THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-5559

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

v.

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

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.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This is a defective construction suit by the Madison at Hamlin Plantation Townhome Association, Inc. (hereinafter "Madison" or "Association") and two of its members, Sandy Randall (hereinafter "Randall") and Cherie Berotti (hereinafter "Berotti"), individually and on behalf of others similarly situated (collectively hereinafter "Plaintiffs" or "Respondents"). Madison consists of one hundred and fourteen (114) townhomes situated in twenty-five (25) buildings, in the Hamlin Plantation neighborhood located at the end of Rifle Range Road in Mount Pleasant. The houses were constructed between 2001 and 2005. Respondents' engineers have determined and documented construction defects exist across the project that have resulted in water intrusion, component and structural degradation, termite infestation, and extensive consequential damages. Additionally, Respondents allege there are other unsuitable and/or improperly installed components.

Respondents filed the underlying claim September 20, 2013 and moved for Class Certification February 24, 2014. Appellants moved to compel arbitration of Respondent Berotti's claims only on April 7, 2014. The Circuit Court heard arguments on both motions

on September 9, 2014, and thereafter granted Respondents' Motion to Certify the Class on September 29, 2014, and denied Appellants' Motion to Compel Arbitration as to Berotti on January 21, 2015. Appellants filed a Notice of Appeal as to both Orders on January 28, 2015.

STATEMENT OF THE FACTS

The townhomes at Madison were construction between 2001 and 2005. The one hundred and fourteen townhomes in twenty-five buildings share foundations, roofs, and exterior cladding. All buildings consist of asphalt shingled roofs and cementitious siding with some brick facades on some garages. The construction defects were discovered in 2013 when a homeowner lost a contract for the sale of her home when significant water intrusion, rot, and termite damage, were uncovered during a pre-closing inspection. Respondents then engaged a local professional engineer, Russell Mease, to inspect and document the existence of defects across the property. Mease investigated twenty-three of the twenty-five buildings at the project. R. pp. 490-562. Mease determined the defects are pervasive, wide-spread, and common to all homes at Madison.

> The documented pattern of deficiencies evidences that the deficiencies are substantially similar in all homes in this subdivision.

R. pp. 75-78.

> The damages caused by the deficiencies are typical and consistent amongst all structures inspected and require significant repairs.

R. pp. 75-78.

This defective construction claim was brought both in the names of the Association and two owners, individually and behalf of all others similarly situated.

The Association, by virtue of the neighborhood's governing documents, is responsible for the repair of substantially all of the building envelope and structural defects existing at Madison. *See generally* R. pp. 563-624. Specifically, the Association is responsible for the repair of the roofs and building exteriors. *See* R. p. 575. To the extent that exterior defects damage the interiors, the Association again is responsible for repairs. R. p. 575. Further, the neighborhood's governing documents expressly provide that the Association is empowered to do all things necessary to protect the property of all owners.

> The Association shall have the right, but not the obligation, to maintain property not owned by the Association where the Board has determined that such maintenance would benefit all Owners.

R. p. 576.

Thus, the Association is responsible for the maintenance and repair of substantially all defective components at issue in the underlying case.

These homes share foundations, exteriors, and roofs. The inspection identified systemic defects across the property and resulted in a project-wide scope of repair. R. pp. 490-562. The repair estimate has been made on a single-project basis. The limited elements owned by the individual homeowners will be subsumed in the larger repair project, for which the Association will be responsible.

The wide spread documented construction defects include violations of the applicable building code(s), industry standards, and manufacturers' installation instructions. R. pp. 490-562. Building codes are adopted by the State and enforced at the local level by the municipality having jurisdiction where the home is located. *See* S.C. CODE ANN. § 6-9-40(a) (1976); S.C. CODE ANN. § 6-9-50(A) (stating municipalities in South Carolina are charged with adopting and implementing building codes). Building codes establish the minimum level of acceptable workmanship. *See* S.C. CODE ANN. § 6-

9-5 (1976). Such statutes are designed to protect the innocent purchaser from the negligence of a contractor. *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 190, 666 S.E.2d 247, 251 (2008), *overruled on other grounds* (recognizing a builder and their subcontractors have a legal duty to build a structure conforming with applicable building codes); *see also Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989).

Piece-meal litigation of the Association claims and each of the one hundred and fourteen owners' individual claims would be judicially inefficient, and result in unnecessary duplication of time and expense wasted because of the overlap and interconnectivity of the construction and the ownership of the claims.

ARGUMENT

The Defendants/Appellants, Builders Support Services of the Carolinas, Inc., and the other Wieland-related Defendants (hereinafter "Wieland"),[1] have appealed two interlocutory orders: an order denying their motion to compel arbitration as to Berotti only, and an order granting Plaintiff/Respondents' motion to certify the class.

I. THE ARBITRATION PROVISION IN BEROTTI'S "WARRANTY" IS UNENFORCEABLE.

Appellants seek to deprive Berotti of any and all recourse for the myriad of construction defects existing in her home. Appellants' arbitration provision contained in

[1] The Wieland Defendants consist of 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.; and John Wieland Homes of Charleston, Inc. It appears all of the "Wieland" entities became Builders Support Services of the Carolinas, Inc., by renaming or merger.

the "Warranty" not only is invalid and unenforceable, but is unconscionable in that it eviscerates any hope of recovery or recompense for the shoddy construction.

Berotti purchased a completed home from Appellants as demonstrated by the Purchase and Sale Agreement and the Certificate of Occupancy[2] documenting that, at the time of completion of the home, John Wieland Homes was the owner. *See generally* R. pp. 625-628; R. p. 671. The Purchase and Sale Agreement references a John Wieland Homes Extended Warranty program. R. p. 626, para. 24. Berotti was not enrolled in the Warranty program until closing on her home. *See* R. p. 629.

The Warranty is so perverse it is unconscionable. It contains a list of thirty-nine enumerated items excluded from the Warranty. Among other things, the Warranty excludes coverage for:

1. defects in porches;
2. loss of use;
3. consequential damages;
4. rot;
5. insect damage;
6. damage caused by water; and
7. violations of building codes or standards.

See R. pp. 635-636; R. pp. 637-641.

The building code is the minimum allowable standard. If Berotti cannot seek recovery for water leaking in her home, or construction that does not meet the minimum standard acceptable by law, she is plainly left with no recourse at all.

[2] A Certificate of Occupancy is granted by the Building Department of the municipality having jurisdiction where the home is located. It indicates that the home is legally available to be occupied.

A. Standard of Review

"Arbitrability determinations are subject to *de novo* review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 544 S.E.2d 663, 667 (2007) (emphasis added). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.*

B. The Court Did Not Err in Denying Appellants' Motion to Compel Arbitration.[3]

Appellants have not identified any reversible error in the Circuit Court's order denying Defendants' Motion to Compel Arbitration as to Berotti. Rather, Appellants have recited their argument first advanced before, and rejected by, the circuit court. *See generally* Initial Brief of Appellants, June 24, 2015.

