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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

JUL 09 2015

J.C. Nicholson, Jr., Circuit Court Judge

SC Court of Appeals

Civil Action No. 2012-CP-10-03870

Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA
Plumbing, Fogel Services, Inc., Charleston LEC, Inc., Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc.
is.....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc.,
are..... Respondents.

PETITION FOR REHEARING BY APPELLANT JOHN WIELAND HOMES AND
NEIGHBORHOODS OF THE CAROLINAS, INC.

Pursuant to Rule 221(a), SCACR, Appellant John Wieland Homes and
Neighborhoods of the Carolinas, Inc. (“Appellant” or “John Wieland Homes”) hereby
petitions for rehearing of the Court’s unpublished decision in this appeal of an order
denying arbitration. See Phillips v. John Wieland Homes, Op. No. 2015-UP-300 (Ct. App.
filed June 24, 2015).

Rehearing is appropriate because (1) the Court’s decision overlooks,
misapprehends, or fails to address Appellant’s argument that the Federal Arbitration Act

applies because the Respondents Peter T. Phillips and Summar C. Phillips' (the "Phillips") Agreement with John Wieland Homes specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act; (2) the Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house; and (3) the Court's decision misapplies the standard of review for factual findings of the Circuit Court.¹

Based on the foregoing, John Wieland Homes respectfully requests that the Court grant rehearing.

FACTUAL/PROCEDURAL BACKGROUND

The Phillips and John Wieland Homes entered into a Purchase and Sale Agreement ("the Purchase Agreement") which incorporated the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program ("the Warranty") (collectively, the "Agreement"). (R.pp.159-217). This Agreement included several Addenda wherein the Phillips' specially contracted for several specific options or customizations of the

¹ The Court's decision also fails to address Appellant's arguments that (1) the Circuit Court committed an error of law in failing to find that the Agreement expressly and unambiguously compels arbitration of all claims between the Phillips and John Wieland Homes when the Agreement specifically compels arbitration of any and all claims between John Wieland Homes and the Phillips arising out of or relating in any manner to the Phillips' home and (2) that the Circuit Court committed an error of law in failing to compel the Phillips to arbitrate their claims against the Trade Contractors when their claims against the Trade Contractors are all dependent upon the Phillips' Agreement with John Wieland Homes, which requires arbitration. The Court did not address these issues because its decision with respect to the applicability of the Federal Arbitration Act was dispositive of these issues. On rehearing of the appeal, the Court should consider these issues that the Court's decision did not address.

residence. **(R.pp.161-68)**. Specifically, the Phillips and John Wieland Homes agreed to the following items in various Addenda to the Purchase Agreement: adding custom paint colors; converting the patio and front walkway to oyster shell; adding phone/cable to the bonus room over the garage; adding a dedicated receptacle for a wine cooler in butler's pantry area; reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; constructing an additional parking pad to the drive; adding additional patio space; converting the entire house to 7 ¼ inch baseboards; and several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68)**.

The Agreement specifically provides that the transaction involved interstate commerce: "As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law." **(R.p.200, ¶ O)**. The terms of the Agreement were specifically agreed to by the Phillips; and both the Purchase Agreement and Warranty include mandatory arbitration provisions. **(R.p.175, ¶ 22 and R.pp.199-201, ¶ O)**.

Paragraph 22 of the Purchase Agreement, entitled "Warranty and Arbitration," provides, in pertinent part that the Phillips agree to the binding arbitration provisions of the Warranty:

Warranty and Arbitration, Purchaser and Seller hereby agree that, in connection with the sale contemplated by this agreement, Purchaser will be enrolled in the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program (JWH Warranty), the JWH Warranty being incorporated herein by reference.

* * *

PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH

WARRANTY AND CONSENTS TO THE TERMS THEREOF,
INCLUDING, WITHOUT LIMITATION, THE MANDATORY
BINDING ARBITRATION PROVISIONS CONTAINED THEREIN . . .

