THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge



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

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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., John Wieland Homes of Charleston, Inc., AAA Plumbing; American Residential Services, LLC; Builders Firstsource-Southeast Group, LLC; Carolina Custom Security, Inc.; Creative Touch Interiors, Inc., individually and f/k/a Rice Planters Carpets,

Defendants,

Inc.; Fogel Services, Inc.;
Larry's Termite Control, Inc.;
McClellan Plumbing, LLC;
Neighborhood Management
Associates, Inc.; George Ryan
Butler; Paul Spencer; and John
Doe 1-50

Of which 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. are the Appellants.

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# INITIAL REPLY BRIEF OF APPELLANTS

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Appellants submit the circuit court erred in denying Appellants' motion to compel arbitration and in granting Respondents' motion for class certification for the reasons set forth in Appellants' Brief and the circuit court's rulings must be reversed for the reasons set forth therein. Respondents' Response Brief fails to set out any facts or law which compel a contrary result. While Appellants continue to rely on the arguments and legal and factual support set out in their Brief, Appellants take this opportunity to refute a number of erroneous assertions in Respondents' Response Brief.

### I. THE ARBITRATION AGREEMENT IS GOVERNED BY THE FEDERAL ARBITRATION ACT, IS NOT UNCONSCIONABLE, AND IS ENFORCEABLE

#### A. The Caselaw Relied Upon by Respondents Supports the Conclusion that the Agreement Involved Interstate Commerce and the FAA Governs

Respondents rely almost exclusively on *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), in support of their argument regarding the application of the Federal Arbitration Act ("FAA") to Appellants' Purchase and Sale Agreement with Cherie Berotti (the "Agreement") and the incorporated Wieland 5-20 Extended Warranty (the "Warranty"). Respondents' reliance on *Bradley* is misplaced because that decision is limited to the sale of real estate and the contract there did not involve the construction of a residence like Appellants' Agreement with Berotti. Respondents cite to *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (2001), as establishing that a "transaction involving construction" can "involve interstate commerce." (Resp'ts' Resp. Br. at 12 n.10.) Additionally, several other decisions by South Carolina's appellate courts have held that

construction contracts can involve interstate commerce and trigger the application of the FAA, even where "the nature of the project" is the sole basis for concluding it will involve interstate commerce. *Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002); *see also Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626, 667 S.E.2d 1, 4 (Ct. App. 2008); *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 431, 343 S.E.2d 45, 47 (Ct. App. 1986).

The *Bradley* opinion makes clear that the homeowner there "agreed to purchase a completed dwelling." *Bradley*, 398 S.C. at 450, 730 S.E.2d at 313. In holding the FAA did not apply to the contract under consideration, the *Bradley* opinion emphasizes it is based on "the historical intrastate character of *real estate* transactions" and the "intrastate nature of the *sale and purchase* of residential *real estate*," and the Court reviewed the contract to determine that it did not involve the construction of the residence, finding:

> [T]he Home Purchase Agreement specifically provides that Bradley agreed to purchase a completed dwelling rather than contract for the construction of a dwelling. Notably, the provisions of the Agreement providing for "New Construction," "House Plan," "Options," and "Color Selection," are eliminated as "N/A" and were not signed by Bradley. Therefore, we find Terry's affidavit is inapposite as his attestation that out-of-state materials, suppliers, and subcontractors were used for the construction of the residence has no bearing on the purchase of the completed dwelling.

*Id.* at 456–58, 730 S.E.2d at 316–18 (emphasis added). In a footnote appended to the preceding language, the *Bradley* opinion addresses the exact circumstance present before this Court and indicates a contract like Appellants' Agreement with Berotti involves interstate commerce and is governed by the FAA, stating:

> 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.

*Id.* at 458 n.8, 730 S.E.2d at 318 n.8.

