THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Bell Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated, ...

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc., a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation; Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber & Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating .....& Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida; RS Custom Homes,

LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Appellant.

Of whom TAMKO Building Products, Inc. is the Appellant.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC,, Third-Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant,

FINAL APPELLATE BRIEF OF APPELLANT, TAMKO BUILDING PRODUCTS, INC.

Richard H. Willis
Paula M. Burlison
BOWMAN AND BROOKE LLP
1441 Main Street, Ste. 1200
Columbia, SC 29201
Telephone: (803) 726-7420

Attorneys for Appellant TAMKO Building Products, Inc.

Columbia, South Carolina
May 7, 2015

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I. Whether One Belle Hall Property Owners Association, Inc.'s and Brandy Ramey's, individually, and on behalf of all others similarly situated, ("OBH") dispute with TAMKO Building Products, Inc. ("TAMKO") must be arbitrated, and the pending lawsuit against TAMKO dismissed, according to the terms of the arbitration clause within the limited warranty provided with TAMKO shingles.

II. Whether the conscionability of the warranty provided with TAMKO shingles should be a determination for the arbitrator rather than the lower court.

III. Whether the lower court erred in finding that the limited warranty provided with TAMKO shingles was unconscionable.

IV. Whether the arbitration clause is severable from the warranty, and therefore enforceable.

STATEMENT OF THE CASE

This controversy arises from a construction lawsuit brought by Plaintiffs One Belle Hall and Brandy Ramey (collectively "OBH") against multiple defendants, including TAMKO Building Products, Inc., ("TAMKO") regarding alleged construction defects at the One Belle Hall condominium project in Mount Pleasant, South Carolina. TAMKO manufactured the shingles used for this condominium project.

On January 9, 2014, OBH served an Amended Complaint on TAMKO, alleging claims of negligence, breach of express and implied warranty, and strict products liability. (R. pp. 39-65). Prior to this date, OBH had been pursuing claims against other defendants by means of a Complaint filed in 2012. (R. pp. 22-38).

On February 28, 2014, TAMKO moved to dismiss and compel arbitration, seeking to enforce the arbitration clause that is part of the limited express warranty provided with the shingles. (R. pp. 108-116). On the day before the hearing on TAMKO's motion, OBH filed its response. (R. pp. 117-139).

On June 25, 2014, the Honorable J.C. Nicholson, Jr., heard arguments on TAMKO's motion. At the hearing, the parties argued primarily over conscionability of the warranty and the enforceability of the arbitration clause as to third parties. (R. pp. 66-107). While many issues were addressed at the hearing, the lower court was primarily concerned with whether the arbitration clause could be enforced against a third party non-signatory beneficiary of the limited warranty. (R. p. 74, line 14 – p. 79, line 4; R. p. 96, line 20 – p. 97, line 19). The lower court resolved this issue in favor of TAMKO, after reviewing this Court's opinion in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012). (R. p. 97, lines 2-19; R. p. 253). However, the lower court agreed with OBH that the underlying warranty was unconscionable

and therefore, unenforceable, and that the arbitration clause could not be severed from the overall warranty. The lower court directed OBH's counsel to submit a proposed order, which was entered on September 17, 2014. (R. p. 253). This order denied TAMKO's motion, declined to enforce the arbitration clause, and declared the warranty limitations and disclaimers to be unconscionable. (R. p. 20). TAMKO timely served its Notice of Appeal on September 29, 2014.

FACTS

TAMKO is a manufacturer and supplier of roof shingles and related products, supplying them throughout the United States and internationally. OBH alleged the existence of damage-causing defects in certain TAMKO shingles that were installed on One Belle Hall condominiums. (R. p. 50, ¶ 65; R. p. 60, ¶¶ 119, 124). TAMKO denies its shingles were defective.