Questions as to whether a transaction involves intrastate or interstate commerce, and thus, implication of the application of the South Carolina Uniform Arbitration Act ("SCUAA") or the Federal Arbitration Act ("FAA"), are reserved for the court. *See generally Bradley v. Brentwood Homes, Inc.*, 398 S.C., 447, 730 S.E.2d 312 (2012); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001); *and Simpson,* 373 S.C. 14, 644 S.E.2d 663 (2007). To ascertain whether a transaction involves commerce within the meaning of either the SCUAA or the FAA, the court must examine the agreement, the

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[3] The question of the arbitrability of a claim is an issue for judicial determination. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Granite Rock Co. v. Int'l Bhd. Of Teamsters,* 561 U.S. 287, 296, 130 S.Ct. 2847, 2855-56 (2010) (noting when such questions of arbitrability arise, the court, not the arbitrator, decides whether a matter should be resolved through arbitration); *AT&T Techs., Inc. v. Communications Workers of America,* 475 U.S. 643, 106 S. Ct. 1415 (1986) (noting same); *Partain v. Upstate Automotive Grp.*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010) ("The question of arbitrability of a claim is an issue for the courts.").

complaint, and the surrounding facts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). In cases involving home purchase agreements, such as here, South Carolina courts have made it clear that the FAA does not apply because such contracts involve intrastate commerce as opposed to interstate commerce. *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317. That leaves the only possible arena as the SCUAA. Under the SCUAA, an arbitration provision must be properly disclosed, and failure to do so, renders the arbitration provision unenforceable under the Act's express provisions. S.C. CODE ANN. § 15-48-10 (2003).[4]

Further, general contract defenses such as fraud, duress and unconscionability apply to a court's evaluation of the enforceability of an arbitration clause governed under either the SCUAA or the FAA. 9 U.S.C.A. § 2 (West 2015) (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."). Thus, in addition to questions concerning commerce, the court may also address "arbitrability" based upon general contract defenses recognized in this State.[5] In other words, if the court finds any clause of a contract unconscionable, including an arbitration clause, the trial court may refuse to

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[4] Although SCUAA's disclaimer requirements may be preempted by the FAA, such preemption only occurs in cases where the transaction at issue involves interstate versus intrastate commerce. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

[5] As aptly noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to *AT&T Mobility LLC v. Concepcion*: "even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, *federal arbitration law normally leaves such matters to the States.*" 131 S. Ct. 1740, 1760 (2011) (emphasis added); *Rent–A–Center, West, Inc. v. Jackson,* 561 U.S. 63, 68, 130 S. Ct. 2772, 2775 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses'"); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64 ("General contract principles of state law apply to arbitration clauses governed by the FAA.").

enforce the clause or otherwise limit its application so as to avoid an unconscionable result. S.C. CODE ANN. § 36-2-302(1) (2003).

1. The Purchase and Sale Agreement

The residences were originally constructed and sold by John Wieland Homes and Neighborhoods of SC, Inc., now Builders Support Services (by merger). Although Berotti is the only homeowner directly at issue in the instant motion, approximately one-third (1/3rd) or fewer of the current homeowners are original homeowners who allegedly signed similar sales agreements.

The contracts at issue are a "Purchase and Sale Agreement" and a "Warranty", not a construction contract.[6] The Purchase and Sale Agreement does not contain an arbitration agreement (or a state arbitration warning); but, it references the "JWH Warranty." R. p. 626, para. 24. The contract further disclaims all "other or further warranties . . . including . . . habitability . . ." R. p. 626, para. 24. It states that the "JWH Warranty . . . is given in lieu of all other rights or remedies . . . including . . . any rights or remedies based on negligent construction, misrepresentation, any tort, violation of any code, statue, or rule . . ." R. p. 626, para. 24. As evidenced by the sale files for all one hundred and fourteen homes at Madison produced by Appellants, both the Purchase and Sale Agreement and the Warranty (discussed below) are standard Wieland form contracts. *See* R. p. 181.

2. The (non) Warranty

Ostensibly, the JWH Warranty purports to provide relief to aggrieved homeowners. However, a detailed reading of the Warranty shows that its true purpose is to provide

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[6] Notably, Buyer was not entitled to possession until "closing" which is after the completion of construction. *See* R. p. 625, para. 4; R. p. 625, para. 3. Thus, the Buyer was contracting for a finished home, not construction of a home.

temporal and substantive limits on Wieland's responsibility for shoddy construction to the point of eliminating all remedy. After five years, the Warranty only provides a remedy for rare, load bearing, structural defects. All other remedies of any kind for any other defect – no matter how egregious – are excluded. Even the "structural warranty" is a misnomer – the only structural components covered are the load bearing components; and only for load bearing failure. *See* R. pp. 635-636. Stated differently, the JWH Warranty, as written, prohibits any remedy of any kind for the defective, leaking, water damaged, termite infested homes at Madison.

If there was any uncertainty left as to the lack of remedy of any kind available to the homeowners under the Warranty, one only has to go to Section IV, "Exclusions":

Para. D, E, P, GG:	Consequential damages of any kind are excluded;
Para. M:	Rotting of any kind and insect damage are excluded;
Para. W:	Violations of local, state, or national building codes or standards are excluded; and
Para. FF:	Persistent failure of any covered item such that the item is considered defective is excluded.

Having excluded violations of the building code, the bare minimum acceptable standard of construction[7], buyers are left with no standard by which to assert a claim.

If there is any further doubt left as to the one-sided nature of this agreement, one need only go to Section V, "General Conditions," which excludes "punitive damages,

[7] *See* S.C. CODE ANN. § 6-9-5 (1976). *See also Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 190, 666 S.E.2d 247, 251 (2008), *overruled on other grounds* (recognizing a builder and their subcontractors have a legal duty to build a structure conforming with applicable building codes); and *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989).

statutory damages, treble or other multiple damages, fees of attorneys or other expert . . . and any type of consequential damages . . ."

Similar to the Purchase and Sale Agreement (discussed above), the Warranty proceeds to disclaim all "other or further warranties . . . including . . . warranties of . . . habitability . . ." and is given "in lieu of all other rights . . . including . . . any rights or remedies based upon negligent construction, misrepresentation, any tort, violation of any code, statute or rule . . ." *See* R. pp. 630-658. If there was any further uncertainty, one could read the "Enrollment (Warranty) Certificate." *See generally* R. p. 629. After providing that Wieland would not have any liability other than what was set forth in the Warranty document, the Enrollment provides:

> . . . Wieland specifically disclaims any liability for incidental or consequential (secondary) damage . . . Except as specifically provided herein, Wieland is not responsible for any loss damage or injury . . . Implied warranties are expressly disclaimers . . . including . . . habitability . . .

R. p. 629, para. 8.

Ultimately, rather than providing Berotti with any remedy or relief, the Sales Contract and Warranty, separately and together, prohibit any consumer remedy.

3. The Trial Court's Ruling

The trial court possessed the authority to decide arbitrability issues, and the trial court, pursuant to its authority, refused to enforce arbitration in this case for a number of reasons, any one of which independently supports the denial of Wieland's Motion.[8] Indeed, the Court should affirm the circuit court's order denying Wieland's Motion because the purchase of a Wieland home involves intrastate commerce, and thus, the arbitration

[8] *See* cases cited *supra* note 3.

clause at issue is governed by the SCUAA as opposed to the FAA. Moreover, because (a) Wieland's Warranty provisions, including its arbitration provision, are made unconscionable due to the cumulative effect of a number of oppressive and one-sided Warranty terms under South Carolina law; (b) the above-referenced provisions are not severable from each other or from Wieland's Warranty according to South Carolina law; and/or (c) Wieland's Warranty is inherently ambiguous and void of its essential purpose, it is proper Wieland's Motion is denied under South Carolina law, irrespective of the FAA's applicability.

i. The Sale of Berotti's Home is Not Interstate Commerce

Appellant's seek to overturn the trial court's ruling that the arbitration provision in unenforceable. First, Appellant's argue that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.* governs.