Unlike *Bradley*, here the Agreement was for both the construction of a home meeting Berotti's design selections *and* the sale of that home to Berotti, and thus, the *Bradley* holding that real estate transactions are intrastate commerce is inapplicable. Appellants' Agreement falls squarely within the situation where a contract is for the construction *and* purchase of a home, which *Bradley* acknowledged is governed by the FAA. As set forth in Appellants' Brief, the Agreement provides for the construction of a home with numerous terms related to the construction and Berotti's selections for the home to be constructed. Unlike the contract at issue in *Bradley*, the Agreement's terms related to construction and design selections were not eliminated, but rather were completed to reflect Berotti's choices for the construction of her townhome. Accordingly, *Bradley* is inapplicable to the Agreement which encompassed the construction of Berotti's residence, and thus, the FAA governs.

### B. Respondents' Assertions that the Warranty is "Perverse" Mischaracterize and Ignore the Plain Terms of the Warranty

Respondents' brashly and incorrectly characterize the Warranty as "perverse" and claim it leaves Berotti with no recourse because it does not cover water intrusion or building code violations. (Resp'ts' Resp. Br. at 5.) Respondents' assertions are contrary to the terms of the Warranty which represents a reasonable attempt by a homebuilder to warranty construction work without providing a blanket guarantee against any potential complaint or loss.

The Warranty covers for the first year "defects in materials or workmanship, as defined in the Construction Quality Standards," and the Construction Quality Standards list numerous defects related to water intrusion, including the following standards which may cover water intrusion:

- 3.1, 3.2, and 3.3 for cracks in masonry and stucco veneer,
- 5.1 for "Leaks in basement or in foundation/crawl space,"
- 5.3 which explicitly provides that "water intrusion" through synthetic stucco is a covered defect,
- 5.4 for "Roof or flashing leaks,"
- 5.5 for "Leaks in exterior walls due to inadequate caulking,"
- 5.6 for "Gutters and/or downspouts leak or have standing water,"
- 6.2 for failure of garage door to operate properly under normal weather conditions, and
- 6.3, 6.6, and 6.7 for window malfunctions.

(Parker Aff., Ex. B. at 5, 17–29.) Moreover, the extended five year warranty covers roof leaks, leakage into the basement or crawl space, and breaks in insulated window seals. (Parker Aff., Ex. B. at 5–6.) Thus, Respondents' assertion that the Warranty broadly excludes "damage caused by water," (Resp'ts' Resp. Br. at 5.), is wrong in light of the plain terms of the Warranty.

Respondents are also mistaken in presuming the Warranty's exclusion of rot, insect damage, and building code violations supports their unconscionability argument. It is

common knowledge that wood structures are susceptible to rot and insect damage and must be maintained over time to prevent such damage. There is nothing unconscionable about a warranty excluding coverage for such damage when the damages are invariably the result of a failure to maintain a structure.

There is also nothing unconscionable about excluding building code violations because building codes have myriad requirements of which many are minor or hypertechnical. While Respondents would have the Court believe that by excluding building code violations the Warranty deprives homeowners of their ability to seek recourse for construction that "does not meet the minimum standard acceptable by law," Respondents' assertion ignores clear South Carolina law. While building codes do provide the standards a builder's work must satisfy, there is no private right of action to recover for any violation of a building code. Rather, a violation of a building code satisfies the duty and breach elements of a negligence claim, and a homeowner still must establish damages, whether physical or economic, and causation to recover. *See Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989) ("[A] violation of a building code violates a legal duty for which a builder *can* be held liable in tort *for proximately caused losses*." (emphasis added)); *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 104, 374 S.E.2d 910, 915 (Ct. App. 1988) (holding that for a negligence *per se* claim, the plaintiff must show not only a violation of the applicable statute but also that "the defendant's conduct proximately caused damage to the plaintiff").

### C. Respondents' Failed to Satisfy Their Burden to Show Berotti Lacked a Meaningful Choice

Respondents' argument that Berotti lacked a meaningful choice is based entirely upon the unsupported assertion that Berotti "had no choice," and "was never consulted in connection with the Warranty agreement, and was never provided the opportunity to negotiate the Warranty's terms." (Resp'ts' Resp. Br. at 17; Resp'ts' Mem. in Opp'n to Appellants' Mot. to Compel Arbit. at 14.) Respondents cite to nothing in the record to support this assertion, nor can Respondents cite to anything in the record to support this assertion because Respondents have presented no such evidence.

