THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-001825
Trial Court Case No. 2015-CP-08-01213

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., 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. are the Respondents.

FINAL BRIEF OF APPELLANT

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I. DID THE CIRCUIT COURT ERR IN DENYING APPELLANT'S MOTION TO COMPEL ARBITRATION OF PARTIES' CLAIMS?

STATEMENT OF THE CASE

This appeal is from an interlocutory order denying a motion to compel arbitration entered in a pending construction defect case.

Appellant The Ryland Group, Inc. ("Appellant") constructed the subject residence, which was completed on September 18, 2006, and sold to the original purchasers. (Appellant's Mem. Supp. Mot. to Compel Arbitration p. 2) (R. p. 89). The residence was then purchased by Respondents Christopher and Natalie Duvall ("Duvalls"), the current owners, on or around December 31, 2008. (Appellant's Mem. Supp. Mot. to Compel Arbitration p. 2) (R. p. 89). Duvalls filed their Complaint against Appellant on May 20, 2015, alleging that structural defects, including but not limited to, cracking in the foundation exist in their residence. (Compl.) (R. pp. 11-18). The Complaint includes a claim that Appellant breached the express written warranties provided with the original sale of the home. (Compl., ¶¶ 13-17) (R. p. 15). Subsequently, Appellant asserted claims against the subcontractors who performed work and provided materials for the subject residence and whose work and services are implicated by Duvalls' claims of alleged defects, and also included an affirmative defense that the dispute was subject to a mandatory arbitration provision.[1] (Appellant's Am. Answer to Duvalls' Compl. and Third-Party Compl.) (R. pp. 56-72).

[1] Appellant also included this reservation of all arbitration rights in its Answer to Duvalls' Complaint filed on July 28, 2015, Appellant's first responsive pleading in this case. (Appellant's Answer to Duvalls' Compl.) (R. pp. 19-28).

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 based on the mandatory arbitration provisions contained in the Agreement of Sale between Appellant and the original purchasers and in the applicable Warranty, as well as in the subcontractor agreements between Appellant and Third-Party Defendants. (Appellant's Mot. to Compel Arbitration; Appellant's Mem. Supp. Mot. to Compel Arbitration; Boyle Aff.) (R. pp. 84-87; R. pp. 88-101; R. pp. 102-347). Duvalls and several Third-Party Defendants opposed the motion on the grounds that the arbitration agreements are unenforceable and that Appellant waived its right to compel arbitration. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration; Stark's and Land Site's Mem. Opp'n to Appellant's Mot. to Compel Arbitration; A.C. Construction's Letter Preserving Arg. Opp'n to Appellant's Mot. to Compel Arbitration) (R. pp. 370-497; R. pp. 526-588; R. pp. 655-656). The circuit court heard arguments on Appellant's motion at the hearing on June 27, 2016, and entered a Form 4 Order on June 30, 2016, denying Appellant's motion to compel arbitration. (Tr. of June 27, 2016 Hr'g; Form 4 Order of June 30, 2016) (R. pp. 608-615; R. p. 9).

On July 8, 2016, Appellant filed its motion to reconsider, amend and/or alter the circuit court's order denying Appellant's motion to compel arbitration, which the circuit court denied. (Appellant's Mot. to Recons.; Order of July 29, 2016) (R. pp. 589-594; R. p. 10). Appellant received written notice of entry of the circuit court's order on August 2,

2016, and timely appealed the order denying Appellant's motion to reconsider by way of a notice of appeal filed and served on August 30, 2016.

ARGUMENTS

I. APPELLANT DID NOT WAIVE ITS RIGHT TO COMPEL ARBITRATION.

At the hearing on Appellant's motion to compel arbitration, the circuit court did not specifically consider the enforceability and the scope of the arbitration provisions in the parties' agreements and denied Appellant's motion to compel arbitration based on its finding that Appellant waived its right to compel arbitration. (Tr. of June 27, 2016 Hr'g pp. 6-7) (R. pp. 613-614). The circuit court erred in finding that Appellant waived its right to compel arbitration and in denying Appellant's motion to compel arbitration.

