ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2011-CP-46-00796

Ralph Wayne Parsons, Jr. and Louise C. Parsons, ... Respondents,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., ... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant.

BRIEF OF APPELLANT JOHN WIELAND HOMES AND NEIGHBORHOODS OF THE CAROLINAS, INC.

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II. Did the circuit court commit an error of law in finding that the Parsons' claims for failing to discover, remediate and/or disclose hazardous substances buried on the property by a previous owner allege outrageous conduct which was unanticipated and unforeseeable to a reasonable consumer?

STATEMENT OF THE CASE

On February 24, 2011, Respondents Ralph Wayne Parsons, Jr. and Louise C. Parsons (the "Parsons") filed a complaint against Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes"), Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., alleging causes of action for rescission, breach of contract, breach of implied warranties, fraud, negligent misrepresentation, negligence/gross negligence, and violation of the South Carolina Unfair Trade Practices Act. **R.pp.7-16.**

These causes of action arose out of the conveyance of real property located at 4270 Rochard Lane in Fort Mill, South Carolina, (the "Property") from John Wieland Homes to the Parsons in 2007. **R.pp.7-16; R.pp.57-61.** The Parsons named Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A., as defendants "solely by reason of their mortgages on the property that is the subject of this action and Plaintiffs' claim for rescission." **R.p.8, ¶5.**

The Parsons allege John Wieland Homes knew or should have known that there were hazard substances buried on the Property by a previous owner because the previous owner utilized the tract on which the Property is located as an "industrial site" and because this use included underground pipes buried on the Property. **R.pp.7-16.** The Parsons assert John Wieland Homes breached a duty to disclose these hazardous substances to the Parsons prior to the

Parsons' purchase of the Property. **R.pp.7-16.** The Complaint seeks to rescind the contract or obtain damages for the decline in value of the Property due to the presence of alleged hazardous substances thereon. **R.pp.7-16.**

On June 10, 2011, John Wieland Homes moved to compel arbitration pursuant to an arbitration clause incorporated into the purchase contract between John Wieland Homes and the Parsons. **R.pp.55-56.**

On September 15, 2011, the circuit court held a hearing on the motion to compel arbitration. **R.p.17.** By order filed on October 10, 2011, the circuit court ruled that the causes of action alleged by the Parsons were not covered by the arbitration clause because the express warranties provided by John Wieland Homes, which were also incorporated by reference into the purchase contract, specifically excluded any claims not provided for in the express warranties. **R.pp.2-6.** The circuit court further held that the Parsons alleged conduct by John Wieland Homes which was so outrageous that a reasonable consumer would not have foreseen that the conduct was subject to the arbitration clause. **R.pp.2-6.**

John Wieland Homes received written notice of entry of the circuit court's order on October 13, 2011. **R.p.168.** On October 19, 2011, John Wieland Homes served notice of its intent to appeal the circuit court's order. **R.pp.168-170.**

FACTS

John Wieland Homes is a corporation organized and existing in the State of Georgia that develops and sells real property, including real property located in South Carolina. **R.pp.111, ¶1, p.113, ¶12.** On November 27, 2002, John Wieland Homes purchased approximately 65 acres of real property in Lancaster County, South Carolina, from Springs Industries, Inc. ("Springs") for the purpose of developing and selling single-family residential lots in a community which

became known as Bridgemill. **R. p.8, ¶7; R.p.112, ¶7.**

Springs previously used a portion of the 65-acre tract for textile storage and fabric cutting. **R.p.112, ¶8.** In the purchase contract between Springs and John Wieland Homes, Springs represented that, to its knowledge, no portion of the tract was being used or had been used as a dump or fill for the disposal, storage, treatment, processing, or handling of hazardous substances. **R.p.113, ¶9.** Springs also represented that the tract was free of all hazardous substances. **R.p.113, ¶9.**

