceeds 95 degrees, a differential of 17 degrees will be accepted as meeting the standard. Rooms located over garages and sunporches will experience a temperature differential due to their exposure, and this is not a deficiency.

BUILDER CORRECTION: Correct the cooling system to meet the standard. Builder to balance dampers, registers and make other minor adjustments one time only during the first year of the warranty. Changing and/or adding refrigerant, which should be done on at least an annual basis, is the responsibility of the Homebuyer(s).

•DEFICIENCY: Refrigerant line leak or clog.

CONSTRUCTION STANDARD: Refrigerant lines should not develop leaks during normal operation. However, condensation lines will clog under normal use. This is the maintenance responsibility of the Homebuyer(s) and requires no correction by the Builder.

BUILDER CORRECTION: During the first two years of the warranty, repair leaking refrigerant lines and recharge the unit.

•DEFICIENCY: Ductwork separates or becomes unattached.

CONSTRUCTION STANDARD: Ductwork should remain intact and securely fastened.

BUILDER CORRECTION: During the first two years of the warranty, reattach and resecure as necessary.

XII. ELECTRICAL SYSTEM

12.1 ELECTRICAL CONDUCTORS

•DEFICIENCY: Failure of wiring to carry its designated circuit load to the electrical box.

CONSTRUCTION STANDARD: Wiring shall carry the designed load for normal residential use.

BUILDER CORRECTION: During the first five years of the warranty, correct the wiring as necessary to meet the standard.

12.2 SWITCHES AND RECEPTACLES

•DEFICIENCY: Fuses blow or circuit breakers kick out.

CONSTRUCTION STANDARD: Fuses and circuit breakers should not activate under normal usage.

BUILDER CORRECTION: During the first two years of the warranty, correct the fuse wiring or breakers as necessary.

•DEFICIENCY: Malfunction of electrical outlets and switches.

CONSTRUCTION STANDARD: All outlets and switches should operate as intended.

BUILDER CORRECTION: During the first five years of the warranty, repair or replace defective switches and outlets. Light fixtures are covered solely by the manufacturer's warranty.

12.3 SERVICE AND DISTRIBUTION

•DEFICIENCY: Ground fault interrupter trips frequently.

CONSTRUCTION STANDARD: Ground fault interrupters are sensitive safety devices that protect against electrical shock and can be tripped very easily. A ground fault interrupter that does not operate as intended is a deficiency.

BUILDER CORRECTION: Builder to replace defective ground fault interrupter.

s:\legal\warranty\5-20 warranty.1105.doc
rev: 112905

NOTES



NOTES



John Wieland
JOHN WIELAND HOMES
AND NEIGHBORHOODS

Rev 4/06

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
SEP 15 PM 2:07
C/A NO.: 2011-CP-46-00796
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

**DEFENDANT JOHN WIELAND HOMES
AND NEIGHBORHOODS OF THE
CAROLINAS, INC.'S MEMORANDUM
OF LAW IN SUPPORT OF MOTION TO
COMPEL ARBITRATION AND
DISMISS**

Defendant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("Defendant" or "JWH") submits this Memorandum of Law in support of its Motion to Compel Arbitration and Dismiss Plaintiffs' Complaint in the above-referenced lawsuit.

FACTUAL BACKGROUND

It is undisputed that Ralph and Louise Parsons ("Plaintiffs" or "Parsons") bought a lot and a house from JWH in Fort Mill, South Carolina on June 30, 2007, as evidenced by the parties' Purchase Agreement, attached to Defendant's Motion as Exhibit "A". The Purchase Agreement's "Warranty and Arbitration" provision incorporates by reference the John Wieland Homes Warranty ("JWH Warranty," attached as Exhibit "B" to Defendant's Motion) that describes in detail the dispute resolution process agreed upon by the parties. (See Ex. A, ¶ 21; Ex. B, p. 10 ¶ 0). The Purchase Agreement and the JWH Warranty are collectively referred to herein as the "Agreement."

The Agreement provides that mandatory, binding arbitration is the sole and exclusive remedy for any and all disputes between these parties arising out of or relating in any manner to any purchase agreement with JWH, the JWH Warranty, the Home and/or property on which it is

constructed, or otherwise. (Ex. B). The Agreement specifically deems to be arbitrable all claims, without limitation, 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. (Ex. B).

Plaintiffs received, read, and expressly consented to the terms of the Agreement and initialed the Agreement's "Warranty and Arbitration" clause acknowledging have done so. (Ex. A, ¶ 21). In direct contravention of the Agreement, Plaintiffs filed the instant lawsuit against JWH alleging causes of action for rescission, breach of contract, fraud, negligent misrepresentation, unfair trade practices, negligence, gross negligence, and breach of implied warranties. Because the Agreement specifically requires that any questions of arbitrability be decided by the arbitrator, Defendant JWH has filed an Arbitration Demand with Construction Arbitration Associates, Inc. seeking a determination of the specific remedies, if any, availing to the Parsons under the Agreement. (See Ex. B, ¶ 0 at 11). Defendant also moves this Court for an order compelling arbitration and dismissing Plaintiffs' Complaint.

THE AGREEMENT

In the Purchase Agreement, Plaintiffs expressly agreed to resolve any disputes in mandatory arbitration. Paragraph 21 of the Purchase Agreement, entitled "Warranty and Arbitration," provides in part:

THE JWH WARRANTY IS ALSO GIVEN BY SELLER AND ACCEPTED BY PURCHASER IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT PURCHASER HAS OR MAY HAVE AT LAW OR IN EQUITY AGAINST SELLER RELATING TO THE PROPERTY, CONSTRUCTION ON THE PROPERTY, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING ON THE PROPERTY INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF

THE JWH WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY PURCHASER. 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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN.

(Ex. A at ¶ 21) (emphasis added in bold). The Plaintiffs agreed to Paragraph 21 and initialed it separately acknowledging that they read and received the JWH Warranty. (Ex. A at ¶ 21). In so doing, they further expressly consented to resolve in binding arbitration per the terms of the JWH Warranty, which is incorporated into Paragraph 21 of the Agreement by reference, any disputes as follows:

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 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.

(Ex. B, ¶ O at 10-11) (emphasis added).

The Agreement further mandates that its arbitration procedure:

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.

(Ex. B, ¶ O at 12) (emphasis in original).

The Plaintiffs were provided a copy of the Homeowner Handbook which includes the JWH Warranty at the same time they were given the Purchase Agreement on June 30, 2007.

(See Clark Aff.). In addition to initialing Paragraph 21 of the Purchase Agreement, the Parsons also signed a Homeowner Handbook Acknowledgement of Receipt on the same date, June 30, 2007.

Notably, the Purchase Agreement entered by the Parsons for the acquisition of the BridgeMill property in 2007 was not the Plaintiffs' first contractual dealings with JWH. In March 2006, the Parsons entered the same Purchase Agreement and they were furnished with the same JWH Warranty for the purchase of property in JWH's BridgeHampton subdivision. (See Clark Aff. Exs. 1, 2, and 3). At that time, the Plaintiffs also agreed to resolve any disputes with JWH in mandatory binding arbitration, and they acknowledged consent to and receipt of the same arbitration clause, Handbook, and JWH Warranty in spring of 2006 as they received again in summer 2007 when they contracted for the purchase of the BridgeMill property. Id.

ARGUMENT

I. **The Federal Arbitration Act applies to the Agreement at issue and preempts South Carolina law.**

To trigger the Federal Arbitration Act ("FAA"), the transaction must "in fact 'involve interstate commerce . . .'" Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 281, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753 (1995). "The term 'commerce' is defined by Section 1 of the [Federal Arbitration] Act to mean interstate or foreign commerce." Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 430, 343 S.E.2d 45, 46 (S.C. Ct. App. 1986); 9 U.S.C.A. § 1.

To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts. See Zabinski v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) (holding transaction involved intrastate development funded by interstate investors, thereby triggering the FAA and

preempting South Carolina law); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (holding the FAA applied where the contract expressly provided it "shall be governed by the FAA"); Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project was interstate where materials, equipment, and supplies were produced and manufactured out-of-state); Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (S.C. Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

The evidence shows that the development of BridgeMill and the construction of the Parsons' home involved interstate commerce and that the parties agreed that the FAA would govern any disputes between them. The affidavit of Andrew McCoy submitted in support of JWH's motion demonstrates that: (1) JWH is a corporation organized under the laws of the state of Georgia; (2) JWH managed the development and sale of BridgeMill from its offices in Charlotte, North Carolina; (3) JWH's development of the BridgeMill subdivision and the construction of homes within BridgeMill, including without limitation the Parsons' property, involved the provision of labor and materials from North Carolina and states other than South Carolina; and (4) JWH employed numerous trades and contracted with suppliers from outside of South Carolina who were involved in the development of BridgeMill and the construction of the Parsons' home. (McCoy Aff. ¶¶ 2-4). Thus, it is undisputed that the development, construction, and sale of the subject home to the Parsons involved interstate commerce.

Like Zabinski, the arbitration provision incorporated by reference and specifically referred to in the Agreement provides: "As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the

U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law.” (JWH Warranty, p. 11 ¶ O; McCoy Aff. ¶4). That the Parsons did not contemplate the interstate nature of the transaction does not change the result. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538 S.E.2d 360, 363-64 (2001) (holding that “[u]nless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.”). Based on the undisputed facts concerning the subject property and the contractual agreement to apply the FAA to any disputes between the parties, the FAA governs the instant dispute and preempts South Carolina law, specifically Section 15-48-10 of the South Carolina Code. See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 116 S. Ct. 1652, 1653, 134 L. Ed. 2d 902 (1996); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 461, 476 S.E.2d 149, 153 (1996).

II. The Agreement's arbitration provisions are enforceable and any ambiguity concerning the scope of the arbitration clause and its application to the Complaint should be resolved in favor of arbitration.

The Fourth Circuit has consistently held that arbitration provisions under the FAA “should be effectuated whenever possible, and federal courts should rigorously enforce agreements to arbitrate.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989)(citations omitted). Under Fourth Circuit law, a litigant can compel arbitration by demonstrating: “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” Poteat

v. Rich Products Corp., 91 Fed.Appx. 832, 834, 2004 WL 119363, 1 (4th Cir. 2004) (citing Adkins v. Labor Ready, Inc., 303 F.3d 496, 500-01 (4th Cir. 2002)).

The FAA reflects "a liberal federal policy favoring arbitration agreements."¹ Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Underlying this policy is Congress' view that arbitration constitutes a more efficient dispute resolution process than litigation. Hightower v. GMRJ, Inc., 272 F.3d 239, 241 (4th Cir. 2001). Accordingly, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002). Any ambiguities related to the interpretation of an arbitration agreement must be resolved in favor of arbitration. "[I]n applying [common law] principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA], due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself are resolved in favor of arbitration. [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]" US. v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001).

The Purchase Agreement and the JWH Warranty both provide that any dispute among the Parsons and JWH, including but not limited to disputes relating to the property the Parsons purchased at BridgeMill, is subject to arbitration.

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

¹ The FAA strongly favors arbitration. It provides: "A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable; save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2.

be final. . . . 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.

(Ex. B, p.11 ¶ O).

The scope of the arbitration provision in the Agreement encompasses every claim and dispute raised by Plaintiffs in their lawsuit. (Compare Exs. A & B with Ex. C). Plaintiffs' lawsuit, in its entirety, arises out of and relates to the Purchase Agreement for the lot and home Plaintiffs bought from JWH. Plaintiffs' Complaint alleges breach of the Purchase Agreement and seeks rescission of the same. (See Compl. First and Second Causes of Action). These claims are within the scope of the Agreement and subject to mandatory, binding arbitration.

Plaintiffs further allege that JWH engaged in tortious conduct including Fraud, Negligent Misrepresentation, Unfair Trade Practices, Negligence, and Gross Negligence. (Compl., Third, Fourth, Fifth, and Sixth Causes of Action). The gravamen of Plaintiffs' Fraud and Negligent Misrepresentation claims is their factually unsupported allegation that JWH intentionally failed to disclose and concealed accurate and complete information concerning their property at the time of the sales transaction under the Purchase Agreement. (Compl., Third and Fourth Causes of Action, ¶¶ 34, 37, 41, 42). Plaintiffs allege that JWH's actions and practices, all of which arise out of the Purchase Agreement as described in their Complaint, are intentionally unfair and deceptive. (Compl., Fifth Cause of Action, ¶ 47). As to their allegations of negligence and gross negligence, Plaintiffs claim that JWH owed them a duty not to sell a home located on allegedly contaminated property. (Compl., Sixth Cause of Action, ¶ 52). Each of these claims sounds in tort and relates to the sales transaction, thereby falling within the scope of the arbitration provision in the Agreement and involving disputes that must be arbitrated.

Finally, Plaintiffs allege that JWH breached Implied Warranties as to the lot and the home they purchased from JWH. (Compl., Seventh Cause of Action). This claim, too, clearly falls within the scope of the arbitration provision in the Agreement and must be arbitrated.

Construction of the JWH Warranty is fundamental to implementing the Purchase Agreement. Further, the Plaintiffs and JWH expressly agreed that their agreement to arbitrate was "not limited to those arising out of or relating to this Agreement or the construction, interpretation, performance, breach, termination, enforceability or validity of this Agreement." They agreed to arbitrate all disputes between them "whether such claim existed prior to or arises on or after the date of this Agreement." Therefore, by the express terms of the existing arbitration provisions, Plaintiffs' disputes with JWH are arbitrable. Indeed, the Agreement clearly and unmistakably evidences that the parties intended for an arbitrator to determine its enforceability and arbitrability.

Plaintiffs' Memorandum misconstrues the Warranty and improperly attempts to apply the exclusion of certain items from the Warranty to the scope of arbitration clause which is in fact broader than the Warranty. The arbitration clause found in the General Provisions of Paragraph V.O. is separate and apart from the Warranty exclusions section and the scope of the claims subject to arbitration in the parties is not limited to Warranty claims as Plaintiffs contend. (Ex. B, p.11 ¶ O). This Court should give the arbitration clause its plain meaning, construe ambiguities in favor of arbitration as the FAA requires, and grant JWH's Motion to Compel Plaintiffs to arbitrate this dispute in the pending proceeding before the CAA.

III. The Plaintiffs received, read, and agreed to the JWH Purchase Agreement and Warranty which include the arbitration provisions on two occasions, once in 2006 and again in 2007.

On June 30, 2007, the day the Plaintiffs executed the Agreement for the purchase of their home in BridgeMill, Plaintiffs initialed Paragraph 21 of the Agreement acknowledging that they received and read the JWH Warranty. Now Plaintiffs contend that although they received a Handbook containing the Warranty, they did not read it before executing the Agreement and would not have agreed to it had they done so. Significantly, Plaintiffs were provided with the Handbook and warranty simultaneously with the Purchase Agreement. (See Chris Davis Aff.) Indeed, they signed an acknowledgment of receipt of the Handbook on June 30, 2007 in addition to initialing the clause of Agreement separately acknowledging that they read and received the Warranty. (Davis Aff., Ex. A).

Significantly, Plaintiffs were familiar with the JWH Warranty and their claim that they were unaware of its existence or its terms are wholly unfounded because they were provided with and executed the same JWH Purchase Agreement and Warranty in March 2006 when they entered a contract to purchase a home in JWH's BridgeHampton subdivision. (See Clarke Aff. & Exs. 1-3). A portion of the Parsons' earnest money from that contract ultimately was credited towards the Plaintiffs' purchase of their BridgeMill home and served as a deposit for the subject Purchase Agreement attached to Defendant's Motion. While JWH contends that Plaintiffs did in fact read and agree to the terms of the Agreements, under South Carolina law, one is bound by a contractual arbitration provision if they signed and thereby agreed to the terms when they are competent and could have read them, regardless whether they in fact did so. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). The court should enforce the

arbitration clause and grant JWH's Motion as Plaintiffs were plainly aware of its existence and terms, and agreed to the clause not once, but twice.

IV. Plaintiffs' Complaint does not involve allegations of illegal or outrageous conduct by JWH, and, therefore, the cases cited by Plaintiffs seeking to avoid the effect of the arbitrations provisions are inapposite.

Because there is a significant relationship between the transaction and contract for the sale of the BridgeMill property to the Plaintiffs and the claims alleged against JWH, the South Carolina cases Plaintiffs rely upon are distinguishable and do not affect the application of the arbitration provisions to the Plaintiffs' claims. The Aiken and Partain cases both involved allegations of outrageous tortious misconduct that were unforeseeable to the parties at the time of the transaction. That is not the case here and those decisions are inapposite.

The Aiken case involved allegations against World Finance Corporation arising from misconduct by its employees. The plaintiff alleged that the employees stole his personal financial information and used it to procure loans and embezzle the proceeds. Aiken v. World Finance Corp. of S.C., 644 S.E.2d 705, 707 (S.C. 2007). The court did not find that a "significant relationship" existed between the tort claims involving theft of personal financial information and the parties' dealings pursuant to their loan agreements. Id. at 708. Therefore, the court refused to interpret the arbitration agreement "as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Id. at 709. However, the Aiken court stated that it did not seek to exclude all intentional torts from the scope of arbitration, but only "those outrageous torts, which although factually related to the performance of the contract, are legally distinct from the contractual relationship between the parties." Id. (emphasis added). In Partain, a case also relied upon extensively by Plaintiffs, the court refused to enforce an arbitration provision against an automobile purchaser where the seller

allegedly intentionally duped the buyer with a “bait-and-switch” and furnished him with a completely different automobile than the one he bargained for. Partain v. Upstate Automotive Group, 689 S.E.2d 602, 605 (S.C. 2010). Again, the court justified its refusal to enforce the arbitration clause on grounds that plaintiffs’ claims involved allegedly outrageous, unforeseeable tortious misconduct. Id.

Here, the Complaint fails to allege facts with “particularity” to support their claim for fraud and this court is not bound to accept Plaintiffs’ conclusory, bare allegations. See Ardis v. Cox, 431 S.E.2d 267, 269 (S.C. App. 1993) (dismissing real estate purchaser’s complaint for fraud and unfair trade practices against seller for failure to plead adequate supporting factual allegations in accordance with Rule 9(b), SCRCP). The Complaint is devoid of substantive allegations supporting that JWH knew or should have known of the alleged contamination on the property the Parsons purchased before the sale occurred. The Plaintiffs received the lot and home they selected and bargained for. There was no “bait and switch” as in Partain. Nor are there allegations that JWH committed “outrageous” tortious misconduct. See Timmons v. Starkey, 698 S.E.2d 809 (S.C. 2010) (holding that arbitration clause was enforceable by brokerage firm against client where the complaint was devoid of supporting allegations that firm engaged in outrageous misconduct or knew its broker was stealing plaintiff-client’s funds from brokerage account). Each of Plaintiffs’ claims bears a significant relationship to the sales transaction and the Purchase Agreement. For these reasons, Aiken and Partain do not preclude enforcement of the Agreement’s arbitration provisions.

V. The arbitration clause at issue is valid and not unconscionable.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25; 644 S.E.2d 663, 668 (2007) (emphasis added). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999).

The Parsons argue that the Purchase Agreement to be one-sided and unconscionable because it requires that they timely comply with the procedures set forth in the JWH Warranty in lodging a dispute. Notably, they do not argue that their claims are time-barred by the JWH Warranty which is among the longest in the construction industry. Nor do they claim that JWH's Warranty has failed to provide them a remedy. Rather, Plaintiffs allege that JWH has spent in excess of \$500,000 to remediate the alleged contamination on their property once the issue was discovered.

Per the Agreement, the Parsons were required to provide Defendant's Customer Service Department with written notice of the claim or dispute and the damages sought in arbitration. (Ex. B, ¶ O at 11). Following the initial letter stating a claim, the Agreement provides that the parties must undergo mandatory, pre-arbitration mediation conducted by an independent, neutral, third-party mediator selected by Construction Arbitration Associates, Inc. ("CAA") based in Atlanta, Georgia, or if the CAA is unable to do so, by the American Arbitration Association.

("AAA"). (Ex. B, ¶ O at 10-11). These provisions are plainly geared towards prompt and fair resolution of any disputes, and they are neither oppressive nor unconscionable.

The Parsons conclusorily argue that the Agreement is one-sided with respect to the CAA's involvement; however, the Parsons fail to provide any evidence that CAA is not a qualified or independent body capable of furnishing and selecting a fair arbitrator. The Parsons complain that the CAA is not precluded from selecting itself, but fail to allege any sound or credible evidence that CAA is biased. On its face, the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. Finally, a plain reading of the arbitration provision reveals that it applies to both parties equally. Contrary to the Parsons' assertions, both parties waive their right to a jury when agreeing to arbitrate. This is not a situation where the Parsons gave up their right to a jury trial, but JWH retained it. The arbitration clause applies reciprocally to the parties.

Simply put, the clear language of the contracts at issue do not constitute terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. There is nothing unconscionable about the pre-arbitration requirement that a demand letter be submitted and the parties engage in pre-arbitration mediation. There is nothing unconscionable about the parties' mutual waiver of a judicial forum in favor of arbitration. The Parsons were not precluded from seeking legal counsel had they not understood the contents of what they read; and they expressly acknowledged they did in fact receive and read the Agreement and Warranty. "[A] person who can read is bound to read an agreement before signing it." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Nor have the Parsons ever complained before now that the Agreement and Warranty are unconscionable. For the foregoing reasons, this Court should enforce the parties' agreed-upon

arbitration clause, compel the Plaintiffs to submit to the binding arbitration before the CAA in the proceeding already initiated by JWH, and dismiss their Complaint.

CONCLUSION

Based on the foregoing Memorandum, the supporting affidavits and exhibits, and any arguments and evidence presented at the hearing before the Court, Defendant John Wieland Homes of the Carolinas, Inc. respectfully requests this Court grant its Motion and enter an Order compelling Plaintiffs to arbitrate these claims and dismissing Plaintiffs' Complaint with prejudice.

Respectfully submitted,

PRATT-THOMAS WALKER, P.A.



G. Trenholm Walker, Esquire

Ian W. Freeman, Esquire

P.O. Drawer 22247

Charleston, S.C. 29403-2247

(843) 727-2200

September 15, 2011
Charleston, South Carolina

Attorneys for Defendant John Wieland Homes and
Neighborhoods of the Carolinas, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

John Wieland Homes and
Neighborhoods of the Carolinas, Inc.

Plaintiff,

vs.

Springs Industries, Inc.

Defendant.

C/A No.: 0:11-cv-01589-JFA

COMPLAINT
(Jury Trial Demanded)

Plaintiff, John Wieland Homes and Neighborhoods of the Carolinas, Inc. alleges and states as follows:

1. John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH") is a corporation organized in the State of Georgia that owns property and transacts business in South Carolina. JWH is the successor to John Wieland Homes and Neighborhoods of North Carolina, Inc., a Georgia corporation.

2. Defendant Springs Industries, Inc. ("Springs") is a corporation organized and existing under the laws of the State of South Carolina.

3. This Court has jurisdiction over the subject matter of this action because the case arises under federal law, namely The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 USC §1961, *et seq.* Jurisdiction is proper under CERCLA § 113 (b), 42 USC §9613 (b), and under 28 USC §1331.

4. This Court has authority to issue a declaratory judgment regarding the rights and liabilities of the parties herein pursuant to CERCLA §113 (g)(2), 42 USC §9613 (g)(2), and 28 USC §2201 and §2202.

5. Venue is proper in this district pursuant to CERCLA §113 (b), 42 USC §9613 (b), and 28 USC § 1391 (b). The real property which is the subject matter of this action is located within this District, and the release of hazardous substances that give rise to this action occurred in this District.

UNDERLYING FACTS

6. JWH is, and at all times relevant to this action, was duly authorized to conduct business in the State of South Carolina. JWH is a "person" as defined in CERCLA §101 (21), 42 USC §9601 (21).

7. On or about November 27, 2002, John Wieland Homes and Neighborhoods of North Carolina, Inc. purchased from Springs and took title to a tract of approximately 65 acres in Lancaster County (the "Property") for the purpose of developing and building a single family residential community that became known as Bridgemill.

8. Springs is a former owner and operator of the Property. Upon information and belief, Springs used the Property for textile storage as well as fabric cutting. Upon information and belief, Springs' activities on the Property included materials that would be considered hazardous. Additionally, upon information and belief, prior to selling the Property, Springs closed a fire pond / settling pond that were on the Property. The fire pond / settling pond had been in use while Springs owned the Property.

9. Springs sold the Property to JWH pursuant to an Agreement for the Purchase and Sale of the Land dated September 5, 2002. Under the Agreement, Springs made certain representations and warranties relating to the condition of the Property. Specifically, as of the effective date of the Agreement, Springs' representatives warranted the following:

To the best knowledge of [Springs], no portion of the Property is being used, or any previous time has been used, as a dump or fill or for the disposal, storage, treatment, processing, or handling of, and the property is free of, all hazardous substances, as defined in the Comprehensive Environmental Response, Compensation, and Liability Act 42 USC § 9601, *et seq.*, as amended ("CERCLA"), and regulations thereunder and under South Carolina law, and the property contains no condition as of the date of the closing which will result in recovery by any person or instrumentality of government (federal, state, or local) of costs of response, removal, or remedial action, or of damages for loss of natural resources, under CERCLA or South Carolina law.

Agreement, § 7.8. Section 20 of the Agreement provides that all of its provisions survive closing.

10. Prior to closing, JWH performed a Phase I Environmental Site Assessment.

11. The assessment did not reveal the existence of any "recognized environmental conditions" that warranted further investigation.

12. JWH's development of the Property as a single-family residential project included the construction of roads, utilities, and other infrastructure as well as the building of houses.

13. In July 2008, JWH was performing work in the backyard of a residence on the Property sold by JWH to Wayne Parsons at 4270 Rochard Lane. The work was being performed in response to concerns raised by Parsons about water drainage.

14. During the work, JWH's contractor encountered a buried underground pipe. Further excavation revealed the presence of a buried, metal-lined, concrete box in the backyard of Mr. Parsons' residence.

15. In response, JWH hired an environmental consulting firm to assist with further investigation. The investigation revealed that the box contained a liquid sludge. The contents of the box and the soil in the vicinity of the box were sampled and analyzed for volatile organic compounds, semi-volatile organic compounds, and metals.

16. The liquid sample from the box revealed the presence of tetrachloroethylene ("PCE") at 34,000 ug/l; trichloroethylene ("TCE") at 2900 ug/l; and other volatile organic compounds.

17. The sludge sample contained PCE at 17,000 mg/kg; TCE at 300 mg/kg, and other volatile organic compounds.

18. The soil sample contained naphthalene at 140 mg/kg.

19. JWH notified the South Carolina Department of Health and Environmental Control ("DHEC") of the discovery of the box.

20. JWH subsequently requested that its environmental consulting firm prepare a work plan to remove the water and sludge from the box; remove the box and piping, and sample the air and crawlspace underneath Mr. Parsons' home.

21. The proposed work plan was submitted to DHEC and Mr. Parsons on August 9, 2008. DHEC authorized JWH to remove and dispose of the contents of the

box and perform the air sampling, but requested that JWH not remove the box or piping pending further investigation.

22. The contents of the box were removed on August 15, 2008 and an additional soil sample was collected. The subsequent result of that sampling revealed relatively low levels of VOCs.

23. Air monitoring was performed on August 20, 2008, the results of which also revealed relatively low levels of VOCs.

24. During this time period, JWH notified Springs to make it aware of its findings.

25. On August 19, 2008 DHEC issued General Notice of Liability Letters under §107(a) of CERCLA, 42 USC §9607 (a). Upon information and belief, both JWH and Springs received these letters.

26. DHEC requested that JWH sign and return a Voluntary Clean-up Contract ("VCC") no later than August 27, 2008 or DHEC would undertake its own response action. JWH approached Springs and requested a joint clean-up effort. Unable to reach an agreement with Springs, ultimately, JWH entered into a VCC with DHEC without Springs, and moved forward with its own work plan to remediate this situation.

27. On November 27, 2008, JWH entered into a VCC with DHEC. The VCC required JWH to submit a remedial investigation work plan. The work plan contained the following tasks: 1) a remedial investigation to determine the source, nature, and extent of contamination of the property; 2) a remedial investigation report documenting results of the remedial investigation and containing a baseline risk assessment; and 3) if

necessary a feasibility study to determine evaluating remedial alternatives for addressing the contamination.

28. The tasks spelled out in the VCC have been carried out and paid for by JWH.

29. JWH has paid for all of the investigation, clean-up costs, and associated costs in response to the contamination. These response costs were necessary and consistent with the National Contingency Plan. Further, Springs is a covered person liable as a potentially responsible party. The contamination was likely present and continued to occur during the period Springs owned and /or operated on the Property

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

30. The allegations in Paragraphs 1 through 29 are incorporated herein by reference.

31. The Declaratory Judgment Act 28 USC § 2201, provides, in relevant part, that:

In a case of actual controversy within its jurisdiction, ...any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested parties seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment and decree shall be reviewable as such.

32. An actual controversy exists between the parties stemming from JWH's demand that Springs pay for the costs for remediating the site and Springs' refusal to do so.

33. JWH is entitled to, and requests, a declaratory judgment that Springs is liable under CERCLA §107(a), §113 (f), 42 USC § 9607(a), for all response costs incurred with respect to the Bridgemill Subdivision site.

SECOND CLAIM FOR RELIEF
(Money Judgment for Past Response Costs)

34. The allegations in Paragraphs 1 through 33 are incorporated herein by reference.

35. JWH has incurred response costs consistent with the National Contingency Plan. Response costs incurred by JWH include cost for investigation, environmental sampling and analysis, and in coordinating with DHEC and other environmental authorities.

36. Springs is liable for JWH for all such costs pursuant to CERCLA § 107(a), CERCLA §113 (f), 42 USC §9607(a) and JWH is entitled to a money judgment against Springs for such amounts.

THIRD CLAIM FOR RELIEF
(Breach of Contract)

37. The allegations in Paragraphs 1 through 36 are incorporated herein by reference.

38. JWH and Springs entered into the Agreement for the purchase of the Property.

39. The Agreement included an express provision, as outlined above, that the Property was free from contamination to the "best knowledge" of Springs. Based on the facts and evidence to date, Springs breached the express terms of the Agreement as

Springs had knowledge of the disposal, storage, treatment, and handling of hazardous substances on the Property and failed to disclose this information.

40. JWH has been directly damaged by Springs' breach and is entitled to judgment against Springs in an appropriate amount of actual damages including, but not limited to, all costs incurred by JWH in the investigation, monitoring, and remediation of the hazardous substances and all costs incurred by JWH in the defense of claims asserted by Parsons.

FOURTH CLAIM FOR RELIEF
(Negligence)

41. The allegations in Paragraphs 1 through 40 are incorporated herein by reference.

42. Springs owed a duty to JWH to disclose all known or reasonably known pollutants as well as any environmental and/or contamination issues on the Property.