The TAMKO shingles were accompanied by a limited warranty that included an express provision requiring all disputes related to the shingles to be submitted to mandatory binding arbitration. (R. p. 170; R. p. 174). The arbitration clause provides:

> **MANDATORY BINDING ARBITRATION:** EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER INCLUDING WHETHER ANY PARTICULAR MATTER IS SUBJECT TO ARBITRATION (EACH AN "ACTION") BETWEEN YOU AND TAMKO (INCLUDING ANY OF TAMKO'S EMPLOYEES AND AGENTS) RELATING TO OR ARISING OUT OF THE SHINGLES OR THIS LIMITED WARRANTY SHALL BE RESOLVED BY FINAL AND BINDING ARBITRATION, REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY. TO ARBITRATE AN ACTION AGAINST TAMKO, YOU MUST INITIATE THE ARBITRATION IN ACCORDANCE WITH THE APPLICABLE RULES OF ARBITRATION OF THE AMERICAN ARBITRATION ASSOCIATION (WHICH ARE AVAILABLE ONLINE AT www.adr.com OR BY CALLING THE AMERICAN ARBITRATION ASSOCIATION AT 1-800-778-7879) AND PROVIDE WRITTEN NOTICE TO TAMKO BY CERTIFIED MAIL AT P.O. BOX 1404, JOPLIN, MISSOURI 64802 WITHIN THE TIME PERIOD PRESCRIBED IMMEDIATELY BELOW.

(R. p. 170). (bold and capital letters in original). OBH did not initiate arbitration in accordance with this arbitration clause.

The limited warranty extends over the 25-year life of the shingles. (R. p. 170; R. p. 174). The warranty limits the remedy to "repair or replace," disclaims all implied warranties, excludes liability for damage to "other property," and disclaims consequential and incidental damages. (R. pp. 170-171; R. pp. 174-175). The warranty also provides that if any of its terms are inconsistent with or unenforceable under any applicable state law, such terms will not apply. (R. p. 170).

Because OBH's response to TAMKO's motion included a vigorous attack on the conscionability of the various limitations in the warranty, TAMKO obtained similar shingle warranties offered by competitors to illustrate that its warranty was not significantly different in its duration, coverage, or scope from warranties common in the industry. These competitors' warranties were submitted to the lower court along with a chart comparing the various terms and clauses. (R. pp. 211-252).

STANDARD OF REVIEW

The denial of a motion to compel arbitration, even if interlocutory, is immediately appealable. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 35, 524 S.E.2d 839, 842 (Ct. App. 1999). Whether a claim is subject to arbitration is "an issue for judicial determination and is subject to de novo review." *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 183, 594 S.E.2d 523, 525 (Ct. App. 2004) (internal quotation and citation omitted). The court's "factual findings underlying the ruling" will be given deference, and "disturbed only if there is no evidence to reasonably support them." *Id.* (internal citation omitted).

ARGUMENT

TAMKO is entitled to arbitration of this dispute and dismissal of OBH's lawsuit as to TAMKO, based on the arbitration clause contained in the long-term shingles warranty. A party seeking to avoid arbitration has an uphill battle. Public policy, both state and federal, favors arbitration of disputes, and "[t]here is a strong presumption in favor of the validity of arbitration agreements." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (internal citation omitted). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered." *Id.* (internal citation omitted). When in doubt, the arbitration agreement stands. Here, the lower court's failure to enforce the arbitration clause in the limited warranty was reversible error.

I. Because OBH limited its challenge to the warranty provisions and did not challenge the validity of the arbitration clause itself, the lower court erred in finding that the arbitration clause was unenforceable.

The lower court erred in allowing OBH to avoid arbitration, when no challenge was made to the specific terms of the arbitration clause itself. To successfully challenge the validity or enforceability of an arbitration clause, the "party must state grounds which relate specifically to the arbitration clause and not just to the contract as a whole." *Brown v. Green Tree Servs., LLC*, 585 F. Supp. 2d 770, 775 (D.S.C. 2008) (internal quotation and citation omitted). Arbitration can be avoided "only when a party has valid grounds upon which to challenge the arbitration clause itself." *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 404, 440 S.E.2d 877, 879 (1994) (emphasis added) (internal citation omitted). Examples of such "valid grounds" for challenging an arbitration clause itself would include a claim that the dispute arose from events occurring after the arbitration clause expired, or claims that the arbitration clause was never entered into. *Id.*

"Arbitration clauses are separable from the contracts in which they are imbedded" and "[a]n arbitration clause's validity is distinct from the substantive validity of the contract as a whole." *New Hope Missionary Baptist Church v. Paragon Builders,* 379 S.C. 620, 630, 667 S.E.2d 1, 5-6 (Ct. App. 2008) (internal quotation and citation omitted). Furthermore, "[e]ven if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Id.* at 630, 667 S.E.2d at 6 (internal quotation and citation omitted).