"The party seeking to establish waiver has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration." *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001). "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. Furthermore, it is the policy of this state to favor arbitration of disputes." *Id.* (citations omitted). Mere inconvenience or delay is insufficient to establish prejudice on its own. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003); *Rich v. Walsh*, 357 S.C. 64, 72, 590 S.E.2d 506, 510 (Ct. App. 2003) ("[M]ere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions."). The Fourth Circuit Court of Appeals has found that a party waives, or defaults, its right to arbitration only when the party seeking to enforce an arbitration clause "so substantially utiliz[ed] the litigation machinery that to subsequently

permit arbitration would prejudice the party opposing [enforcement of the provision]." *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004) (quoting *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985)). "[E]ven in cases where the party seeking arbitration has invoked the litigation machinery to some degree, the dispositive question is whether the party objecting to arbitration has suffered *actual prejudice*." *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001) (emphasis in original) (citation omitted) (internal quotation marks omitted).

A. The Facts Evidencing Merely Limited Discovery Prior to Appellant's Motion to Compel Arbitration

Duvalls filed their Complaint against Appellant on May 20, 2015. (Compl.) (R. pp. 11-18). Following the instigation of the lawsuit and by way of an early attempt to resolve this matter with Duvalls in accordance with the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, Appellant and its engineer made certain preliminary investigations of the subject residence in July 2015. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration p. 3) (R. p. 372). Appellant filed its first responsive pleading on July 28, 2015, in which Appellant included an affirmative defense reserving all arbitration rights. (Appellant's Answer to Duvalls' Compl.) (R. pp. 19-28). Appellant provided its written responses to Duvalls' discovery requests on December 4, 2015. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration p. 4) (R. p. 373). Further, on December 4, 2015, Appellant obtained a consent order to amend Appellant's pleading and add third-party claims against Third-Party Defendants. (Consent Order Allowing Appellant's Am. Answer) (R. pp. 3-6). On December 10, 2015, Appellant filed its amended responsive pleading in which it added third-party claims against its subcontractors, the above-captioned Third-Party Defendants, and in

which Appellant again included an affirmative defense that the dispute was subject to a mandatory arbitration provision. (Appellant's Am. Answer to Duvall's Compl. and Third-Party Compl.) (R. pp. 54-72).

When early settlement discussions with Duvalls were unsuccessful, Appellant issued a request to install crack monitors on the subject residence. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration p. 4) (R. p. 373). Because Duvalls refused Appellant's request, Appellant filed a motion to compel the installation of crack monitors, which the circuit court granted on January 21, 2016. (Order Granting Appellant's Mot. Compel) (R. pp. 7-8). The crack monitors were installed by Appellant's engineer on January 28, 2016, and Appellant's engineer read the monitors only once on March 7, 2016. (Duvalls' Mem. Opp'n to Appellant's Mot. to Compel Arbitration p. 5) (R. p. 374). Following Duvalls' continued refusal to engage in meaningful settlement negotiations with Appellant premised on the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, on March 17, 2016, Appellant moved forward with compelling arbitration of Duvalls' claims and of Appellant's third-party claims against Third-Party Defendants. (Appellant's Mot. to Compel Arbitration; Appellant's Mem. Supp. Mot. to Compel Arbitration; Boyle Aff.) (R. pp. 84-87; R. pp. 88-101; R. pp. 102-347).

Admittedly, Appellant engaged in certain limited discovery prior to moving to compel arbitration. However, the mere fact that Appellant invoked the litigation machinery to some minimal degree does not automatically mean Appellant waived its arbitration rights, and the dispositive question is whether Duvalls have suffered actual prejudice. As in all waiver cases, any appropriate analysis is heavily fact-driven. In

determining whether a party waived its right to compel arbitration, courts generally consider the following factors: "(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." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

B. The Length of Time Prior to Appellant's Motion to Compel Arbitration Was Not Substantial

Appellant filed its motion to compel arbitration less than ten months after Duvalls filed this lawsuit. South Carolina courts have compelled arbitration when even more time has elapsed. *Compare Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (a five year period involving significant discovery constitutes waiver), *and Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003) (a nineteen month period that includes the exchange of written discovery and the taking of depositions demonstrates waiver), *with Toler's Cove*, 355 S.C. at 612, 586 S.E.2d at 585 (a thirteenth month period where discovery was "very limited in nature and the parties had not availed themselves of the court's assistance," and "[r]espondent had not held any depositions" did not constitute waiver), *and Rich v. Walsh*, 357 S.C. at 67, 590 S.E.2d at 507 (a thirteenth month period with limited discovery and one deposition did not demonstrate waiver).

C. The Extent of Discovery Prior to Appellant's Motion to Compel Arbitration Was Limited

The extent of discovery, in conjunction with the status of the case on the trial docket, establishes the degree of prejudice sustained by the party opposing arbitration.