43. Springs breached that duty, upon information and belief, by failing to disclose that hazardous materials had been present and/or stored on the Property, that there were possible contamination sites on the Property, that there were hazardous materials associated with the fire pond / settling pond on-site during its ownership, and that it had been engaged in other activities on the Property involving potentially hazardous substances.

44. Springs' failure to disclose these material facts was a misrepresentation as to the condition of the Property.

45. Springs had a financial interest in the sale of the Property to JWH.

46. JWH justifiably relied upon Springs' representations.

47. Upon information and belief, Springs was negligent in its storage, management, and/or use of hazardous substances while it was an owner of the Property and conducted operations on the Property, causing property damage to JWH's Property.

48. As a direct and proximate result of Springs' negligence, including negligent misrepresentation, JWH has suffered actual damages including but not limited to the various costs previously described.

WHEREFORE, Plaintiff respectfully requests a declaratory judgment that Springs is liable for all response costs related to the site, a money judgment against Springs for past response costs, an award of actual damages resulting from Springs' breach of contract, an award of actual damages resulting from Springs' negligence including negligent misrepresentation, and for such other and further relief as is allowed by law and as the Court may deem just and proper.

PRATT-THOMAS WALKER, P.A.

s/ G. Trenholm Walker

G. Trenholm Walker Fed ID # 4487
Clayton B. McCullough Fed ID # 7120
P.O. Drawer 22247
Charleston, SC 29413
843.727.2200
gtw@p-tw.com
cbm@p-tw.com

ATTORNEYS FOR PLAINTIFF

June 30, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

Plaintiffs,

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

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C/A NO.: 2011-CP-46-00796

AFFIDAVIT OF ANDREW W. MCCOY

2011 SEP 15 PM 2:07
CLERK OF COURT
YORK COUNTY, SC

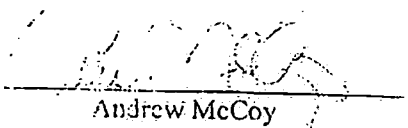
APPEARING BEFORE ME AND BEING DULY SWORN, ANDREW MCCOY states the following:

1. I am a resident of Weddington, North Carolina, am over eighteen years of age, and competent to testify about the matters stated herein based on my own personal knowledge.
2. I currently serve as Vice President of Construction for John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH"). JWH is a corporation organized under the laws of the state of Georgia. I formerly served as the Land Development Manager for JWH and oversaw development of the BridgeMill subdivision and the construction of homes at BridgeMill during the period when the Parsons home was built. Although the BridgeMill subdivision is located in Lancaster County, South Carolina, the JWH Division that managed operations during its development and still today is based out of JWH's offices in Charlotte, North Carolina.
3. JWH's development of the BridgeMill subdivision and the construction of homes within BridgeMill, including without limitation the Parsons' property, involved the provision of labor and materials from North Carolina and states other than South Carolina. JWH employed numerous trades and contracted with suppliers from outside of South Carolina who were involved in the development of

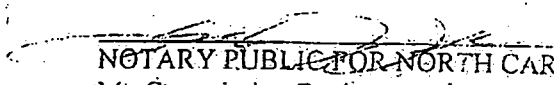
BridgeMill and the construction of the Parsons' home. The development, construction, and sale of the subject home to the Parsons involved interstate commerce.

4. Because JWH's development of the BridgeMill subdivision and construction of homes within it, including the Parsons' property, implicates interstate commerce, JWH has included (and still includes) a mandatory binding arbitration provision in its Purchase Agreement and JWH Warranty the provides for arbitration of all disputes concerning any property JWH sells in the subdivision in accordance with the Federal Arbitration Act, 9 U.S.C. §§ 1-16. The JWH Warranty applicable to the sale of the Parsons' property in June 2007 specifically provides: "As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law." JWH Warranty, p. 11 ¶ 10.

FURTHER AFFIANT SAYETH NOT.


Andrew McCoy

SWORN TO and subscribed before me
this 14 day of September, 2011.


NOTARY PUBLIC FOR NORTH CAROLINA
My Commission Expires: 10-05-2015



STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

Plaintiffs,

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

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C/A NO. 2011-CP-46-00796

AFFIDAVIT OF CHRIS DAVIS

2011 SEP 15 PM 2:09
C.C.P. & GS
YORK COUNTY, SC

APPEARING BEFORE ME AND BEING DULY SWORN, CHRIS DAVIS states the following:

1. I am a resident of Fort Mill, South Carolina, am over eighteen years of age, and competent to testify about the matters stated herein based on my own personal knowledge.
2. I currently serve as a Licensed Sales Professional for Builder Services, Inc. ("BSI"). For more than the past five years BSI has acted as the independent listing broker for property in the BridgeMill subdivision that is for sale by John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH"). I formerly served as the Neighborhood Sales Manager for BSI during the period when the subject home in BridgeMill was built and sold to Mr. and Mrs. Ralph Wayne Parsons in 2007. As the Neighborhood Sales Manager, I was responsible for showing prospective purchasers property within BridgeMill and providing them with real estate sales information, including JWH's warranty, and Purchase and Sales Agreements for their consideration. In that capacity, I dealt with Mr. and Mrs. Parsons concerning their purchase of property in the BridgeMill subdivision in 2007.
3. On June 30, 2007, I met with Mr. and Mrs. Parsons and provided them a Purchase and Sale Agreement concerning the purchase of property in the BridgeMill subdivision at 4270 Rochard

Lane, Fort Mill, South Carolina and an accompanying Homeowner Handbook. The JWH Warranty was included in the Homeowner Handbook I furnished to them. My standard practice has been and remains to simultaneously provide prospective purchasers with both the Purchase Agreement and the Homeowner Handbook when they consider entering a contract to purchase property in the BridgeMill subdivision.

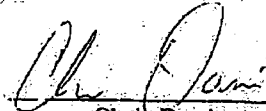
4. On June 30, 2007, during our meeting, the Parsons executed the Purchase Agreement for the purchase of the home at 4270 Rochard Lane in the subdivision. I have reviewed JWH's motion to compel arbitration and Exhibit 1 to the motion is a true and authentic copy of the Purchase Agreement the Parsons signed that day. On June 30, 2007, the same day that the Parsons signed the Purchase Agreement, Mr. Parsons executed the Homeowner Handbook Receipt Confirmation attached hereto as Exhibit A acknowledging receipt of the Handbook. I have reviewed JWH's motion to compel arbitration and Exhibit 2 is a true and authentic copy of the JWH Warranty furnished to the Parsons which was included in the Homeowner Handbook provided to them on June 30, 2007.

5. Paragraph 21 of the Purchase Agreement entitled "Warranty and Arbitration" was initialed by Mr. and Mrs. Parsons at the time they signed the Agreement. They also separately initialed the top and bottom of Purchase Agreement's page containing Paragraph 21. Paragraph 21 provides, among other things, as follows:

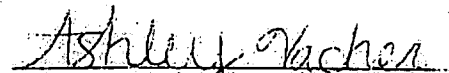
PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN.

[SIGNATURE ON FOLLOWING PAGE.]

FURTHER AFFIANT SAYETH NOT


Chris Davis

SWORN TO and subscribed before me
this 14 day of September, 2011.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 4/3/2014

Homeowner Handbook Receipt Confirmation

(Please print)

Purchaser's Name Ralph Parsons Jr, Louise Parsons

Neighborhood BMLW Lot/Block 279

Neighborhood Sales Manager Chris Davis

I acknowledge receipt of the John Wieland Homes and Neighborhoods
Homeowner Handbook.

Signed [Signature] Date Received 6-30-07
Purchaser

Return completed card to Region Quality Manager



[Signature]
JOHN WIELAND HOMES
AND NEIGHBORHOODS



STATE OF SOUTH CAROLINA

COUNTY OF YORK

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

Plaintiffs,

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

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

C/A NO.: 2011-CP-46-00796

AFFIDAVIT OF KEVIN CLARKE

FILED-RECEIVED
2011 SEP 15 PM 2:08
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, S.C.

APPEARING BEFORE ME AND BEING DULY SWORN, KEVIN CLARKE states the following:

1. I am a resident of Fort Mill, South Carolina, am over eighteen years of age, and competent to testify about the matters stated herein based on my own personal knowledge.
2. I currently serve as Construction Manager for John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("JWH"). I formerly served as the Vice-President of Construction for JWH and oversaw the construction of homes at JWH's BridgeHampton subdivision in Lancaster County, South Carolina.
3. I am informed and believe that in March 2006, the Parsons entered a purchase agreement with JWH to buy a home in the BridgeHampton subdivision located at 5070 Karriker Court, Fort Mill, SC 29715. I dealt with Mr. Parsons on behalf of JWH concerning the construction of the home the Parsons were purchasing on Karriker Court. Attached hereto is a true and authentic copy of the Purchase Agreement (Exhibit 1), the JWH Warranty (Exhibit 2), and the Homeowner Handbook Receipt Confirmation (Exhibit 3) signed by the Parsons on or about March 22, 2006. The JWH Warranty is included in the Homeowner Handbook which Mr. Parsons acknowledged he received in writing. I am

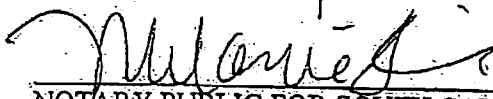
Page 1 of 2

informed and believe that the Parsons ultimately chose to purchase property in the BridgeMill subdivision rather than in BridgeHampton, and \$2,000 of earnest money that they paid in support of the purchase contract for the BridgeHampton property was applied to the purchase contract for the home they purchased in BridgeMill in 2007. A review of the arbitration provisions contained in Paragraph 20 of the 2006 JWH Purchase Agreement and Paragraph O of JWH Warranty entered by the Parsons for the BridgeHampton property reflects that they are identical to those contained in the 2007 JWH Purchase Agreement and JWH Warranty which are applicable to the property ultimately purchased by the Parsons.

FURTHER AFFIANT SAYETH NOT.


Kevin Clarke

SWORN TO and subscribed before me
this 14 day of Sept, 2011.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 1-26-2015

Embossed Hereon Is My
State of South Carolina Notary Public Seal
My Commission Expires January 26, 2015
MELANIE SILLS



FALS. NCS#

PURCHASE AND SALE AGREEMENT
8325-D Knowledge Boulevard, Charlotte, NC 28273
(764) 522-9200

03/22/06
(Date of Purchaser's Offer)

The Property and Financial Terms

1. **Agreement to Buy and Sell Property.** The undersigned Purchaser, Ralph Wayne Parsons, Jr. and Loise C. Parsons, undersigned Seller agrees to sell, all that tract or parcel of land being and being in Lancaster County, South Carolina, Being Lot 757 of Block of Hampton Village Neighborhood, Being more commonly known as 5070 Karriker Court Port Mill, SC 29713, (street address, city, state, zip), Being recorded in Lancaster County Record, Plat Book 2065, Page 0094.

(The foregoing land and the improvements constructed or to be constructed thereon by Seller are referred to herein as the "Property")
2. **Purchase Price and Purchase Deposit.** The Purchase Price of the Property shall be Three Hundred Sixty-Six Thousand Nine Hundred Dollars, \$366,900.00, to be paid to Seller in immediately available funds at closing. Purchaser has paid Seller \$11,000.00 (U 0) Cash (X 1) check as a "purchase deposit" which shall be applied as partial payment of the Purchase Price of the Property at closing. Purchaser further agrees as follows: (a) Broker shall have no liability for the purchase deposit since Seller is holding the same, (b) Seller may deposit the purchase deposit in an interest-bearing account, with all interest earned on the purchase deposit being retained by Seller and not becoming a part of the purchase deposit, and (c) Seller may, at its discretion, use the purchase deposit as working capital or for any other purpose. The purchase deposit shall be non-refundable unless Seller is unable or unwilling to close, and Purchaser hereby acknowledges that the purchase deposit and any interest thereon is a part of Seller's liquidated damages upon Purchaser's default prior to closing.

3. **Additional Deposits.** Purchaser acknowledges that Seller reserves the right to require additional non-refundable deposits for the installation of extras not included as a standard feature for the neighborhood in the amount of at least twenty-five (25%) percent of the total charge for such item(s) (Seller may require larger deposits in its discretion). Such non-standard items are determined in Seller's sole discretion and may include, without limitation, basement finishing, skylights, additional fireplaces, custom tile or marble, retaining walls, and structural framing and foundation modifications. These additional deposits may be required in the above instances regardless of Purchaser's mortgage downpayment requirements but shall be credited to Purchaser at closing. Such deposits shall be non-refundable unless Seller is unable or unwilling to close, and Purchaser hereby acknowledges that such deposits and any interest thereon are a part of Seller's liquidated damages upon Purchaser's default prior to closing. Purchaser's initials RWP LCP

4. **Broker.** BSI Inc. ("Broker") has entered into a client relationship with Seller and has acted as agent for the Seller in this transaction. Brian L. Smith, Remis Executive, ("Selling Broker") has entered into a client relationship with Purchaser and has acted as agent for the Purchaser in this transaction. Any Agency Disclosure form attached hereto is made a part hereof. Purchaser acknowledges that Broker's representation of Seller has been disclosed in Purchaser's monthly statement and that there is no brokerage or agency relationship between Broker and Purchaser, even though Broker may perform ministerial acts for the benefit of Purchaser. Purchaser acknowledges that Purchaser has not relied upon the advice or representations, if any, of Seller or Broker, or their respective representatives, relative to the purchase and ownership of the Property and the matters related thereto. Except as set forth in this agreement, Purchaser and Seller represent and warrant that they have not dealt with, and have not seen and are not represented by, any other agent or broker, or other person or entity, in connection with the sale of the Property, and they agree to indemnify and hold each other harmless from any and all claims, losses, damages, costs and expenses, including, without limitation, attorney's fees and court costs, incurred or suffered by one of them because of any claim or claimant's fee of commission with respect to this transaction made by the other or by an agent or broker, or other person or entity, claiming to represent the other.

Real estate commission rates or fees are not fixed by law or custom and are not controlled, suggested, recommended or maintained by any board of Realtors or any multiple listing service within South Carolina. Compensation for services rendered is solely a matter of negotiation between the broker/agent and the client.

No broker to this transaction shall owe any duty to Purchaser or Seller greater than is set forth under South Carolina law. Seller and Purchaser acknowledge that if they have entered into a client relationship with a broker, that broker has disclosed on a prior basis (a) the types of brokerage relationships offered by the broker and (b) any other brokerage relationship which would conflict with the client's interest. In this agreement, the term "broker" shall mean a licensed South Carolina real estate broker and the broker's affiliated licenses.

5. **Take.** Seller shall convey good and marketable title to the Property to Purchaser by general warranty deed subject only to (a) zoning ordinances affecting the Property, (b) general utility and right-of-way easements serving the Property, (c) subdivision restrictions of record and items reflected on the recorded plat as of the closing date, and (d) other restrictions and encumbrances herein specified (see subdivision # 2). Purchaser shall have a reasonable time after the effective date of this agreement in which to examine title and in which to furnish Seller with a written statement of objections (other than the foregoing) which materially and adversely affect the marketability of title. Purchaser and Seller agree that marketable title shall mean title which a reputable title insurance company, licensed to do business in the State in which the Property is located, will insure at its regular rates. Seller shall have until closing to satisfy all valid objections and if Seller fails to satisfy such valid objections, then Purchaser may terminate this agreement by written notice to Seller, the purchase deposit and other deposits made hereunder shall be returned to Purchaser, and the parties shall have no further rights or obligations hereunder.

6. **Covenants.** Purchaser acknowledges that the Property is and will be subject to recorded protective covenants; that Purchaser has received a copy of such covenants in substantially similar covenants, and that Purchaser and the Property shall be bound by the recorded covenants. Purchaser agrees that Purchaser has read and fully understands the recorded protective covenants referenced herein and that Purchaser is fully and solely responsible for compliance with said recorded protective covenants. Furthermore, Purchaser acknowledges that only Purchaser, and not the developer, builder or sales agent, is fully responsible for Purchaser's and the Property's adherence to the recorded protective covenants as it applies to all new construction on the Property and any exterior or other changes to the home and the Property after construction.

Purchaser acknowledges that only the neighborhood association having jurisdiction over the Property is authorized to approve architectural alterations and exterior changes. Approval or assistance of any type provided by any sales agent, builder representative or other person or entity shall not be sufficient to authorize any architectural alteration or exterior change and shall not prejudice or impair the right of such association to enforce the architectural control provisions of the recorded protective covenants. The recorded protective covenants obligate Purchaser to submit plans for all architectural alterations and exterior changes to home and site to the approval by the association.

Purchaser acknowledges that the neighborhood association having jurisdiction over the Property is mandatory and Purchaser shall be a member. Purchaser shall pay dues levied by such association, meaning dues to be paid at closing based on the date of closing and the schedule provided by such association.

If the Property is not shown on a recorded plat as of the effective date of this agreement, Purchaser acknowledges that the boundaries of the Property as finally platted may vary slightly from preliminary boundaries. Purchaser also acknowledges that the final boundaries of the Property shall be as per latest recorded plat shown as of date of closing (and not as on any survey or other documents recorded at closing or otherwise). Boundaries are not established by landscaping, trees, fencing, liability whatsoever for issues arising out of the foregoing. Purchaser's initials RWP LCP

7. **Loan.** A written loan application shall be made by Purchaser within 10 days after the date of Purchaser's offer (as noted in the upper right-hand corner of the first page of this agreement). Within 30 days after the effective date of this agreement, Purchaser shall obtain a lender commitment letter with all conditions fully disclosed and acceptable to Seller, and provide a copy of such letter to Seller. If Purchaser fails to obtain and provide a copy of such letter within such 30 day period, Seller may at any time thereafter terminate this agreement, and retain the purchase deposit and all other deposits hereunder as liquidated damages. In addition, if Purchaser fails to make a timely written loan application, or fails at any time to provide information on a timely basis to allow for loan processing, or fails at any time to

Seller's initials

Purchaser's initials

- [illegible]

Conclusion

- 132

AFFILIATED BUSINESS ARRANGEMENT DISCLOSURE STATEMENT

NOTICE

To: Ralph Wayne

Property: 5073 Karliker Court
Fort Mill SC 29715

From: John Wieland Homes and Neighborhoods of the Carolinas, Inc.

Date: _____

This is to give you notice that John ("Wieland") has a business relationship with Wieland Financial Services, Inc. ("Wieland Financial"). Wieland and Wieland Financial are owned by the same persons and share some common directors and officers. Because of this relationship, Wieland Financial may provide Wieland with a financial or other benefit.

John ("Wieland") has a business relationship with Wieland Financial Services, Inc. ("Wieland Financial"). Wieland and Wieland Financial are owned by the same persons and share some common directors and officers. Because of this relationship, Wieland Financial may provide Wieland with a financial or other benefit.

Wieland Financial is a residential mortgage lender. Below is the range of charges for residential mortgage services by Wieland Financial.

Below is the range of charges for residential mortgage services by Wieland Financial.

[provider and settlement services]

[charge or range of charges]

Wieland Financial is a residential mortgage lender making loans.

0% - 5% of loan amount

You are NOT to be influenced by Wieland Financial as a condition for settlement of your loan on, or the purchase of, the subject property.

You are NOT to be influenced by Wieland Financial as a condition for settlement of your loan on, or the purchase of, the subject property.

THERE ARE FOUR OTHER SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO REQUEST TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

THERE ARE FOUR OTHER SERVICE PROVIDERS AVAILABLE WITH SIMILAR SERVICES. YOU ARE FREE TO REQUEST TO DETERMINE THAT YOU ARE RECEIVING THE BEST SERVICES AND THE BEST RATE FOR THESE SERVICES.

DISCLAIMER

I/we have read this disclosure and understand that Wieland is referring me/us to purchase the above-described services. I/we understand that Wieland may receive a financial or other benefit as the result of this referral.

I/we have read this disclosure and understand that Wieland is referring me/us to purchase the above-described services. I/we understand that Wieland may receive a financial or other benefit as the result of this referral.

Ralph Wayne 3-22-06
 [Signature] [Date]

104/22/06
 [Signature] [Date]

Legal: John Wieland Homes and Neighborhoods of the Carolinas, Inc. 1-19-06

Wieland Financial

Wieland Financial

John Wickland
WICKLAND HOMES
SOUTH CAROLINA NEIGHBORHOODS

ADDENDUM

Attached to that certain contract dated 03/22/06 between
Purchaser(s) and John Wickland Homes and Neighborhoods
of Bridgeville, South Carolina

Buyer: Wayne Parsons, Jr. and Louise C. Parsons
for property known as Lot 757 of Block
5070 Kanika Court, Fort Mill

Date	Code	Description	Qty	UOM	Total (\$)
					Home Price w/o Options 335,000
03/21/2006	cus11	Contingency	1		6,400.00
12/13/2005	ln045	Standard			
03/20/2006	STB00	Produce Wall Replacement	1	each	incl
		Produce Wall Replacement	1	each	25,500.00

SUBTOTAL of Options Page 1
Option Total 31,900.00
Home Price As Of 3/21/2006 31,900.00
366,900.00

John Wickland
John Wickland Homes and Neighborhoods
of the Carolinas, Inc.
Date Executed

Wayne Parsons, Jr.
Purchaser
Wayne Parsons, Jr.
Date Executed 3-22-06

Wickland Realty Associates, Inc.
Ballantyne

Louise C. Parsons
Purchaser
Louise C. Parsons
Date Executed 03/22/06

NEW BROKER
Date Executed

to the Carolinas, Inc., Seiler, for property known as Lot 757 of
Brightwood, being more commonly known as 5070

The home to be constructed is to be a _____
 be _____ with _____ front _____
 _____ and back _____ placement _____ (crawl space, basement or slab)

Purchaser acknowledges that it has been fully advised regarding the existence of a 15 ft Permanent Storm Drainage easement and Wellpoints on the Wellpoint Wellpoints in the back left corner and right of the closing or termination of this agreement. Purchaser and its agents are not objectionable to Purchaser. This provision shall survive

Any rendering is attached to be for the purpose of a location and approximate location of _____ Plan Options _____ and is not to be relied upon for any other purpose. The provision shall not be a condition of the making or termination of this agreement.

Purchaser acknowledges that the following information is collected from Purchaser at closing:	
A. An amount equal to a month's dues to the neighborhood association, which is Purchaser's contribution to work the month of the year when the assessment due. It will be deposited into the common fund for the neighborhood association.	an assessment of the neighborhood association, which is Purchaser's contribution. This is not a payment of assessments and is not credited against future assessments.
B. The annual neighborhood association dues.	an amount for the neighborhood association will be provided at the time of closing.

[illegible]

Purchaser acknowledges that the site is active, and is in close proximity to the neighborhood (within approximately 1 mile). Purchaser realizes that bag landfill operations occur and may continue to occur, and

Selling Broker's initials

Purchaser does not find this objectionable about the landfill or any other property or be made by Seller and/or its representative to determine whether or not the landfill boundaries of the neighborhood will have. Purchaser waives all claims Purchaser has foregoing. This provision shall survive of 7. **DISCLOSURE: RISK FINDING**

Purchaser acknowledges that the plat that shows the Property has been in North Carolina. However, that state line and surveyor contracted by Seller. Purchaser South Carolina may review the boundary boundary line between the two states. Purchaser acknowledges that this is acceptable and against Seller and its affiliates. This provision shall survive closing or termination of this agreement. Purchaser's initials *RP*

Purchaser is not relying on any advice, opinions or representations of the boundaries of the neighborhood that may have been or may be. Purchaser acknowledges that it is Purchaser's responsibility to determine the existence or use of any other property outside the boundaries of the Property and/or Purchaser's quality of life. Purchaser waives all claims against Seller and its affiliates relating to all of the foregoing. This provision shall survive closing or termination of this agreement. Purchaser's initials *RP*

Purchaser acknowledges that the state line depicted on the plat that shows the Property has been in North Carolina and South Carolina. However, that state line and surveyor contracted by Seller. Purchaser South Carolina may review the boundary boundary line between the two states. Purchaser acknowledges that this is acceptable and against Seller and its affiliates. This provision shall survive closing or termination of this agreement. Purchaser's initials *RP*

Seller: John Wickland Homes, Inc.
North Carolina, Inc.
John Wickland Homes, Inc.

Builder Services, Inc.
Lucia Halloran

Ralph W. Parsons, Jr.
Date Executed

Phyllis C. Parsons
Date Executed

3-22-06
Date Executed

05/22/06
Date Executed

Buyer: **BROKER'S NEW BROKER**

Buyer

Seller's initials

Purchaser's initials

Builder's initials

Selling Broker's initials

10000 Blvd., Charlotte, NC 28274
704-522-9274

SPECIAL SELLER INFORMATION

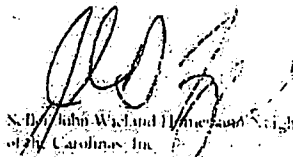
Attached to this certain is a copy of the deed of
Purchase, and John W. Land Homes, Inc. is the
Block _____ of _____
Kamick Court, Fort Mill, SC 29715

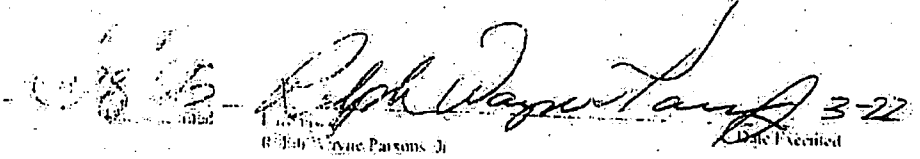
Seller _____ Ralph Wayne Parsons, Jr. and Louise C. Parsons
the Carolina, Inc. Seller for property known as Lot _____ 757 of _____
Neighborhood, being more commonly known as _____ 5070

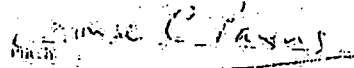
8. \$2,500 Promotional Incentive:

Purchaser has an additional \$2,500 to use on
available at this time.

Due to our March Madness promotion. No additional incentives are


John W. Land Homes, Inc.
John W. Land Homes, Inc.


Ralph Wayne Parsons, Jr.
Date Executed 3-22


Louise C. Parsons
Date Executed

03/22/06
Date Executed

Builder Services, Inc.
Linda Hallinan

Selling Broker _____ A NEW BROKER

Seller's initials

Block of record

Block of record

Selling Broker's initials

136

*JOHN WIELAND HOMES
AND NEIGHBORHOODS*

THE WIELAND 5-20
EXTENDED WARRANTY



THE WIELAND 5-20 EXTENDED WARRANTY

IN GEORGIA:

Customer Service Department, 1950 Sullivan Road, P. O. Box 87363, Atlanta, GA 30337
Phone: (770) 907-3400 Fax: (770) 907-3440
Website: www.jwcustomercare.com

IN TENNESSEE:

Customer Service Department, 300 Seaboard Lane, Suite 3, Franklin, TN 37067
Phone: (615) 790-3090 Fax: (615) 790-0075
Website: www.jwcustomercare.com

IN CHARLOTTE, NORTH CAROLINA:

Customer Service Department, 8325-D Arrowridge Boulevard, Charlotte, NC 28273
Phone: (704) 522-9200 Fax: (704) 522-9040
Email: customerservice.charlotte@jwhomes.com
Website: www.jwcustomercare.com

IN RALEIGH, NORTH CAROLINA:

Customer Service Department, 107-A Quail Fields Court, Morrisville, NC 27560
Phone: (919) 481-3309 Fax: (919) 481-9157
Website: www.jwcustomercare.com

IN CHARLESTON, SOUTH CAROLINA:

Customer Service Department, 496 LaMesa Drive, Mt. Pleasant, SC 29464
Phone: (843) 849-8787 Fax: (843) 849-8877
Website: www.jwcustomercare.com

IN KENTUCKY:

Website: www.jwcustomercare.com

TABLE OF CONTENTS

LIMITED WARRANTY

I.	What is Covered	1
A.	One Year (Workmanship)	1
B.	Two Years (Systems)	1
C.	Five Years (Extended Items)	1
D.	Twenty Years (Structural)	2
II.	What Wieland Will Do	3
III.	What the Homebuyer(s) Must Do	4
IV.	Exclusions	5
V.	General Provisions	9
	LEGAL NOTICES	13

CONSTRUCTION QUALITY STANDARDS

I.	Site Work	14
II.	Cast-in-Place Concrete	15
III.	Masonry	16
IV.	Carpentry	16
V.	Thermal and Moisture Protection	17
VI.	Doors and Windows	19
VII.	Finishes	21
VIII.	Fireplaces	23
IX.	Cabinetry	24
X.	Plumbing Systems	24
XI.	Heating and Air Conditioning System	26
XII.	Electrical System	27

LIMITED WARRANTY

I. What Is Covered

- A. Workmanship. During the first year of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from defects in materials or workmanship, as defined in the Construction Quality Standards, except as they apply to defects in fixtures and equipment which are covered in accordance with the manufacturer's warranty.
- B. Systems. During the first two (2) years of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from defects in the electrical, plumbing and mechanical systems, as defined in Sections X, XI and XII of the Construction Quality Standards, to include the wiring, piping and ductwork portions of the systems. This coverage applies to the HVAC system only if Homebuyer(s) document that the HVAC system has been professionally maintained (i.e., by a company or individual who is licensed as necessary and who is currently in the business of providing such residential maintenance service) per manufacturer's standards/instructions at least once per year. Defects in any of the systems resulting from failures in a fixture or piece of equipment which are covered by a manufacturer's warranty are not covered by this warranty.
- C. Extended Items. During the first five (5) years of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from the following, as defined in the Construction Quality Standards:
1. Verified leaks, due to defects in materials or workmanship, at roof penetrations made in the course of construction.
 2. Verified active flow of exterior surface water into the basement or so as to create standing water in the crawl space for at least forty-eight (48) consecutive hours, so long as the active flow is due solely to acts or omissions of Wieland. Wieland must receive written notice of any covered claim within ten (10) days of the date of discovery by Homebuyer(s). Wieland will not be responsible for anything caused by (a) breaks, leaks or bursting of water mains or pipes; (b) any grading done by or on behalf of Homebuyer(s) which causes water to flow toward the outside foundation wall; (c) failure to maintain the grade initially established by Wieland for the Home; (d) prolonged direction of water against the outside foundation wall from water spigots, sprinklers, hoses, or broken or clogged gutters; (e) bent, broken, or clogged downspouts; (f) landscaping improperly installed by or on

behalf of Homebuyer(s); and (g) an irrigation system that was not installed by Wieland.

