THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 2013-001449 (S.C. Ct. App. filed Aug. 20, 2015)

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 the Petitioner,

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled upon by the Court of Appeals on August 20, 2015.

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals, like the circuit court, commit an error of law in finding that the Agreement was not governed by the Federal Arbitration Act when the Agreement specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act?

II. Did the Court of Appeals, like the circuit court, commit an error of law in finding that the Agreement was not governed by the Federal Arbitration Act when the Circuit Court did not consider the Addenda to the Agreement which included specific customization of the construction of the Phillips' house?

(a) Did the Court of Appeals, like the Circuit Court commit an error of law by failing to rule that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house?

(b) Did the Court of Appeals misapply the rule that a circuit court's factual findings are entitled to deference on appeal, when 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?

III. Did the Court of Appeals an error in failing to address the argument that the Agreement expressly and unambiguously compels arbitration of all claims between the Phillips and John Wieland Homes?

IV. Did the Court of Appeals an error in failing to address the argument that the argument 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?

STATEMENT OF THE CASE

On June 14, 2012, Respondents Peter T. Phillips and Summar C. Phillips (the "Phillips") filed a complaint against Respondent Omega Flex, Inc. ("Omega Flex"),

Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("Petitioner" or "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. **App. pp.16-31.**

The Phillips' Complaint alleges that John Wieland Homes is a corporation organized and existing in the State of Georgia that develops and sells real property, including real property located in South Carolina and that John Wieland Homes was the building contractor and seller of the Phillips' home. **App. p.16, ¶ 3.** The Phillips' Complaint seeks damages arising from a fire on June 25, 2009 at 1417 Hooper Street on Daniel Island. **App. p.17, ¶¶ 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. **App. p.17, ¶ 1.**

On October 29, 2012, John Wieland Homes moved to compel arbitration of the Phillips' claims against John Wieland Homes pursuant to an arbitration clause incorporated into the Purchase and Sale Agreement ("the Purchase Agreement") entered into between John Wieland Homes and the Phillips. **App. pp.327-30.** Additionally, John Wieland Homes moved to compel arbitration of the Phillips' claims against AAA Plumbing, Fogel Service, and Charleston LEC (collectively, the "Trade Contractors"). **App. pp.327-30.**

John Wieland Homes argued that these claims were subject to arbitration under the Federal Arbitration Act. **App. pp.327-30.**[1]

John Wieland Homes' argument the Phillips' claims were subject to arbitration under the Federal Arbitration Act is based upon the contracted entered into between the Phillips and John Wieland Homes. The Phillips and John Wieland Homes entered into the Purchase Agreement which incorporated the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program ("the Warranty") (collectively, the "Agreement"). **App. pp.164-220.** The terms of the Agreement were specifically agreed to by the Phillips; and both the Purchase Agreement and Warranty include mandatory arbitration provisions. **App. p.178, ¶ 22 and App.pp.202-204, ¶ O.** In the Purchase Agreement, the Phillips expressly agreed to resolve any disputes in mandatory arbitration. **App. p.178, ¶ 22.** Paragraph 22 of the Purchase Agreement, entitled "Warranty and Arbitration," provides, in pertinent part:

> 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.
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> * * *
>
> 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 . . .

App. p.178, ¶ 22. The Phillips agreed to Paragraph 22 and initialed it separately,

[1] 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). **App. p.7.**

acknowledging that they read and received the Warranty. **App. p.178, ¶ 22.** In so doing, per the terms of the John Wieland Homes 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.

App. pp.202-203, ¶ O. The Agreement mandates that its arbitration procedure:

> 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). WIELAND AND HOMEBUYER(S) HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN EQUITY OR OTHERWISE WHICH MIGHT OTHERWISE HAVE BEEN AVAILABLE TO THEM IN CONNECTION WITH ANY SUCH DISPUTES.

App.204, ¶ O.

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." **App. p.203, ¶ O.**

In addition to covering disputes between the Phillips and John Wieland Homes, the arbitration provision of the Agreement permits John Wieland Homes to include its suppliers and other contractors as parties to the arbitration:

> If Wieland so chooses, Wieland may have its supplier(s) and contractor(s) whose work or supplies are involved in the dispute

> included as parties to the arbitration. Questions of whether issues are arbitrable and the actual interpretation of terms needing definition in order to arbitrate an issue shall be determined by the arbitrator.