See Rhodes, 374 S.C. at 128, 647 S.E.2d at 252. South Carolina courts are more accepting of "routine" paper discovery, whereas discovery efforts such as depositions and those which "involve substantial time, effort and money" establish more than a "mere inconvenience" to the party opposing arbitration. *See id.* at 128 & n.3, 647 S.E.2d at 252. The extent of discovery in which Appellant engaged prior to moving to compel arbitration largely was related to the settlement negotiations with Duvalls premised on the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act. Further, the extent of such discovery was minimal, and the facts of the present case are likened to those of *Gen. Equip. & Supply Co.*, in which the court found no evidence of prejudice from delay in demanding arbitration where a party sought arbitration after less than eight months of litigation which "consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories" and the parties availed themselves of the court's services only twice before the motion seeking arbitration was filed. 344 S.C. at 557, 544 S.E.2d at 645. In the case at bar, Appellant only responded to "routine" written discovery requests of Duvalls and no depositions have been taken. While Appellant availed itself of the court's services on two occasions, the facts of the present case are easily distinguishable from that of *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665-67, 521 S.E.2d 749, 753-54 (Ct. App. 1999), in which the court found that waiver occurred due to the party availing itself of the court's assistance on *40 separate occasions* over the course of *two and a half years*.

The facts of *Rich v. Walsh* are also similar to the facts of the present case, which further supports the conclusion that Appellant did not waive its right to compel

arbitration. In *Rich v. Walsh*, the court held that the defendant did not waive its right to enforce arbitration even though it participated in limited discovery before it filed its motion to compel arbitration. *Id.* at 67, 590 S.E.2d at 507. Between the filing of the complaint and the motion to compel arbitration, which was approximately thirteen months, the defendant participated in the following discovery efforts: the defendant submitted one set of interrogatories and one set of requests to admit, the defendant provided responses to standard interrogatories, the defendant took a brief deposition of the plaintiff, and the defendant filed one motion to compel discovery, which was subsequently settled. *Id.* at 72-73, 590 S.E.2d at 510. Because discovery was very limited, the court reasoned the defendant did not waive its right to compel arbitration and vacated and remanded the case. *Id.* at 72-73, 590 S.E.2d at 510-11.

D. Duvalls Failed to Show They Were Prejudiced By the Delay in Seeking Arbitration

The dispositive question of what constitutes waiver of the right to arbitrate is whether Duvalls have suffered actual prejudice. Duvalls have the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration. As the court in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 387–88, 759 S.E.2d 727, 736 (2014) explained:

> [T]he FAA requires courts to resolve any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or *an allegation of waiver, delay*, or a like defense to arbitrability. Thus, there is a presumption against finding a party has waived its right to compel arbitration, and a party seeking to prove a waiver of a right to arbitrate carries a heavy burden . . . .

Id. (emphasis in original) (citations omitted) (internal quotation marks omitted).

The mere fact that Appellant invoked the litigation machinery to some minimal degree does not automatically mean Appellant waived its arbitration rights. Appellant did not "so substantially utilize the litigation machinery" prior to moving to compel arbitration that allowing arbitration would prejudice Duvalls. Duvalls cannot show that such limited discovery involved "substantial time, effort and money" on their part. In fact, similar to *Rich v. Walsh*, "the period in question was marked mostly by inactivity or otherwise minimal discovery efforts." *Id.* at 72, 590 S.E.2d at 510. Thus, Duvalls have not met their "heavy burden" and failed to establish that they suffered prejudice or anything more than a "mere inconvenience" during the minimal discovery that occurred prior to Appellant's filing of its motion to compel arbitration.

Because Duvalls failed to show that they suffered actual prejudice from the minimal delay in Appellant's filing of its motion to compel arbitration and from the limited discovery efforts in which the parties engaged prior to the filing of the motion, the circuit court erred in finding that Appellant waived its right to compel arbitration and in denying Appellant's motion to compel arbitration. Accordingly, pursuant to its *de novo* standard of review, *see Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007), this Court should reverse the circuit court's denial of the motion to compel arbitration.

II. BECAUSE BINDING, ENFORCEABLE ARBITRATION AGREEMENTS EXIST THAT COVER THE PARTIES' CLAIMS, THE COURT ERRED IN NOT COMPELLING ARBITRATION.

While the circuit court did not specifically consider the enforceability and the scope of the arbitration provisions in the parties' agreements at the hearing on Appellant's motion to compel arbitration, the circuit court did state that all memoranda were incorporated for purposes of review. (Tr. of June 27, 2016 Hr'g p. 5) (R. p. 612).