3. Verified plumbing leaks in the exterior water service line, plumbing pipes and fittings, tubs, sinks, faucets, and toilets. Tarnishing and pitting of faucets is excluded.
 4. Defects in materials or workmanship in only the following appliances selected from the Wieland selections: Oven, Range, Range Hood, Dishwasher, Garbage Disposal, Built-In Microwave, and Water Heater. After expiration of any manufacturer's warranty, Wieland will cover materials and labor as would be covered by the manufacturer's warranty.
 5. Verified interior gas line piping leaks.
 6. Defects in materials or workmanship in the electrical main breaker panel, electrical service disconnect, interior wiring, switches, and outlets.
 7. Failure of the HVAC compressor pump and condenser coil, heat exchanger, and thermostats installed by Wieland. After expiration of any manufacturer's warranty on the above components, Wieland will replace the above components as would be covered by the manufacturer's warranty. This coverage applies only if Homebuyer(s) document that the above components have been professionally maintained (i.e., by a company or individual who is licensed as necessary and who is currently in the business of providing such residential maintenance service) per manufacturer's standards/instructions at least once per year.
 8. Breaks in the hermetic seal of insulated windows, and defects in materials and workmanship in sash tracks and sash locks, as defined in the manufacturer's warranty. After expiration of any manufacturer's warranty, Wieland will cover materials as would be covered by the manufacturer's warranty.
 9. Verified sewer service line leaks due to defects in materials or workmanship.
- D. Structural. During the first twenty (20) years of this warranty, which commences on the day that title first transfers from Wieland or that occupancy by anyone first occurs (whichever occurs first), Wieland warrants that the Home will be free from "Structural Defects."

A "Structural Defect" is: (i) actual physical damage (ii) to only the following designated load-bearing elements of the Home (iii) caused by failure of such load-bearing elements which affect their load-bearing function (iv) to the extent that the

Home becomes unsafe or unsanitary. The following elements, if load-bearing, constitute the designated elements: 1. foundation systems and footings; 2. beams; 3. girders; 4. lintels; 5. columns; 6. walls and partitions; 7. floor systems; and 8. roof framing systems. All four (4) parts of the definition must be satisfied in order for a condition to qualify as a Structural Defect. This is designed to be coverage only for catastrophic failure of load-bearing elements of the Home.

Examples of elements not covered by this warranty which are deemed not to have Structural Defect potential are: 1. nonload-bearing partitions and walls; 2. wall tile, wall paper, etc.; 3. plaster, laths, or drywall; 4. flooring and subflooring material; 5. stucco, synthetic stucco, brick or stone veneer; 6. any type of exterior siding; 7. roof shingles, sheathing and felt paper; 8. heating, cooling, ventilating, plumbing, electrical and mechanical systems; 9. appliances, fixtures or items of equipment; 10. doors, trim, cabinets, hardware, insulation, paint and stains; 11. basement slabs and other interior floating, ground-supported concrete floor slabs; and 12. water intrusion, including, without limitation, leaks in walls, roofs, plumbing, basements and crawl spaces.

II. What Wieland Will Do

- A. Notwithstanding any language herein to the contrary, if a defect occurs in a warranted item during the applicable period of this warranty, Wieland will repair, replace or pay the Homebuyer(s) the reasonable cost of repairing or replacing the defective item. The choice to repair, replace, pay or combination thereof is solely that of Wieland. Wieland will also repair (or pay for the repair of) any item needing to be damaged or destroyed in order to make the warranted repair, except for improvements added after the completion of Wieland's original construction, which are the responsibility of Homebuyer(s) to remove or repair.
- B. With regard to Structural Defects, Wieland will repair and/or replace the Structural Defects or make arrangements for such repairs and/or replacement. Wieland shall have complete discretion as to the methods and manners for repairing and/or replacing Structural Defects. The repair of a Structural Defect is limited to: 1. the repair of damage to the load-bearing portions only as necessary to restore the load-bearing ability of such load-bearing portions; and 2. the repair of those items of the Home damaged by the Structural Defect which make the Home unsafe or unsanitary.
- C. Notwithstanding anything herein to the contrary, where Wieland shall become responsible to pay the reasonable costs of repair or replacement for Structural Defects arising at any time during the applicable period of this warranty and amounting to \$2,500 or more, payment shall be made to or on behalf of the Homebuyer(s) and the mortgagee or successor mortgagees who have notified Wieland in writing of their security interest in the Home on or prior to the date of payment of the claim, as their respective interests may appear.

- D. Before Wieland repairs or pays for the repair of a claim, there must be an assignment to Wieland of any rights that may exist against any other person or entity with respect to the claim. No repairs, replacements or payments made under the terms and conditions of this warranty shall act to extend this warranty or any time periods hereunder.
- E. Notwithstanding anything herein to the contrary, if an item is on or in the common elements of a condominium or is otherwise under the ownership or maintenance control of a homeowners, neighborhood or condominium association, and such association refuses to allow Wieland to perform work on the item, Wieland shall be relieved of any obligation to perform work on the item, and the item shall be deemed excluded from this warranty.

III. What the Homebuyer(s) Must Do

If the Homebuyer(s) should have a complaint on any item covered by this warranty during the applicable period of this warranty, the Homebuyer(s) must send a clear and specific written complaint to Wieland (dating the defect occurrence). This written notice must be received no later than 30 days after the expiration of the applicable coverage period for such item under this warranty (except where a shorter time period is specified). The written notice must be sent to the Wieland Customer Service Department at the address listed on the Table of Contents page of this warranty. In case of an emergency problem, the Homebuyer(s) must notify Wieland immediately in order that further damages can be mitigated. The Homebuyer(s) should take reasonably immediate action if circumstances dictate the need.

However, Wieland is entitled to assess claimed defects and decide on an appropriate repair plan. Wieland is also entitled to choose to repair or replace, or to pay the fair value of the repair or replacement of, a covered defect. If Homebuyer(s) repair (or cause the repair of) the claimed defect before Wieland has an opportunity to inspect the claimed defect, it is impossible for Wieland to assess whether the defect was covered by this warranty, whether the repair made was cost-effective, necessary, and effective, and whether Wieland would have been able to solve the problem in another way. For these reasons, Wieland will not accept, nor will arbitrators be able to award to Homebuyer(s), any claimed defect which Homebuyer(s) have had replaced or repaired, except for an emergency repair which was authorized by Wieland. If Wieland is unavailable for emergency authorization, Homebuyer(s) must make minimal repairs so that further damages can be mitigated and report the emergency to Wieland as promptly as possible. Repairs will not be reimbursed unless, at a minimum, the above procedures have been followed.

IV. Exclusions

This warranty does not apply to:

- A. Defects in outbuildings, including, without limitation, detached garages and detached carports (except finished space over garages and outbuildings that contain or are served by the plumbing, electrical, heating, cooling or ventilation systems serving the Home); built-in refrigerators; home theatres/entertainment components; other non-standard "extras" in the Home; swimming pools and other recreational facilities; driveways, walkways, decks and porches; patios (attached or detached), stoops and steps (except as specifically stated herein); boundary walls, retaining walls and bulkheads (except where boundary walls, retaining walls and bulkheads are necessary for the structural stability of a covered building); fences; landscaping of any kind (except as specifically stated herein); irrigation and fire suppression sprinkler systems; or any other improvements not a part of the Home; and in addition:

Any and all aspects of any "tankless" water heating system and the installation thereof, and anything else related thereto, are excluded. The foregoing specifically excludes, without limitation, (a) repair, replacement and any other aspect of such water heating system, and (b) any damage or problems with any other aspect of the Home resulting from such water heating system, including, without limitation, structural damage or matters;

- B. Damage to real property that is not part of the Home;
- C. Damage to or defects in concrete floors of attached or detached garages or attached or detached patio slabs that are built separate from foundation walls or other structural elements of the Home;
- D. Bodily or personal injury of any kind (including physical or mental pain and suffering and emotional distress); medical, hospital, rehabilitation or other incidental or consequential expenses; attorneys' fees, court costs, experts' fees and other such expenses; or damage to any property of others;
- E. Any loss or damage which the Homebuyer(s) has not taken appropriate action to minimize as soon as practicable;
- F. Any defect in, or caused by, alterations made by or on behalf of Homebuyer(s), or material or work supplied by anyone other than Wieland or Wieland's employees, agents or subcontractors;
- G. Loss of use, loss of opportunity, loss of market value, loss of rental value or any and all consequential loss or damages;
- H. Defects in any property not included in the original Home delivered for the original final sales price;

- I. Any damage to the extent it is caused or made worse by:
1. Negligence, improper maintenance, lack of maintenance or improper use or operation by anyone other than Wieland or Wieland's employees, agents or subcontractors;
 2. Failure by the Homebuyer(s) to give prompt and proper notice to Wieland of any defects;
 3. Changes of the grading of the ground that do not comply with accepted grading practices, including changes in, and failure to maintain, grades, swales, drainage structures, stabilized soil, and sodded, seeded and landscaped areas;
 4. Changes in the level of underground water table which were not reasonably foreseeable at the time of construction of the Home;
 5. Subsidence or soil movement which was not reasonably predictable through reasonable soil testing or other geological investigation at the time of construction of the Home (this does not apply to any Home with an original FHA loan still in effect);
 6. Dampness, condensation, mold/mildew or any other condition arising due to the failure to maintain adequate ventilation and/or adequately low humidity levels; or
 7. Failure by the Homebuyer(s) or by anyone other than Wieland or Wieland's employees, agents or subcontractors to comply with the warranty requirements of manufacturers of appliances, equipment or fixtures;
- J. Loss or damage not caused by a defect or deficiency in the design or construction of the Home by Wieland or Wieland's employees, agents or subcontractors;
- K. Loss or damage externally caused, including, but not limited to: acts of God; riot or civil commotion; hurricane, tornado or other windstorm; fire; explosion; smoke; water; mold/mildew; hail; lightning; falling trees or other objects; aircraft; vehicles; flood; mud slides; earthquakes; volcanic eruption; radon or other natural or introduced gases; abuse or use of the Home, or any part thereof, beyond the reasonable capacity of such part for such use; conditions or occurrences beyond Wieland's control; or by any other external cause (including, without limitation, criminal acts);
- L. Any loss, damage, defect, cost or expense which is caused, in whole or in part, by

any peril or occurrence for which compensation is provided in whole or in part by legislation, by class action or other lawsuit settlement, or which is covered by other insurance or public funds;

- M. Rotting of any kind; mold/mildew; the presence of mold/mildew anywhere in the Home, including, without limitation, in any crawl space, unfinished basement or other unfinished or finished space (all aspects of mold/mildew, including cleaning or otherwise addressing, are the responsibility of the Homebuyer(s) as part of maintenance of the Home); the presence of radon or other natural or introduced gases; insect damage; and damage due to vermin, radiation, pollution or toxic substances of any kind;
- N. Any loss or damage which arises while the Home or any portion thereof is being used for nonresidential purposes;
- O. Any condition which does not result in actual physical damage to the Home;
- P. Costs of shelter, transportation, food, moving, storage, or other incidental expenses related to relocation during repair, or any other costs due to loss of use, inconvenience or annoyance;
- Q. Any complaint or claim on an item reported to Wieland after an unreasonable delay or later than 30 days after the expiration of the applicable coverage period for such item under this warranty (or later than any shorter time period herein specified); or loss or damage resulting from failure to comply with manufacturers' warranty requirements;
- R. Normal wear and deterioration;
- S. Failure of Wieland to complete construction;
- T. Glass breakage and exterior hardware;
- U. Failure of Wieland to perform any washing, cleaning or clean-up of any kind;
- V. Structural slab foundation systems that have experienced some movement but are within the foundation's design performance criteria; separation, settlement or movement of concrete slabs within the structure at control joints (joint material maintenance is not the responsibility of Wieland);
- W. Violations of local, state or national building codes, ordinances or standards;
- X. Pre-existing conditions the Homebuyer(s) were aware of before closing on the Home.

and knowingly accepted (waived), such as "punch list" or "orientation" items, whether or not appearing on a punch list or orientation checklist;

- Y. Outside hosebibs and other hose connections;
- Z. Loss or damage resulting from any failure to comply with federal, state, local or other elevation requirements, including, but not limited to: 1. failure of the lowest floor elevation of the Home to meet or exceed the base flood elevation established by the Federal Emergency Management Agency and applicable community floodplain management ordinances; and 2. errors in connection with the collection and certification of elevation information, whether committed by Wieland, an agent of Wieland or by any person authorized by state or local law or ordinance to provide floodplain management information, or by any other person;
- AA. Damage due to weather conditions which exceed the specifications for any covered item;
- BB. Damage to any personal property;
- CC. Damage caused by any alteration to a covered item;
- DD. Any aspect whatsoever related to light fixtures and fans, except as noted in Section 12.2 of the Construction Quality Standards;
- EE. Performance of any covered item; operation only is covered by this warranty;
- FF. Persistent failure of any covered item in many homes such that the item is considered defective as made or manufactured, as reasonably determined by Wieland; and
- GG. ALL CONSEQUENTIAL DAMAGE OF ANY KIND;

V. General Provisions

- A. Time is of the essence. The time limits contained in this warranty are a material condition of this warranty.
- B. Homebuyer(s) means any and all record owners of the Home (stated in the warranty certificate applicable to the Home, if the initial Homebuyer(s)) and Home means the dwelling described in the warranty certificate applicable to the Home. Builder or Wieland means John Wieland Homes and Neighborhoods, Inc., in Georgia, Tennessee and Kentucky, and means John Wieland Homes and Neighborhoods of the

Carolinas, Inc., in North Carolina and South Carolina.

- C. A warranted defect must first occur during the applicable designated portion of the warranty for that warranted defect in order to be covered as provided in this warranty. Therefore, per Section IV.X of this warranty, any pre-existing conditions the Homebuyer(s) knew about before closing on the Home and knowingly accepted (waived), such as "punch list" or "orientation" items, are not covered.
- D. No one is authorized to change, alter or add to this warranty without the express written consent of Wieland.
- E. The maximum amount payable under this warranty by Wieland for all claims submitted is the original final sales price of the Home shown on the warranty certificate applicable to the Home, which includes the parcel of land on which the Home was constructed.
- F. This warranty is independent of any contractual arrangement between the Homebuyer(s) and Wieland for the construction of the Home and/or its sale, if any. Nothing contained in any such contract or any other contract between Wieland and the Homebuyer(s) can restrict or override the provisions of this warranty. The contractual arrangement includes, but is not limited to, Builder substitutions or changes in plans, specifications or materials.
- G. If Wieland's performance of any of its obligations is delayed by any event not resulting from Wieland's own conduct, Wieland will be excused from performing until the effects of that event are remedied. Examples of such events are acts of God or the common enemy, labor strikes, shortages of materials, war, riot, civil commotion, sovereign conduct, or acts of persons who are not parties to this warranty.
- H. Wieland and Wieland's employees, agents, contractors and subcontractors must be allowed access to the Home and areas around or attached to the Home during normal business hours when claim servicing is required and to inspect, repair and conduct tests as, in Wieland's judgment, may be required. It is Homebuyer(s) responsibility to ensure this access. This warranty shall be void if this access is not permitted.
- I. Anything requiring repair or replacement which cannot be repaired or replaced with items readily available in the standard marketplace will be repaired or replaced with items of similar kind and quality which are so available.
- J. This warranty does not apply to appliances, consumer products, or other pieces of equipment, except as noted in Section I of this warranty.
- K. Any legal action resulting from disputes between the Homebuyer(s) and Wieland that are not the direct result of provisions contained in this warranty are not the

responsibility of Wieland.

- L. Each successor in title to the Home, including any mortgagee in possession, in no way affects the coverage under this warranty for its unexpired term. Each such successor is also bound by the provisions of this warranty and the Construction Quality Standards. There is no limit to the number of such successions during the unexpired terms, nor any cost incurred because of such successions.
- M. If, at the time of a claimed loss, there is any valid and collectible insurance, whether primary, excess or contingent, that applies to the losses, defects or claims covered by this warranty, then Wieland shall not be liable for any of said losses, defects or claims.
- N. When repairing or replacing, Wieland will attempt to match and replace with the original choice of colors and materials, except where the item was custom-ordered. Due to manufacturing variances, discontinued items, natural fading, weathering, etc., Wieland cannot and does not guarantee color matches. In addition, Wieland is not accountable for discontinued items, changes in dye lots, colors or patterns, or items ordered outside of the original construction of the Home.
- O. **Mandatory Binding Arbitration.** Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them. Wieland and Homebuyer(s) shall first mediate formally any disputes between them, with the mediation commencing, and the mediator being selected, in the same manner as set forth below for the commencement of arbitration and the selection of an arbitrator (if the parties cannot mutually agree otherwise).

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.

The terms and procedures of this warranty shall first apply to any claims or disputes that are within the coverage of this warranty. In order to be able to arbitrate or mediate any warranty claims, Homebuyer(s) must first have complied with all procedures set forth in this warranty within the time limits set forth herein. Failure

of Homebuyer(s) to comply with such procedures in a timely manner shall bar any such claims against Wieland.

In order to initiate arbitration for disputes, Wieland or Homebuyer(s) must provide clear and specific written notice (if to Homebuyer(s), at the Home address; if to Wieland, to Wieland's Customer Service Department at the address set forth in this warranty) to the other that such party desires to arbitrate matters in dispute, together with a description of the claim or dispute and of the damages or relief being sought. Arbitrations will be conducted by an independent, neutral, third-party arbitrator, located in the general metropolitan area where the Home is located, selected by Construction Arbitration Associates, Inc., Atlanta, Georgia (CAA) (CAA is not precluded from selecting itself); if CAA is unable or legally precluded from selecting an arbitrator, then the American Arbitration Association (AAA) shall do so (AAA is not precluded from selecting itself). As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law.

Arbitrations will be conducted in accordance with rules provided or determined by the person or entity selecting the arbitrator as provided above; provided, however, if any procedural matters are not covered in those rules, the arbitrator shall decide such matters. The arbitrator will hold a hearing on the claim(s) or dispute(s) and render a decision or award, and such decision or award shall be final and binding on the parties.

If Wieland so chooses, Wieland may have its supplier(s) and contractor(s) whose work or supplies are involved in the dispute included as parties to the arbitration. Questions of whether issues are arbitrable and the actual interpretation of terms needing definition in order to arbitrate an issue shall be determined by the arbitrator.

Judgment upon an award rendered by an arbitrator may be entered in any court having jurisdiction thereof upon the application of Wieland or Homebuyer(s). Wieland shall pay all up front filing fees relating to arbitration or mediation. Each party shall bear its own costs and expenses and an equal share of the arbitrator's fees, the administrative fees of arbitration, and/or fees of mediation.

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.

Any dispute involving Wieland's directors, officers, shareholders, employees, agents, predecessors, affiliates or related companies shall be resolved through the foregoing mediation and arbitration process and not in a court of law. The waiver or invalidity of any portion of this Section shall not affect the validity or enforceability of the remaining portions of this Section; specifically, if it is validly determined that a particular claim or type of claim is not subject to arbitration hereunder, such determination shall not affect or invalidate the applicability of arbitration or mediation hereunder to any other claim or type of claim.

P: THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE HOME AND/OR PROPERTY ON WHICH IT IS CONSTRUCTED (INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE), EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY WIELAND OTHER THAN AS EXPRESSED IN THIS WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY WIELAND. THIS WARRANTY IS ALSO GIVEN BY WIELAND AND ACCEPTED BY HOMEBUYER(S) IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT HOMEBUYER(S) HAVE OR MAY HAVE AT LAW OR IN EQUITY AGAINST WIELAND RELATING TO THE HOME AND/OR PROPERTY ON WHICH IT IS CONSTRUCTED; CONSTRUCTION OF THE HOME, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING IN THE HOME AND/OR ON THE PROPERTY ON WHICH IT IS CONSTRUCTED, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THIS WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY HOMEBUYER(S).

LEGAL NOTICES

For Georgia only:

GEORGIA LAW CONTAINS IMPORTANT REQUIREMENTS THAT YOU (HOMEBUYER(S)) MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT OR OTHER ACTION FOR DEFECTIVE CONSTRUCTION AGAINST THE CONTRACTOR WHO CONSTRUCTED, IMPROVED OR REPAIRED YOUR HOME. IF APPLICABLE, NINETY (90) DAYS BEFORE YOU FILE YOUR LAWSUIT OR OTHER ACTION, YOU MUST SERVE ON THE CONTRACTOR A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU

ALLEGED ARE DEFECTIVE. UNDER THE LAW, A CONTRACTOR HAS THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS, OR BOTH. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY A CONTRACTOR. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT OR OTHER ACTION.

For Kentucky only:

SECTIONS 411.250 TO 411.266 OF THE KENTUCKY REVISED STATUTES CONTAIN IMPORTANT REQUIREMENTS THAT YOU (HOMEBUYER(S)) MUST FOLLOW BEFORE YOU MAY FILE A LAWSUIT FOR DEFECTIVE CONSTRUCTION AGAINST THE BUILDER OF YOUR HOME. IF APPLICABLE, YOU MUST DELIVER TO THE BUILDER A WRITTEN NOTICE OF ANY CONSTRUCTION CONDITIONS YOU ALLEGED ARE DEFECTIVE AND PROVIDE THE BUILDER THE OPPORTUNITY TO MAKE AN OFFER TO REPAIR OR PAY FOR THE DEFECTS. YOU ARE NOT OBLIGATED TO ACCEPT ANY OFFER MADE BY THE BUILDER. THERE ARE STRICT DEADLINES AND PROCEDURES UNDER STATE LAW, AND FAILURE TO FOLLOW THEM MAY AFFECT YOUR ABILITY TO FILE A LAWSUIT.

CONSTRUCTION QUALITY STANDARDS

The following Construction Quality Standards are based on standards that have been developed and accepted by the residential construction industry in general. While it is virtually impossible to develop a construction standard for each possible deficiency, Wieland has attempted to isolate the most common deficiencies that occur and in so doing list the extent of Builder and Homebuyer(s) responsibility. Where a specific deficiency has not been identified, the standard practice of the residential construction industry at the time of construction of the Home will apply.

Homebuyer(s) should be aware that all new homes go through a period of expansion and contraction. During this period, a home may experience some minor material shrinkage, cracking and other events that are unavoidable and considered normal, such as, without limitation, temporary expansion of pipes that then make contact with wall studs or other material, floor squeaks, and other noises and sounds that are part of the settlement of the home. Homebuyer(s) should also be aware that Homebuyer(s) are responsible for proper home maintenance. Damage caused by negligence, lack of maintenance, improper maintenance or changes, alterations or additions by or on behalf of Homebuyer(s), is excluded from the warranty.

The following Construction Quality Standards are expressed in terms of required standards that Wieland's construction must meet. Non-compliance with these standards calls for corrective action. Unless otherwise noted below, all following items identified are One-Year (Workmanship) warranted items.

I. SITE WORK

1.1 GROUND SETTLING

•**DEFICIENCY:** Excessive ground settling around the foundation, utility trenches or other areas on the lot that have been excavated and backfilled affecting drainage away from the Home.

•**CONSTRUCTION STANDARD:** Ground settling should not exceed 6 inches from the final landscaping grade established by the Builder and should not impede water drainage away from the Home.

•**BUILDER CORRECTION:** If the Builder provided final landscaping grade, the Builder shall recompact and backfill excessively settled areas affecting drainage away from the Home one time, but only during the first year of the warranty. Any landscaping affected by the repair is not the responsibility of Builder.

1.2 LANDSCAPING

•Builder shall have no obligation, responsibility or liability whatsoever for (1) trees and/or shrubbery that Builder would have removed, or had planned to remove, during construction but which Homebuyer(s) (or predecessor) specifically requested not be removed; (2) natural areas left undisturbed by Builder, including, without limitation, drainage in such areas; (3) site drainage and/or standing or ponding water of any kind or nature whatsoever; and (4) trees of any kind whatsoever, except as specifically stated herein.

•Builder will provide a replacement shrub one time only for any shrub that dies during the first 30 days of the warranty. No labor or other materials will be provided.

•Builder guarantees the survival of at least two-thirds (2/3) of the total number of nursery-grown "B&B" transplanted trees during the first six months of the warranty, so long as they are properly cared for as determined by Builder. Proper care includes: 1) watering: during the spring, summer and early fall, water trees at least once per week, soaking the root ball heavily; 2) fertilizing: in March, May and July, fertilize each tree with 1/3 cup of 10-10-10 fertilizer per inch of trunk diameter; and 3) mulch: maintain pine straw mulch around the base of the tree to a depth of 3" to 4". Any

replacement trees that may be required to meet the minimum two-thirds (2/3) total number will be replanted one time only. Dead trees will be cut flush to the ground where possible. Stumps will be ground only if the tree was in a grassed area of the front yard.

•During the first year of the warranty, Builder warrants that lawns of Bermuda and Zoysia sod that are laid when dormant will come out of dormancy. Areas of 25 contiguous square feet or less are excluded as these will grow over naturally. Areas greater than 25 contiguous square feet will be repaired one time only in the Spring.

•Fescue lawns (seed and sod) are not covered by the warranty.

II. CAST-IN-PLACE CONCRETE

•DEFICIENCY: Excessive basement or foundation wall cracks.

CONSTRUCTION STANDARD: Non-structural cracks are not unusual in concrete foundation walls. Cracks greater than 1/8 inch are considered excessive.

BUILDER CORRECTION: The Builder shall repair non-structural cracks in excess of 1/8 inch by surface patching. If needed, any such work should be done toward the end of the first year of the warranty.

•DEFICIENCY: Excessive cracking of basement floor, attached garage slab or attached patio slab, other than as excluded by Section IV.A and IV.C of the warranty.

CONSTRUCTION STANDARD: Minor cracks are common. Cracks exceeding 1/4 inch in width or 1/4 inch in vertical displacement are considered excessive.

BUILDER CORRECTION: The Builder shall repair cracks exceeding the maximum tolerances by surface patching or other methods, as required.

•DEFICIENCY: Cracks in concrete slab on grade finished floors.

CONSTRUCTION STANDARD: Cracks which significantly impair the appearance or performance of the finish flooring material are not acceptable.

BUILDER CORRECTION: The Builder shall repair cracks as necessary so as not to be apparent when the finish flooring material is in place. Repair or replace finish flooring.

•DEFICIENCY: Uneven concrete floors.

CONSTRUCTION STANDARD: Concrete floors in rooms designed and finished by Builder or habitation should not have pits, depressions or areas of unevenness exceeding 1/4 inch in 32 inches or slope in excess of 1/240 of room width or length. Not applicable to floors designed for specific drainage purposes or to slabs that have experienced some movement but are within design performance criteria.

BUILDER CORRECTION: Builder to repair or replace to meet the above standard. Surface patching shall be acceptable. Repair or replace finish flooring installed by Builder, if any.

•DEFICIENCY: Pitting, scaling or spalling of non-excluded concrete.

CONSTRUCTION STANDARD: Such concrete surfaces should not disintegrate to the extent that the aggregate is exposed and loosened under normal conditions of weathering and use. Not applicable to deterioration caused by salt, chemicals, mechanical implements, normal activities involved in the construction of the Home, and other factors beyond the Builder's control.

BUILDER CORRECTION: Builder to repair or replace to meet the above standard.

•DEFICIENCY: Excessive separation of brick or masonry edging from concrete slab and step.

CONSTRUCTION STANDARD: Cracks or separation is common, but cracks in excess of 1/4 inch are excessive.

BUILDER CORRECTION: The Builder shall grout the crack.

•DEFICIENCY: Cracking, settling, heaving or separating of structurally attached stoops or steps.

CONSTRUCTION STANDARD: Stoops or steps should not settle, heave or separate in excess of 1 inch in relation to the house structure. No cracks except hairline cracks (less than 1/4 inch) are acceptable in structurally attached concrete stoops.

BUILDER CORRECTION: Builder to take corrective action to meet standard. Surface patching shall be acceptable.

III. MASONRY

3.1 BRICK, BLOCK AND STONE

•DEFICIENCY: Excessive cracking in masonry walls.

CONSTRUCTION STANDARD: Small cracks in masonry and mortar due to shrinkage are not unusual. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Repair cracks in excess of 1/8 inch by pointing or patching. It is recommended that this be done toward the end of the first year of the warranty. Horizontal cracks greater than 3/16 inch should be investigated to determine the cause. Horizontal cracks greater than 3/16 inch should be repaired by pointing, patching, reinforcement or replacement of defective area. Color matching is not guaranteed.

•DEFICIENCY: Excessive cracking in masonry walls or veneer above grade.

CONSTRUCTION STANDARD: Small cracks due to shrinkage are not unusual. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Repair cracks in excess of 1/8 inch by pointing. It is recommended that this be done toward the end of the first year of the warranty. Color matching is not guaranteed.

3.2 STUCCO

•DEFICIENCY: Excessive cracking or spalling of finish surface.

CONSTRUCTION STANDARD: Hairline cracks are common. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Clean out area by scraping and fill with stucco. Color, finish and texture matching are not guaranteed.

3.3 HARDCOAT STUCCO

•DEFICIENCY: Excessive cracking in hardcoat stucco wall surfaces.

CONSTRUCTION STANDARD: Hairline cracks are normal in hardcoat stucco wall surfaces. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Builder to repair cracks by filling with a latex filler. Existing color and finish to be matched as closely as possible by using tinted filler or painting the repaired area. Exact matching of the color, finish and texture is not guaranteed.

IV. CARPENTRY

4.1 ROUGH CARPENTRY

•DEFICIENCY: Floor squeak.

CONSTRUCTION STANDARD: Floor areas should not have squeaks that are loud and reasonably objectionable, and the subflooring should be secure to the joists. However, there is no guarantee that floors will not squeak, so isolated floor squeaks are not defects.

BUILDER CORRECTION: Builder should locate and make every reasonable effort to repair, if caused by improper installation.

•DEFICIENCY: Uneven wood framed floors.

CONSTRUCTION STANDARD: Floors should be level within 1/4 inch in 32 inches, measured parallel to floor joists. The overall floor slope should not be in excess of 1/240 of room width or length.

BUILDER CORRECTION: Builder to correct or repair to meet the above standards.

•DEFICIENCY: Bowled stud walls and/or ceilings.

CONSTRUCTION STANDARD: All interior and exterior walls and ceilings have slight variances on

their finished surfaces. Bowing should not be so visible as to detract from the finished surface. Walls and ceilings bowed in excess of 1/240 of any horizontal or vertical measurement is considered excessive.

BUILDER CORRECTION: Builder to correct or repair to meet the above standards.

DEFICIENCY: Out of plumb wood framed walls.

CONSTRUCTION STANDARD: Walls should be plumb within 1 inch in 8 feet.

BUILDER CORRECTION: Builder to correct or repair to meet the above standards.

DEFICIENCY: Delaminating subflooring.

CONSTRUCTION STANDARD: Subflooring that delaminates on the "finish" side is a defect.

BUILDER CORRECTION: Builder to repair or replace the subflooring and replace the finish materials as needed to match the existing finish as closely as possible. Color, finish and texture matching are not guaranteed.

4.2 FINISH CARPENTRY — INTERIOR

DEFICIENCY: Quality of finished interior trim workmanship.

