THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No.: 2018-001598
Civil Action No.: 2018-CP-40-00873

Jonathan Mart, on behalf of himself and others similarly situated, ... Respondent,

v.

Great Southern Homes, Inc., ... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

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I. Did the lower court err in finding and holding that an arbitration agreement in the third-party StrucSure Home Warranty, which was not drafted, signed or issued by the Appellant, should be construed as incorporated into the parties' Contract for Sale for purposes of interpreting the respective arbitration clauses contained in each written document?

II. Did the lower court err in finding and holding that the parties intended that the two written agreements should be interpreted as one agreement when such would be contrary to the parties' intent as both documents contained merger clauses? (R. at 142, Miscellaneous, Para. b; R. at 194, Para. 10).

III. Did the lower court err in finding and holding that an arbitration agreement contained in the third-party StrucSure Home Warranty applied to Respondent's causes of action asserted in the Complaint when the Respondent never invoked the StrucSure Home Warranty by filing a claim on the warranty within the context of this case?

IV. Did the lower court err in finding the parties' Contract for Sale, "expressly incorporates the Express Limited Warranty into its terms"? (R. at 010).

STATEMENT OF THE CASE

This appeal concerns the Honorable DeAndrea Gist Benjamin's order denying Appellant's motion to dismiss and compel arbitration. The action arises from the purchase of a house by Jonathan Mart ("Mart" or "Respondent") from Great Southern Homes, Inc. ("GSH" or "Appellant"). The parties entered into a Contract for Sale (the "Contract") on July 18, 2015 and closed on the house on December 18, 2015. On February 12, 2018, Mart filed a complaint on behalf of himself and others similarly situated[1] against GSH alleging breach of contract and unjust enrichment and seeking declaratory relief on the grounds that the contract allegedly contains a defective waiver of the implied warranty of habitability. (R. at 020–028). In response to the

[1] The Complaint is styled as a class action. However, class certification has yet to be brought before the court and Mart remains the sole plaintiff at this time.

Complaint and before filing an answer, GSH filed its Motion to Dismiss and Compel Arbitration on April 16, 2018. (R. at 091). GSH's Motion was based upon the arbitration provision in the Contract between the parties. Following briefing by the parties, Judge Benjamin heard arguments on June 13, 2018. (R. at 039). Judge Benjamin requested proposed orders and issued her Form-4 Order on June 15, 2018, stating that the matter was under advisement. (R. at 089, ll. 5–11; R. at 002). On July 26, 2018, Judge Benjamin issued the order denying GSH's motion to dismiss and compel arbitration. (R. at 015). GSH appealed that order on August 21, 2018. (R. at 334).

In her order, Judge Benjamin found that the parties' Contract for Sale applied to the claims asserted by Mart in his Complaint. (R. at 009–010). The trial court also found that the parties' Contract for Sale, "expressly incorporates the Express Limited Warranty into its terms." Additionally, the trial court also found that a separate warranty document issued by StrucSure Home Warranty, LLC ("StrucSure") of Denver, Colorado (the "Warranty") contained an arbitration provision that also applied to this case, despite the fact that Mart's Complaint contains no claim having been made on the StrucSure Warranty. *Id.* Applying both arbitration provisions to this case, Judge Benjamin concluded that neither could be enforced due to conflicting terms. Judge Benjamin's Order raises four primary issues on appeal.

First, whether the lower court erred in concluding that an arbitration agreement in this third-party Warranty which was not drafted, signed or issued by the Appellant, should be construed as part of the parties' Contract for Sale for purposes of interpreting the respective arbitration clauses contained in each of the two written documents. Second, whether the lower court erred in finding that the parties intended that the two agreements should be interpreted as one agreement when such would be contrary to the parties' express intent, as both documents contained merger clauses. (R. at 142, Miscellaneous, Para. b; R. at 194, Para. 10). Third, whether the lower court erred in finding that an arbitration agreement contained in the third-party Warranty applied to

Respondent's causes of action asserted in the Complaint when the Respondent never invoked the Warranty by filing a claim on the Warranty. Fourth, whether the lower court erred in finding the parties' Contract for Sale "expressly incorporates the Express Limited Warranty into its terms." (R. at 010).

STATEMENT OF THE FACTS

On July 18, 2015 Respondent Jonathan Mart entered a contract with Appellant such that the Appellant would build a home conforming with the plans and specifications attached to the contract. The parties' contract contains a merger clause in the Section entitled, "Miscellaneous", Subsection b which provides, "This contract embodies the entire agreement between seller and purchaser with respect to the property. No amendment or modification of this contract (including contracts for charges in construction "extras") shall be valid unless contained in a writing executed by both parties." (R. at 142, para. b). The parties' contract at the top of Page 1 provided in caps in bold print the following, "**CONTRACT SUBJECT TO ARBITRATION (S.C. CODE 15-48-10) version 040215.**" [R. at 139].