Berotti is not required to adhere to the Arbitration Clause contained in the Warranty as the sales transaction did not involve interstate commerce. The arbitration clause does not invoke application of the FAA since the subject transaction involves *intrastate* rather than *interstate* commerce.[9]

The Supreme Court of South Carolina has held that "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." *Zabinski*, 346 S.C. at 594, 553

[9] It is undisputed that the arbitration clause does not comply with the requirements of the South Carolina Uniform Arbitration Act ("UAA"). S.C. CODE § 15-48-10 (2005). South Carolina's UAA requires that "[n]otice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. CODE § 15-48-10(a) (2005).

S.E.2d at 117 (citing *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999)). The United States Supreme Court utilizes a "commerce in fact" test to determine if the transaction involves interstate commerce for the FAA to apply. *Id.* at 591, 553 S.E. 2d at 115 (citing *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 115 S. Ct. 834 (1995)). The transaction must turn out, in fact, to have involved interstate commerce. *Id.* (citing *Roberson v. Money Tree of Alabama, Inc.*, 954 F. Supp. 1519 (M.D. Ala. 1997)). "Despite this expansive interpretation of the FAA, the FAA does not reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 591, 553 S.E. 2d at 115-16 (citing *Volt Info. Scis. Inc. v. Board of Trs.*, 489 U.S. 468, 109 S. Ct. 1248 (1989)).

As it applies to cases involving real estate, the Supreme Court of South Carolina has held that "interstate commerce was not involved in a contract for the sale of a commercial building located in South Carolina to out-of-state parties even though, incidental to the sale, the parties utilized the services of a North Carolina engineer and procured financing from a Pennsylvania lender." *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317 (2012) (citing *Mathews v. Fluor Corp.*, 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994)).

Thus, while interstate commerce may be implicated in certain transactions,[10] our Supreme Court adheres to the view that real estate purchase contracts only implicate

[10] The Supreme Court of South Carolina has stated that a transaction involving construction on Hilton Head Island did, in fact, involve interstate commerce as contemplated by the FAA because the South Carolina partnership utilized out-of-state materials, contractors, and investors. *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 118. Furthermore, the Supreme Court of South Carolina has recently broadened the definition of interstate commerce as it applies to residency agreements in nursing homes by overturning *Timms v. Greene,* 310 S.C. 469, 427 S.E.2d.642 (1993). *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 371, 759, S.E.2d 727, 733 (2014).

intrastate commerce because "the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity." *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317 (quoting *Zabinski*, 346 S.C. at 595, 553 S.E.2d at 117-18). Specifically, in *Bradley v. Brentwood Homes, Inc.* the "Home Purchase Agreement specifically provided that the home buyer agreed to purchase a completed dwelling rather than contract for the construction of a dwelling." 398 S.C. at 459, 730 S.E.2d at 318. The Court confirmed its prior rulings that the sale of a residence is inherently *intrastate*. *Bradley*, 398 S.C. at 456, 730 S.E.2d at 317. Furthermore, the Court concluded that "if the utilization of out-of-state financing or a national warranty was sufficient to constitute interstate commerce, then every transaction that involved these ancillary factors would be subject to the FAA; therefore, a decision to that effect would eviscerate the well-established real estate exception to the FAA." *Bradley*, 398 S.C. at 458, 730 S.E.2d at 317. Ultimately, the court found that the defendant in the case "failed to satisfy its burden of proof as none of the factors relied upon to establish the involvement of interstate commerce negate[d] the intrastate nature of the sale and purchase of residential real estate." *Id.* at 458, 730 S.E.2d at 317-18.

As it pertains to the case at hand, Berotti purchased a home in Mount Pleasant, South Carolina (*intrastate*).[11] As evidenced by the Plaintiffs' Agreements of Sale, these homes were built and sold by John Wieland Homes and Neighborhoods of SC, Inc. located at 496 LaMesa Dr., Mt. Pleasant, SC 29464 (*intrastate*). Berotti's home was not built just for her, as Appellants argue, rather her home was one of a block of five homes in a single building that were permitted together (*intrastate*). John Wieland Homes, not Berotti, was

[11] *See generally* R. pp. 625-628.

identified as the owner on the Certificate of Occupancy, thus indicating Berotti purchased a finished home *(intrastate)*[12]. The builder, John Wieland Homes and Neighborhoods of SC, Inc., was a corporation organized in the State of South Carolina, and they were the General Contractor of the Plaintiffs' homes *(intrastate)*. Therefore, it is clear that Defendants have not satisfied their burden of proof to negate the well-established South Carolina precedent respecting the inherent *intrastate* nature of the sale of a home.

ii. South Carolina Law and Equity Invalidate the "Warranty"

Additionally, South Carolina law and equitable principles invalidate Appellant's warranty and arbitration provisions. The FAA provides arbitration clauses are unenforceable when state law or equitable principles invalidate clause provisions. 9 U.S.C.A. § 2 (West 2015) (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."). In other words, where state law governs issues concerning the validity, revocability and enforcement of contracts generally, state law also governs issues concerning the validity, revocability and enforcement of arbitration clauses.[13]

Thus, in South Carolina, a party may effectively challenge the arbitrability[14] of a given claim based upon general contract defenses including fraud, duress and

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[12] *See* R. p. 671.

[13] *See* cases and accompanying text *supra* note 5.

[14] When such questions of arbitrability arise, the trial court, not the arbitrator, decides whether a matter should be resolved through arbitration. *See* cases cited *supra* note 3. This determination involves a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *See Simpson*, 373 S.C. at 22-24, 644 S.E.2d at 667-68 (noting where one party denies the existence of an arbitration agreement raised by an opposing party, a court must

unconscionability. *See Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64 (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA). [15]

Here, Plaintiffs/Respondents asserted a number of state-specific grounds challenging the legitimacy of Wieland's arbitration provisions. Accordingly, Wieland's arbitration clause was found unenforceable, and this Court should affirm the trial court's denial of Wieland's Motion to Compel Arbitration.

iii. The "Warranty" is Unconscionable and Unenforceable

Wieland's warranty provisions are wholly unconscionable and therefore unenforceable. Specifically, its arbitration and legal remedies provisions leave the buyer with an absence of meaningful choice and eviscerates any and all recourse. The Warranty disclaims any damages to significant portions of the property, eliminates any coverage for damage caused by leaks, precludes any recovery for loss of use due to the defects, and, most significantly, eliminates coverage for failing to comply with the building code. Without an obligation to comply with the building code, a homeowner would have no recourse even if they found the house was made of paper mache. The "warranty" coupled

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immediately determine whether the agreement exists in the first place); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 14 742 S.E.2d 37, 40 (Ct. App. 2013), cert. granted, (July 24, 2014) ("When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties."). *See also* S.C. CODE ANN. § 15-48-20(a) (2003) (providing arbitration will be denied if a court determines no agreement to arbitrate existed).

[15] According to South Carolina law, a party may seek revocation of a contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C. CODE ANN. § 15-48-10(a) (2003).

with the one-sided nature of its "remedial" provisions, resulted in the trial court finding said provisions unenforceable, and thus, refused to compel arbitration regardless of the whether or not the FAA applied. S.C. CODE ANN. § 15–48–20(a) (2003); *see also D.R. Horton*, 403 S.C. at 17, 742 S.E.2d at 41 (citing S.C. CODE ANN. § 36-2-302(1) (2003) ("[South Carolina] legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.") (internal citations omitted)).