OBH's claim of unconscionability goes to the contract (i.e., the warranty) generally. The lower court cited no independent basis for finding that the arbitration clause in and of itself was unconscionable. For example, OBH asserted that TAMKO's limited warranty was of an "unconscionable nature" and that it was "exculpatory in nature, contrary to South Carolina law, and violates public policy." (R. p. 124). OBH failed to support its assertion on any basis independent of the warranty. Instead, OBH stated explicitly that the "arbitration clause is made unconscionable by oppressive provisions which pervade the Warranty. . ." (R. p. 132).

Likewise, in reaching its decision that the arbitration clause was unenforceable, the lower court relied upon only the alleged "oppressive conditions" of the warranty as a whole, stating that "the arbitration provision is made unconscionable based on the cumulative effect of several ambiguous, oppressive and one-sided provisions located throughout the Warranty, including the 'exclusions from coverage,' 'transferability' and 'legal remedies' sections . . ." (R. pp. 5-6).

The lower court treated the warranty provisions and arbitration clause as if they were inseparable for purposes of determining whether OBH must comply with the arbitration clause. But South Carolina law requires arbitration agreements to be treated otherwise – as "separable from the contracts in which they are imbedded" and as "distinct from the substantive validity of

the contract as a whole." *New Hope Missionary Baptist Church,* 379 S.C. at 630, 667 S.E.2d at 5-6 (internal quotation and citation omitted). The rationale for that separate treatment is based on an analysis of the "conscionability" of the terms of the limited warranty – that is, are they so oppressive that no reasonable person would make them, nor any fair and honest person accept them. *See Simpson,* 373 S.C. at 24-25, 644 S.E.2d at 668. The case law is clear that this determination can, and therefore should, be made by the arbitrator. *See Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 449 (2006). When the arbitration process to which the parties have agreed is fair – allowing for an independent and impartial arbitrator and permitting fair notice and an opportunity to be heard as to the substance of the dispute – then the lower court must require arbitration. *See Simpson,* 373 at 32, 644 S.E.2d at 672.

Here, the controversy arises under the provisions of the warranty as a whole. Because neither OBH nor the lower court identified any specific unconscionable provisions within the arbitration clause itself, the lower court erred in allowing OBH to avoid arbitration.

II. Because the arbitration clause contains no one-sided or oppressive terms, does not preclude any remedies, does not violate any statutory law, and applies equally to all parties, the lower court erred in holding it to be unconscionable.

If this Court determines that the lower court properly assessed the enforceability of the arbitration clause, despite no challenge from OBH and no discussion in the order, then this Court must address the lower court's error in finding the arbitration clause to be unconscionable. Under South Carolina law, the test for establishing unconscionability consists of two elements: (1) "the absence of meaningful choice on the part of one party due to one-sided contract provisions" and (2) "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson,* 373 S.C. at 24-25, 644 S.E.2d at 668 (citing

Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). Both elements must be present for the arbitration clause to be unconscionable. *Id.*

The focus of the unconscionability test for an arbitration clause is limited to "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668-69 (citing *Hooters of Am., Inc. v. Phillips,* 173 F.3d 933, 938 (4th Cir. 1999)). In making its determination of whether an arbitration clause is unconscionable, the court "must consider that the policies of the United States and this State favor arbitration of disputes." *Carlson v. SC State Plastering, LLC,* 404 S.C. 250, 259, 743 S.E.2d 868, 873 (Ct. App. 2013) (internal citation and quotation omitted).