CONSTRUCTION STANDARD: Joints between moldings and adjacent surfaces should not exceed 1/8 inch.

BUILDER CORRECTION: Repair joints and touch up the finish as needed to match existing as close as possible. Caulking is acceptable.

4.3 FINISH CARPENTRY—EXTERIOR

DEFICIENCY: Quality of finished exterior trim workmanship.

CONSTRUCTION STANDARD: Joints between exterior trim elements should not exceed 3/8 inch. In all cases the exterior trim at masonry and siding shall be capable of performing its function to exclude the elements.

BUILDER CORRECTION: Repair joints and touch up the finish as needed to match existing as close as possible. Caulking is acceptable.

4.4 NAIL HOLES

DEFICIENCY: Exposed nail heads in wood.

CONSTRUCTION STANDARD: Nail holes which have not been filled on finished painted wood are deficiencies. However, material used to fill nail holes may shrink and/or dry up over time, but this is not a deficiency. In addition, some nail holes may not be filled where, because of the product, the surface finish is not conducive or designed to have nail holes filled, and this is not a deficiency.

BUILDER CORRECTION: Fill nail holes as required to meet standard and touch up finish as necessary to match as closely as possible. Color and finish matching are not guaranteed.

V. THERMAL AND MOISTURE PROTECTION

5.1 BASEMENTS AND CRAWL SPACES

DEFICIENCY: Active water flow into basement or so as to create standing water in the crawl space for at least forty-eight (48) consecutive hours.

CONSTRUCTION STANDARD: Leaks resulting in active flow of water through the basement walls or through the basement floor are unacceptable. Leaks resulting in active flow of water that creates standing water in the crawl space for at least forty-eight (48) consecutive hours are unacceptable. Leaks caused by landscaping improperly installed by or on behalf of Homebuyer(s) or by failure to maintain the grades established by Builder are not deficiencies. Dampness in walls and floors may occur in new construction and is not considered a deficiency.

BUILDER CORRECTION: During the first five years of the warranty, the Builder

shall take such action as necessary to correct basement and crawl space leaks as described above, except where the cause is determined to result from neglect or action by Homebuyer(s) or someone acting on behalf of Homebuyer(s). Any mold/mildew and/or the presence thereof anywhere in the Home, including, without limitation, in any crawl space, unfinished basement or other unfinished or finished space, is not covered. All aspects of mold/mildew, including cleaning or otherwise addressing, are the responsibility of the Homebuyer(s) as part of maintenance of the Home.

5.2 EXTERIOR SIDING

•DEFICIENCY: Loose siding; delamination, splitting or deterioration of siding.

CONSTRUCTION STANDARD: Siding should be securely fastened to the Home. It should not delaminate, split or deteriorate.

BUILDER CORRECTION: Builder to re-secure or reinstall loose siding. Builder will repair or replace delaminated, split or deteriorated siding matching the existing texture and finish as closely as possible.

NOTE: Any item related in any way to exterior siding (including, without limitation, water intrusion) is covered for one year from the commencement of the warranty.

5.3 SYNTHETIC STUCCO (EIFS)

•DEFICIENCY: Cracks in synthetic stucco wall surfaces.

CONSTRUCTION STANDARD: Cracks are normal in synthetic stucco wall surfaces. Cracks greater than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Builder to clean out area by scraping and fill with synthetic stucco to repair cracks as required and touch up the finish to match the existing finish as closely as possible. Color, finish and texture matching are not guaranteed.

NOTE: Any item related in any way to synthetic stucco (including, without limitation, water intrusion) is covered for one year from the commencement of the warranty.

5.4 ROOFING

•DEFICIENCY: Leaks at roof penetrations made in the course of construction.

CONSTRUCTION STANDARD: Roof penetrations made in the course of construction should not leak under normal weather conditions. Leaks resulting from severe weather conditions, such as ice and snow build-up, high winds and driven snow or rains, are not deficiencies. In addition, maintenance/replacement of boots and caulking are Homebuyer(s) maintenance items.

BUILDER CORRECTION: During the first five years of the warranty, Builder shall correct or repair any verified leaks at roof penetrations made in the course of construction.

•DEFICIENCY: Lifted, curled or torn shingles.

CONSTRUCTION STANDARD: Shingles should not lift, curl or tear under normal weather conditions. Accidental loss or damage from, for example, natural causes, fire, aircraft or vehicles is not a deficiency.

BUILDER CORRECTION: Builder to repair and/or replace defective shingles to match the existing shingles as closely as possible.

5.5 SEALANTS

•DEFICIENCY: Leaks in exterior walls due to inadequate caulking.

CONSTRUCTION STANDARD: Joints and cracks in exterior wall surfaces and around openings

should be properly caulked to exclude the entry of water and excessive drafts. Properly installed caulking will shrink and must be maintained by Homebuyer(s) during the life of the Home; this is not a deficiency.

BUILDER CORRECTION: If requested by Homebuyer(s), Builder shall repair and/or caulk joints or cracks in exterior wall surfaces as required to correct the deficiency. It is Homebuyer(s) responsibility to maintain the caulking.

5.6 GUTTERS AND DOWNSPOUTS

•**DEFICIENCY:** Gutters and/or downspouts leak or have standing water.

CONSTRUCTION STANDARD: Gutters and downspouts should not leak. Gutters should be pitched properly to drain water. Standing water in the gutter that does not exceed 1 inch in depth is acceptable. However, it is the Homebuyer(s) responsibility to keep gutters and downspouts clean so as to assure proper drainage and prevent leaks, overflow or standing water.

BUILDER CORRECTION: Repair leaks and pitch to drain properly.

VI. DOORS AND WINDOWS

6.1 INTERIOR AND EXTERIOR DOORS

•**DEFICIENCY:** Warping of interior and exterior doors.

CONSTRUCTION STANDARD: Exterior doors may warp to some degree due to the temperature and moisture differential between the inside and outside faces. Doors that warp so as to prevent normal closing are defective. Warping of 1/4 inch or less, measured from top to bottom, is acceptable.

BUILDER CORRECTION: Repair or replace the doors as needed and finish to match the existing doors as closely as possible.

•**DEFICIENCY:** Door binds against the frame. Door will not lock.

CONSTRUCTION STANDARD: Doors should operate freely without binding against the frame. The lock should operate smoothly and fit to the keeper.

BUILDER CORRECTION: Builder to adjust the door and keeper to operate freely.

•**DEFICIENCY:** Door panels shrink showing bare wood.

CONSTRUCTION STANDARD: Panels will shrink and expand, showing raw wood edges, with temperature and humidity changes. This is not a deficiency.

BUILDER CORRECTION: None.

•**DEFICIENCY:** Split door panel.

CONSTRUCTION STANDARD: Splits that allow visible light penetration through the door are defects.

BUILDER CORRECTION: Repair or replace as needed one time during the first year of the warranty. Finish to match the existing doors as closely as possible.

•**DEFICIENCY:** Door rubs on the carpet.

CONSTRUCTION STANDARD: The door should not rub the carpet.

BUILDER CORRECTION: Builder to trim the bottom of the door and re-seal the bottom edge.

6.2 GARAGE DOOR(S) ON ATTACHED GARAGE

•**DEFICIENCY:** Garage door(s) fail to operate properly.

CONSTRUCTION STANDARD: Garage door(s) should operate properly and fit the opening closely. Under heavy weather conditions, there may be some penetration by the elements.

BUILDER CORRECTION: Builder to adjust or replace garage doors as required to operate under normal weather conditions.

6.3 WOOD, METAL AND PLASTIC WINDOWS

•DEFICIENCY: Malfunction of windows.

CONSTRUCTION STANDARD: Windows should operate with reasonable ease. Double hung window sashes are permitted to move within a 2 inch tolerance when in the open position.

BUILDER CORRECTION: Builder to adjust, repair or replace as required. During the first five years of the warranty, Builder to adjust or replace wood double hung window sash tracks if necessary to correct the deficiency.

•DEFICIENCY: Condensation and/or frost on windows.

CONSTRUCTION STANDARD: Condensation on interior surfaces is caused by temperature and humidity differences. In cold weather, this will turn to frost. This is not a deficiency.

BUILDER CORRECTION: None.

6.4 SASH LOCK

•DEFICIENCY: Sash lock will not operate properly.

CONSTRUCTION STANDARD: The sash lock should be firmly attached to the window frame and close properly so as to lock the window.

BUILDER CORRECTION: During the first five years of the warranty, Builder to adjust, repair or replace the sash lock. Builder to adjust the window if the sashes do not align properly to permit the sash lock to operate.

6.5 STORM DOORS, WINDOWS AND SCREENS

•DEFICIENCY: Improper operation of storm doors, windows and screens installed by Builder.

CONSTRUCTION STANDARD: Storm doors, windows and screens should operate and fit so as to provide the protection they are intended to provide.

BUILDER CORRECTION: Builder to adjust or replace as needed.

6.6 WEATHERSTRIPPING AND SEALS

•DEFICIENCY: Air or water infiltration around doors and windows.

CONSTRUCTION STANDARD: Air infiltration is generally normal and necessary for proper ventilation of the Home, even in colder or warmer weather. Air infiltration will be noticeable around doors and windows, especially during high winds. There could be some water infiltration during high winds as well.

BUILDER CORRECTION: None. This is not a defect.

6.7 INSULATED WINDOW SEALS

•DEFICIENCY: Clouding or condensation between the panes of insulated glass.

CONSTRUCTION STANDARD: The windows should be free of clouding and condensation between the panes of glass.

BUILDER CORRECTION: During the first five years of the warranty, Builder to repair breaks in the hermetic seal of insulated windows to correct the deficiency, as defined in the manufacturer's warranty. After expiration of any manufacturer's warranty, Builder will cover materials as would be covered by the manufacturer's warranty.

VII. FINISHES

7.1 LATH AND PLASTER

•DEFICIENCY: Excessive cracks in surfaces.

CONSTRUCTION STANDARD: Hairline cracks are common. Cracks larger than 1/8 inch in width are considered excessive.

BUILDER CORRECTION: Builder to repair cracks and touch up the paint to match as closely as possible, one time only during the first year of the warranty.

7.2 DRYWALL

•DEFICIENCY: Defects caused by poor workmanship such as blisters in tape, excess compound in joints, exposed corner beads, or trowel marks.

CONSTRUCTION STANDARD: Imperfections such as occasional nail pops that do not crack the finish, seam lines and hairline cracks are common to drywall and are not defects. Depressions or slight mounds at nail heads are not defects. Blisters in tape, excess compound in joints, exposed corner beads, trowel marks, excessive nail pops and nail pops that cause cracking of the finish are defects.

BUILDER CORRECTION: Builder to correct defects to acceptable tolerance and touch up the finish to match the existing finish as closely as possible, one time only during the first year of the warranty. Significant repairs may require the entire area to be repainted. An exact color match is not guaranteed.

7.3 HARD SURFACE FINISHES (CERAMIC TILE, MARBLE, FLAGSTONE, QUARRY TILE)

•DEFICIENCY: Finish material (not the mortar or grout joints) cracks and/or becomes loose.

CONSTRUCTION STANDARD: Finish material that cracks or becomes loose is a defect.

BUILDER CORRECTION: Builder to replace any cracked materials and resecure any loose materials. Slight color and pattern variations are normal. Builder is not responsible for discontinued materials by the manufacturer. Unless the defective area is greater than 25% of the finished area, the Builder will not be required to replace the entire area.

•DEFICIENCY: Cracks in mortar or grout joints or at junctions with other material, such as a bathtub.

CONSTRUCTION STANDARD: Cracks are common under normal conditions.

BUILDER CORRECTION: Builder will repair mortar or grout as necessary, one time only in the first year of the warranty. Builder is not responsible for color variations or discontinued color grout.

7.4 HARDWOOD FLOORING

•DEFICIENCY: Cracks between the planks, squeaks and uneven floors.

CONSTRUCTION STANDARD: There are no industry standards for determining an acceptable or excessive crack. Builder will repair cracks that exceed 1/16 inch. But Homebuyer(s) must prevent excessive moisture from getting on the floor and maintain a stable temperature and humidity level in the home year-round. Floors should be level within 1/4 inch in 32 inches.

BUILDER CORRECTION: Builder will repair cracks that exceed 1/16 inch. Cracks between planks of 1/16 inch to 1/8 inch will be repaired by filling with a color coordinated wood filling compound to match as closely as possible. Cracks that exceed 1/8 inch will be repaired by replacing the planks. Squeaks caused by defective installation will be repaired. Uneven flooring resulting from buckling, swelling, or warping that exceeds 1/4 inch in 32 inches as measured perpendicular to the planks will be repaired if caused by defective workmanship.

7.5 RESILIENT FLOORING

•DEFICIENCY: Nail pops appear on the surface of flooring.
 CONSTRUCTION STANDARD: Readily apparent nail pops are a deficiency.
 BUILDER CORRECTION: The Builder shall correct nail pops which have broken the surface and repair or replace the floor covering in the affected area only (not the entire floor). Builder is not responsible for discontinued patterns or color variations in tile floor covering.
 •DEFICIENCY: Depressions or ridges appear in the flooring due to subfloor irregularities.
 CONSTRUCTION STANDARD: Readily apparent depressions or ridges exceeding 1/8 inch should be repaired. The ridge or depression measurement is taken at the gap created at one end of a 6 inch straight edge placed over the depression or ridge with three inches on one side of the depression or ridge held tightly to the floor.
 BUILDER CORRECTION: The Builder shall take corrective action as necessary to bring the defect within acceptable tolerances so that it is not readily visible. Builder is not responsible for discontinued patterns or color variations in floor covering.
 •DEFICIENCY: Seams or shrinkage gaps show.
 CONSTRUCTION STANDARD: Gaps shall not exceed 1/8 inch in width. Where dissimilar materials abut, the gap shall not exceed 3/16 inch.
 BUILDER CORRECTION: Builder to correct. If replacement is necessary, the Builder is not responsible for discontinued patterns or color variations in the floor covering.

7.6 CARPETING

•DEFICIENCY: Carpet seams separate, carpet becomes loose or excessive stretching occurs.
 CONSTRUCTION STANDARD: Seams that separate due to improper installation are a deficiency. Carpet should not come loose. Carpet should not have excessive stretching. The carpeting material itself is not covered, but is covered solely by the manufacturer's warranty.
 BUILDER CORRECTION: Builder to repair seams. Builder to resecure or restretch carpeting as needed one time only during the first year of the warranty.

7.7 PAINTING

•DEFICIENCY: Mildew or fungus on painted surfaces.
 CONSTRUCTION STANDARD: Mildew or fungus is a maintenance item. It is not a deficiency.
 BUILDER CORRECTION: None.
 •DEFICIENCY: Exterior paint or stain peels or deteriorates.
 CONSTRUCTION STANDARD: Exterior paints or stains should not fail during the first year of the warranty. Fading is normal and subject to sun and weather exposure. Fading is not a deficiency. Peeling or other deterioration of exterior paint which occurs after the end of the first year of the warranty is not covered, even though some peeling or deterioration of some part of the exterior paint may have occurred during such first year.
 BUILDER CORRECTION: Builder shall properly prepare and refinish affected areas only, matching the existing color as closely as possible. Color matching of paint is not guaranteed.
 •DEFICIENCY: Painting required as corollary repair because of other work.
 CONSTRUCTION STANDARD: Necessary repair of a painted surface under warranty will be refinished to match surrounding areas as closely as possible.
 BUILDER CORRECTION: Refinish repaired areas as indicated. Color matching of paint is not guaranteed.

•DEFICIENCY: Deterioration of varnish or lacquer finishes.
 CONSTRUCTION STANDARD: Natural finishes on interior woodwork that deteriorate during the

first year of the warranty are a deficiency. Exterior varnish-type finishes deteriorate rapidly and are not covered.

BUILDER CORRECTION: Refinish the affected area only, matching the color as closely as possible.

DEFICIENCY: Interior paint application and coverage.

CONSTRUCTION STANDARD: Interior paint shall sufficiently cover wall, ceiling and trim surfaces.

BUILDER CORRECTION: Builder shall repaint affected surfaces only where inadequate paint has been applied. The color shall be matched as closely as possible.

DEFICIENCY: Paint splatters and smears on finish surfaces.

CONSTRUCTION STANDARD: Excessive splatters and smears that detract from the finish, and which can not be removed by normal cleaning methods, are a deficiency. Minor paint splatters that are not readily noticeable are not a deficiency.

BUILDER CORRECTION: Builder to clean/remove paint and restore the surface finish, matching colors as closely as possible.

7.8 WALL COVERING

DEFICIENCY: Peeling of wallpaper.

CONSTRUCTION STANDARD: Peeling of wallpaper, not due to abuse or negligence, is a deficiency. Wallcovering installed by anyone other than Builder is not covered.

BUILDER CORRECTION: Builder to repair or replace defective wallpaper. Builder is not responsible for discontinued patterns or variations in color.

DEFICIENCY: Mismatching in wallcovering pattern originally installed by Builder.

CONSTRUCTION STANDARD: Mismatching pattern due to workmanship over a large area that severely detracts from the appearance is a deficiency. Wallcovering installed by anyone other than Builder is not covered.

BUILDER CORRECTION: Builder to replace mismatched wallcovering. Builder is not responsible for discontinued patterns or variations in color.

VIII. FIREPLACES

8.1 FIREPLACE OPERATION

DEFICIENCY: Fireplace or chimney does not draw properly causing smoke to enter the home.

CONSTRUCTION STANDARD: The fireplace and chimney should function as intended. High winds can cause temporary negative draft situations. Similar negative draft situations can also be caused by obstructions such as large branches of trees too close to the chimney. In some cases, it may be necessary to open a window slightly to create an effective draft. Builder is not responsible for malfunctions due to natural causes and/or causes beyond Builder's control.

BUILDER CORRECTION: Builder to correct malfunctions caused by improper construction.

8.2 CHIMNEY

DEFICIENCY: Chimney separating from structure to which it is attached.

CONSTRUCTION STANDARD: Newly built fireplaces will often incur slight amounts of separation from the main structure. Separation greater than 1/4 inch from the main structure in any 10 foot vertical measurement is a deficiency.

BUILDER CORRECTION: Builder to correct as required. Grouting or caulking is acceptable for separations up to 1/4 inch.

IX. CABINETRY

9.1 KITCHEN AND VANITY CABINETS

•DEFICIENCY: Cabinet doors and drawers malfunction.
 CONSTRUCTION STANDARD: Cabinet doors, drawers and other operating parts should function as designed.
 BUILDER CORRECTION: Builder to repair or replace.
 •DEFICIENCY: Warping of cabinet doors and drawer fronts.
 CONSTRUCTION STANDARD: Warpage that exceeds 1/4 inch (exclusive of any gap created by spacers), measured from the face of the cabinet frame with the door or drawer in the closed position, is a deficiency.
 BUILDER CORRECTION: Builder to correct or replace as required.
 •DEFICIENCY: Gaps between cabinets and the ceiling or walls.
 CONSTRUCTION STANDARD: Gaps should not exceed 1/4 inch.
 BUILDER CORRECTION: Adjust cabinets and countertops, or close with suitable moulding to match the finish as closely as possible. Caulking is acceptable.

9.2 COUNTERTOPS

•DEFICIENCY: Surface cracks, delaminations and chips in high pressure laminated vanity and kitchen countertops.
 CONSTRUCTION STANDARD: Countertops fabricated with high pressure laminate coverings should not delaminate or have chips or surface cracks. Gaps between joints should not exceed 1/16 inch. Moisture and water build-up in seams will occur if such areas are not properly maintained by Homebuyer(s) so, unless caused by Builder moisture and water build-up in seams is not a deficiency.
 BUILDER CORRECTION: Builder to repair or replace to meet the standard.

X. PLUMBING SYSTEMS

10.1 SEPTIC TANK SYSTEM

•DEFICIENCY: Septic system fails to operate properly.
 CONSTRUCTION STANDARD: Septic system should properly handle normal flow of household effluent. It is possible that an overflow can occur due to freezing, soil saturation, changes in the ground water table or excessive use of plumbing or appliances. Periodic pumping of the septic tank is considered a Homebuyer(s) maintenance responsibility and a normal need for pumping is not a deficiency.
 BUILDER CORRECTION: During the first two years of the warranty, Builder to repair system to correct malfunction due to improper design or installation. Builder shall not be responsible for malfunctions which occur through negligence or abuse or natural causes (such as freezing or changes in ground water table) and/or conditions that are beyond the Builder's control. The following are considered negligence or abuse:

- A. Excessive use of water, such as overuse of the washing machine and the dishwasher, including their simultaneous use.
- B. Connection of sump pump, roof drains or backwash from water conditioner to the system.
- C. Placing of non-biodegradable items in the system.
- D. Addition of any harsh chemicals, greases or cleaning agents, and excessive amounts of bleaches or drain cleaners.
- E. Use of a food waste disposer not supplied by Builder.
- F. Placement of impervious surfaces over the disposal area.
- G. Allowing vehicles to drive or park over the disposal area.
- H. Failure to periodically pump out the septic tank when required.

10.2 PLUMBING

•**DEFICIENCY:** Water service line breaks or leaks or fails to deliver water.

CONSTRUCTION STANDARD: Service connections are the Builder's responsibility. The water service line should function as intended. Damage or failure resulting from neglect or abuse or landscaping activities, or from conditions beyond the Builder's control (such as, for example, without limitation, disruption or elimination of sources of water supply), is not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder to repair verified leaks in the line or restore service, if leak or failure is due to defective workmanship or materials, and restore the landscaping in the affected area. The Builder's responsibility for water service lines extends only from the Home to the water meter connection on the property on which the Home is situated.

NOTE: Should a water service line break or leak occur, Homebuyer(s) should immediately shut off the water service at the meter and call the appropriate public utility service.

•**DEFICIENCY:** Leakage in pipes or fittings. Leakage from pipes freezing and bursting.

CONSTRUCTION STANDARD: No leaks should exist in any plumbing pipes or fittings. Condensation on piping does not constitute leakage. Exterior hose bibs and other hose connections are not covered. Leaks occurring because of neglect or failure to maintain suitable temperatures in the Home to prevent pipes from freezing and bursting are not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder shall repair any leakage from pipes or fittings installed by Builder, except for leakage caused by freezing. During the first two years of the warranty, Builder shall repair any leakage from pipes or fittings installed by Builder caused by freezing.

NOTE: Should a water pipe leak occur, Homebuyer(s) should immediately shut off the water service and call the appropriate public utility service.

•**DEFICIENCY:** Stopped up sewers, fixtures and drains.

CONSTRUCTION STANDARD: Sewer fixtures and drains should operate properly. Damage, insufficient operation or clogging due to neglect, abuse, improper operation or landscaping activities, or from conditions beyond Builder's control, is not covered.

BUILDER CORRECTION: During the first five years of the warranty, where defective construction is shown to be the cause of the deficiency, the Builder will make the necessary repairs. The Builder's responsibility for sewer lines extends only to the boundary line of the property on which the Home is situated.

•**DEFICIENCY:** Leakage in a faucet, valve, tub, sink or toilet.

CONSTRUCTION STANDARD: No faucet, valve, tub, sink or toilet should leak due to defects in material or workmanship. Replacement and maintenance of washers and seals are the responsibility of the Homebuyer(s). Leakage due to worn washers or seals is not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder shall repair or replace the leaking faucet, valve, tub, sink or toilet.

•**DEFICIENCY:** Defective plumbing fixtures or trim fittings.

CONSTRUCTION STANDARD: Fixtures or fittings should operate or perform their intended function properly. Tarnishing and pitting of faucets are not covered, but are covered solely by the manufacturer's warranty. High iron content in the water will cause staining of fixtures. It is the Homebuyer(s) responsibility to treat the water, if necessary. No Builder correction is required.

BUILDER CORRECTION: During the first five years of the warranty, the Builder shall repair or replace any fixture or fitting which is outside of acceptable standards of operation or performance.

10.3 GAS LINE

•**DEFICIENCY:** Leakage in the interior gas line piping.

CONSTRUCTION STANDARD: No leaks should exist in any gas pipes or fittings. Damage

resulting from neglect or abuse, or from conditions beyond the Builder's control (such as, for example, without limitation, disruption or elimination of sources of gas supply), is not covered.

BUILDER CORRECTION: During the first five years of the warranty, Builder to repair verified leaks in piping as necessary, if leak is due to defective workmanship or materials.

NOTE: Should a gas pipe leak occur outside the Home, Homebuyer(s) should call the appropriate public utility service immediately. If the leak occurs inside the Home, Homebuyer(s) should shut off the gas service immediately, ventilate the Home, and call the appropriate public utility service immediately.

XI. HEATING AND AIR CONDITIONING SYSTEM

11.1 HEATING

•**DEFICIENCY:** Inadequate heating.

CONSTRUCTION STANDARD: The heating system shall be capable of producing an inside temperature of 68 degrees Fahrenheit as measured in the center of each room at a height of 3 feet above the floor under local outdoor winter design conditions as specified in the ASHRAE handbook. There may be times when the outdoor temperature falls below the design temperature. When this occurs, the temperature in the Home may be lower than 68 degrees. Rooms located over garages and sunporches will experience a temperature differential due to their exposure, and this is not a deficiency.

BUILDER CORRECTION: Correct the heating system to meet the standard. Builder to balance dampers, registers and make other minor adjustments one time only during the first year of the warranty.

11.2 AIR CONDITIONING

•**DEFICIENCY:** Inadequate cooling.

CONSTRUCTION STANDARD: If air conditioning is provided, the cooling system shall be capable of maintaining an inside temperature of 78 degrees Fahrenheit as measured in the center of each room at a height of 5 feet above the floor under local outdoor summer design conditions as specified in the ASHRAE handbook. There may be times when the outdoor temperature rises above the design temperature. When this occurs, the temperature in the Home may be higher than 78 degrees. When the outdoor temperature exceeds 95 degrees, a differential of 17 degrees will be accepted as meeting the standard. Rooms located over garages and sunporches will experience a temperature differential due to their exposure, and this is not a deficiency.

BUILDER CORRECTION: Correct the cooling system to meet the standard. Builder to balance dampers, registers and make other minor adjustments one time only during the first year of the warranty. Changing and/or adding refrigerant, which should be done on at least an annual basis, is the responsibility of the Homebuyer(s).

•**DEFICIENCY:** Refrigerant line leak or clog.

CONSTRUCTION STANDARD: Refrigerant lines should not develop leaks during normal operation. However, condensation lines will clog under normal use. This is the maintenance responsibility of the Homebuyer(s) and requires no correction by the Builder.

BUILDER CORRECTION: During the first two years of the warranty, repair leaking refrigerant lines and recharge the unit.

•**DEFICIENCY:** Ductwork separates or becomes unattached.

CONSTRUCTION STANDARD: Ductwork should remain intact and securely fastened.

BUILDER CORRECTION: During the first two years of the warranty, reattach and resecure as necessary.

XII. ELECTRICAL SYSTEM

12.1 ELECTRICAL CONDUCTORS

•DEFICIENCY: Failure of wiring to carry its designated circuit load to the electrical box.
CONSTRUCTION STANDARD: Wiring shall carry the designed load for normal residential use.
BUILDER CORRECTION: During the first five years of the warranty, correct the wiring as necessary to meet the standard.

12.2 SWITCHES AND RECEPTACLES

•DEFICIENCY: Fuses blow or circuit breakers kick out.
CONSTRUCTION STANDARD: Fuses and circuit breakers should not activate under normal usage.
BUILDER CORRECTION: During the first two years of the warranty, correct the fuse wiring or breakers as necessary.
•DEFICIENCY: Malfunction of electrical outlets and switches.
CONSTRUCTION STANDARD: All outlets and switches should operate as intended.
BUILDER CORRECTION: During the first five years of the warranty, repair or replace defective switches and outlets. Light fixtures are covered solely by the manufacturer's warranty.

12.3 SERVICE AND DISTRIBUTION

•DEFICIENCY: Ground fault interrupter trips frequently.
CONSTRUCTION STANDARD: Ground fault interrupters are sensitive safety devices that protect against electrical shock and can be tripped very easily. A ground fault interrupter that does not operate as intended is a deficiency.
BUILDER CORRECTION: Builder to replace defective ground fault interrupter.

s:\legal\warranty\5-20 warranty.1105.doc
rev 112905

Exhibit Handbook Receipt Confirmation
(Please print)

Exhibit Name: Joseph Wayne Parsons + Louise Parsons

Exhibit Number: Gracie W. Parsons Lot/Block 1787

Exhibit Address: 1787 W. 1st St. St. Louis, Mo. 63103



Exhibit Description: Gracie W. Parsons
 Date of Receipt: 1/1/80
 Signature: Joseph Wayne Parsons
 Printed Name: JOSEPH WAYNE PARSONS
 Address: 1787 W. 1st St. St. Louis, Mo. 63103
 Phone: 434-1111

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

RECEIVED

OCT 20 2011

SC Court of Appeals

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,

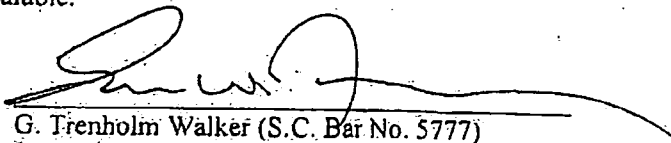
Of Whom John Wieland Homes and Neighborhoods
of the Carolinas, Inc. is the

Appellant.

NOTICE OF APPEAL

John Wieland Homes and Neighborhoods of the Carolinas, Inc. appeals the enclosed order of the Honorable S. Jackson Kimball filed October 10, 2011. Appellant received written notice of entry of this order on October 13, 2011. The order denying Appellant's motion to compel arbitration is immediately appealable.

October 19, 2011



G. Trenholm Walker (S.C. Bar No. 5777)

Ian W. Freeman (S.C. Bar No. 72736)

P.O. Drawer 22247

Charleston, SC 29413-2247

Tel: (843) 727-2242

ATTORNEYS FOR APPELLANT

Other Counsel of Record:

Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.
Hamilton Martens & Ballou, LLC
PO Box 10940
Rock Hill, SC 29731
ATTORNEYS FOR RESPONDENTS

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,

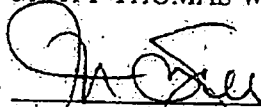
Of Whom John Wieland Homes and Neighborhoods
of the Carolinas, Inc. is the Appellant.

PROOF OF SERVICE

I hereby certify that a true and correct copy of a Notice of Appeal herein was served on
this 19th day of October, 2011 via U.S. mail, postage prepaid, upon the following counsel of
record:

Herbert W. Hamilton, Esq.
Tracy T. Vann, Esq.
Hamilton Martens & Ballou, LLC
PO Box 10940
Rock Hill, SC 29731

PRATT-THOMAS WALKER, P.A.



Janet Segell, Paralegal to Ian W. Freeman
P.O. Drawer 22247
Charleston, SC 29413-2247

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

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

Case Number: 2011-CP-46-00796

Plaintiffs,

v.

