STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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Case No. 2015-CP-08-1213

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SC Court of Appeals

Christopher Duvall and Natalie Duvall, . . . . . Plaintiffs,

v.

The Ryland Group, Inc., . . . . . Defendant,

And

The Ryland Group, Inc. . . . . Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc., . . . . . Third-Party Defendants,

Of which The Ryland Group, Inc. is the . . . . . Appellant,
And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc., Carolina Consulting Engineers, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. are . . . . . Respondents.

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# AMENDED INITIAL BRIEF OF RESPONDENTS CHRISTOPHER DUVALL AND NATALIE DUVALL

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## STATEMENT OF ISSUES ON APPEAL

**I. DID THE CIRCUIT COURT ERR IN FINDING THAT APPELLANT WAIVED ANY RIGHT IT MAY HAVE HAD TO COMPEL ARBITRATION OF RESPONDENTS' CLAIMS?[1]**

**II. IS THE ARBITRATION PROVISION OTHERWISE UNENFORCEABLE?**

## STATEMENT OF THE CASE AND FACTUAL BACKGROUND

The Ryland Group, Inc. ("Appellant") constructed 1502 Marsh Reed Court, Hanahan, South Carolina, (the "Home") in 2006. Appellant sold the Home to the original purchasers in February of 2006.[2] (Affidavit of Michael Boyle, ¶ 2). In 2008, Christopher and Natalie Duvall ("Respondents") purchased the Home from the original purchasers. Respondents did not purchase the Home from Appellant and were not parties to the "Agreement of Sale dated February 12, 2006," attached as Exhibit "A" to the Affidavit of Michael Boyle.[3] Appellant did, however, provide a ten year transferrable written warranty (the "Warranty") to the original purchasers of the Home. (Affidavit of Michael Boyle, Ex. B). When Respondents purchased the Home in 2008, the Warranty transferred to them.

The only portion of the Warranty actually signed by the original purchasers is the Warranty Enrollment form and that document does not mention arbitration. (Affidavit of Michael Boyle, Ex.

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[1] At the initial hearing Appellant indicated a Form 4 order would be sufficient. (Transcript, P. 7, ll. 16-18). Appellant also neglected to request a reasoned order, with findings of fact and conclusions of law, when it moved for reconsideration. (The Ryland Group, Inc.'s Notice of Motion and Motion to Reconsider, Amend and/or Alter Order Denying Its Motion to Compel Arbitration, July 8, 2016). It does appear from the Transcript that the Circuit Court found waiver. (Transcript, P. 6, ll. 19-21).

[2] The original purchasers of the Home are not parties to this case.

[3] Ryland's Initial Brief repeatedly refers to the "Agreement of Sale dated February 12, 2006," attached as Exhibit "A" to the Affidavit of Michael Boyle. (Initial Brief of Appellant, P. 15, 16, 20, 21, 23). The Duvalls were not parties to the Agreement of Sale. The Duvalls are not making claims under the Agreement of Sale. While there is a colorable argument that principles of equitable estoppel apply to the arbitration provisions in the Warranty, there is no argument whatsoever that the Duvalls are bound by any arbitration provision contained the Agreement of Sale. The Agreement of Sale is completely irrelevant to the outcome of this appeal.

B). The Warranty itself is not signed by the original purchasers. There is no mention of arbitration, or alternative dispute resolution, on the first page of the Warranty. (Affidavit of Michael Boyle, Ex. B). The first mention of arbitration in the Warranty appears on the 4th page where it states "This agreement includes procedures for informal settlement of disputes, including mediation and binding arbitration . . ." (Affidavit of Michael Boyle, Ex. B).

In October of 2013, Respondents made a warranty claim based on extensive cracking in the foundation and walls at the Home. (Affidavit of Chris Duvall, Exhibit "3" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, ¶¶ 3-5). Respondents provided Appellant with a written report detailing problems at the Home. Appellant sent a representative to the Home who told Christopher Duvall that the problems were merely "cosmetic" in nature. Appellant denied Respondents' warranty claim. (Affidavit of Chris Duvall, Exhibit "3" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, ¶¶ 3-5).

On May 20, 2015, the Respondents filed this action against Appellant. (Complaint). After the case was filed Appellant's counsel requested and received a report from Respondents' expert detailing the problems at the Home. On July 9, 2015, Appellant conducted an extensive investigation of the Home for the purposes of discovery. (Affidavit of Chris Duvall, Exhibit "3" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, ¶ 6). This site visit involved the Respondents allowing Appellant's expert engineers, Mr. Thomas E. Vokmar, P.E., Mr. Robert C. Young, Jr., P.E., and Mr. Tyler Armentrout, all of Volkmar Consulting Services, LLC, onto the property, along with Ryland representative Mr. Mike Boyle and counsel for Ryland. During this July 9,

2015, discovery visit, Appellant conducted a walk through investigation, spoke with Christopher Duvall regarding the problems with the Home, obtained photographs, used a level to take measurements of the floors at the Home, and conducted a survey of the lot "to determine relative ground surface elevations" at the Home. Additionally, Appellant performed five (5) hand auger borings in order to conduct soil testing.[4] (See Volkmar Consulting Services, LLC, letter and report, attached as Exhibit "1" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016).

