IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

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 ..... Petitioner.

REPLY BRIEF OF PETITIONER JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.

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I. The Parsonses' claims fall within the scope of the arbitration clause because they bear a significant relationship to the Purchase and Sale Agreement.

Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons' ("Respondents" or "Parsonses") claims fall within the scope of the broad arbitration provisions of the Purchase and Sale Agreement (the "Agreement") because (1) the claims bear a significant relationship to the Agreement, and (2) the arbitration provision encompasses claims arising in tort, contract, or "of any kind." Respondents' brief dodges the substantive analysis that demonstrates their lawsuit, in its entirety, arises out of and relates to the Agreement for construction and sale of a home by John Wieland Homes ("Petitioner" or "John Wieland Homes"). Respondents' Complaint alleges breach of the Agreement and seeks rescission of the same. Their tort and deceptive practices claims also relate to the transactions described by the Agreement. Under the plain terms of the Agreement, their claims involve disputes that must be arbitrated. Undertaking a *de novo* review and considering the Agreement in the light most favorable to arbitrability, Petitioner respectfully submits this Court should reverse and compel arbitration of this dispute.

In Landers, this Court set the standard to be applied here. Specifically, this Court held that a former employee's tort claims, including slander and intentional infliction of emotional distress, were subject to arbitration when the employment agreement provided that "any controversy or claim arising out of relating to this contract, or the breach thereof, shall be settled by binding arbitration. . . ." Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 103-04, 739 S.E.2d 209, 210-11 (2013). The Court found that the proper inquiry in deciding the scope of arbitrability is whether the alleged tort claims bear a "significant relationship" to the Agreement. See 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."). Additionally, in holding that the claims in that case were subject to arbitration under the "significant relationship" test, the Court rejected the argument that whether particular claims were foreseeable by the parties is the proper inquiry. See id. at 115-16, 739 S.E.2d at 217 (stating that the Court "reject[s] the trial court's alternative ruling that the claims are not subject to arbitration because they were not foreseeable.").

The gravamen of Respondents' tort claims is their factually unsupported allegation that John Wieland Homes failed to disclose and concealed information concerning their property at the time of the sales transaction under the Agreement. **App. p. 14-15, ¶¶ 34, 37, 41, 42**. They allege that Petitioner's actions and practices, all of which arise out of the Agreement, are intentionally unfair and deceptive. **App. p. 16, ¶ 47**. Any duty allegedly owed to Respondents arose from the Agreement to construct and sell a home. Thus, each of the Parsonses' claims relates to the sales transaction, thereby falling within the scope of the arbitration provision in the Agreement and involving disputes that must be arbitrated.

In this case, the Parsonses and Petitioner both agreed that "**[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 would be subject to binding arbitration. **App. p.77, §V, ¶O** (emphasis added). Additionally, the arbitration provision "specifically includes, without limitation, **claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.**" **App. p.78, §V, ¶O** (emphasis added). The arbitration provision plainly encompasses claims relating to alleged misrepresentations to the

Parsonses, tortious conduct, and alleged damage to the Parsonses' home and lot. The arbitration provision is not limited to resolution of warranty claims as Respondents erroneously contend.

In Carlson v. S. Carolina State Plastering, LLC, 404 S.C. 250, 262, 743 S.E.2d 868, 875 (Ct. App. 2013), the Court of Appeals, applying the standard set in Landers, held that an arbitration clause in a home construction agreement similar to that in the instant Agreement extended to tort claims arising from alleged defective construction of a home as well as those for breach of warranty. The appellate court reasoned:

> The arbitration clause in the purchase agreement executed by the Carlsons applies to "every controversy or claim arising out of or relating to this Agreement, or the breach thereof...." We hold the factual allegations underlying the Carlsons' claims have a significant relationship between the purchase agreement, such that the arbitration clause should be read to encompass the Carlsons' tort claims.

Id. 404 S.C. at 262, 743 S.E.2d at 875 (emphasis added). The same significant relationship exists here and mandates arbitration of Respondents' claims.