Prior to the closing, John Wieland Homes obtained a Phase I Environmental Assessment that did not reveal the existence of any recognized environmental conditions warranting further investigation. **R.pp.113, ¶¶10-11.** After the closing, John Wieland Homes constructed roads, utilities and other infrastructure on the tract. **R.p.113, ¶12.** John Wieland Homes also removed facilities relating to the prior use of the tract by Springs. **R.p.113, ¶9.**

On March 22, 2006, the Parsons executed an agreement with John Wieland Homes to purchase certain real property located at 5070 Karriker Court in the BridgeHampton subdivision in Fort Mill, South Carolina. **R.p.126, ¶3; R.pp.128-131.** The Parsons simultaneously received a warranty booklet from John Wieland Homes entitled "The Wieland 5-20 Extended Warranty" and executed a separate acknowledgement that they had received this warranty booklet. **R.p.126, ¶3; R.p.167.**

The Parsons ultimately chose to purchase a separate piece of property from John Wieland Homes. **R.pp.126-127, ¶3.** Consequently, on June 30, 2007, the Parsons executed a contract to purchase the Property, utilizing the earnest monies paid toward the Karriker Court property. **R.pp.57-61; R.p.123, ¶4; R.pp.126-27, ¶3.** The Purchase and Sale Agreement executed by the Parsons on June 30, 2007, is almost identical to the Purchase and Sale Agreement for the

Karriker Court property they executed on March 22, 2006. **R.pp.57-61; R.pp.128-131.**

Paragraph 21 of both agreements provides, in pertinent part:

> 21. **Warranty and Arbitration**. Purchaser and Seller hereby agree that, in connection with the sale contemplated by this agreement, Purchaser will be enrolled in the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program, booklet revision date 04/06 (JWH Warranty), *the JWH Warranty being incorporated herein by reference . . . . PURCHASER ACKNOWLEDGES THAT PURCHASER HAS RECEIVED AND READ A COPY OF THE CURRENT JWH WARRANTY AND CONSENTS TO THE TERMS THEREOF, INCLUDING, WITHOUT LIMITATION, THE BINDING ARBITRATION PROVISIONS CONTAINED THEREIN. . . .*

R.p.59, ¶21; R.p.130, ¶21 (emphasis added in italics). The Parsons initialed under this Paragraph 21 in both agreements. **R.p.59, ¶21; R.p.130, ¶21.** Both agreements provide that this paragraph survives closing or termination of the pertinent agreement. **R.p.60, ¶34; R.p.131, ¶34.**

The JWH Warranty attached to both agreements is also more or less identical. **R.pp.62-95; R.pp.137-166.** Section V, Paragraph O in the JWH Warranty provides, in relevant part:

> **Mandatory Binding Arbitration**. Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them. . . .
>
> *Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland* (if any), this warranty, the Home *and/or property on which it is constructed*, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. This applies only to claims or disputes that arise after the later of: (a) the issuance of the final certificate of occupancy for the Home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). *This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.*

. . . .

> WIELAND AND HOMEBUYER(S) HEREBY ACKNOWLEDGE AND AGREE THAT THE ARBITRATION PROCEDURE SET FORTH HEREIN SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE RESOLUTION OF ANY AND ALL DISPUTES ARISING AFTER THE INITIAL CLOSING OF THE PURCHASE OF THE HOME BY THE INITIAL HOMEBUYER(S). WIELAND AND HOMEBUYER(S) HEREBY WAIVE ANY AND ALL OTHER RIGHTS AND REMEDIES AT LAW, IN EQUITY OR OTHERWISE WHICH MIGHT OTHERWISE HAVE BEEN AVAILABLE TO THEM IN CONNECTION WITH ANY SUCH DISPUTES.

R.pp.75-77, §V, ¶O (emphasis added in italics).

