THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-5559
Appellate Case No. 2015-000201

Madison at Hamlin Plantation Townhome Association, Inc., and Sandy Randall and Cherie Berotti, individually and on behalf of all others similarly situated,

Respondents,

v.

Builders Support Services of the Carolinas, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc. individually and f/k/a John Wieland Home and Neighborhoods of NC, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of SC, Inc., John Wieland Homes of SC, Inc., John Wieland Homes, Inc., and John Wieland Homes of Charleston, Inc.,

Appellants.

INITIAL BRIEF OF APPELLANTS

Thomas C. Hildebrand, Jr.
Kristina Y. Baxley
F. Elliotte Quinn IV
Parker, Poe, Adams & Bernstein LLP
200 Meeting Street, Suite 301
Charleston, SC 29401
(843) 727-2650
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. **DID THE CIRCUIT COURT ERR IN DENYING WIELAND'S MOTION TO COMPEL ARBITRATION OF RESPONDENT CHERIE BEROTTI'S CLAIMS?**

II. **DID THE CIRCUIT COURT ERR IN GRANTING RESPONDENTS' MOTION FOR CLASS CERTIFICATION?**

STATEMENT OF THE CASE

This appeal is from two interlocutory orders entered in a pending construction defect case: an order denying a motion to compel arbitration and an order granting a motion for class certification.

On September 20, 2013, Respondents Madison at Hamlin Plantation Townhome Association, Inc., Sandy Randall, and Cherie Berotti brought this construction defect action against Appellants Builder Support Services of the Carolinas, Inc., John Wieland Homes of SC, Inc., John Wieland Homes, Inc., and John Wieland Homes of Charleston, Inc. (collectively referred to as "Wieland"), alleging the 114 townhomes comprising the Madison at Hamlin Plantation planned community ("Madison") suffer from design and construction defects. (Summons & Compl.) Respondents Randall and Berotti brought their claims as homeowners both individually and on behalf of a class of all other homeowners in Madison. (Summons & Compl.) Through subsequent pleadings, numerous subcontractors and material suppliers have been added as defendants and third-party defendants. (Second Am. Compl.; Appellants' Answer to Resp'ts' Second Am. Compl., Cross-cls, & Third-Party Compl.)

Respondents moved to certify a class of all homeowners in Madison, and Appellants opposed the motion on the basis that the proposed class did not meet the requirements for

certification of a class set out in Rule 23, SCRCP. (Resp'ts' Mot. for Class Certification; Appellants' Mem. in Opp'n to Resp'ts' Mot. for Class Certification; Appellants' Reply Mem. in Opp'n to Resp'ts' Mot. for Class Certification.) The circuit court held a hearing on the motion on September 10, 2014, and entered an order on September 29, 2014, granting the motion for class certification. (Tr. of Sept. 10, 2014 Hr'g; Sept. 29, 2014 Order.)

Additionally, Appellants moved to compel arbitration of Berotti's claims based on the mandatory arbitration provisions contained in the Purchase and Sale Agreement between Berotti and Appellants, and Respondents opposed the motion on the grounds the arbitration agreement is unenforceable. (Appellants' Mot. to Compel Arbit.; Resp'ts' Mem. in Opp'n to Appellants' Mot. to Compel Arbit.) The circuit court heard arguments on the motion at the same September 24, 2014 hearing , and entered a Form 4 order on January 21, 2015, denying Appellants' motion to compel arbitration. (Tr. of Sept. 10, 2014 Hr'g; Jan. 21, 2015 Form 4 Order.)

Appellants timely appealed both the order granting class certification and the order denying the motion to compel arbitration by way of a notice of appeal filed and served on January 27, 2015.

ARGUMENTS

I. BECAUSE A BINDING, ENFORCEABLE ARBITRATION AGREEMENT EXISTS THAT COVERS RESPONDENT CHERIE BEROTTI'S CLAIMS, THE COURT ERRED IN NOT COMPELLING ARBITRATION OF HER CLAIMS.

The circuit court erred in finding the arbitration agreement between Berotti and Appellants was unenforceable and denying Appellants' motion to compel arbitration. Both

South Carolina and federal law and policy strongly favor the arbitration of disputes, arbitration agreements are presumptively enforceable, and all doubts concerning arbitration agreements are to be resolved in favor of arbitration. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001). Here, Berotti entered into a valid, enforceable arbitration agreement governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq*, and accordingly, pursuant to South Carolina and federal law her claims must be dismissed or stayed in favor of resolution through arbitration.

Berotti purchased her townhome from Wieland pursuant to a Purchase and Sale Agreement ("Agreement") which subjects all disputes between Berotti and Wieland related to her townhome to arbitration as set forth in Wieland's warranty documents current at that time. (Parker Aff., Ex. A.) The Agreement provides: "Purchaser acknowledges that Purchaser has received and read a copy of the current JWH Warranty and consents to the terms thereof, including without limitation, the mandatory binding arbitration provisions contained therein." (Parker Aff., Ex. A at 2.) Berotti initialed at the beginning and the end of the provision. (Parker Aff., Ex. A at 2.)