On November 12, 2015, after having advised the Respondents' counsel that Ryland would not seek to compel arbitration, Ryland filed a Motion to Amend The Ryland Group, Inc.'s Answer to Plaintiffs' Complaint, and sought to assert claims in this case against Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company. (collectively the "Third-Party Defendants") (Motion to Amend The Ryland Group, Inc.'s Answer to Plaintiffs' Complaint, November 12, 2015). On December 3, 2015, Judge R. Markley Dennis, Jr., signed a Consent Order Allowing the Amended Answer of The Ryland Group, Inc., (Consent Order Allowing the Amended Answer of The Ryland Group, Inc., December 4, 2015) and on December 10, 2015, Appellant filed The Ryland Group, Inc.'s

[4]Appellant's Initial Brief repeatedly refers to the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act," (Initial Brief of Appellant, P. 6, 7, 9, and 10) which has nothing to do with this case. Appellant's Initial Brief cites its Motion to Compel Arbitration, Memorandum in Support of Motion to Compel Arbitration, and the Affidavit of Michael Boyle, to support its contention that it engaged in "settlement negotiations" pursuant to the "South Carolina Notice and Opportunity to Cure Construction Dwellings Defects Act." None of the cited materials reference that Act. It is undisputed that Ryland was given notice of the defects, by the homeowners, well over a year before the filing of this lawsuit. Long before the filing of this suit, Ryland was given written reports from the Duvalls outlining the defects, inspected the Home, and denied the Duvalls' claims. Appellant did not argue in any of its briefs to the Circuit Court that any of its visits to the Home were made pursuant to the "Notice and Opportunity to Cure Construction Dwelling Defects Act." That is because every visit to the Home, including the first visit, was made during the course of discovery and was absolutely not related to the "Notice and Opportunity to Cure Construction Dwelling Defects Act."

Amended Answer to Plaintiffs' Complaint and Third-Party Complaint whereby it asserted claims against the Third-Party Defendants. (The Ryland Group, Inc.'s Amended Answer to Plaintiffs' Complaint and Third-Party Complaint, December 10, 2015). The Third-Party Defendants added to this case by Appellant have filed answers and have conducted discovery.

On December 14, 2015, Appellant served the Respondents with Defendant The Ryland Group, Inc.'s Request for Production to the Plaintiffs. In said Request for Production Appellant sought "authorization to place crack monitors into the cracks in the masonry on the home and to then leave them in place and undisturbed for the remainder of this litigation." (The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs, Ex. "B," December 31, 2015). Respondents objected to Appellant's request to affix "crack monitors" to the Home. (The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs, Ex. "A," December 31, 2015).

On December 31, 2015, Appellant filed The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs. (The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs, December 31, 2015). Said Motion to Compel sought "an Order compelling Plaintiffs to allow Ryland's request for authorization to install crack monitors at the residence which is the subject of this litigation." The Motion to Compel came on for a hearing before the Honorable Judge J.C. Nicholson on January 11, 2016. On that date Appellant, through counsel, requested that the Circuit Court order Respondents to allow Appellant to place measuring devices on the Home. Given Appellant's representations that "crack monitors" were necessary for it to properly defend this matter, Judge Nicholson granted Ryland's Motion to Compel, ordered the Respondents to provide Appellant with access to the Home, ordered Respondents to allow Appellant to affix crack monitors to their Home, and ordered Respondents to provide Appellant continuing access to the

Home for the purpose of accessing said "crack monitors."[5] (Order Granting Motion to Compel, January 21, 2016).

The Order Granting Motion to Compel was filed on January 21, 2016. Pursuant to that Order Granting Motion to Compel the Court ordered that Appellant "should be, and hereby is, authorized to place a reasonable number of monitors at any exterior cracks in the residence. Plaintiffs shall provide Defendant Ryland with reasonable access and with 24 hours' notice to check the crack monitors on a reasonably periodic basis, but no more than 45 days between visits and also within one month of trial." (Order Granting Motion to Compel, January 21, 2016).