While the Parsons contend they were provided the JWH Warranty only after signing the Purchase and Sale Agreement for the Property, they signed an acknowledgement of receipt of the JWH Warranty on March 22, 2006, in association with the purchase contract for the Karriker Court property, and on June 30, 2007, the same day they executed the Purchase and Sale Agreement for the Property. **R.p.123, ¶4; R.p.125; R.p.126,¶3; R.p.167.** As previously mentioned, they also acknowledged that they received *and read* the JWH Warranty in Paragraph 21 of the Purchase and Sale Agreement for both properties. **R.p.59, ¶21; R.p.130, ¶21.**

John Wieland Homes conveyed the Property to the Parsons on October 31, 2007. **R.p.9, ¶13.** According to the Parsons, in July 2008, the Parsons were performing routine irrigation maintenance for a suspected leak in their backyard when they discovered a 4-inch PVC pipe buried on the Property. **R..10, ¶18.** Further investigation revealed a buried 2-inch PVC pipe, and both buried PVC pipes ran the entire width of the backyard. **R.p.10, ¶18.** Beginning in mid-yard, the buried PVC pipes were encased in concrete and were attached to a metal box, also encased in concrete. **R.p.10, ¶18.** The 4-inch PVC pipe and the metal box contained a black sludge. **R.p.10, ¶18.**

The Parsons contacted John Wieland Homes, which arranged for the removal of the pipes and the sludge. **R.p.10, ¶19.** Testing and analysis revealed that the black sludge constituted a hazardous substance. **R.p.10, ¶19.** Consequently, the South Carolina Department of Health and Environmental Control ("DHEC") was contacted in August 2008. **R.p.10, ¶20.**

In October 2008, John Wieland Homes entered into a voluntary cleanup contract with DHEC and undertook the remediation of the hazardous substances and other materials from the Parsons' yard. **R.p.11, ¶22.** A buried 12-inch, cast iron pipe was also discovered during this process. **R.p.11, ¶22.** The tasks spelled out in the voluntary cleanup contract were carried out and paid for by John Wieland Homes. **Resps.' Br., p.1; R.p.116, ¶28.** John Wieland Homes has continued its remediation efforts on the Property and even filed a lawsuit in federal court against Springs for breaching its representations in the purchase contract with John Wieland Homes and for contribution toward the response costs incurred by John Wieland Homes. **R.p.11; R.pp.111-119.**

On February 24, 2011, the Parsons filed the present lawsuit against John Wieland Homes. **R.pp.7-16.** The substantive allegations of the Parsons' complaint allege that John Wieland Homes breached the Purchase and Sale Agreement for the Property by "failing to accurately and fully disclose latent defects with the property"; "selling property that was environmentally contaminated"; and "selling property with known underground pipes, rendering the home worth substantially less than the Plaintiffs [sic] purchase price." **R.p.11, ¶25; R.p.12, ¶30.** As a result, the Parsons requested that the contract be rescinded or, in the alternative, that the Parsons be awarded damages for the alleged breach. **R.p.12, ¶¶27, 31.** The Parsons further allege that John Wieland Homes breached implied warranties of habitability and workmanlike construction in their conveyance of the Property to the Parsons, again requesting damages for the breach of these

warranties. **R.pp.15-16, ¶¶57-60.**

The Parsons also aver that John Wieland Homes "knew or reasonably should have known that Plaintiffs' home had been constructed upon industrial pipes, including hazardous waste and materials" prior to the sale of the Property to the Parsons, that John Wieland Homes intentionally or negligently concealed these facts from the Parsons, and that the Parsons are entitled to recover damages for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence as a result thereof. **R.pp.12-15, ¶¶32-56.**

John Wieland Homes moved to dismiss the Parsons' complaint and compel arbitration on the basis of the arbitration clause referenced and incorporated into the Purchase and Sale Agreement for the Property. **R.pp.55-56.** The circuit court held a hearing on the motion to compel arbitration on September 15, 2011. **R.p.17.** At the hearing, the circuit court asked counsel for John Wieland Homes to read *only* the arbitration clause in the Purchase and Sale Agreement "[b]ecause this is just all about arbitration." **R.p.22:5-10.** In addition, the court recognized: "Well, it's [referring to the Parsons' Complaint] not about contamination. It's about what was on the property." **R.pp.29:24-30:9.**