(R.p.175, ¶ 22). The Phillips agreed to Paragraph 22 and initialed it separately, acknowledging that they read and received the Warranty. **(R.p.175, ¶ 22).** In so doing, per the terms of the Warranty, which is incorporated into Paragraph 22 of the Purchase Agreement by reference, the Phillips expressly agreed as follows:

Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland (if any), this warranty, the Home and/or property on which it is constructed, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. . . . This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.

(R.pp.199-200, §V, ¶ O). The Agreement mandates that arbitration procedure shall be the exclusive dispute resolution process for any dispute arising after the closing. **(R.p.201, §V, ¶ O).**

On June 14, 2012, the Phillips filed a complaint against Respondent Omega Flex, Inc. (“Omega Flex”), John Wieland Homes, Respondent AAA Plumbing (“AAA Plumbing”), Respondent Fogel Services, Inc. (“Fogel Services”), and Respondent Charleston LEC, Inc. (“Charleston LEC”), alleging causes of action for negligence, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, strict liability, breach of contract, breach of implied warranty of workmanlike service, and breach of implied warranty of habitability. **(R.pp. 13-28).** The Phillips’ Complaint seeks damages arising from a fire on June 25, 2009

at 1417 Hooper Street on Daniel Island. (R.p.14, ¶¶ 7-9). The fire was allegedly caused by a lightning strike that created a hole in a CSST gas pipe, which allegedly caused the natural gas to ignite at the hole in the CSST, which then purportedly escaped the hole in the CSST. (R.p.14, ¶ 10).

On October 29, 2012, John Wieland Homes moved to compel arbitration of the Phillips' claims against John Wieland Homes and to compel arbitration of the Phillips' claims against AAA Plumbing, Fogel Service, and Charleston LEC (collectively, the "Trade Contractors") on the basis that these claims are all subject to arbitration under the Federal Arbitration Act. (R.pp.324-27).² The Circuit Court refused to compel arbitration, ruling that the Agreement entered into between the Phillips and John Wieland Homes did not involve interstate commerce and was not subject to the Federal Arbitration Act. (R.pp.1-7). This appeal followed.

LAW/ANALYSIS

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

Rehearing in the present case is supported by the following alternative grounds:

- 1. The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Federal Arbitration Act applies because the Phillips' Agreement with John Wieland Homes specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act.**

² The parties did not dispute that the arbitration agreement at issue in this case does not meet the technical requirements of South Carolina Code section 15-48-10(a). (R.p.4).

The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Federal Arbitration Act applies because the Phillips' Agreement with John Wieland Homes specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act.

The Federal Arbitration Act provides: "A written provision in . . . a 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. Here, by its plain language, the Agreement provides that the transactions involved interstate commerce and that it is governed by the Federal Arbitration Act: "As the purchase agreement with Wieland and this warranty are *transactions involving interstate commerce*, arbitrations *shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16*, to the exclusion of any provisions of state law." (R.p.200, ¶ O) (double emphasis added).

The South Carolina Supreme Court has held that an agreement that an agreement that provides it shall be governed by the Federal Arbitration Act is enforceable in accordance with its terms. Specifically, in Munoz v. Green Tree Fin. Corp., the Court held that "the arbitration agreement, which applies to 'this contract and the relationships which result from this contract', provides it shall be governed by the FAA . . . [and] . . . [a]rbitration agreements, like other contracts, are enforceable in accordance with their terms." 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (internal quotation marks omitted) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.,

489 U.S. 468, 478 (1989)). The Supreme Court has recently reaffirmed this ruling. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013) (citing Munoz, 343 S.C. at 538, 542 S.E.2d at 363–64, and stating in a parenthetical as follows: “holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms”).

The Court’s decision does not address that the Agreement specifically provides that it involves interstate commerce and that it shall be governed by the FAA. The Court’s decision cites to Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012) for the proposition that the development of real estate is inherently interstate transaction and the proposition that the Federal Arbitration Act does not apply to a residential real estate transaction that has no substantial or direct connection to interstate commerce. Brentwood Homes did not address the issue of whether a contract, providing that the transaction involves interstate commerce and would be governed by the Federal Arbitration Act, is enforceable. Therefore, Brentwood Homes is not controlling as to whether the Phillips and John Wieland Homes agreement that the Agreement involved interstate commerce and was governed by the Federal Arbitration Act is enforceable. It is totally inapposite. The Court’s decision also cites Munoz, but for the proposition that the Federal Arbitration Act applies to contracts regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate commerce transaction.