Under our jurisprudence, "unconscionability" is defined to include both an absence of meaningful choice as well as oppressive, one-sided contractual provisions. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69; *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability as "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.").

a. Absence of Meaningful Choice

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson,* 373 S.C. at 25, 644 S.E.2d 669 (citations omitted). "In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Id.* "[U]nder general principles of state contract law, an

adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson,* 373 S.C. at 26-27, 644 S.E.2d at 669. In circumstances involving adhesion contracts, an absence of meaningful choice is readily apparent based upon the lack of bargaining power. Accordingly, adhesion contracts, such as commercial sales agreements and manufacturer warranties, are subject to "considerable skepticism" due to the disparity in bargaining positions of the parties. *Simpson,* 373 S.C. at 27, 644 S.E.2d at 669. Consequently, "the presumption in favor of arbitration is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation, there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson,* 373 at 26, 644 S.E.2d at 669 (citations omitted).

Here, Berotti had *no choice* and *zero input* as to *any aspect* of Wieland's Warranty, including the Warranty's arbitration and legal remedies provisions. Berotti was never consulted in connection with the Warranty agreement, and was never provided the opportunity to negotiate the Warranty's terms. Furthermore, Berotti, like the other Respondents, is a non-merchant consumer[16], and therefore, this case is distinguishable from (a) cases where the parties were sophisticated business entities in an arms-length negotiation; and (b) cases where the parties were also sophisticated and had the opportunity to negotiate terms.

Appellants point to options in the Purchase and Sale Agreement as indication this was not an adhesion contract. As evidenced by their very appearance, these were form contracts. The buyers were allowed to choose from a defined set of options; brass fixtures

[16] Berotti is a payroll manager. *See* R. p. 672.

or nickel, lighting package A or lighting package B. The construction components at issue in this case did not change. Appellants argue that the fact that Berotti's purchase was contingent on the sale of a prior home is evidence that Berotti could change to Agreement. Such contingencies were standard options in the sales process.[17] As evidence of the "multitudinous" changes Berotti made, Appellants, presumably facetiously, point to a stipulation in the Purchase and Sale Agreement that states "Seller neither provides nor installs toilet paper holders or towel racks." *See generally* Initial Brief of Appellants, June 24, 2015; *and* R. pp. 625-628. This term was inserted in Berotti's contract by Wieland, as it appears to have been in other buyers' contracts as well.

Given Respondents are unsophisticated, lacked bargaining power and were presented with Wieland's Warranty on a take it or leave it basis, there is, as the trial court found, clearly an absence of meaningful choice. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670 ("Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement . . ."); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). This is even more the case given Wieland's arbitration and remedial-related provisions result in (a) the loss of the right to a jury trial; (b) the loss of the ability to maintain a class action; and (c) the loss of other certain remedies otherwise allowed by South Carolina law including the recovery of monetary damages.

[17] *See* R. p. 673.

As such, the trial court could not ignore the "adhesive" nature of these provisions - non-negotiable provisions which were drafted by Wieland on a take it or leave it basis, and which functioned to contract away certain significant rights and remedies otherwise lawfully available to Respondents. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 ("Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law . . .").

b. Oppressive/One-Sided Terms

Specifically as to oppressive terms, the South Carolina Court of Appeals in *Smith versus D.R. Horton, Inc.* recently affirmed a trial court's decision finding the arbitration provision contained in a D.R. Horton purchase contract unconscionable and unenforceable due to the "cumulative effect" of partisan provisions. 403 S.C. 10, 15, 742 S.E.2d 37, 40 (Ct. App. 2013). The trial court, confronted with a motion to compel arbitration brought by D.R. Horton, Inc., viewed the warranties and arbitration section of the purchase contract *as a whole*, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies . . ." *Id.* Per its review, the trial court held the sections' collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id.* The trial court further found "perhaps even more stark [were] the provisions in the Limitations of Liability . . ." in which D.R. Horton claimed it could not be liable for monetary damages of any kind. *Id.* Based upon the foregoing, the trial court concluded, and our Court of Appeals subsequently affirmed, the arbitration provision was "wholly unconscionable and

unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." *Id.*

Here, a review of Wieland's Warranty reveals strikingly similar warranty limitations and disclaimers to those addressed, and ultimately rejected, by the *D.R. Horton* Court. As seen above, the Warranty eliminates most remedies after the structure is two years old, and all meaningful remedies after the structure is five years old. It eliminates all remedies of any kind for the current Plaintiffs/Respondents. An Order compelling arbitration under the terms of these documents is effectively an order that these Plaintiffs/Respondents are not entitled to any remedy on their defective construction claims – on houses suffering so much degradation that they are worth less than the mortgages that they secure.

Another example of Appellants' oppressive and one-sided terms is the waiver of the warranty of habitability. The Warranty, Warranty Enrollment, and Sales Contract repeatedly disclaim the warranty of habitability. *See generally* R. pp. 630-658; R. p. 629; *and* R. pp. 625-628. The warranty of habitability may only be disclaimed if the disclaimer is "(1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006) (implied warranty of habitability exists to protect innocent purchasers). This standard is strictly applied and will be met only in rare circumstances. *Id.* As there is no evidence that the disclaimer of habitability satisfied any of these requirements, the disclaimer is void. As this and other unconscionable terms permeate the arbitration and warranty agreement, the Motion to Compel Arbitration should be denied.

Wieland's Warranty contains arbitration and remedial provisions which mirror the provisions found unconscionable in *D.R. Horton*:

D.R. Horton's Warranty	**Wieland's Warranty**
Warranty Purported to Be Only Warranty Extended by Horton (except for warranties which cannot be disclaimed by law).	Warranty Purports to Be Only Warranty Extended by Wieland.
Purported to Disclaim All Other Warranties, Express or Implied, as to Quality, Fitness for Particular Purpose, Merchantability and Habitability.	Purports to Disclaim All Other Obligations, Guarantees, Warranties, and Conditions, Express or Implied, Including Any Implied Warranty or Warranty of Habitability and of Any Other Obligations or Liability on the Part of Wieland.
Provided All Disputes, of Any Kind, Subject to Binding Arbitration.	Provides All Disputes, of Any Kind, Subject to Binding Arbitration.
Provided Horton Shall Not be Liable for Monetary Damages of Any Kind, Including Secondary, Consequential, Punitive, General, Special or Indirect Damages.	Provides Wieland Shall Not be Liable for Direct or Indirect Economic Damages, or for Consequential or Incidental Damages of Any Kind.

