

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

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APPEAL FROM SOUTH CAROLINA COURT OF APPEALS

S.C. Supreme Court

Case No. 2015-001978

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 Respondents.

**RETURN TO PETITION FOR A WRIT OF CERTIORARI OF RESPONDENTS PETER
T. PHILLIPS AND SUMMAR C PHILLIPS**

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Columbia, South Carolina
November 10, 2015

QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals correctly find that the Purchase Agreement was not governed by the Federal Arbitration Act when the Purchase Agreement did not involve transactions involving interstate commerce?
- II. Did the Court of Appeals correctly find that the Purchase Agreement was not governed by the Federal Arbitration Act in view of the fact that the Addenda to the Agreement included only inconsequential choices that the Phillipses could make on the home?
 - a. Did the Court of Appeals correctly determine that the Purchase Agreement involves intrastate commerce?
 - b. Did the Court of Appeals correctly rule that the Circuit Court's factual findings are entitled to deference on appeal?
- III. Did the Court of Appeals correctly choose not to review Petitioners' argument that the arbitration clause expressly and unambiguously compelled arbitration based on its decision that the Purchase Agreement was not governed by the Federal Arbitration Act?
- IV. Did the Court of Appeals choose not to review Petitioners' argument that the Phillipses be compelled to arbitrate their claims against the Trade Contractors based on its decision that the Purchase Agreement was not governed by the Federal Arbitration Act?

STATEMENT OF THE CASE

The Phillipses and John Wieland Homes entered into a Purchase and Sale Agreement (“Purchase Agreement”) on June 7, 2008, which purported to include a mandatory arbitration provision. (ROA pp. 359-64). The parties have agreed that the arbitration section does not conform to the South Carolina Uniform Arbitration Act requirements. (ROA p. 4). The Purchase Agreement states that the contract is for the sale of property. (ROA p. 359). Additionally, the Purchase Agreement incorporated the John Wieland Homes and Neighborhoods 5-20 Extended Warranty, along with the Addendum to the Purchase Agreement. (ROA p. 362). (ROA p. 365). (ROA p. 368).

Peter T. Phillips and Summar C. Phillips (“the Phillipses”), the Respondents, sued Petitioner John Wieland Homes and Neighborhoods of the Carolinas, Inc. (“John Wieland Homes”), along with other Defendants who are also Respondents in this appeal. (ROA pp. 9-28). The Phillipses pled several causes of action. (ROA pp. 9-28).

The Phillipses Complaint arises out of a home fire on June 25, 2009, at the Phillipses’ home located at 1417 Hooper Street in Daniel Island, South Carolina. (ROA p. 4). The Phillipses purchased the home from John Wieland Homes approximately one (1) year prior to the fire. (ROA p. 14). As a result, the Phillipses home and its contents were severely damaged, and they were unable to live in their home for a period of time. (ROA p. 14).

At the time of the purchase, the Phillipses and John Wieland Homes executed a Purchase Agreement containing an arbitration clause, prompting the Appellant, John Wieland Homes, on October 29, 2012, to move to compel arbitration between the Phillipses and the other Defendants in the original action. (ROA pp. 324-27). The Appellant argued in its motion to compel arbitration that the Phillipses claims were subject to arbitration under the Federal Arbitration Act.

(ROA pp. 324-27). In turn, the Phillipses contended that the Agreement was not subject to the Federal Arbitration Act because the contract was for the sale of a home rather than the construction of a home, meaning interstate commerce was not involved in the transaction. (ROA pp. 340-43). The Honorable J.C. Nicholson, Jr. heard the motion on December 18, 2012, and issued an order which held that the Agreement did not involve interstate commerce, and, therefore, was not subject to the Federal Arbitration Act. (ROA pp. 3-7).

The Petitioner filed a Motion to Reconsider, Alter, or Amend that Order on May 6, 2013, which was denied; Petitioner then filed a notice of its intent to appeal on June 25, 2013. (ROA pp. 345-58). An appeal followed, and the case was decided on the briefs. The Court of Appeals issued its decision on June 24, 2015, affirming the decision of the lower court, citing several cases to support its decision. *See Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015). Appellant filed this Petition for Writ of Certiorari on September 21, 2015.

