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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated,

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc. a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation, Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a/ Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber and Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales, Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.;

Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

v.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC, Third Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

RESPONDENTS' PETITION FOR REHEARING

JUSTIN O'TOOLE LUCEY, PA
Justin O'Toole Lucey, Esquire (Bar No. 15438)
Dabny Lynn, Esquire (Bar No. 78703)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: 843.849.8400
Facsimile: 843.849.8406
Email: jlucey@lucey-law.com
Email: dlynn@lucey-law.com

Attorneys for the Respondents

June 16, 2016
Charleston, South Carolina

PETITION FOR REHEARING

Pursuant to Rules 221 and 240 of the South Carolina Rules of Appellate Procedure ("SCACR"), Respondents, One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated ("Respondents"), respectfully file this Petition for Rehearing of this Court's decision filed June 1, 2016 (Opinion No. 5407) ("Opinion").

Respondents petition for rehearing on the grounds that this Court overlooked and misapprehended points of law and fact in reversing the decision of the Trial Court. Accordingly, and for the reasons explained fully herein, Respondents respectfully request this Court rehear the questions concerning whether the Trial Court properly determined TAMKO's arbitration clause is unconscionable, unenforceable and unseverable based upon the facts and circumstances of this case.

STANDARD OF REVIEW

Rule 221, SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition for rehearing. *Arnold v. Carolina Power & Light Co.,* 168 S.C. 163, 167 S.E.2d 234 (1933). "The purpose of such a petition is to aid the court in deciding correctly a case heard by it" and a properly drawn rehearing petition must state "the points. . .overlooked or misapprehended by the court." *Id. at 172-73; Kennedy v. S.C. Retirement System,* 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

SUMMARY OF ARGUMENT

In its Opinion, this Court concluded the Trial Court erred in four ways, including: (1) finding the arbitration clause in TAMKO's Warranty was unconscionable; (2) determining the adhesive nature of the Warranty contributed to the arbitration clause's unconscionability; (3) deciding the arbitration clause was not severable; and (4) holding the cumulative effect of remedial provisions rendered the arbitration clause (as defined by TAMKO) unconscionable and

unenforceable. This Court also separately concluded: (1) TAMKO's arbitration clause facilitates an unbiased decision by a neutral decision maker because it does not limit a purchaser's right to a meaningful legal proceeding; (2) TAMKO's section on legal remedies is separate and distinct from the Warranty's arbitration clause; and (3) the Warranty's limitations and disclaimers are irrelevant to an unconscionability analysis because they are not part of the arbitration clause.

In reaching each of these conclusions, Respondents suggest this Court misapprehended and overlooked several points of law and fact, any and all of which warrant reconsideration and a rehearing of this matter. Particularly, Respondents contend the Court's conclusions discount fundamental tenants of contract construction, the rules of appellate procedure, and prior appellate court decisions; overlook the relationship between TAMKO's initial arbitration sentences and other remedial provisions; ignore the oppressive nature of each of these provisions and the practical effect of their cumulative operation; disregard factual findings supported by the record; and rely upon non-applicable versions of the Warranty and other misconstrued facts.

ARGUMENT

I. The Court Erred By Deciding an Issue Not Preserved for Appellate Consideration and By Failing to Address and Rule Upon The Preservation Issue

TAMKO informed the Trial Court it had five questions to address in analyzing Respondents' unconscionability challenge. (R. at 71). The fifth question TAMKO told the Court to consider was whether the underlying contract was unconscionable, further indicating that "[i]f it is then the Court can decline to enforce it all together. . . ." (R. at 85) (emphasis added). Ceding this authority to the Trial Court, TAMKO cannot complain of the Court's exercise of this authority, and thus, this entire appeal is unpreserved. *See, e.g., State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) (citing *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998)

(holding an issue conceded in the Circuit Court cannot be argued on appeal)). This Court contravened the rules of appellate procedure in considering an unpreserved issue, and also, erred in failing to address the preservation issue altogether in its Opinion.

II. The Court Erroneously Concluded that TAMKO's Arbitration Clause Consists of Just Two Sentences

Much of the Court's Opinion is based upon the Court's incorrect finding that TAMKO's "arbitration clause" consists of only the initial, two arbitration sentences quoted on Page Four of the Opinion and set forth below:

> Mandatory Binding Arbitration: Every claim, controversy, or dispute of any kind whatsoever including whether any particular matter is subject to **arbitration** (each an **"action"**) between you and TAMKO (**including any of TAMKO's employees and agents**) relating to or arising out of the Shingles or this **Limited Warranty** shall be resolved by final and binding arbitration, regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory. To arbitrate an action against TAMKO, you must initiate the arbitration in accordance with the applicable rules of arbitration of the American Association (which are available online at www.adr.org or by calling the American Arbitration Association at (800-778-7879), the judicial arbitration and mediation service or other arbitration service agreed to in writing by TAMKO, and provide written notice to TAMKO by certified mail at P.O. Box 1404, Joplin, Missouri 64802 **within the time period prescribed immediately below.**

(Opinion at 4) (emphasis added).

This finding is incorrect. At a minimum, the arbitration clause consists of the entirety of Page Five of the Warranty for four reasons. First, Page Five starts with the above-referenced, initial arbitration sentences and ends with the following, arbitration-related sentences:

> Any **action** brought by you against TAMKO will be **arbitrated** (or, if **arbitration** of the action is not permitted by law, *litigated*) individually and you will not consolidate, or seek class treatment for, any **action** unless previously agreed to in writing by both TAMKO and you.
>
> No representative, **employee or other agent of TAMKO** or any other person other than TAMKO's president has authority to assume for TAMKO any additional **liability** or responsibility in connection with the shingles **except as described above.**

(R. at 170) (emphasis added).