Clearly, under our state law principles of contract interpretation, such limitations offered on a take it or leave it basis, and which serve to wrongfully deprive substantial rights while concomitantly eviscerating all means of recovering any damages, are unconscionable. Indeed, as noted by our Supreme Court in *Simpson v. MSA of Myrtle Beach, Inc.*:

> *The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution* . . . [T]his arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled . . . Therefore, under the general rule, this provision in the arbitration clause is unenforceable. *In conjunction with Simpson's lack of meaningful choice in*

> *agreeing to arbitrate, this provision is an unconscionable waiver of statutory rights, and therefore, unenforceable.*

373 S.C. at 29-30, 644 S.E.2d at 671 (emphasis added).

Subsequently, the *D.R. Horton* Court reached a similar conclusion:

> Relying on the Supreme Court's analysis in *Simpson,* we affirm the trial court's finding of unconscionability, *particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.*

403 S.C. at 15, 742 S.E.2d at 40-41 (emphasis added).

As applied to Madison, Wieland's Warranty provisions negate the very remedies and damages contemplated as being available under the Warranty's terms. Thus, the Wieland Warranty does not provide the Plaintiffs/Respondents the possibility of recovery *of any kind* – there is no recovery to be had per the Warranty provisions drafted by Wieland. Rather, the Warranty provisions create an internal inconsistency within the Warranty itself by negating all meaningful warranty coverage for the primary risk associated with said Warranty – damage arising out of or to the residences that Wieland built. Like the defendants in both *D.R. Horton* and *Simpson*, Wieland takes the position its Warranty relieves *Wieland of all liability for this very damage under any conceivable set of circumstances*. Clearly, this renders the Warranty (a) void of its essential purpose; (b) lacking in mutuality; and (c) procedurally and substantively unconscionable.[18]

[18] Under our jurisprudence, such internal inconsistencies render Wieland's Warranty inherently ambiguous and unconscionable, and therefore, this Court should refuse to enforce the same. In the insurance context, for example, the South Carolina Court of Appeals in *Isle of Palms Pest Control Co. v. Monticello Insurance Co.*, directly confronted a similar "internal inconsistency" issue, concluding as follows:

Given such unconscionable provisions are unenforceable according to South Carolina law, the trial court correctly denied Wieland's Motion so as to avoid any unconscionable result irrespective of the FAA. *Id.* (citing S.C. CODE ANN. § 36–2–302(1) (2003) ("If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result . . .")).

c. The Warranty Provisions are Not Severable

Appellants next argue that if unconscionable terms exist, they are severable from the arbitration provisions. The trial court correctly found that the oppressive and unconscionable terms contained in the purported agreement between Appellant and Berotti are so intertwined with the arbitration provisions so as to render the entire Warranty unenforceable.

While Courts are permitted to "sever" unconscionable, contractual provisions, the purported agreement between Berotti and Wieland is not a proper candidate for the application of this remedy. South Carolina courts, and a host of other courts throughout the nation, "recognize severability if not always an appropriate remedy for an

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> [T]he internal inconsistency created by [a policy exclusion] which *purports to bar coverage for claims arising out of the very operation sought* to be insured renders [the policy] *ambiguous in favor of coverage.*

319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994), *reh'g denied*, (Aug. 4, 1995) (emphasis added). S*ee also Hooters of Augusta, Inc. v. American Global Ins. Co.*, 272 F. Supp. 2d 1365, 1378 (S.D. Ga. 2003) (noting "[i]nsurers must not deceive insurance purchasers into believing they have coverage only to have an exclusionary provision entirely nullify it").

unconscionable provision . . . '[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts . . .'" *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673; *D.R. Horton,* 403 S.C. at 15, 742 S.E.2d at 40-41 ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly [D.R.] Horton's attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (internal citations omitted) (emphasis added); *see also Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.,* 406 F. Supp. 2d 585, 604 (M.D.N.C. 2005) ("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights . . . the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

Similar to *Simpson* and *D.R. Horton*, Wieland's arbitration clause is "made unconscionable" by oppressive provisions which pervade the Warranty, thereby rendering "severability" impractical, if not impossible. Thus, in line with South Carolina jurisprudence, all unconscionable provisions contained within Wieland's Warranty were read together, and ultimately rejected together by the court. *Id.*

Thus, due to the sale of a home invoking intrastate commerce, and unenforceable and unconscionable terms found intertwined pervasively in the purported agreement

between Berotti and Appellants, thus rendering them unseverable, the trial court committed no reversible error in denying Appellants' Motion to Compel Arbitration and the Order should be affirmed.

iv. Practical Considerations Preclude Arbitration

There are several practical considerations that preclude arbitration. First, while the state favors alternative dispute resolution, it should not do so at the expense of judicial economy. The benefit of alternative dispute resolution is a quicker resolution that keeps the Court's dockets clear. Here, because a class cannot be arbitrated, approximately thirty-five or so individual arbitrations will be needed in addition to this already pending action.

Moreover, arbitrations are expensive, with each one costing thousands of dollars. Appellants' have provided no evidence they have the funds necessary to pay for a single arbitration, let alone the dozens of others that would presumably follow for the other remaining original purchasers, nor have Appellants identified the personnel available to affect repairs if so ordered by the arbitrator.

II. THE COURT'S ORDER CERTIFYING THE CLASS IS NOT IMMEDIATELY APPEALABLE.

Class certification orders are not decisions on the merits affecting substantial rights, and therefore are not immediately appealable. *Knowles v. Standard Sav. & Loan Ass'n*, 274 S.C. 58, 261 S.E.2d 49 (S.C. 1979). *See, e.g., Thornton v. South Carolina Elec. & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475 (S.C. Ct. App. 2011) (although defendant's motion was captioned as a motion to strike class action allegations, the motion actually raised the merits of class certification, and thus, the effect of the order granting the motion was not to strike a pleading, as its label suggested, but rather to deny class certification on the

merits; as a result, the interlocutory order denying class certification was not immediately appealable;); *and Salmonsen v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (S.C. 2008) (class certification orders in products liability action by homeowner against seller of synthetic stucco were not immediately appealable; orders did not prevent a judgment from which appeal could be taken, nor did they discontinue the action).

Further, the arguments Appellants advance in order to bootstrap the appeal of class certification are unavailing. Appellants cite to *Hite v. Thomas & Howard Co. of Florence, Inc.* for the proposition that "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling will avoid unnecessary litigation." 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991). However, there is no South Carolina authority that supports the application of the above-quoted *Hite* proposition when the issue properly before the court on appeal is denial of a motion to compel arbitration, and the issue the appellant seeks to have considered in addition is an interlocutory order denying class certification. In fact, the case law only supports "appendage" of interlocutory orders not immediately appealable when (1) there is an underlying issue on appeal properly before the Court, and (2) the additional issue sought to be "appended" to the underlying issue is an appeal from a (a) motion to strike or (b) motion to amend the complaint, which, (3) if also considered, would avoid unnecessary litigation. *See Briggs v. Richardson,* 273 S.C. 376, 356 S.E.2d 544 (1979); *Pelfrey v. Bank of Greer*, 270 S.C. 691, 244 S.E.2d 315 (1978); *Tate v. Oxner*, 283 S.C. 313, 114 S.E.2d 225 (1960); *Woods v. Rock Hill Fertilizer Co.,* 102 S.C. 442, 86 S.E. 817 (1915); *and Pruitt v. Bowers,* 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998).

As a threshold matter, *Hite* was explicitly overruled by *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) when the South Carolina Supreme Court concluded the interlocutory order, in that case an appeal from a denial of a Rule 12(b)(6) motion to dismiss, was not "directly appealable." The *Huntley* Court explained the denial of the interlocutory motion at issue in *Hite* did not "establish the law of the case nor [] preclude a party from raising the issue at a later point or points in the case," and because that motion's denial did not "finally decide any issue, it is not directly appealable." *Huntley*, 319 S.C. at 560. As a result, the South Carolina Supreme Court in *Hite* erroneously (1) addressed the merits of an interlocutory order not directly appealable, and (2) reached "the remaining issues on appeal regarding the [eight] other causes of action," each the subject of the same order. 305 S.C. at 360. The latter error resulted from the application of the above-quoted *Hite* proposition, for the first time in South Carolina making reviewable all causes of action alleged in a single motion to dismiss denied by the lower court. *Id. See also Ferguson v. Charleston Lincoln Mercury, Inc.*, 344 S.C. 502, 544 S.E. 2d 285 (Ct. App. 2001); *aff'd,* 349 S.C. 558, 564 S.E.2d 94 (2002) (following the grant of summary judgment on the merits which rendered the class certification issue moot, the Supreme Court affirmed the application of the *Hite* proposition: the class certification issue could be "appended" to the underlying appealable issue, grant of summary judgment, because (1) the appealable issue and additional issue arose in a single order as in *Hite*, (2) where the additional issue's operation effected a motion to strike, and thus, could permissibly be reviewed on appeal just as a motion to strike, and (3) a ruling on appeal of the additional issue contained in the interlocutory order will avoid unnecessary litigation); *and Ex Parte*

Wilson, 367 S.C. 7, 14, 625 S.E.2d 205, 208 (2005) (holding that appellant's argument, identical to Appellants' in the instant case, "is without merit").