ARGUMENT

A party may file a Petition for Writ of Certiorari in five (5) circumstances. First, a Petition will be considered when there is a novel question of law. S.C.R. App. R. 242(b). There is no novel question of law in this matter. Second, a Petition will be considered when “there is a dissent in the decision of the Court of Appeals.” *Id.* There was no dissent to the decision in this case. *See Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015). Third, the Supreme Court may consider a Petition for Writ of Certiorari “[w]here the decision of the Court of Appeals is in conflict with the prior decision of the Supreme Court.” S.C.R. App. R. 242(b). The Court of Appeals’ decision in this matter affirms prior decisions of the Supreme Court of South Carolina as well as the South

Carolina Court of Appeals. The Supreme Court may also consider a Petition for Writ of Certiorari when “substantial constitutional issues are directly involved.” S.C.R. App. R. 242(b). There are no substantial constitutional issues involved in this matter. Finally, the Supreme Court may consider a Petition when “a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” *Id.* Since real estate is solely an intrastate matter, there is no federal question involved. *Zabinski v. Bright Acres, Ass’n*, 346 S.C. 580, 553 S.E.2d 110 (2001). Therefore, it is Respondents’ position that Petitioners’ Petition for Writ of Certiorari should be denied.

1. The Court of Appeals and Circuit Court correctly found that the Purchase Agreement was not governed by the Federal Arbitration Act because the Agreement was for the sale of a home and not for the construction of a home.

According to the Federal Arbitration Act, “[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 (West). The Federal Arbitration Act defines commerce under the Act as “among the several States.” 9 U.S.C.A. § 1 (West). In the instant case, neither the Court of Appeals nor the Circuit Court committed an error of law when it found that the Purchase Agreement did not involve interstate commerce because the Purchase Agreement was for the sale of a home rather than for the construction of a home.

The contract between Petitioner and the Phillipes provided for mandatory binding arbitration in the original Purchase Agreement. (ROA p. 362). Even though all parties agree that the arbitration provision is invalid and unenforceable under South Carolina law, the Petitioner asserts that the Federal Arbitration Act preempts state law if state law invalidates a

valid arbitration agreement involving interstate commerce. *Bradley*, 398 S.C. at 454-55, 730 S.E.2d at 315. The trial court and Court of Appeals were correct in determining that the Federal Arbitration Act does not govern this transaction because this was a contract for the sale of a home as distinguished from the construction of a home. “The development of land within South Carolina borders is the quintessential example of a purely intrastate activity.” *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117-18 (2001).

Appellant relies on *Munoz vs. Green Tree Fin. Corp.* in an attempt to claim that arbitration agreements are enforceable according to their terms. 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001). However, *Munoz* involved “an installment contract and security agreement with Gerald Sealy (Builder) to finance home improvements in the amount of \$15,000 secured by a mortgage on their home.” 343 S.C. at 536, 542 S.E.2d at 362. The facts in *Munoz* implicate interstate commerce. First, it was a construction contract; additionally, the Court found that the Builder assigned its right to a Delaware corporation, the principal place of business of that corporation was in Minnesota, the agreement was prepared in Minnesota, and the proceeds of their loan were disbursed from a Minnesota bank. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364. The instant case deals solely with the sale of a home, and the sale of a home is a purely intrastate activity. *Zabinski*, 346 S.C. at 595, 553 S.E.2d 117-18.

It is clear that the Court of Appeals synthesized the Appellant’s arguments but, nevertheless, determined that an arbitration agreement must actually involve interstate commerce for the FAA to apply, whether the parties intended for it to apply or not. In fact, the Court of Appeals cited *Munoz*, “stating ‘the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.’” *Peter T. Phillips and*

Summar C. Phillips v. Omega Flex, Inc., et. al., Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015), citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Since the Court determined that this was a transaction which involved real estate only, interstate commerce was not involved, and the FAA did not apply even though Appellant hoped for it to apply.

Petitioners also rely on *Volt Information Sciences v. Board of Trustees of the Leland Stanford Junior University*, but this reliance is unfounded. The Supreme Court of the United States notes in *Volt* that the contract was a “construction contract.” *Volt*, 489 U.S. 468, 470 (1989). The contract in this matter was for the purchase of a home rather than the construction of a home, so the decision in *Volt* has no relevance to this matter.

The Petitioners then contend that *Bradley v. Brentwood Homes, Inc.*, is inapposite. The Supreme Court of South Carolina held in *Bradley* that when a home purchase agreement provides that a purchaser is receiving a completed dwelling and is not contracting for the construction of a home, the transaction does not involve interstate commerce, meaning that the transaction is not subject to the Federal Arbitration Act. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). Paragraph One (1) of the Purchase Agreement explicitly states that the contract is for the sale of property. (ROA p. 359). Additionally, Petitioner’s own witness, Dennis A. Black, a Division Quality Manager for Appellant, states in Paragraph Three (3) of his affidavit supporting Appellant’s motion that the Phillipses “entered a purchase agreement with JWH to buy a home in the located [sic] at 1417 Hooper Street, Charleston, SC 29492.” (ROA pp. 159-160).

