THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2018-CP-10-02152
Appellate Case No. 2019-000562

Six Fifty Six Owners Association, Inc. and Robert John Nutley, individually, and on behalf of all others similarly situated, Respondents,

v.

WCB, LLC; 656 Coleman, LLC; and The Ryland Group, Inc., Defendants

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

APPELLANT THE RYLAND GROUP, INC.'S INITIAL REPLY BRIEF

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INTRODUCTION

Although Plaintiffs Robert John Nutley ("Nutley") and Six Fifty Six Owners Association, Inc.'s (the "Association", collectively "Plaintiffs")[1] have attempted in their brief to obfuscate the real issues, and the accurate material facts applicable in this appeal, the proper inquiry for the Court in deciding this matter is straightforward—is Ryland entitled to enforce the agreement to arbitrate contained in either the Purchase and Sale Agreement, or the Master Deed, or both?

The straight forward facts, that Plaintiffs' disingenuous meanderings cannot hide or refute, are:

1. The circuit court did not find that the agreement to arbitrate set forth in Section 13 of the Purchase and Sale Agreement was unconscionable and unenforceable; it found only that the whole Purchase and Sale Agreement was unconscionable and unenforceable. (R. ___).
2. The circuit court did not express any analysis of Ryland's Motion to Compel Arbitration pursuant to the arbitration agreement in the Master Deed; it concluded only that a prior order, in response to another party's motion to compel arbitration was the law of the case. (R. ___).
3. The Purchase and Sale Agreement applicable to Plaintiff Nutley's unit, and indeed all units purchased at the Project, contains an agreement to arbitrate. (R. ___).
4. That agreement to arbitrate is set forth in its entirety in Section 13 of the Purchase and Sale Agreement. (R. ___).

[1] Ryland refers to the Plaintiffs collectively through its filings with the Court, in part, because Plaintiffs refer to themselves collectively and indistinguishably in most material allegations in their Complaint.

5. Section 13 of the Purchase and Sale Agreement contains nothing else, and no other material terms, but the agreement to arbitrate. (R. ___).

6. Section 13 of the Purchase and Sale Agreement does not incorporate by reference, or even refer to any other section or provisions of the Agreement, or to any other agreements or documents. (R. ___).

7. Plaintiffs have each sued Ryland specifically for breach of express warranty. (R. ___).

8. Plaintiffs admit in their own brief in this appeal that the Purchase and Sale Agreement (not Section 13 but Section 25) incorporated by reference the Ryland Home Warranty Program Insured Limited Warranty which is "the sole express warranty that Ryland gave [with the sale of the units]." (Respondents' Brief p. 5).

9. Plaintiff Nutley not only sued Ryland on this express warranty, he availed himself of the express warranty's rights and protections when he specifically submitted warranty repair requests under that express warranty in December 2014. (R. ___).

10. Whether or not Plaintiffs signed the Purchase and Sale Agreement containing the unequivocal agreement to arbitrate in Section 13, Plaintiffs have availed themselves of the other benefits in the Purchase and Sale Agreement by utilizing the express warranty provisions therein in the past, and by seeking to enforce the express warranty provisions in this very case by suing Ryland on the express warranty they admit arises solely through the Purchase and Sale Agreement.[2] (R. ___).

[2] Upon information and belief, the other unit owners (the alleged members of the putative class) are signatories to the Purchase and Sale Agreement. Plaintiff Nutley is atypical if not unique—and certainly not representative of the purported class.

11. The only finding or ruling by the circuit court addressing Ryland's Motion to Compel Arbitration pursuant to the arbitration agreement in the Master Deed is the conclusion that such motion was precluded by the law of the case. (R. ___).

12. If the law of the case doctrine does not apply, the record is devoid of anything indicating the circuit court actually considered Ryland's Motion to Compel Arbitration pursuant to the arbitration agreement in the Master Deed or that it made any findings or conclusions under an analysis which justifies a decision to deny Ryland's Motion to Compel Arbitration.

ARGUMENTS

I. The circuit court's conclusion that the Purchase and Sale Agreement is unconscionable is an error of law and clearly violates the *Prima Paint* doctrine.