In briefing and at the hearing, the Parsons contended that "the contract itself specifically says it doesn't apply to this kind of claim . . . ." **R.p.36:16-18.** The Parsons emphasized Section IV of the JWH Warranty, iterating the exclusions *from the warranty*. **R.p.41:11-17.** John Wieland Homes, in turn, explained that the arbitration clause is separable and required to be interpreted independently of the other clauses in the contract. **R.p.47:8-25.**

The Parsons also argued that an arbitration clause is unenforceable "in a situation where the action that is complained of is so egregious that no one could have foreseen that that would have been part of what they were agreeing to arbitrate." **R.p.43:2-11.** In response, John Wieland

Homes distinguished cases relied upon by Parsons, explaining that the alleged conduct of John Wieland Homes—a failure to disclose a condition of the Property about which the Parsons contend it knew or should have known—did not rise to the level of cases where the party seeking to enforce an arbitration clause committed outrageous acts such as a "bait and switch" or the misappropriation of personal financial information or the verbal abuse and intimidation of a debtor. **R.pp.48:24-51:14.** John Wieland Homes also noted that, unlike the precedent cited by the Parsons, the claims asserted by the Parsons in this case have a significant relationship to both the Purchase and Sale Agreement and the condition of the Property, both of which are covered by the arbitration clause. **R.pp.48:24-51:14.**

On October 10, 2011, the circuit court entered an order denying the motion to compel arbitration on two grounds. **R.pp.2-6.** First, the court held: "Because the Warranty does not apply to, and specifically excludes, the claims asserted by Plaintiffs, I find and conclude that the arbitration clause contained therein is also inapplicable." **R.p.5.** Second, the court ruled that "[n]either Plaintiffs, nor reasonable consumers, can be held to have expected the arbitration provisions at issue to apply to such a situation." **R.p.6.** This appeal follows.

STANDARD OF REVIEW

"Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination." New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). "However, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Appeal from the denial of a motion to compel arbitration is subject to de novo review." New Hope, 379 S.C. at 625, 667 S.E.2d at 3.

ARGUMENT

I. The circuit court committed an error of law in interpreting the terms of the warranty instead of the terms of the arbitration clause. The scope of the arbitration clause encompasses the claims asserted by the Parsons.

The scope of the arbitration clause encompasses the Parsons' claims. The circuit court's circumvention of the arbitration clause by looking to the separate warranty provision to determine the scope of the arbitration clause was error. Whether the claims are arbitrable is determined by the terms of the arbitration clause, not the terms of the warranty provision.

The circuit court initially held that "[b]ecause the Warranty does not apply to, and specifically excludes, the claims asserted by the Plaintiffs, I find and conclude that the arbitration clause contained therein is also inapplicable." **R.p.5.** The circuit court erred in its interpretation of the contract. At the risk of repeating the obvious, the warranty provision determines the scope of defects subject to the warranty, while the arbitration clause determines the scope of claims subject to arbitration.

The arbitration clause plainly includes "[a]ny and all unresolved claims or disputes of any kind or nature" between the parties arising out of or relating to the purchase agreement, the warranty, the home, *or* the property. **R.p.75, §V, ¶O.** In addition, the arbitration clause "specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage." **R.p.76, §V, ¶O.** Consequently, the arbitration clause, by its clear and unambiguous language, includes the Parsons' claims.

A. The circuit court mistakenly interpreted the exclusions to the warranty instead of the arbitration clause, which is separate and distinct from the warranty.

"An arbitration clause is a contractual term, and general rules of contract interpretation

must be applied to determine a clause's applicability to a particular dispute." Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." D.A. Davis Const. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

"Arbitration clauses are separable from the contracts in which they are imbedded." Jackson Mills, Inc. v. BT Capital Corp., 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994); see also Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 411 (1967) ("The Court thus holds that the Arbitration Act, designed to provide merely a procedural remedy which would not interfere with state substantive law, authorizes federal courts to fashion a federal rule to make arbitration clauses 'separable' and valid."). Likewise, the validity of an arbitration clause is distinct from the validity of the contract as a whole. New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008).