Pursuant to the Order Granting Motion to Compel, Appellant made a Court ordered visit to the Home on January 28, 2016. During that visit Appellant's engineers affixed monitors to the Home. On March 7, 2016, Appellant availed itself of the Court ordered opportunity to visit the Home and access its "crack monitors." (Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016). On March 14, 2016, Respondent wrote Appellant's counsel regarding the insufficiency of Respondent's discovery responses. (Plaintiffs' Motion to Compel Defendant to Respond to Discovery, March 31, 2016, Ex. C). On March 16, 2016, nine days after a Court ordered visit to the Home to access its "crack monitors," Appellant filed The Ryland Group, Inc.'s Notice of Motion and Motion to Compel Arbitration. Apparently, based on information Appellant gained during Court Ordered discovery, it made a strategic decision to seek to compel arbitration.

Incredibly, despite its argument that it has not waived the right to compel arbitration,

[5]Indeed, Appellant actually requested that the Respondents' be ordered to allow Appellant to place crack monitors *inside* the Home and to grant Appellant access to the inside of their home within 24 hours of notice from Appellant. The Court declined to order the Respondents to allow Appellant inside the Home throughout the pendency of this litigation.

Appellant has still not removed the Court Ordered crack monitors from the Home. (Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Reconsider, Amend and/or Alter Order Denying its Motion to Compel Arbitration, August 3, 2016). While Appellant appeals the Order denying its motion to compel arbitration, Appellant continues to gather data via crack monitors attached to Respondents' Home. Appellant's crack monitors have now been affixed to the Home for over a year.

In addition to the discovery initiated by Appellant, the Third-Party Defendants have conducted discovery. (Motion to Compel, June 8, 2016).

## ARGUMENT

### I. APPELLANT HAS WAIVED ANY RIGHT TO COMPEL ARBITRATION.

Appellant has conducted extensive discovery, including conducting multiple visits to the Home, conducting soil borings, conducting surveys of the lot, serving Defendant The Ryland Group, Inc.'s Request for Production to the Plaintiffs, filing The Ryland Group, Inc.'s Motion to Compel Against Plaintiffs, and affixing and monitoring Court Ordered "Crack Monitors" at the Home. Appellant's engineering expert also indicated that he used a "Swiss Hammer," to obtain information at the Court Ordered March 7, 2016, visit. (Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, P. 8).[6]

Additionally, Appellant has obtained a Court Order allowing it to join the Third-Parties to this case, and has failed to object to those Third-Parties conducting discovery. (Motion to Compel,

[6]When counsel for Respondents arrived onsite for the March 7, 2016, Court Ordered inspection, Appellant's engineering expert indicated that he had been conducting testing using a "Swiss Hammer" prior to counsel's arrival. Although Appellant's engineering expert was onsite pursuant to Court Order, the "Swiss Hammer" testing exceeds the scope of the January 21, 2016, Order Granting Motion to Compel.

June 8, 2016). Appellant has unequivocally waived any right to compel arbitration.

**a. Appellant has Waived Arbitration by Conducting Extensive Discovery Including Obtaining a Court Order to Attach "Crack Monitors" to Respondents' Home, Actually Attaching "Crack Monitors" to Respondents' Home, and Making Court Ordered Visits to Respondents Home to Inspect Those "Crack Monitors."**

It is difficult to imagine a clearer waiver of the right to compel arbitration than asking for, and receiving, a Court Order requiring Respondents to place multiple "crack monitors" on their Home and requiring Respondents to provide Appellant access to those "crack monitors" at least every 45 days and within 1 month of trial. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127 (Ct. App. 2007)("To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took 'advantage of the judicial system by engaging in discovery.'"); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551 (Ct. App. 2003)(Upholding trial court's denial of motion to compel discovery when evidence indicated that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information . . . it might not have been able to otherwise obtain).

Having previously conducted extensive discovery at the Home in July of 2016, on January 28, 2016, Appellant made a Court Ordered visit to the Home to affix three "crack monitors" to the foundation and back porch of the Home. Since that time, Respondents, who have two small children, have had a crack monitor on the floor of their screened in back porch. To the extent Respondents' children can play on their back porch at all, they have to be constantly watched to make sure they are not playing with the "crack monitor" affixed to their porch.[7] (Affidavit of

7 Indeed, photograph 30, on Bates No. Ryland 00160 of the Volkmar report attached as Exhibit 1 to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, shows the crack on the Duvalls' back porch where one of the "crack monitors" was

Chris Duvall, Exhibit "3" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, ¶ 11).

On March 7, 2016, pursuant to Court order, Respondents allowed Appellant access to the Home to inspect its "crack monitors." (Affidavit of Chris Duvall, Exhibit "3" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, ¶ 12). Nine days later, after gathering information from the "crack monitors" pursuant to Court Order, Appellant decided that it would like to arbitrate this case. Incredibly, even while appealing this matter, Appellant continues to leave their crack monitors affixed to Respondents' Home.