The circuit court erred as a matter of law in denying Ryland's Motion to Compel Arbitration on the grounds that "Ryland's Purchase Agreement is unconscionable."[3] (R. ___). The Court must reverse the circuit court's erroneous decision that Ryland's Motion to Compel Arbitration may be denied based on a conclusion that the Purchase and Sale Agreement is unconscionable. The Court must either (1) conduct a proper analysis of the arbitration agreement in the Purchase and Sale Agreement—contained entirely in Section 13 of the agreement—or (2) remand the case to the circuit court so that a proper analysis may be performed.

[3] Ryland filed a Rule 59(e) motion requesting the circuit court conduct a proper analysis of Ryland's Motion to Compel Arbitration pursuant to the arbitration provision in the Purchase and Sale Agreement and received a Form 4 order containing no additional analysis from the circuit court.

A. The Court may properly only consider Section 13 of the Purchase and Sale Agreement when deciding whether to compel arbitration pursuant to the Purchase and Sale Agreement.

1. The Court in *Smith v. D.R. Horton, Inc.* confirmed that in considering an arbitration agreement only the arbitration agreement itself is relevant and proper—not the entire contract.

The Supreme Court of South Carolina's ruling in *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), does two things. First, the Court's decision unquestionably establishes the black-letter law of South Carolina to be consistent with the principles established in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Those unassailable, bedrock legal principles recognized by both Supreme Courts are:

a. In order to avoid arbitration, a party must assert a contractual defense to the Arbitration Agreement itself, and not the contract as a whole;

b. A party must allege that the *Arbitration Agreement* is unconscionable, not that the *entire contract* is unconscionable; and

c. In conducting an unconscionability inquiry, courts may only consider the provisions of the Arbitration Agreement itself, and not those of the whole contract.

D.R. Horton, 417 S.C. at 48, 790 S.E.2d at 4.

Second, the South Carolina Supreme Court's decision in *D.R. Horton* applied the *Prima Paint* principles to a specific, and unique, factual situation. *Id.* at 48-49, 790 S.E.2d at 4. The factual situation before the court in *D.R. Horton* is absolutely distinguishable and fundamentally different from the facts attendant in this case. In this case before the Court, the agreement to arbitrate set forth in the Purchase and Sale Agreement is set forth in Section 13 of that Agreement. (R. ___). Section 13 contains no other terms or provisions other than the agreement to arbitrate. (R. ___). The language in Section 13 does not incorporate by reference, or even

refer to any other section or provision of the Purchase and Sale Agreement, or to any other agreements or documents. (R. ___).

The arbitration agreement in the Purchase and Sale Agreement in this case, in its entirety provides:

> **13. ARBITRATION: ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO (A) THIS AGREEMENT, (B) THE PROPERTY, (C) YOUR PURCHASE OF THE PROPERTY, (D) OUR CONSTRUCTION OF THE HOME, OR (E) ANY PERSONAL INJURY OR PROPERTY DAMAGE THAT YOU ALLEGE TO HAVE SUSTAINED ON THE PROPERTY, SHALL FIRST BE SUBMITTED TO MEDIATION AND, IF NOT SETTLED DURING MEDIATION, SHALL BE RESOLVED BY BINDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT OR SIMILAR STATE STATUTE, AND NOT BY A COURT OF LAW.**
>
> **THE MEDIATION AND THE ARBITRATION SHALL BE CONDUCTED BY THE AMERICAN ARBITRATION ASSOCIATION (AAA) UNDER THE AAA CONSTRUCTION INDUSTRY ARBITRATION RULES AND MEDIATION PROCEDURES UNLESS THE PARTIES AGREE OTHERWISE. THE DECISION OF THE ARBITRATOR SHALL BE BASED ON APPLICABLE LAW AND BE FINAL AND BINDING ON YOU AND US AND JUDGMENT UPON THE AWARD MAY BE ENFORCED IN ANY COURT HAVING JURISDICTION.**
>
> **IN THE EVENT THAT THE PROVISIONS OF THIS SECTION ARE DETERMINED TO BE UNENFORCEABLE FOR ANY REASON, WE AND YOU AGREE THAT ANY TRIAL OF THE ISSUES RELATING TO THIS AGREEMENT OF SALE SHALL BE TRIED ONLY TO THE COURT AND NOT TO A JURY. YOU EXPRESSLY WAIVE ANY RIGHT TO A TRIAL BY JURY.**
>
> **THE RIGHTS AND OBLIGATIONS SET FORTH IN THIS SECTION SHALL SURVIVE CLOSING OR ANY EARLY TERMINATION OF THIS AGREEMENT OF SALE. WE SHALL HAVE THE OPTION TO INCLUDE OUR SUBCONTRACTORS, SUPPLIERS AND WARRANTY**

COMPANY AS PARTIES IN THE MEDIATION AND ARBITRATION.