App.203, ¶ O. The Phillips have alleged that the Trade Contractors performed work on the house and that those parties are directly liable to the Phillips; however, any work those parties performed was performed pursuant to a Trade Contractor Application and Agreement entered into between the Trade Contractor and John Wieland Homes. **App. p.224, ¶ 7, App.p.226, ¶ 7, & App. p.228, ¶ 7.** Each of the agreements provides that the Trade Contractors will participate in and cooperate with any arbitration:

> Cooperation in Arbitration. Upon request and at no expense to Wieland, Trade Contractor shall cooperate and participate in, as may be reasonably directed by Wieland, any arbitration proceedings arising out of the home warranty coverage provided by Wieland or otherwise related to or arising out of the construction of the homes by Wieland.

App. p.224, ¶ 7, App. p.226, ¶ 7, & App. p.228, ¶ 7.

On December 18, 2012, the Circuit Court held a hearing on the Motion to Compel Arbitration. **App. pp.4-10.** By Order filed on April 25, 2013, the Circuit Court ruled that the Purchase Agreement entered into between the Phillips and John Wieland Homes did not involve interstate commerce and was not subject to the Federal Arbitration Act. **App. pp.4-10.**

On May 6, 2013, John Wieland Homes received written notice of entry of the order filed on April 25, 2013. **App. pp.248-49.** On May 6, 2013, John Wieland Homes timely served and filed a Motion to Reconsider, Alter, or Amend the Order. **App. pp.248-49; App. pp.347-61.** The Circuit Court denied the Motion to Reconsider, Alter or Amend by Order filed on May 30, 2013. **App. p.257.** On June 25, 2013, John Wieland Homes served notice of its intent to appeal the Circuit Court's Orders. **App. pp.248-49.**

On June 24, 2015, the South Carolina Court of Appeals affirmed the Circuit Court's decision in an unpublished opinion. **App. pp.502-504.** In this unpublished opinion, the Court of Appeals rejected, without substantively addressing, the argument that the Federal Arbitration Act applies because the Phillips' Agreement with John Wieland Homes specifically provided that the Agreement was a transaction involving interstate commerce and that it would be governed by the Federal Arbitration Act. **App. pp.503-504, ¶ 1.** The Court of Appeals also rejected, without substantively addressing, the 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. **App. p.504, ¶ 2.** In rejecting this second argument, the Court of Appeals misapplied 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 of Appeals respectfully declined to consider the remaining issues. **App. p.504, ¶ 3.** Petitioner filed and served a Petition for Rehearing on July 9, 2015. **App. pp.505-520.** The Court of Appeals denied the Petition by Order entered on August 20, 2015. **App. pp.538-539.** This Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

South Carolina Rule of Appellate Procedure 242(b) provides the applicable considerations for the granting of a petition for writ of certiorari:

> (b) Considerations Governing Review. A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:
>
> (1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

S.C.R. App. P. 242 (b). As explained in detail in the arguments section below, this Petition for Writ of Certiorari should be granted based upon subsections (3) and (5) above—the decision of the Court of Appeals is in conflict with prior decisions of this Court and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court on an issue of federal law.

This case involves the right to enforce an arbitration agreement between contracting parties. "Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination." New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." Zabinski, at 596, 553 S.E.2d at 118 (citation omitted). "Appeal from the denial of a motion to compel arbitration is subject to de novo review." New Hope, 379 S.C. at 625, 667 S.E.2d at 3.

ARGUMENT

I. The Court of Appeals, like the Circuit Court committed an error of law in finding that the Agreement was not governed by the Federal Arbitration Act when the Agreement 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 that "[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, the Court of Appeals committed an error of law in finding that the Agreement did not involve interstate commerce when the Agreement specifically provided that the Agreement included transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act. The Court of Appeals, like the Circuit Court, ignored that the prior decisions of this Court and of the United States Supreme Court, which compel the enforcement of the parties binding agreement that the Agreement involved interstate commerce and that the arbitration of any disputes would be governed by the Federal Arbitration Act.

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."*** **App. p.203, ¶ O (double emphasis added).**

The South Carolina Supreme Court has held that an agreement that a contract shall be subject to the Federal Arbitration Act is binding and enforceable. 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"). In Volt Info. Sciences, the United States Supreme Court recognized that contracts requiring an arbitration under state law are enforceable, even if the contract would have otherwise been governed by the Federal Arbitration Act, because an arbitration agreement should be enforced in accordance with its terms:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA. . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479, 109 S. Ct. at 1256 (internal citations omitted).