The Limited Warranty described in the Contract for Sale states as follows:

> **LIMITED WARRANTY:** The Seller shall furnish the Purchaser, at closing, with a limited warranty issued by a warranty company approved by the South Carolina Real Estate Commission. A sample copy of the warranty shall be available for inspection during reasonable business hours prior to closing at the office of the Seller. This limited warranty shall warrant workmanship for One (1) year and warrant the structure itself for Ten (10) years from date of closing. Said limited warranty shall be incorporated in the deed delivered at closing. Purchaser acknowledges that said limited warranty is not a maintenance agreement FOR QUALITY ASSURANCE PURPOSES WARRANTY VISITS MAY BE VIDEO W/AUDIO TAPED. [R. at 140].

The parties' Contract for Sale in bold print also provided:

> **This Limited Warranty issued to the purchaser shall be in lieu of all other warranties, express or implied, any warranty of**

> **habitability, suitability for residential purposes, merchantability, or fitness for a particular purpose is hereby excluded and disclaimed. Seller shall in no event be liable for consequential or punitive damages of any kind. There is no warranty whatsoever on trees, shrubs, grass, vegetation or erosion caused by lack thereof, nor on subdivision improvements, including but not limited to, streets, roads, sidewalks, sewer, drainage or utilities. Purchaser agrees to accept said limited warranty in lieu of all other rights or remedies, whether based on contract or tort.** [R. at 140].

On a separate page and in a separate section the parties' Contract of Sale provided the following arbitration provision:

> **ARBITRATION:** Any dispute between the parties hereto arising out of this contract, related to the contract or the breach thereof, including without limitation, disputes relating to the property, improvements, or the condition, construction or sale thereof and the deed to be delivered pursuant hereto, shall be resolved by final and binding arbitration between three (3) arbitrators, one selected by each party, who shall mutually select the third arbitrator, pursuant to the South Carolina Uniform Arbitration Act, S.C. Code § 15-48-10, et Seq. [R. at 141].

The above Limited Warranty is the subject of Mart's Complaint while the foregoing Arbitration provision is the subject of this Appeal.

As to the Warranty issued to Mart, GSH did not draft it, sign it, or issue it and there is no evidence in the record suggesting that it did. (R. at 225). Home Warranty, LLC is the Warranty Administrator, although GSH supervises and performs repairs pursuant to its membership agreement with StrucSure. (R. at 194). Importantly, a separate insurance company becomes responsible for ensuring repairs are completed in the event that GSH becomes unable to perform or supervise repairs. (R. at 217). Any such failure on the part of GSH would be a matter between it and StrucSure, not between it and Mart, whose claims would lie against StrucSure. There is no claim in this case that GSH has ever defaulted on any such warranty claim.

The merger clause contained in the Warranty on Page 10, provides: "This Express Limited Warranty is separate and apart from any contracts between You and Your Builder, including any sales agreements." This language on Page 1, Paragraph 10 goes on to include a merger provision that states no amendments to the Warranty are made unless there is a formal written and signed agreement. (R. at 194).

The Warranty provides, "If coverage is provided and the Builder is unable to perform one (1) and two (2) year warranty obligations, the Insurer becomes the Warrantor who performs the Builder's warranty obligations. The Insurer is the Warrantor the entire coverage term (Years one (1) through ten (10)) for Major Structural Components." (R. at 217).

The Warranty provides in Section 15 the terms of the arbitration and defines the scope of arbitration under the Warranty as claims "between Homeowner, Builder, the Administrator and the Insurer or any combination of the foregoing arising out of any defect or deficiency in the home or real the property on which the home is situated, the sale of the home by the Builder including any claim of breach of contract, negligence or intentional misrepresentation, or nondisclosure in the inducement, execution, or performance of any alleged . . . duty in good faith." (R. at 215). This Section also makes it clear that binding arbitration "means You are waiving Your right to a trial by a judge and/or a jury." (R. at 215).

However, at the end of the Arbitration section the StrucSure Home Warranty on Page 23 provides the following:

> NOTE: For homes with FHA/VA financing only. For Homes with the original FHA or VA financing only, and not withstanding anything written above, You may elect judicial resolution of any disputes as an alternative to the Arbitration provision set forth in the Express Limited Warranty.