AFFIDAVIT OF WAYNE PARSONS

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

Defendants.

Personally appeared before me, Wayne Parsons, who being duly sworn deposes
and says:

1. I am over the age of 18 and competent to make this affidavit.
2. I am a Co-Plaintiff in the captioned lawsuit.
3. In approximately May of 2007, my wife and I began looking for a home in Bridge Mill subdivision being built by John Wieland Homes ("JWH").
4. We found a house we liked which was in the early stages of construction. Wieland told us that if we wanted to control the quality and finish of the house, we needed to sign a contract and make a deposit.
5. On June 30, 2007, we signed the contract in the Wieland sales office. Our realtor and the Wieland sales person were present.

6. I read the contract and questioned the arbitration provision. I asked if the arbitration agreement meant we couldn't sue Wieland if something goes wrong. We were told that any claim under the warranty would be decided in arbitration.

7. The contract makes reference to a homeowner's handbook. We were not given the homeowner's handbook until after the contract was signed. We were told to go ahead and initial the sentence indicating that we had received and read the handbook, and that we would be given the handbook later.

8. We were never told that the arbitration agreement requires the use of an arbitration group selected by Wieland. Had we known this provision was in the handbook, we would never have signed the contract.

9. We closed on the purchase of the house on October 13, 2007. The purchase price of the house was \$621,102.00.

10. When we signed the Purchase Agreement and closed the purchase of the house, we were not aware that the property had been used as an industrial site and underground pipes, tanks and other appurtenances had been located on the property. We certainly were not aware that hazardous materials had been stored and/or used on the surrounding land or that any hazardous material was present on the site of our home.

11. In 2008, while investigating a possible irrigation leak in the backyard, we discovered a four inch PVC pipe buried on our property. Further investigation revealed a two inch PVC pipe in our backyard. Both pipes ran the entire width of our backyard. Beginning in the middle of the yard, the PVC pipes became encased in concrete. Both PVC pipes were attached to a metal box also encased in concrete. The four inch PVC pipe and the metal box contained a black sludge.

12. We contacted Wieland about our discovery. Wieland began to arrange for removal of the pipes. Testing established that the black sludge was hazardous waste.

13. We also contacted South Carolina Department of Health and Environmental Control ("DHEC"). DHEC performed additional tests and confirmed that the black sludge was hazardous and that chemical vapors were entering the crawl space of the home.

14. After discussions with DHEC, JWH entered a voluntary clean-up contract with DHEC and began the process of removing the pipes and the sludge.

15. While excavating the plastic piping, a 12" cast iron pipe was discovered. The cast iron pipe ran the width of the backyard, which ran from my neighbor's driveway through my backyard, underneath the foundation in the crawl space of my house, underneath my neighbor's drive, and ended in the road.

16. Representatives of JWH admitted to the SCDHEC official on site that that they knew the cast iron pipe was there, and that JWH had removed the cast iron pipe from the remainder of the development but left it underground in my backyard.

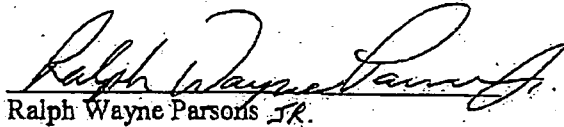
17. Whether or not there was hazardous waste buried on my lot, we would not have purchased this house had we known the 12" cast iron piping was buried in the yard. The presence of the pipe severely limited what we could do with the yard since it was 2 1/2 feet below ground level.

18. Despite Wieland's remediation efforts, our home has been substantially compromised, and the presence of the hazardous waste has created a stigma which will make the house difficult to sell at any price. Due to the removal of pipes and contaminated soil, ten (10) Helical piers had to be installed to stabilize the foundation of

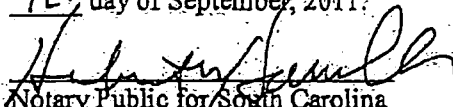
the house, as well as the cast iron pipe underneath the home. Pipes were found running through the foundation of the house some of which contained hazardous waste. Several of the pipes still remain in the foundation of the house. Removal of the pipes would have compromised the foundation.

19. Had the pipes and sludge not been discovered, we are informed and believe that long-term exposure to chemical vapors in the crawl space of the house could have caused serious health issues including cancer.

20. Attached hereto are several pictures of the remediation effort by Wieland. I took the pictures and prepared the captions. I affirm that the information in the captions is true to the best of my knowledge.

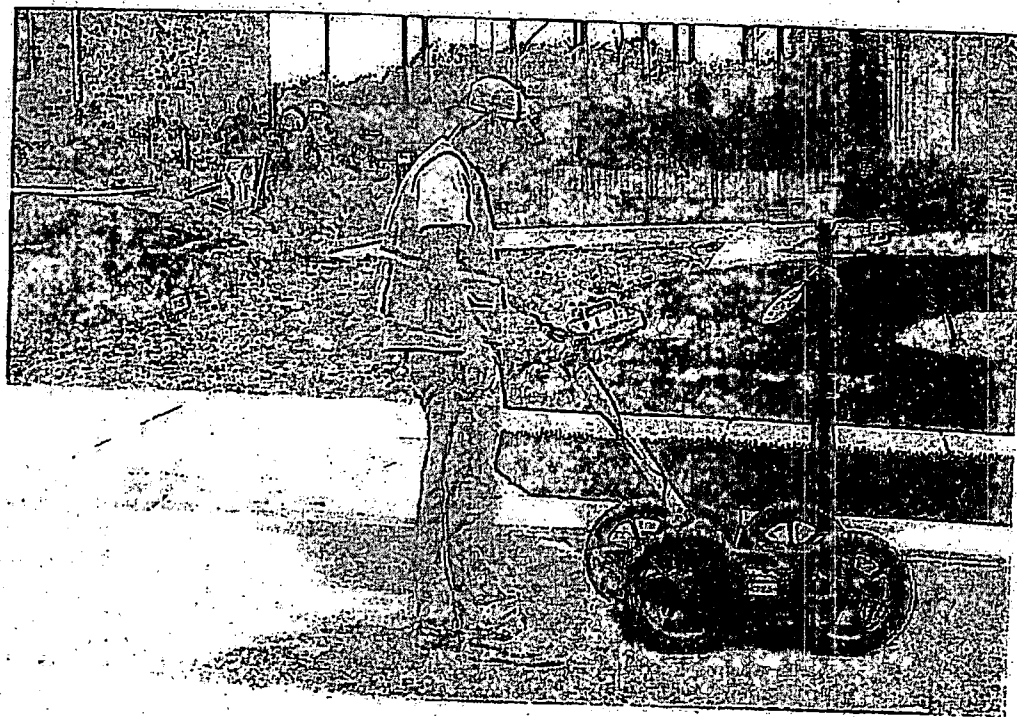
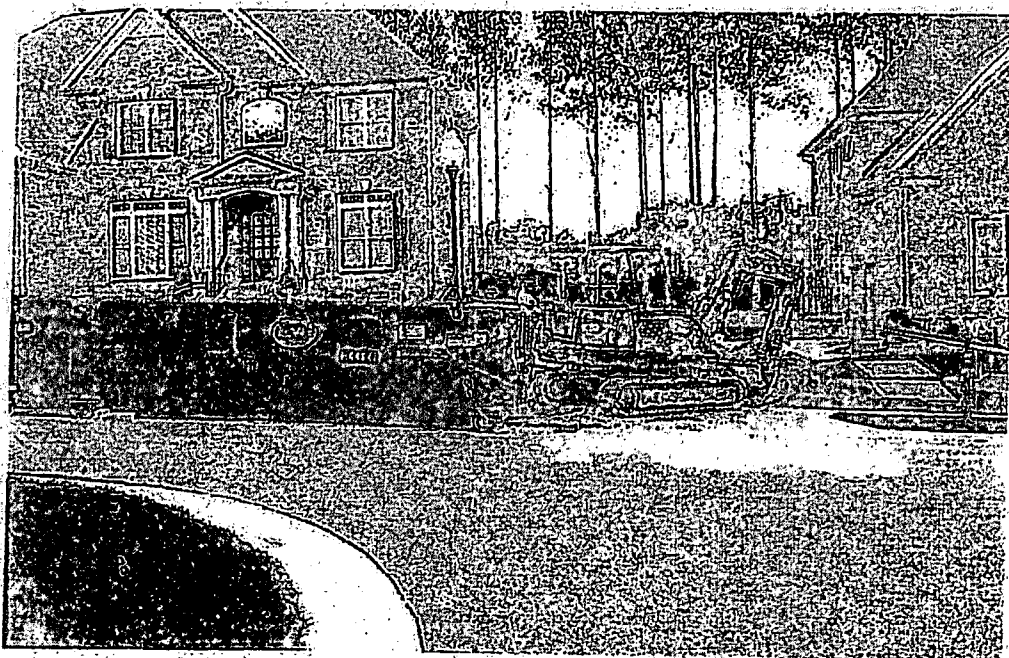

Ralph Wayne Parsons JR.

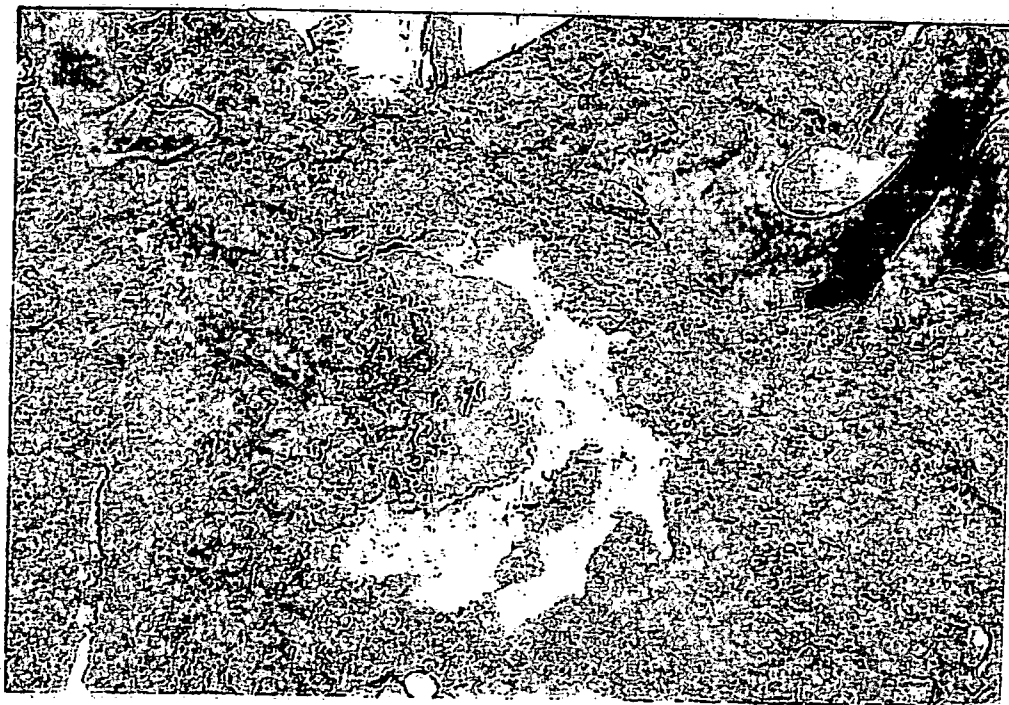
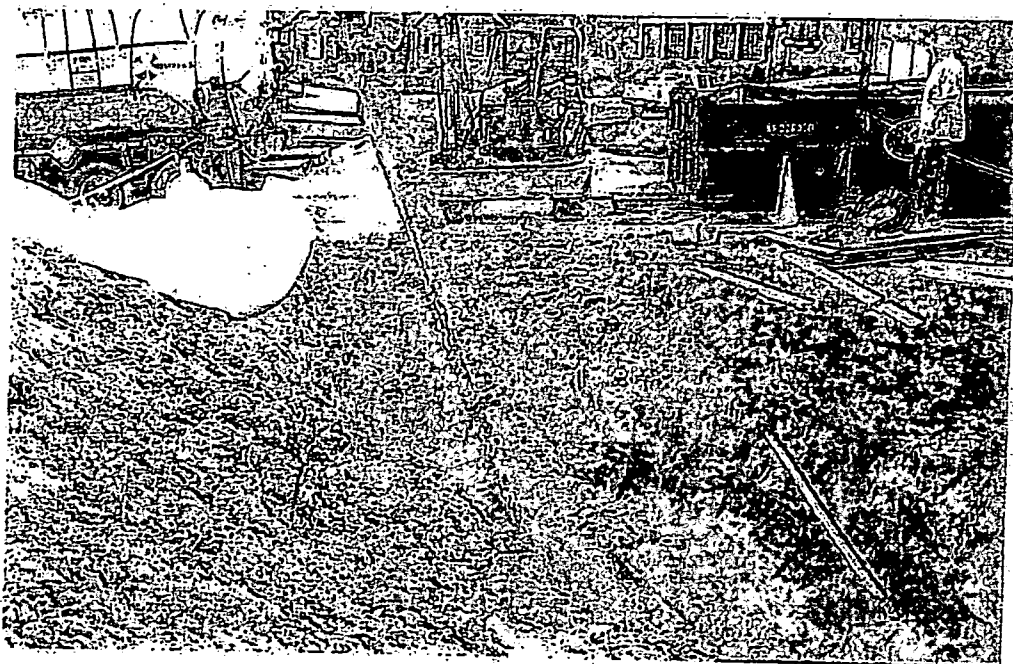
Sworn to before me this
12th day of September, 2011.

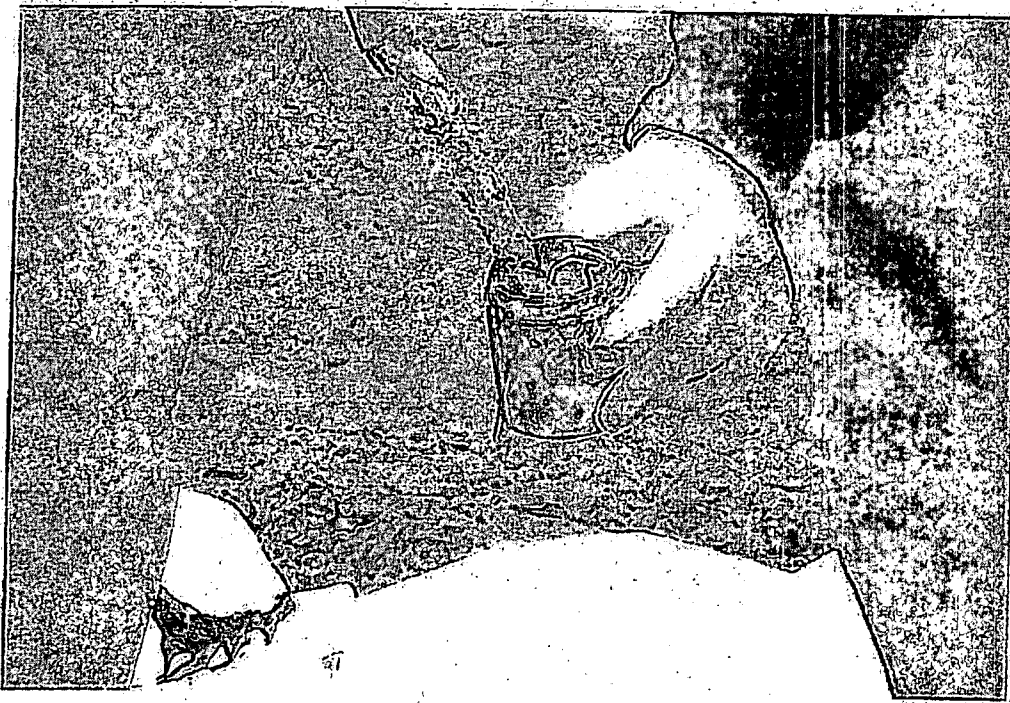

Notary Public for South Carolina

My commission expires: 7/19/2015

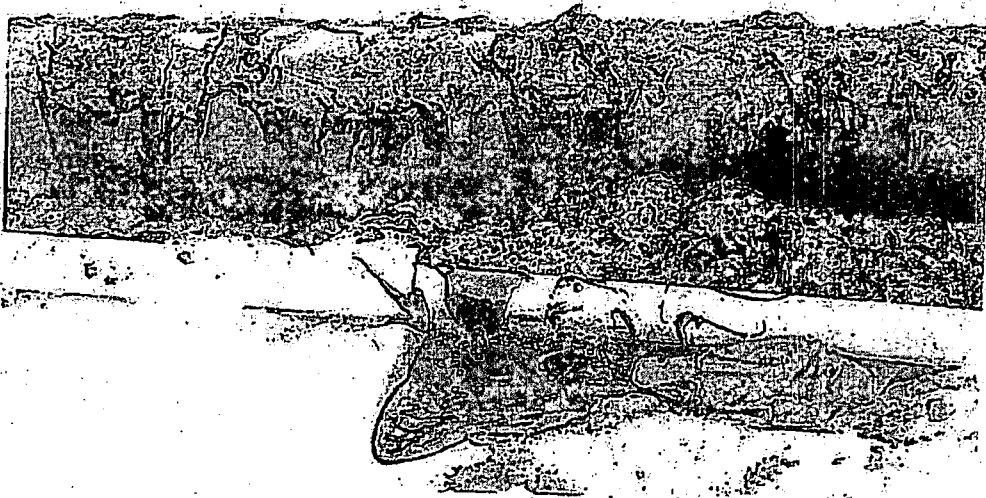
4820-1175-2202, v. 1













PICTURES OF THE HEILICAL PIERS ON SOUTH SIDE FOUNDATION WALL. NOTICE THE IRREGULAR DEPTHS OF THE FOUNDATION. PICTURES OF THE 12 INCH CAST IRON PIPE RUNNING UNDER THE FOUNDATION. THE CAST IRON PIPE REMAINS UNDER THE FOUNDATION, CAPPED AT BOTH ENDS. THE DEPTH OF CONTAMINATION BELOW THE 4 INCH PVC PIPE WAS 10 FEET DUE TO THE SAW CUT IN THE PIPE WHICH ALLOWED LEAKAGE BEFORE THE CONCRETE WAS INSERTED.

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.

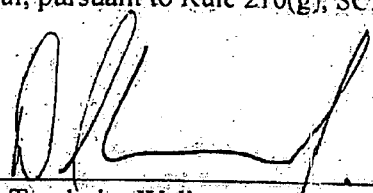
John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and
South Carolina Bank & Trust, N.A., ... Defendants,

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Record on Appeal contains all material proposed to be
included by the parties herein and not any other material, pursuant to Rule 210(g), SCACR.

September 4, 2012



G. Trenholm Walker
Ian W. Freeman
Daniel S. McQueeney, Jr.
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413-2247
(843) 727-2200
ATTORNEYS FOR APPELLANT



12 INCH CAST IRON PIPE IN BACK YARD. VIEW
IS FROM THE BACK FENCE TOWARD THE EAST
BACK FOUNDATION. THE PIPE WAS DISCOVERED
APPROXIMATELY 8 FEET FROM THE FENCE AND
ONLY 2 ½ FEET BELOW GROUND LEVEL!

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.

BRIEF OF APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE
CAROLINAS, INC.

Ian W. Freeman
G. Trenholm Walker
Daniel S. McQueeney, Jr.
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2243
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of the Issues on Appeal.....	1
Statement of the Case.....	1
Facts.....	2
Standard of Review.....	8
Argument.....	9
I. The circuit court committed an error of law in interpreting the terms of the warranty instead of the terms of the arbitration clause. The scope of the arbitration clause encompasses the claims asserted by the Parsons.....	9
A. The circuit court mistakenly interpreted the exclusions to the warranty instead of the arbitration clause, which is separate and distinct from the warranty.....	9
B. The arbitration clause applies to, and specifically includes, the Parsons' claims.....	12
II. The circuit court committed an error of law in finding that the Parsons' claims for failing to discover, remediate, and/or disclose hazardous substances buried on the Property by a previous owner alleged outrageous conduct which was unanticipated and unforeseeable to a reasonable consumer.....	16
Conclusion.....	20

TABLE OF AUTHORITIES

CASES

<u>Aiken v. World Fin. Corp.</u> , 373 S.C. 144, 644 S.E.2d 705 (2007)	16-20
<u>Allied-Bruce Terminix Companies, Inc. v. Dobson</u> , 513 U.S. 265 (1995)	12
<u>Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.</u> , 96 F.3d 88 (4th Cir. 1996)	13
<u>Ardis v. Cox</u> , 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993)	19
<u>Argoe v. Three Rivers Behavioral Health, L.L.C.</u> , 392 S.C. 462, 710 S.E.2d 67 (2011)	18-19
<u>Carolina Care Plan, Inc. v. United HealthCare</u> , 361 S.C. 544, 606 S.E.2d 752 (2004)	13
<u>D.A. Davis Const. Co., Inc. v. Palmetto Props., Inc.</u> , 281 S.C. 415, 315 S.E.2d 370 (1984)	10
<u>Drews Distrib., Inc. v. Silicon Gaming, Inc.</u> , 245 F.3d 347 (4th Cir. 2001)	15
<u>First Baptist Church v. George A. Creed</u> , 276 S.C. 597, 281 S.E.2d 121 (1981)	10
<u>Jackson Mills, Inc. v. BT Capital Corp.</u> , 312 S.C. 400, 440 S.E.2d 877 (1994)	10
<u>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.</u> , 863 F.2d 315 (4th Cir. 1988)	13, 15
<u>Long v. Silver</u> , 248 F.3d 309 (4th Cir. 2001)	14
<u>May v. Hopkinson</u> , 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986)	19
<u>Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.</u> , 460 U.S. 1 (1983)	13
<u>New Hope v. Paragon Bldrs.</u> , 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008)	8, 10
<u>Palmetto Homes, Inc. v. Bradley</u> , 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2004)	15
<u>Partain v. Upstate Auto. Group</u> , 386 S.C. 488, 689 S.E.2d 602 (2010)	16-20
<u>Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.</u> , 867 F.2d 809 (4th Cir. 1989)	14-15
<u>Pierson v. Dean, Witter, Reynolds, Inc.</u> , 742 F.2d 334 (7th Cir. 1984)	15
<u>Prima Paint Corp. v. Flood & Conklin Mfg. Co.</u> , 388 U.S. 395 (1967)	10
<u>S.C. Dep't of Transp. v. M & T Enters.</u> , 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008)	12
<u>Schulmeyer v. State Farm Fire & Cas. Co.</u> , 353 S.C. 491, 579 S.E.2d 132 (2003)	10
<u>S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.</u> , 312 S.C. 559, 437 S.E.2d 22 (1993)	13
<u>Towles v. United HealthCare Corp.</u> , 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999)	9-10, 13
<u>Valley Pub. Serv. Auth. v. Beech Island</u> , 319 S.C. 488, 462 S.E.2d 296 (Ct. App. 1995)	11
<u>Zabinski v. Bright Acres Assocs.</u> , 346 S.C. 580, 553 S.E.2d 110 (2001)	8, 12
<u>Zandford v. Prudential-Bache Sec., Inc.</u> , 112 F.3d 723 (4th Cir. 1997)	14

STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court commit an error of law in interpreting the terms of the warranty instead of the terms of the arbitration clause by finding that the arbitration clause is inapplicable because the warranty does not apply to, and specifically excludes, the claims asserted by the Parsons?

II. Did the circuit court commit an error of law in finding that the Parsons' claims for failing to discover, remediate and/or disclose hazardous substances buried on the property by a previous owner allege outrageous conduct which was unanticipated and unforeseeable to a reasonable consumer?

STATEMENT OF THE CASE

On February 24, 2011, Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons (the "Parsons") filed a complaint against Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes"), Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., alleging causes of action for rescission, breach of contract, breach of implied warranties, fraud, negligent misrepresentation, negligence/gross negligence, and violation of the South Carolina Unfair Trade Practices Act. **R.pp.7-16.**

These causes of action arose out of the conveyance of real property located at 4270 Rochard Lane in Fort Mill, South Carolina, (the "Property") from John Wieland Homes to the Parsons in 2007. **R.pp.7-16; R.pp.57-61.** The Parsons named Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., as defendants "solely by reason of their mortgages on the property that is the subject of this action and Plaintiffs' claim for rescission." **R.p.8, ¶5.**

The Parsons allege John Wieland Homes knew or should have known that there were hazard substances buried on the Property by a previous owner because the previous owner utilized the tract on which the Property is located as an "industrial site" and because this use included underground pipes buried on the Property. **R.pp.7-16.** The Parsons assert John Wieland Homes breached a duty to disclose these hazardous substances to the Parsons prior to the

Parsons' purchase of the Property. **R.pp.7-16.** The Complaint seeks to rescind the contract or obtain damages for the decline in value of the Property due to the presence of alleged hazardous substances thereon. **R.pp.7-16.**

On June 10, 2011, John Wieland Homes moved to compel arbitration pursuant to an arbitration clause incorporated into the purchase contract between John Wieland Homes and the Parsons. **R.pp.55-56.**

On September 15, 2011, the circuit court held a hearing on the motion to compel arbitration. **R.p.17.** By order filed on October 10, 2011, the circuit court ruled that the causes of action alleged by the Parsons were not covered by the arbitration clause because the express warranties provided by John Wieland Homes, which were also incorporated by reference into the purchase contract, specifically excluded any claims not provided for in the express warranties. **R.pp.2-6.** The circuit court further held that the Parsons alleged conduct by John Wieland Homes which was so outrageous that a reasonable consumer would not have foreseen that the conduct was subject to the arbitration clause. **R.pp.2-6.**

John Wieland Homes received written notice of entry of the circuit court's order on October 13, 2011. **R.p.168.** On October 19, 2011, John Wieland Homes served notice of its intent to appeal the circuit court's order. **R.pp.168-170.**

FACTS

John Wieland Homes is a corporation organized and existing in the State of Georgia that develops and sells real property, including real property located in South Carolina. **R.pp.111, ¶1, p.113, ¶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. **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.** In the purchase contract between Springs and John Wieland Homes, Springs represented that, to its knowledge, no portion of the tract was being used or had been used as a dump or fill for the disposal, storage, treatment, processing, or handling of hazardous substances. **R.p.113, ¶9.** Springs also represented that the tract was free of all hazardous substances. **R.p.113, ¶9.**

Prior to the closing, John Wieland Homes obtained a Phase I Environmental Assessment that did not reveal the existence of any recognized environmental conditions warranting further investigation. **R.pp.113, ¶¶10-11.** After the closing, John Wieland Homes constructed roads, utilities and other infrastructure on the tract. **R.p.113, ¶12.** John Wieland Homes also removed facilities relating to the prior use of the tract by Springs. **R.p.113, ¶9.**

On March 22, 2006, the Parsons executed an agreement with John Wieland Homes to purchase certain real property located at 5070 Karriker Court in the BridgeHampton subdivision in Fort Mill, South Carolina. **R.p.126, ¶3; R.pp.128-131.** The Parsons simultaneously received a warranty booklet from John Wieland Homes entitled "The Wieland 5-20 Extended Warranty" and executed a separate acknowledgement that they had received this warranty booklet. **R.p.126, ¶3; R.p.167.**

The Parsons ultimately chose to purchase a separate piece of property from John Wieland Homes. **R.pp.126-127, ¶3.** Consequently, on June 30, 2007, the Parsons executed a contract to purchase the Property, utilizing the earnest monies paid toward the Karriker Court property. **R.pp.57-61; R.p.123, ¶4; R.pp.126-27, ¶3.** The Purchase and Sale Agreement executed by the Parsons on June 30, 2007, is almost identical to the Purchase and Sale Agreement for the

Karriker Court property they executed on March 22, 2006. R.pp.57-61; R.pp.128-131.

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.pp.75-77, §V, ¶O (emphasis added in italics).

While the Parsons contend they were provided the JWH Warranty only after signing the Purchase and Sale Agreement for the Property, they signed an acknowledgement of receipt of the JWH Warranty on March 22, 2006, in association with the purchase contract for the Karriker Court property, and on June 30, 2007, the same day they executed the Purchase and Sale Agreement for the Property. R.p.123, ¶4; R.p.125; R.p.126, ¶3; R.p.167. As previously mentioned, they also acknowledged that they received *and read* the JWH Warranty in Paragraph 21 of the Purchase and Sale Agreement for both properties. R.p.59, ¶21; R.p.130, ¶21.

John Wieland Homes 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 John Wieland Homes, 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, John Wieland Homes 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 John Wieland Homes. **Resps.' Br., p.1; R.p.116, ¶28.** John Wieland Homes has continued its remediation efforts on the Property and even filed a lawsuit in federal court against Springs for breaching its representations in the purchase contract with John Wieland Homes and for contribution toward the response costs incurred by John Wieland Homes. **R.p.11; R.pp.111-119.**

On February 24, 2011, the Parsons filed the present lawsuit against John Wieland Homes. **R.pp.7-16.** The substantive allegations of the Parsons' complaint allege that John Wieland Homes breached the Purchase and Sale Agreement for the Property 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 contract 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 John Wieland Homes 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 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 Parsons, that John Wieland Homes 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.**

John Wieland Homes moved to dismiss the Parsons’ complaint and compel arbitration on the basis of the arbitration clause referenced and incorporated into the Purchase and Sale Agreement for the Property. **R.pp.55-56.** The circuit court held a hearing on the motion to compel arbitration on September 15, 2011. **R.p.17.** At the hearing, the circuit court asked counsel for John Wieland Homes to read *only* the arbitration clause in the Purchase and Sale Agreement “[b]ecause this is just all about arbitration.” **R.p.22:5-10.** In addition, the court recognized: “Well, it’s [referring to the Parsons’ Complaint] not about contamination. It’s about what was on the property.” **R.pp.29:24-30:9.**

In briefing and at the hearing, the Parsons contended that “the contract itself specifically says it doesn’t apply to this kind of claim” **R.p.36:16-18.** The Parsons emphasized Section IV of the JWH Warranty, iterating the exclusions *from the warranty*. **R.p.41:11-17.** John Wieland Homes, in turn, explained that the arbitration clause is separable and required to be interpreted independently of the other clauses in the contract. **R.p.47:8-25.**

The Parsons also argued that an arbitration clause is unenforceable “in a situation where the action that is complained of is so egregious that no one could have foreseen that that would have been part of what they were agreeing to arbitrate.” **R.p.43:2-11.** In response, John Wieland

Homes distinguished cases relied upon by Parsons, explaining that the alleged conduct of John Wieland Homes—a failure to disclose a condition of the Property about which the Parsons contend it knew or should have known—did not rise to the level of cases where the party seeking to enforce an arbitration clause committed outrageous acts such as a “bait and switch” or the misappropriation of personal financial information or the verbal abuse and intimidation of a debtor. **R.pp.48:24-51:14.** John Wieland Homes also noted that, unlike the precedent cited by the Parsons, the claims asserted by the Parsons in this case have a significant relationship to both the Purchase and Sale Agreement and the condition of the Property, both of which are covered by the arbitration clause. **R.pp.48:24-51:14.**

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 follows.