Simpson provides a good example of an unconscionable arbitration clause, which differs widely from the arbitration clause here. In *Simpson,* a customer and car dealership entered into a contract that included an arbitration clause. *Simpson,* 373 S.C. at 19, 644 S.E.2d at 665. In applying the first element of the unconscionability test, the *Simpson* court noted that while the parties agreed that the contract was one of adhesion, "adhesion contracts, however, are not per se unconscionable." *Id.* at 27, 644 S.E.2d at 669. Here, the contract is an "adhesion" contract, as are all standard construction materials warranties. Purchasers and sellers of bulk materials for use in construction do not negotiate specific warranty terms on a sale-by-sale basis. Thus, the first element of the unconscionability test is not at issue in this appeal.

In applying the second element of the unconscionability test, in *Simpson*, the court found that multiple provisions within the arbitration clause itself were oppressive and one-sided. Specifically, the arbitration clause contained a provision that prohibited double and treble damages. The court determined that provision to be in derogation of applicable statutory law "because it prevents Simpson from receiving the mandatory statutory remedies to which she may

be entitled in her underlying SCUTPA and Dealers Act claims." *Id.* at 30, 644 S.E.2d at 671. The court also found the arbitration clause to be "one-sided and oppressive" and that it "[did] not promote a neutral and unbiased arbitral forum" because it allowed the dealership to bring a judicial proceeding and completely disregard any pending claims by the consumer, who was limited to arbitration only. *Id.* at 32, 644 S.E.2d at 672. Thus, the *Simpson* court held the arbitration clause to be unconscionable and unenforceable because of these one-sided, oppressive provisions within the arbitration clause itself, finding that these provisions were "not geared toward achieving an unbiased decision by a neutral decision-maker." *Id.* at 30 - 32, 644 S.E.2d at 671 - 72. In other words, the arbitration clause in *Simpson* satisfied the second element of the unconscionability test.

By comparison, the TAMKO arbitration clause contains no one sided or oppressive conditions. It simply provides that any claims or disputes relating to or arising out of the shingles must be resolved by final and binding arbitration, regardless of the cause of action or theory of recovery. It then provides for the method for initiating and conducting the arbitration, in accordance with the applicable rules of the American Arbitration Association. In the TAMKO arbitration clause, nothing is one sided or oppressive. Certainly, the AAA is a neutral and unbiased arbitral forum. *See McCauley v. JSP Consulting, LLC,* No. 2012-UP-128, 2012 WL 10841261, *1 (S.C. Ct. App. Feb. 29, 2012) (unpublished opinion) ("Further, nothing in the record suggests the agreement's language is not geared toward achieving an unbiased decision by a neutral arbitrator. The agreement requires the arbitration to be governed by the rules of the National Arbitration Forum (NAF), which provide a neutral process for the selection of an arbitrator.")

This Court has recently determined what constitutes a conscionable and therefore enforceable arbitration clause. In *Carlson,* homeowners commenced a lawsuit over alleged construction defects in their home's stucco siding. *Carlson,* 404 S.C. at 254, 743 S.E.2d at 871. Defendants sought enforcement of an arbitration clause within the purchase agreement. *Id.* at 254-55, 743 S.E.2d at 870-71. The court found that the arbitration clause was not unconscionable, distinguishing that arbitration clause from the one analyzed in *Simpson. Id.* at 259-60, 743 S.E.2d at 873-74.

The *Carlson* arbitration clause did not "waive any rights or remedies otherwise available by law." *Id.* at 260, 743 S.E.2d at 874. The other limitations in the contract to which the Carlsons objected, such as "limiting the statute of limitations for bringing claims to two years," were "not part of the arbitration clause" and therefore were "irrelevant to a determination of whether the arbitration clause is unconscionable." *Id.* Further, this Court explained that the arbitration clause did "not lack mutuality" and applied to all parties equally. *Id.* Based on those factors, this Court concluded that there was no merit to the Carlsons' argument that the arbitration clause was unconscionable.

The fact that the TAMKO arbitration clause is part of an adhesion contract is an insufficient basis upon which to hold it unenforceable. In *York v. Dodgeland of Columbia, Inc.,* 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013), the court analyzed whether two arbitration clauses were unconscionable. Because of provisions within the arbitration clause itself, the first arbitration clause was similar to that in *Simpson,* so the court deemed it unenforceable. *Id.* at 88, 90, 749 S.E.2d at 150-51.

