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.

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

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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." **(JWH Warranty, §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." See Bradley v. Brentwood Homes, Inc., Op. No. 27143 (S.C. Sup. Ct. filed July 11, 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."); **Hr'g Tr. P.23:9-10** (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 of Leland Stanford Junior Univ., 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 Horizontal Prop. Regime, 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.*

(JWH Warranty, §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, read fairly, applies only to claims of defects in the design and construction of the house," 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." **(JWH Warranty, §V, ¶O)** (emphasis added in italics).

Similarly, while the circuit court held "the arbitration provisions are inapplicable to the claims asserted in this case," 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.*"

(JWH Warranty, §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. of S. Carolina, 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.*" **(JWH Warranty, §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." (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 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."); New Hope Missionary Baptist Church v. Paragon Builders, 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." **(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, 28, 644 S.E.2d 663, 670 (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.*

(JWH Warranty §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, 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

[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 . . . ." **(JWH Warranty §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 . . . ." **(JWH Warranty §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 . . . ." **(JWH Warranty §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,

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August 6, 2012
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC 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 the Initial Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. was served on this 6th day of August, 2012 via U.S. mail, postage prepaid, upon the following counsel of record:

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The Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
P.O. Box 11629
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RE: Parsons, Ralph v. John Wieland Homes
2011201528

Dear Ms. Kitchings:

Please find enclosed Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.'s Initial Reply Brief in connection with the above-referenced matter. As evidenced by the enclosed Proof of Service, I am serving counsel for Respondent with a copy of Return. We would greatly appreciate your sending us a recorded copy of the Return in the enclosed, self-addressed envelope.

Thank you for your assistance.

With regards, I am,

PRATT-THOMAS WALKER, P.A.

Janet Segall
Paralegal to Ian W. Freeman

/jas
enclosures

c: Herbert Hamilton, Esq.
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