Accordingly, because Duvalls and Third-Party Defendants raised additional arguments in their opposition to Appellant's demand for arbitration, Appellant sets forth below additional grounds in support of its argument that the circuit court erred in denying Appellant's motion to compel arbitration.

Whether brought under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1, *et seq.*, or the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10, *et seq.*, federal and South Carolina courts clearly favor arbitration of disputes. *See O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997) (stating that the FAA represents "a liberal federal policy favoring arbitration agreements."); *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 59, 791 S.E.2d 286, 291 (Ct. App. 2016) ("The policy of the United States and South Carolina is to favor arbitration of disputes."). Because of the preference for arbitration, when making these determinations, courts must resolve any doubts concerning the application and scope of arbitration agreements in favor of arbitration. *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596-97, 553 S.E.2d 110, 118 (2001).

A. The Parties' Agreements with Appellant Contain Binding Arbitration Provisions

The residence at issue in this litigation was purchased from Appellant by the original purchasers pursuant to the Agreement of Sale dated February 12, 2006 (the "Agreement"). (Boyle Aff., Ex. A) (R. pp. 106-136). The first page of the Agreement contains a statement at the top typed in underlined, bold capital letters that states that "**THIS AGREEMENT CONTAINS A BINDING IRREVOCABLE AGREEMENT TO ARBITRATE.**" (Boyle Aff., Ex. A, p. 1) (R. p. 106). The Agreement further

provides that "**ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT, THE PROPERTY, . . . PURCHASE OF THE PROPERTY OR . . . CONSTRUCTION OF THE HOME SHALL BE SETTLED BY BINDING ARBITRATION . . . .**" (Boyle Aff., Ex. A, ¶ 10) (R. p. 108). The original purchasers of the subject residence also signed the Warranty Enrollment Form on September 22, 2006, which enrolled the subject residence in the Ryland Home Warranty Program (the "Warranty"). (Boyle Aff., Ex. B) (R. pp. 137-183). The Warranty is specifically referenced in the Agreement, in which the original purchasers agreed to accept the Warranty as the only warranty from Appellant. (Boyle Aff., Ex. A, ¶ 18) (R. p. 109). The first substantive page of the Warranty contains a statement in bold capital letters that states that "**THIS AGREEMENT INCLUDES PROCEDURES FOR INFORMAL SETTLEMENT OF DISPUTES, INCLUDING . . . BINDING ARBITRATION IN ACCORDANCE WITH THE PROCEDURES OF THE FEDERAL ARBITRATION ACT.**" (Boyle Aff., Ex. B) (R. p. 144). The Warranty further provides that any dispute with Appellant "shall be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act . . . ." (Boyle Aff., Ex. B, ¶ 5e) (R. p. 150). At no time have Duvalls disputed the validity of the Agreement or the Warranty. In fact, Duvalls have brought claims against Appellant based on the Warranty. (Compl., ¶¶ 6, 11-22) (R. pp. 14-16).

While Duvalls are subsequent purchasers of the subject residence, Duvalls have specifically pled claims for breach of the Warranty issued by Appellant to the original purchasers for structural deficiencies. (Compl.) (R. pp. 14-18). Because Duvalls are asserting specific rights under the original Agreement and Warranty, Duvalls become

obligated to the provisions of that Agreement and Warranty, including the arbitration provisions contained therein. In *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), the South Carolina Court of Appeals held that when a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine of equitable estoppel estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause. Similarly, in *Wilson v. Willis*, 416 S.C. 395, 417-18, 786 S.E.2d 571, 582-83 (Ct. App. 2016), the South Carolina Court of Appeals recently held that the parties were equitably estopped from arguing their status as nonsignatories precluded enforcement of the arbitration provision when their complaints sought to benefit from the enforcement of other provisions in the agreement because "the allegations in their complaints necessarily depend[ed] upon the terms, authority, and duties created and imposed by that agreement." *Id.* Interpreting South Carolina law, the Fourth Circuit Court of Appeals similarly has held that "[a] nonsignatory is estopped from refusing to comply with an arbitration clause when it [is seeking or] receives a direct benefit from a contract containing an arbitration clause." *R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157 (4th Cir. 2004) (citing *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

Appellant's agreements with its subcontractors, the above-captioned Third-Party Defendants, also contain clear, unambiguous, and binding arbitration provisions. Appellant entered into agreements with its subcontractors, Third-Party Defendants Land Site Services, Inc. ("Land Site"), Higdon Concrete, LLC ("Higdon")[2], A.C. Construction, Inc. ("A.C. Construction"), and Stark Truss Company, Inc. a/k/a Stark Truss Company of

[2] To date, no answer has been filed on behalf of Higdon and no counsel has appeared on its behalf.