The Court’s decision does not address or distinguish the applicable rule of law—that a contract, providing that it involves interstate commerce and that it shall be governed by the Federal Arbitration Act, is enforceable in accordance with its terms. As recognized

by the courts in Volt Info. Sciences and Munoz, and most recently in Cape Romain Contractors, arbitration agreements, like other contracts, are enforceable in accordance with their terms—an agreement that provides it shall be governed by the Federal Arbitration Act is enforceable in accordance with its terms. Because the Court’s decision failed to address this argument, rehearing should be granted.

2. The Court’s decision fails to address, overlooks, or misapprehends Appellant’s argument that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips’ house and the Court’s decision misapplies the standard of review for factual findings of the Circuit Court.

- (a) The Court’s decision misapplies the rule that a circuit court’s factual findings are entitled to deference on appeal, because the Circuit Court in this case did not consider the Addenda at all or make any findings with respect to the Addenda, it simply ignored them.

The Court, citing *Aiken v. World Fin. Corp. of South Carolina*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007), found that the Circuit Court did not commit legal error with respect to the Addenda because a circuit court’s factual findings in determining whether to compel arbitration will not be reversed if any evidence reasonably supports the findings. The Court’s decision misapplies the rule that a circuit court’s factual findings are entitled to deference on appeal. The Circuit Court in the case did not consider the Addenda at all or make any findings with respect to the Addenda, it simply ignored them. The Circuit Court’s discussion of the terms of the Agreement illustrates that it did not consider the Addenda at all:

Under this contract, the seller, John Wieland Homes, had a right to build as it deemed fit. It had ultimate discretion on materials. The provision of the agreement allowing the Plaintiffs to make certain selections was marked as not applicable. John Wieland Homes reserved the right to decide home placement, driveway location, number of deck steps and all exterior colors. The seller was not required to gain the purchaser’s permission prior to making any of these decisions. The agreement further provided that no

structural or mechanical changes could be made once framing was complete.

(R.p.5). This characterization of the Agreement makes clear the Circuit Court did not consider the Addenda, which included, among other things, customizing paint colors, reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor, construction an additional parking pad to the drive, and adding additional patio space.

The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Circuit Court erred by only considering the original Agreement and failing to consider the Addenda, which included the type of options and customizations that involve interstate commerce such that the Federal Arbitration Act would apply. The Circuit Court's failure to consider the full Agreement, which would include consideration the Addenda, is reversible error. See e.g., Brentwood Homes, at 455, 730 S.E.2d at 316 ("To ascertain whether a transaction involves commerce within the meaning of the FAA, *the court must examine* the agreement, the complaint, and the surrounding facts." (quoting Zabinski, at 594, 553 S.E.2d at 116) (double emphasis added)). Because the Court's decision fails to address, overlooks, or misapprehends Appellant's argument, rehearing should be granted.

(b) The Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house.

The Court's decision failed to address, overlooks, or misapprehends Appellant's argument the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house.

The Federal Arbitration Act applies and preempts state law because the transaction—a contract to customize the construction of a home and for the purchase of that home—involves interstate commerce. The FAA provides: “A written provision in . . . a 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. “The United States Supreme Court has held that the phrase ‘involving commerce’ is the same as ‘affecting commerce,’ which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.” Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)).

“The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements.” Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). “The basic purpose of the FAA is to overcome state courts’ refusal to enforce arbitration agreements.” Id. at 590-91, 553 S.E.2d at 115 (citation omitted); see also Allied-Bruce Terminix Companies, 513 U.S. at 270. “While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties’ agreement to arbitrate.” Zabinski, 346 S.C. at 592, 553 S.E.2d at 116 (citation omitted).