It is clear that the Court of Appeals determined that the Federal Arbitration Act did not apply because this transaction involved intrastate commerce rather than interstate commerce.

Therefore, the Court of Appeals did not commit an error of law, and this Court should deny the Petition for Writ of Certiorari because the decision by the Court of Appeals affirms the prior decisions of the Supreme Court of South Carolina and the Supreme Court of the United States.

2. The Court of Appeals and Circuit Court correctly considered the Addenda and Purchase Agreement in finding that the Purchase Agreement was not governed by the Federal Arbitration Act.

a. The Court correctly interpreted the Appellant's argument when it determined that the Agreement and Addenda did not involve interstate commerce.

Petitioner claims that the Federal Arbitration Act applies because the Phillipes made some choices regarding the home; however, this position is not based on the facts. The Phillipes made incidental decisions regarding the home, like the Plaintiff in *Bradley v. Brentwood Homes*. In *Bradley*, the seller “[gave] \$1,000.00 credit towards [sic] refrigerator to Buyer” and “upgrade[d] lighting to Buyer satisfaction in kitchen and dining room.” Plaintiff’s Notice of Motion and motion for Summary Judgment Pursuant to Rule 56, S.C.R.C.P., “Exhibit C,” at 59, *Bradley vs. Brentwood Homes*, 398 S.C. 447, 730 S.E.2d 312 (2012). Mr. Bradley, the purchaser, determined which appliances would be in his kitchen with the \$1,000.00 credit, and also chose the lighting in the kitchen and the dining room. Even though the Purchaser made some choices regarding the home, the Supreme Court of South Carolina found these were not significant and that the Home Purchase Agreement was for the purchase of a home and not the construction of a home.

The present case is on point with *Bradley* in that the choices made by the Phillipes were, at most, incidental. In Section Eight (8) of the Purchase Agreement, the seller (John Wieland Homes) is given full authority to make all decisions over the materials used on the home. (R. p. 360). Section Twelve (12) of the purchase agreement states that the seller “reserves the right to approve the lot, house placement, driveway location, number of deck steps included in Purchase

Price and all exterior colors.” (ROA p. 361). Additionally, Section Fourteen (14) of the purchase agreement states that the purchaser (Phillipses) or the purchaser’s agents have no authority to do work on the property prior to closing on the home. (ROA p. 361). In Section Nine (9) of the purchase agreement, the Phillipses were given the option to choose the type of carpet, vinyl, and fixtures. (ROA p. 360). In Addendum One, the Phillipses were to make selections regarding heated and cooled rooms, the bathrooms, and the closets on the third floor. (ROA p. 368). The addendum has a Design Selection Checklist where the Phillipses had the option to choose incidental, purely aesthetic features of the home. (ROA p. 369). If the contract were for the actual construction of a home, then the Phillipses would have made the ultimate decisions regarding the materials and would have been allowed access to the construction process prior to closing. (ROA pp. 359-64). However, like in *Bradley*, since the Phillipses made only incidental choices, it is clear that the contract was for the sale of a home and not the construction of a home.

In fact, the Court of Appeals cited the *Bradley* case in its Order, “noting the purchase agreement specifically provided for the purchase of a completed dwelling.” *Peter T. Phillips and Summar C. Phillips v. Omega Flex, Inc., et. al.*, Order No. 2015-UP-300 (S.C. Ct. App. filed June 24, 2015), citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. at 458, 730 S.E.2d at 317 (2012). The Court then addressed that the homeowner in *Bradley* did not make any decisions regarding the house plan, options, or color selection. *Id.* As in *Bradley*, the Phillipses had no real decision-making authority regarding the construction specifics of the home. The Court’s use of this particular quote shows that it considered the incidental choices that the Phillipses made in the original Agreement and Addenda and determined that this was the sale of a home rather than the construction of a home.

This Court should deny the Petition for Writ of Certiorari, affirm the Court of Appeals' decision, and further affirm the prior decisions of the Supreme Court of South Carolina and Supreme Court of the United States.

b. The Court of Appeals correctly interpreted the rule that a circuit court's factual findings are entitled to deference on appeal.