Given these arbitration-related sentences are physically placed in such a manner that they are the first and last things read when viewing Page Five of TAMKO's Warranty, TAMKO obviously intended all of Page Five to be an integrated arbitration/dispute resolution procedure. As such, there is no reason to excise the provisions in the middle of this arbitration clause from this Court's analysis.

Second, an arbitration clause is, in fact, a dispute resolution mechanism and procedure; and, the entirety of Page Five deals with this same subject matter.

Third, the initial arbitration sentences expressly reference and incorporate the time periods set forth in the Legal Remedies section, further evidencing TAMKO's intent that all provisions on Page Five be read together. Inserted between the initial and ending arbitration sentences, the Legal Remedies section provides:

> Legal Remedies: Except where prohibited by law, the obligation contained in this **limited warranty** is expressly in lieu of **all other obligations, guarantees and warranties, expressed or implied,** including any implied warranty of merchantability or fitness for a particular purpose, **and of any other obligations or liability on the part of TAMKO** Building Products, Inc. In no event, shall TAMKO be **liable** for consequential or incidental **damages of any kind**. . . .No action for breach of this **limited warranty or any other action** against TAMKO relating to or arising out the Shingles. . .**shall be brought later than one year after any cause of action** has accrued. In jurisdictions where statutory claims or implied warranties cannot be excluded, **all such statutory claims, implied warranties and all rights to bring actions for breach thereof expire one year. . . after the date of purchase. . .**

(R. at 170) (emphasis added).

Fourth, because the referenced time periods contained within the Legal Remedies section are inseparable from the claims and conditions to which they apply, the only logical result is that

the Legal Remedies section is incorporated into the initial arbitration sentences and the entirety of Page Five is an integrated arbitration/dispute resolution procedure.

In addition to the entirety of Page Five, the arbitration clause also consists of two more provisions located on Page Four of TAMKO's Warranty because these provisions relate to the same TAMKO's "obligations" referenced in the Legal Remedies section (which, again, is assimilated into the arbitration sentences located on Page Five). In other words, TAMKO's "obligations" set forth in the Legal Remedies section implicate "other parts" of the Warranty which also set forth TAMKO's "obligations" and these "other parts" include the "Exclusion from Coverage" and "Transferability" paragraphs[1] located on Page Four of TAMKO's Warranty:

> Exclusions from Coverage: TAMKO shall not be **liable** under any circumstances for. . .(2) **Damages** to any building, either exterior or interior, or any property contained therein or for injuries or **damages of any kind whatsoever. . .**
>
> Transferability: The Owner may transfer this **Limited Warranty** one (1) time during the first two (2) years of the Term to a Purchaser of the building upon which the Shingles are installed (a "Purchaser"). . .The Owner may transfer **this limited warranty** only one (1) time. Except for one transfer to a Purchaser during the first two (2) years of the Term, this limited warranty may not be sold, assigned, or transferred in any manner whatsoever. Neither a Purchaser nor any other person may transfer this Warranty. Except as set forth in this paragraph, any assignment, sale or transfer of **this limited warranty** or the building to which the TAMKO Shingles are applied shall immediately terminate **all liability** of TAMKO for the Shingles, all **warranties** contained herein or hereunder and any applicable **implied warranties** including **warranties of merchantability** and **fitness for particular purpose.**

(R. at 143) (emphasis added).

As demonstrated above, every provision on Page Five of TAMKO's Warranty, including the initial and ending arbitration sentences as well as the Legal Remedies section are explicitly interrelated based upon the plain language of these provisions, the subject matter discussed within

[1] The Legal Remedies section and "Exclusion from Coverage" and "Transferability" paragraphs are collectively referred to as the "remedial provisions".

these provisions, the placement of these provisions on a single page, and thus, constitute a single, integrated, dispute resolution provision/arbitration clause. This arbitration clause also deals with subject matter (i.e., TAMKO's "obligations" meaning what TAMKO is liable for) discussed in the two remedial provisions located on Page Four of TAMKO's Warranty.[2] Consequently, all of these "provisions" factually constitute "the arbitration clause" and the Court's conclusions, all of which rely on the contrary finding limiting the clause to two sentences, require rehearing.

III. The Court Erroneously Failed to Apply Rules of Contract Construction in Construing TAMKO's Dispute Resolution Provisions

A.) The Court Failed to Interpret The Warranty as A Whole

The Court's Opinion overlooks the canon of contract construction requiring this Court interpret contracts as a whole, reading together related contractual provisions while considering the parties' respective bargaining position and surrounding circumstances in assessing the parties' intentions at the time of contracting. As the South Carolina Supreme Court explained in *Brady*:

> It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where possible, all the language used should be given a reasonable meaning. Agreements should be liberally construed so as to give them effect and carry out the intention of the parties. In arriving at the intention of the parties. . .the subject matter, the surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, are to be regarded, and the [contract] construed as a whole. Different provisions dealing with the same subject matter are to be read together.

Brady v. Brady, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952) (emphasis added) (citations omitted); *see also Thomas–McCain, Inc. v. Siter,* 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977)

[2] The Court's Opinion overlooks the patent relationship clearly existing among all of these provisions focusing, instead, on the purportedly "separate" nature of the Legal Remedies section. However, the Court's Opinion makes no mention of "separateness" as to any other sentences located on Page Five of TAMKO's Warranty and includes no reference whatsoever to the "exclusions from coverage" and "transferability" sections located on Page Four of the Warranty. Further, the Court's Opinion does not address the visual appearance of the Legal Remedies paragraph as a subparagraph to the Mandatory Arbitration paragraph.