Paragraph 21 of the Purchase and Sale Agreement for the Property unambiguously incorporates the "JWH Warranty" including, without limitation, the binding arbitration clauses contained therein. See First Baptist Church of Timmonsville v. George A. Creed & Son, Inc., 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) ("We think that, in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'"). **R.p.59.**

Section V, Paragraph O in the JWH Warranty provides, in relevant part:

> **Mandatory BindingArbitration**. Wieland and Homebuyer(s) will cooperate with one another in avoiding and informally resolving disputes between them. . . .
>
> *Any and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland* (if any), this warranty, the Home *and/or property on which it is constructed*, or otherwise, shall be resolved by final and binding arbitration conducted in accordance with this provision, and such resolution shall be final. This applies only to claims or disputes that arise after the later of: (a) the issuance of the final certificate of occupancy for the Home, or (b) the initial closing of the purchase of the Home by the initial Homebuyer(s). *This specifically includes, without limitation, claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives; rescission of any contract or agreement; any tort; any implied warranties; any personal injury; and any property damage.*

R.pp.75-76, §V, ¶O (emphasis added in italics).

Instead of turning to the arbitration clause contained in Section V, Paragraph O of the JWH Warranty to determine the claims subject to arbitration, the circuit court mistakenly looked to the exclusions from the warranty, contained in Section IV of the JWH Warranty. Neither the Purchase and Sale Agreement nor the JWH Warranty states that the exclusions from the warranty also constitute exclusions from mandatory arbitration. The interpretation invoked by the circuit court is not only contrary to the express terms of the parties' agreement but also results in a nonsensical meaning. Cf. Valley Pub. Serv. Auth. v. Beech Island Rural Cmty. Water Dist., 319 S.C. 488, 497, 462 S.E.2d 296, 301 (Ct. App. 1995) (explaining that the court will not adopt nonsensical interpretation of provision in contract). Under the circuit court's interpretation, only claims that are covered by the warranty are subject to arbitration, but these are very claims that are least likely to be subject to dispute.

The arbitration clause itself plainly provides that it applies to more expansive claims

than the warranty, as it specifically includes tort claims, claims for personal injury, and claims for implied warranties, all of which are expressly excluded from the warranty. This misinterpretation of the Purchase and Sale Agreement is an error of law warranting reversal on appeal. See S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008) ("The construction of a clear and unambiguous contract presents a question of law for the court.")

B. The arbitration clause applies to, and specifically includes, the Parsons' claims.

If the circuit court had interpreted the arbitration clause instead of the warranty exclusions, it unequivocally would have found that the arbitration clause plainly applies to the Parsons' claims, which are specifically enumerated in the clause.

"The policy of the United States and South Carolina is to favor arbitration of disputes." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." Id. at 597, 553 S.E.2d at 118.

"The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Id. at 590, 553 S.E.2d at 115. "The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." Id. at 590-91, 553 S.E.2d at 115; see also Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 270 (1995) (same). "While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." Zabinski, 346 S.C. at 592, 553 S.E.2d at 116.

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved 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." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004) (same). "Furthermore, unless the court can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the dispute, arbitration should be ordered." S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc., 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993). "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles v. United HealthCare Corp., 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999).

Arbitration clauses which subject to arbitration all claims "arising out of or relating to" a contract or transaction are characterized as "broad arbitration clauses capable of an expansive reach." Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 96 F.3d 88, 93 (4th Cir. 1996). Such language "embraces every dispute between the parties having a significant relationship to the contract regardless of the label attached to the dispute." J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir. 1988).