The Court of Appeals cited *Aiken v. World Financial Corporation* to assert that "a circuit court's factual findings in determining whether to compel arbitration will not be reversed on appeal if any evidence reasonably supports the findings." 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007). It is clear that the Circuit Court considered the Addenda to the Agreement in making its decision. First, the Addenda, or its contents, were mentioned at both the hearing on December 18, 2012, and April 16, 2013. (ROA pp. 255-323). In the Order issued by Judge Nicholson on April 23, 2013, he mentioned the "incidental choices" that Plaintiffs could make, which were contained within the Addenda. (ROA p. 5). The wording in Judge Nicholson's Order shows that he considered the Addenda when issuing his Order. Therefore, the Court of Appeals correctly interpreted the standard of review because the Circuit Court considered the Addenda in rendering its Order, and this Court should deny the Petition for Writ of Certiorari.

3. The Court of Appeals correctly determined that the issue of whether the Purchase Agreement expressly and unambiguously compelled arbitration need not be reviewed based on the aforementioned arguments.

The Court of Appeals did not address the issue of whether the Purchase Agreement expressly and unambiguously compelled arbitration because it had already determined that the Federal Arbitration Act was not applicable to the Purchase Agreement based on the arguments as explained above, and the fact that the Petitioner conceded it was not enforceable under South Carolina law because the contract violated the South Carolina Uniform Arbitration Act.

The Court of Appeals correctly chose not to rule on this Argument because their ruling on other issues, based on the factual showing, was dispositive of this issue. The lower court correctly chose not to enforce the arbitration clause even though the Phillips signed the Agreement that the Purchase Agreement was subject to the FAA because factually it was not, and under South Carolina law regarding arbitration it was unenforceable because it lacked the requisite form. Accordingly, the Petition for Writ of Certiorari should be denied.

4. The Court of Appeals correctly determined that the issue of whether the Trade Contractors' claims should be subject to arbitration need not be reviewed based on the aforementioned arguments.

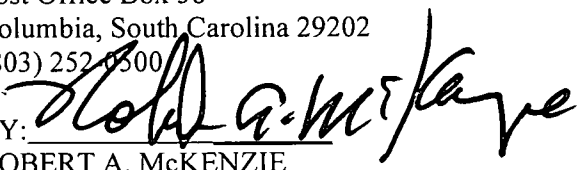
The Court of Appeals did not address the issue of whether the Trade Contractors' claims should be subject to arbitration because it had already determined that the Federal Arbitration Act was not applicable to the Purchase Agreement based on the arguments as explained above. However, if the Supreme Court of South Carolina chooses to review this argument, it is Respondents' position that since the Federal Arbitration Act does not apply to the transaction between the Phillipses and John Wieland Homes, that it would, likewise, be inapplicable to any claims by the Phillipses against the Trade Contractors. There was no contract between the Phillipses and any of the Trade Contractors, and any claims against the Trade Contractors would be based in whole or in part on the work they did on the home sold to the Phillipses.

The Court of Appeals correctly chose not to rule on this Argument because their ruling on other issues was dispositive of this issue, but if this issue was considered, it is clear that the claims against the Trade Contractors should be handled in a consistent manner and the Petition for Writ of Certiorari should be denied.

CONCLUSION

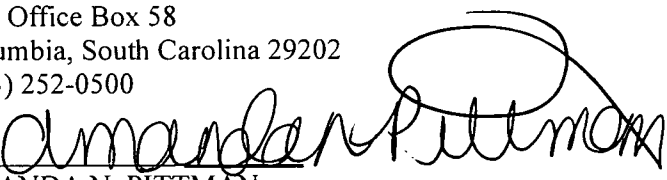
For the foregoing reasons, the Phillipses respectfully request that this Court DENY the Petition for Writ of Certiorari because the Court of Appeals correctly made its findings and there are no grounds under Rule 242 for the Petition to be heard.

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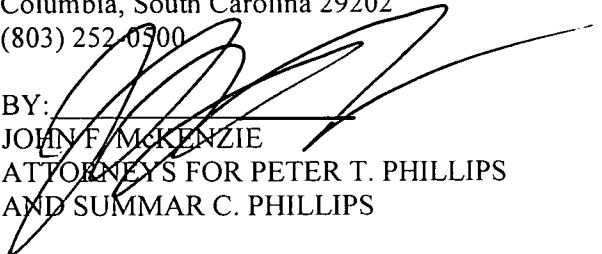
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CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the Return to Petition for a Writ of Certiorari of Respondents Peter T. Phillips and Summar C. Phillips was served upon the attorneys listed below by depositing said paper(s) in the United States Mail; Columbia, South Carolina, on the 10th day of November, 2015, with the first class postage duly-affixed and a return address clearly indicated on the envelope, addressed as follows:

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