This case involves whether parties may contract that Federal Arbitration Act applies to their disputes—the need to enforce the contract in accordance with its terms in this context is equally, if not more, compelling. It would inflict violence, to use the parlance of the Volt court, to the purposes of the Federal Arbitration Act, if contracting parties who have agreed to be governed by the Federal Arbitration Act (and that their contract involves interstate commerce) are not compelled to arbitrate their disputes arising under the contract.

The Court of Appeals committed an error of law by refusing to enforce the plain language of the Agreement entered into between John Wieland Homes and the Phillips.

The Court of Appeals did not address or distinguish Munoz, but rather ruled that the Agreement was not governed by the Federal Arbitration Act because it was a contract for the purchase and sale of a completed home as in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). Assuming *arguendo* that the Agreement in this case did involve the purchase of a fully completed house, Brentwood Homes, which did not address the issue of whether parties to a purchase agreement can agree that the sale involved interstate commerce and would be governed by the Federal Arbitration Act, is not dispositive as to whether the Phillips and John Wieland Homes agreement that the contract involved interstate commerce and was governed by the Federal Arbitration Act is enforceable. Munoz, however, is dispositive of the issue.

The prior rulings of this Court and United States Supreme Court dictate that courts enforce arbitration agreements between parties in accordance with their terms. Here, the Court of Appeals, and the Circuit Court, ignored those opinions, which represent a broader policy in this state and this country that parties are fee to contract as they see fit. See e.g., Volt Info. Scis. at 478, 109 S. Ct. at 1255 (The Federal Arbitration Act "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.")(citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414, 87 S. Ct. 1801, 1811, n. 12 (1967) ("the Act was designed 'to make arbitration agreements as enforceable as other contracts, but not more so'"); Blakeley v. Rabon, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) (stating the general rule that "[t]he court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.").

This Court should grant the Petition for Writ of Certiorari and correct the Court of

Appeal's departure from the prior decisions of this Court and the United States Supreme Court cited above.

II. The Court of Appeals, like the Circuit Court, committed an error of law in finding that the Agreement was not governed by the Federal Arbitration Act when the Circuit Court did not consider the Addenda to the Agreement which included specific customization of the construction of the Phillips' house.

(a) The Court of Appeals, like the Circuit Court, committed an error of law by failing to rule that the Agreement involves interstate commerce because the Addenda to the Agreement provide for the specific customization of the construction of the Phillips' house.

Not only did the Phillips and John Wieland Homes contract for the Agreement to be governed by Federal Arbitration Act, the Agreement indeed involved interstate commerce. As such, 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—involved 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)(double emphasis added); 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).

In Brentwood Homes, this 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 decision 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. (double emphasis added). Here, the Agreement included 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 prewiring for surround sound. **App. pp.164-71.**

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." **App. p.162, ¶¶ 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.").

The Court of Appeals, like the Circuit Court—citing the rule stated in Brentwood Homes that the sale and purchase of residential real estate was a purely intrastate activity—ruled that the Agreement did not involve interstate commerce. Neither considered the Addenda to the contract. The Addenda are part of the Agreement and clearly distinguish this case from Brentwood Homes. Unlike the contract in Brentwood Homes, the Agreement in this case includes several specific options or customizations of the residence. **App. pp.164-71**. The Court of Appeals decision is contrary to the clearly established law cited above providing that contracts the Federal Arbitration Act is to be broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent and that contracts for construction are governed by the Federal Arbitration Act. Significantly, the decision is also contrary to "[t]he federal policy favoring arbitration, as expressed in the FAA . . ." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001).

This Court should grant the Petition for Writ of Certiorari and correct the Court of Appeal's departure from the prior decisions of this Court and the United States Supreme Court cited above.

(b) The Court of Appeals misapplied 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 of Appeals, 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 of Appeals committed legal error in relying on this rule because 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.

App. p.8. 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 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)). The Court of Appeals

decision is contrary to this Court's prior decision requiring lower courts to examine the agreement at issue.

This Court should grant the Petition for Writ of Certiorari and correct the Court of Appeal's departure from the prior decisions of this Court cited above.