Summerville, Ltd. a/k/a Stark Truss, Inc. d/b/a Carolina Truss Systems, Inc. ("Stark"), which agreements relate to these subcontractors' work and materials provided for the residence that is the subject of this litigation. (Boyle Aff., Ex. C-D and F-G) (R. pp. 184-238, 260-312). The agreements between Appellant and Land Site, Higdon, A.C. Construction, and Stark all require the arbitration of "any dispute arising out of or relating to" these subcontractors' work or any breach of the agreements. (Boyle Aff., Ex. C-D and F-G, ¶ 16) (R. pp. 186, 210, 262, 288). Appellant also entered into an agreement with its subcontractor Third-Party Defendant Carolina Consulting Engineers, Inc. ("CCE") that relates to CCE's work and services provided for the subject residence. (Boyle Aff., Ex. E) (R. pp. 239-259). The agreement between CCE and Appellant requires the arbitration of "**ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO**" CCE's work and services or any breach of the agreement. (Boyle Aff., Ex. E, ¶ 7) (R. pp. 241-242). The agreement between CCE and Appellant further provides that the arbitration shall be "**PURSUANT TO THE FEDERAL ARBITRATION ACT** . . . ." (Boyle Aff., Ex. E, ¶ 7) (R. pp. 241-242).

Where, as here, "an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Ellie, Inc. v. Miccichi,* 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) (citation omitted) (internal quotation marks omitted). The parties cannot claim that they had no notice that they agreed to arbitrate any claims. Again, the mandatory binding arbitration provision is found in the Warranty for the subject residence on which Duvalls rely in bringing their claims against Appellant. (Boyle Aff., Ex. B; Compl.) (R. pp. 137-183; R. pp. 14-18). Similarly,

Appellant's agreements with its subcontractors, Third-Party Defendants Land Site, Higdon, CCE, A.C. Construction, and Stark, also contain clear and unambiguous arbitration provisions. (Boyle Aff., Ex. C-G) (R. pp. 184-312). In *Towles v. United Healthcare Corp.*, the plaintiff argued that he had no notice of an arbitration agreement because the arbitration clause was incorporated by reference in an acknowledgement that plaintiff had signed. *Towles*, 338 S.C. 29, 38-40, 524 S.E.2d 839, 844-45 (Ct. App. 1999). The Court of Appeals rejected that argument, stating that "[a]fter receiving and signing the acknowledgement, [the plaintiff] cannot legitimately claim [the defendant] failed to provide actual notice of the arbitration provisions because the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Id.* at 39, 524 S.E.2d at 845 (citing *Citizens & S. Nat'l Bank of S.C. v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994); *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986) (noting that "every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it")).

B. The FAA Governs

The parties' agreements with Appellant involved interstate commerce and are governed by the FAA. The FAA applies to any arbitration agreement in a contract for a transaction that involves interstate commerce. *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 281 (1996). The first substantive page of the Warranty for Duvalls' residence on which Duvalls rely in bringing their claims against Appellant contains a statement in bold capital letters that states that "**THIS AGREEMENT INCLUDES PROCEDURES FOR INFORMAL SETTLEMENT OF DISPUTES, INCLUDING . . . BINDING ARBITRATION IN ACCORDANCE WITH THE**

PROCEDURES OF THE FEDERAL ARBITRATION ACT." (Boyle Aff., Ex. B) (R. p. 144). The Warranty further expressly stipulates that any dispute with Appellant "shall be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act . . . ." (Boyle Aff., Ex. B, ¶ 5e) (R. p. 150).

While the South Carolina Supreme Court has held that the "purchase and sale of residential real estate" is an intrastate transaction, and thus not subject to the FAA, *see Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012), that decision is of no impact here. 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. *See Zabinski*, 346 S.C. at 594-95, 553 S.E.2d at 117-18 (holding that the development and sale of apartments "involved interstate commerce because the partnership utilized out-of-state materials, contractors, and investors"). Even if Appellant and the original purchasers, and by extension Duvalls, did not expressly agree that the construction and sale of the residence involved interstate commerce, which Appellant denies, South Carolina courts essentially accept it as given that construction involves interstate commerce. *See Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) ("It would be virtually impossible to construct [a housing project for the elderly] with materials, equipment and supplies all produced and manufactured solely within the State of South Carolina.").