"The Wieland 5-20 Extended Warranty" (the "Warranty"), which was in effect at the time Berotti purchased her townhome, provides that any dispute between Berotti and Wieland related to her home, the purchase agreement, or the warranties is subject to mandatory, binding arbitration. (Parker Aff., Ex. B. at 13–14.) The Warranty's arbitration provision is prefaced by the heading "**Mandatory Binding Arbitration**," and states:

"WIELAND AND HOMEBUYER(S) ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSING OF THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUYER(S)." (Parker Aff., Ex. B at 13–14.)

Appellants moved to compel arbitration of Berotti's claims based on the Agreement and incorporated Warranty, and Respondents opposed the motion on two alternative grounds: that the Agreement's arbitration provision is not governed by the FAA because it involves only intrastate commerce and that the Agreement's arbitration provision is unconscionable and unenforceable. (Appellants' Mot. to Compel Arbit.; Resp'ts' Mem. in Opp'n to Appellants' Mot. to Compel Arbit.) The circuit court accepted Respondents' arguments and denied the motion to compel arbitration.

Respondents and the circuit court are incorrect in both respects. The Agreement involved interstate commerce and is plainly distinguishable from decisions concerning intrastate commerce. Also, Berotti had a meaningful choice in entering into the Agreement and the Agreement does not contain oppressive terms and even if it did, those terms would be severable, and therefore the Agreement's arbitration provision is not unconscionable and unenforceable. Accordingly, pursuant to its *de novo* standard of review, *see Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007), this Court should reverse the circuit court's denial of the motion to compel arbitration.

A. The FAA Governs

The Agreement was for the construction, sale, and warranty of Berroti's home and the fulfillment of Wieland's contractual obligations involved numerous instances of interstate commerce ranging from the use of out-of-state supplies to an out-of-state financing company. Accordingly, the Agreement involved interstate commerce and is governed by the FAA.

The FAA applies to any arbitration agreement in a contract for a transaction that involves interstate commerce. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1995). The FAA broadly covers all interstate commerce to the limits of Congress' expansive Commerce Clause powers. *See id.* at 277.

While the South Carolina Supreme Court has held that the "purchase and sale of residential real estate" is an intrastate transaction, and thus, not subject to the FAA, *see Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), that decision is of no impact here. The Agreement between Berotti and Wieland was for both the construction and sale of a home, and it is axiomatic that the construction of a home involves interstate commerce. *See Zabinski*, 346 S.C. at 594–95, 553 S.E.2d at 117–18 (holding that the development and sale of apartments "involved interstate commerce because the partnership utilized out-of-state materials, contractors, and investors"); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct an eighteen (18) story apartment building . . . with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina."). Respondents' argument below was premised entirely on the Agreement being

solely a contract for the sale of a residence, and Respondents acknowledged below that a transaction involving the construction of residences can involve interstate commerce. (Resp'ts' Mem. in Opp'n to Mot. to Compel Arbit. at 10–11.)

Evidencing that the Agreement was for the construction of a home, Berotti entered into the Agreement on May 18, 2001, and the building permit for the townhome was not issued until July 9, 2002. (Parker Aff., Ex. A at 3; Appellants' Notice of Filing Exs. in Support of Mot. to Compel Arbit. at 5.) The Agreement clearly provides for the construction of a home, rather than merely the purchase of a completed home, as evidenced by:

- Section 3 of the Agreement provides that closing shall occur "after loan and/or completion of house."
- Section 13 provides: "Seller reserves the right to approve lot, house placement and all exterior colors."
- Section 16 provides a procedure in the event "a dispute arises between purchase and Seller concerning construction."
- Section 18 required Berotti to make design selections.
- Section 19 provides for the type of insulation to be installed in Berotti's townhome.
- Section 27 provides: "No structural or mechanical changes will be made to the property once framing is complete unless otherwise provided for by this contract."
- Special Stipulation 39 provides for delays in construction and states: "We believe that the permit process will be completed in time to allow us to construct your home without delay."

- Special Stipulation 41 provides: "Purchaser understands that all renderings of floor plans and elevations are preliminary and subject to change."

(Parker Aff., Ex. A at 1–3.) Additionally, reviewing the Purchase and Construction File for Berotti's townhome, it is clear that Berotti was contracting for the construction and purchase of a home, rather than merely purchasing a completed home. Therein, she made numerous directives to Wieland for specific details of her home ranging from flooring choices to adding a sun room to the rear of the home. (Appellants' Notice of Filing Exs. in Support of Mot. to Compel Arbit. at 7–145.) Therefore, the Agreement was for both the construction and sale of a home, and was not merely the purchase and sale of residential real estate.