III. The Court of Appeals respectfully failed to address the argument that the Agreement expressly and unambiguously compels arbitration of all claims between the Phillips and John Wieland Homes.

As explained above, the Agreement is subject to the Federal Arbitration Act. Additionally, as explained below, the scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillips in their lawsuit. The Court of Appeals, and the Circuit Court, should have required the arbitration of all claims between the Phillips and John Wieland Homes.

"An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute." Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (citation omitted). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." D.A. Davis Const. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of

waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). Underlying this policy is Congress' view that arbitration constitutes a more efficient dispute resolution process than litigation. See Hightower v. GMRJ, Inc., 272 F.3d 239, 241 (4th Cir. 2001). Accordingly, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002) (citation omitted).

"Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993). "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles, at 41-42, 524 S.E.2d at 846.

Arbitration clauses which subject to arbitration all claims "arising out of or relating to" a contract or transaction are characterized as "broad arbitration clauses capable of an expansive reach." Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). Such language "embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988).

In this case, the Agreement unambiguously provides that any dispute relating to any warranties, tort, or property damage (among other things) between the Phillips and John Wieland Homes is subject to arbitration:

> 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.

App. pp.202-203, ¶ O.

The scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillips in their lawsuit—the Phillips have asserted causes of action in negligence, contract and implied warranty all seeking recovery for property damage. **App. pp.21-23, ¶¶ 33-49.** Such claims are within the scope of the arbitration agreement as quoted above. See Long v. Silver, 248 F.3d 309, 318 (4th Cir. 2001) ("Because this breach of contract claim arises directly under the 1972 Agreement, it is clearly arbitrable."); Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492-93, 593 S.E.2d 480, 484 (Ct. App. 2004) ("Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence essentially allege Subcontractor defectively installed the masonry work on a residential homebuilding projects [which are] matters concerning the agreement or the work performed [and] within the scope of the arbitration agreement.").

Because these claims are within the scope of the Agreement, they are subject to mandatory, binding arbitration.

IV. The Court of Appeals respectfully failed to address the argument 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.

In addition to erring in failing to compel the Phillips to arbitrate their claims against

John Wieland Homes, the Court of Appeals, like the Circuit Court, erred in failing to compel the Phillips to arbitrate their claims against the Trade Contractors. Both the Agreement between the Phillips and John Wieland Homes and the agreements between John Wieland Homes and the Trade Contractors expressly and unambiguously permit John Wieland Homes to add the Trade Contractors as parties to any arbitration between John Wieland Homes and the Phillips, and the Phillips' claims are all dependent upon their contract with John Wieland Homes, which expressly requires arbitration.

The arbitration provision in the Agreement between the Phillips and John Wieland Homes provides, in pertinent part:

> If Wieland so chooses, Wieland may have its supplier(s) and contractor(s) whose work or supplies are involved in the dispute included as parties to the arbitration. Questions of whether issues are arbitrable and the actual interpretation of terms needing definition in order to arbitrate an issue shall be determined by the arbitrator.

App. p.203, §V, ¶ O. Moreover, John Wieland Homes' contracts with each of the Trade Contractors provides as follows:

> Cooperation in Arbitration. Upon request and at no expense to Wieland, Trade Contractor *shall cooperate and participate in*, as may be reasonably directed by Wieland, *any arbitration proceedings arising out of the home warranty coverage provided by Wieland or otherwise related to or arising out of the construction of the homes by Wieland.*

App. p.224, ¶ 7, App. p.226, ¶ 7, & App. p.228, ¶ 7 (emphasis added).

Because the Phillips' claims against the Trade Contractors are based in whole or in part on their Agreement with John Wieland Homes, the Federal Arbitration Act applies to the Phillips' claims against the Trade Contractors for the same reasons discussed above relating to their claims against John Wieland Homes. Therefore, the same legal standard favoring arbitration is applicable to these claims.

Although the Trade Contractors are non-signatories to the Agreement between the Phillips and John Wieland Homes, the Complaint alleges the Trade Contractors performed work as subcontractors pursuant to subcontracts with John Wieland Homes, entered into by virtue of the contract between John Wieland Homes and the Phillips. **App. pp.25-26, ¶¶ 53-62; App. pp.27-28, ¶¶ 66-75; & App. pp.29-31, ¶¶ 79-88**. The Phillips allege that bilateral contracts were created between themselves and the Trade Contractors and that the Trade Contractors breached those contracts. **App. pp.25-26, ¶¶ 53-62; App. pp.27-28, ¶¶ 66-75; & App. pp.29-31, ¶¶ 79-88.** Because the Phillips' breach of contract claims against the Trade Contractors are predicated upon the existence of multiple contracts, including the Phillips' contract with John Wieland Homes, all of the claims the Phillips assert against the Trade Contractors are subject to the arbitration provision of the contract between the Phillips and John Wieland Homes.