(noting the primary objective of contract construction is to ascertain and give effect to the parties' intentions, intentions which must be gathered from the contents of the entire agreement, and not from any particular clause within the agreement); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 147, 538 S.E.2d 672, 675 (Ct. App. 2000) ("The primary test as to the character of a contract is the intention of the parties, such intention to be gathered from the whole scope and effect of the language used.").

This canon of construction affects this Court's ultimate analysis for two reasons. First, it provides that our courts should read together different provisions dealing with the same subject matter, indicating that (a) this Court should construe the initial and ending arbitration sentences and remedial provisions as one clause; and (b) the Trial Court did not err by considering these provisions as one clause. Second, it provides that our Courts must construe contracts as a whole, considering surrounding circumstances, the situation of the parties, and the object in view and intended to be accomplished by the parties at the time, indicating neither this Court nor the Trial Court must limit its analysis to the initial arbitration sentences. *See Brady*, 222 S.C. 242, 72 S.E.2d 193; *Thomas-McCain, Inc.*, 268 S.C. 193, 232 S.E.2d 728; *Barnacle Broad, Inc.*, 343 S.C. 140, 538 S.E.2d 672; *see also Smith v. D.R. Horton,* 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013) (viewing the Warranties and Dispute Resolution Section "as a whole" finding it included an arbitration provision "along with an entire host of attempted waivers of important remedies. . ."); *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126 n.3, 713 S.E.2d 799, 804 n.3 (Ct. App. 2011) ("During oral argument, Appellants contended this court is bound to reviewing the terms of the arbitration clause itself in determining its validity. We disagree. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability.") (emphasis added) (citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663,

670 (2007) (finding an arbitration clause unconscionable partly because a consumer did not possess the business judgment necessary to understand the arbitration agreement and did not have a lawyer present when the consumer signed the agreement)).[3] Here, each of the Court's conclusions overlook these points, and thus, warrant rehearing.

B.) The Court Erred in Considering Form Over Function

Additionally, the Court's reliance on the location of the remedial provisions (aka dispute resolution restrictions) in, near, or away from the initial arbitration sentences exalts form over substance in contravention of another canon of construction. *See, e.g., Suburban Imp. Co. v. Scott Lumber Co.,* 59 F.2d 711, 715 (4th Cir. 1932) ("The vital consideration in construing a contract is not what the parties call it, but what they put in it; for the law regards substance and not form."); *Soil Remediation Co. v. Nu-Way Envtl.,* 317 S.C. 274, 278, 453 S.E.2d 253 257 (Ct. App. 1994) (noting the court should consider substance before form in interpreting whether a contract meets the proper notice requirements under the South Carolina Uniform Arbitration Act). There is simply no reason a provision providing "you may not recover monetary damages of any kind" (such as TAMKO's exclusion from coverage provision) should be treated differently than "the arbiter may not award monetary damages of any kind." There is also no reason provisions providing "you only have one year to bring any cause of action" and "after one year this 'right' expires" (such as TAMKO's legal remedies section) should be treated differently than "the arbiter may not consider any actions more than one year old." Additionally, there is no reason provisions providing to "terminate all liability" (such as TAMKO's exclusion from coverage and transferability provisions) should be treated differently than "the arbiter may not make findings of

[3] In discussing *Prima Paint* and whether this decision requires a Court consider only the arbitration itself, Justice Toal aptly mentioned in the oral arguments for *Smith versus D.R. Horton* that the *Prima Paint* decision "simply says you have to look at the "arbitration provision" and "does not stand for the proposition that one can cherry pick out" certain language of a provision one drafted and which includes express references to other provisions.

liability". This Court ignores this logic, and instead, erroneously places form over function. In doing so, the Court commits another error – it disregards the fact that these provisions, all of which attempt to waive significant legal remedies, attempts to stack the deck against innocent consumers by developing an dispute resolution framework which provides no meaningful resolution. The Court's error is compounded by the fact that the Court acknowledged the attempted waiver of statutory remedies and damages[4] as a significant factor in *D.R Horton* (Opinion at 7); yet, allows TAMKO's placement of these waivers to dictate their effect, again exalting form over substance and, in fact, violating this Court's ruling in *D.R. Horton* where it considered provisions affecting fairness regardless of location (recognized by this Court in its Opinion at 8-9). There is no justification for this Court discounting the substantial similarities between the warranty at issue in *D.R Horton* and the applicable warranty at issue here, especially given *D.R. Horton's* finding of an arbitration clause's unconscionability based upon a provision, not physically "within" the arbitration clause, which exempted the defendant for all monetary damages. Importantly, departing from the well-established interpretational principles in *D.R. Horton* as well as *Simpson* will cause significant confusion in lower courts. Frankly, in light of *Simpson* and *D.R. Horton*, *Carlson* is an aberration.

IV. The Court Erred in Construing Ambiguities Against Respondents

The Court's Opinion also overlooks and misapplies the well-established interpretational principles used in the context of patently ambiguous contractual provisions. In South Carolina, courts must construe such ambiguous provisions in favor of non-drafting party by resolving any ambiguity in a contract, doubt, or uncertainty as to contractual provisions against the party who

[4] While this Court correctly noted that the UCC does permit waiver of some remedies, the waivers remain subject to a unconscionability challenge – such as the challenge Respondents successfully mounted in the Trial Court.

drafted the agreement. *Myrtle Beach Lumber Co., Inc. v. Willoughby,* 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. *Contracts* § 324).