The *York* court determined the second arbitration agreement was not unconscionable, even though it was part of an adhesion contract. *Id.* at 91, 749 S.E.2d at 151. The court

explained that "the [second] arbitration agreement . . . did not incorporate oppressive and one-sided terms; the [second] arbitration agreement . . . did not preclude the arbitrator from awarding mandatory statutory remedies and it did not incorporate a lack of mutuality of remedies." *Id.* at 91, 749 S.E.2d at 151.

A comparison of the second *York* arbitration clause to the one at issue here reveals similar terms. The second *York* arbitration clause provides:

> Any claim or dispute . . . between you and us or our agents . . . that arises out of or relates to your credit application, this Contract or any resulting transaction . . . is to be decided by neutral, binding arbitration. . . . The Federal Arbitration Act . . . governs [and] not any state [arbitration] law.

Id. at 77, 749 S.E.2d at 144. The TAMKO arbitration clause states:

> Every claim, controversy, or dispute of any kind whatsoever . . . between you and TAMKO (including any of TAMKO's employees and agents) . . . arising out of the shingles or this limited warranty . . . shall be resolved by final and binding arbitration . . . . To arbitrate an action . . . you must initiate the arbitration in accordance with the applicable rules of arbitration of The American Arbitration Association. . . and provide written notice to TAMKO . . . .

(R. p. 170).

The TAMKO arbitration clause withstands the scrutiny applied in *Simpson, Carlson,* and *York.* It is not one-sided and oppressive, does not preclude any remedies or violate any statute, and applies to all parties equally. By providing that disputes are to be subject to arbitration and giving instructions for utilizing the rules of the American Arbitration Association, it is geared toward achieving an unbiased decision by a neutral arbitrator.

OBH and the lower court's order find fault with other limitations within the limited warranty, outside the arbitration clause. Yet "these provisions are not part of the arbitration clause and are irrelevant to a determination of whether the arbitration clause is unconscionable." *Carlson,* 404 S.C. at 260, 743 S.E.2d at 874 (citing *Davis v. KB Home of S.C., Inc.,* 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011)). TAMKO's arbitration clause does not contain any

oppressive terms, such that reasonable, fair, and honest people would avoid them, and promotes "achieving an unbiased decision by a neutral decision-maker." Consequently, it does not meet the test for unconscionability and must be enforced. The lower court's contrary holding is reversible error.

III. Because the lower court's determination of unconscionability was reserved only to the provisions of the warranty, not to the terms of the arbitration clause, the order erroneously deprived the arbitrator of the power to determine whether the contract was unconscionable.

OBH's contention that the arbitration clause should not be enforced is based solely on its objections to the underlying limitations of the warranty; therefore, the lower court erred in making a determination that the warranty provisions were unconscionable. "[A] challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Buckeye Check Cashing, Inc.*, 546 U.S. at 449 (emphasis added); *see also Brown*, 585 F. Supp. 2d at 777 (internal citation omitted) (noting that when a party "allege[s] unconscionability of the contract terms generally, these issues are determined by an arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement.") Further, in deciding whether an arbitration agreement is enforceable, "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).

Here, OBH's claims of unconscionability focused only on the warranty, not any conditions within the arbitration clause itself. Similarly, the lower court's order addressed only the alleged unconscionability of the overall warranty. Under *Buckeye* and its progeny, only an arbitrator, not a court, can address such a challenge to the contract as a whole. Here, the lower court erroneously ruled on the potential merits of OBH's underlying substantive contractual claims. Because OBH challenged the validity of the warranty as a whole, instead of making a

challenge specific to the arbitration clause itself, the lower court erred in considering OBH's contractual claims rather than sending them to the arbitrator.

IV. Because the disclaimers and limitations in the warranty's provisions are consistent with South Carolina law and are commonly included in standard materials warranties as commercially reasonable, the lower court erred in finding the warranty provisions to be unreasonable.