In addition to Appellants' Court Ordered Home inspections, Appellant has conducted a site visit in the ordinary course of discovery that involved three engineers, a lawyer, and a Ryland representative visiting the Home, inspecting the interior and exterior, boring holes around the home, and surveying the lot. Respondent has been required to file a Motion to Compel Discovery against Appellant. (Plaintiffs' Motion to Compel Defendant to Respond to Discovery, March 31, 2016).

**(i) South Carolina Standard for Determining Waiver.**

"It is generally held that the right to enforce an arbitration clause may be waived." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665 (Ct. App. 1999). "Determining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125-126

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installed. The photo shows a hammer and saw on the floor of the rear screened in porch. These are not real adult tools. They are a toy hammer and saw used by the Duvalls' young children on the back porch where there is now a "crack monitor" installed.

(Ct. App. 2007).

"In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665 (Ct. App. 1999).

> Generally, the factors our courts consider to determine if a party waived its right to compel arbitration are: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. These factors, of course, are not mutually exclusive, as one factor may be inextricably connected to, and influenced by, the others.

*Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126 (Ct. App. 2007).

**(ii) Whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration.**

With regard to the first factor, "what is 'a substantial length of time' varies from one case to the next, depending on the extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Rhodes*, supra at 126. Here, Appellant waited nearly ten months after this action was filed to move to compel arbitration. Delays of less than a year give rise to waiver when accompanied by substantial discovery. *See Rhodes* supra, (ten month delay between initiation of action and motion to compel arbitration resulted in waiver when extensive discovery conducted.).

Appellant's Initial Brief asserts that "After the initial pleadings were filed, the case went into something of a hiatus as Appellant and Duvalls engaged in lengthy settlement negotiations premised on the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. When settlement discussions with Duvalls broke down, on March 17, 2016, Appellant

moved to compel arbitration of Duvalls' claims and of Appellant's third-party claims against the above referenced Third-Party Defendants . . ." (Initial Brief of Appellant, P. 6-7).

Respondents dispute that meaningful and "lengthy settlement negotiations" took place between the time the initial pleadings were filed and the time of Appellant's motion to compel arbitration. Indeed, Appellant made no monetary offer to settle this case prior to filing the motion to compel arbitration. Further, no discussions or inspections made in this case have anything whatsoever to do with the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act." The Duvalls gave Appellant notice of the defects prior to any lawyer involvement in this case. Appellant sent a representative to the Home to inspect the defects, told Respondents that the multiple cracks in their foundation and throughout their Master Bedroom were "cosmetic," and denied the claim.[8] Appellant did not move to dismiss or stay this case pursuant to the "South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act" and did not raise that Act in any brief submitted to the Circuit Court.

Respondents also dispute that the case entered into a "something of a hiatus." Respondents served interrogatories and requests for production on Appellant on October 6, 2015, approximately two months after Appellant filed its Answer to the Complaint. (Plaintiffs' Motion to Compel Defendant to Respond to Discovery, March 31, 20016, Ex. A and B). On November 10, 2015, Appellant amended its Answer to assert third-party claims against five subcontractors.

**(iii) Whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration.**

Appellant conducted substantial discovery prior to seeking to compel arbitration. Perhaps most importantly, Appellant obtained Court Ordered discovery prior to deciding it would move to

[8]Appellants now have grass growing through the carpet in their bedroom.

compel arbitration. *Compare Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125 (Ct. App. 2007) (refusing to compel arbitration when moving party "sought the circuit court's assistance in executing out-of-state subpoenas . . ."), with *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612 (2003)(upholding trial court's grant of motion to compel arbitration when the "parties had not availed themselves of the court's assistance.").

Since Respondents initiated this action Appellant has conducted three site inspections (one pursuant to a request by Appellant's counsel and two pursuant to Court Order); has taken extensive measurements of the Home, has conducted soil borings and taken soil samples from the property, has sought and received an order compelling discovery, and has affixed and monitored "crack monitors" at the Home. Additionally, Appellant's engineer used a "Swiss Hammer" to obtain data regarding the Home during the Court Ordered March 7, 2016, site inspection. The entire report from Volkmar Consulting Services, LLC, ("Exhibit 1" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration), is based on discovery conducted in this action.

**(iv) Whether the non-moving party was prejudiced by the delay in seeking arbitration.**

This factor overwhelmingly establishes that Appellant has waived its right to compel arbitration.