The Parsons' first two causes of actions seek the alternative remedies of rescission and money damages, respectively, for the purported breach by John Wieland Homes of the Purchase & Sale Agreement—the very agreement incorporating the arbitration clause. In this respect, the arbitration clause plainly applies to "[a]ny and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any

purchase agreement with Wieland . . . ." **R.p.75, §V, ¶O.** Likewise, the arbitration clause specifically includes "claims related to any . . . rescission of any contract or agreement . . . ." **R.p.76, §V, ¶O.** It is axiomatic that these claims are well within the scope of the broad arbitration clause. See Long v. Silver, 248 F.3d 309, 318 (4th Cir. 2001) ("Because this breach of contract claim arises directly under the 1972 Agreement, it is clearly arbitrable."); Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723, 730 (4th Cir. 1997) ("Zandford's breach of contract claim seeking . . . rescission of the settlement agreement and mutual release . . . was properly found arbitrable by the district court.").

With respect to the Parsons' claims for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence, each of these claims rests upon allegations that John Wieland Homes, as the seller of the Property, knew or should have known about industrial pipes containing hazardous substances buried on the Property by a previous owner and, thus, had a duty to disclose this condition to the Parsons, as the purchaser of the Property. **R.pp.13-15, ¶¶36, 41, 42, 47, 53.** To this extent, the arbitration clause applies to "[a]ny and all unresolved claims or disputes of any kind or nature between Wieland and Homebuyer(s) arising out of or relating in any manner to any purchase agreement with Wieland . . . and/or property on which it [the Parsons' home] is constructed . . . ." **R.p.75, §V, ¶O.** Furthermore, the arbitration clause specifically includes "claims related to any representations, promises or warranties alleged to have been made by Wieland or its representatives . . . any tort . . . and any property damage." **R.p.76, §V, ¶O.**

In this respect, courts have held that broad arbitration clauses encompass claims for fraud, negligent misrepresentation, unfair trade practices, and negligence/gross negligence which arise from the execution or performance of a contract. See, e.g., Peoples Sec. Life Ins. Co. v.

Monumental Life Ins. Co., 867 F.2d 809, 813 (4th Cir. 1989) (recognizing that gravamen of the plaintiff's complaint alleged fraudulent inducement of a contract, which is within scope of a broad arbitration clause); Drews Distrib., Inc. v. Silicon Gaming, Inc., 245 F.3d 347, 352 (4th Cir. 2001) (reversing the district court's order staying arbitration on claims for fraud, negligent misrepresentation, and cancellation of agreement); Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 492-93, 593 S.E.2d 480, 484 (Ct. App. 2004) ("Contractor's causes of action for breach of contract accompanied by a fraudulent act and negligence essentially allege Subcontractor defectively installed the masonry work on a residential homebuilding projects [which are] matters concerning the agreement or the work performed [and] within the scope of the arbitration agreement."); J.J. Ryan, 863 F.2d at 319 ("Manifestly, the district court properly concluded that the factual allegations of the dispute about unfair trade practices arose 'in connection with' the distribution contracts and were referable to arbitration."); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 338 (7th Cir. 1984) ("Claims of fraud under a contract, breach of fiduciary duty, negligence, and gross negligence are not immune from arbitration under a broadly-worded valid arbitration clause.").

Each of the causes of action alleged by the Parsons against John Wieland Homes is plainly and unambiguously covered by the broad arbitration clause incorporated into the Purchase and Sale Agreement for the Property. The circuit court respectfully turned basic principles of contract construction on their heads when he interpreted the exclusions to the express warranties to apply to the arbitration clause, which applies to, and expressly *includes*, every single one of the Parsons' causes of action. In addition, both the Fourth Circuit Court of Appeals and South Carolina state appellate courts have interpreted such a broad arbitration clause to apply to the claims alleged by the Parsons. Accordingly, the circuit court's order should

be reversed.

II. The circuit court committed an error of law in finding that the Parsons' claims for failing to discover, remediate and/or disclose hazardous substances buried on the Property by a previous owner alleged outrageous conduct which was unanticipated and unforeseeable to a reasonable consumer.