A. South Carolina law provides for disclaimers and limitations such as those contained in TAMKO's limited warranty.

If this Court determines that it was proper for the lower court to consider the conscionability of the warranty as a whole, beyond the arbitration clause itself, then the lower court should have found the warranty provisions at issue here to be conscionable. The limited warranty at issue is a standard construction materials contract, incorporating limitations and disclaimers expressly allowed by the Uniform Commercial Code and the South Carolina Commercial Code. *See* S.C. Code Ann. §§ 36-2-316 (2003) and 36-2-719 (2003). The warranty at issue limits the remedy to "repair or replace," disclaims implied warranties, excludes liability for damage to "other property," and disclaims consequential and incidental damages. These limitations are expressly permitted under South Carolina law, and have been consistently enforced as valid contractual provisions. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1037 – 1048 (D.S.C. 1993).

To meet the statutory requirements for disclaimers, the disclaimer must be specific and conspicuous and must mention merchantability. *Id.* at 1037 (quoting S.C. Code Ann. § 36-3-316(2)). The warranty provisions at issue here meet these requirements. *See id.* at 1037-1039. The warranty language at issue specifically mentions "merchantability" and "fitness for a particular purpose" and is conspicuously presented with bolded headings throughout, all upper-case letters and bolded text for the disclaimers, as distinct from the other lower-case, non-bolded printed type. The language is specific, plainly stating that "the obligation contained in this

limited warranty is expressly in lieu of any other obligations, guarantees, and warranties . . . ." (R. p. 170). Because the warranty's limitations and disclaimers are expressly allowed by South Carolina law, these provisions are valid and enforceable.

B. Disclaimers and limitations in standard materials warranties are commercially reasonable.

The lower court's holding disregards the commercial reality of the marketplace. The warranty's disclaimers and limitations at issue are commercially reasonable. Commercial warranties for mass-produced products are always "take it or leave it" contracts of adhesion. No one negotiates warranty terms for mass-produced commercial products. TAMKO acknowledges that the contract at issue is one of adhesion. However, the warranty terms are not so one-sided or oppressive that "no reasonable person would make them and no fair and honest person would accept them." *Gladden v. Boykin,* 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013) (quoting *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668). In fact, TAMKO demonstrated to the lower court that other shingle manufacturers offer nearly identical warranty terms, which are routinely accepted by "fair and honest" consumers on a regular basis. (R. pp. 211-252).

In *Gladden,* homeowners sued over a contract for a home inspection, which limited liability to the inspection fee. *Id.* at 142, 739 S.E.2d at 883. In finding the limitation of liability was not unconscionable, the court explained, "Limitation of liability and exculpation clauses are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it." *Id.* at 144-145, 739 S.E.2d at 884. (internal citation omitted).

The TAMKO warranty, made by the seller to accompany the sale of its shingles, extends over the life of the product, for 25 years. As in most warranties of this type, TAMKO limits the

remedy to repair or replace, disclaims implied warranties, excludes liability for damage to other property, and disclaims consequential and incidental damages, all of which are commercially reasonable provisions. *See id.* The limitations and disclaimers within the warranty provisions are routinely entered into and are commonly used by shingle manufacturers across the board. (R. pp. 211-252).

These types of warranties present a typical tradeoff – the manufacturer gets the benefit of limiting its risk for its mass-produced construction product, and the purchaser gets an affordable product with a long-term warranty of 25 years, as opposed to the six year implied warranty that would operate by law. If the shingles are defective, the warranty provides the remedy of repair or replacement of those shingles, a limitation which is commonplace in standard materials contracts, particularly given the decades-long duration of the warranty.

In exchange for these warranty limitations, the buyer pays less for the product. If shingle manufacturers were not permitted to limit the warranty in this manner, shingle manufacturers would have to raise costs to unaffordable levels to cover their increased risk. Similar to the home inspector's disclaimer in *Gladden,* a shingle manufacturer's ability to disclaim and limit its warranty is reasonable when without those limitations, it could face being responsible for the cost of the contents of each particular building using its shingles, no matter what unknown valuables those buildings might contain. As shingles are necessary for residential and commercial structures, maintaining the affordability is a buyer's benefit that exists by way of providing the manufacturer with enforceable warranty limitations and disclaimers. Because the warranty's disclaimers and limitations are commercially reasonable and routinely entered into, the lower court erred in finding the warranty to be unconscionable.