Furthermore, the construction and sale of Berotti's townhome involved interstate commerce, including the use of construction materials and equipment manufactured outside South Carolina, as set forth in the affidavit supporting Appellants' motion to compel arbitration. (Parker Aff. at 3.) Respondents have not challenged this averment.

In conclusion, the Agreement was for both the construction and sale of a home, that transaction involved interstate commerce, and thus, the FAA governs the Agreement's arbitration provision. If Respondents were to prevail on their argument that the Agreement is not subject to the FAA due to a lack of interstate commerce, any construction agreement where the purchaser does not own the underlying land would be exempt from the FAA, and such a decision would directly contravene the broad scope of the FAA and Congress' Commerce Clause powers. Accordingly, exercising its *de novo* review, the Court should hold that the Agreement is governed by the FAA.

B. The Arbitration Agreement is Valid and Enforceable

The Agreement's arbitration provision is valid and enforceable because it is clear, bargained for, and fair to the parties; it is presumed to be enforceable, and Respondents failed to meet the elements required to establish unconscionability.

Arbitration agreements are presumptively enforceable, and only in the exceptional instance where unconscionable are they unenforceable. "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. Thus, an arbitration agreement is only unconscionable where it *both*: (1) is the result of an absence of a meaningful choice by one party *and* (2) contains oppressive terms. *See id.* at 24, 644 S.E.2d at 668.

The *Simpson* decision is instructive as to the extreme contractual terms required for an agreement to be unconscionable. There, the Court first found the arbitration agreement was the result of a lack of a meaningful choice because the contract was an adhesion contract, the arbitration clause was inconspicuous in the contract, and the contract was for the purchase of a necessity. *Id.* at 27–28, 644 S.E.2d at 669–70. The Court went on to hold that the arbitration clause contained oppressive and one-sided terms because it prohibited the recovery of statutory remedies,[1] reserved certain judicial remedies to one party,[2] and

---

1 The arbitration agreement provided that the arbitrator could not award "punitive, exemplary, double, or treble damages" and thus barred the plaintiff from recovering the statutory double and treble damages provided as remedies for her statutory claims. *See*

purported to apply to a warranty claim that was statutorily barred from being subjected to arbitration.[3]

Unlike *Simpson*, here the arbitration agreement is not unconscionable *both* because Berotti had a meaningful choice and because there are no oppressive terms. Furthermore, even if there are oppressive terms, those terms could be severed, leaving an intact and enforceable arbitration agreement.

i. Berotti Had a Meaningful Choice

There is *no* evidence that Berotti was denied a meaningful choice in entering into the Agreement. While Respondents asserted below that the Agreement is an adhesion contract, their argument is limited to the bald assertion that Berotti "had *no* choice and *zero input* as to *any* aspect of Wieland's Warranty." (Resp'ts' Mem. in Opp'n to Mot. to Compel Arbit. at 14.) Not only does such a bald assertion fail to satisfy Respondent's burden of proof, Respondents' assertion is grossly contrary to the facts.

The Supreme Court has strongly and clearly indicated that the bar is so high for establishing a lack of meaningful choice that this element can be satisfied by only the most exceptional and egregious circumstances, stating:

Simpson, 373 S.C. at 29–30, 644 S.E.2d at 670–71.

2 The arbitration agreement provided that while all disputes between the parties were to be settled in binding arbitration, one party was not required to submit claims to arbitration and could have certain claims resolved judicially even when arbitration was ongoing. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672.

3 The arbitration agreement provided that it applied to "any and all disputes" including specific claims that would implicate the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310, *et seq*. *Simpson*, 373 S.C. at 32–33, 644 S.E.2d at 673. However, federal rules and caselaw established that parties may not agree to arbitrate Magnuson-Moss Warranty Act claims. *Id.*

> Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with such factors as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

Gladden v. Boykin, 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013).

Such exceptional and egregious circumstances have not been shown by Respondents and plainly are not present here. The Agreement itself inarguably confirms that it was tailored by and to Berotti and her particular townhome as evidenced by the "special stipulations" bargained for by Berotti and included in the Agreement. (Parker Aff., Ex. A at 3.) Those stipulations include a requirement that Berotti could not be required to close on her new townhome before first selling her former home, and even provide that Berotti will install her own toilet paper holders and towel racks. (Parker Aff., Ex. A at 3.) Moreover, the construction file for Berotti's residence is replete with changes, additions, subtractions, and selections by Berotti in relation to the construction and purchase of her townhome. (Appellants' Notice of Filing Exs. in Support of Mot. to Compel Arbit. at 7–145.) Therefore, the Agreement was not offered on a take-it-or-leave-it basis with non-negotiable terms and is not an adhesion contract.