Moreover, arbitration agreements are presumptively enforceable, *see Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007), and in defending against the Agreement's arbitration provisions on the grounds of unconscionability, Respondents bear the burden of proving Berotti's lack of a meaningful choice. *See Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 92 (2000) ("[W]here . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."); *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014) (holding that a "party seeking to prove a waiver of a right to arbitrate carries a heavy burden" (internal quotations omitted)); *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873–74 (Ct. App. 2013) (holding that an unconscionability argument was "without merit" where "no evidence in the record indicates whether the purchase agreement was an adhesion contract"). Because Respondents did not present any evidence

that Berotti lacked a meaningful choice, Respondents failed to satisfy their burden and their unconscionability argument fails. Because the absence of a meaningful choice is a necessary element for establishing unconscionability, Respondents' failure to establish this element is fatal to their unconscionability argument.

## II. RESPONDENTS' CLASS FAILS TO SATISFY THE COMMONALITY AND TYPICALITY REQUIREMENTS FOR A CLASS ACTION AND THE CIRCUIT COURT ERRED IN FINDING OTHERWISE

### A. South Carolina Law Permits this Court to Consider the Class Certification Order in Conjunction with the Arbitration Order

South Carolina law provides that an order that is not directly appealable can be considered if there is another appealable order before the appellate court and a ruling on the unappealable order will avoid additional litigation. Respondents erroneously contend this well-established principle is limited to instances where "the underlying issue is an appeal from a (a) motion to strike or (b) motion to amend the complaint." (Resp'ts' Resp. Br. at 26.) Respondents cite *Briggs v. Richardson*, 273 S.C. 376, 356 S.E.2d 544 (1979) in support of their limited reading of the law, but *Briggs* contains no such limitation, stating a general principle that "[w]hile not normally appealable, this issue is before the Court due to the appealability of the first issue." *Briggs*, 273 S.C. at 379 n.1, 256 S.E.2d at 546 n.1. The Supreme Court has more recently stated, without any limitation to motions to strike or to amend, the general rule 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, Inc.*; 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991). Also, the authoritative source on South Carolina appellate

practice, Chief Justice Toal's *Appellate Practice in South Carolina*, provides: "An order not immediately appealable will nonetheless be considered if there is an appealable issue before the appellate court, and a ruling on appeal will avoid unnecessary litigation." Jean Hoefer Toal, Shahin Vafai, & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 88 (2d ed. 2002).

Respondents also erroneously assert that *Hite* and the principle at issue here were "explicitly overruled" by *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995). In *Hite*, the threshold issue was whether the Court would consider an interlocutory appeal from the denial of a motion to dismiss pursuant to Rule 12(b)(6). *Hite*, 305 S.C. at 360, 409 S.E.2d at 341. The appellants challenged the denial of the motion to dismiss on the basis that the claims in the suit must be brought in a derivative action. *Id.* However, the respondents had requested a jury trial, and if the appellants were correct that the claims must be brought as derivative claims, the denial of the motion to dismiss would permit a jury trial in a derivative action for which there is no right to a jury trial. *Id.* On this basis, the Court held: "An order allowing a jury trial in a derivative suit is directly appealable. We therefore consider the appeal of the denial of the motion to dismiss these causes of action." *Id.* (citation omitted).

Only after concluding this threshold appealability issue did the Court go on to address the principle at issue in the case *sub judice*, holding: "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. We therefore address the remaining issues on appeal regarding the several other causes of action." *Id.*

*Huntley* only dealt with the first appealability issue in *Hite* and only overruled *Hite*'s holding that the denial of a motion to dismiss is immediately appealable where the motion is based on the premise that the claims must be brought in a derivative action. That *Huntley*'s overruling of *Hite* is limited to the derivative claims issue is clear from the language of the *Huntley* decision:

> Although generally the denial of a Rule 12(b)(6) motion is not directly appealable, we have allowed an appeal in cases such as this where the issue is whether a claim is properly asserted as a direct action or as a shareholder's derivative action. We now reconsider *Hite*, and overrule it *to the extent it holds this type of order is directly appealable.*

*Huntley*, 319 S.C. at 560, 462 S.E.2d at 861 (emphasis added, citation omitted). Thus, *Huntley* has no effect on the principle relied upon by Appellants which permits this Court to consider the class certification order in conjunction with the immediately appealable order denying Appellants' motion to compel arbitration.