V. Because the warranty's severability and savings clauses lawfully preserve the validity of the warranty and the enforceability of the arbitration clause, the lower court's bare conclusion that the arbitration clause was not severable from the purportedly unconscionable provisions of the warranty was reversible error.

If TAMKO's warranty disclaimers and limitations are, in fact, "unconscionable," its arbitration clause would still survive. "[A]n arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc.*, 546 U.S. at 445. The particular warranty at issue contains a severability clause, which states, "Invalidity or unenforceability of any provision herein shall not affect the validity or enforceability of any other provision which shall remain in full force and effect." (R. p. 170). This severability clause is part of the contract and provides for removal of any terms of the contract deemed by the court to be unconscionable. *Hardee v. Hardee,* 348 S.C. 84, 92, 558 S.E.2d 264, 268, n.3 (Ct. App. 2001) (noting that the agreement contained a severability clause which provided the court with the ability to find certain provisions unenforceable while upholding the contract as a whole.) The warranty also provides that if the "exclusion or limitation of implied warranties or incidental or consequential damages" is not allowed by law in the purchaser's state, then those "limitations or exclusions may not apply to you." (R. p. 170). This language also saves the contract, including the arbitration clause, should the warranty disclaimers and limitations be deemed unenforceable under South Carolina law. Thus, this arbitration clause is severable from the rest of the contract and survives the lower court's erroneous decision that the warranty provisions were unconscionable.

Without any substantive analysis whatsoever, the lower court erroneously concluded that the arbitration clause was not severable from the allegedly unconscionable provisions of the warranty, making the arbitration clause unsalvageable and unenforceable. Citing *Simpson* and *D.R. Horton,* the lower court explained, "TAMKO's arbitration clause is made unconscionable by oppressive provisions which pervade the Warranty, thereby rendering severability

impractical, if not impossible." (R. p. 20). With all due respect to the lower court, this conclusory statement lacks any basis in reality since a simple reading of the warranty would easily reveal oppressive provisions, if there are any. The arbitrator could find these to be oppressive and refuse to enforce them. Moreover, the lower court's treatment is contrary to established South Carolina and U.S. Supreme Court precedent. *See Buckeye Check Cashing, Inc.*, 546 U.S. at 445; *see also New Hope Missionary Baptist Church*, 379 S.C. at 630, 667 S.E.2d at 5-6 (Ct. App. 2008).

The *Simpson* court analyzed the severability of unconscionable provisions within the arbitration clause itself, not unconscionable provisions outside the arbitration agreement. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 674. In analyzing the unconscionability of an arbitration clause's provisions in *Simpson*, the court stated that "severability clauses have been used to remove the unenforceable provisions in an arbitration clause while saving the parties' overall agreement to arbitrate." *Id.* at 34, 644 S.E.2d at 673. The *Simpson* arbitration clause contained three separate one-sided and therefore unconscionable provisions, leading the court to conclude that it could not sever the oppressive terms within the arbitration agreement, and therefore, the arbitration agreement was unenforceable. *Id.* at 34-35, 644 S.E.2d at 674. That is not the situation here.

The lower court's reliance upon *D.R. Horton* is misplaced. Unlike in *Simpson* and *Carlson*, the *D.R. Horton* court considered the warranty and arbitration clause together as part of the same section of a purchase agreement, and did not limit its analysis to the language of the arbitration clause itself. *Smith v. D.R. Horton*, 403 S.C. 10, 15, 742 S.E.3d 37, 40-41 (Ct. App. 2013). The court pointed to warranty provisions that the lower court deemed unconscionable to affirm the finding that the arbitration clause was invalid and not severable. *Id.* at 17, 742 S.E.2d

at 41. Inexplicably, in basing its analysis on the warranty's provisions rather than the arbitration clause, the *D.R. Horton* court relied upon the very analysis in *Simpson* in which the court limited its unconscionability determination to the arbitration clause itself, not the underlying warranty. *Id.* at 15-16, 742 S.E.2d at 40-41.