In this regard, this Court's Opinion contains a critical oversight – it acknowledges the initial arbitration sentences contain an ambiguity by indicating these sentences "may appear one-sided because only the consumer is required to submit claims to arbitration"; yet, the Court goes on to resolve this ambiguity in favor of TAMKO. (Opinion at 9 n.6) ("Although the arbitration clause may appear one-sided because only the consumer is required to submit claims to arbitration, TAMKO contends it would never be forced to initiate a cause of action – such as a collection dispute – against an end user because it receives payment for its products upon delivery to its various distributors."). TAMKO's unsupported contention of how its initial arbitration sentences should operate does not rectify the fact that, as written, its initial arbitration sentences are capable of multiple interpretations. As such, the initial arbitration sentences are ambiguous and this ambiguity must be resolved in favor of Respondents meaning the Court must affirmatively acknowledge these sentences' one-sided nature which, ignoring all the foregoing points, independently warrants a rehearing of this matter.

X. This Court's Conclusions Regarding Any Purported Error Committed By Trial Court Finding the Arbitration Clause Unconscionable Requires Rehearing

In its Opinion, this Court concludes the Trial Court erred in finding the "arbitration clause" unconscionable and relying upon the adhesiveness of TAMKO's Warranty to support this finding. This Court's conclusions misapprehend the following points of law and fact:

First, this Court's conclusions suggest the Trial Court erred by considering more than just the initial arbitration sentences in finding the "arbitration clause" unconscionable. As noted above, this misconstrues the law providing a Court may look outside an arbitration clause in assessing its

enforceability and/or at the totality of the process and fairness in assessing the enforceability of the arbitration clause.

Second, this Court's conclusions overlook both the law and the facts in that the arbitration agreement, when properly read as a whole, is unconscionable given the sheer volume of oppressive and one-sided provisions contained in the agreement which wrongfully limit available statutory rights and remedies.[5]

Third, this Court (a) discounts the substantial similarities between the warranty at issue in *D.R. Horton* and the applicable warranty at issue here;[6] (b) disregards *D.R. Horton's* finding of an arbitration clause's unconscionability based upon a provision, not physically "within" the arbitration clause, which exempted the defendant for all monetary damages; and (c) overlooks the fact that departing from well-established interpretational principles and deciding an issue undoubtedly affected by our Supreme Court's still pending decision in *D.R. Horton* will cause significant confusion in lower courts.

Fourth, this Court's conclusions ignore the fact-specific nature of an unconscionability determination. In other words, while unconscionability is a question of law, the answer to this question is fact-driven. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667 ("The court's factual findings underlying the ruling will be given deference and disturbed only if there is no evidence to

[5]Considering all related provisions which should be read together, the arbitration agreement contains seven "unconscionables" (including the disclaimer of all monetary damages and all liability; two provisions which restrict the Statute of Limitations, the one year expiration of statutory rights provision, the consequential and incidental damage exclusion, the express warranty disclaimer and the Legal Remedies section as a whole) At minimum, and as seemingly implicated by the Court, the arbitration agreement consists of the initial Arbitration Sentences and the Legal Remedies Section and this section contains four "unconscionables" (including the one year Statute of Limitation restriction, the one year expiration of statutory rights provision, the consequential and incidental damage exclusion, the express warranty disclaimer) in addition to being unconscionable in its entirely due to its inherently ambiguous nature. Additionally, while waiver of class rights, by itself, does not make an arbitration clause unconscionable, it does contribute to the stacked scheme in this instance.

[6] These similarities are addressed at length in the Trial Court Order's as well as Respondents pleadings contained in the Record on Appeal.

reasonably support them.") (emphasis added); 7A C.J.S. Contracts § 4 (1999) (noting "the determination of unconscionability is fact specific") (emphasis added). Here, the Trial Court found these provisions were oppressive, one-sided and included within an admittedly adhesive agreement. These factual findings are supported by the record which means the Trial Court could not have committed a legal error – the law indicates the presence of these facts are what makes these provisions unconscionable. Accordingly, this Court is obligated to sustain these factual findings made by the Trial Court.

Fifth, this Court's conclusion that "the adhesive nature of the warranty did not contribute to the unconscionability of the arbitration clause" relies upon the language of non-applicable shingle packaging and misapprehends the law which includes an "adhesiveness" requirement. In its Opinion, this Court determined the trial court erred in finding the adhesive nature of TAMKO's warranty contributed to the unconscionability of the arbitration clause because "the TAMKO shingles' packaging" contained a certain section purporting to allow a purchaser to return the shingles if not satisfied with the terms and conditions of the Warranty. (Opinion at 7-8). However, this Court overlooked the fact that this Packaging Warranty is applicable as to shingles "sold on or after January 1, 2013", and thus, inapplicable to the shingles sold and installed at One Belle Hall in 2006. (R. at 182). It further ignores the reality of the situation, that homeowners rarely see the shingle package in new construction.

Moreover, this Court's conclusion that the Trial Court erred in relying on the Warranty's admittedly adhesive nature as support for its unconscionability finding runs contrary to South Carolina precedent which defines "the absence of meaningful choice" as one of the two elements required to establish unconscionability. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; *D.R. Horton*, 403 S.C. at 14, 742 S.E.2d at 40. The Court's Opinion points to *Simpson* which considered the

"adhesive" nature of the contracts at issue as a fact supporting the unconscionability of the arbitration clause included in those contracts. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669.[7] Additionally, the primary case upon which this Court's Opinion relies, *Carlson*, expressly noted the lack of adhesiveness in support of its ultimate determination. *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 873 (2013) ("In contrast to the facts in *Simpson,* no evidence in the record indicates whether the purchase agreement was an adhesion contract. . .").