The rule articulated in *Pelfrey v. Bank of Greer*, the authority cited by the *Hite* Court, narrowly allowed a particular kind of interlocutory order, one denying a motion to strike, to be appealed prior to final judgment only when "(1) the motion to strike is in the nature of a demurrer or (2) there is an appealable issue before the court justifying the consideration of the motion to strike also in order to avoid unnecessary consideration." 270 S.C. 691, 695-96, 244 S.E.2d 315, 317 (1978). In *Pelfrey,* the Court "refrained from considering the appeal from [] additional motions to strike" as "the motions [at issue] involve[d] factual matters [] best [] determined at the trial in light of the facts developed." *Id.* Critically, the *Pelfrey* Court could consider the additional matters on appeal because the underlying appealable matter, denial of a compulsory reference of the issues which affected the mode of trial, was properly before the court, and the "remaining question" the appellant wished to "append" to the properly appealable one, refusal to strike certain allegations from the amended complaint, was (1) a motion to strike, (2) considerable at the discretion of the court (3) in order to avoid unnecessary litigation because its review of the appealable issue justified consideration of the motion to strike also. *Id.*

Likewise, in *Pruitt v. Bowers,* the court could properly consider the motion to amend the complaint since that motion accompanied the appeal of the grant of motion for summary judgment. 330 S.C. 483, 499 S.E.2d 250 (1998) (citing *Briggs v. Richardson*, 273 S.C. 376, 256 S.E.2d 283 (Ct. App. 1987) and *Garrett v. Snedigar*, 293 S.C. 176, 359

S.E.2d 283 (Ct. App. 1987)).[19] Notably, the *Pruitt* Court prudently elected not to entertain appeal of the interlocutory order granting the motion to amend the complaint despite the existence of an appealable issue, the trial court's grant of motion for summary judgment, because it presented (1) a novel theory of liability, (2) the trial court had not had an opportunity to rule on the sufficiency of the allegations, and as such, "arguments going to the legal merits of the proposed pleadings are better taken up in the context of a 12(b) motion to dismiss or a Rule 56, SCRCP, motion for summary judgment." 330 S.C. at 488.

Unlike the narrow circumstances where appending an interlocutory order to a properly appealable issue was permitted, in the instant matter, no unnecessary litigation will be avoided. The case will go forward to trial as to all class members aside from Berotti, and if this appeal is heard individually, it will certainly add voluminous, unnecessary "mini-trials," creating the potential for duplicative, contrary rulings. *See Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (noting "piecemeal appeals should be avoided" thus the reason behind denying review of pretrial motions). In the least, substantial court resources will be tied up in hearing each claim brought by each homeowner, doing a disservice to both the court and the litigants. Further, the appended issue is not a motion to strike, nor a motion to amend, as has been permitted in prior applications of the rule, nor is the issue of class certification a cause of action subject of the same order as in *Hite*. The procedural posture in *Hite* would have precluded the court

[19] However, even the aforementioned rule has been foreclosed in as much as it previously provided an avenue for appeal from orders denying summary judgment. *E.g., Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987), *overruled by Olson v. Faculty House of Carolina, Inc.* 354 S.C. 151, 580 S.E.2d 440, (2003) (the South Carolina Supreme Court in *Olson* holding "that the denial of a motion for summary judgment is not appealable, even after final judgment;" expressly overruling *Garrett* and its progeny).

from hearing the additional causes of action subject of the single order at issue, as what was being appealed in *Hite* was the denial of a motion to dismiss. As this case is certain to proceed forward, and this appeal is neither a motion to strike nor a motion to amend, Appellants cannot rely on *Hite, Pelfrey, Woods,* or *Pruitt* to "append" the interlocutory order granting class certification to its proper appeal from denial of its motion to compel arbitration.

The most notable precedent in the appellate cases discussed above is the *Salmonsen* case. *Salmonsen* addressed the attempted interlocutory appeal of orders granting class certification and denying decertification in conjunction with an opposing party's cross appeal of an order converting the opt-out class to an opt-in class on the eve of trial. The basis for the later appeal not being interlocutory was that it affected the mode of trial. The Supreme Court refused to consider the appeal of the interlocutory class certification order(s); but then went on to find that the opt-in order was immediately appealable. After finding that it was presented with at least one properly appealed order, the Supreme Court did not go back and entertain the appeal of the class certification orders under a convenience or any other doctrine. This constituted either an express or implicit finding that an interlocutory class certification appeal was not proper even when the Court was presented with an appeal over which the Court clearly had jurisdiction. *Salmonsen*, p. 452-3.

III. THE COURT DID NOT ERR IN GRANTING CLASS CERTIFICATION.

The Court did not err in granting Plaintiff/Respondents' motion to certify the class of homeowners as a companion to the larger, primary Association claim[20]. Moreover, Appellants have failed to identify reversible error. Specifically, Respondents satisfied all five elements for class certification, Rule 23(a) of the South Carolina Rules of Civil Procedure.

1. Numerousity;
2. Common questions of law or fact;
3. Typicality of the claims or defenses of the representative parties;
4. Fair and adequate protection of the interests of the class by the representatives; and
5. The amount in controversy exceeds $100.00.

In fact, Appellants only challenge the Court's ruling as to Commonality and Typicality.

A. Standard of Review

A trial judge's ruling on whether an action is properly maintainable as a class action is within his discretion. *King v. American General Fin., Inc.*, 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009); *Gardner v. South Carolina Dep't of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (citing *Waller v. Seabrook Island Property Owners Ass'n*, 300 S.C. 465, 388 S.E.2d 799 (1990)). "The trial court retains the power to decertify or modify the class at any time prior to final judgment" in fulfilling its "continuing duty to ensure that the requirements of Rule 23 remain satisfied." *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 447, 661 S.E.2d 81, 84 (2008) (quoting Judge Dennis who recognized "the decision to certify a

[20] Please recall the Association, by virtue of the governing documents, is responsible for the maintenance and repair of the building exteriors, and any incidental damages caused by defects in the exterior or as a result of remedying defects in the exterior.

class is not set in stone."). *See also In re Whirlpool Corp. Front-Loading Washer Products Liability Litig. ("Whirlpool II")*, 722 F.3d 838, 851 (6th Cir. 2013) *cert denied, Whirlpool Corp. v. Glazer,* 134 S. Ct. 1277, 1277 (2014); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (noting same). It follows that appellate courts give deference to the trial court's discretion to grant class certification absent an error of law. *Gardner*, 353 S.C. at 21, 577 S.E.2d at 200.

1. Respondents Satisfy the Commonality Requirement.

Appellants fail to identify reversible error in the Circuit Court's finding that Plaintiffs/Respondents satisfy the Commonality requirement of Rule 23(a), SCRCP. As set forth above, the Circuit Court applied a rigorous analysis of the facts, arguments, and case law and determined that common questions of fact and law exist sufficient to satisfy the class.