In its severability analysis, the *D.R. Horton* court properly explained that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Id.* at 16, 742 S.E.2d at 41 (internal quotation and citation omitted). The court further explained that "courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause" and admonished that "hacking away the unenforceable parts," when "illegality pervades the arbitration agreement," seems like impermissible rewriting of the contract by the court. *Id.* at 17, 742 S.E.2d at 41 (emphasis added) (internal citation and quotation omitted). Even though the *D.R. Horton* court's unconscionability analysis went beyond the arbitration agreement itself to the substance of the warranty, the case law and analysis that the court cited are limited to whether provisions within the arbitration clause are so unconscionable as to preclude severance.

Here, the lower court could not have based its severability decision on unconscionable provisions within the arbitration clause itself. There are none. The lower court should have allowed the arbitrator to decide whether the substantive limitation and disclaimer provisions of the warranty are enforceable, limiting its own analysis to just the arbitration clause itself, as the court did in *Simpson* and *Carlson.* Because this contract contains a severability clause, the lower court erred in finding that the arbitration clause does not survive the allegedly unconscionable warranty provisions.

CONCLUSION

The public policy of the State of South Carolina and of the United States emphatically favors arbitration. OBH made no challenge to the terms of the arbitration clause itself, and therefore should not have been permitted to avoid arbitration. The arbitration clause is conscionable and enforceable under the analyses of *Simpson, Carlson,* and *York,* and the lower court erred in finding otherwise.

Further, the lower court erred in failing to recognize that determining whether the overall warranty is enforceable is within the province of the arbitrator. The lower court also erroneously found this standard materials limited warranty to be unconscionable and unenforceable. The lower court's ruling poses broad implications reaching far beyond this case, affecting adversely countless standard materials contracts throughout South Carolina. For these reasons, TAMKO requests that this Court reverse the lower court's denial of its motion to dismiss, and compel this dispute to be submitted to arbitration.

Respectfully submitted,

Richard H. Willis
Paula M. Burlison
BOWMAN AND BROOKE LLP
1441 Main Street, Ste 1200
Columbia, SC 29201
Telephone: (803) 726-7420

Attorneys for Appellant TAMKO Building Products, Inc.

Columbia, South Carolina
May 7, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Bell Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated, ...

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc., a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation; Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber & Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating .....& Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of

Florida, Inc. a/k/a Energy Saving Products of Florida; RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Appellant.

Of whom TAMKO Building Products, Inc. is the Appellant.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC,, Third-Party Defendant,

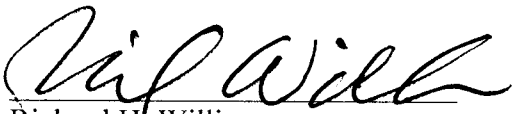
Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant,

CERTIFICATION PURSUANT TO RULE 211, SCACR

Pursuant to Rule 211(a), SCACR, undersigned counsel certifies that the Final Appellate Brief of Appellant filed in this matter on behalf of TAMKO Building Products, Inc. complies with Rule 211(b), SCACR.



Richard H. Willis
Paula M. Burlison
BOWMAN AND BROOKE LLP
1441 Main Street, Ste. 1200
Columbia, SC 29201
Telephone: (803) 726-7420

Attorneys for Appellant TAMKO Building Products, Inc.

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Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida; RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

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J. Correa Electrical Company, LLC, Third-Party Defendant,

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, TAMKO Building Products, Inc. on One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated, by depositing a copy of it in the United States Mail, postage prepaid, on May 7, 2015, addressed to their attorneys of record, Justin Lucey and Dabny Lynn, Post Office Box 806, Mt. Pleasant, SC 29465.

BOWMAN AND BROOKE LLP

By: 

Richard H. Willis
Paula M. Burlison
1441 Main Street, Suite 1200
Columbia, SC 29201
(803) 726-7420

Attorneys for Appellant TAMKO Building Products, Inc.

May 7, 2015