An examination of the Warranty reveals that it goes to great lengths to describe in detail what is covered under the warranty and how a claim is made. As an example, in Section 8,

Subsection 6.3 for wood, plastic and metal windows the StrucSure Home Warranty provides examples of an observation and a comment concerning whether the observation is a deficiency or not and what should be done, for example:

> **OBSERVATION:** Malfunction of windows.
> **DEFICIENCY:** Windows that do not operate in conformance with manufacturer's design standards are deficient.
> **BUILDER CORRECTION:** The Builder shall consult with the manufacturer when necessary and make required adjustments so that the windows operate in accordance with the standard.
>
> **OBSERVATION:** Double hung windows do not stay in place when open.
> **DEFICIENCY:** Double hung windows are permitted to move with a two inch tolerance, up or down when put in an open position. Any excessive movement exceeding the tolerance is a Deficiency.
> **BUILDER CORRECTION:** The Builder shall adjust such sash balances one time only during the first-year of warranty coverage. Where possible, the Builders shall instruct the Homeowner on the method of adjustment for future use.
>
> **OBSERVATION:** Condensation or frost on window frames or glass panes.
> **DEFICIENCY:** None. Window glass and frames will collect condensation on the frame and glass surface when humidity and temperature differences are present. Condensation is usually the result of temperature/humidity conditions in the Home.
> **BUILDER CORRECTION:** None required.

(R. at 205).

Reference to the Warranty will show that great detail has been taken to describe the overview, exclusions, warranty workmanship/materials and delivery portion of systems coverage, warranty for site work and grading, drainage, and concrete, masonry, carpentry, thermal and moisture protection, finishes, including lath and plaster, gypsum, wallboard, hard surface flooring, resilient flooring, finished wood flooring, painting, wallcovering, and carpeting. Further, an examination of the Warranty also discloses detailed treatment concerning specialties, equipment, plumbing, mechanical systems, HVAC and ductwork, electrical systems, and other mechanical

systems. Sections 10–12 address how to request warranty performance and to make a claim for both workmanship and major structural defects. (R. at 212–214).

During the three years after Respondent's closing on December 18, 2015, he has never made a claim on the StrucSure Home Warranty for any purpose related to this litigation. On February 12, 2018, Respondent entered suit demanding payment he claims is due him under the parties' July 18, 2015 Contract for Sale in exchange for the waiver contained in the parties' Contract for Sale. (R. at 017–028).

The issues raised by Mart's Complaint relate only to defects he alleges in the sales contract between the parties. Mart makes no claim under the Warranty, does not name StrucSure as a party, and does not allege any defect in the home he purchased. Instead, he attacks the Contract and questions the legal sufficiency of using the StrucSure Home Warranty as consideration for waiver of an implied warranty. Such an attack on the Contract itself is covered by the Arbitration Provision in that Contract, not the Arbitration Provision contained in the Warranty which was never invoked in this case because Mart never filed any claim under that Warranty.

STANDARD OF REVIEW

This appeal is brought pursuant to S.C. Code Ann. §15-48-200(a)(1) which provides for immediate review upon the denial of a motion to compel arbitration. The arbitrability of a case such as this is a matter for judicial determination. *Wilson v. Willis*, 416 S.C. 395, 408; 786 S.E.2d 571, 577–78 (Ct. App. 2016) (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). The circuit court judge's factual findings should not be reversed if there is evidence that reasonably supports the findings. *Id.*, 416 S.C. at 408, 786 S.E.2d at 578 (quoting *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009)). However, the judge's legal determination is subject to *de novo* review on appeal. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016) (citing *Gissel*,

382 S.C. at 240, 676 S.E.2d at 323). Both state and federal law and policy strongly support arbitration. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596; 553 S.E.2d 110, 118 (2001) (citing *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000)); *Wilson*, 416 S.C. at 408, 786 S.E.2d at 578 (quoting *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013)); *see also Mailsource, LLC v. M. A. Bailey & Assocs.*, 356 S.C. 370, 375; 588 S.E.2d 639, 642 (Ct. App. 2003). Thus, where there is any doubt concerning the scope of arbitration, those doubts should be resolved in favor of arbitration. *Wilson*, 416 S.C. at 408, 786 S.E.2d at 578 (quoting *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). Furthermore, the "party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Wilson*, 416 S.C. at 408–09, 786 S.E.2d at 578 (quoting *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (internal punctuation omitted) (quoting *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

ARGUMENTS

The lower court erred in denying Appellant's Motion to Compel Arbitration and in so doing:

I. The lower court erred in finding and holding that an arbitration agreement in the third-party StrucSure Home Warranty which was not drafted, signed or issued by the Appellant should be construed as incorporated into the parties' Contract for Sale for purposes of interpreting the respective arbitration clauses contained in each written document.

II. The lower court erred in finding and holding that the parties intended that the two written agreements should be interpreted as one agreement when such would be contrary to the parties' intent as both documents contained merger clauses. (R. at 142, Miscellaneous, Para. b; R. at 194, Para. 10).