As an alternative ground for denying the motion to compel arbitration, the circuit court ruled "the conduct complained of in this case meets the standard established by *Aiken* and *Partain*." **R.p.6.** The alleged omissions of John Wieland Homes in failing to discover, remediate and/or disclose hazardous substances buried on the Property by a previous owner, falls far short of the type of conduct alleged in Aiken and Partain. The Parsons allege *no* conduct similar to the tort of outrage, and the only fraudulent conduct they allege involves the purported duty of John Wieland Homes, as the seller, to disclose a latent defect on the Property to the Parsons, as the purchaser. This purported duty arises directly and solely from the contractual relationship between the parties.

In Aiken v. World Fin. Corp., 373 S.C. 144, 147, 644 S.E.2d 705, 707 (2007), the Supreme Court of South Carolina addressed a case in which the plaintiff filed suit against World Finance, a nationwide personal finance company, alleging that employees of World Finance conspired to use the personal information provided by the plaintiff and other clients to obtain sham loans and embezzle the proceeds for the employees' personal benefit. The plaintiff sought damages for outrage and emotional distress, negligence, negligent hiring/supervision, and unfair trade practices. Id. The circuit court denied World Finance's motion to compel arbitration, and World Finance ultimately received certiorari review by the state Supreme Court. Id.

On appeal, the Supreme Court recognized: "World Finance primarily argues that because Aiken's contracts with World Finance gave the conspirators access to Aiken's information in order to carry out their crimes, there is a significant relationship between Aiken's claims and the

underlying loan agreement, thereby warranting arbitration." Id. at 149-50, 644 S.E.2d at 708. The Court found this argument "unpersuasive," opining that the "'relationship' asserted by World Finance between Aiken's tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of 'significant.'" Id. at 150, 644 S.E.2d at 708. "Applying what amounts to a 'but-for' causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them." Id.

The Court concluded:

> [W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Id. at 151, 644 S.E.2d at 709. The Court also emphasized the circumscribed nature of its ruling in Aiken:

> In establishing the line for claims subject to arbitration, this Court does not seek to exclude all intentional torts from the scope of arbitration. For instance, the parties in the instant case stipulate that a tort claim which essentially alleges a breach of the underlying contract (e.g., breach of fiduciary duty, misappropriation of trade secrets) would be within the contemplation of the parties in agreeing to arbitrate. We only seek to distinguish those outrageous torts, which although factually related to the performance of the contract, *are legally distinct from the contractual relationship between the parties.*

Id. at 152, 644 S.E.2d at 709 (emphasis added).

In Partain v. Upstate Auto. Group, 386 S.C. 488, 490, 689 S.E.2d 602, 603 (2010), the Supreme Court addressed whether a plaintiff's tort claim premised on an alleged "bait and

switch" was subject to an arbitration clause in a purchase contract for a truck. The Court held that the case was controlled by Aiken because the plaintiff could not "be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase." Id. at 494, 689 S.E.2d at 605. "Moreover, Partain cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from allegedly fraudulent conduct." Id. The Court emphasized "that this case should not be read as providing an 'end-run' around arbitration clauses." Id. Thus, "[w]here parties have contractually agreed to arbitrate a claim, a party may not escape its commitment simply by presenting his claim as a tort." Id. "Only where the claim presented was clearly not within the contemplation of the parties will a court decline to enforce an otherwise proper arbitration agreement." Id. at 494-95, 689 S.E.2d at 605.

Read in conjunction, Aiken and Partain stand for the proposition that only allegations of outrageous or fraudulent conduct which is "legally distinct from the contractual relationship between the parties" will not be subject to arbitration under a broad arbitration clause. Unlike the plaintiffs in Aiken and Partain, the Parsons claim that the purportedly outrageous or fraudulent conduct of John Wieland Homes involved, not an act, such as misappropriation of financial information or a "bait and switch," but a failure to act. In other words, the Parsons' claims are premised on an omission by John Wieland Homes—failures to discover, remediate, and/or disclose industrial pipes containing hazardous substances on the Property.

While the Supreme Court has not defined "outrageous conduct" in the context of determining arbitrability, decisions defining the tort of outrage are instructive. For instance, in Argoe v. Three Rivers Behavioral Health, L.L.C., 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011), the Court recognized that, to be "extreme and outrageous," the conduct must "exceed all possible

bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community . . . ." In this respect, the Parsons do not include any causes of action in their complaint comparable to the tort of outrage. Instead, they rely on allegations of fraudulent conduct by John Wieland Homes.