> To ascertain whether the non-moving party was prejudiced, our courts often examine whether the party requesting arbitration took advantage of the judicial system by engaging in discovery. This inquiry, however, is just part of a broader, common sense approach our courts take to determine whether a motion to compel arbitration should be granted or denied: (1) if the parties conduct little or no discovery, then the party seeking arbitration has not taken advantage of the judicial system, prejudice will likely not exist, and the law would favor arbitration; (2) if the parties conduct significant discovery, then the party seeking arbitration has taken advantage of the judicial system, prejudice will likely exist, and the law would disfavor arbitration. Of course, cases do not always fit neatly into clearly defined

> categories, which is why our law resists a formulaic approach and motions to compel arbitration are resolved only after a fact-intensive inquiry. Accordingly, each case turns on its particular facts.

*Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127 (Ct. App. 2007).

Under this analysis, it is difficult to conceive of clearer example of taking "advantage of the judicial system," than seeking, and receiving, a Court Order requiring physical attachment of monitoring devices to the Home of a litigant. Not only was this discovery order sought by Appellant, Appellant actually did affix monitoring devices to Respondents' Home and has visited the Home for the purpose of monitoring the devices. Now, apparently concerned with the results of its Court Ordered monitoring program, Appellant has belatedly decided that it should move to compel arbitration.

The South Carolina Courts have declined to compel arbitration when a party delays filing a motion to compel in order to gather information it may not be able to gather in arbitration. *See Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 551 (Ct. App. 2003)(Upholding trial court's denial of motion to compel arbitration when evidence indicated that defendant "availed itself of discovery tools unavailable in arbitration, thereby prejudicing [plaintiff] by obtaining information . . . it might not have been able to otherwise obtain).

Here, Appellant has sought, and obtained, discovery unavailable in arbitration. Appellant seeks to compel arbitration before the American Arbitration Association. This case, which involves a home warranty, would be subject to the American Arbitration Association's Consumer Arbitration Rules. (See AAA Consumer Arbitration Rules, R-1, attached as "Exhibit 6" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29, 2016, stating that AAA Consumer Arbitration Rules are applied to cases involving "Warranties (home, automobile, product)). Under the AAA Consumer

Arbitration Rules, discovery is limited to the exchange of documents. (See AAA Consumer Arbitration Rules, R-22 Exchange of Information between the Parties, stating that the AAA Consumer Arbitration Rules ordinarily only allow for the exchange of documents and information and the identification of witnesses).

Appellant requested that the Circuit Court order Respondents to conduct discovery that would not be available in arbitration. That is an unequivocal waiver. Appellant could not have made three separate visits to the Home, and could not have attached monitoring devices to the Home, pursuant to the AAA Consumer Arbitration Rules. Appellant cannot "have its cake and eat it to," by being allowed to take advantage of Court ordered discovery and nonetheless have the case compelled to arbitration.

**b. Respondents Have Been Prejudiced by Appellant's Addition of the Third-Party Defendants to this Matter.**

The Warranty is an agreement between the Respondents and Appellant. There is no provision in the Warranty, or in the AAA Consumer Arbitration Rules, requiring Respondents to participate in an arbitration between Appellant and its various subcontractors. With full knowledge of the Warranty, and after indicating that it would not pursue arbitration, Appellant obtained a Court Order and joined the Third-Party Defendants in this case.

Without any objection from Appellants, the Third-Party Defendants have conducted discovery. (Motion to Compel, June 8, 2016).

Neither the Warranty, nor the American Arbitration Association's Consumer Arbitration Rules, provide for third-parties to be involved in the arbitration between Respondents and Appellant. (*See* AAA Consumer Arbitration Rules, attached as "Exhibit 6" to Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel

Arbitration, April 29, 2016).

Additionally, the American Arbitration Association's Consumer Arbitration Rules do not provide for discovery to be conducted via subpoenas to non-parties. (See AAA Consumer Arbitration Rules, R-22 Exchange of Information between the Parties, stating that the AAA Consumer Arbitration Rules ordinarily only allow for the exchange of documents and information and the identification of witnesses). Appellants joined the Third-Party Defendant to this matter with full knowledge of the Warranty, and will full knowledge that the Third-Party Defendants would be free to pursue discovery via subpoenas to non-parties.

## II. THERE IS NO ENFORCEABLE ARBITRATION AGREEMENT BETWEEN RESPONDENTS AND APPELLANT.

The Warranty is a confusing document. It purports to be "insured" and administered by a "Claims Administrator," "Columbia National Risk Retention Group, Inc." (hereinafter "CN"). Pursuant to the dispute resolution procedure CN will "review and mediate" any claims under the Warranty. (Affidavit of Michael Boyle, Ex. B at Section B-5(c)). Although the Warranty portrays CN as a third-party "Claims administrator," who will mediate disputes between homeowners and Ryland, upon information and belief, CN is a division of Ryland.[9] The first mention of arbitration in the Warranty appears on the fourth page where it states "This agreement includes procedures for informal settlement of disputes, including mediation and binding arbitration . . ." (emphasis added). (Affidavit of Michael Boyle, Ex. B).