III. The lower court erred in finding and holding that an arbitration agreement contained in the third-party StrucSure Home Warranty applied to Respondent's causes of action asserted in the Complaint when the Respondent never invoked the StrucSure Home Warranty by filing a claim on the Warranty within the context of this case.

IV. The lower court erred in finding and holding the parties' Contract for Sale, "Expressly incorporates the Express Limited Warranty into its terms." (R. at 010).

The question before the court is whether two separate contracts, each with a distinct purpose and related arbitration provision, can be conflated to produce a result of no arbitration whatsoever. Appellant asserts that the lower court's conclusion that there should be no arbitration of Respondent's claims is erroneous and contrary to existing precedent. Should any one of the four arguments asserted above be correct, Appellant respectfully submits that the lower court's order should be reversed. The lower court erred in denying Appellant's motion to compel arbitration for the following reasons.

ARGUMENT I

THE LOWER COURT ERRED IN FINDING AND HOLDING THAT AN ARBITRATION AGREEMENT IN THE THIRD-PARTY STRUCSURE HOME WARRANTY WHICH WAS NOT DRAFTED, SIGNED OR ISSUED BY THE APPELLANT SHOULD BE CONSTRUED AS INCORPORATED INTO THE PARTIES' CONTRACT FOR SALE FOR PURPOSES OF INTERPRETING THE RESPECTIVE ARBITRATION CLAUSES CONTAINED IN EACH WRITTEN DOCUMENT.

There are two agreements involved in this analysis. The first is the parties' July 18, 2015 Contract of Sale, and the second is, the StrucSure Express Limited Warranty. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009). The Respondent would prefer to focus on only the arbitration clauses contained in the two documents for this purpose. However, "Where the agreement in question is a written contract, the parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 197, 232 S.E.2d 728, 729 (1977) (citing *Bruce v. Blalock*, 241 S.C. 155, 127 S.E.2d 439 (1962); *see also Ellie, Inc. v. Miccichi*, 358 S.C.78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004).

Respondent's challenge of the parties' arbitration clause contained in their Contract for Sale is based upon his legal contention that these two written agreements are merged into one contract for purposes of interpretation. Indeed, Respondent does not contend that the arbitration clause in each of these two agreements, viewed separately, are unconscionable or lack any essential term. Respondent argues that the two written documents, by their provisions, are incorporated one with the other and also argues that neither agreement contains a merger clause. In order to evaluate this, an examination of the entire agreement for both documents is important to ascertain whether the parties intended that the two documents are to be incorporated, one with the other.

The parties' Contract for Sale in the first instance was for the purpose of contractually binding the seller to sell and the purchaser to buy an identified piece of improved property for a sum certain and to provide details such as a closing date, payment of earnest money, homeowner association charges, limited warranty to be issued later, termite inspection, risk of loss, financing, real estate commissions, arbitration and miscellaneous details related to Respondent's purchase of the home.

The StrucSure Home Warranty application was signed by Respondent on December 18, 2015, five months after the Contract for Sale was signed. The StrucSure Home Warranty was an, "Express Limited Warranty Coverage One-Year Workmanship Materials, Two-Year Delivery Portion of Systems and 10-Year Major Structural Defects." (R. at 192). The Warranty is detailed in describing its limits, the homeowner's duties and responsibilities, exclusions and a full explanation of the areas of construction, as site work, concrete, masonry, carpentry, thermal and moisture protection, doors and windows, finishes, specialties (fireplaces), equipment, mechanical systems, heating, air conditioning, ductwork, electrical system, plumbing and a separate section discussing, "Major Structural Defect Coverage." (R. at 200–211, 213). The document also

describes how to make a claim for both warranty performance for workmanship/materials and/or delivery portion of systems defects as well as for any major structural defect. (R. at 194–214).

From an examination of the foregoing it should be plain that the parties' July 18, 2015 Contract for Sale and the StrucSure Home Warranty issued after December 18, 2015 have different goals. The Contract for Sale was to formalize the parties' agreement to purchase and sell and under what terms. The Warranty issued by StrucSure Home Warranty, LLC of Denver, Colorado was to provide the homeowner a detailed description of the remedies under the Warranty for a number of complaints, including but not limited to defects in the home.

Respondent acknowledges that there were two written agreements but contends that these two documents should be interpreted as one. That being so, each contract has its own arbitration provision which provides for different methods of selecting arbitrators and other details such as the latter provides for arbitration under the FAA and the former under the South Carolina Uniform Arbitration Act. The Respondent insists that these two contracts must be construed as one contract because they make reference to one another and both relate to the warranties concerning the subject residence. However, Respondent also contends that the StrucSure Home Warranty provisions apply to and are operative as to any dispute between the buyer and seller even though Mart does not allege he has made any claim on the Warranty.