(R. __).

In *D.R. Horton*, the agreement to arbitrate was very different. It was set forth in one of ten subparts to paragraph 14 of the contract in issue. The very title of paragraph 14 was "Warranties and Dispute Resolution."

Based upon the unique facts and circumstances in that case, the majority in *D.R. Horton* concluded it was proper, in that case, to "construe the entirety of paragraph 14, entitled 'Warranties and Dispute Resolutions' as the arbitration agreement." *D.R. Horton*, 417 S.C. at 48-49, 790 S.E.2d at 4. The majority in *D.R. Horton* further concluded that it may properly consider the entirety of paragraph 14 in determining whether the arbitration agreement is unconscionable because "subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.* at 48, 790 S.E.2d at 4. While the majority gave no specific examples or references to support this conclusion, presumably it was founded on such things as (i) the subparagraphs in paragraph 14 had separate headings referencing a variety of topics such as "Standard Warranty," "RWC Warranty," "Exclusions," "Existing Terms," "Landscaping," "MANDATORY BINDING ARBITRATION," and "Limitations of Liability;" (ii) the "Standard Warranty" subparagraph expressly referred to the "RWC Warranty" subparagraph; (iii) the "Exclusions" subparagraph expressly identified things excluded from the other warranty subparagraphs; (iv) the "Mandatory Binding Arbitration" subparagraph specifically referenced the interrelationship between its application and the application of the "RWC Warranty" terms; (v) subparagraph "h" specifically cross-referenced "subparagraphs (a)-(d) above"; (vi) the "Limitation of Liability" subparagraph specifically cross-referenced "PARAGRAPH 4 above." *Id.* at 53-59, 790 S.E.2d at 6-10.

Compared and contrasted with the attendant facts and the language of the agreement to arbitrate in *D.R. Horton*, which were the operative basis and justification for the majority to construe the arbitration agreement more broadly, it is evident that no such justification exists or can be manufactured in this case to construe anything beyond the four corners of Section 13 in determining arbitrability. As Justice Kittredge observed in his dissent "it is only by treating paragraph fourteen as a single indivisible provision that the majority is able to transform the . . . objection to certain warranty and liability disclaimers into a challenge to the arbitration provision." *Id.* at 60, 790 S.E.2d at 10. Section 13 does not contain any cross-references to other sections of the Purchase and Sale Agreement. (R. __). Section 13 also does not contain any cross-reference to any provision in another document. (R. __). The unique circumstances that allowed the court in *D.R. Horton* to read Section 14, and all of its subparagraphs, as a single arbitration provision are not present in Section 13 of the Purchase and Sale Agreement. Therefore, consideration by the Court of any terms outside of Section 13 violates the *Prima Paint* doctrine and is not justifiable under any applicable precedent.

Plaintiffs' efforts to expand the self-contained arbitration provision in Section 13 of the Purchase and Sale Agreement are unavailing. Analysis of Section 13 does not require, or permit, consideration of the separate terms of the Ryland Home Warranty Program Insured Limited Warranty or the Master Deed. Plaintiffs' repeated efforts to argue the import of other sections of the Purchase and Sale Agreement, or completely separate documents, in support of their argument in opposition to compelling arbitration must be ignored (except to the extent it reveals the reality that Plaintiffs can point to nothing actually contained in Section 13 which supports their argument). A proper analysis of the arbitration provision in the Purchase and Sale Agreement is limited to Section 13. Plaintiffs' arguments to the contrary are unsupported by South Carolina law and constitute a violation of the *Prima Paint* doctrine.