Sixth, the Court's purported distinction of this case as a "modern transaction for goods" governed by Article Two of the Uniform Commercial Code is a distinction without a difference. Article Two was just as applicable in the *Simpson* case (wherein the Supreme Court found an arbitration clause unconscionable) as is it in the instant case. The Court also overlooks a key provision of Article Two which "permits the Court to refuse to enforce any unconscionable clause in a contract or to limit its applicable as to avoid an unconscionable result," a provision which the *Simpson's* reference to support its unconscionability determination. S.C. Code Ann. § 36-2-302(1) (2003); *Simpson, 373* S.C. at 34, 644 S.E.2d at 673 ("[Article 2] permits this Court to 'refuse to enforce' any unconscionable clause in a contract or to 'limit its application as to avoid an unconscionable result.'"). Additionally, the Court misses the fact this case concerns defective shingles and its conclusions overlook the law which applies in cases involving defective products. *See, e.g., Carlson v. Gen. Motors Corp.*, 883 F.2d 287, 292, 296 (4th Cir. 1989) ("When a manufacturer is aware that its product is inherently defective, but the buyer has no notice of [or] ability to detect the problem, there is perforce a substantial disparity in the parties' relative

[7] While our Supreme Court in *Simpson* acknowledged that adhesion contracts are not *per se* unconscionable, it also held that a finding of adhesion, here an admission of adhesion, is a beginning point in the analysis. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27, 644 S.E.2d 663, 669 (2007); (R. at 75) (TAMKO's counsel acknowledges "This is a contract of adhesion."). In other words, while adhesion alone does not make a contract unconscionable, it most certainly is a building block toward a finding of unconscionability.

bargaining power. . .In such a case, the presumption is that the buyer's acceptance of limitations on his contractual remedies—including of course any warranty disclaimers—was neither 'knowing' nor 'voluntary,' thereby rendering such limitations unconscionable and ineffective") (internal citations omitted) (emphasis added).

Seventh, the Court's reference to *Simpson* in its recitation of the law directly conflicts with the unconscionability conclusions the Court reaches a few pages later in its Opinion. Compare (Opinion at 7-8) with (Opinion at 10). For example, the Court notes the Supreme Court in *Simpson* "first found the customer had no meaningful choice in agreeing arbitrate" and "noted the [agreement] was a contract. . .that it viewed with 'considerable skepticism' because automobiles are necessities in modern society." (Opinion at 7). Yet, the Court claims the Trial Court erred in considering these very same things in this case which, like *Simpson*, involves a transaction for goods (shingles), and these goods (critical for adequate shelter), are clearly more of a "necessity" than the car at issue in *Simpson.* (Opinion at 7). The Court also notes the *Simpson* Court "found a provision in the arbitration clause that was unconscionable because it failed to promote a neutral and unbiased arbitral forum. . .While the provision forced the consumer to submit all of her claims to arbitration, it preserved the dealer's right to bring judicial proceeding against the consumer. . . . " Yet, the Court overlooks similar provisions within the initial arbitration sentences here, even after acknowledging their one-sided nature. (Opinion at 9 n.6) (noting "the arbitration clause may appear one-sided because only the consumer is required to submit claims to arbitration. . .").[8]

XIII. This Court's Conclusion Regarding the Alleged Neutrality of the Initial Arbitration Sentences Overlook the One-Sided Nature of These Sentences as well as the Illusory Promises Existing in these Sentences and Remedial Provisions, and Further, Discounts the Practical Effect of these Sentences and Remedial Provisions Which Stacks the Deck against Respondents

[8] As mentioned above, the Court's "may appear one-sided" language indicates the Arbitration Section is capable of multiple interpretations, and thus, ambiguous. South Carolina's contract interpretational rules require this Court resolve this ambiguity in favor of Respondents.

In its Opinion, this Court finds the initial arbitration sentences "facilitate an unbiased decision by a neutral decision maker". (Opinion at 13). This Court's finding, again, puts form over substance, and further, misapprehends the following points of law and fact:

First, both the initial arbitration sentences as well as the remedial provisions are lacking mutuality, and thus, all are unenforceable. The Court overlooks the fact that the initial arbitration sentences and remedial provisions consist of "illusory" promises. The Court's failure in acknowledging these "illusory" promises as well as the rules involved in construing such "illusory" promises is significant for two reasons. The first reason concerns mutuality of obligation - when illusory promises are all that support a purported "bilateral" contract, there is no mutuality of obligation, and thus, there is no contract. A promise is "illusory" when it fails to bind the promisor, who retains the option of discontinuing performance, and that's exactly the case here. TAMKO's remedial provisions, like *D.R. Horton's* remedial provisions, are "illusory" because they negate the very remedy it purports to promise in its arbitration sentences and remedial provisions. TAMKO's remedial provisions are referenced by the initial arbitration sentences, and therefore, these sentences are supported by the same illusion. In other words, these remedial provisions eviscerate all benefits purportedly provided by TAMKO's Warranty and this serves an express limitation on the ability of an arbiter to award damages, and renders both the remedial provisions and initial arbitration lacking in mutuality. TAMKO's initial arbitration sentences are also "illusory" because they subject consumers to arbitration proves without mutually subjecting TAMKO to this process, and thus, are one-sided in nature. Even considering only the initial arbitration sentences, there is no mutuality, and thus, no neutrality which is contrary to this Court's finding.