The lower court's Order stated,

> "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Channel*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). Where material terms of a contract are inconsistent and conflicting, there is no meeting of the minds. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 83, 749 S.E.2d 139, 147 (Ct. App. 2013) (acknowledging where arbitration agreements provided for conflicting and inconsistent material terms, it would be unenforceable for lack of mutual assent thereto). The designation of a specific arbitral forum is a material term of an arbitration

agreement. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 128-32, 678 S.E.2d 435, 437-39 (2009).

Additionally, Mart had the freedom to choose. Because it is uncontested that the arbitration provisions in both the parties' Contract for Sale and the StrucSure Home Warranty were not unconscionable and did not lack any material terms, there existed a meeting of the minds in 2015 that Mart could choose either document under which to proceed. Hence, no conflict existed.

It is significant to note that the referenced South Carolina authorities refer to the interpretation of a singular contract or when two written agreements have been incorporated into one document and interpreted as one. The Respondent does not contend that either the Contract of Sale or the StrucSure Home Warranty, viewed independently, lack any "essential and material term." The Respondent attempts to negate arbitration by urging that these two contracts should be interpreted as one and, if so, the arbitration clauses in the two documents cannot be reconciled. Indeed, that is the gravamen of the Respondent's argument because without the combination of these two written agreements into one contract there is no conflict in the operative document's arbitration clause which could negate the Respondent's written agreements to arbitrate. Indeed, no claim has ever been made by the Respondent under the Warranty because, on information and belief, no material defects exist in his house. It should be pointed out here that the incorporation of these two written documents fail in the first instance as they were NOT signed at the same time, NOT signed by the same parties and did NOT have the same purpose. *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009).

ARGUMENT II

THE LOWER COURT ERRED IN FINDING AND HOLDING THAT THE PARTIES INTENDED THAT THE TWO WRITTEN AGREEMENTS SHOULD BE INTERPRETED AS ONE AGREEMENT WHEN SUCH WOULD BE CONTRARY TO THE PARTIES' INTENT AS BOTH DOCUMENTS CONTAINED MERGER CLAUSES (R. at 142, Miscellaneous, Para. b; R. at 194, Para. 10).

In *York*, the case cited by Respondent to the court below, Justice Few, writing for this court addressed a situation almost identical to the one in the case at bar. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013). The *York* case addresses two sets of plaintiffs and defendants involved in automobile transactions. *Id.*, 406 S.C. at 75, 749 S.E.2d at 143. Plaintiff Olga Cristy purchased a new car from Jim Hudson Hyundai. *Id.*, 406 S.C. at 76, 749 S.E.2d at 143. To complete the transaction Cristy signed two contracts, a buyer's order for the sale and a retail installment contract for the financing. *Id.* Both contracts contained arbitration provisions that did not match in their terms. *Id.*, 406 S.C. at 76–77, 749 S.E.2d at 143–44. The Court of Appeals found that Judge G. Thomas Cooper, Jr. correctly granted the Defendants' motion to compel arbitration because each plaintiff had entered into an arbitration agreement that complied with statutory law, evidenced intent to arbitrate, and was not unconscionable or against public policy. *Id.*, 406 S.C. at 78, 749 S.E.2d at 145.

Cristy argued, much like the Respondent in the case before the court, that inconsistent or conflicting terms in the two contracts showed that no meeting of the minds existed as to arbitration. Then Judge Few, writing for this Honorable Court, stated:

> *3. Cristy's arbitration agreements did not incorporate inconsistent or irreconcilable terms.*
>
> Cristy argues no meeting of the minds existed to arbitrate because the arbitration provisions within her Buyers Order and installment contract were inconsistent and conflicting. Cristy, citing *Harris v. Ideal Solutions, Inc.*, [citation omitted], posits that because the "two contracts [were] executed at the same time on the same subject, they were treated as unitary" and, thus, the conflict between the two arbitration clauses prevented any meeting of the minds to arbitrate. While we agree *Harris* is applicable, we disagree with Cristy's interpretation of the case's holding.

The Court of Appeals correctly quoted the *Harris* Court when it stated, "'The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined

by the contract language.' '*[I]n the absence of anything indicating a contrary intention,* where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together.'" *York*, 406 S.C. at 83–84, 749 S.E.2d at 147–48 (emphasis in original) (citations omitted). The Court of Appeals concluded that the contract language demonstrated that, "Cristy and Jim Hudson Hyundai explicitly intended a demarcation between the two contracts." *York*, at 406 S.C. 67, 84; 749 S.E.2d 139 at 147. The Court of Appeals added, "Further, this memorialized intent precludes construing the two contracts together. *See Harris*, [citation omitted] (stating the general rule that '*anything indicating a contrary intention*' precludes a court from construing contracts together, even though they were executed at the same time, by the parties, for the same purpose, and in the course of the same transaction)."