STANDARD OF REVIEW

“Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination.” New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). “However, 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.” Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). “Appeal from the denial of a motion to compel arbitration is subject to de novo review.” New Hope, 379 S.C. at 625, 667 S.E.2d at 3.

ARGUMENT

I. The circuit court committed an error of law in interpreting the terms of the warranty instead of the terms of the arbitration clause. The scope of the arbitration clause encompasses the claims asserted by the Parsons.

The scope of the arbitration clause encompasses the Parsons' claims. The circuit court's circumvention of the arbitration clause by looking to the separate warranty provision to determine the scope of the arbitration clause was error. Whether the claims are arbitrable is determined by the terms of the arbitration clause, not the terms of the warranty provision.

The circuit court initially held that "[b]ecause 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 circuit court erred in its interpretation of the contract. At the risk of repeating the obvious, the warranty provision determines the scope of defects subject to the warranty, while the arbitration clause determines the scope of claims subject to arbitration.

The arbitration clause plainly includes "[a]ny and all unresolved claims or disputes of any kind or nature" between the parties arising out of or relating to the purchase agreement, the warranty, the home, or the property. R.p.75, §V, ¶O. In addition, the arbitration clause "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. Consequently, the arbitration clause, by its clear and unambiguous language, includes the Parsons' claims.

A. The circuit court mistakenly interpreted the exclusions to the warranty instead of the arbitration clause, which is separate and distinct from the warranty.

"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. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." D.A. Davis Const. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

"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."). Likewise, the validity of an arbitration clause is distinct from the validity of the contract as a whole. New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008).

Paragraph 21 of the Purchase and Sale Agreement for the Property unambiguously incorporates the "JWH Warranty" including, without limitation, the binding arbitration clauses contained therein. See First Baptist Church of Timmonsville v. George A. Creed & Son, Inc., 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) ("We think that, in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'"). **R.p.59.**

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.

R.pp.75-76, §V, ¶O (emphasis added in italics).

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 mistakenly looked to the exclusions from the warranty, contained in Section IV of the JWH Warranty. Neither the Purchase and Sale Agreement nor the JWH Warranty states that the exclusions from the warranty also constitute exclusions from mandatory arbitration. The interpretation invoked by the circuit court is not only contrary to the express terms of the parties' agreement but also results in a nonsensical meaning. Cf. Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist., 319 S.C. 488, 497, 462 S.E.2d 296, 301 (Ct. App. 1995) (explaining that the court will not adopt nonsensical interpretation of provision in contract). Under the circuit court's interpretation, only claims that are covered by the warranty are subject to arbitration, but these are very claims that are least likely to be subject to dispute.

The arbitration clause itself 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 Purchase and Sale Agreement is an error of law warranting reversal on appeal. 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.")

B. The arbitration clause applies to, and specifically includes, the Parsons' claims.

If the circuit court had interpreted the arbitration clause instead of the warranty exclusions, it unequivocally would have found that the arbitration clause plainly applies to the Parsons' claims, which are specifically enumerated in the clause.

"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 federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Id. at 590, 553 S.E.2d at 115. "The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." Id. at 590-91, 553 S.E.2d at 115; see also Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270 (1995) (same). "While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." Zabinski, 346 S.C. at 592, 553 S.E.2d at 116.

"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, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004) (same). "Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993). "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles v. United HealthCare Corp., 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999).

Arbitration clauses which subject to arbitration all claims "arising out of or relating to" a contract or transaction are characterized as "broad arbitration clauses capable of an expansive reach." Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). Such language "embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988).

The Parsons' first two causes of actions seek the alternative remedies of rescission and money damages, respectively, for the purported breach by John Wieland Homes of the Purchase & Sale Agreement—the very agreement incorporating the arbitration clause. In this respect, the arbitration clause plainly applies to "[a]ny 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” R.p.75, §V, ¶O. Likewise, the arbitration clause specifically includes “claims related to any . . . rescission of any contract or agreement” R.p.76, §V, ¶O. It is axiomatic that these claims are well within the scope of the broad arbitration clause. See Long v. Silver, 248 F.3d 309, 318 (4th Cir. 2001) (“Because this breach of contract claim arises directly under the 1972 Agreement, it is clearly arbitrable.”); Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723, 730 (4th Cir. 1997) (“Zandford’s breach of contract claim seeking . . . rescission of the settlement agreement and mutual release . . . was properly found arbitrable by the district court.”).

With respect to the Parsons’ claims for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence, each of these claims rests upon allegations that John Wieland Homes, as the seller of the Property, knew or should have known about industrial pipes containing hazardous substances buried on the Property by a previous owner and, thus, had a duty to disclose this condition to the Parsons, as the purchaser of the Property. R.pp.13-15, ¶¶36, 41, 42, 47, 53. To this extent, the arbitration clause applies to “[a]ny 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 . . . and/or property on which it [the Parsons’ home] is constructed” R.p.75, §V, ¶O. Furthermore, the arbitration clause specifically includes “claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives . . . any tort . . . and any property damage.” R.p.76, §V, ¶O.

In this respect, courts have held that broad arbitration clauses encompass claims for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence which arise from the execution or performance of a contract. See, e.g., Peoples Sec. Life Ins. Co. v.

Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989) (recognizing that gravamen of the plaintiff's complaint alleged fraudulent inducement of a contract, which is within scope of a broad arbitration clause); Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 352 (4th Cir. 2001) (reversing the district court's order staying arbitration on claims for fraud, negligent misrepresentation, and cancellation of agreement); Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492-93, 593 S.E.2d 480, 484 (Ct. App. 2004) ("Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence essentially allege Subcontractor defectively installed the masonry work on a residential homebuilding projects [which are] matters concerning the agreement or the work performed [and] within the scope of the arbitration agreement."); J.J. Ryan, 863 F.2d at 319 ("Manifestly, the district court properly concluded that the factual allegations of the dispute about unfair trade practices arose 'in connection with' the distribution contracts and were referable to arbitration."); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984) ("Claims of fraud under a contract, breach of fiduciary duty, negligence, and gross negligence are not immune from arbitration under a broadly-worded valid arbitration clause.").

Each of the causes of action alleged by the Parsons against John Wieland Homes is plainly and unambiguously covered by the broad arbitration clause incorporated into the Purchase and Sale Agreement for the Property. The circuit court respectfully turned basic principles of contract construction on their heads when he interpreted the exclusions to the express warranties to apply to the arbitration clause, which applies to, and expressly *includes*, every single one of the Parsons' causes of action. In addition, both the Fourth Circuit Court of Appeals and South Carolina state appellate courts have interpreted such a broad arbitration clause to apply to the claims alleged by the Parsons. Accordingly, the circuit court's order should

be reversed.

II. The circuit court committed an error of law in finding that the Parsons' claims for failing to discover, remediate and/or disclose hazardous substances buried on the Property by a previous owner alleged outrageous conduct which was unanticipated and unforeseeable to a reasonable consumer.

As an alternative ground for denying the motion to compel arbitration, the circuit court ruled "the conduct complained of in this case meets the standard established by *Aiken* and *Partain*." **R.p.6.** The alleged omissions of John Wieland Homes in failing to discover, remediate and/or disclose hazardous substances buried on the Property by a previous owner, falls far short of the type of conduct alleged in *Aiken* and *Partain*. The Parsons allege *no* conduct similar to the tort of outrage, and the only fraudulent conduct they allege involves the purported duty of John Wieland Homes, as the seller, to disclose a latent defect on the Property to the Parsons, as the purchaser. This purported duty arises directly and solely from the contractual relationship between the parties.

In *Aiken v. World Fin. Corp.*, 373 S.C. 144, 147, 644 S.E.2d 705, 707 (2007), the Supreme Court of South Carolina addressed a case in which the plaintiff filed suit against World Finance, a nationwide personal finance company, alleging that employees of World Finance conspired to use the personal information provided by the plaintiff and other clients to obtain sham loans and embezzle the proceeds for the employees' personal benefit. The plaintiff sought damages for outrage and emotional distress, negligence, negligent hiring/supervision, and unfair trade practices. *Id.* The circuit court denied World Finance's motion to compel arbitration, and World Finance ultimately received certiorari review by the state Supreme Court. *Id.*

On appeal, the Supreme Court recognized: "World Finance primarily argues that because Aiken's contracts with World Finance gave the conspirators access to Aiken's information in order to carry out their crimes, there is a significant relationship between Aiken's claims and the

underlying loan agreement, thereby warranting arbitration.” Id. at 149-50, 644 S.E.2d at 708. The Court found this argument “unpersuasive,” opining that the “‘relationship’ asserted by World Finance between Aiken’s tort claims and the parties’ prior dealings under the loan agreements hardly rises to the level of ‘significant.’” Id. at 150, 644 S.E.2d at 708. “Applying what amounts to a ‘but-for’ causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties’ agreement to arbitrate claims between them.”

Id.

The Court concluded:

[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will 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.

Id. at 151, 644 S.E.2d at 709. The Court also emphasized the circumscribed nature of its ruling in

Aiken:

In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. 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. 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. at 152, 644 S.E.2d at 709 (emphasis added).

In Partain v. Upstate Auto. Group, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010), the Supreme Court addressed whether a plaintiff’s tort claim premised on an alleged “bait and

switch” was subject to an arbitration clause in a purchase contract for a truck. The Court held that the case was controlled by Aiken because the plaintiff could not “be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase.” Id. at 494, 689 S.E.2d at 605. “Moreover, Partain cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct.” Id. The Court emphasized “that this case should not be read as providing an ‘end-run’ around arbitration clauses.” Id. Thus, “[w]here parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort.” Id. “Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement.” Id. at 494-95, 689 S.E.2d at 605.

Read in conjunction, Aiken and Partain 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. Unlike the plaintiffs in Aiken and Partain, the Parsons claim that the purportedly outrageous or fraudulent conduct of John Wieland Homes involved, not an act, such as misappropriation of financial information or a “bait and switch,” but a failure to act. In other words, the Parsons’ claims are premised on an omission by John Wieland Homes—failures to discover, remediate, and/or disclose industrial pipes containing hazardous substances on the Property.

While the Supreme Court has not defined “outrageous conduct” in the context of determining arbitrability, decisions defining the tort of outrage are instructive. For instance, in Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011), the Court recognized that, to be “extreme and outrageous,” the conduct must “exceed all possible

bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community” In this respect, the Parsons do not include any causes of action in their complaint comparable to the tort of outrage. Instead, they rely on allegations of fraudulent conduct by John Wieland Homes.

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 John Wieland Homes 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. “Nondisclosure is fraudulent when there is a duty to speak.” Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). “[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.” May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986). Absent the contractual relationship with the Parsons, there is no duty to speak by John Wieland Homes and, accordingly, no alleged fraudulent conduct.

This is distinguishable from the situations in Aiken and Partain. For instance, in Aiken, the defendant argued that the tortious *conduct* of World Finance could not have occurred “but for” the parties’ contractual relationship. Id. However, the duty owed by World Finance to the victims—not to permit the misappropriation of personal financial information—was not solely contractual. In this case, on the other hand, there is no *duty* other than that recognized between the parties to a purchase and sale contract. Put differently, the Parsons allege no duty which is “legally distinct from the contractual relationship between the parties.” Aiken, supra.

Consequently, the arbitrability exception recognized in Aiken and Partain for outrageous torts and fraudulent conduct legally distinct from the contractual relationship between the parties does not apply.

The circuit court committed an error of law in extending Aiken and Partain beyond their holdings to encompass the allegations in the Parsons' complaint.

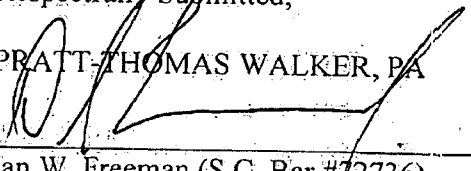
CONCLUSION

In determining whether the Parsons' claims were subject to arbitration, the circuit court incorrectly turned to the exclusions from the express warranties instead of the plain, unambiguous language of the arbitration clause, which is separable and distinct from the warranties. The arbitration clause itself clearly applied to the Parsons' claims and even specifically enumerated these claims to be arbitrable.

The circuit court also committed an error of law in relying on Aiken and Partain. There are no allegations in the complaint relating to the tort of outrage. Instead, the Parsons allege that John Wieland Homes committed fraud by failing to disclose latent defects on the Property, about which the Parsons contend John Wieland Homes knew or should have known. A fraud claim premised on non-disclosure arises directly from the contractual relationship of the parties as buyer and seller. Consequently, there is no fraudulent conduct alleged to be legally distinct from the contractual relationship of the parties, as required by the Aiken line of cases.

For the foregoing reasons, the circuit court's order denying the motion to compel arbitration filed by John Wieland Homes should be REVERSED.

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

September 24, 2012
Charleston, South Carolina

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.

RESPONDENTS' FINAL BRIEF

Cristi P. Cox
Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
ATTORNEYS FOR RESPONDENTS

OTHER COUNSEL OF RECORD:

George Trenholm Walker
Ian W. Freeman
Daniel S. McQueeney, Jr.
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2243
ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
I. Did the trial court err in holding that the Respondents' claims did not fall within the scope of the arbitration clause?	
II. Did the trial court err in determining that the Appellant's alleged failure to disclose known hazardous waste was not subject to arbitration?	
Statement of the Facts	2
A. <i>The pertinent facts underlying the Plaintiffs' claims</i>	2
B. <i>The Arbitration Clause JWH Seeks to Enforce</i>	4
Standard of Review	5
Argument	6
I. <u>The arbitration agreement does not cover the claims asserted by the Plaintiffs</u>	6
II. <u>The Parsons' claims alleging outrageous and illegal actions of JWH are not subject to arbitration as a matter of law.</u>	10
III. <u>As alternative sustaining grounds, JWH's alleged arbitration agreement is unconscionable and therefore unenforceable as a matter of law.</u>	13
Conclusion	19

TABLE OF AUTHORITIES

CASES

<u>Aiken v. World Fin. Corp. of S.C.</u> , 373 S.C. 144, 644 S.E.2d 705 (2007).....	6, 10, 11
<u>Faltaous v. Anderson Ocean Club Dev., LLC</u> , 388 S.C. 45, 693 S.E.2d 434 (2010).....	9
<u>First Options v. Kaplan</u> , 514 U.S. 938 (1995)	6, 13
<u>Holler v. Höller</u> , 364 S.C. 256, 612 S.E.2d 469 (2005)	14
<u>Lackey vs. Green Tree Financial Corp.</u> , 330 S.C. 388, 498 S.E.2d 898 (1998).	14
<u>MBNA Am. Bank v. Christianson</u> , 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008).....	5
<u>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</u> , 473 U.S. 614 (1985)	6
<u>Partain v. Upstate Automotive Group, Inc.</u> , 386 S.C. 488, 689 S.E.2d 602 (2010)	6, 7, 10, 11, 12.....
<u>Simpson v. MSA of Myrtle Beach, Inc.</u> , 373 S.C. 14, 644 S.E.2d 663 (S.C. 2007)	13, 14, 19
<u>Sydnor v. Conseco Fin. Serv. Corp.</u> , 252 F. 3d 302 (4th Cir. 2001)	6
<u>Unisun Ins. Co. v. Hertz Rental Corp.</u> , 312 S.C. 549, 436 S.E.2d 182 (S.C. App. 1993) ...	6
<u>Zabinski v. Bright Acres Associates</u> , 346, S.C. 580, 553 S.E.2d 110, (2001).....	7, 9, 10

STATUTES AND RULES

S.C. Code Ann. § 36-2-302(1) 2003).....	13

Statement of Issues on Appeal

- I. Did the trial court err in holding that the Respondents' claims did not fall within the scope of the arbitration clause?
- II. Did the trial court err in determining that the Appellant's alleged failure to disclose known hazardous waste was not subject to arbitration?

Statement of the Case

The crux of this dispute concerns the discovery of underground piping and hazardous waste on residential property located in Lancaster County ("Property"). The Appellant/Defendant ("JWH"), owned, developed, and later sold the Property to Respondents/Plaintiffs ("Parsons"). As alleged in their Complaint filed on February 24, 2011, the Parsons contend that JWH was aware of the presence of the pipes and hazardous waste prior to conveying the Property and failed to disclose the condition to the Parsons. The Complaint specifically asserts, among other causes of action, Fraud, Negligent Misrepresentation, and Unfair Trade Practices against JWH.

JWH does not dispute the fact that contamination was discovered on the Property and admits that it has previously assumed responsibility for remediation of the contamination. The remediation cost JWH in excess of \$500,000 to date. JWH apparently denies having knowledge of the contamination prior to the sale, however, it has not filed an Answer to the Complaint addressing the allegations in this case.¹

¹ In its designation of matters to be included in the record on this appeal, JWH has identified a Complaint which JWH drafted and filed in federal court against a third-party not involved in this appeal. (S.C. Fed. Dist. Case No. 0:11-cv-01588-JFA) ("JWH Complaint"). The Parsons object to such designation as irrelevant, improper, and prejudicial and request that the Court disregard the self-serving allegations of the JWH Complaint as evidence in this appeal. The Parsons have filed a formal Motion to Strike the JWH Complaint from the record on appeal and incorporate by reference the arguments asserted therein.

On June 10, 2011, JWH filed a Motion to Dismiss and to Compel Arbitration of all claims asserted in the Parsons' Complaint, based upon the terms of a "Warranty and Arbitration" clause contained in the sales contract. The Parsons, however, submit they never agreed to arbitrate the claims asserted in their Complaint and further assert that the claims asserted against JWH concern alleged illegal and outrageous tortious conduct, which is not subject to arbitration as a matter of law.

After a full hearing on the matter, the Honorable S. Jackson Kimball of York County, issued an order dated October 10, 2011 ruling that the Parsons claims were not subject to arbitration as a matter of law. Thereafter, JWH filed an Answer to the Complaint, a separate motion requesting dismissal on the basis of improper venue, and a motion for reconsideration of the court's previous ruling denying arbitration. Prior to any hearings or rulings on any of the motions including the motion for reconsideration, on October 19, 2011 JWH filed a notice appealing the trial court's October 10, 2011 Order denying arbitration.

Statement of Facts

A. The pertinent facts underlying the Plaintiffs' claims are summarized as follows:

In or about November 2002, JWH purchased approximately 65 acres of land located in the Indian Land region of Lancaster County for purposes of development (R. p. 8 at ¶7). Prior to JWH's purchase of the property, the property was owned by Springs Industries, Inc., an entity which conducted industrial activities on the property (R. p. 8 at ¶8). Following its purchase of the property in 2002, JWH demolished the former Springs Industries' building located on the property, and removed all visible evidence of the building from the property (R. pp. 8-9 at ¶9). As alleged, JWH also removed some

underground pipes, valves and tanks left by Springs' former industrial operations. Id. JWH then subdivided the property and developed The Woods at Bridgemill Subdivision (the "Subdivision"), which consisted primarily of single family "spec" homes (R. p. 9 at ¶10).

After removing all visible evidence that the property had once been an industrial site, JWH began selling lots and "spec" homes in the second phase of the Subdivision (R. p. 9 at ¶11). On October 31, 2007, JWH sold a lot and home to the Parsons (R. p. 9 at ¶13). The Parsons paid \$621,102 for their home, which is currently financed by Wachovia and South Carolina Bank & Trust (R. p. 9 at ¶14). At the time the Parsons purchased their home they were not aware that any portion of the Subdivision had previously been used as an industrial site, and had no reason to discover that fact through reasonable due diligence (R. p. 10 at ¶16). JWH did not disclose to the Parsons that any portion of the Subdivision had previously been used as an industrial site, and did not disclose to the Parsons that numerous underground pipes, valves and tanks had been located on the property (R. p. 10 at ¶17).

In July 2008, the Parsons were performing maintenance on a suspected sprinkler leak in their backyard when they discovered a metal lined concrete box buried on their property as well as cast iron and PVC piping (R. p. 10 at ¶18). When the box was opened, a black sludge was discovered in the box. Id. The black sludge was determined to be hazardous waste (R. p. 10 at ¶19). The black sludge was also found in the PVC pipe, which pipe was actually located running through the foundation of the Parsons' home, which was also constructed by JWH (R. p. 11 at ¶23; R. p. 49, lines 14-20).

The Parsons contacted South Carolina's Department of Health and Environmental Control (R. p. 10 at ¶20-21). DHEC performed testing and analysis of the sludge. *Id.* DHEC's testing confirmed that the sludge was hazardous waste. *Id.* In October 2008, at the suggestion of DHEC, JWH entered a "voluntary clean-up contract". JWH undertook voluntary remediation efforts to remove the hazardous waste and other buried materials from the Parsons' yard. Despite JWH's remediation efforts, the Plaintiffs contend that the value of their home has been permanently impacted and the home has been stigmatized by the presence of hazardous waste on the property, hence the filing of this action (R. p. 11 at ¶22-23).

B. The Arbitration Clause JWH Seeks to Enforce.

JWH seeks an order reversing the lower court's ruling that the Parsons' claims are not subject to arbitration. The alleged arbitration agreement JWH seeks to enforce is contained in Paragraph 21 of the 5 page "Purchase and Sale Agreement" for the Property, which document was drafted entirely by JWH (R. p. 57 at ¶ 21). Specifically, Paragraph 21 of the Agreement provides verbatim and in like font/appearance:

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. THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE PROPERTY AND IMPROVEMENTS (INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE), EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY SELLER OTHER THAN AS EXPRESSED IN THE JWH WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY SELLER. THE JWH WARRANTY IS ALSO GIVEN BY SELLER AND ACCEPTED BY PURCHASER IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT PURCHASER HAS OR MAY HAVE AT LAW OR IN EQUITY AGAINST SELLER RELATING TO THE PROPERTY, CONSTRUCTION ON THE PROPERTY, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING ON THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THE JWH WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY PURCHASER. 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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. Certain appliances and other consumer products sold as part of the improvements are covered by manufacturer's warranties. Purchaser is entitled to examine those warranties upon request to the Seller.

Aside from the paragraph heading, "Warranty and Arbitration," the only mention of the term "arbitration" is found at the end of the paragraph and merely provides:

"purchaser consents to the terms [of the JWH Limited Warranty], including the binding arbitration provision contained therein."

Id. The JWH Limited Warranty is a 27-page booklet.² The only arbitration provision “contained therein” is buried in the middle of the document and specifically listed as one of sixteen “General Provisions” of the Limited Warranty.³ By its express terms and context, the JWH Warranty, “including the binding arbitration provision contained therein,” only deals with defects or deficiencies in the design and construction of the Home and specifically excludes contamination claims.⁴

The entire Agreement, including Paragraph 21, was drafted solely by JWH. Except for the negotiation of the purchase price, the Parsons had no ability to negotiate the terms of the Agreement, the terms of the Warranty or the terms of the Arbitration provision. The Parsons were provided no additional consideration for the Arbitration clause.

STANDARD OF REVIEW

Determinations of arbitrability are subject to de novo review. MBNA Am. Bank v. Christianson, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008). However, a circuit court’s factual findings will not be reversed on appeal if any evidence reasonably supports the findings. Id.

² The JWH Extended Warranty was purportedly incorporated by reference into the Purchase Agreement. The Parties dispute when the Parsons were actually provided a copy of the warranty booklet. Because the trial Court held that the Parsons’ claims were not covered by the terms of the arbitration clause or the terms of the Warranty Booklet, it is not necessary to resolve this disputed issue of fact.

³ JWH Warranty §V, at ¶O (R. pp.75-77).

⁴ JWH Limited Warranty, Paragraph IV(M)(R. p. 72).

ARGUMENT

JWH's motion to dismiss and compel arbitration was properly denied by the trial court. Not only does the arbitration clause at issue not cover the claims asserted in the Plaintiff's Complaint; but the illegal and outrageous acts alleged against JWH are not subject to arbitration as a matter of law pursuant to Aiken v. World Fin. Corp. of S.C., 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, 604 (2010). Furthermore, and as alternative sustaining grounds for the trial court's order denying arbitration, the Parsons' submit that the arbitration clause is unconscionable and therefore unenforceable.

I. The arbitration agreement does not cover the claims asserted by the Plaintiffs.

The Parsons' Complaint and the causes of action asserted therein, deal with JWH's alleged failure to disclose the presence of underground piping and hazardous waste on the Property of which JWH is alleged to have been aware. The purported arbitration agreement JWH seeks to enforce, however, only applies to defects related to the design and construction of the home and is therefore inapplicable to the claims asserted in this case. As such, the trial court's order should be affirmed.

While state and federal policy generally favor arbitration, the initial inquiry is whether the parties actually agreed to arbitrate their dispute. Sydor v. Conseco Fin. Serv. Corp., 252 F. 3d 302 (4th Cir. 2001)(citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)). In determining whether the parties executed an enforceable arbitration agreement, ordinary state-law principles governing contract formation apply. Id. (citing First Options v. Kaplan 514 U.S. 938, 944 (1995)); see also Unisun Ins. Co. v. Hertz Rental Corp., 312 S.C. 549, 551-52, 436 S.E.2d 182

(S.C. App. 1993)("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made.").

To determine whether an arbitration clause encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause. Zabinski v. Bright Acres Associates, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001.) A claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or "if a significant relationship" exists between the claim and the contract. Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602, 604 (2010). Neither of these conditions exists in this case.

Despite Appellant's contentions to the contrary, the arbitration clause which JWH wrote and now seeks to enforce is not a stand-alone provision of the Purchase Agreement. Rather, *as written by JWH* the arbitration clause is expressly part of and inextricably intertwined with the JWH Warranty, which is inapplicable to the Parsons claims.

The only mention of arbitration in the Purchase Agreement is found in Paragraph 21 under the heading "Warranty and Arbitration." Buried at the end of the paragraph is a single reference to arbitration which merely provides:

"purchaser consents to the terms [of the JWH Limited Warranty], including the binding arbitration provision contained therein."⁵

⁵ Purchase Agreement at ¶21 (R. p. 59).

The JWH Limited Warranty is a 27-page booklet.⁶ The only arbitration provision "contained therein" is buried in the middle of the document and specifically listed as one of sixteen "General Provisions" of the Limited Warranty.⁷ By its express terms and context, the JWH Warranty, "including the binding arbitration provision contained therein," only deals with defects or deficiencies in the design and construction of the Home and does not apply to contamination or failure to disclose or fraud. In fact, the express terms of the Limited Warranty containing the arbitration clause clearly states that the Warranty does NOT apply to:

Loss or damage not caused by a defect or deficiency in the design or construction of the Home by Wieland or Wieland's employees, agents or subcontractors.⁸

Damage to real property that is not part of the Home;⁹

Loss of Market value...or any and all consequential loss or damages;¹⁰

...Pollution or toxic substances of any kind.¹¹

Because the Warranty itself does not apply to the claims asserted in the Parsons' lawsuit, by its own terms, the purported arbitration clause contained therein is also inapplicable.

In its brief, the Appellant essentially argues that this Court should completely ignore all context when interpreting the scope of an arbitration clause. Specifically, JWH

⁶ The JWH Extended Warranty was purportedly incorporated by reference into the Purchase Agreement. The Parties dispute when the Parsons were actually provided a copy of the warranty booklet. Because this Court finds that Plaintiff's claims are not covered by the terms of the arbitration clause or the terms of the Warranty Booklet, it is not necessary to resolve this disputed issue of fact.

⁷ JWH Limited Warranty SV, at ¶O (R. pp. 75-77)

⁸ JWH Limited Warranty, Paragraph IV(J) (R. p. 71)

⁹ JWH Limited Warranty, Paragraph IV(B)(R. p. 70) The term "Home" is defined in the Warranty as "the dwelling." Paragraph V(B)(R. p. 74), JWH Limited Warranty.

¹⁰ JWH Limited Warranty, Paragraph IV(G) (R. p. 70).

¹¹ JWH Limited Warranty, Paragraph IV(M) (R. p. 72).

asks the Court to ignore the fact that the arbitration clause is by its express terms only a general provision of the Limited Warranty. However, when the drafter of the agreement specifically limits the applicability of the arbitration clause to apply only to certain matters--the drafter is bound to the terms it drafted and this Court should not re-write the agreement to find coverage. Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (2010) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement.") Because the arbitration clause is expressly limited to the warranty issues, the Parsons non-warranty claims are not subject to arbitration.

Following the Supreme Court's holding in Zabinski v. Bright Acres Associates, 346, S.C. 580, 597, 553 S.E.2d 110, 118 (2001), the Parsons submit that their nondisclosure and fraud claims also do not bear a "special relationship" to the Warranty and/or the Purchase Agreement so as to compel arbitration. In Zabinski, the Court was confronted with an arbitration clause in a partnership agreement that required "any controversy or claim arising out of the partnership agreement" to be submitted to arbitration. Despite the broad wording of the clause, the Court refused to compel arbitration of certain claims asserted by the partners, including: 1) legal malpractice claims against the attorney drafting the partnership agreement; and 2) contract claims concerning certain partner's individual ownership interest in the partnership. Although acknowledging that the excluded claims were indirectly related to the partnership agreement, the Court concluded that the facts underlying the claims were "not

encompassed by the arbitration agreement" and required proof of matters independent of the partnership agreement. Id. at 598, 119.

Like Zabinski, although the purchase agreement is indirectly related to the Parsons' fraud and nondisclosure claims, such claims are not encompassed by the terms of the arbitration clause and bear no "special relationship" to the Purchase Agreement or Limited Warranty. The Parsons allege that JWH knew hazardous waste existed on the property and intentionally concealed the hazardous waste by constructing a home on top of and around the waste. The underlying facts of the Parsons' claims are completely independent of the purchase contract and involve JWH's conduct and knowledge prior to the execution of the purchase contract. More fundamentally, the underlying claims concern matters not covered by the arbitration clause, Limited Warranty or Purchase contract and concern conduct and knowledge that could not have even been contemplated by the Parsons when negotiating the purchase contract. Because the facts underlying the Parsons' claims bear no special relationship to the arbitration clause or the purchase contract, the Parsons' claims should not be forced into an arbitration forum.

II. The Parsons' claims alleging outrageous and illegal actions of JWH are not subject to arbitration as a matter of law.

The claims asserted against JWH involve alleged outrageous tortious conduct (i.e. intentional/fraudulent failure to disclose contamination on the Property) which is unanticipated and unforeseeable to reasonable consumers purchasing a residential property. Consequently, the Parsons' claims are excluded from arbitration pursuant to Aiken and Partain.

In Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007), our Supreme Court held that "this Court will 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 Aiken, the plaintiff/consumer sued defendant/finance company for alleged theft of the plaintiff's personal information by employees of a consumer finance company. The company sought to enforce a broadly-worded arbitration clause to which plaintiff had agreed in applying for a loan. Although the plaintiff voluntarily submitted the personal information to the finance company in applying for a loan, and although the plaintiff knew the information would be used by defendant's employees, the Court found that the theft of the personal information was "outrageous conduct that [plaintiff] could not possibly have foreseen when he agreed to do business with [finance company]." Id. at 151, 644 S.E.2d at 709. As a result, the Court held that the plaintiff could not have intended to submit the dispute to arbitration.

The tortious conduct alleged against JWH is just as outrageous, if not more so, than the conduct described in Aiken. The Parsons have alleged that JWH knew the Property was contaminated prior to the execution of the sale agreement. JWH knew the property was previously an industrial site prior to the transfer, yet it never disclosed such condition to the Parsons. Furthermore, the underground pipes leading to the container holding the bulk of the hazardous waste was discovered during the construction process. In fact, as alleged by the Parsons and as determined by the trial court, intentional efforts were made by JWH to build the house "around" the underground pipes. Based upon these allegations and as guided by Aiken, this Court concludes that neither the Parsons,

nor reasonable consumers in the same posture, would have expected or should be expected to arbitrate a claim of this nature.

Even if the alleged arbitration clause is arguably “broad enough” in scope to cover the causes of action asserted in the Complaint, the Parsons’ claims are still not subject to arbitration as a matter of law, pursuant to Partain v. Upstate Automotive Group, Inc., 386 S.C. 488, 689 S.E.2d 602 (2010). In Partain, the plaintiff/consumer filed a lawsuit against the defendant/truck dealership, alleging that the dealership violated the S.C. Unfair Trade Practices Act by selling purchaser a different truck than the one he had negotiated to purchase. The defendant/dealership filed a motion to dismiss and to compel arbitration pursuant to a broad arbitration clause contained in the purchase agreement. Reaffirming its decision in Aiken, the Supreme Court held the arbitration clause was not applicable the Plaintiff’s claims involving “illegal and outrageous acts unforeseeable to a reasonable consumer.” Furthermore and more importantly, the Court went a step further to agree that such illegal and outrageous acts are not subject to arbitration *even when the claim is arguably encompassed by the broad language of the arbitration clause.* Id. at 604-605.

Following the rationale and holding announced in Partain, the intentional transfer of contaminated property to innocent consumers is the type “illegal and outrageous conduct” the Supreme Court has held to be outside the scope of arbitration—regardless of the breadth of the arbitration clause itself. Just as in Partain, the Parsons have asserted a claim for violation of the S.C. Unfair Trade Practices Act in connection with alleged tortious and outrageous conduct by the seller in connection with a consumer transaction. Like the Plaintiff in Partain, the Parsons had no way of knowing that the property was

contaminated; that pipes were buried on the property, and that JWH knew or should have known of this condition. Consequently, and as Partain directs, the Parsons "cannot be held to have contemplated that in signing the arbitration clause, they were agreeing to arbitrate claims for allegedly fraudulent conduct."

III. As alternative sustaining grounds, JWH's alleged arbitration agreement is unconscionable and therefore unenforceable as a matter of law.

At the hearing, the Plaintiffs also argued that the arbitration clause at issue was unconscionable and unenforceable as a matter of law and further requested that the trial court grant discovery on the issue of unconscionability, specifically as it relates to the selection of the arbitrator and the procedures under the purported arbitration forum. Because the trial court concluded the claims were not subject to arbitration on other grounds, the Court rendered no decision on these issues. The Parsons assert herein, as alternative sustaining grounds, that the arbitration clause is unconscionable and in violation of public policy.

South Carolina law provides that "[i]f the court as a matter of law finds [a] contract or any clause of the contract to have been unconscionable at the time it was made[,] the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (S.C. 2007), referencing S.C. Code Ann. § 36-2-302(1) 2003). In South Carolina, unconscionability is defined as "the absence of meaningful choice on the part of one party due to one sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair or honest person would accept

them.” Simpson, 644 S.E.2d at 668. In determining whether a contract lacks meaningful choice, our Courts are directed to look at several factors: the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Simpson, 644 S.E. 2d at 669. A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” Id., quoting, Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (2005).

Nature of the Injuries

It is hard to conceive of many more personal injuries as severe as those suffered by the Parsons in this case. They have lost their single most important financial investment—their home. Although they contracted to buy a home, they actually received a hazardous waste site.

Disparity of Bargaining Power

In terms of disparity in bargaining power, it is clear that JWH has the decisive upper hand. The Parsons are consumers. JWH is a large, sophisticated commercial entity which has teams of lawyers drafting its standard form purchase agreements and warranty booklets. The Purchase Agreement which contains the purported arbitration clause is a contract of adhesion. Lackey v. Green Tree Financial Corp., 330 S.C. 388, 498 S.E.2d 898 (1998) (“A contract of adhesion is... a standard form contract offered on a take it or leave it basis.”); see also Simpson, 644 S.E.2d at 668. Like the contracts in Green Tree and in Simpson, the contract in this case is a standard form contract created by JWH and offered to its customers on a take-it-or-leave-it basis. Except for the sales price and determination of the particular

lot and house plan, the Parsons had no ability to negotiate the terms of the contract. In fact, the Agreement utilizes "check-the-box" provisions to provide choice on items such as flooring and insulation; however, nowhere does it provide the option of eliminating the arbitration provision. The Parsons had no opportunity to pay additional money for input into the contract terms, especially in terms of the "warranty and arbitration" provision. Both the existence and the terms of the arbitration provisions were determined solely by JWH on a take it or leave it basis. The bargaining power lay exclusively with JWH in this transaction and the Parsons were completely without ability to affect the inclusion or the substance of the arbitration provisions.

Conspicuousness of Arbitration Clause

Far from conspicuous, the alleged arbitration agreement JWH seeks to enforce is buried in the middle of a 5 page document written entirely in miniature font (less than 8 pt.) and drafted solely by JWH and its attorneys. Specifically, Paragraph 21 of the Agreement provides verbatim and in like font/appearance:

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. THERE ARE AND WILL BE NO OTHER OR FURTHER WARRANTIES OR REPRESENTATIONS ON THE PROPERTY AND IMPROVEMENTS (INCLUDING, WITHOUT LIMITATION, WARRANTIES OF MERCHANTABILITY, WORKMANLIKE QUALITY, HABITABILITY, SUITABILITY FOR RESIDENTIAL PURPOSES, OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE), EITHER EXPRESS OR IMPLIED, WRITTEN, ORAL OR STATUTORY, MADE BY SELLER OTHER THAN AS EXPRESSED IN THE JWH WARRANTY, AND ALL SUCH OTHER WARRANTIES ARE HEREBY EXPRESSLY EXCLUDED AND DISCLAIMED BY SELLER. THE JWH WARRANTY IS ALSO GIVEN BY SELLER AND ACCEPTED BY PURCHASER IN LIEU OF ALL OTHER RIGHTS OR REMEDIES THAT PURCHASER HAS OR MAY HAVE AT LAW OR IN EQUITY AGAINST SELLER RELATING TO THE PROPERTY, CONSTRUCTION ON THE PROPERTY, AND THE CONDITIONS OR CIRCUMSTANCES EXISTING ON THE PROPERTY, INCLUDING, BUT NOT LIMITED TO, ANY RIGHTS OR REMEDIES BASED ON NEGLIGENT CONSTRUCTION, MISREPRESENTATION, ANY TORT, VIOLATION OF ANY CODE, STATUTE OR RULE, BREACH OF CONTRACT (EXPRESS OR IMPLIED), OR BREACH OF WARRANTY (OTHER THAN BASED ON THE TERMS OF THE JWH WARRANTY), AND ALL SUCH OTHER RIGHTS OR REMEDIES ARE HEREBY EXPRESSLY WAIVED BY PURCHASER. 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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. Certain appliances and other consumer products sold as part of the improvements are covered by manufacturer's warranties. Purchaser is entitled to examine those warranties upon request to the Seller.

(R. p. 59 ¶21) Aside from the heading, the only mention of arbitration in the purchase agreement is found at the end of the paragraph where it states that the purchaser "consents to the terms [of the JWH Limited Warranty], including the binding arbitration provision contained therein."

The JWH Extended Warranty is a 27 page booklet, which was not provided to the Parsons at the time of the signing of the contract. The "arbitration provisions" in the JWH Extended Warranty are buried the middle of the booklet under the heading "General Provisions" as item "O." Although expressly limited as a "general term" of the Limited Warranty, JWH contends the arbitration clause should be read to extend to anything related to the Property—including matters outside the scope of the Limited Warranty. However, there is absolutely no indication that the arbitration clause is intended to deal with anything other than the construction defects covered by the Warranty in which it is contained. There is certainly no evidence that the Parsons intended, by signing the Purchase Agreement to arbitrate claims that JWH intentionally sold them a waste site, versus a home.

Oppressive/One-Sided Terms

The terms of the arbitration clause are oppressive, one-sided, and intentionally crafted to favor JWH. As an initial matter, the terms of the arbitration clause specifically preserve JWH's right to litigate any and all claims it may have while it retains ownership in the Property, but denies that same right to the Parsons. Specifically, the arbitration clause in the Limited Warranty provides:

Any and all claims that that arise out of or relate in any manner to the purchase agreement with Wieland, this warranty, the Home and/or the property on which it is constructed, or otherwise shall be conducted 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 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).¹² This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives,

¹² JWH Warranty Section "O", at p. 10, emphasis added (R. p. 75).

rescission of any contract or agreement, any tort, any implied warranties, any personal injury and any property damage.

As written, only after the final closing occurs does the arbitration clause (and the Limited Warranty obligations) spring into effect.¹³ Consequently, the arbitration provision specifically preserves JWH's right to litigate any claims against the Parsons while it is the owner of the Property. The Parsons, however, lose the right litigate ANY claims once they become the owner. Furthermore, because the Limited Warranty is not effective until the sale is complete, JWH's primary obligations to the Parsons (those created by the Limited Warranty) can never be litigated, as they are only triggered when the arbitration clause is in effect. The end result is that the consumer is the only party truly affected by the arbitration clause.

Numerous other oppressive and one sided terms are also present in the arbitration clause, including but not limited to the following:

- Paragraph 3 of the arbitration provision provides that before the Parsons can mediate or arbitrate any Limited Warranty claims, they must first have complied with all of the procedures set forth in the Limited Warranty within the prescribed time limits. (JWH Warranty, R. p. 76, at ¶2) In fact, the Parsons failure to do so "shall bar any claims against JWH." Id. Nowhere in the arbitration provision is any similar restriction placed on JWH's ability to bring a claim, or, for that matter, any adverse consequences imposed for JWH's failure to promptly respond to its warranty obligation.
- Paragraph 6 of the arbitration provision provides that if JWH chooses, it may have its suppliers and contractors made parties to the arbitration. However, the Parsons are not permitted the same right.
- The Parsons are purportedly required to waive any and all claims, rights or remedies they may have against JWH including "any tort, violation of code, statute or rule, etc." (JWH Warranty, Section P., R. p. 77) JWH is not obligated to waive any of its statutory rights or claims while it is the owner of the Property.

¹³ JWH Warranty, R. p. 66).

- JWH limits arbitrator's ability to award certain damages unless authorized by JWH. JWH Limited Warranty at III, ¶ 2. R. p. 69).

The arbitrator selection rules mandated by the arbitration provision are also so fundamentally unfair that no fair and honest person would accept them. Paragraph 4 of JWH's arbitration clause provides that the arbitrator shall be selected by the Construction Arbitration Associates, Inc. ("CAA"), an entity located in Atlanta, Georgia—which also happens to be the state in which JWH is located and incorporated. No other information is provided about CAA, its pool of arbitrators, the rules it abides by, its track history, or its specific relationship, to JWH. The CAA is authorized to establish all of the rules for the arbitration. There are no provisions ensuring the neutrality or qualifications of the arbitrator. In fact, the arbitrator purportedly selected by the CAA in the present case is from a law firm in which JWH is listed as a client. The arbitrator selection procedures of CAA are arbitrary, out of line with industry standards¹⁴, and provide no assurances for the selection of an unbiased and competent arbitrator capable of fairly and equitably adjudicating the JWHs' claims. Consequently, the arbitrator selection rules are unconscionable and should not be enforced.

Finally and most importantly, when interpreted in conjunction with the other "general terms" and "general exclusions" in the Limited Warranty, the Parsons are left with no remedy at all for JWH's alleged fraud. Because of the numerous exclusions and waiver provisions contained in the Limited Warranty, the only claims which the Parsons are

¹⁴ See the American Arbitration Association's Home Construction Arbitration and Mediation rules; Rule ARB-15 deals with the appointment of arbitrators. It provides that after a claim has been filed, the AAA will send the parties an identical list of up to 10 potential arbitrators. The parties can agree on an arbitrator, or they may strike from the list any names objected to. The parties will then have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. This method is far superior to the one employed by CAA, in that it ensures that the arbitrator will be agreeable to both parties.

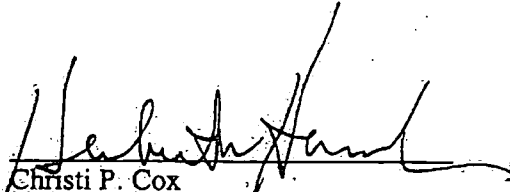
permitted to even submit to arbitration are those claims specifically covered by the Limited Warranty. The only claims covered by the Limited Warranty are defects in the design and construction of the dwelling.

In Simpson, the Supreme Court of South Carolina found unenforceable an arbitration provision prohibiting the arbitrator from awarding double or triple damages. Simpson 373 S.C. at 29-30, 644 S.E.2d at 671. The Court held that the arbitration clause was unconscionable as it prevented the plaintiff from receiving a mandatory statutory remedy to which she might be entitled, and further held that unconditionally permitting the weaker party to waive such statutory remedies pursuant to an adhesion contract runs counter to the unfair trade practice statute's purpose of punishing acts adversely affecting the public interest. Simpson, 373 S.C. at 30, 644 S.E.2d at 671. Unequal, unfair and oppressive terms pervade the warranty and the arbitration provisions therein. Consequently, the entire arbitration provision should be held invalid on the basis of its unconscionability and on the basis of public policy.

Conclusion

Based on the foregoing, Respondents' respectfully submit that the Trial Court's order should be affirmed.

September 21, 2012



Christi P. Cox

Herbert W. Hamilton

HAMILTON MARTENS & BALLOU, LLC

P. O. Box 10940

Rock Hill, SC 29731

(803) 329-7672

ATTORNEYS FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Kimball Jackson, Circuit Court Judge
York County

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,

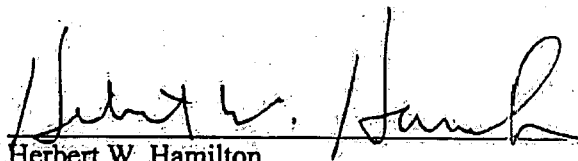
Of whom John Wieland Homes and Neighborhoods
of the Carolinas, Inc. is the,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief complies with Rule 211(b).

September 21, 2012.



Herbert W. Hamilton
HAMILTON MARTENS & BALLOU, LLC
P.O. Box 10940
Rock Hill, South Carolina 29731
(803) 329-7672
ATTORNEYS FOR APPELLANT

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.

REPLY BRIEF OF APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF
THE CAROLINAS, INC.

Ian W. Freeman
G. Trenholm Walker
Daniel S. McQueeney, Jr.
Pratt-Thomas Walker, P.A.
P.O. Drawer 22247
Charleston, SC 29413-2247
(843) 727-2243
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities	ii
Summary of Reply Argument.....	1
Reply Argument.....	2
I. The circuit court, like Respondents, ignored the terms of the arbitration provision	2
II. Respondents are misplaced in relying on <u>Zabinski</u> to contend that the claims at issue in the present case have no “special relationship” to the arbitration provision. The claims here not only have a significant relationship to the arbitration provision, they are expressly referenced therein.	7
III. Respondents’ reliance on <u>Faltaous</u> is also mistaken. The arbitration provision in <u>Faltaous</u> , unlike the arbitration provision in the present case, was narrowly limited in scope and expressly did not apply to claims arising from the subject contract.	10
IV. The circuit court, like Respondents, failed to recognize that, unlike the defendants in <u>Aiken</u> and <u>Partain</u> , John Wieland Homes is alleged to have breached a duty to disclose latent defects. Respondents seek to hold John Wieland Homes liable for an omission, not any outrageous action.....	12
V. The circuit court, like Respondents, also ignored the language in <u>Aiken</u> and <u>Partain</u> limiting the Court’s ruling to torts which are legally distinct from the contractual relationship between the parties.....	13
VI. Respondents incorrectly argue that the arbitration provision or the separate warranty provision is unconscionable. In order to set aside an arbitration provision, the provision itself must be unconscionable. As a matter of law, the arbitration provision in this case is not unconscionable.....	15
VII. Respondents’ argument that the arbitration procedures render the arbitration provision unconscionable is not ripe and should also be rejected.....	21
Conclusion	24

TABLE OF AUTHORITIES

CASES

<u>Aiken v. World Fin. Corp.</u> , 373 S.C. 144, 644 S.E.2d 705 (2007).....	9, 12-13
<u>Amick v. Hagler</u> , 286 S.C. 481, 334 S.E.2d 525 (Ct. App. 1985).....	18
<u>Black v. B.B. Kirkland Seed Co.</u> , 158 S.C. 112, 155 S.E. 268 (1930).....	20
<u>Bradley v. Brentwood Homes, Inc.</u> , 398 S.C. 447, 730 S.E.2d 312 (2012)	4
<u>Carolina Care Plan, Inc. v. United HealthCare</u> , 361 S.C. 544, 606 S.E.2d 752 (2004).....	5
<u>Chatlos Sys., Inc. v. Nat'l Cash Register Corp.</u> , 635 F.2d 1081 (3d Cir. 1980).....	17
<u>Drews Distrib., Inc. v. Silicon Gaming, Inc.</u> , 245 F.3d 347 (4th Cir. 2001)	9
<u>Ellis v. Taylor</u> , 316 S.C. 245, 449 S.E.2d 487 (1994)	4
<u>Faltaous v. Anderson Ocean Club</u> , 388 S.C. 45, 693 S.E.2d 434 (Ct. App. 2010).....	10-11
<u>First Gen. Services of Charleston, Inc. v. Miller</u> , 314 S.C. 439, 445 S.E.2d 446 (1994).....	20-21
<u>Gibbs v. G.K.H., Inc.</u> , 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993)	18
<u>Hofer v. St. Clair</u> , 298 S.C. 503, 381 S.E.2d 736 (1989).....	18
<u>Holler v. Holler</u> , 364 S.C. 256, 612 S.E.2d 469 (Ct. App. 2005)	17
<u>Hooters of Am., Inc. v. Phillips</u> , 173 F.3d 933 (4th Cir. 1999).....	15, 21-24
<u>Int'l Paper Co. v. Schwabedissen Maschinen</u> , 206 F.3d 411 (4th Cir. 2000).....	9
<u>Jacobson v. Yaschik</u> , 249 S.C. 577, 155 S.E.2d 601 (1967).....	14
<u>Jeske v. Brooks</u> , 875 F.2d 71 (4th Cir. 1989)	16
<u>J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.</u> , 863 F.2d 315 (4th Cir. 1988).....	9
<u>Kaplan v. RCA Corp.</u> , 783 F.2d 463 (4th Cir. 1986).....	16
<u>Lackey v. Green Tree Fin. Corp.</u> , 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998)	16-18
<u>Lewis v. Premium Inv. Corp.</u> , 351 S.C. 167, 568 S.E.2d 361 (2002).....	7
<u>Long v. Silver</u> , 248 F.3d 309 (4th Cir. 2001)	8
<u>May v. Hopkinson</u> , 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986).....	9
<u>Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.</u> , 460 U.S. 1 (1983).....	5, 15
<u>Munoz v. Green Tree Fin. Corp.</u> , 343 S.C. 531, 542 S.E.2d 360 (2001).....	3-4, 6, 15, 19
<u>Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.</u> , 843 F. Supp. 1027 (D.S.C. 1993).....	16-17
<u>New Hope Missionary v. Paragon Bldrs.</u> , 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008).....	12
<u>Osteen v. T.E. Cuttino Const. Co.</u> , 315 S.C. 422, 434 S.E.2d 281 (1993)	5
<u>Palmetto Homes, Inc. v. Bradley</u> , 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2004)	9
<u>Partain v. Upstate Auto. Group</u> , 386 S.C. 488, 689 S.E.2d 602 (2010).....	12-14
<u>Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.</u> , 867 F.2d 809 (4th Cir. 1989)	8
<u>Pierson v. Dean, Witter, Reynolds, Inc.</u> , 742 F.2d 334 (7th Cir. 1984).....	9
<u>Reyhani v. Stone Creek Cove Condo. II</u> , 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997).....	5
<u>Schulmeyer v. State Farm Fire & Cas. Co.</u> , 353 S.C. 491, 579 S.E.2d 132 (2003).....	4-5
<u>S.C. Dep't of Transp. v. M & T Enterprises</u> , 379 S.C. 645, 667 S.E.2d 7 (Ct. App. 2008).....	12
<u>S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.</u> , 312 S.C. 559, 437 S.E.2d 22 (1993).....	15
<u>Simpson v. MSA of Myrtle Beach, Inc.</u> , 373 S.C. 14, 644 S.E.2d 663 (2007)	19, 21
<u>Thornton v. Trident Med. Ctr., LLC</u> , 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2003).....	10
<u>Timmons v. Starkey</u> , 389 S.C. 375, 698 S.E.2d 809 (2010).....	14
<u>Towles v. United HealthCare Corp.</u> , 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).....	4, 6
<u>Volt Info. Sciences, Inc. v. Bd. of Trustees</u> , 489 U.S. 468 (1989)	4
<u>Zabinski v. Bright Acres Assocs.</u> , 346 S.C. 580, 553 S.E.2d 110 (2001)	7-8

<u>Zandford v. Prudential-Bache Sec., Inc.</u> , 112 F.3d 723 (4th Cir. 1997).....	8

CODES

S.C. Code Ann. § 36-2-105	17
S.C. Code Ann. § 36-2-107.....	17
9 U.S.C.A. §2	3

RULES

Rule 14, SCRCP.....	20-21

SUMMARY OF REPLY ARGUMENT

The circuit court entirely overlooked the parties' arbitration provision in finding it inapplicable to Respondents' underlying claims. The circuit court's order fails to refer to, much less quote, any term within the arbitration provision as supporting its findings and conclusions. Likewise, since the plain wording of the arbitration provision expressly covers all their claims, Respondents also ignore the terms of the arbitration provision in contending the provision fails to encompass their claims. Instead, like the circuit court, Respondents rely completely on the *separate* warranty provision. Refusing to compel arbitration without referring even once to the arbitration provision at issue is unprecedented. No reported South Carolina decision has determined whether arbitration should be compelled *without referring to and applying the arbitration provision*.

Importantly, the circuit court's failure to articulate or interpret the arbitration provision itself automatically rendered many of its terms meaningless. Respondents' brief underscores this error. Respondents' interpretation of only the separate warranty provision would arbitrarily read out many of the specific terms within the arbitration provision. The interpretation of a contract is a matter of law which this Court reviews *de novo*. This Court should reverse because of the circuit court's clear legal error in interpreting the arbitration provision without reference to *any* of its terms.

Similarly, the circuit court misinterpreted Aiken and Partain. In Aiken, the Supreme Court of South Carolina refused to apply an arbitration provision to a dispute involving employee theft because the illegal actions of the defendant were legally distinct from the defendant's contractual duties and because the dispute had no significant relationship to the subject contract. In Partain, the Supreme Court reiterated that outrageous acts, such as an illegal

“bait and switch,” were not covered by an arbitration provision but warned that courts should not read the decision to permit an “end-run” around binding arbitration provisions by interpreting every tort claim to fall outside the scope of a broad arbitration clause.

This case involves no illegal or outrageous acts. It involves an alleged failure to disclose latent defects in the sale of real property—a purported *failure to act*. Any legal duty Respondents aver was breached by John Wieland Homes would have necessarily arisen directly from the contractual relationship between purchaser and seller. In other words, John Wieland Homes would *only* have a duty to speak as a result of the Purchase and Sale Agreement incorporating the arbitration provision. The important distinctions between this case and the Aiken line were ignored by the circuit court and the Respondents in their brief. This error of law also warrants reversal.

As an alternative contention, Respondents assert that the warranty provision incorporated into the Purchase and Sale Agreement is unconscionable. Federal and state law requires the arbitration provision itself to be considered on the issue of unconscionability—not any other contractual terms. Moreover, Respondents fail to establish that the arbitration provision lacked mutuality or contained oppressive and one-sided terms. Finally, Respondents’ contention that the arbitration provision incorporates unfair processes is unsupported factually or legally. Consequently, to the extent this Court even addresses the fact-intensive issue of unconscionability, this alternative argument, which was not ruled upon by the circuit court, should be rejected.

REPLY ARGUMENT

I. The circuit court, like Respondents, ignored the terms of the arbitration provision.

In arguing that the subject arbitration provision is inapplicable to their claims,

Respondents never quote the specific terms of the arbitration provision, ignoring its plain language and rendering many of its terms meaningless.¹ The circuit court similarly omitted reference to the terms of the arbitration provision, instead only quoting the portion of the Purchase and Sale Agreement which incorporates the arbitration provision and then quoting a few excerpts from the exclusions to the separate warranty provision. This legal error warrants reversal.

“[A] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. §2.

Although the applicability of the Federal Arbitration Act (“FAA”) has not been raised by Respondents, where, as here, the parties agree in the subject contract that the FAA applies, such agreement will be enforced. See 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.”). The arbitration provision in this case provides, in pertinent part: “As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any

¹ In their appellate brief, Respondents fail to quote the arbitration provision until page 16, when they quote a portion of its language in support of their argument that the contract is unconscionable. They do not address the arbitration provision in their facts, their argument that the provision does not cover their claims, or their argument that the underlying claims are not subject to arbitration under Aiken and Partain. This omission is even more obvious in the circuit court’s order, which ignores the arbitration provision entirely.

provisions of state law.” R.p.76, §V, ¶O.

In addition, the Supreme Court of South Carolina recently confirmed that the present contract, which involves an agreement to *construct and sell* real property, is governed by the FAA as a “transaction involving commerce.” Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012) (“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.”); R.p.39:9-10 (where Respondents’ counsel states: “I think Wieland owned it and contracted to have the houses *built and sold*.”) (emphasis added).

“General contract principles of state law apply to arbitration clauses governed by the FAA.” Munoz, 343 S.C. at 539, 542 S.E.2d at 364. “[I]n applying general state-law principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the Act . . . due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration.” Volt Info. Sciences, Inc. v. Bd. of Trustees, 489 U.S. 468, 475-76 (1989).

“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. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). “When the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect.” Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). “The court’s duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” Id.

A court may not “arbitrarily read out” certain provisions of a contract or interpret a

contract such that specific terms would be rendered “meaningless.” Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 498, 579 S.E.2d 132, 135-36 (2003). “Documents will be interpreted so as to give effect to all of their provisions, if practical.” Reyhani v. Stone Creek Cove Condo. II, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997). “A court must construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court reasonably may do so.” Osteen v. T.E. Cuttino Const. Co., 315 S.C. 422, 427, 434 S.E.2d 281, 284 (1993). Any doubts or ambiguities must be resolved in favor of arbitration. Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004).

The following terms of the arbitration provision in Section V, Paragraph O of the JWH Warranty are ignored by Respondents and by the circuit court in his order denying John Wieland Homes’ motion to compel arbitration:

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.

R.p.75-76, §V, ¶O (emphasis added in italics).

These terms are contained in the arbitration provision within the JWH Warranty received and acknowledged by the Parsons on *two separate occasions*—March 22, 2006 and June 30, 2007. See Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (“[A] person who can read is bound to read an agreement before signing it.”); Towles, 338 S.C. at 39, 524 S.E.2d at 845 (“After receiving and signing the Acknowledgment, Towles cannot legitimately claim United failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document’s contents to an individual when the individual can learn the contents from simply reading the document.”).

By failing to look to the specific terms of the arbitration provision, the circuit court and Respondents effectively and arbitrarily “read out” many of its terms. For instance, while the circuit court held “the arbitration agreement, fairly read, applies only to claims of defects in the design and construction of the house” (R.p.4), the arbitration provision specifically states: “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).

Similarly, while the circuit court held “the arbitration provisions are inapplicable to the claims asserted in this case” (R.p.4), this ruling ignores that 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 (emphasis added in italics). Thus, Respondents’ causes of action for

breach of contract, rescission, fraud, negligent misrepresentation, unfair trade practices, negligence & gross negligence, and breach of warranties are also expressly covered by the arbitration provision, and any reading to the contrary would delete whole swathes of such provision. See Lewis v. Premium Inv. Corp., 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002) (“It is not the function of the court to rewrite contracts for parties.”).

II. Respondents are misplaced in relying on Zabinski to contend that the claims at issue in the present case have no “special relationship” to the arbitration provision. The claims here not only have a *significant* relationship to the arbitration provision, they are expressly referenced therein.

In Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597-98, 553 S.E.2d 110, 119 (2001), the Supreme Court of South Carolina expressly quoted the arbitration provision within the parties’ partnership agreement, stating that “any controversy or claim arising out of the partnership agreement’ should be settled by arbitration if it cannot be settled by the partnership,” and holding that “any claim pursuant to the partnership agreement is arbitrable.” “Further, any tort claims between the partners that relate to the partnership agreement are arbitrable.” Id. “Finally, the winding up of the partnership is covered by the arbitration agreement because it concerns issues that are the direct result of the partnership agreement.” Id.

Nevertheless, the Court in Zabinski also held that certain *third party claims* were not subject to arbitration, recognizing that “[a] broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a ‘significant relationship’ exists between the asserted claims and the contract in which the arbitration clause is contained.” Id. at 598, 553 S.E.2d at 119. The Court found:

Despite South Carolina’s presumption in favor of arbitration, we find *the remaining third party claims* are not subject to arbitration *because a significant relationship does not exist between the following claims and the partnership agreement: (1) any attorney malpractice action against Westmoreland [who was not a party to*

the partnership agreement]; (2) any attorney malpractice action against Massey's attorney, Bullard [who was also not a party to the partnership agreement]; and (3) any action between Massey and Leutwiler concerning the purchase agreement entered into by Massey to buy Leutwiler's interest in the partnership.

Id. (emphasis added).

As to these claims, the Court explained the "malpractice claims concern the partnership only indirectly, and cannot be considered claims 'arising out of the partnership agreement.'" Id. "Furthermore, the winding up of the partnership will involve a totally different set of facts than the facts surrounding the attorney malpractice claims." Id. "Finally, the action between Leutwiler and Massey involves a dispute over the purchase agreement, which is completely unrelated to the partnership agreement." Id. "The facts involved in this controversy are completely independent of any dispute arising out of the partnership agreement and are not arbitrable." Id.