Plaintiffs spend most of their forty-two (42) page brief discussing everything but the express language of Section 13 of the Purchase and Sale Agreement and Article X of the Master Deed. Plaintiffs seek to argue that other provisions of the Purchase and Sale Agreement, or other provisions of the Master Deed, or other documents all together (such as the separate warranty) should be found to be oppressive or unconscionable. Those issues, and those arguments, are to be resolved by the arbitrator. *See Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20-21, 133 S. Ct. 500, 503, 184 L. Ed. 2d 328 (2012) (citing *Preston v. Ferrer*, 552 U.S. 346, 349, 128 S.Ct. 978, 169 L.Ed.2d 917 (2008); and *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). Those arguments are not lost to Plaintiffs, but they are not germane to the analysis of whether the disputes must be arbitrated.

2. **The holding in *Davis v. KB Home of S.C., Inc.* does not support Plaintiffs' arguments in favor of an expansive application of the *Prima Paint* doctrine.**

In addition to their proposed misapplication of the decision in *D.R. Horton*, Plaintiffs' reliance on the Court of Appeals decision in 2011 in *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126, 713 S.E.2d 799, 804 (Ct. App. 2011), *aff'd in part, vacated in part*, No. 2011-199587, 2014 WL 2535489 (S.C. Jan. 29, 2014), is misplaced. In the end, the only effective ruling in *Davis* was that the agreement to arbitrate contained in an employment application was no longer binding, or of any force or effect, when the parties entered into a subsequent employment agreement which contained an effective merger clause which caused the new agreement to supersede the prior application. Those facts have no relevance or application to the present case at bar, and neither does the decision in *Davis*. Furthermore, subsequent to *Davis* the Supreme Court decided *D.R. Horton* and removed any doubt that proper inquiry is limited to the terms of the applicable agreement to arbitrate and not to the contract as a whole.

B. Plaintiffs' claim for breach of express warranty is a blatant attempt to take a direct benefit from the Purchase and Sale Agreement and, therefore, Plaintiffs are estopped from avoiding the application of the Purchase and Sale Agreement's arbitration provision.

Plaintiffs attempt to avoid the application of direct benefits estoppel by asserting the untenable position that they are not seeking to enforce the Purchase and Sale Agreement, even though Plaintiffs each sued Ryland for breach of express warranty (an express warranty which Plaintiffs admit in their brief is "the sole express written warranty that Ryland gave to [the unit purchaser]"). (Respondents' Brief p. 5). In the Complaint, Plaintiffs chose jointly to assert all five of their causes of action. (R. ___). Plaintiffs jointly sued Ryland for "Breach of Warranty." (R. ___). As the basis for their claim for "Breach of Warranty," Plaintiffs jointly and specifically alleged, not just a breach of implied warranties, but the breach of the "express" warranty:

> 76. The design, construction sale, and repair of 656 Coleman Townhomes came with express and implied warranties that work would be performed in a careful, diligent and workmanlike manner. . . .

(R. __) (emphasis added). In addition to the undeniable fact that both Plaintiffs sued Ryland specifically for breach of the express warranty, in their very brief to this Court Plaintiffs admit that "[t]he Ryland Home Warranty Program Insured Limited Warranty . . . is the sole express written warranty that Ryland gave to [the unit purchaser] and is incorporated by reference into the Purchase Contract." (Respondents' Brief p. 5).

Ryland's Motion to Compel Arbitration must be viewed in light of the allegations in Plaintiffs' Complaint. Plaintiffs chose jointly to sue Ryland for breach of the express warranty and admitted to this Court that the sole express written warranty available to unit purchasers is through the Purchase and Sale Agreement. Plaintiffs' undeniable attempt to sue to enforce the sole express written warranty is an effort to obtain a direct benefit from the Purchase and Sale Agreement. *See Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct.

App. 2012) (holding the doctrine of direct benefits estoppel requires a non-signatory to be bound by an arbitration provision within a contract executed by other parties when the non-signatory seeks to enforce a provision of that contract). Accordingly, the Court must compel Plaintiffs to arbitrate their claims against Ryland pursuant to the arbitration agreement in the Purchase and Sale Agreement.

II. The circuit court erred in failing to conduct a proper review of whether the Plaintiffs are required to arbitrate their claims against Ryland pursuant to the arbitration agreement in the Master Deed.