Second, TAMKO's arbitration clause, as properly construed, does not facilitate an unbiased decision. In determining whether an arbitration clause provisions is "bilateral" (i.e., unbiased or mutual), the court should look beyond the clause's facial neutrality and examine its actual effect. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1174 n.8 (9th Cir. 2003) *citing Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003); *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1174 (N.D. Cal. 2002) (an arbitration provision that is facially neutral may still be substantively unconscionable). When the actual effect of the arbitration clause unfairly "stacks the deck" against one party, the clause is unconscionable and unenforceable. *Plaskett v. Bechtel Int'l, Inc.*, 243 F. Supp. 2d 334, 345 (3rd Cir. 2003) *citing Acorn*, 211 F. Supp. at 1174) *cf. S.C. Farm Bureau Mut. Ins. Co. v. Kennedy,* 398 S.C. 604, 615, 730 S.E.2d 862, 867 (2012) ("The literal interpretation of policy language will be rejected where its application would lead to unreasonable results and the definitions as written would be so narrow as to make coverage merely illusory."); *Isle of Palms Pest Control Co. v. Monticello Ins. Co.,* 319 S.C. 12, 19 (Ct. App. 1994), *reh'g denied,* (Aug. 4, 1995) (emphasis added) ("To give effect to the professional liability exclusion would render the policy virtually meaningless, because it would exclude coverage for all claims. . . [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.").

Here, the arbitration clause promotes TAMKO's judicial remedies over Respondents, purports to wrongfully deprive Respondents of a host of important legal remedies and exempts TAMKO from all liability and all monetary damages. Particularly, the arbitration clause's exclusions from coverage paragraph provides "TAMKO shall not be liable for any damages of any kind whatsoever" contrary to both our States' strict liability laws and statutorily prescribed

remedies for breach of warranty. Its transferability and legal remedies paragraphs also disclaim TAMKO's liability, and further, seemingly operate to limit the applicable statute of limitation as to all claims contrary to Section 15-3-140 of the South Carolina Code. S.C. Code Ann. § 15-3-140 ("No clause, provision or agreement in any contract. . .shall be barred from bringing suit upon any cause of action arising out of the contract if not brought within a period less than the time prescribed by the statute of limitations. . ."). Both its exclusions from coverage and legal remedies paragraphs are inherently ambiguous because there is no coverage and no remedy to be had under these provisions. *See, e.g., Hartman v. Jensen's, Inc.*, 277 S.C. 501, 289 S.E.2d 648 (1982) (affirming a trial court's finding that a disclaimer couched under a "terms of warranty" heading was not effective because "placing alleged disclaimer under the bold heading of 'terms of warranty' created an ambiguity and was likely to fail to alert the consumer that an exclusion of the warranty was intended."). Its initial and ending arbitration sentences as well as all of its remedial provisions are patently ambiguous which means they are capable of multiple interpretational, and thus, subject to TAMKO's interpretational whims in the absence of judicial involvement. Moreover, these initial and ending arbitration sentences also seemingly apply only to consumers, and not to TAMKO. Clearly, the cumulative effect of these provisions contained within what rightfully constitutes TAMKO's arbitration clause unduly prejudice Respondents and this Court erred in finding otherwise.

Additionally, the Court erred in limiting its analysis to only the facial neutrality of the initial arbitration sentences rather than to the actual effect of these sentences as applied in conjunction with the remedial provisions (which is how TAMKO intended these provisions to operate). This Court in *D.R. Horton* did not so limit its analysis and neither should this Court so limit its analysis here. As Justice Kittredge recently noted during the oral arguments in *D.R.*

Horton, if the Court's review is limited to just the arbitration clause as D.R. Horton (and TAMKO) would define it, then the result would home builders going into to arbitration to "beat up" consumers with other unconscionable provisions contained in their Warranties (i.e., inevitably leads to an unfair legal proceeding).

Finally, this Court ignores the fact that *D.R. Horton* is the decision which is dispositive here and its reliance on *Munoz* and *Carlson* is misplaced. *D.R. Horton*, similar to this case, involved provisions expressly referencing each other, dealing with the same subject matter and which D.R. Horton, like TAMKO, intended to be read together. This was not the case in either *Munoz* or *Carlson* and, as such, neither of these decisions control the facts and circumstances here which are more akin to the facts and circumstances considered in by the *D.R. Horton* and *Simpson* Courts.

XII. This Court's Conclusions Regarding Any Purported Error Committed by Trial Court in Declining to Sever the Initial Arbitration Sentences or Related Remedial Provisions Requires Rehearing

The Trial Court committed no error in refusing to sever the initial arbitration sentences and remedial provisions from each other or the Warranty because South Carolina law permits non-severability where, like here, provisions intended to be read together contain multiple attempted waivers of important legal remedies. *Simpson*, *373* S.C. at 33-34, 644 S.E.2d at 673 (acknowledging non-severability permissible where illegality permeates contractual provisions such that only a disintegrated fragment would remain after hacking away the unenforceable parts); *D.R. Horton*, 403 S.C. at 16-17, 742 S.E.2d at 41-42 (acknowledging the same); *see also* S.C. Code § 36-2-302(1) (legislation permits the Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result.").