Evidencing that the Agreement was for the construction of a home, the original purchasers entered into the Agreement on or around February 12, 2006 (Boyle Aff., Ex. A) (R. pp. 106-136), and the building permit for the residence was not issued until September 18, 2006. (Appellant's Mem. Supp. Mot. to Compel Arbitration p. 2) (R. p.

89). The Agreement clearly provides for the construction of a home, rather than merely the purchase of a completed home, as evidenced by, among other things, the following:

- Page 1 provides September 22, 2006, as the estimated date of substantial completion, requires the original purchasers to make option selections within a specified time, and sets forth deposit amounts to be paid by the original purchasers upon completion of design selections and prior to the start of construction.
- Page 1 defines the "Property" as the "Home site and the Home that [Appellant] will construct."
- Section 2 sets forth the details concerning the construction of the home, stating, among other things, that "[c]onstruction will substantially follow the Home blueprints and the Customer Selected Option Sheet", that [Appellant] "reserve[s] the right to make changes in the Home Plan as [Appellant] deem[s] reasonably appropriate", and the original purchasers confirmed by way of initials that they reviewed and accepted the blueprints and the record plat for the home.
- Section 3 provides for delays in construction and states: "Substantial Completion may occur before or after the Estimated Date of Substantial Completion, but not later than One (1) year from the Agreement of Sale Date, unless delayed by circumstances or conditions beyond [Appellant's] control."
- Section 10 provides for mandatory and binding arbitration in the event a dispute arises out of the "purchase of the property or [Appellant's] construction of the home."

(Boyle Aff., Ex. A, pp. 1-3) (R. pp. 106-108). Additionally, review of the purchase and construction file for the residence evidences that the original purchasers were contracting for the construction and purchase of a home, rather than merely purchasing a completed home. The various Riders to the Agreement and related materials indicate that the original purchasers had various options and selections with regard to the construction of the home. (Boyle Aff., Ex. A, pp. 9-10, 20, 24-25, 27-29) (R. pp. 114-115, 125, 129-130, 132-134). Therefore, the Agreement was for both the construction and sale of a home, and was not merely the purchase and sale of residential real estate.

Furthermore, the construction and sale of the residence involved interstate commerce. Appellant has provided specific instances of the involvement of interstate commerce in the construction of the subject residence. (Boyle Aff. ¶¶ 8-11) (R. pp. 104-105). Because the subcontractor agreements "contemplated the use of materials manufactured outside the state of South Carolina" and could not be performed "without the use of materials in interstate commerce," the claims against Third-Party Defendants subcontractors also implicate interstate commerce and are subject to the FAA. *See Blanton v. Stathos*, 351 S.C. 534, 541, 570 S.E.2d 565, 569 (Ct. App. 2002) (determining that a contract for design and architectural services in the construction of a restaurant in South Carolina involved interstate commerce).

In light of the foregoing, the Agreement was for both the construction and sale of a home, that transaction involved interstate commerce, and therefore, the FAA governs the arbitration provisions in the parties' agreements with Appellant. Thus, even if Duvalls or Third-Party Defendants point to any state law to void the arbitration provisions, such law cannot stand against the preemptive effect of the FAA. As the

South Carolina Supreme Court has stated, the "federal policy favoring arbitration, as expressed in the FAA, is binding in state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements." *Toler's Cove*, 355 S.C. at 611, 586 S.E.2d at 584.

C. The Scope of the Arbitration Agreements Covers the Relevant Claims

Duvalls' allegations that structural defects, including, but not limited to, cracking in the foundation, exist in their residence clearly fall within the ambit of the arbitration provision contained in the Agreement and the Warranty. (Compl.) (R. pp. 14-18). The Agreement and the Warranty relate to the residence that Appellant sold to the original purchasers, who then sold it to Duvalls, and Duvalls' claims in the Complaint directly relate to the construction of the residence and assert specific rights under the original Agreement and Warranty. The arbitration provision referenced in the Agreement provides that "**ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT, THE PROPERTY, . . . PURCHASE OF THE PROPERTY OR . . . CONSTRUCTION OF THE HOME SHALL BE SETTLED BY BINDING ARBITRATION . . . .**" (Boyle Aff., Ex. A, ¶ 10) (R. p. 108). Furthermore, the arbitration provision referenced in the Warranty provides that "[a]ny 'unresolved dispute' . . . with [Appellant] shall be submitted to binding arbitration governed by the procedures of the Federal Arbitration Act . . . ." (Boyle Aff., Ex. B, ¶ 5e) (R. p. 150). The Warranty defines the term "unresolved dispute" to mean