Additionally, the arbitration provision is conspicuous, rather than obscured. In the Warranty, the arbitration provision begins with the bold, underlined heading "**Mandatory Binding Arbitration**" and concludes with capitalized text providing that all disputes are

---

at 33, 644 S.E.2d at 673.

subject to arbitration. (Parker Aff., Ex. B 14–15.) In the Agreement, Berotti initialed at the beginning and the end of the arbitration provision. (Parker Aff., Ex. A at 2.) Therefore, because the Agreement was not an adhesion contract and Berotti had ample notice of the arbitration provision, she had a meaningful choice in accepting the arbitration provision. Because the lack of a meaningful choice is a necessary element to establish that a contract is unconscionable, the fact that Berroti had a meaningful choice ends the analysis and leaves the Agreement and its arbitration provision valid and enforceable.

ii. There Are No Oppressive Terms

Furthermore, even if Berotti lacked a meaningful choice, which is contrary to the evidence, the terms in the Agreement and incorporated Warranty are not oppressive, and therefore, the arbitration agreement is not unconscionable.

Respondents rely exclusively on the Court of Appeal's decision in *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013), in support of their argument that the Agreement and Warranty contain oppressive terms. There, this Court upheld on three grounds a trial court's finding that an agreement was unconscionable: (1) "attempted waivers of important legal remedies," (2) "attempts to disclaim implied warranty claims," and (3) attempts to provide that one of the two parties "could not be liable for monetary damages of any kind." *Smith*, 403 S.C. at 15, 742 S.E.2d at 40. The Court focused in on the third ground, stating: "[W]e affirm the trial court's finding of unconscionability, particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages." *Id.* at 15, 742 S.E.2d at 40–41.

This case is distinguishable from *Smith* in that here there is no attempt by Wieland to avoid liability for damages of any kind, the crux of the *Smith* decision. The Warranty explicitly provides that "if a defect occurs in a warranted item during the applicable period of this warranty, Wieland will repair, replace or pay the Homebuyer(s) the reasonable cost of repairing or replacing the defective item." (Parker Aff., Ex. B at 7.) The Warranty only disclaims consequential or secondary damages. Furthermore, the Warranty represents a fair and reasonable trade-off between the seller and purchaser. The purchaser receives the benefit of a broad warranty—a warranty broader than that provided by the common law—covering all workmanship for one year, covering all systems for two years, covering specific extended warranty items for five years, and covering structural defects for twenty years. Notably, under the law as it existed at the time Berotti purchased her home, she would not have had any claim after thirteen years due to the applicable statute of repose, whereas the warranty extended any structural claim out to twenty years. *See Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 140, 628 S.E.2d 38, 40 (2006). In exchange for the broad warranty, the purchaser agreed to forego some legal rights against the seller, namely the right to consequential damages. Thus, the Warranty's limitations are not unconscionable provisions, but rather represent a bargain reached between purchasers and sellers whereby the purchaser trades certain legal remedies in exchange for a guaranteed warranty of specific scope and duration.

Additionally, unlike in *Smith* and *Simpson* where agreements were found unconscionable, here the provisions at issue are mutual obligations, applicable to both

parties. For example, while the Warranty excludes "punitive damages; statutory damages; treble or other multiple damages; fees of attorneys, other professionals or experts; any costs or expenses . . .; any type of consequential damages; or any other items of a punitive nature," that limitation begins by stating that the arbitrator cannot make such a damages award "for or against any party to an arbitration hereunder." Thus, the damages limitation applies to both parties and this mutuality causes the term to not be oppressive. Therefore, because the Agreement and Warranty do not contain oppressive terms, they are not unconscionable and the arbitration provision is enforceable.

iii. If There Are Oppressive Terms, They Are Severable and the Arbitration Provision Remains Binding and Enforceable

Even assuming there are unconscionable provisions in the Agreement or Warranty, those provisions are severable from the arbitration provision and therefore, the arbitration provision remains enforceable. Accordingly, even were the circuit court correct to the extent it found portions of the Agreement or Warranty unconscionable, the circuit court erred in failing to sever those terms and enforce the arbitration provision.

If a court finds a provision of a contract to be unconscionable, the court can sever the unconscionable provisions and save the overall agreement to arbitrate. *Simpson*, 373 S.C. at 35, 644 S.E.2d at 673. While severing unconscionable clauses in order to give effect to the remainder of a contract is not required, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties." *Id.* (quoting *Booker v. Robert Half Int'l Inc.*, 413 F.3d 77, 84–85 (D.C. Cir. 2005)). Generally, the intent of the parties is to be fulfilled through severing unconscionable clauses, except when "illegality pervades the

arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . . ." *Id.* (quoting *Booker*, 413 F.3d at 84–85).