Rather than undertake an analysis of Respondents' claims' allegations as Landers requires, which would expose their clear link to the Agreement, the Court of Appeals adopted Respondents' argument that their claims are not subject to arbitration because the broad language of the arbitration clause above should be read by this Court to be limited by provisions of the Agreement unrelated to arbitrability—exclusions and limitations of the express warranty. See **Resp'ts' Br., 10-14**. The Court of Appeal's ruling is unsupported by the terms of the arbitration provision or this Court's decision in Landers. See e.g., Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (". . . an arbitration clause is separable from the contract in which it is embedded . . ."). The arbitration provision incorporated into the Agreement is broad and nothing in the arbitration provision purports to limit the causes of action to which the provision applies. See **App. p.77, §V, ¶O**. The scope and enforceability of the

provisions of the warranty limiting damages covered by the express warranty is for the arbitrator to decide, not a limitation of whether any particular claim is subject to arbitration.

The wide breadth of the arbitration clause is clear, but even assuming *arguendo* the Agreement was ambiguous because the arbitration clause is found among the warranty provisions, that alone would not make the arbitration provision unenforceable. In interpreting a contract that falls within the scope of the Federal Arbitration Act ("FAA") as this Agreement does, "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.**" United States v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001) (emphasis added).[1] Sitting *de novo*, this Court must resolve the question in favor of arbitration, not defer to the circuit court as if the determination were a finding of fact as the Court of Appeals erroneously did. 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).

Respondents cite to the Faltaous case and argue that the exclusions on the coverage of the warranty are a limitation upon the scope of the arbitration provision of the Agreement. **Resp'ts' Br., 13** (citing Faltaous v. Anderson Ocean Club Dev., LLC, 388 S.C. 45, 693 S.E.2d 434 (Ct. App. 2010)). However, in Faltaous, unlike this case, the court relied upon limitations in the *arbitration provision* in deciding that certain claims were not subject to arbitration. Faltaous, 388 S.C. at 47-48, 693 S.E.2d at 435. The arbitration provision in this case is far more expansive than in Faltaous. It expressly applies to all disputes that relate to the Property or arise out of the Agreement, and does not include terms restricting it to claims for breach of the Agreement.

[1] Respondents do not challenge the applicability of the FAA here. Unlike Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 459, 730 S.E.2d 312, 318 (2012), the character of the Agreement was for construction and sale of a home and the Agreement and the record support the FAA's application. See **App. pp. 29, 30, 78, 122-126**.

Indeed, the arbitration clause expressly extends to "claims or disputes of any kind or nature", including "torts" and those for "property damage." See **App. p.77-78, §V, ¶O**.

Therefore, the broad arbitration clause here expressly reaches not only claims for breach of the Agreement, but also those claims premised on the Respondents' other liability theories -- claims for recission; claims arising in tort; and claims relating to implied warranties— all of which bear a significant relationship to the Agreement and are therefore subject to binding arbitration.

II. To the extent that Aiken and Partain survive the Landers opinion, they are inapplicable.

Respondents rely upon Aiken and Partain to argue that their claims are not subject to arbitration because their claims are based upon "unanticipated and unforeseeable" actions. **Resp'ts' Br., 15-18** (citing 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)).

However, in Landers, the Court specifically held that the "significant relationship" test was the proper inquiry and rejected the argument that "foreseeability" was the relevant inquiry:

> . . . [the plaintiff] 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. Thus, we . . . hold that each is to be arbitrated. 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***.

Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 115-16, 739 S.E.2d 209, 217 (2013) (double emphasis added). Therefore, the foreseeability test of Aiken and Partain did not survive Landers.

In Aiken, this Court held that it would "refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Aiken, at 152, 644 S.E.2d at 709 ("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."). Similarly, in Partain, the Court found that claims of outrageous and intentional fraudulent conduct, unrelated to any agreement, were not subject to arbitration. See Partain v. Upstate Auto. Grp., 386 S.C. 488, 493-94, 689 S.E.2d 602, 605 (2010) (fraud claims for dealership's post-contract substitution of an entirely different vehicle in place of the truck the plaintiff had agreed to purchase not subject to arbitration).