A proper review and analysis of the arbitration agreement (Article X) in the Master Deed is required. There is no indication in the Record that the circuit court made such an analysis in rendering its decision to deny Ryland's Motion to Compel Arbitration.

Plaintiffs now seek to bootstrap the circuit court's decision on Ryland's Motion to Compel Arbitration to the prior decision on WCB's separate motion to compel arbitration. However, the purported justifications for such bootstrapping fail as a matter of law. Namely, the prior decision on WCB's motion does not qualify as the law of the case. Additionally, Ryland was not required to appeal the decision on WCB's motion rather than pursuing its own motion. Finally, Ryland's separate Motion to Compel Arbitration was not precluded on the basis it required a circuit court judge to overrule impermissibly another circuit court judge.

A. The January 3, 2017, Order is not the law of the case and it was an error to find that this order applied to Ryland's Motion to Compel Arbitration.

It was an error for the circuit court to refuse to consider Ryland's Motion to Compel Arbitration pursuant to the Master Deed on the grounds that the January 3, 2017, Order is the law of the case.

"[T]he law of the case doctrine . . . applies only to subsequent proceedings in the same litigation following an appellate decision." *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999). "[O]rdinarily an

interlocutory order which merely decides some point or matter essential to the progress of the [case], collateral to the issues in the case, is not binding as the law of the case, and may be reconsidered and corrected by the court before entering a final order on the merits." *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (citation omitted); *Lucius v. Du Bose*, 114 S.C. 375, 103 S.E. 759, 761 (1920) ("[P]reliminary findings, on interlocutory motions, are not final or conclusive, and do not bind the parties or the court at the trial of the case on its merits.").

This is not a situation wherein the second circuit court judge adopted the prior circuit court order as his basis and reasoning for denial of Ryland's Motion to Compel Arbitration. The circuit court could have done that, and then Ryland could have appealed that decision and effectively appealed the prior order at the same time. However, the second circuit court judge did not give Ryland that consideration or that opportunity. The second judge's order, and the record in this case, supports no other conclusion but that the second judge gave no independent consideration to, or decision on, Ryland's Motion to Compel Arbitration. Rather, the circuit court erred by denying the motion solely on the misapplication of the legal principle of "law of the case." That principle does not apply and that decision was error.

The first circuit court order denying WCB's motion was merely an interlocutory order. The United States Supreme Court and the Fourth Circuit Court of Appeals have found that when the right to appeal an interlocutory order is created by statute a party may appeal the interlocutory order, but they are not bound to appeal the interlocutory order to avoid the application of the law of the case doctrine.[4] *United States v. U. S. Smelting Ref. & Min. Co.*, 339

[4] Contrary to Plaintiffs' assertion that the federal authorities analyzing the law of the case are inapplicable, the Court of Appeals in *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015) quoted the United States Supreme Court's opinion in *U.S. Smelting*, the Fifth Circuit Court of Appeal, and the United States Bankruptcy Court for the Southern District

U.S. 186, 199, 70 S.Ct. 537, 544 (1950) (stating that "[t]he appellants might have appealed, but they were not bound to" when analyzing the application of the law of the case doctrine to an interlocutory order that could have been appealed pursuant to a specific statute); *Choice Hotels Int'l, Inc. v. Patel*, 236 F. App'x 868, 870 (4th Cir. 2007) (finding the law of the case doctrine was inapplicable to an order denying a motion to compel arbitration pursuant to the Federal Arbitration Act that was not previously appealed).

Notwithstanding the interlocutory character of a denial of a motion to compel arbitration, the South Carolina Arbitration Act states that such an order *may* be appealed. S.C. CODE ANN. § 15-48-200. Under the South Carolina Arbitration Act (which controls the right to appeal the denial of a motion to compel arbitration), Ryland was not bound to immediately appeal the order denying WCB's motion to compel arbitration to avoid the application of the law of the case doctrine. *See U. S. Smelting Ref. & Min. Co.*, 339 U.S. at 199, 70 S.Ct. at 544. Thus, when the second circuit court judge chose to deny Ryland's Motion to Compel Arbitration pursuant to the Master Deed merely upon the basis that the prior order was the law of the case—apparently with no independent review or consideration of Ryland's motion—he erred.