In concluding to the contrary, this Court makes a singular assertion that the Warranty's limitation and disclaimers are "irrelevant" to its analysis because they are not a part of the initial arbitration sentences. This assertion is incorrect because it misstates the severability test which, as articulated by the *Simpson* Court, is whether severability or non-severability best achieves the "intent of the parties". *Simpson, 373* S.C. at 34, 644 S.E.2d at 673. The severability test is not whether certain provisions "are part" of other provisions as this Court implicates, and thus, its entire analysis as to severability is misplaced and warrants reconsideration. *Id.*; *see also Packard & Field v. Byrd,* 73 S.C. 1, 6, 51 S.E. 678, 679 (1905) (noting the "severability of a contract depends primarily upon the intent of the parties rather than upon the divisibility of the subject, although the latter aides in determining the intention). (emphasis added). In fact, the Court's findings as to severability are entirety devoid of any reference to the parties' intentions or reasonable expectations, and thus, all are improperly supported.

The Court's severability analysis also overlooks the fact that South Carolina precedent provides courts with the discretion to find an entire contract "indivisible" where, like here, the contract consists of a single promise which, because of illegality, is really no promise at all:

> Where the consideration or promise is single, there is no difficulty in pronouncing the contract indivisible, and in declaring the whole void if there be illegality in the consideration or promise.

Packard & Field v. Byrd, 73 S.C. 1, 6, 51 S.E. 678, 679 (1905) (emphasis added); *see also United States v. Bethlehem Steel Corp.*, 315 U.S. 289 (1942) ("Whether a number of promises constitute one contract (and are non-separable) or more than one is to be determined by inquiring 'whether the parties assented to all the promises as a single whole, so that there would have been no bargain whatever, if any promise or set of promises were struck out."). Applying this precedent to the facts

presented here, TAMKO's Limited Warranty is a singular promise[9] wholly negated by the Warranty's illegal pronouncement that TAMKO shall not be liable under any circumstances for damages of any kind whatsoever. The Trial Court recognized this fact and, properly exercising the discretion afforded it under this precedent, determined TAMKO's warranty was "indivisible". There simply is no error of law here.

Finally, this Court's reliance on the severability language contained in the legal remedies section of TAMKO's Warranty amounts to nothing more than an attempt to create error where no error exists. As noted by both the *D.R. Horton* and *Simpson* Courts, severability clauses may be used to remove unenforceable provisions while saving the parties' overall agreement; however, "severability is not always an appropriate remedy . . . [where] illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract rather than fulfilling the intent of the parties." *Simpson*, *373* S.C. at 34, 644 S.E.2d at 673; *D.R. Horton*, 403 S.C. at 16-17, 742 S.E.2d at 41-42 (emphasis added).

In other words, the Court's reliance on the legal remedies section's severability language as opposed to the substantive relationship between this section and other Warranty terms exalts form over substance in contravention of recognized contractual rules. Just because a provision contains severability language does not mean this provision is unrelated to other contractual provisions, and also, does not require a court "save language" when impractical. See, e.g., *Simpson*, *373* S.C. at 35 n.9, 644 S.E.2d at 674 n.9 (finding severability was an impractical and improper remedy due to the sheer magnitude of unconscionability terms which attempted to waive statutory rights) citing *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1249 (9th Cir.1994)

[9] According the Warranty's plain language, "TAMKO's obligation (aka singular promise) contained in th[e] Limited Warranty is expressly in lieu of [all other promises]."

(noting that severance of illegal provisions is inappropriate when the entire arbitration clause represents an "integrated scheme to contravene public policy" (citations omitted); *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."); see also *D.R. Horton*, 403 S.C. 10, 742 S.E.2d 37 (discussed infra). Moreover, this "severability language" is only included in the legal remedies sections[10] and is not included the initial and ending arbitration sentences or the other remedial provisions, and thus, cannot save the unconscionable terms included in these provisions. Even if the "severability language" included in the legal remedies section somehow applied to these above-referenced provisions as this Court implicates, the only terms actually saved would be this severability language because nothing of substance remains after "hacking away" the host of unconscionable terms which permeate all of these provisions. As this result runs directly contrary to our

[10] While the Court's Opinion concludes "TAMKO's section of legal remedies is separate and distinct from the Warranty's arbitration clause," the Court provides no justification for this conclusion. Rather, the Court immediately proceeds to note "even if the section was a continuation of the arbitration clause, it is prefaced with [severability language]" which would render its terms inapplicable "if the arbitrator found they violated South Carolina law." (Opinion at 12 n.7). Not only should the Court address the lack of an express basis supporting this "separate and distinct" determination, the footnote accompanying this determination serves as an example of the Court placing form over substance and misapprehending of our State's "severability" jurisprudence.

severability jurisprudence, so too does the Court's severability conclusions which inevitably lead to this result.

X. This Court's Opinion Relies Upon Non-Applicable Versions Of TAMKO's Warranty

The Court did not identify which version of TAMKO's Warranty it considered in issuing its Opinion; however, as the applicable warranty is illegible, the Court must have relied upon the later, non-applicable version. Three versions of TAMKO's Warranty are included in the Record; however, only the signed version is applicable here. (R. at 172-188) (containing the three versions of TAMKO's Warranty attached as exhibits to the Affidavit of Alex Hines originally filed by TAMKO with the trial court on July 10, 2014). The other two versions are at least partially different; and, the extent of the difference cannot be confirmed because of the illegibility of the applicable Warranty. Therefore, TAMKO has not, and cannot, prove its alleged arbitration agreement with Respondents, or the details thereof.