South Carolina Courts have consistently held that a contract that involves the construction of a residence, by its very nature, involves interstate commerce. See Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (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.”) (citations omitted); Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project was interstate where materials, equipment, and supplies were produced and manufactured out-of-state); Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

However, in Brentwood Homes, the Court held that the sale and purchase of residential real estate was a purely intrastate activity. See Brentwood Homes, at 458, 730 S.E.2d at 317 (“[W]e conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA.”). The Brentwood Homes Court specifically noted that the contract in that case did not include customizations of the home: “Notably, the provisions of the Agreement providing for . . . ‘Options,’ and ‘Color Selection,’ are eliminated as ‘N/A’ and were not signed by Bradley.” Id.

Here, the Agreement does include customizations of the construction of the home, as provided by the Addenda. Specifically, the Phillips and John Wieland Homes agreed to the following items in various Addenda to the Purchase Agreement: adding custom paint colors; converting the patio and front walkway to oyster shell; adding phone/cable to the bonus room over garage; adding a dedicated receptacle for a wine cooler in butler’s pantry area; reframing of the stairs to accommodate hardwood treads on first flight of stairs to

second floor; constructing an additional parking pad to the drive; adding additional patio space; converting the entire house to 7 ¼ inch baseboards; and several modifications related to wiring or rewiring for surround sound. **(R.pp.161-68)**.

The Agreement clearly involves interstate commerce, based upon the customizations of the construction of the home, as provided by the Addenda. Each of the items included in the Addenda, which are part of the Agreement, involve interstate commerce. In fact, Dennis A. Black, the one-time Division Quality Manager for John Wieland Homes, specifically stated in his affidavit that the construction of the Phillips' home "implicates interstate commerce." **(R.p.159, ¶¶ 1, 4)**. The terms of the Addenda to the Agreement and Black's affidavit that the construction of the Phillips' house involved interstate commerce unequivocally demonstrate that the Agreement involved interstate commerce. See e.g., New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("we find the trial court properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . . [the builder's] affidavit swearing the project will involve businesses and supplies from outside South Carolina.").

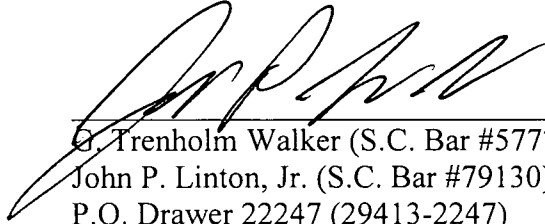
Therefore, because the Court's decision fails to address, overlooks, or misapprehends Appellant's argument that the Agreement clearly involves interstate commerce, based upon the construction customizations provided for in the Addenda, rehearing should be granted.

CONCLUSION

For the foregoing reasons, the Court should grant a rehearing.

Respectfully Submitted,

PRATT-THOMAS WALKER, PA



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July 9, 2015

Via Courier

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
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Columbia, SC 29201

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JUL 09 2015

SC Court of Appeals

Re: Phillips, et al. v. Omega Flex, Inc., et al.
Appellate Case No. 2013-001449
Our Client: John Wieland Homes & Neighborhoods of the Carolinas, Inc.
Our File No. 1895-013

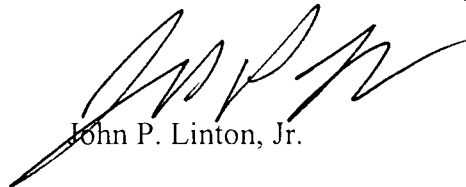
Dear Ms. Kitchings:

Enclosed please find the original and six copies of the Petition for Rehearing of Appellant John Wieland Homes & Neighborhoods of the Carolinas, Inc. in the above referenced matter. Also enclosed are the Proof of Service and our firm check for the filing fee.

Please contact me if you have any questions. Thank you for your assistance.

Very truly yours,

PRATT-THOMAS WALKER, P.A.



John P. Linton, Jr.

JPL/cam

c: All Counsel of Record

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc.
is.....Appellant,

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc.,
are..... Respondents.

PROOF OF SERVICE

I hereby certify that true and correct copies of Petition for Rehearing of Appellant
John Wieland Homes and Neighborhoods of the Carolinas, Inc. were served on this 9th day
of July, 2015 via U.S. mail, postage prepaid, upon the following counsel of record:

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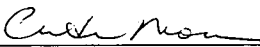
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