B. Ryland's Motion to Compel Arbitration pursuant to the Master Deed did not require one judge to overrule another judge.

A proper and independent consideration of Ryland's Motion to Compel Arbitration by the lower court would not have given rise to an impermissible situation of one circuit court judge overruling another. As this court recognized in *Binkley v. Burry*, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct. App. 2002) it is not impermissible for one circuit court judge to rule on related but

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of New York, in analyzing whether a party's motion to compel arbitration was barred by the doctrine of the law of the case when the Court of Appeals had previously issued an order affirming the circuit court's denial of another party's motion to compel arbitration.

potentially distinguishable issues from those previously ruled upon by another circuit court judge. This does not constitute "overruling" the other judge.

It is important to observe that the cases cited by Plaintiffs for the proposition that one judge may not "overrule" another actually involve cases where the second judge was issuing orders to "vacate" or "set aside" another judge's prior order involving the same parties. In *Cook v. Taylor*, 272 S.C. 536, 538, 252 S.E.2d 923, 925 (1979), the issue was the second judge issuing an order to vacate the first judge's order of reference to a master. In *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986), a circuit court judge reversed a prior order of another circuit court judge permitting the filling of an amended complaint. In both *Cook* and *Enoree Baptist Church*, the improper action was for a second judge to vacate or set aside an existing order by another circuit court judge on the same motion, between the same parties. The second circuit court judge effectively issued an order "reversing" the prior order on the same motion.

The present case does not involve such a procedural history or setting. WCB filed a motion to compel Plaintiffs to arbitrate their claims against WCB. The circuit court issued an order denying WCB's motion. Next, in timely fashion, Ryland filed a motion to compel Plaintiffs to arbitrate their claims against Ryland. Ryland's Motion to Compel Arbitration did not seek to have the circuit court overrule, vacate, or set aside the prior ruling that Plaintiffs do not have to arbitrate their claims against WCB. Instead, Ryland sought—for the first time—to have the circuit court determine whether Plaintiffs are required to arbitrate their claims against Ryland. Therefore, the application of the rule that one circuit court judge may not overrule, or reverse the prior decision of another circuit court judge is inapplicable in this case. Ryland was not requesting an order overruling the decision on the prior motion.

C. The denial of a motion to compel arbitration need not be immediately appealed on the grounds that it affects the mode of trial.

Plaintiffs' argument that Ryland was obligated immediately to appeal the January 3, 2017, Order denying WCB's motion to compel arbitration, because it involved a substantial right—the mode of trial—is inapposite and unfounded.

The concept that an order affecting the mode of trial must be immediately appealed is a general notion arising from S.C. CODE ANN. § 14-3-330(2). However, that general rule, that statute, and the cases decided thereunder, have no application to orders ruling on motions to compel arbitration. The appeal of orders granting or denying motions to compel arbitration are more specifically governed by S.C. CODE ANN. § 15-48-200. *See Haffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 135 (1995). As the Supreme Court held, the assertion that S.C. CODE ANN. § 14-3-330 should be applied to determine appealability of an order ruling on a motion to compel arbitration "is without merit." *Haffner*, 321 S.C. at 538, 471 S.E.2d at 135. Applying the general provisions of § 14-3-330 to an order on arbitrability would conflict with § 15-48-200 which is more specifically applicable, and specific laws prevail over general laws. *Id.* (citing *Nat'l Advert. Co. v. Mount Pleasant Bd. of Adjustment*, 312 S.C. 397, 400, 440 S.E.2d 875, 877 (1994)).

Section 15-48-200 expressly and unambiguously provides that in the case of an order denying a motion to compel arbitration "[a]n appeal *may* be taken. . . ." (emphasis added). The statute plainly does not require that an appeal from an order denying a motion to compel arbitration must be taken, or that it must be taken immediately. Indeed, further analysis of § 15-48-200 reveals its obvious difference from the more general rule related to appeals from orders that affect the mode of trial. Under § 15-48-200 an order granting a motion to compel arbitration—which is definitely a decision affecting the mode of trial—is not appealable at all.