Respondents point only to the limitations of damages and disclaiming of remedies other than the contractual warranty as unconscionable provisions. None of those provisions go to the parties' clear intent to submit any dispute to arbitration. Arbitration can still occur, pursuant to the exact procedure provided for in the Agreement and Warranty, even if the damages and remedies limitations are removed. Accordingly, even if the Agreement and Warranty contain unconscionable terms, those terms do not affect the arbitration procedure agreed to by the parties for the resolution of disputes and the arbitration provision must be enforced as severed from the unconscionable terms.

In conclusion, Respondents' argument that the arbitration agreement between Wieland and Berotti is unenforceable because not governed by the FAA and unconscionable fail in light of the applicable law and available evidence. Because the Agreement is for the construction of Berotti's home and that transaction involved interstate commerce, the Agreement is governed by the FAA, and because Respondents failed to establish a lack of meaningful choice or oppressive terms, the Agreement is not unconscionable. Accordingly, the arbitration agreement is valid and enforceable, and the circuit court erred in denying Appellants' motion to compel arbitration.

II. BECAUSE RESPONDENTS' CLASS FAILS TO SATISFY THE COMMONALITY AND TYPICALITY REQUIREMENTS FOR A CLASS ACTION AND BECAUSE THE CLASS ASSERTS AN UNFAIR TRADE PRACTICES CLAIM, THE COURT ERRED WHEN IT CERTIFIED A PLAINTIFF CLASS.

There are numerous and complex differences among the claims of the individual townhome owners in Madison who comprise Respondents' class, and as a result, the requirements of Rule 23(a) of the South Carolina Rules of Civil Procedure for a class action are not met here. Because Rule 23's requirements cannot be met in light of such differences, the circuit court erred in granting Respondents' motion for class certification.[4]

Setting forth five requirements for class certification, Rule 23(a) of the South Carolina Rules of Civil Procedure provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if the court finds (1) the class is so numerous that joinder

---

4 While class certification orders are interlocutory and thus typically not immediately appealable, the class certification order here is appealable pursuant to the exception that "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation." *Hite v. Thomas & Howard Co. of Florence*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (Ct. App. 1991); *see also, e.g.*, *Pelfrey v. Bank of Greer*, 270 S.C. 691, 695, 244 S.E.2d 315, 317 (1978) (holding that an interlocutory order may be considered on appeal where "there is an appealable issue before the court justifying consideration of the [interlocutory order] also in order to avoid unnecessary litigation"); *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, —, 86 S.E. 817, 819 (1915) (considering an interlocutory order due to the presence of an appealable issue before the Court and because it would avoid unnecessary litigation); *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct. App. 1998) (holding that while the appeal of the grant of a motion to amend a complaint was interlocutory, the Court could consider it "because it accompanies the appeal of the grant of [the defendant's] motion for summary judgment."). Here, there is an appealable issue before the Court in the form of the denial of Appellants' motion to compel arbitration. Additionally, a ruling on the interlocutory class certification order will save the judicial system and the litigants from the costs of additional litigation because at a minimum, a ruling on the class certification by this Court would eliminate the need for a second, later appeal on the class issue.

> of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, (4) the representative parties will fairly and adequately protect the interests of the class, and (5) in cases in which the relief primarily sought is not injunctive or declaratory with respect to the class as a whole, the amount in controversy exceeds one hundred dollars for each member of the class.

In determining whether the five prerequisites for class certification are satisfied, the party seeking class certification bears the burden of establishing the five requirements, and "the court must apply a rigorous analysis to determine each prerequisite is satisfied." *Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003). The "failure to satisfy even one prerequisite is fatal to class certification." *Id.* at 21, 577 S.E.2d at 200.

In this action Respondents assert causes of action for negligence, breach of warranty, strict liability, breach of fiduciary duty, and violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. §§ 39-5-10, *et seq.* (1985 & Supp. 2014). Respondent Madison at Hamlin Plantation Townhome Association, Inc. is the property owners association for Madison and has ownership of and responsibility for the "common" elements which consist of "roofs, downspouts and gutters" and "all exterior building surfaces with the exception of hardware and glass." (Sept. 29, 2014 Order at 4.) The remaining components of the townhomes are owned in fee simple by the individual unit owners. Representing the class of unit owners are Respondents Randall and Berotti. Berotti purchased her townhome from Wieland as an original purchaser in 2003 and pursuant to an agreement containing a mandatory arbitration provision, whereas Randall purchased her townhome as a subsequent purchaser in 2010. (Second Am. Compl. at 3; Parker Aff., Ex. A

at 3.)

Respondents moved to certify a class "of all persons and entities that own structures located on Billings Street and Blalock Street located in Madison." (Resp'ts' Mot. for Class Certification at 1.) Despite Appellants' arguments that Respondents fail to establish the requirements of Rule 23, SCRP, especially the commonality and typicality requirements, the circuit court granted Respondents' motion and certified the class.