South Carolina's Rule 23 commonality requirement is satisfied if at least one common legal or factual question exists among Class members. *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011), *cert. granted* (June 26, 2014) (stating "commonality is met when the class shares *a* determinative issue," finding that Class shared the determinative issue of loss of use) (emphasis added); *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 157 (Ct. App. 1986) (noting "a single, common question" can fulfill the Rule 23(a)(2), SCRCP, commonality requirement) (citations omitted); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S. Ct. 2541, 2556 (2011) (noting Rule 23(a) does not require that all questions of law or fact raised in the litigation be common; indeed, even a single question of law or fact common to the members of the class will satisfy the commonality requirement.); Richard A. Nagareda,

The Preexistence Principle and the Structure of the Class Action, 103 COLUM. L. REV. 149, 176, n.110 (2003) (For purposes of Rule 23(a)(2), "even a single common question will do."). "A question is ordinarily understood to be a subject or point open to controversy . . . [t]hus, a question common to the class must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims." *Dukes,* 564 U.S. ___, 131 S. Ct. at 2562. (Ginsburg, J., dissenting). Similarly stated, what is necessary for certification are common issues, the resolution of which will advance the litigation. *McGann*, 287 S.C. at 568, 340 S.E.2d at 157 ("Ultimately, commonality is a judgment that the issues are sufficiently similar so that the class action will be a more efficient means of resolving the problem . . ."") (citations omitted); *Dukes,* 564 U.S. ___, 131 S. Ct. at 2551 (noting commonality requires "a common contention of such a nature that it is capable of class-wide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009) ("What matters to class certification . . . is not the raising of common questions . . . but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation.") *See also Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010) ("This Court has expressed the viewpoint that class actions are favored in this state," quoting the United States Supreme Court: "The class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23" in *Califano v. Yamasaki*, 442 U.S. 682, 701, 99

S. Ct. 2545, 2557 (1979)). *Grazia* is notable as the Supreme Court sustained a construction class far more diverse than the instant case.

Here, several common legal and factual questions exist among Class members according to the Circuit Court's Order. *See* R. pp. 5-29. Specifically, the Court found at least four primary questions exist:

1) Whether Madison contains latent defects;

2) Whether Defendants (Appellants) contributed to Madison's defective condition;

3) Whether Madison's defective condition proximately caused resulting damage; and

4) How much will the repair of Madison's defective condition and resulting damage cost?

R. p. 15.

Additionally, the Court found that, in addition to there being common questions, the claims arise from a common nucleus of facts given the class members' homes contain similar latent defects and damage, were commonly developed and commonly constructed using the same general plans and materials, by the same developer/general contractor, under similar building code and industry standard requirements. Citing to the Plaintiff / Respondent's expert engineer, Russell Mease, the Court found that building envelopes, which suffer the alleged defects, are common across all units, with minor variations. Further, the Court found that any variation in the extent of damages is academic because the suggested repair, a complete recladding of the exterior, subsumes all degrees of damage.

The Circuit Court found that because Plaintiff/Respondents' claim are essentially based upon the same claim of defective construction, and the Mease Report evidences these defects and damages are common among the Class members, they are capable of class-

wide resolution. *Dukes*, 564 U.S. ___, 131 S. Ct. at 2551. "In other words, proof of common defects, common failures and common damage exist as to the Madison townhomes, and therefore, class certification is appropriate because the class action vehicle best serves to resolve such "common" issues "in one stroke" for all members of the class. R. p. 16 (citing *Dukes*, 564 U.S. ___, 131 S.C. at 2551); *see also* cases cited *supra* note 9.

Significantly, Appellant's expert, Newkirk, concedes that one of the five main construction issues, a life-safety issue, breaches in firewalls, exists in every home at Madison. R. pp. 162-176. Notably, a fire has occurred during the pendency of this action, endangering lives and evidencing further fire wall voids. R. pp. 183-204. A single important common issue is all that is truly needed to certify the class.

i. The Arbitration Provision is Unenforceable and Does Not Defeat Commonality

Appellants first argue that the unenforceable arbitration provision found in the original purchase contracts preclude class certification. Fewer than 1/3 of the proposed class members are original purchasers. Therefore, approximately 2/3 of the proposed class members do not have contracts with Appellants. As such, as conceded by Appellants, the majority of class members could never have been compelled to arbitrate, assuming the arbitration provision was enforceable. Initial Brief of Appellants 18. Nevertheless, the existence of the unenforceable arbitration provision does not defeat commonality because 1) the provision is unenforceable and 2) the provision does not negate the common questions of law and fact posited by Plaintiffs, or the common nucleus of the alleged bad acts of Defendants giving rise to the claims. At most, the existence of the arbitration provision, *if it were enforceable*, would create a subclass of Madison homeowners subject to arbitration.

ii. A Change in Building Codes Does Not Defeat Commonality

Appellants next argue that, because the construction spanned several years and a new building code went in to effect during construction, the existence of two building codes governing the construction defeats the Commonality requirement of Rule 23(a), SCRCP. Appellants have identified a distinction without a difference. Plaintiffs' expert acknowledged the existence of the two building codes but noted "both of the applicable Codes have similar, if not exactly the same requirements." R. p. 492. The Circuit Court took note of this distinction and found it immaterial, stating "the relevant building code provisions remain essentially unchanged." R. p. 15. In fact, the Court invited Appellants to articulate a distinction between the codes at oral arguments; Appellants were unable to do so. R. p. 457, line 17 – R. p. 458, line 16. The requirements that buildings be constructed in compliance with Building Codes and Manufacturers' Instructions does not change. Thus, the duty to comply remains the same. It follows that breaching the duty to comply, regardless as to which code, remains the same. Therefore, the common claim of "failing to construct the homes without defects" remains constant among the class members.

iii. Minor Variations in the Structures Do Not Defeat Commonality

Appellants then argue that differences in appearance between the one hundred and fourteen townhomes are sufficient to defeat commonality. Appellants cite to small differences in the homes such as two stories vs. three, minimal brick around garages vs. no brick, and decks vs. no decks. Given the Association's maintenance and repair responsibility for the exterior cladding, differences with regard to square footage and/or

type of exterior cladding are immaterial to the class as they related to damages which are the responsibility of the Association.[21] *See generally,* R. pp. 563-624. Therefore, any variance in the homes or damages to them are immaterial as it relates to the class.

iv. Appellants' Use of Multiple Subcontractors Does Not Defeat Commonality

Appellants next seek to defeat commonality by pointing to their use of multiple subcontractors. As found by the Circuit Court, "[t]he Madison townhomes share their roofs, exterior walls, and cladding, share common construction details, and all are alleged to suffer common defects and common resulting damages which are addressed in a single repair scope and a single repair estimate. Thus, any purported individualized differences in subcontractors or floor plans, does not likely changes the common facts and common questions which exist among the class." R. p. 20. Further, all subcontractors are already defendants in the Association's suit, irrespective of the class certification. The subcontractors will remain in the case through verdict, by virtue of each and every one's participation in the myriad of construction defects at Madison, until they prove they are not at fault. The class certification serves its purpose in streamlining the judicial process and ensures that the dispute is resolved in its entirety. R. p. 21. Moreover, the existence of varying subcontractors is immaterial given the Association's "ownership", as noted above, of all of the construction claims.