Aiken and Partain are also distinguishable in that the Parsonses do not allege any outrageous torts. All the claims they assert are significantly related to the Agreement. For instance, the Parsonses' factual allegations rely upon an alleged duty of John Wieland Homes to discover, remediate, and disclose hazardous substances on the Property. In other words, the Parsonses allege a failure to act, or omission, by John Wieland Homes with respect to the Property that is the subject of the Agreement. Respondents ground their claims on a duty to disclose—a duty which arises directly from the contractual relationship between the parties. See Jacobson v. Yaschik, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967) (noting that duty to disclose may arise from the nature of a contract between parties).

Unlike the present case, Aiken and Partain involve factual allegations that the defendants *intentionally committed outrageous torts*, the commission of which bore no significant relationship to the agreement containing the arbitration clause. See Aiken, 373 S.C. at 147, 644 S.E.2d at 707 (involving misappropriation of personal financial information which was separate and apart from the parties' loan agreement dealings); Partain, 386 S.C. at 490, 689 S.E.2d at 603 (involving a seller's intentional "bait and switch" of an automobile). Absent factually supported allegations of "outrageous" tortious misconduct unrelated to the contract, arbitration should be enforced. 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).

Respondents' argument that their claims are not subject to arbitration pursuant to the holdings of Aiken and Partain should be rejected. Foreseeability of alleged wrongful conduct is not the proper inquiry. Additionally, Aiken and Partain are distinguishable. In this case the alleged duty to disclose is significantly related to the Agreement, and the Parsonses have not alleged intentional, outrageous conduct or any tortious conduct unrelated to the Agreement containing the arbitration provision.

III. The petition for writ of certiorari was timely.

Rule 242(c) provides, in relevant part, that "[a] petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days after the petition for rehearing or reinstatement is *finally* decided by the Court of Appeals." (emphasis added). In this case, Petitioner complied with Rule 242(c) by serving on opposing counsel and filing proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days of the Court of Appeal's denial of Petitioner's second petition for rehearing. After the Court of Appeals issued a decision on Petitioner's first petition for rehearing affirming the trial court, the Court of Appeals *granted* Petitioner's second petition for rehearing, reheard the matter, withdrew its opinion, and issued a new opinion which was substituted and refiled on August 28, 2013. **App. pp. 285-86** ("The attached opinion is substituted for the previous opinion, which is withdrawn."); **Resp'ts' Br., 7** ("Admittedly, the Court granted the first petition for rehearing, withdrew its first opinion and substituted another opinion).

In its new opinion, the Court of Appeals failed to address the issue of whether JWH's alleged failure to disclose hazardous substances on the Property amounted to conduct that was unanticipated and unforeseeable to a reasonable consumer, an issue that is pivotal to the decision. App. pp.287-288. John Wieland Homes then timely served and filed a petition for rehearing as to the second opinion and for rehearing *en banc*, which the Court of Appeals denied by order filed on March 14, 2014. **App. pp.289-310; pp.311-312.**

Respondents argue that Petitioner was required to seek a writ of certiorari after the Court of Appeals withdrew its first opinion and substituted a new opinion, because the changes made to the substituted opinion only affected one ground for the Court of Appeals' decision. **Resp'ts' Br., 7.** In making this argument, Respondents ignore that a *denial* of a petition for rehearing was required *before* Petitioner could seek a writ of certiorari because a petition for rehearing constitutes a procedural prerequisite to obtaining certiorari review. See Toal, et al., Appellate Practice in South Carolina p.277 (2nd ed. 2002) ("A petition for certiorari may not be filed until the decision of the Court of Appeals is final, specifically, not until the petition for rehearing has been acted on by the Court of Appeals"); see also Rule 242(c) ("A decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition for rehearing or reinstatement has been acted on by the Court of Appeals.").

In fact, then counsel for Petitioner, Daniel S. McQueeney, Jr., confirmed that, when the Court of Appeals has withdrawn an opinion and issued a substituted opinion, the Supreme Court will not accept a petition for writ of certiorari until after a petition for rehearing is denied by the Court of Appeals:

> 10. On August 28, 2013, in an abundance of caution, I contacted the clerk's office of the Supreme Court of South Carolina regarding the procedural aspects of petitioning for certiorari.