The trial court erred in certifying Respondents' class because Respondents cannot satisfy the commonality and typicality requirements of Rule 23. The circuit court also erred in certifying the class because the class purports to assert a SCUTPA claim and such claims cannot be pursued through class litigation.

A. Commonality

The claims of the proposed class members lack commonality for five overarching reasons: the presence or absence of a mandatory arbitration provision, the applicability of distinct and separate building codes, the differences in the homes and defects, the variety of subcontractors who performed work on the homes, and Wieland's defenses.

The requirement that there be questions of law or fact common to the class means "in practical terms" that "the party must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together." *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200 (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991)). "Commonality is met only where the class shares a determinative issue." *Id.* For an issue to be a determinative issue, it must be central, rather than peripheral, to the resolution of the

class members' claims. *See id.* at 21, 577 S.E.2d at 201. Accordingly, commonality does not exist where a court must conduct an investigation into the merits of each class member's claim. *See id.* at 22, 577 S.E.2d. at 201. This follows from the principle that "[t]he very purpose of a class action is to avoid the necessity of requiring each member of the class to prove the elements of the cause of action." *O'Quinn v. Beach Assocs.*, 272 S.C. 95, 104, 249 S.E.2d 734, 738 (1978).

Respondents' class lacks the required commonality in part due to the mandatory arbitration provisions applicable to a portion of the class members. The claims of all individuals or entities who purchased their townhome directly from Wieland are subject to a mandatory arbitration provision within the respective purchase agreements. For that reason, the claims of one of the two class representatives, and some, but not all of the class members, are subject to binding arbitration agreements. While the circuit court attempted to alleviate this problem by certifying two subclasses—one of owners subject to arbitration agreements and represented by Berotti and one of owners not subject to arbitration agreements and represented by Randall, the circuit court's efforts do not resolve the problem the arbitration agreements create for class certification. As set forth in the Warranty, which provides the arbitration provisions for all class members with arbitration agreements: "Claims of more than one property owner may not be arbitrated in a single arbitration." Therefore, those class members subject to an arbitration agreement cannot be class members because their claims cannot be both arbitrated and subject to class litigation.

The different building codes applicable to the Madison townhomes also detracts from

any potential commonality of Respondents' class. During the time period in which the townhomes were constructed, South Carolina adopted a new statewide building code.[5] For this reason, one building code applied to the earlier constructed townhomes in Madison, whereas a different building code applied to the later constructed townhomes. Therefore, the code governing whether a condition in a townhome is defective will depend on when the townhome was constructed, and the Court will be required to engage in an individualized examination of each townhome based on when it was constructed.

As Appellants' expert averred: "The codes promulgate different standards of care for different buildings constructed as part of the Project." (Newkirk Aff. at 9.) Respondents' expert acknowledges that there are relevant differences in the two building codes, stating in his report: "For the construction deficiencies identified during this investigation both of the applicable Codes have similar, if not exactly the same requirements." (Mease Report at 3.) The circuit court's order addresses this issue, but finds that "the relevant building code provisions remain essentially unchanged." (Sept. 29, 2014 Order at 11.) Implicit within this finding is that the relevant building code provisions have changed at least in part, and thus, an individualized examination of each townhome based on when it was constructed will still be required.

Furthermore, a comparison of the building code provisions relied upon by

---

5 During the time period in which the townhomes were constructed, South Carolina adopted the 2000 Edition of the International Residential Code, replacing the earlier building code. Plaintiffs' expert, Russell Mease acknowledged this distinction in his affidavit and report, stating in his affidavit that the alleged deficiencies in the buildings "are in violation of the CABO One and Two Family Dwelling Code (CABO Code) and/or IRC 2000." (Mease Aff.

Respondents' expert in his report reveals that the codes are not identical, and at a minimum, resolution of the case will require the consideration and application of both codes. *See* International Residential Code for One- and Two- Family Dwellings, 2000 (First Printing), *available at* http://www.publiccodes.cyberregs.com/icode/irc/2000.index.htm; The Council of American Building Officials (CABO), CABO One and Two Family Dwelling Code, *available at* http://www.publiccodes.cyberregs.com/icc/cabo/otfdc/1995/index.htm.

A third and significant consideration detracting from any commonality of Respondents' class is the host of differences among the class members' claims:

- The twenty-five buildings containing the townhomes differ in the number of townhomes in each building, ranging from two to six units in each building.
- The buildings were constructed over a period of three years.
- Some of the townhomes are two stories tall whereas others are three stories tall.
- Seven of the twenty-five buildings have a deck attached.
- Of those seven buildings with a deck, the enclosure configuration and height of the decks vary.
- The alleged defects and damages vary among the decks.
- Thirty-three of the one-hundred fourteen units have a park-under garage, eight units have an attached garage, and two units have a detached garage. The remaining units do not have a garage.
- Of those units with a park-under garage, some of those units have a brick veneer.