### a. The Federal Arbitration Act Does Not Apply and the Warranty Does Not Comply with SC Code Ann § 15-48-10

Appellant's Initial Brief repeatedly refers to the "Agreement of Sale dated February 12,

[9]Ryland has not disputed that Columbia National Risk Retention Group, Inc., the purported third-party "claims administrator," **is actually a division of Ryland itself**.

2006," attached as Exhibit "A" to the Affidavit of Michael Boyle. Respondents were not parties to this Agreement of Sale, make no claims pursuant to the Agreement of Sale, and did not even have possession or knowledge of the Agreement of Sale prior to Appellant's production in this lawsuit. Which begs the question, why does Appellant repeatedly cite to the Agreement of Sale, and not the Warranty? The answer is that the Warranty does not comply with SC Code Ann § 15-48-10.

The Agreement of Sale, which is not at-issue in this case, is stamped on the first page, **"THIS AGREEMENT CONTAINS A BINDING IRREVOCABLE AGREEMENT TO ARBITRATE. SEE UNIFORM ARBITRATION ACT (TITLE 15, CHAPTER 48 SC CODE."** (Affidavit of Michael Boyle, Ex. A). The Warranty, however, does not even use the term "arbitration" on the first page. In other words, the Agreement of Sale (which the Respondents had never even seen prior to this lawsuit) complies with SC Code Ann § 15-48-10, the Warranty, on the other hand, does not comply with SC Code Ann § 15-48-10.

In must be kept in mind that Respondents were not *parties to either the Agreement of Sale or the Warranty.* The only argument that the Respondents are subject *to any arbitration agreement at all*, is that they are asserting claims pursuant to the Warranty and are therefore equitably estopped from denying they are bound by the arbitration provisions *in the Warranty.* As Appellant's counsel stated at the hearing on its Motion to Compel Arbitration, "typically I would say that there is not any claim to compel arbitration if they are a subsequent purchaser. The reason that I believe that arbitration is appropriate is that the plaintiff has specifically alleged in their complaint that they are relying on a warranty that we provided as part of the sale." (Transcript, P. 4). Appellant's counsel stated, correctly, that Respondents rely on the *Warranty.* Respondents, however, at no time have relied, in any way, on *the Agreement of Sale* and there is

zero basis to say that "equitable estoppel" requires Respondents to comply with the Agreement of Sale. Again, the Agreement of Sale is irrelevant to Appellant's "equitable estoppel" argument..

The Warranty does not meet the requirements of SC Code Ann § 15-48-10. That statute provides that:

> Notice 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.

SC Code Ann § 15-48-10(a).

The Warranty does not comply with the South Carolina Law and therefore "the contract shall not be subject to arbitration."

Appellant's argument that somehow interstate commerce removes the Warranty from the requirements of SC Code Ann § 15-48-10(a), is misplaced.[10] Appellant's argument that this matter is governed by the Federal Arbitration Act ("FAA") is explicitly premised on the Agreement of Sale dated February 12, 2006," attached as Exhibit "A" to the Affidavit of Michael Boyle. *See* Initial Brief of Appellant, P. 20 ("The Agreement between Appellant and the original purchasers was for both the construction and sale of a home, and it is axiomatic that the construction of a home involves interstate commerce."). As stated above, Respondents do not base their claims on the Agreement of Sale, or any other agreement to "construct" a residence.

Appellant's argument that this case falls outside of the well-established residential real estate exception to the FAA is a red hearing. *See Bradley v. Brentwood Homes, Inc.* 398 S.C. 447 (2012)(recognizing "intrastate nature of the sale and purchase of residential real estate" and

10 There is a well-established residential real estate exception to the FAA. *See Bradley v. Brentwood Homes, Inc.* 398 S.C. 447 (2012)(recognizing "intrastate nature of the sale and purchase of residential real estate" and "well-established real estate exception to the FAA"). Ryland implicitly recognized this by referencing the South Carolina Uniform Arbitration Act, § 15-48-10, et seq, on the first page of the Agreement of Sale.

"well-established real estate exception to the FAA"). Respondent's suit is based on the Warranty. Respondents had no involvement with any agreement "for the construction of a home" (Appellant's Initial Brief, P. 20). Respondents' Warranty claim involved a single Charleston area Ryland employee visiting the Home, performing a cursory inspection, and fraudulently denying Respondents' warranty claim. It is absurd to suggest that these actions constitute "interstate commerce." The Warranty is subject to of SC Code Ann § 15-48-10(a) and is invalid.