Respondents also provide helpful additional caselaw supporting Appellants' position, but misconstrue it as well. Respondents cite to the decision in *Ex Parte Wilson*, 367 S.C. 7, 625 S.E.2d 205 (2005), which acknowledges 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." *Wilson*, 367 S.C. at 14, 625 S.E.2d at 208. Respondents would have the Court believe the next sentence in the *Wilson* opinion—"Appellant's arguments are without merit."—is a rejection of this legal principle. To the contrary, a closer reading of the opinion reveals that only one order, an order quashing a subpoena *duces tecum*, was before the Court. *See id.* at 10–14, 625 S.E.2d at 206–08. Therefore, the Court rejected all of the appellant's "arguments" regarding the appealability of

that order and presumably rejected the appellant's argument based on the principle at issue in the case *sub judice* because there was no other immediately appealable issue before the Court.

Finally, Respondents erroneously contend that *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), held a class certification order cannot be considered even when another, appealable order is before an appellate court. *Salmonsen* made no such holding. To the contrary, therein the party seeking appellate review of the class certification order "concede[d] that '[u]nder the present law in South Carolina, all appeals in this matter should be dismissed as interlocutory,'" but the party then argued against precedent that class certification orders should be immediately appealable. *Salmonsen*, 377 S.C. at 449, 661 S.E.2d at 85. Therefore, in *Salmonsen* the parties did not raise the principle at issue in the case *sub judice*, and the Court did not consider the principle. *See id.* Because the principle at issue here was neither raised nor considered, *Salmonsen* is of no effect here. *See Theisen v. Theisen*, 394 S.C. 434, 446, 716 S.E.2d 271, 276–77 (2011) ("It is well-settled that even though an appellate court has decided a case containing a certain issue, unless that issue was actually raised on appeal those cases are not dispositive."); *Hutto v. S. Farm Bureau Life Ins. Co.*, 259 S.C. 170, 173, 191 S.E.2d 7, 8–9 (1972) ("It is, of course, settled law that a case cannot be considered as a binding precedent on a legal point that was not argued in the case and not mentioned in the opinion." (internal quotation omitted)).

Both as a general principle of law and in this case specifically, it furthers the goals of judicial economy and efficiently resolving parties' disputes to permit another interlocutory order, and specifically the class certification order at issue here, to be considered when an

immediately appealable interlocutory order is already before an appellate court. The general rule barring appellate review of interlocutory orders until after a final judgment exists "to prevent unnecessary delay . . . by appeals from interlocutory orders which may have no prejudicial effect upon the final judgment." *Woods v. Rock Hill Fertilizer Co.*, 102 S.C. 442, 86 S.E. 817, 819 (1915). But where one immediately appealable order is already properly before an appellate court, "the reason for the rule does not apply" and it will often save judicial and litigant resources to resolve interlocutory rulings at the same time as the immediately appealable issue. *Id.*

That logic applies squarely here because the immediately appealable arbitration ruling is already properly before the Court and appellate review of the class certification order at this stage will avoid additional future litigation. Whether the Court affirms or reverses the circuit court's grant of class certification, the ruling will avoid the need for an appeal on the class certification issue following the entry of a final judgment. A ruling will also provide the parties with finality on the class issue which will aid the parties in efficiently litigating and negotiating a resolution of the case.