---

at 2; Mease Report at 3.)

- Only some of the units with a brick veneer have alleged defects in the veneer.
- The windows installed in the townhomes were manufactured by two different manufacturers.
- Respondents' expert only found water intrusion at some of the windows and the form of water intrusion and the associated alleged defects vary.
- The damage caused by water intrusion at the windows varies.
- Respondents allege that the fire separation walls have failed in some townhomes but have not failed in others.
- The alleged defects in the firewalls are not present in every unit.
- The units were maintained, repaired, and altered in different ways.

(Newkirk Aff. at 4–7; Mease Report at 2.)

These differences destroy any superficial commonality among the proposed class members' claims. As Appellants' expert averred, "the diversity of [Respondents'] claims and the diversity of the building designs and construction means and methods make it impossible to adequately and professionally assess [Respondents'] claims without conducting a townhome-by-townhome evaluation." (Newkirk Aff. at 8.) For example, considering the alleged deficiencies in the decks, only some units have decks, and of those units that do have decks the alleged defects and damages vary among those units. Because only some units have decks, there automatically is a lack of commonality between those units with claimed defects in their decks and those units without a deck. Similarly, only some units have a brick veneer and of those units with a brick veneer, only some of those units have alleged defects

in the brick veneer. Therefore, the class members' claims will necessarily vary from one class member to another, rather than allowing the efficient, uniform disposition of common claims.

Another consideration detracting from any commonality in the class is the fact that numerous subcontractors supplied their services in the construction of the townhomes with numerous configurations of different subcontractors working on the various townhomes. More specifically, the construction of Madison involved twenty-one framing subcontractors, seven drywall subcontractors, five roofing subcontractors, five window installation subcontractors, and two siding subcontractors. (Second Am. Compl.) Because each subcontractor can assert that it performed its work differently from other subcontractors and not in a defective manner, the resolution of the class members' claims will require individualized proof in relation to each subcontractor's work. (Newkirk Aff. at 8.)

A final consideration detracting from any purported commonality is the fact that Wieland has asserted a number of affirmative defenses (Appellants' Ans. to Second Am. Compl., Crossclaims, and Third-Party Complaint), and the resolution of those defenses will require individualized examination of each class member's claim, as each townhome is owned in fee simple. Specifically, Wieland asserts affirmative defenses based on the statute of limitations, statute of repose, comparative negligence and recklessness by Respondents' failure to maintain their property and mitigate their damages, failure to make a claim within the applicable warranty period, laches, estoppel, unclean hands, failure to give notice of and an opportunity to cure any alleged defects, and waiver. The resolution of each of these

defenses will require consideration of the individual merits of each class member's claim. For example, the statute of limitations defense cannot be resolved on a class-wide basis but rather will require consideration of when each alleged defect in a class member's home was or should have been discovered.

For all of these reasons, as is true of most construction defect claims, the many issues requiring individualized determinations render these claims inappropriate for resolution through the class action device, and the circuit court erred in certifying a class due to the lack of commonality. As the Louisiana Court of Appeals explained in holding that a class should not be certified in a construction defect case:

> Each of the homes involved would have been constructed by a different set of contractors under different contractual arrangements. Individual inquiries would have to be made into the source of water entry and the severity of the damage. These "house specific" issues would implicate testimony from a host of different builders, contractors, subcontractors, installers and materials suppliers. In addition to the individualized issues related to the role of third parties in causing the water damage, the question of compensation for damage to the homes will raise further individualized issues such as the extent of damage, the type of repair needed on each house and the cost of the repairs.

Simeon v. Colley Homes, 818 So. 2d 125, 130 (La. Ct. App. 2001). The Nevada Supreme Court reached a similar conclusion in holding that a case was not appropriate for class certification, explaining that:

> [C]onstructional defect cases relating to several different properties are often very complex, involving allegations between numerous primary parties and third parties concerning different levels or types of property damages. In many instances, these types of cases present issues of causation, liability defenses, and damages that cannot be determined or presumed through the use of generalized proof, but rather require each party to individually substantiate his or her claims.

Shuette v. Beazer Homes Holdings Corp., 124 P.3d 530, 543 (Nev. 2005).

The reasoning employed by those courts applies squarely to this case. The individualized issues of what defects exist, whether those defects caused damage to individual homeowners, the extent of those damages, and the role of the multitude of subcontractors all cause the class to lack commonality and the case to be inappropriate for class resolution. To certify a class would necessitate the type of "individualized examination" that the Supreme Court has expressly held results in a lack of commonality. *See Gardner*, 353 S.C. at 22, 557 S.E.2d at 201. Accordingly, because the class lacks the required commonality, the circuit court erred in certifying the class.