[21] The only damages ultimately possessed by the individual owners/class members are Loss of Use damages that will be incurred as a result of the community-wide repairs necessary.

v. Appellant's Defenses Do Not Defeat Commonality

Similarly, Appellant's attempt to defeat commonality by pointing to its defenses in the underlying claim again are unavailing as the defenses relate to the claims of the Association, by virtue of its repair and maintenance responsibilities, and not to the claims of the class for loss of use. And, loss of use claim for owners in multi-family complexes have previously been found suitable for class treatment. *Pope*, 395 S.C. at 422, 717 S.E.2d at 775 ("In this case, we find the representatives claimed damages arising from construction defects and loss of use . . . We find the representatives' claims were typical of the claims of the other class members.")

2. Respondents Satisfy the Typicality Requirement.

Appellants fail to identify reversible error in the Circuit Court's determination that Respondents satisfy the Typicality requirements of Rule 23(a), SCRCP. The Circuit Court found Plaintiffs/Respondents satisfied the Typicality requirement of Rule 23(a) because the claims of the class representatives are typical of the claims of the class. "Typicality is satisfied if 'the claims or defenses of the [class representative] are typical of the claims or defenses of the class". R. p. 16 (citing Rule 23(a)(3), SCRCP). Citing *Whirlpool*, the Court noted "typical" does not mean identical, and the requirement is satisfied if the class members' claims are "fairly encompassed by the named plaintiffs' claims." *Whirlpool II*, 722 F.3d at 852. They need not be identical. Rather, 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,* 564 U.S. ___, 131 S. Ct. at 2551 n.5 (quoting *Gen. Tel Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n. 13 (1982)).

The Court noted, typicality requirements are generally satisfied in instances where plaintiffs' claims arise out of a defendant's common course of conduct. *Bates v. Tenco* Services, Inc., 132 F.R.D. 160, 163 (D.S.C. 1990) ("The question of typicality focuses on the similarity of the legal and remedial theories of claims of the named and unnamed plaintiffs. The plaintiffs' claims for damages stem for effects of the defendants' activities on the plaintiffs' property . . . Whether each potential member of the class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality.") Thus, the Court found, in a construction defect class, the class representative need only allege injury stemming from "defective conditions caused by defendants" to satisfy the typicality requirement of Rule 23(a). R. p. 17 (citing *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160, 163 (D.S.C. 1990)). *See also Pope*, 395 S.C. at 422, 717 S.E.2d at 775 ("In this case, we find the representatives claimed damages arising from construction defects and loss of use . . . We find the representatives' claims were typical of the claims of the other class members."); *In Re: Cox Enterprises, Inc. Set-Top Cable Television Box Antitrust Litig.*, No. 12-ML-2048-C, 2014 WL 104964, at *1, *4 (W.D. Ok. Jan. 4, 2014) ("Differing fact situations of class members do not defeat typicality under Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory.").

The Circuit Court's rigorous analysis concluded that the Plaintiffs/Respondents' claims arise out of Appellants' common course of conduct and are legally and factually consistent with those sought on behalf of the proposed Class. R. p. 18. Therefore,

Plaintiffs/Respondents were found to have satisfied the typicality requirement of Rule 23(a) because the claims asserted by Plaintiffs are typical of the class and are based on a common nucleus of facts arising out of Defendants/Appellants common course of conduct.

Appellants blanketly assert that Randall and Berotti did not suffer the same injury as the remainder of the class, yet fail to identify with specificity how their injuries differ. This omission is made because Appellants cannot demonstrate any differences. Randall and Berotti are members of the Association. The Association is charged with maintenance and repair of the buildings. If the Association needs funding (outside of litigation proceeds) that funding will come from assessments against the members. Randall and Berotti, like the balance of the class, face loss of use of their properties if the entire building envelope of all buildings is removed and replaced. The claims of the representatives are typical of the class in that they involve the same essential characteristics.

3. SCUPTA

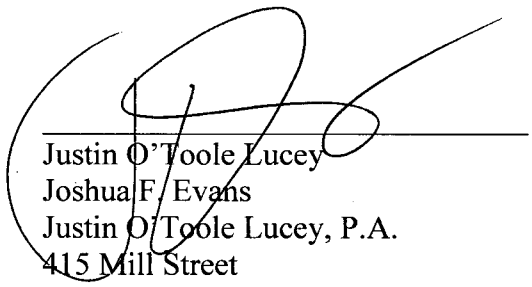
The inclusion of SCUTPA in the class claims is scrivener's error. Plaintiffs/Respondents did not intend to move for class certification as to the SCUPTA claim. The SCUTPA claim was intended to be brought only in the name of the Association and the Plaintiffs' pleadings can be so amended upon remand.

CONCLUSION

Due to the intrastate nature of the sale and purchase of Berotti's home, and the unconscionability and unenforceability of the warranty terms intertwined with the purported arbitration provision, Appellants' Motion to Compel Arbitration as to Berotti was properly denied and the Circuit Court's Order should be affirmed. Further, Appellants fail to identify any reversible error in the Circuit Court's Order.

Class certification is 1) not immediately appealable and 2) the Circuit Court's Order Granting Plaintiffs' Motion for Class Certification is well within the discretion of the trial judge. After rigorous analysis, the Circuit Court found Respondents satisfied all of the requirements of Rule 23, particularly the requirements of commonality and typicality given the common questions of law and fact arising from the same nucleus of facts relating to the conduct of Appellants, and the similar characteristics of the class representatives' and class' claims. Appellants have failed to identify reversible error in the Circuit Court's granting of Class Certification.

This Court should affirm the decisions of the Circuit Court on both orders on appeal.



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September 30, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-5559

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

Respondents,

v.

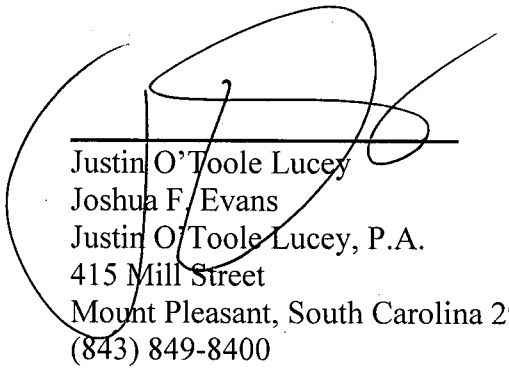
Builders Support Services of the Carolinas, Inc., individually and f/k/a John Wieland Homes and Neighborhoods of the Carolinas, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of NC, Inc. individually and f/k/a John Wieland Homes and Neighborhoods of SC, Inc., John Wieland Homes of SC,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

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.

September 30, 2015



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2013-CP-10-559
Appellate Case No. 2015-000201

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

Respondents,

v.

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

Appellants.

PROOF OF SERVICE

I certify that I have served **RESPONDENTS' FINAL BRIEF AND CERTIFICATE OF COMPLIANCE WITH RULE 211(B), SCACR** on Appellants by delivering a copy of it in the United States Mail, postage prepaid, on October 1, 2015 addressed as follows:

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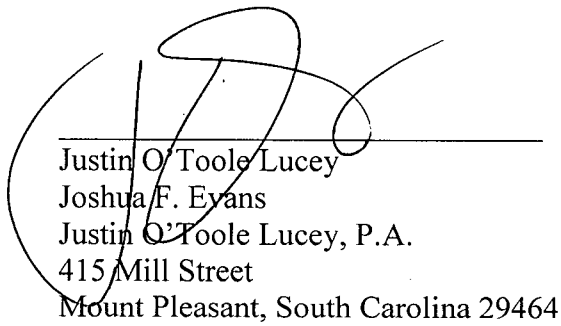

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