Therefore, the court in its quest to affect the parties' intent should examine whether there was "anything" in the documents indicating a contrary intention to construe the contracts together. The Respondent contends that no such contrary intention is manifest because of the absence of any merger clause, or any such clause requiring any change in the contract to be in writing and signed by the parties. To the above issues the Appellant offers the following:

1. Manifest intent that the Contract of Sale and the StrucSure Express Limited Warranty are not to be construed together is clearly stated at § 1, Overview of the StrucSure Express Limited Warranty [R. at 194] in Sub Paragraph (10), as follows: **"This Express Limited Warranty is separate and apart from any contracts between YOU and YOUR BUILDER, including any sales agreements"** (emphasis added). The four corners of this document disclose a contrary intent by the parties to have the two documents construed as one.

2. Contrary to Plaintiff's argument that the agreements lack any merger clause, the Express Limited Warranty in §1, Overview, states, "It cannot be altered, affected or amended in any manner by any other agreement except only through a formal written agreement signed by the Builder, Insurer, the Administrator, and You." (R. at 194, § 1, Sub Paragraph (10)).

3. Contrary to Plaintiff's argument that the agreements lack any merger clause, the parties' Contract of Sale [R. at 142] provides under the section entitled Miscellaneous, Sub Para. B, the following: "This Contract embodies the entire Agreement between Seller and Purchaser with respect to the property. No amendment or modification of this Contract . . . shall be valid unless contained in a writing executed by both parties."

Both agreements contain such a "contrary intention" and, unlike Respondent's assertion, both contain a merger clause. The Warranty specifically provides it is, ". . . separate and apart from any contracts between you and your builder, including any sales agreements." (R. at 194). The Contract for Sale contains a merger clause. (R. at 142, Miscellaneous, Sub. Para. b). As to the StrucSure Home Warranty, it is true Appellant has duties under that document as an approved Builder by the third-party warranty company, but Appellant did not sign it, draft it, or issue it. Moreover, the warranty document was created more than five months after the Contract of Sale.

The trial court's decision, therefore, to interpret these two written agreements as one contract is contrary to prevailing South Carolina precedent. *York,* at 84, instructs that, a memorialized statement that the parties expressed a contrary intention to interpret the two agreements together, "precludes construing the two contracts together," and to do so would be at variance with prevailing South Carolina case law. Reversal of this manifest error of law is appropriate.

Respondent's argument there was no meeting of the minds between the parties is fallacious as the parties' intent set forth in their Contract for Sale and Respondent's StrucSure Home Warranty are each plain and do not lack any material terms.

Respondent argues that he wants a jury trial and that the arbitration agreement in the Contract for Sale differs from the arbitration agreement in the StrucSure Home Warranty and, that being true, there was no meeting of the minds between the parties as to arbitration. (R. at 020,

270). However, Respondent purchased his home through VA financing. (R. at 247–264). That being so, Respondent Mart had the right to a jury trial under the Warranty, set forth as follows.

Section 15 of the Warranty [R. at 216]:

> Note: For Homes with FHA/VA Financing Only:
>
> For Homes with the original FHA or VA financing only, and notwithstanding anything written above, You may elect judicial resolution of any disputes as an alternative to the Arbitration provision set forth in this Express Limited Warranty.

There is no evidence that Mr. Mart ever filed a claim with StrucSure Home Warranty, LLC and he does not allege he was discouraged in any way by the Appellant from doing so. There is no conflict between the two documents. The Warranty arbitration clause does not come into consideration until the Homeowner makes a claim under the Warranty, something Respondent did not do. Further addressing Respondent's jury demand, had he made a Warranty claim, he could arbitrate or litigate at his option. Therefore, the "meeting of the minds" between the parties clearly gave Mart the right to a jury trial after filing his StrucSure Home Warranty claim.

The claim that Mart never agreed to arbitrate is patently false. Arbitration provisions appear in the Contract of Sale and the StrucSure Home Warranty. Respondent makes the case that there was no meeting of the minds because the arbitration clause in the parties' contract differs from the arbitration clause in the Warranty.

