IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

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

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are.....Respondents.

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

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STATEMENT OF THE CASE

On June 14, 2012, Respondents Peter T. Phillips and Summar C. Phillips (the "Phillips") filed a complaint against Respondent Omega Flex, Inc. ("Omega Flex"), Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. ("John Wieland Homes"), Respondent AAA Plumbing ("AAA Plumbing"), Respondent Fogel Services, Inc. ("Fogel Servies"), and Respondent Charleston LEC, Inc. ("Charleston LEC"), alleging causes of action for negligence, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, strict liability, breach of contract, breach of implied warranty of workmanlike service, and breach of implied warranty of habitability. **(R.pp. 13-28).**

The Phillips' Complaint seeks damages arising from a fire on June 25, 2009 at 1417 Hooper Street on Daniel Island. **(R.p.14, ¶¶ 7-9)**. The fire was allegedly caused by a lightning

strike that created a hole in a CSST gas pipe, which allegedly caused the natural gas to ignite at the hole in the CSST, which then purportedly escaped the hole in the CSST. **(R.p.14, ¶ 10).**

On October 29, 2012, John Wieland Homes moved to compel arbitration of the Phillips' claims against John Wieland Homes pursuant to an arbitration clause incorporated into the Purchase Agreement entered into between John Wieland Homes and the Phillips. **(R.pp.324-27).** Additionally, John Wieland Homes moved to compel arbitration of the Phillips' claims against AAA Plumbing, Fogel Service, and Charleston LEC (collectively, the "Trade Contractors"). **(R.pp.324-27).** John Wieland Homes argued that these claims were subject to arbitration under the Federal Arbitration Act. **(R.pp.324-27).**[1]

On December 18, 2012, the Circuit Court held a hearing on the Motion to Compel Arbitration. **(R.pp.1-7).** By Order filed on April 25, 2013, the Circuit Court ruled that the Purchase Agreement entered into between the Phillips and John Wieland Homes did not involve interstate commerce and was not subject to the Federal Arbitration Act. **(R.pp.1-7).**

On May 6, 2013, John Wieland Homes received written notice of entry of the order filed on April 25, 2013. **(R.pp.245-46).** On May 6, 2013, John Wieland Homes timely served and filed a Motion to Reconsider, Alter, or Amend the Order. **(R.pp.245-46; R.pp.344-58).** The Circuit Court denied the Motion to Reconsider, Alter or Amend by Order filed on May 30, 2013. **(R.pp.245-46).** On June 25, 2013, John Wieland Homes served notice of its intent to appeal the Circuit Court's Orders. **(R.pp.245-46).**

FACTS

The Phillips' Complaint alleges that John Wieland Homes is a corporation organized and existing in the State of Georgia that develops and sells real property, including real property

[1] The parties did not dispute that the arbitration agreement at issue in this case does not meet the technical requirements of South Carolina Code section 15–48–10(a). **(R.p.4).**

located in South Carolina and that John Wieland Homes was the building contractor and seller of the Phillips' home. **R.p.13, ¶ 3.**

The Phillips and John Wieland Homes entered into a Purchase and Sale Agreement ("the Purchase Agreement") which incorporated the terms of the John Wieland Homes and Neighborhoods 5-20 Extended Warranty program ("the Warranty") (collectively, the "Agreement"). **(R.pp.159-217).** The terms of the Agreement were specifically agreed to by the Phillips; and both the Purchase Agreement and Warranty include mandatory arbitration provisions. **(R.p.175, ¶ 22 and R.pp.199-201, ¶ O).** In the Purchase Agreement, the Phillips expressly agreed to resolve any disputes in mandatory arbitration. **(R.p.175, ¶ 22).** Paragraph 22 of the Purchase Agreement, entitled "Warranty and Arbitration," provides, in pertinent part:

> 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 (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 MANDATORY BINDING ARBITRATION PROVISIONS CONTAINED THEREIN . . .

(R.p.175, ¶ 22). The Phillips agreed to Paragraph 22 and initialed it separately, acknowledging that they read and received the Warranty. **(R.p.175, ¶ 22).** In so doing, per the terms of the John Wieland Homes Warranty, which is incorporated into Paragraph 22 of the Purchase Agreement by reference, the Phillips expressly agreed as follows:

> 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 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.199-200, §V, ¶ O). The Agreement mandates that its arbitration procedure:

> 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.p.201, §V, ¶ O).

The Agreement specifically provides that the transaction involved interstate commerce: "As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law." **(R.p.200, ¶ O).**

In addition to covering disputes between the Phillips and John Wieland Homes, the arbitration provision of the Agreement permits John Wieland Homes to include its suppliers and other contractors as parties to the arbitration:

> If Wieland so chooses, Wieland may have its supplier(s) and contractor(s) whose work or supplies are involved in the dispute included as parties to the arbitration. Questions of whether issues are arbitrable and the actual interpretation of terms needing definition in order to arbitrate an issue shall be determined by the arbitrator.