> all claims, demands, disputes, controversies, and differences that may arise between You[3] and Your Builder[4], including without limitation,

[3] The term "You" is defined in the Warranty as a term "referring to the Home Owner," and the term "Home Owner" is defined in the Warranty as including "the first purchaser of the Home and any and all

> disputes: (1) as to events, representations, or omissions which pre-date this Agreement; (2) arising out of this Agreement or other action performed or to be performed by Your Builder pursuant to this Agreement; (3) as to repairs or warranty claims arising during the term of this Agreement; or (4) as to repairs or replacements made or the reasonableness of costs offered for any defect covered by this Agreement . . . .

(Boyle Aff., Ex. B, ¶ 5f) (R. p. 151). Therefore, the arbitration provisions of the Agreement and the Warranty encompass the claims alleged in Duvalls' Complaint, and those claims are subject to mandatory arbitration as provided for in the Agreement and the Warranty.

Similarly, the agreements between Appellant and its subcontractors, Third-Party Defendants Land Site, Higdon, CCE, A.C. Construction, and Stark, contemplate the arbitration of Appellant's third-party claims for breach of contract, breach of warranty, negligence, and indemnification against the subcontractors. Specifically, the agreements with Land Site, Higdon, A.C. Construction, and Stark all provide that "any dispute arising out of or relating to this Agreement or the breach, termination or validity thereof shall be settled by binding arbitration . . . ." (Boyle Aff., Ex. C-D and F-G, ¶ 16) (R. pp. 186, 210, 262, 288). Such agreements further provide that the "parties agree to (a) allow to join into the arbitration proceeding hereunder or (b) join any other arbitration proceeding being conducted by, persons or entities related to the dispute whose involvement may be necessary to completely resolve the dispute, such as (1) a homeowner . . . and (4) Subcontractor's materialmen or subcontractors." (Boyle Aff., Ex. C-D and F-G, ¶ 16) (R. pp. 186, 210, 262, 288). Similarly, the agreement with CCE

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successors in title during the term of this Agreement . . . ." (Boyle Aff., Ex. B, Section A-8 & A-16) (R. pp. 145-146).

[4] The term "Builder" is defined in the Warranty as "[t]he builder of the Home, which is The Ryland Group, Inc. or one of its subsidiaries." (Boyle Aff., Ex. B, Section A-1) (R. p. 145).

provides that the "**PARTIES AGREE THAT ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO THIS AGREEMENT, OR CONSULTANT'S WORK UNDER THIS AGREEMENT SHALL BE SETTLED BY BINDING ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT . . . .**" (Boyle Aff., Ex. E, ¶ 7) (R. pp. 241-242). Therefore, the arbitration provisions of the agreements between Appellant and Third-Party Defendants are implicated by Appellant's third-party claims against Third-Party Defendants for allegedly deficient work performed by Third-Party Defendants on Duvalls' residence that allegedly resulted in structural defects.

Thus, Duvalls' claims against Appellant and Appellant's third-party claims against Third-Party Defendants clearly fall within the scope of the applicable arbitration provisions. *See Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

D. The Arbitration Agreement Is Not Unconscionable

Duvalls failed to establish the unconscionability of the arbitration provision located in the Warranty on which Duvalls rely in bringing their claims against Appellant. (Boyle Aff., Ex. B). Even if the arbitration agreement at issue was an adhesion contract, which Appellant denies, the South Carolina Supreme Court has made clear that adhesion contracts are not per se unconscionable. *See Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. The second prong of the unconscionability analysis requires the determination of whether no reasonable person would make or accept any oppressive or one-sided terms within the arbitration agreement. *See id.* at 24-25, 644 S.E.2d at 668 (stating that an unconscionability analysis has two prongs).