In instances where there are two merger clauses at play, the later one would generally prevail. However, as is typical, both the merger clauses in this case require a written agreement *signed by both GSH and Mart*. (*See* R. at 142, 194). The sales contract was of course signed by both GSH and Mart in July 2015. The Warranty was issued at some point after December 18, 2015, five months later, thus making it latest in time. However, the Warranty *was never signed by GSH*, was never drafted by GSH nor issued by GSH. Therefore, there is no question that even

if the warranty applied in this case it could not be considered a valid modification of the sales contract. Thus, only the arbitration provision in the sales contract applies and the Warranty cannot be considered conflicting.[2] Indeed, the nonbinding authority cited by Respondent and the lower court in support of combining the two contracts in such a fashion as to make them conflicting also supports Appellant's reasoning.

As to the issue of incorporation of two written documents, Respondent urged the lower court to consider *Willis v. Tower Loan of Miss., LLC (In Re Willis)*, 579 B.R. 381, 2017 Bankr. LEXIS 4243 (2017), where the debtor was not bound by an arbitration agreement that was on the back of the loan agreement because he was required to sign a second arbitration agreement that conflicted with the first. *Willis* is not applicable to this case. The *Willis* court pointed out that, "The Loan Agreement consists of one (1) page and does not contain a merger clause" and in a footnote to that observation explained:

> A merger clause signals to the courts that the parties agree that the contract is to be completely integrated. A standard merger clause achieves the purpose of ensuring that the contract at issue invalidates or supersedes any previous agreements, as well as negates the apparent authority of an agent to later modify the contract's terms.

Willis, 579 B.R. 381, 383 n.3 (citations and internal punctuation omitted). This same problem was pointed out by the Tenth Circuit in an opinion about a case with six different agreements at play. *See Ragab v. Howard*, 841 F.3d 1134, 1138 (10th Cir. 2016) (citing *Ex parte Palm Harbor Homes, Inc.*, 798 So. 2d 656, 660 (Ala. 2001)). Noting that the Alabama Supreme

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[2] Moreover, even if the Court considered the warranty a valid modification of the sales contract, that modification would override any prior conflicting arbitration terms in the original contract just as the York court stated again resulting in arbitration. *York*, 406 S.C. at 84, 749 S.E.2d at 148 (citing *U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009)). However, Appellant notes that the warranty lacks any provision for a demand for arbitration by GSH. It seems unlikely that the arbitration provisions in the Warranty, which only provide for the filing of claims by the Buyer, would be intended to supplant the provision in the sales contract.

Court had resolved an arbitration dispute by relying on a merger clause, which is "strong evidence that the parties did not intend to include terms not expressly incorporated into the document containing the clause," the court lamented the lack of clarifying merger clauses in the six agreements under consideration. *Id.*, 841 F.3d at 1138 n.4 (quoting *Summit Contractors, Inc. v. Legacy Corner, L.L.C.*, 147 F. App'x 798, 801 (10th Cir. 2005)). Both the written agreements in this case contain merger clauses. Therefore, as Respondent's own authority points out, the merger clauses signal to the courts that the parties did not intend these two contracts to be combined into one.

The trial court's error in reaching the legal conclusion that the existence of the arbitration clause within the Warranty is a subsequent arbitration agreement between the parties in this case can be demonstrated by the claims procedure of the warranty itself. It is clear that the homeowner (Buyer) may initiate a claim under the Warranty which could lead to arbitration, but the opposite is not true. The Warranty provides no provision for the Builder to either file a claim or to initiate arbitration with the Homeowner. The Warranty is a one-way street in this regard. Appellant had duties under the Warranty, such as responding to warranty items, but that does not make Great Southern Homes a signatory to the Warranty.

The Homeowner, Respondent Mart, had a clear choice as to where to initiate his claim, either under the Parties' Contract of Sale or the Warranty. If he had chosen to file a claim with StrucSure Home Warranty, LLC he would have been entitled to seek judicial resolution because he financed the purchase through a VA backed loan. (R. at 247). If Mart had chosen the Warranty route and preferred arbitration, then certainly the Warranty's arbitration provision would apply as to the mechanics of the arbitration. If Mart had chosen to enter suit via the Warranty, he could have done that instead. This dynamic gives Mart the choice as to whether he wants to pursue his claim under the Warranty in arbitration under the FAA or through judicial resolution. If Mart

preferred to pursue his claim under the South Carolina Uniform Arbitration Act the Builder-Appellant would be bound to arbitrate or litigate under the South Carolina Act per terms of the Contract. If Mart were to forego a claim under the Warranty, as he has done in this case, then none of the provisions of the Warranty are implicated, including its arbitration provision.

This paradigm is consistent with that described by then Tenth Circuit Court of Appeals Judge Neil Gorsuch, now U.S. Supreme Court Associate Justice, in his dissenting opinion in *Ragab*, 841 F.3d at 1139 (10th Cir.), when he stated, First, the plaintiff could initiate arbitration under the agreement of his choosing because "'the defendants have expressly acknowledged that his claims f[ell] within the scope of every single agreement.'"