Rather than addressing the judicial efficiency created by the Court ruling on the class issue in this appeal, Respondents set up a straw-man by arguing that a reversal of class certification would result in "voluminous, unnecessary 'mini-trials.'" (Resp'ts' Resp. Br. at 29.) Whether the class certification decision should be affirmed or reversed is not relevant to the issue of whether the decision should be considered in this appeal. The issue is whether "a ruling on appeal will avoid unnecessary litigation," *Wilson*, 367 S.C. at 14, 625 S.E.2d at

208, and as Appellants have shown, the Court ruling on the class certification issue will avoid additional litigation and thus, the Court should consider the issue in this appeal.

### B. The Circuit Court Erred in Finding the Proposed Class Meets the Commonality Requirement of Rule 23, SCRCP

As an initial matter, Respondents grossly inflate the relevance of *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010), and are mistaken as to the holding therein. While Respondents contend that in *Grazia* "the Supreme Court sustained a construction class far more diverse than the instant case" (Resp'ts' Resp. Br. at 34.), the *Grazia* opinion makes no such ruling. The issue in *Grazia* was whether "the Notice and Opportunity to Cure Construction Dwelling Defect Act is in conflict with the State's class action lawsuit jurisprudence." *Grazia*, 390 S.C. at 566, 703 S.E.2d at 198. Whether the proposed class met the requirements of Rule 23(a), SCRCP was neither raised to nor ruled upon by the Court. Therefore, the *Grazia* decision in no way signifies the Court's general approval of large construction defect class actions. *See Theisen*, 394 S.C. at 446, 716 S.E.2d at 276–77; *Hutto*, 259 S.C. at 173, 191 S.E.2d at 8–9.

Respondents' arguments as to the application of Rule 23(a), SCRCP to the facts in this case is also flawed. Respondents acknowledge the circuit court below found there were at least some changes to the relevant building code provisions by finding the "provisions remain *essentially unchanged*." (Resp'ts' Resp. Br. at 36 (emphasis added).) Respondents suggest any variations in the applicable building codes are immaterial because "the common claim of 'failing to construct the homes without defects' remains constant among the class members." (Resp'ts' Resp. Br. at 36.) If this was all that was required to satisfy Rule 23's

commonality requirement, essentially any two homeowners could bring a class construction defect claim against their builder regardless of whether there are different applicable duties for construction of their homes, different alleged defects in their homes, and different subcontractors and materials suppliers. Following Respondents' reasoning, essentially any construction defect claim could be a class claim because the issue of whether a builder constructed a home without defects is an issue for every construction defect claim. This is the equivalent of suggesting that whenever two individuals can assert the same cause of action against the same defendant they can bring their claims through a class action because there is the common issue of whether they can satisfy the legal elements of the shared cause of action. This is plainly contrary to South Carolina law which provides that to establish commonality "the party must articulate the existence of '*significant* common, legal, or factual issues' which bind the proposed class together." *Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (quoting *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 64 (S.D. Ohio 1991) (emphasis added)). South Carolina courts emphasize 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 also attempt to manufacture commonality by characterizing the various differences among the townhomes at issue in this suit as "minor variations," "differences in appearance," and "small differences" which do not defeat commonality. (Resp'ts' Resp. Br. at 36.) The differences among the townhomes are *numerous* and *substantial* and accordingly create significant variations in the alleged defects, damages and necessary repairs among the

townhomes. For example, Respondents' expert identified alleged defects in decks on the townhomes, but only some of the townhomes have decks. (Mease Report at 44–45; Newkirk Aff. at 4.) Respondents' expert also identified a specific alleged structural defect present only in the even smaller subset of units which have a park-under garage and an elevated deck. (Mease Report at 2, 45; Newkirk Aff. at 4.) Similarly, Respondents' expert identified alleged deficiencies in the brick veneer on townhomes, but only some of the townhomes have brick veneer. (Mease Report at 2, 60; Newkirk Aff. at 4.)