The Parsons' allegations of fraud in this case are founded solely on an alleged nondisclosure of latent defects in the Property, about which the Parsons allege John Wieland Homes knew or should have known. **R.pp.7-16.** While nondisclosure may be fraudulent when there is a duty to speak, the only duty to speak in this case is directly premised on the contractual relationship between the parties—the relationship of buyer and seller. "Nondisclosure is fraudulent when there is a duty to speak." Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993). "[A] buyer has the right in South Carolina to rely on a seller of a home to disclose latent defects or hidden conditions which are not discoverable on a reasonable examination of the property and of which the seller has knowledge." May v. Hopkinson, 289 S.C. 549, 557, 347 S.E.2d 508, 513 (Ct. App. 1986). Absent the contractual relationship with the Parsons, there is no duty to speak by John Wieland Homes and, accordingly, no alleged fraudulent conduct.

This is distinguishable from the situations in Aiken and Partain. For instance, in Aiken, the defendant argued that the tortious *conduct* of World Finance could not have occurred "but for" the parties' contractual relationship. Id. However, the duty owed by World Finance to the victims—not to permit the misappropriation of personal financial information—was not solely contractual. In this case, on the other hand, there is no *duty* other than that recognized between the parties to a purchase and sale contract. Put differently, the Parsons allege no duty which is "legally distinct from the contractual relationship between the parties." Aiken, supra.

Consequently, the arbitrability exception recognized in Aiken and Partain for outrageous torts and fraudulent conduct legally distinct from the contractual relationship between the parties does not apply.

The circuit court committed an error of law in extending Aiken and Partain beyond their holdings to encompass the allegations in the Parsons' complaint.

CONCLUSION

In determining whether the Parsons' claims were subject to arbitration, the circuit court incorrectly turned to the exclusions from the express warranties instead of the plain, unambiguous language of the arbitration clause, which is separable and distinct from the warranties. The arbitration clause itself clearly applied to the Parsons' claims and even specifically enumerated these claims to be arbitrable.

The circuit court also committed an error of law in relying on Aiken and Partain. There are no allegations in the complaint relating to the tort of outrage. Instead, the Parsons allege that John Wieland Homes committed fraud by failing to disclose latent defects on the Property, about which the Parsons contend John Wieland Homes knew or should have known. A fraud claim premised on non-disclosure arises directly from the contractual relationship of the parties as buyer and seller. Consequently, there is no fraudulent conduct alleged to be legally distinct from the contractual relationship of the parties, as required by the Aiken line of cases.

For the foregoing reasons, the circuit court's order denying the motion to compel arbitration filed by John Wieland Homes should be REVERSED.

Respectfully Submitted,

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September 24, 2012
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Circuit Court Judge

Case No. 2011-CP-46-00796

Ralph Wayne Parsons, Jr. and Louise C. Parsons, ... Respondents,

v.

John Wieland Homes and Neighborhoods of the Carolinas, Inc., Wells Fargo Bank, N.A., and South Carolina Bank & Trust, N.A.,..... Defendants,

Of Whom John Wieland Homes and Neighborhoods of the Carolinas, Inc. is the .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief and Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc., enclosed herewith, comply with Rule 211(b), SCACR.

Respectfully Submitted,

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PROOF OF SERVICE

I hereby certify that true and correct copies of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.'s Final Brief and Final Reply Brief were served on this 24th day of September, 2012 via U.S. mail, postage prepaid, upon the following counsel of record:

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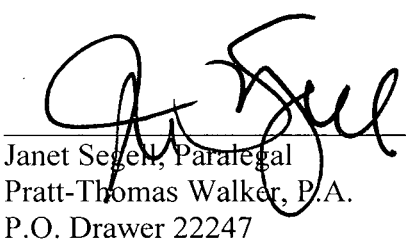

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