In the case before the court there is no mutual conflict between the two arbitration clauses unless one buys into the false assumption that the provisions of the Warranty apply to an arbitration between the Appellant-Builder and Respondent-Buyer without the Buyer ever invoking the Warranty's provisions by making a claim with StrucSure Home Warranty, LLC. Such a conclusion is not reasonable and is inconsistent with the intent of the parties.

ARGUMENT III

THE LOWER COURT ERRED IN FINDING AND HOLDING THAT AN ARBITRATION AGREEMENT CONTAINED IN THE THIRD-PARTY STRUCSURE HOME WARRANTY APPLIED TO RESPONDENT'S CAUSES OF ACTION ASSERTED IN THE COMPLAINT WHEN THE RESPONDENT NEVER INVOKED THE STRUCSURE HOME WARRANTY BY FILING A CLAIM ON THE WARRANTY WITHIN THE CONTEXT OF THIS CASE.

It is unreasonable to hold, without a claim being filed, a third-party warranty's arbitration provision has any application to a dispute between builder and buyer. The Warranty is an insurance backed plan with a detailed schedule of coverage, but if a claim is never filed the Warranty Administrator and the Insurer never learn about the controversy. The Warranty explains how to file a claim, provides the address, and as to Mart individually would have afforded him a choice between arbitration or judicial resolution. To seek relief under the Warranty, like any other

similar document, the first step must be to file a claim with the Warranty Administrator. Mart did not do so and, therefore, the provisions within the Warranty do not apply to the allegations in the Complaint and to hold otherwise is plain error.

ARGUMENT IV

THE LOWER COURT ERRED IN FINDING AND HOLDING THE PARTIES' CONTRACT FOR SALE, "EXPRESSLY INCORPORATES THE EXPRESS LIMITED WARRANTY INTO ITS TERMS" (R. at 10).

It was error for the lower court to hold that the parties' Contract for Sale, "Expressly incorporates the Express Limited Warranty into its terms" for the following reasons. First, the incorporation of one written document into another must be clear and specific. It is, "not enough for the contract to merely mention the instrument, and the referring language in the Contract must demonstrate the parties intended to incorporate all or a part of the referenced instrument. Additionally, a reference in a contract to another instrument will incorporate the other instrument only to the extent indicated and for the specific purpose indicated." 17A Am.Jur.2d *Contracts* § 381. The parties' Contract for Sale does not even mention by name the StrucSure Home Warranty much less specifically demonstrate an intention to incorporate the terms of this unidentified document. Further, for the "doctrine of incorporation by reference" to apply, a document to be incorporated by reference is required to be described in the contract such that it is identifiable beyond all reasonable double. 17A Am.Jur.2d *Contracts* § 381 (citing *State ex rel. Hewitt v. Kerr*, 461 S.W.3d 798 (Mo. 2015) and *Maines Paper & Food Service, Inc. v. Keystone Assocs.*, 134 A.D.3d 1340, 23 N.Y.S.3d 398 (3d Dept. 2015)). There cannot possibly be compliance with this standard under these facts because the Warranty was not named and could not have been known to the buyer at the time of the Contract for Sale.

Second, the timeline of events does not work in favor of incorporation. At the time of the Contract for Sale, July 18, 2015, the StrucSure Home Warranty to Mart did not yet exist and would

not for over five months thereafter. There is authority for the proposition that a document cannot incorporate into its terms another document that does not exist. *Cf.* S.C. Code Ann. § 62-2-509 (codifying a requirement that a document may only be incorporated in a will by reference if there is manifest intent and the document is in existence at the time the will is executed). It was error to find otherwise.

CONCLUSION

The lower court's order should be reversed for any one of the following reasons: Incorporation of the Warranty and the parties' Contract for Sale was error because the Appellant did not draft, sign, or issue the StrucSure Home Warranty. Interpreting the two written agreements as one agreement is contrary to South Carolina case law as such would be adverse to the parties' intent as both written agreements contained merger clauses. The application of the arbitration agreement contained in the StrucSure Home Warranty to the causes of action in the Complaint even though the Respondent never filed a claim under the Warranty. Finally, finding the parties' Contract for Sale, "expressly incorporates its terms" when the Contract for Sale did not identify the StrucSure Home Warranty, states a contrary intent to incorporate another document, and at the time of the Contract for Sale the Warranty document did not exist.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this final Appellant's brief, having been edited only to complete the record citations and correct any obvious errors or misspellings, complies with Rule 211(b), SCACR, pursuant to Rule 211(a), SCACR.

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