Unlike Zabinski, the present case involves claims which arise directly from the Purchase and Sale Agreement. Specifically, Respondents state the following causes of action, which pertinent case law indicates are arbitrable as claims arising from the subject contract or significantly related thereto:

(1) Rescission of the Purchase and Sale Agreement. See Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723, 730 (4th Cir. 1997) ("Zandford's breach of contract claim seeking . . . rescission of the settlement agreement and mutual release . . . was properly found arbitrable by the district court.");

(2) A breach of the Purchase and Sale Agreement. See Long v. Silver, 248 F.3d 309, 318 (4th Cir. 2001) ("Because this breach of contract claim arises directly under the 1972 Agreement, it is clearly arbitrable.");

(3) Fraud in failing to discover and disclose latent defects on the property. See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989) (recognizing that gravamen of the plaintiff's complaint alleged fraudulent inducement of a contract, which is within scope of a broad arbitration clause); see

also 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.”); Aiken v. World Fin. Corp., 373 S.C. 144, 152, 644 S.E.2d 705, 709 (2007) (“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.*”) (emphasis added);

(4) Negligent misrepresentation in failing to discover and disclose latent defects on the property. See Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 352 (4th Cir. 2001) (reversing the district court’s order staying arbitration on claims for fraud, negligent misrepresentation, and cancellation of agreement);

(5) Unfair trade practices in failing to discover and disclose latent defects on the property. See J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 319 (4th Cir. 1988) (“Manifestly, the district court properly concluded that the factual allegations of the dispute about unfair trade practices arose ‘in connection with’ the distribution contracts and were referable to arbitration.”);

(6) Negligence and gross negligence in failing to discover and disclose latent defects on the property. See Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492-93, 593 S.E.2d 480, 484 (Ct. App. 2004) (“Contractor’s causes of action for breach of contract accompanied by a fraudulent act and negligence essentially allege Subcontractor defectively installed the masonry work on residential homebuilding projects [which are] matters concerning the agreement or the work performed [and] within the scope of the arbitration agreement.”); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984) (“Claims of fraud under a contract, breach of fiduciary duty, negligence, and gross negligence are not immune from arbitration under a broadly-worded valid arbitration clause.”); and

(7) Breach of implied warranties of habitability and workmanlike construction. See Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 420 (4th Cir. 2000) (breach of warranties subject to arbitration, even against non-signatory to contract).

These claims not only bear a significant relationship to the arbitration provision, they are

expressly addressed therein, as 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 (emphasis added in italics). As such, the circuit court committed an error of law in finding the Respondents’ claims were not covered by the arbitration provision. See Thornton v. Trident Med. Ctr., LLC, 357 S.C. 91, 100-01, 592 S.E.2d 50, 55 (Ct. App. 2003) (reversing circuit court for committing error of law in failing to compel arbitration).

III. Respondents’ reliance on Faltaous is also mistaken. The arbitration provision in Faltaous, unlike the arbitration provision in the present case, was narrowly limited in scope and expressly did not apply to claims arising from the subject contract.

In Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 47-48, 693 S.E.2d 434, 435 (Ct. App. 2010), the purchasers of a condominium building under a preconstruction contract brought suit against the seller of the building for breach of contract, negligent misrepresentation, and unfair trade practices when they learned that parking for the building was located two streets behind the condominium. Seller counterclaimed and sought specific performance to require Buyers to close the purchase, damages based on breach of contract, and a declaratory judgment. Id. at 48, 493 S.E.2d at 435. Seller moved to compel arbitration; the circuit court denied the motion, and Seller appealed. Id.

The Court of Appeals initially recognized:

To decide whether an arbitration agreement encompasses a dispute, we must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the label assigned to the claim. However, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.* Additionally, *unless we can say with positive assurance the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be*

ordered.

Id. (emphasis added).

The Court then 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).

In the present case, the circuit court did not block-quote or analyze the arbitration provision. The terms of the arbitration provision itself are completely lacking from the circuit court's order, and the circuit court quotes only the portion of the Purchase and Sale Agreement which incorporated the arbitration provision, followed by a portion of the separate warranty provision. 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).

Since the circuit court committed an error of law in interpreting the arbitration provision,

the circuit court's decision should be reversed and remanded to compel arbitration. See S.C. Dep't of Transp. v. M & T Enterprises, 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."); New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) ("Appeal from the denial of a motion to compel arbitration is subject to de novo review.").

IV. The circuit court, like Respondents, failed to recognize that, unlike the defendants in Aiken and Partain, John Wieland Homes is alleged to have breached a duty to disclose latent defects. Respondents seek to hold John Wieland Homes liable for an omission, not any outrageous action.

Aiken and Partain are premised on outrageous *actions* taken by the defendants therein, or their employees. They are not premised on silence in the face of an alleged duty to speak. Aiken v. World Fin. Corp., 373 S.C. 144, 152, 644 S.E.2d 705, 710 (2007), which the circuit court expressly relied upon in denying John Wieland Homes' motion to compel arbitration, involved allegations that the defendant's employees misappropriated the plaintiff's financial information. The Court first recognized the general rule that "broadly-worded arbitration agreements apply to disputes in which a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Id. at 149, 644 S.E.2d at 708. *After quoting the arbitration provision* in the loan agreement between the plaintiff and the defendant, the Court concluded: "To interpret an arbitration agreement to apply to *actions* completely outside the expectations of the parties would be inconsistent with this goal." Id. at 152, 644 S.E.2d at 710 (emphasis added).

Likewise, in Partain v. Upstate Auto. Group, 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010), the Court grounded its ruling on allegations regarding the defendant's affirmative misconduct after the parties contracted for the sale of a truck: "Partain cannot be held to have

foreseen that Upstate Auto, after completing a sale, *would substitute an entirely different vehicle in place of the truck he had agreed to purchase.*" (emphasis added).

Simply put, the allegations in the present case that John Wieland Homes allegedly remained silent in the face of a duty to speak do not rise to the level of the intentional, outrageous actions committed by the defendants and their employees in Aiken and Partain. This is the exact argument John Wieland Homes raised to the circuit court and in its opening brief. Nonetheless, neither the circuit court nor Respondents ever distinguished this important point. This error requires reversal.

V. The circuit court, like Respondents, also ignored the language in Aiken and Partain limiting the Court's ruling to torts which are legally distinct from the contractual relationship between the parties.

In Aiken v. World Fin. Corp., 373 S.C. 144, 152, 644 S.E.2d 705, 709 (2007), the Court held: "In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration." "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. (emphasis added). Similarly, in Partain v. Upstate Auto. Group, 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010), the Court emphasized "that this case should not be read as providing an 'end-run' around arbitration clauses." Id. Thus, "[w]here parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort." Id. "Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement." Id. at 494-95, 689 S.E.2d at 605.

Respondents ground their claims on a duty to disclose—a duty which arises directly from the contractual relationship between the parties. "The duty to disclose may be reduced to three

distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.” Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967). “Where material facts are accessible to the vendor only, and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser, the vendor is bound to disclose such facts and make them known to the purchaser.” Id. at 485, 193 S.E.2d at 128.

In this case, the purported duty to disclose of John Wieland Homes arises directly from the contractual relationship between the parties. In the absence of a contract to buy and sell real estate, there would be no duty—arising in tort or otherwise. While Respondents seek to circumvent this issue by couching the same set of facts within as many different causes of action as possible in the underlying complaint, the Court in Partain held such an attempt is unavailing—“a party may not escape its commitment simply by presenting his claim as a tort.” Id. at 494, 689 S.E.2d at 605.

Respondents never address this issue in their brief, and the circuit court erred in converting Respondents’ allegations regarding a contractual duty to disclose into a purportedly outrageous tort claim. This error warrants reversal. See Timmons v. Starkey, 389 S.C. 375, 378, 698 S.E.2d 809, 811 (2010) (reversing trial court’s determination that defendant’s conduct was illegal or outrageous).

VI. Respondents incorrectly argue that the arbitration provision or the separate warranty provision is unconscionable. In order to set aside an arbitration provision, the provision itself must be unconscionable. As a matter of law, the arbitration provision in this case is not unconscionable.

As an alternative argument, Respondents contend that the arbitration or the separate warranty provision is unconscionable. The circuit court never ruled on this issue, so Respondents' argument enjoys no presumption of correctness.

"Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001); see also Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999) ("In this case, the challenge goes to the validity of the arbitration agreement itself."). "[A] party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993). "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, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983).

In their brief, Respondents vacillate between quoting provisions of the arbitration provision and quoting provisions of the remainder of the contract. Among other things, Respondents contend the arbitration provision is unconscionable because "[t]he Parsons are purportedly required to waive any and all claims, rights or remedies they may have against JWH . . ." and because "JWH limits arbitrator's ability to award certain damages unless authorized by JWH." See Resps.' Br. p.17. There is no such language within the arbitration provision, located

in Section V, Paragraph O of the JWH Warranty. Thus, to the extent Respondents allege that these terms are unconscionable, which John Wieland Homes denies, this issue is required to be presented to the arbitrator. See Jeske v. Brooks, 875 F.2d 71, 75 (4th Cir. 1989) (“We also reject Jeske’s arguments that the arbitration clause must be declared invalid on grounds that the customer’s agreement as a whole is void due to ‘overreaching, unconscionability and fraud,’ as well as lack of consideration. Because the alleged defects pertain to the entire contract, rather than specifically to the arbitration clause, they are properly left to the arbitrator for resolution.”).

Respondents also fail to show that the arbitration clause itself is unconscionable. “The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law.” Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998). “Unconscionability is characterized by the ‘absence of meaningful choice on the part of one party due to one-sided contract provisions, *together with* terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.’” Id. (emphasis in original).

“The factors determining ‘unconscionability’ are various: the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” Kaplan v. RCA Corp., 783 F.2d 463, 467 (4th Cir. 1986).

While Respondents comment on the nature of the “personal injuries” they purportedly suffered, there is no allegation of personal injury anywhere in their complaint. Instead, Respondents allege economic loss, which courts hold does not favor a finding of unconscionability. See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027,

1046 (D.S.C. 1993) aff'd, 46 F.3d 1125 (4th Cir. 1995) (recognizing the nature of the injury is economic, which does not favor a finding of unconscionability); Chatlos Sys., Inc. v. Nat'l Cash Register Corp., 635 F.2d 1081, 1087 (3d Cir. 1980) ("One fact in this case that becomes significant under the Code is that the claim is not for personal injury but for property-damage."); S.C. Code Ann. § 36-2-719 ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.").²

In addition, John Wieland Homes' complete removal of the small quantity of waste solution discovered on or near the Respondents' property to the satisfaction of SCDHEC must be considered. See Chatlos, 635 F.2d at 1087 ("[A]lthough not determinative, it is worth mentioning that even though unsuccessful in correcting the problems within an appropriate time, NCR continued in its efforts."); Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case."). In their brief, Respondents emphasize that John Wieland Homes has spent "in excess of \$500,000" in cleaning up the property. **Resps.' Br. p.1.**

While Respondents contend that the Purchase and Sale Agreement is a contract of adhesion, this Court has recognized: "The fact that a contract is one of adhesion does not make it unconscionable." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 395, 498 S.E.2d 898, 901 (Ct. App. 1998). "Unconscionability . . . requires a greater showing." Id. at 395, 498 S.E.2d at 902. "Form contracts obviously serve a very useful purpose in commerce." Id.

"The contract of adhesion is a part of the fabric of our society." Id. "It should neither be

² The UCC is applicable to the sale of goods but not to sales of real property and non-severable improvements to real property. S.C. Code Ann. §§ 36-2-105 and 36-2-107.

praised nor denounced. . . .” Id. “That is because there are important advantages to its use despite its potential for abuse.” Id. “These advantages include the fact that standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, and that the drafter can rationally calculate the costs and risks of performance, which contributes to rational pricing.” Id. at 395-96, 498 S.E.2d at 902. “Thus, the conclusion that the agreements in this case are adhesion contracts does not render them unenforceable.” Id. at 396, 498 S.E.2d at 902.

Respondents also fail to cite to any oppressive or one-sided terms within the arbitration provision. Respondents’ assertion that the temporal limitation on the applicability of the provision to “claims or disputes that arise 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)” creates an oppressive or one-sided term is misplaced. There is nothing unusual or oppressive about the arbitration provision and the warranties covering the property running from the time title passes to the buyer. This provision benefits the purchaser and the seller equally, as both purchasers and sellers have well-recognized pre-closing remedies. See Hofer v. St. Clair, 298 S.C. 503, 506, 381 S.E.2d 736, 738 (1989) (affirming damages award to purchaser for vendor’s breach of contracts to sell real property); Gibbs v. G.K.H., Inc., 311 S.C. 103, 105, 427 S.E.2d 701, 702 (Ct. App. 1993) (“Rescission is an appropriate remedy for a purchaser whose seller has contracted but is unable to provide marketable title because of defects in the title.”); Amick v. Hagler, 286 S.C. 481, 484-85, 334 S.E.2d 525, 527 (Ct. App. 1985) (affirming circuit court’s decision to grant purchaser’s request for specific performance of contract to purchase real estate).

There is also a mutuality of remedy after the arbitration clause is triggered, contrary to

Respondents' unsupported assertions. "An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) (emphasis in original). "The Munozes have not been deprived of a remedy—they simply must seek their remedy through arbitration rather than through the judicial system." Id. "Moreover, under state law, a lack of mutuality of remedy does not invalidate a contract." Id. Here, both parties must arbitrate *any* dispute between them once the certificate of occupancy issues and the closing occurs.

In addition, there is no clause within the arbitration provision in this case similar to the one struck down by the Supreme Court in Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007): "The arbitration clause in Simpson's contract with Addy provides that '[i]n no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party.'" Nothing in the arbitration provision in the present dispute contains any limitation on remedies—the arbitration provision here simply requires *both* parties to submit their claims to arbitration.

Respondents also contend, without citation to any pertinent authorities, that the following term in the arbitration provision is one-sided or oppressive:

The terms and procedures of this warranty shall first apply to any claims or disputes that are within the coverage of this warranty. In order to be able to arbitrate or mediate any warranty claims, Homebuyer(s) must first have complied with all procedures set forth in this warranty within the time limits set forth herein. Failure of Homebuyer(s) to comply with such procedures in a timely manner *shall bar any such claims against Wieland.*

R.p.76, §V, ¶O (emphasis added).³

Respondents contend this provision limits their remedies to an express warranty. This ignores the plain language of the provision, which limits only the express warranty claims set out in the separate warranty provision and bars *only* such *warranty* claims in the event the pertinent procedures are not followed. In this respect, South Carolina has long recognized that a seller has absolute discretion to limit an express warranty. Black v. B.B. Kirkland Seed Co., 158 S.C. 112, ___, 155 S.E. 268, 269 (1930) (“The seller is not bound to warrant any article that he sells, and he has the right to limit the warranty given as he sees fit in any manner and to any extent acceptable to the purchaser.”). There is thus nothing oppressive or one-sided about this term.

Furthermore, Respondents contend that a clause within the arbitration provision permitting John Wieland Homes to assert claims against its suppliers and contractors is oppressive or one-sided. Again, Respondents cite to no authority for this proposition. This provision simply permits third-party claims within the arbitration proceeding, and, in this respect, grants John Wieland Homes the same privileges it would have been afforded under Rule 14, SCRCPP, in the absence of an arbitration provision. See First Gen. Services of Charleston, Inc. v. Miller, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (“Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon derivative liability.”).

While Respondents contend that this clause also limits their own right to implead a third-party defendant, impleader under Rule 14 presupposes that there is *no* direct liability to the

³ Respondents misquote this term, specifically the italicized portion, in their brief. Respondents purport to quote this term, stating “the Parsons failure to do so [comply with the warranty provision] ‘shall bar all claims against JWH.’” (emphasis added). There is no such language in the arbitration provision.

plaintiff. See id. (“The outcome of the principal claim must impact the third-party defendant’s liability; however, *no right exists to implead a third-party defendant who is directly liable to the plaintiff.*”) (emphasis added). There is also no term in the arbitration provision to limit Respondents’ remedies, if any, against these parties, nor is there any term within the arbitration provision requiring Respondents’ causes of action against these parties, if any, to be arbitrated. *A fortiori*, Respondents cannot show that this term oppresses them.

Finally, it is significant that, unlike the purchaser in *Simpson*, Respondents were provided a copy of the JWH Warranty, which included the same arbitration provision as that at issue in the present case, on March 22, 2006, well more than a year before they signed the subject Purchase and Sale Agreement incorporating the exact same arbitration provision on June 30, 2007. During this time, Respondents not only had the opportunity to read through the arbitration provision in detail, but also had the opportunity to consult with their own attorney before signing the Purchase and Sale Agreement. Cf. Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (“[W]e also acknowledge Simpson’s claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. Similarly, we note Simpson’s allegation that the contract was ‘hastily’ presented for her signature.”).

Respondents failed to show either a lack of mutuality or oppressive and one-sided terms within the arbitration provision itself. Consequently, to the extent this Court sees it necessary to address Respondents’ alternative ground, the ground should be rejected as unsupported by any evidence.

VII. Respondents’ argument that the arbitration procedures render the arbitration provision unconscionable is not ripe and should also be rejected.

In Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir. 1999), relied upon by

Respondents, the Fourth Circuit Court of Appeals held, in the context of a Title VII case for sexual harassment, that the defendant, Hooters, “materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.” Respondents mistakenly contend that the arbitration procedures in this case are similarly unfair.

Comparing the facts in Hooters to the facts in this case is like comparing apples to oranges. If anything, the arbitration process advocated by the defendant in Hooters reinforces the fairness of the arbitration provision at issue here.

As a preliminary matter, unlike the arbitration provision in the present dispute, the arbitration provision in Hooters permitted the defendant to set up “a forum by promulgating arbitration rules and procedures.” Id. The arbitration procedures in the present case were not promulgated by either party to the contract. To the contrary, the plain terms of the arbitration provision, which are once again ignored by Respondents, require the arbitration to be conducted “by an independent, neutral, third-party arbitrator . . . selected by Construction Arbitration Associates, Inc., Atlanta, Georgia (CAA) . . . [and] if CAA is unable or legally precluded from selecting an arbitrator, then the American Arbitration Association (AAA) shall do so” R.p.76, §V, ¶O. The arbitration provision continues: “Arbitrations will be conducted in accordance with rules provided or determined by the person or entity selecting the arbitrator as provided above” R.p.76, §V, ¶O.

In Hooters, 173 F.3d at 940-41, the Fourth Circuit emphasized: “Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance.” “*Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award.*” Id. (emphasis added). “In the case before us, we

only reach the content of the arbitration rules because *their promulgation was the duty of one party under the contract.*” Id. (emphasis added). “The material breach of this duty warranting rescission is an issue of substantive arbitrability and thus is reviewable before arbitration.” Id. “This case, however, is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.” Id.

In this case, unlike in Hooters, John Wieland Homes neither selects the arbitrator nor promulgates the rules under which the arbitration takes place. Respondents complain that “the arbitrator will be selected by [CAA], an entity located in Atlanta, Georgia—which also happens to be the state in which [John Wieland Homes] is located and incorporated.” **Resps.’ Br. p.17.** Respondents once again fail to show how this would adversely impact the arbitration process, which would occur in the nearest metropolitan area where the Respondents’ property is located. There is no adverse inference drawn from these circumstances which is supported by any facts or legal authorities cited by Respondents.

Moreover, while Respondents also complain, again without reference to any record evidence, that the “arbitrator purportedly selected by the CAA in the present case is from a law firm in which JWH is listed as a client” (**Resps.’ Br. p.18**), the simple solution to this issue is to inform the CAA and request an “independent, neutral, third-party arbitrator” as set forth in the arbitration provision. These are issues for the arbitrator, not for the court.

Other arbitration rules in the Hooters case are not present here. Unlike the current case, the arbitration provision in Hooters required the plaintiff, but not the defendant, to provide notice of the claim, the names of fact witnesses, and a brief summary of the facts known to each witness. Id. The arbitration provision in the present proceeding states: “In order to initiate

arbitration for disputes, *Wieland and Homebuyer(s)* must provide clear and specific written notice . . . to the other . . .” R.p.76; §V, ¶O (emphasis added).

Similarly, while the defendant, but not the plaintiff, in Hooters was permitted to include any claim in the scope of the arbitration, move for summary dismissal before a hearing is held, record the proceedings, cancel the arbitration, and “bring suit in court to vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel exceeded its authority,” there are no similar terms in the arbitration agreement between John Wieland Homes and Respondents. Id. at 939.

Another striking difference between the present case and Hooters is the lack of any evidentiary support for the allegations in Respondents’ brief, in contrast to the extensive testimony from experts and arguments from amicus parties in the Hooters litigation. See id. at 939-40 (quoting testimony from expert witnesses that the arbitration procedure promulgated by the defendant “do not satisfy the minimum requirements of a fair arbitration system,” “violates the most fundamental aspect of justice, namely an impartial decision-maker,” and “is without a doubt the most unfair arbitration program I have ever encountered.”).

In short, Hooters has no applicability to the facts at issue in the present case. The arbitration agreement between John Wieland Homes and Respondents applies equally to both parties, requires a neutral, independent arbitrator, and incorporates rules promulgated from a third-party organization. There is no evidence to the contrary, and Respondents’ argument in this regard should therefore be rejected.

CONCLUSION

The circuit court did not analyze the arbitration provision at the center of the present dispute. The circuit court’s interpretation of other provisions in the Purchase & Sale Agreement

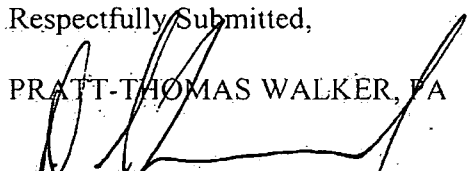
is irrelevant to the issue of arbitrability, and the circuit court committed an error of law in ignoring the arbitration provision in favor of the separate warranty provision.

The circuit court also erred in relying on Aiken and Partain. Respondents' allegations assert breaches of a contractual duty, and Respondents' claims involve causes of action directly covered by the arbitration provision. Moreover, there is no illegal or outrageous conduct in the present case similar to that proscribed in Aiken and Partain.

Respondents' alternative argument that the arbitration clause should be struck down as unconscionable is also misplaced. Respondents err in citing to other provisions of the contract to contend the arbitration provision itself is unconscionable, point to no oppressive or one-sided terms, and fail to establish a lack of mutuality. In fact, the Fourth Circuit's decision in Hooters emphasizes just how fair the arbitration provision in the present case is.

For the foregoing reasons, the circuit court's decision should be REVERSED.

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

September 24, 2012
Charleston, South Carolina

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2011-201528

Appeal From York County
S. Jackson Kimball, III, Circuit Court Judge

Unpublished Opinion No. 2013-UP-296
Heard February 6, 2013 – Filed June 26, 2013

AFFIRMED

George Trenholm Walker, Ian Wesley Freeman, and
Daniel Simmons McQueeney, Jr., all of Pratt-Thomas
Walker, P.A, of Charleston, for Appellant.

Herbert W. Hamilton and Christi P. Cox, both of
Hamilton Martens Ballou & Carroll, LLC, of Rock Hill;

and Tracy Thompson Vann, of Nexsen Pruet, LLC, of
Charlotte, NC, for Respondents.

PER CURIAM: This case arises from Ralph Wayne Parsons, Jr. and Louise C. Parsons's purchase of real property located in Fort Mill (the Property) from John Wieland Homes and Neighborhoods of the Carolinas, Inc. (Wieland). Wieland argues the trial court erred in declining to enforce an arbitration agreement found in the contract governing the purchase of the property. 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 Parsons' claims: *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (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); *Faltaous v. Anderson Ocean Club Dev., LLC*, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement." (internal citation omitted)).
2. As to whether the trial court erred in finding Wieland's failure to disclose hazardous substances buried on the Property amounted to conduct that was unanticipated and unforeseeable by a reasonable consumer: *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) ("Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this [c]ourt will 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."); *Partain v. Upstate Auto. Grp.*, 386 S.C. 488, 494, 689 S.E.2d 602, 605 (2010) (finding plaintiff could not have been held to "have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct"); S.C. Code Ann. § 27-50-40(A)(6) (2007) (stating an owner of real property shall furnish a purchaser with a written statement disclosing the "presence of . . . [an] underground storage tank, hazardous material or toxic material, buried or covered, and other environmental contamination").

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

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).

Rehearing is appropriate because the Court's decision 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; (3) JWH's argument that the circuit court erred in interpreting the warranty provisions instead of the arbitration provision in the subject purchase contract; (4) The inapplicability of Aiken and

Partain to this case; and (5) 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 another panel's decision in Carlson v. S.C. State Plastering, LLC, Op. No. 5143 (Ct. App. filed June 12, 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).

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

1. **The Court's decision misapprehends the applicable standard of review.** The Court's 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.").

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.

This Court's decision, like 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.

"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. United 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 (Ci. 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).

In the present case, 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 decision 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.

The Court's decision also fails to address JWH's argument that 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 (Cl. App. 2008) ("The construction of a clear and unambiguous contract presents a question of law for the court.").

4. The Court's decision overlooks and misapprehends JWH's argument regarding the inapplicability of Aiken and Partain to this case.

The Court's decision references the decisions in Aiken and Partain, but contains no analysis regarding their applicability. The Court's decision also relies on section 27-50-40(A)(6) of the South Carolina, which supports JWH's assertions that Aiken and Partain do not apply here because it establishes that underground environmental contamination is a foreseeable risk in a real estate transaction. In this respect, the Court overlooked or misapprehended JWH's arguments, again supporting rehearing.

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, this Court’s citation to 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;
- (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

¹ Based on the summary nature of the Court's decision, it is impossible to determine whether the Court is suggesting that the Disclosure Act applies to the present transaction. To the extent the Court suggests that section 27-50-40 applies to this transaction, it does not. See S.C. Code Ann. § 27-50-30(10) ("This article does not apply to transfers . . . involving the first sale of a dwelling never inhabited . . ."). Moreover, the Parsons have not asserted a claim under the Disclosure Act. Nevertheless, section 27-50-40, which would apply to a subsequent sale of the real property by the Parsons, clearly contemplates 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.

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. In this regard, the Court’s decision would, as a matter of law, necessarily preclude *any* claims potentially violating such disclosures from being subject to arbitration despite Aiken and Partain.

In light of the foregoing, the Court’s reliance on the Disclosure Act also supports rehearing of this appeal.

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

In Carlson v. S.C. State Plastering, LLC, Op. No. 5143 (Ct. App. filed June 12, 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.² Unlike the

² As previously discussed, this Court’s apparent interpretation of the Disclosure Act would render the defective construction claims at issue in Carlson non-arbitrable as a matter of law.

panel in Carlson, the Court's decision in the present appeal fails to address Landers.

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).³

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

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.

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 a previous decision of a separate panel 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 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, Op. No. 5143 (Ct. App. filed June 12, 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.*

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 Court’s decision in the present appeal summarily concludes 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, 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 and the present decision.

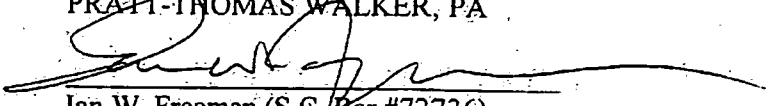
Pursuant to Rule 219(a)(2), SCACR, as discussed *infra*, the issues in this appeal are also of exceptional importance given the recent decisions of the Supreme Court of South Carolina in Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013), and the United States Court of Appeals for 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 a rehearing, and such rehearing should occur *en banc*.

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

July 10, 2013

Charleston, South Carolina

The South Carolina Court of Appeals

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

v.

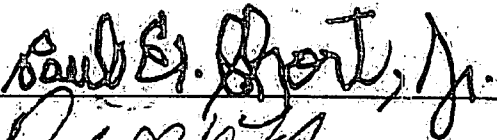
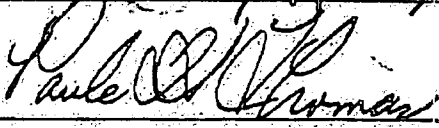
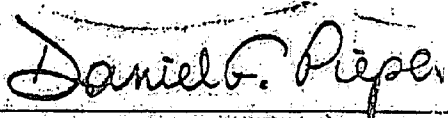
John Wieland Homes and Neighborhoods of the
Carolinas, Inc., Wells Fargo Bank, N.A., and South
Carolina Bank & Trust, N.A., Defendants,

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

Appellate Case No. 2011-201528

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

	J.
	J.
	J.

Columbia, South Carolina

cc:

George Trenholm Walker
Herbert W. Hamilton
Ian Wesley Freeman
Daniel Simmons McQueeney, Jr.
Tracy Thompson Vann
Christi P. Cox

FILED

28 August 2013

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2011-201528

Appeal From York County
S. Jackson Kimball, III, Circuit Court Judge

Unpublished Opinion No. 2013-UP-296
Heard February 6, 2013 – Filed June 26, 2013
Withdrawn, Substituted and Refiled August 28, 2013

AFFIRMED

George Trenholm Walker, Ian Wesley Freeman, and
Daniel Simmons McQueeney, Jr., all of Pratt-Thomas
Walker, PA, of Charleston, for Appellant.

Herbert W. Hamilton and Christi P. Cox, both of
Hamilton Martens Ballou & Carroll, LLC, of Rock Hill;
and Tracy Thompson Vann, of Nexsen Pruet, LLC, of
Charlotte, NC, for Respondents.

PER CURIAM: This case arises from Ralph Wayne Parsons, Jr. and Louise C. Parsons's purchase of real property located in Fort Mill (the Property) from John Wieland Homes and Neighborhoods of the Carolinas, Inc. (Wieland). Wieland argues the trial court erred in declining to enforce an arbitration agreement found in the contract governing the purchase of the property. 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 Parsons's claims: *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (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); *Faltaous v. Anderson Ocean Club Dev., LLC*, 388 S.C. 45, 48, 693 S.E.2d 434, 435 (Ct. App. 2010) ("Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that he or she has not agreed to submit. Because arbitration rests on the agreement of the parties, the range of issues that can be arbitrated is restricted by the terms of the agreement." (internal citation omitted)).
2. As to whether the trial court erred in finding Wieland's failure to disclose hazardous substances buried on the Property amounted to conduct that was unanticipated and unforeseeable by a reasonable consumer: *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive).

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

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 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 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,

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

September 11, 2013
Charleston, South Carolina

The South Carolina Court of Appeals

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.

Appellate Case No. 2011-201528

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr.

J.

Paul C. Thomas

J.

Daniel G. Pieper

J.

Columbia, South Carolina

cc:

George Trenholm Walker

Herbert W. Hamilton

Ian Wesley Freeman

Daniel Simmons McQueeney, Jr.

Tracy Thompson Vann

Christi P. Cox

FILED

March 14, 2014