The first Warranty, attached as Exhibit "C" to the Hines Affidavit, is a copy of the TAMKO Warranty as purportedly printed on its shingle packaging in or about 2006; however, a close reading of this packaging indicates it was printed in 2013, and thus, not applicable here. (R. at 174, 182) ("Packaging Warranty"). Respondents direct the Court's attention to the one-sentence paragraphs directly above the purported "notice" box located on the far right of "Packaging Warranty" which indicates the packaging was printed in or about 2013. Moreover, the physical location of certain provisions, such as the initial arbitration sentences, are different from location of the initial arbitration sentences included in the applicable warranty.

The Second Warranty, attached as Exhibit "D" to the Hines Affidavit is a copy of the TAMKO Warranty actually provided to Respondents in their Homeowner's Warranty Manual. (R.

at 175, 184-185) ("Provided Warranty"). The initial arbitration sentences and the Legal Remedies Section are illegible in this version.

The Third Warranty, attached as Exhibit "E" to the Hines Affidavit was represented by TAMKO to be a "clean copy" of the Provided Warranty; however, the this document and its terms are different from this Warranty which means this version was not provided, either directly or indirectly, to the Respondents. (R. at 175, 187-88).[11] For instance, the Provided Warranty (Ex. D) has an additional mark under the Instructions on Page Six to 'Retain this Warranty. . ." Additionally, this Warranty limits its effect to United States (excluding Alaska and Hawaii) in the final paragraph on Page Five whereas the Provided Warranty appears to reference provinces and Canada in the same paragraph, evidencing different versions. As the remaining paragraphs on Page Five of the Provided Warranty are illegible, it is impossible to determine what other similarities or differences exist; and, it is impossible to prove the terms of the alleged arbitration agreement.

Because the Court Opinion's relies upon the language of non-applicable versions of TAMKO's Warranty, all of these conclusions warrant reconsideration. Reconsideration is further warranted given the applicable Signed Warranty (as seen by Respondents) is "illegible" and "hard to read" as previously pointed out by the Trial Court, Respondents, and even TAMKO.[12] This fact which is supported by the record, but never acknowledged by this Court, is crucial to the Court correctly deciding the case because this Court cannot assess the validity of an arbitration agreement the Court cannot read. Proving the existence of a binding arbitration agreement is TAMKO's burden, a burden which TAMKO failed to satisfy by never producing a legible copy of any arbitration-related provision actually contained in the applicable Warranty. *Brazell v. Windsor*,

[11] Respondents note this issue is also pointed out in their Brief. (Resp't Br. 5 n.11).
[12] (R. at 93, lines 11-20); (Resp't Br. 5 n.11).

384 S.C. 512, 516 682 S.E.2d 824, 829 (2009) ("[O]n a 12(b)(6) motion, if matters outside the pleadings are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of pursuant to Rule 56, SCRCP . . ."); *Hedgepath v. AT&T*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (holding the party seeking summary judgment has the burden).

CONCLUSION

Based upon the foregoing reasons, this Court should grant rehearing, vacate its initial opinion and hold rehearing proceedings. After rehearing proceedings, this Court should issue an Opinion affirming the Trial Court's decision with respect to the issues in the appeal.

Respectfully Submitted,

Justin O'Toole Lucey, Esquire (Bar No. 15438)
Dabny Lynn, Esquire (Bar No. 78703)
JUSTIN O'TOOLE LUCEY, P.A.
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: 843.849.8400
Facsimile: 843.849.8406
Email: jlucey@lucey-law.com
Email: dlynn@lucey-law.com

Attorneys for the Respondents

June 16, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated,

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc. a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation, Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a/ Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber and Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales, Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.;

Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

v.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC, Third Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that on June 16, 2016, a true copy of the attached and foregoing Respondents' Petition for Rehearing, together with this Proof of Service, has been served upon all parties by causing a copy of the same by hand delivery to Richard H. Willis, Angela G. Strickland, and Paula M. Burlison at Bowman and Brooke, LLP, 1441 Main Street, Suite 1200, Columbia, South Carolina 29201.

JUSTIN O'TOOLE LUCEY, PA

Justin O'Toole Lucey, Esquire (Bar No. 15438)
Dabny Lynn, Esquire (Bar No. 78703)
415 Mill Street
Mt. Pleasant, SC 29464
Telephone: 843.849.8400
Facsimile: 843.849.8406
Email: jlucey@lucey-law.com
Email: dlynn@lucey-law.com

Attorneys for the Respondents

June 16, 2016
Charleston, South Carolina

JUSTIN O'TOOLE LUCEY, PA

Attorney at Law

415 Mill Street, Mount Pleasant, SC 29464
Phone: 843.849.8400 Fax: 843.849.8406 office@lucey-law.com

Justin Lucey
Joshua F. Evans
Stephanie D. Drawdy
Dabny Lynn
James L. Floyd, III
Anna S. McCann
Taylor M. Morris

Reply to:
P.O. Box 806
Mt. Pleasant, SC 29465

June 16, 2016

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated vs. Trammel Crow Residential Co., et al.
Lower Court Case No.: 2012-CP-10-7594
Appellate Case No.: 2014-002115

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of *Respondents' Petition for Rehearing* in the above-referenced matter. Also enclosed is a proof of service of this document upon counsel for the Appellant and a check in the amount of $25.00 for filing of this motion. Please return the additional filed copy to our courier.

Sincerely,

Annette M. Mixson
Paralegal to Dabny Lynn

:amm
Enclosures (as stated)
cc w/ encl.:
Richard H. Willis, Esq., Angela G. Strickland, Esq.
and Paula M. Burlison, Esq. (via Hand Delivery)