While Respondents claim the alleged defects are limited to elements for which the Madison at Hamlin Plantation Townhome Association, not the homeowner class members, are responsible, this claim is contradictory to the record. Respondents' Second Amended Complaint alleges not only "failure of one or more components of the exterior building envelope" but also "resulting consequential damage to non-defective building components," "failure of various other building components," and "fire, smoke, and water damage to multiple units." (Second Am. Compl. ¶¶ 29 & 31.) Respondents' Second Amended Complaint also lists as one of the purported common legal and factual issues: "Whether Plaintiffs *and the Class* are entitled to compensatory damages, including, among other things: (i) compensation for all out-of-pocket monies expended by other members of the Class for repair of their townhomes as well as repair/replacement of other property damage . . . ." (Second Am. Compl. ¶ 41.) Among other allegations related to non-common elements, Respondents' expert identified alleged defects in the installation of the hardwood flooring, the area of which will necessarily vary among townhomes, and in the windows. (Mease Report at 24–29, 69.) The Madison at Hamlin Plantation Townhome Association has

ownership of and responsibility for only 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.) Thus, the floors and the windows are both owned by and the responsibility of the homeowners and any claims related to them are those of the class.

Accordingly, there is a kaleidoscope of applicable duties, alleged defects and damages, responsible subcontractors, and affirmative defenses. Among other issues, resolution of this case will require a determination of:

- the applicable duty for each townhome,
- the alleged defects in each townhome,
- the subcontractors responsible for the allegedly defective work at each townhome,
- whether the evidence supports any of Appellants' affirmative defenses for each townhome,
- the damages for each townhome, and
- what repairs, if any, are needed for each townhome.

This is exactly the type of individual determination of the merits of each class member's claim that renders a case unsuitable for class resolution and which leaves no factual support for the circuit court's finding that the commonality requirement has been satisfied here. Therefore, in light of the multitude of differences among the class members' claims, the circuit court abused its discretion in finding the commonality requirement of Rule 23(a) was satisfied and certifying Respondents' class.

### C. Typicality

For the reasons previously articulated, the homeowners' claims, both those of the two named plaintiff, class representative homeowners and those of the class members, vary drastically from townhome to townhome. Resolution of their claims will require individualized consideration of each townhome. Accordingly, typicality does not exist because the class representatives' claims are "so different from the claims of the absent class members that their claims will not be advanced by plaintiff[s'] proof of [their] own individual claim[s]." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466–67 (4th Cir. 2006).

Moreover, Respondents rely on the language in the United States Supreme Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), that the typicality analysis aids courts in "determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 131 S. Ct. at 2551 n.5. These conditions are not satisfied by Respondents' class. Again for reasons previously articulated, resolution of the class claims will require individualized examination of each townhome, and thus, the class action device will not be economical.

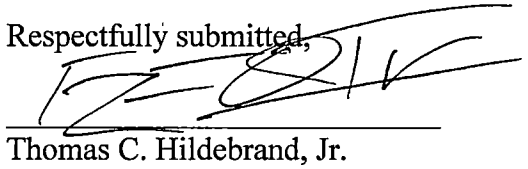
Also, in light of the many differences among the townhomes, the evidence does not support finding that the class representatives' claims are typical of the class claims or that the class representatives can fairly and adequately represent the class members. Given the many variations among the townhomes, the class representatives will have different alleged defects, different alleged damages, different responsible subcontractors, different purportedly

necessary repairs, and different evidence to offer in response to Appellants' affirmative defenses. For example, the class representatives cannot be presumed to fairly and adequately litigate when a class member had notice of a claim for purposes of Appellants' statute of limitations defense if the class representatives do not face a similar statute of limitations issue. Similarly, the class representatives cannot be presumed to fairly and adequately pursue, for example, the issue of the alleged defects in the brick veneer or the decks if the class representatives' townhomes do not have brick veneer or a deck. Accordingly, the evidence does not support the circuit court's conclusion that the typicality requirement has been satisfied, and the circuit court erred in finding that requirement satisfied.

## CONCLUSION

For the reasons stated herein, the circuit court erred in denying Appellants' 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,



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THE STATE OF SOUTH CAROLINA
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**PROOF OF SERVICE**

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The undersigned hereby certifies that on August 13, 2015, he served a copy of the Initial Reply Brief of Appellants on all counsel of record to this Appeal by United States Mail, postage prepaid, addressed as follows:

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