**b. The Arbitration Provision is Unconscionable.**

Regardless of whether the FAA or South Carolina Uniform Arbitration Act applies, the arbitration provisions are unconscionable. *See Smith v. D.R. Horton, Inc.* 417 S.C. 42 (2016). The Warranty is a contract of adhesion. "[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 v. MSA of Myrtle Bach, Inc.*, 373 S.C. 14, 26-27 (2007).

In South Carolina, when an arbitration clause in a contract of adhesion attempts to waive important rights, the arbitration clause is unenforceable. *See Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15 (2013)(upholding trial court's finding that arbitration clause was unconscionable when home warranty attempted to "disclaim implied warranties" and waive "important remedies," and limit monetary damages.).

The entire dispute resolution mechanism is a sham. Section B-5(c), requiring mediation, as a prerequisite to arbitration, states "After we compete repairs or replacement, if You believe that Our repair work is unsatisfactory, You will have 30 days to file a written request for mediation with CN." (Affidavit of Michael Boyle, Ex. B, Section B-5(c)). However, under Section B-3(d), "*Before* we repair or replace a defective item, We will ask You to acknowledge in writing Your agreement to the proposed repair or replacement and *deliver to US an agreement to release Us*

*with respect to the defect* and any conditions arising from the defect." How can the homeowner pursue mediation, if they believe Appellant's "repair work is unsatisfactory," if the homeowner had to provide a release before the work was performed?

Section B-3, which is intertwined with the dispute resolution procedures of Section B-5 and B-6, purports to give Appellant complete discretion of whether to "repair or replace a defective item, or to pay you the reasonable cost of repair or replacement." The effect of this Section is to "prohibit any monetary damages," at Appellant's sole discretion. A prohibition on "any monetary damages" is "clearly one-sided and oppressive." *Smith v. D.R. Horton, Inc*, 417 S.C. 42, 50 (2016).

The most egregious provision in the Warranty is Section B-6, which reads as follows:

> If You institute arbitration proceedings or litigation against Us or CN for any obligation arising or claimed to have arisen under this Agreement before giving the proper notices and opportunities to cure warranty defects or before finishing the mediation process, as provided under this Agreement, You agree to indemnify US and CN, as appropriate, for all costs and expenses of such arbitration, including reasonable attorney's fees, regardless of whether You have an otherwise legitimate claim under this Agreement.

(Affidavit of Michael Boyle, Ex. B, Section B-6).

The Warranty seeks to discourage homeowners from making "otherwise legitimate" warranty claims by exposing them to financial devastation if they incorrectly navigate the complicated dispute resolution process outlined in the Warranty or fail to participate in the sham mediation procedure administered by CN. Under this procedure homeowners are prohibited from filing suit to challenge the validity of the arbitration procedure itself. If a homeowner does file a lawsuit and challenge the arbitration procedure, Appellant purports to have the right to force that homeowner to pay its attorneys' fees "regardless of whether" the homeowner has "an otherwise legitimate claim under" the Warranty. Appellant purports to have the right to financially destroy any

homeowner who brings a lawsuit to determine the enforceability of the at-issue arbitration provision, *regardless of whether the homeowners' home is falling apart*. This provision prevents South Carolina homeowners from accessing the Courts to determine the validity of an arbitration provision, is unconscionable, and unenforceable.

Additionally, under Section B-5(g) of the Warranty the arbitrator has the ability to award attorney's fees and costs *against the homeowner*. (Affidavit of Michael Boyle, Ex. B, Section B-5(g)). There is no provision that the homeowner's warranty claim must be brought in bad faith or be frivolous in order to expose the homeowner to liability for attorney's fees and costs. If the homeowner makes a claim under the Warranty, and ultimately loses, the homeowner faces the prospect of being liable for tens of thousands (or more likely hundreds of thousands) of dollars in attorneys' fees and arbitration fees. A home is the biggest investment a family will likely ever make. It is inconceivable that Appellant puts homeowners in the position of facing financial devastation for attempting to address construction defects in their homes.