11. During this conversation, I explained that I was counsel of record for a matter pending in the Court of Appeals, that a petition for rehearing had been granted in the matter, and that the Court of Appeals had withdrawn its previous opinion and re-filed a substituted opinion.

12. During this conversation, I asked whether, from an administrative perspective, the Supreme Court had a policy regarding whether a petition for certiorari would be accepted before a petition for rehearing was denied.

13. I was informed that the Supreme Court would not accept a petition for certiorari until the Court of Appeals had *denied* a petition for rehearing.

Supp. App. p. 2, ¶¶ 10-13 (emphasis in original). Therefore, the denial of a petition for rehearing is a procedural prerequisite to a petition for writ of certiorari. Petitioner was required to seek rehearing after the Court of Appeals withdrew its opinion and substituted a new opinion.[2]

A petition for rehearing following the Court of Appeals' substituted opinion was also necessary to preserve issues that were not addressed in the Court of Appeals' substituted opinion. Rule 242(d)(2) limits any petition for certiorari to those questions that are raised in a petition for rehearing: "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." Where, as here, the Court of Appeals grants rehearing and substitutes a new opinion, Rule 242(d)(2) compels a petitioner, to petition for rehearing to raise the Court's failure to address an issue which it had previously addressed in order to preserve the issue for certiorari review.

For these reasons, the petition for writ of certiorari was timely.

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[2] Respondents cite three cases, all of which concern the filing of successive motions to reconsider (or similar post-trial motions), in support of their argument that the petition for certiorari is untimely. As fully discussed in Petitioner's brief, these case are readily distinguishable because a petition for rehearing is a procedural prerequisite to a petition for certiorari, and further distinguishable because the successive motions in those cases were filed after the denial of the first motion. See **Pet.'s Br., pp. 25-26**.

IV. 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 clause is unconscionable. Respondents' argument enjoys no presumption of correctness since neither the Circuit Court, nor the Court of Appeals, ruled on this issue.

"In analyzing claims of unconscionability in the context of arbitration agreements . . . courts . . . focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." Smith v. D.R. Horton, Inc., 403 S.C. 10, 14, 742 S.E.2d 37, 40 (Ct. App. 2013) (quoting Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). ". . . '[i]t is under this general rubric that [courts] determine whether a contract provision is unconscionable. . . .'" Id. (quoting Simpson, 373 S.C. at 25, 644 S.E.2d at 669 (additional citation omitted)).

"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." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998) (emphasis in original) (citation omitted). "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).

Here, Respondents fail to show that the arbitration clause is unconscionable. There is no

allegation of personal injury anywhere in the complaint. The injury alleged is economic loss. Courts disfavor a finding of unconscionability where the damages are economic loss. See e.g., 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).

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 Sys., Inc. v. Nat'l Cash Register Corp., 635 F.2d 1081, 1087 (3d Cir. 1980) ("[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.").

Appellant disputes Respondents' contention the Agreement is a contract of adhesion, but this Court has recognized, even if it were, that "does not make it unconscionable." Lackey, at 395, 498 S.E.2d at 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. Respondents not only read and agreed to the terms of the contract once, they did so twice, apparently appreciating the low cost and efficiency of contracting with John Wieland Homes for the purchase of property and construction of their house. **App. p. 124-33.**

Additionally, the arbitration provision is not inconspicuous. The heading of paragraph 21 of the Agreement includes the term "Arbitration," and the arbitration provision is in all capitalized letters. **App. p. 61**. Furthermore, the Parsonses initialed both at the end of the paragraph and the end of the page, specifically acknowledging that their attention was

purposefully drawn to the arbitration provision. **App. p. 61**.

Respondents also fail to cite to any oppressive or one-sided terms within the arbitration provision. Their assertion that the temporal limitation on the applicability of the provision to claims arising the later of the issuance of the final certificate of occupancy or the initial closing of the purchase of the Property creates an oppressive or one-sided term is misplaced. There is nothing oppressive about the arbitration provision and the warranties covering the property running from the time title passes to the buyer. Additionally, 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); Id. ("The Munozes have not been deprived of a remedy-they simply must seek their remedy through arbitration rather than through the judicial system."). Here, *both* parties must arbitrate *any* dispute between them once the certificate of occupancy issues and the closing occurs.