The Court of Appeals recently decided a case involving similar facts. See Pearson v. Hilton Head Hosp., 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) (reversing the circuit court's denial of a defendant's motion to compel arbitration). In Pearson, the plaintiff, Dr. Pearson, an anesthesiologist, entered into a contract with LocumTenens.com ("Locum"), an online medical professional placement corporation, to place him in Hilton Head Hospital ("the Hospital") for 40 days in 2007. Id. at 285-86, 733 S.E.2d at 599. The Hospital had a contract with Locum, but not with Pearson. See id. at 286, 733 S.E.2d at 599. Pearson was fired and sued both Locum and the Hospital. See id. Both the Hospital's contract with Locum and Locum's contract with Pearson provided for mandatory arbitration of all claims arising out of the contract or relationship of the parties. See id. Both defendants moved to compel arbitration. See id. The circuit court granted Locum's

motion since he had a contract with Pearson, but denied the Hospital's motion. See id. The Hospital argued on appeal that "Dr. Pearson [was] bound by the arbitration clause both as a nonsignatory to the Hospital and Locum's agreement and as a signatory to his and Locum's agreement." Id. at 296, 733 S.E.2d at 605. The Court of Appeals ultimately ruled in favor of Hospital and offered several rationales for its decision, some of which are relevant and compelling in this case. For example, this Court found it significant that Pearson's causes of action relied on the existence of Locum's contract with the Hospital as a prerequisite to his claim:

> . . . looking at the Hospital as a nonsignatory in the contract between Dr. Pearson and Locum, Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital. Because both of those contracts have arbitration clauses, **he should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions** . .

Id. at 297, 733 S.E.2d at 605 (emphasis added).

Like in Pearson, the Phillips' suit against each of the Trade Contractors involves two contracts—the Phillips' Agreement with John Wieland Homes and John Wieland Homes' contract with each Trade Contractor. Just as in Pearson, the Phillips are signatories to one of the contracts and non-signatories to the other. Notably, the Phillips' causes of action against the Trade Contractors rely on the existence and validity of the contract between themselves and John Wieland Homes. **App. pp.25, ¶ 54** (alleging that "[t]he Plaintiffs, by virtue of their contract with Defendant John Wieland Homes, entered into a subcontract with Defendant Fogel Services by which Defendant Fogel Services would install or oversee the installation of plumbing and gas lines in the Plaintiffs' home in a workmanlike manner"); **App. pp.25, ¶ 55** ("This agreement entered into by Defendant John Wieland Homes, on behalf and for the benefit of the Plaintiffs constituted a contract

between the Plaintiffs and Defendant Fogel Services"); **App. pp.25-26, ¶¶ 53-62** (alleging breach of contract and breach of implied warranty of work manlike service as to Defendant Fogel Services); and **App. pp.27-28, ¶¶ 66-75 and App. pp.29-31, ¶¶ 79-88** (alleging similar contract formation, breach, and breach of implied warranties as to AAA Plumbing and Charleston LEC).

Because the arbitration provision of the Agreement in this case provides for binding, mandatory arbitration and John Wieland Homes' contracts with the Trade Contractors require those parties to participate in and cooperate with any arbitration, the Phillips should be required to arbitrate their claims against John Wieland Homes and the Trade Contractors.

CONCLUSION

For the foregoing reasons, John Wieland Homes respectfully requests that this Court GRANT its Petition for Writ of Certiorari and correct the Court of Appeal's departure from the prior decisions of this Court and the United States Supreme Court.

Respectfully Submitted,

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September 21, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 2013-001449 (S.C. Ct. App. filed Aug. 20, 2015)

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 the Petitioner,

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

PROOF OF SERVICE

I hereby certify that true and correct copies of the Petition for a Writ of Certiorari and Appendix (on CD) were served on this 21st day of September, 2015 via U.S. mail, postage prepaid, upon the following counsel of record:

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