Courts from around the country have invalidated arbitration provisions requiring unsuccessful consumers to pay the prevailing corporation's attorney's fees. *See DeVito v. Autos Direct Online, Inc.*, 37 N.E.3d 194, 203-205 (2015-Ohio-3336)("Loser Pays" provision in consumer arbitration provision is unconscionable. "The prospect of incurring these onerous costs and fees has the chilling effect of stopping cold a substantial number of potential claimants from seeking to vindicate their statutory rights . . . for most persons who would utilize this disguised remedy, an adverse ruling could spell financial disaster. . . We further conclude the loser-pays provision, which requires the nonprevailing party to pay attorney fees even if the consumer has not filed the action in bad faith, is against public policy.") (Christopher and Natalie Duvall's Memorandum in Opposition to The Ryland Group, Inc.'s Motion to Compel Arbitration, April 29,

Ex. 8); S*ee also Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wash.2d 598, 606, 293 P.3d 1197, 1201 (Wash. 2013)( "Because the 'loser pays' provision serves to benefit only [Defendant] and, contrary to the legislature's intent, effectively chills [the consumer's] ability to bring suit . . . it is one-sided and overly harsh. Therefore, we hold it to be substantively unconscionable.").

The punitive nature of Section B-5(g) and Section B-6 would require homeowners to risk financial ruin in order to address construction defects in their homes. Section B-6 completely shields Ryland's Warranty form from judicial scrutiny. This is unconscionable and against public policy.

Appellant's argument that the arbitration provisions in Section B-5(g) and B-6, are severable from the Arbitration provisions is plainly wrong. Both B-5(g) and B-6, are integral parts of the arbitration provision itself. Indeed, Section B-6 would be meaningless but for its reference to the "proper notices and opportunities to cure" referenced in Section B-5. *See Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49 (2016)("The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision."). Section B-3(d), requiring a release from the homeowner *before* any repair or replacement is performed, potentially renders the entire mediation and arbitration provisions meaningless. A release has to be entered into before the work is done, and mediation does not occur until "[a]fter We complete repairs or replacement." Arbitration is not allowed until after mediation is exhausted.

The entire dispute resolution procedure is unconscionable. If a homeowner is lucky enough to have not signed a release prior to the repair or replacement, able to navigate the various timing requirements, able to pay for mediation, and then initiate arbitration, they are still potentially on the hook for Appellant's attorney's fees and costs. If they miss any steps along the

way to arbitration the homeowner is required to indemnify Appellant "for all costs and expenses of such arbitration, including reasonable attorney's fees, regardless of whether You have an otherwise legitimate claim under this Agreement." Appellant's Warranty amounts to a tool to intimidate homeowners and prevent them from filing legitimate construction defect claims.

## CONCLUSION

Appellant has undeniably waived arbitration by engaging in extensive discovery. Even absent waiver, the Warranty does not meet the requirements of SC Code Ann § 15-48-10. The arbitration provision requiring homeowners' with legitimate claims to pay Appellant's attorney's fees if they seek judicial review of the enforceability of the arbitration provisions, along with its "loser pays" requirements, render the arbitration provisions unconscionable.

For all of these reasons this Court should AFFIRM the Order denying Ryland's Motion to Compel Arbitration.

Respectfully submitted,

April 27, 2017

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STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY

Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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Case No. 2015-CP-08-1213

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Christopher Duvall and Natalie Duvall, ..... Plaintiffs,

v.

The Ryland Group, Inc., ..... Defendant,

And

The Ryland Group, Inc. ..... Third-Party Plaintiff,

v.

Land Site Services, Inc., Carolina Consulting Engineers, Inc., Higdon Concrete, LLC, A.C. Construction, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc., ..... Third-Party Defendants,

Of which The Ryland Group, Inc. is the ..... Appellant,
And

Of which Christopher Duvall and Natalie Duvall, Land Site Services, Inc., Carolina Consulting Engineers, Inc., and Stark Truss Company, Inc. a/k/a Stark Truss Company of Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. are ..... Respondents.

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that on April 27, 2017 he served a copy of the ***Amended Initial Brief of Respondents Christopher Duvall and Natalie Duvall*** by depositing the same in the U.S. Mail, First Class postage prepaid, and addressed to the following:

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April 27, 2017

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Christopher Duvall and Natalie Duvall, et al v. The Ryland Group, Inc. et al*
Appellate Case No.: 2016-01825
Our File No. 77-35

Dear Ms. Kitchings:

In regard to Appellate Case No.: 2016-01825, and pursuant to the Court's Order filed April 7, 2017, I am enclosing an original and one (1) copy of the Amended Initial Brief of Respondents Christopher Duvall and Natalie Duvall and the original and one (1) copy of Respondents Christopher Duvall and Natalie Duvall's Amended Designation of Matter to be Included in Record on Appeal for filing, together with Certificates of Service for each document.

Kindly return a clocked copy of the Amended Brief and the Amended Designation to me in the self-addressed, stamped envelope that is enclosed.

Very truly yours,

James Taylor Anderson, III

JTAIII/ads
Enclosure

cc: **Via U.S. Mail w/ encls.**
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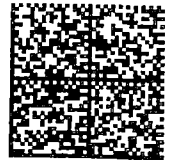

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