Duvalls' reliance on the *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016) decision is misplaced as the *D.R. Horton* opinion is distinguishable for several reasons. The arbitration, limitation of warranties, and limitation of damages provisions in *D.R. Horton* were contained within the same paragraph 14 entitled "Warranties and Dispute Resolution". *Id.* at 45, 790 S.E.2d at 2. In *D.R. Horton*, the court acknowledged that "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself and not those of the whole contract," but held that "the subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.* at 49, 790 S.E.2d at 4. In the case at bar, Duvalls argue that the following provisions in the Warranty are unconscionable: the limitation of warranties and limitation of damages provisions found on the first page of the Warranty, the limitation of damages provisions found in Section B-3(a) and Section D-19 of the Warranty, and the provision requiring indemnification if the purchasers fail to abide by the appropriate dispute resolution procedures found in Section B-6 of the Warranty. (Boyle Aff., Ex. B, pp. 4, 12, 15, 29) (R. pp. 140, 148, 151, 165). However, the arbitration provision is found in Section B-5 of the Warranty and is contained within entirely separate and distinct paragraphs than the allegedly unconscionable provisions. (Boyle Aff., Ex. B, pp. 14-15) (R. pp. 150-151). Moreover, the court in *D.R. Horton* found that because the arbitration agreement did not contain a severability clause, "the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement." *Id.* at 50 n.6, 790 S.E.2d at 5. Unlike the arbitration agreement in *D.R. Horton*, the Warranty in the present case does contain a severability clause in Section B-7(c), which provides that "[s]hould any

provision of this Agreement be determined by a court of competent jurisdiction to be unenforceable, that determination will not affect the validity of the remaining provisions." (Boyle Aff., Ex. B, p. 16) (R. p. 152). Further, the first page of the Warranty states that "[s]ome states do not allow the exclusion or limitation of . . . damages by a builder so all of the exclusions and limitations may not apply to [the purchaser]." (Boyle Aff., Ex. B, p. 4) (R. p. 140).

The recent *One Bell Hall* opinion provides authority directly on point with regard to Appellant's argument that the arbitration provision is not unconscionable. In *One Belle Hall*, the court held that the trial court "erred in finding the purportedly unenforceable disclaimers and limitations within the 'Legal Remedies' paragraph contributed to the unconscionability of the arbitration agreement." 418 S.C. at 63, 791 S.E.2d at 293. The court also found that the trial court "erred in finding the arbitration agreement was not separable from other allegedly unconscionable provisions that precede the arbitration agreement on page five" and that "these provisions [were] clearly outside the arbitration agreement." *Id.* at 64, 791 S.E.2d at 293. Further, the court stated that because the "Legal Remedies" paragraph contained a severability clause, it was unable to conclude that the allegedly unconscionable disclaimers and limitations within that paragraph were oppressive "because they would not apply in the underlying dispute if the arbitrator found they violated South Carolina law." *Id.* at 64 & n.7, 791 S.E.2d at 293. Moreover, the court specifically recognized that the appellant in that case "used language to the effect that any attempted disclaimer or limitation did not apply to purchasers in jurisdictions that disallowed them." *Id.* at 63-64, 791 S.E.2d at 293.

Finally, Duvalls argue that the Warranty provision found in Section B-5(g) that allows the arbitrator to award attorneys' fees to the prevailing party is unconscionable. (Boyle Aff., Ex. B, p. 15). Duvalls, however, do not reference any South Carolina authority that would support their argument that such a provision in an arbitration agreement is unconscionable. The attorneys' fees provision at issue is a mutual obligation applicable to both parties, and this mutuality causes the term to not be oppressive or unconscionable. In addition, the provision does not state that the arbitrator is *required* to award attorneys' fees to the prevailing party but merely states that the "[a]rbitrator will have the authority to award costs, including reasonable attorneys' fees . . . to the substantially prevailing party in such arbitration." (Boyle Aff., Ex. B, p. 15) (R. p. 151). Nothing in the attorneys' fees provision would prevent the facilitation of an unbiased decision by the arbitrator. *See One Bell Hall*, 418 S.C. at 64-65, 791 S.E.2d at 294 ("arbitration provision [must] facilitate[] an unbiased decision by a neutral decisionmaker in the event of a dispute"); *see also Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 (stating courts should generally focus on whether an arbitration clause is "geared towards achieving an unbiased decision by a neutral decision-maker").

In light of the foregoing, because the parties' agreements with Appellant contain unambiguous, mandatory, and binding arbitration provisions whose scope covers Duvalls' claims against Appellant and Appellant's third-party claims against Third-Party Defendants and because such arbitration provisions are not unconscionable but are valid and enforceable, the circuit court erred in denying Appellant's motion to compel arbitration. Accordingly, exercising its *de novo* review, this Court should reverse the circuit court's denial of the motion to compel arbitration.

CONCLUSION

For the reasons stated herein, the circuit court erred in denying Appellant's motion to compel arbitration and this Court should reverse the decision of the circuit court.

Respectfully submitted,

July 13, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2016-001825
Trial Court Case No. 2015-CP-08-01213

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., 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. are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that the Final Brief of Appellant complies with Rule 211(b), SCACR.

July 17, 2017

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