B. Typicality

While the lack of commonality alone is sufficient for a reversal of the class certification order, the circuit court also erred in certifying the class because Respondents failed to satisfy the typicality requirement.

To satisfy the typicality requirement—the requirement that the claims of the representative parties be typical of the claims of the class—"a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (internal citation omitted). The typicality requirement, like the commonality requirement, seeks to "ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class." *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir. 1997)). "A plaintiff's claim cannot be so

different from the claims of the absent class members that their claims will not be advanced by plaintiff's proof of his own individual claim." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006).

Respondents Randall and Berotti, the class representatives, did not suffer the same injury as the class members and therefore the typicality requirement is not satisfied. As previously discussed, there is a multitude of differences among the class members as to the alleged defects, the alleged damages, the responsible parties, and the application of Wieland's defenses. Those same issues exist as between the class representatives and the class members. Each class representative and each class member suffered water intrusion in different ways. The class representative and class members will have performed different types and levels of maintenance and repairs on their townhomes. Also, the class representatives' townhomes were constructed by a set of subcontractors and other townhomes were constructed by other subcontractors.

Therefore, proof of the class representatives' claims will not advance the class members' claims, and the class representatives' claims are not, and cannot, be typical of those of the class members. Because the typicality requirement is not satisfied, this is another ground on which the circuit court erred and on which the class certification order should be reversed.

C. SCUTPA

As set forth in the circuit court's Order, the class asserts a SCUTPA claim. (Sept. 29, 2014 Order at 5.) This constitutes another error by the circuit court because SCUTPA claims

are not subject to class adjudication.

SCUTPA provides: "Any person who suffers any ascertainable loss of money or property . . . as a result of the use or employment of the unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." S.C. Code Ann. § 39-5-140(a) (1985) (emphasis added). The Supreme Court has interpreted that statutory language as "preventing an action for actual damages from being brought in a representative capacity." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). Accordingly, the circuit court's certification of a class asserting a SCUTPA claim was erroneous.

CONCLUSION

For the reasons stated herein, the circuit court erred in denying Wieland's motion to compel arbitration and in granting Respondents' motion for class certification and this Court should reverse the decisions of the circuit court in both respects.

Respectfully submitted,

June 24, 2015

Thomas C. Hildebrand, Jr.
F. Elliotte Quinn IV
200 Meeting St., Suite 301
Charleston, SC 29401
(864) 727-2650
Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-5559

Madison at Hamlin Plantation Townhome Association, Inc., and Sandy Randall and Cherie Berotti, individually and on behalf of all others similarly situated,

Respondents,

v.

Builders Support Services of the Carolinas, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of NC, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of SC, Inc., John Wieland Homes of SC, Inc., John Wieland Homes, Inc., John Wieland Homes of Charleston, Inc.,

Appellants.

PROOF OF SERVICE

I certify that I have served **INITIAL BRIEF OF APPELLANTS AND APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on Respondents by delivering a copy of it in the United States Mail, postage prepaid, on June 24, 2015 addressed as follows:

Justin O. Lucey, Esq.
Joshua F. Evans, Esq.
Justin O'Toole Lucey PA
P.O. Box 806
Mt. Pleasant, SC 29465
(843) 849-8400
Attorneys for Respondents

PARKER POE ADAMS & BERNSTEIN LLP
200 Meeting Street, Suite 301
P.O. Box 160
Charleston, SC 29401
(843) 727-2650

Parker Poe

F. Elliotte Quinn IV
Telephone: 843.727.6315
Direct Fax: 843.727.2680
elliottequinn@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

June 24, 2015

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Madison at Hamlin Plantation Townhome Association, Inc. and Sandy Randall and Cherie Berotti, individually, and on behalf of all others similarly situated v. Builders Support Services of the Carolinas, Inc., et al.
Case No.: 2013-CP-10-5559

Dear Ms. Kitchings:

Enclosed herewith please find the original and one copy of the Initial Brief and Designation of Matter, along with a Proof of Service in the above-referenced matter. Please file the documents and return filed-stamped copies to me.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions. By copy of this letter, we are serving same on all counsel of record.

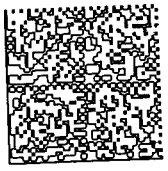
With best regards,

Elliotte Quinn

FEQ/lah
Enclosure

cc: Justin O. Lucey, Esq. *(via email and US Mail)*
Joshua F. Evans, Esq. *(via email and US Mail)*

First Class Mail
ComBasPrice



U.S. POSTAGE PITNEY BOWES

ZIP 29401 $ 003.62⁰
02 1W
0001380105 JUN 24 2015

RECEIVED
JUN 26 2015
SC Court of Appeals

Parker Poe
200 Meeting Street, Suite 301
Charleston, SC 29401
Post Office Box 160
Charleston, SC 29402

To:

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, SC 29201