Respondents also 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, SCRCP, 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 plaintiff. See id. (stating that ". . . no right exists to implead a third-party defendant who is directly liable to the plaintiff."). 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—this term is not oppressive or one-sided.

The remaining provisions of cited by Respondents concern the coverage provided by the Warranty not the arbitration clause. Respondents' argument fails as a matter of law as to these provisions because these are not terms within the arbitration provision. Munoz and a wealth of precedent instruct that an arbitration clause is separable from the remainder of the contract and its "validity is distinct from the substantive validity of the contract as a whole." Munoz, 343 S.C. at 540, 542 S.E.2d at 364.

Respondents also assert that the provisions providing that the arbitrator shall be selected by the Construction Arbitration Association, Inc. ("CAA") and that the arbitrator will establish

the procedure for the arbitration are fundamentally unfair and would be accepted by no honest person because the CAA is located in Atlanta, Georgia, the same location as Petitioner's business. **Resp'ts' Br., 23-24**. This argument is unsupported by anything in the record and is premature.[3] Prematurity aside, Respondents once again fail to show how this would adversely impact the arbitration hearing that must occur in the nearest metropolitan area where the Respondents' property is located, not Atlanta, Georgia. There is no adverse inference drawn from these circumstances supported by any facts or legal authorities cited by Respondents.

At bottom, the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker as Smith v. D.R. Horton requires. The plain terms of the arbitration provision, 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 . . . ." **App. p. 78, §V, ¶O** (double emphasis added).

Finally, it is worth noting that 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.'" The arbitration provision before this Court does not contain any limitation on remedies. It simply requires *both* parties to submit their respective claims to arbitration.

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[3] "Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance." Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 940-41 (4th Cir. 1999) "*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).

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 over a year before they signed the subject Purchase and Sale Agreement on June 30, 2007, incorporating the exact same arbitration provision. **App. p. 128, ¶ 3.** During this year, Respondents had the opportunity to read through the arbitration provision in detail and to consult with their own attorney before signing. 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.").

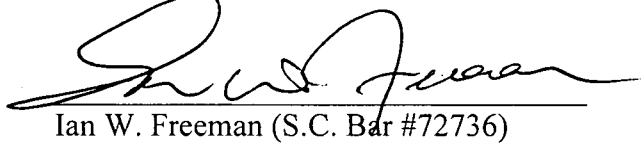
Respondents failed to show either a lack of mutuality or oppressive and one-sided terms within the arbitration provision itself. Consequently, to the extent this Court sees it necessary to address Respondents' alternative ground, the ground should be rejected as unsupported by any evidence.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court reverse the Court of Appeals and remand this matter to the circuit court to order arbitration.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



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November 20, 2014
Charleston, South Carolina

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PROOF OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief of Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. was served on this 20th day of November, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

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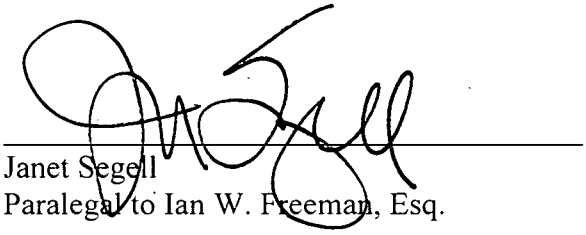

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OF COUNSEL
THOMAS P. GRESSETTE, JR. (SC, USVI)

November 20, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RE: Ralph Parsons v. John Wieland Homes
Case Tracking No. 2014-000782
Our File No. 1895-012

Dear Mr. Shearouse:

Please find enclosed an original and six copies of the Reply Brief of Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. in the above-referenced matter, with Proof of Service of one copy of same on opposing counsel.

Thank you for your courtesies.

Yours truly,

PRATT-THOMAS WALKER, P.A.

Ian W. Freeman, Esq.

/jas
enclosures

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