All of the authority cited by Plaintiffs regarding the immediate appeal of an order affecting the mode of trial involve the application of S.C. CODE ANN. § 14-3-330. *See Salmonsen v. CGD, Inc.*, 377 S.C. 442, 452-53, 661 S.E.2d 81, 87 (2008) (holding that an order establishing an "opt-in" notification procedure was an immediately appealable because the order under S.C. CODE ANN. § 14-3-330 affected the mode of trial); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 71, 533 S.E.2d 331, 333 (2000) (holding that an order bifurcating a case is not an immediately appealable pursuant to S.C. CODE ANN. § 14-3-330); *Creed v. Stokes*, 285 S.C. 542, 542-43, 331 S.E.2d 351, 352 (1985) (holding that an order of reference to the master in equity must be immediately appealed pursuant to S.C. CODE ANN. §14-3-330(2)); *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997) (holding that an order denying a motion for a jury trial affects the mode of trial and must be immediately appealed pursuant to S.C. CODE ANN. § 14-3-330(2)). The Court in *Haffner*, 321 S.C. at 538, 471 S.E.2d at 135, concluded that applying the provisions of § 14-3-330 to an order regarding the appealability of orders relating to arbitration lacks merit. Thus, Plaintiffs cited case law is not germane in this appeal.

The timing on appeals from orders denying motions to compel arbitration is not firmly established. Instead, the determination of whether a party waits too long to commence an appeal is regulated by the concept of waiver as it has been developed by courts in arbitration cases. *See Rhodes v. Benson Chrysler–Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007). Imposition of a waiver in arbitration cases is not based on the passage of any particular time, it is based upon whether a party has acted inconsistently with preserving or exercising its right to compel arbitration by taking advantage of the judicial system and, thereby, prejudicing the other party. *Id.* If the parties conduct little or no discovery, then the party seeking to compel arbitration has "not taken 'advantage of the judicial system,' prejudice will likely not exist, and the law would favor arbitration." *Id.*; *Toler's Cove Homeowners Ass'n, Inc.*, 355 S.C. at 612,

586 S.E.2d at 585 (finding a thirteen-month period in which discovery was limited in nature, the parties had not availed themselves of the court's assistance, and respondent had not held any depositions did not demonstrate waiver). On the other hand, "if the parties conduct significant discovery, then the party seeking to compel arbitration has taken 'advantage of the judicial system,' prejudice will likely exist, and the law would disfavor arbitration." *Id.*; *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003) (finding a nineteen-month period in which the parties exchanged written interrogatories and requests to produce and the party requesting arbitration took two depositions demonstrated waiver).

In the case before this Court, Ryland has not availed itself of discovery or other use of the court or judicial process. Thus, the record is clear, Ryland has taken no action that would constitute a waiver of its right to appeal or to compel Plaintiffs to arbitration, and the mere passage of time after any ruling affecting Ryland's right to compel arbitration does not bar this appeal.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying Ryland's Motion to Compel Arbitration. Neither the law, nor the facts, support a finding that the terms of any of the contracts at issue in this case contain unenforceable agreements to arbitrate and, therefore, Ryland respectfully requests this Court reverse the circuit court's order denying Ryland's Motion to Compel Arbitration and conduct a proper review of Ryland's Motion to Compel Arbitration or, alternatively, remand the matter to the circuit court to conduct a proper analysis of Ryland's Motion to Compel Arbitration.

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

PROOF OF SERVICE

I hereby certify that I have served the **APPELLANT THE RYLAND GROUP, INC.'S INITIAL REPLY BRIEF** on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on August 26, 2019, addressed to the following:

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August 26, 2019

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August 26, 2019

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Six Fifty Six Owners v. WCB, LLC***
***Appellate Case No.* 2019-000562**

Dear Mrs. Kitchings:

Enclosed for filing please find an original and two (2) copies of Appellant The Ryland Group, Inc.'s Initial Reply Brief regarding the above-referenced matter.

Please return a filed-stamped copy with our courier. As evidenced by the attached Proof of Service and by copy of this letter, we are providing counsel of record with a copy of same.

With kindest regards,

Sincerely,

Katon E. Dawson, Jr.

KED:bg
Enclosures

cc: Justin O'Toole Lucey, Esq.
Joshua Fletcher Evans, Esq.
James L. Floyd, III, Esq.
Collin H. Fuller, Esq.