(R.p.200, §V, ¶ O). The Phillips have alleged that the Trade Contractors performed work on the house and that those parties are directly liable to the Phillips; however, any work those parties performed was performed pursuant to a Trade Contractor Application and Agreement entered into between the Trade Contractor and John Wieland Homes. **(R.p.221, ¶7, R.p.23, ¶7, &**

R.p.225, ¶7). Each of the agreements provides that the Trade Contractors will participate in and cooperate with any arbitration:

> Cooperation in Arbitration. Upon request and at no expense to Wieland, Trade Contractor shall cooperate and participate in, as may be reasonably directed by Wieland, any arbitration proceedings arising out of the home warranty coverage provided by Wieland or otherwise related to or arising out of the construction of the homes by Wieland.

(R.p.221, ¶7, R.p.223, ¶7, & R.p.225, ¶7).

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) (citing Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)). "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, at 596, 553 S.E.2d at 118 (citation omitted). "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 finding that the Agreement was not governed by the Federal Arbitration Act when the Agreement specifically provided that the Agreement involved transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act.

The Federal Arbitration Act provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. Here, the Circuit Court committed an error of law in finding that the Agreement did not involve interstate commerce

when the Agreement specifically provided that the Agreement included transactions involving interstate commerce and that it would be governed by the Federal Arbitration Act

By its plain language, the Agreement provides that the transactions involved interstate commerce and that it is governed by the Federal Arbitration Act: "As the purchase agreement with Wieland and this warranty are transactions involving interstate commerce, arbitrations shall be governed by the U.S. Arbitration Act, 9 U.S.C. Sections 1-16, to the exclusion of any provisions of state law." **(R.p.200, ¶ O).**

The South Carolina Supreme Court has held that an agreement that a contract shall be subject to the Federal Arbitration Act is binding and enforceable. Specifically, in Munoz v. Green Tree Fin. Corp., the Court held that "the arbitration agreement, which applies to 'this contract and the relationships which result from this contract', provides it shall be governed by the FAA . . . [and] . . . [a]rbitration agreements, like other contracts, are enforceable in accordance with their terms." 343 S.C. 531, 539, 542 S.E.2d 360, 363-64 (2001) (internal quotation marks omitted) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478 (1989)). The Supreme Court has recently reaffirmed this ruling. See Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013) (citing Munoz, 343 S.C. at 538, 542 S.E.2d at 363–64, and stating in a parenthetical as follows: "holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms").

The Circuit Court committed an error of law by refusing to enforce the plain language of the Agreement entered into between John Wieland Homes and the Phillips. The Circuit Court did not address or distinguish Munoz, but rather ruled that the Agreement was not governed by the Federal Arbitration Act because it was a contract for the purchase and sale of a completed

home as in Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012). Assuming *arguendo* that the Agreement in this case did involve the purchase of a fully completed house, Brentwood Homes, which did not address the issue of whether parties to a purchase agreement can agree that the sale involved interstate commerce and would be governed by the Federal Arbitration Act, is not controlling as to whether the Phillips and John Wieland Homes agreement that the contract involved interstate commerce and was governed by the Federal Arbitration Act is enforceable. Munoz, however, is controlling. Accordingly, the Circuit Court should be reversed.

II. The Circuit Court committed an error of law in finding that the Agreement was not governed by the Federal Arbitration Act when it did not consider the Addenda to the Agreement which included specific customization of the construction of the Phillips' house.

Not only did the Phillips and John Wieland Homes contract for the Agreement to be governed by Federal Arbitration Act, the Agreement indeed involved interstate commerce. As such, the Federal Arbitration Act applies and preempts state law because the transaction—a contract to customize the construction of a home and for the purchase of that home—involved interstate commerce.

The FAA provides: "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2. "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)).

"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." Zabinski v. Bright Acres Assoc., 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). "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 (citation omitted); see also Allied-Bruce Terminix Companies, 513 U.S. at 270. "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 (citation omitted).

South Carolina Courts have consistently held that a contract that involves the construction of a residence, by its very nature, involves interstate commerce. See Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318, n. 8 (2012) ("We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA.") (citations omitted); Episcopal Hous. Corp. v. Fed. Ins. Co., 269 S.C. 631, 639, 239 S.E.2d 647, 651 (1977) (holding that the contract for the construction of an elderly housing project was interstate where materials, equipment, and supplies were produced and manufactured out-of-state); Circle S. Enterprises, Inc. v. Stanley Smith & Sons, 288 S.C. 428, 431-32, 343 S.E.2d 45, 47 (Ct. App. 1986) (finding a construction contract involved interstate commerce where the equipment, materials, and subcontractors at issue were furnished from out-of-state).

The Circuit Court in this case found that the Agreement did not involve interstate commerce because the Agreement was solely for purchase of a completed residence. **(R.p.6)**

(citing Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 318 (2012)). In Brentwood Homes, the Court held that the sale and purchase of residential real estate was a purely intrastate activity. Brentwood Homes, at 458, 730 S.E.2d at 317 ("[W]e conclude that Brentwood Homes failed to offer sufficient evidence that the transaction involved interstate commerce to subject the Agreement to the FAA."). The Court specifically noted that the contract in that case did not include customizations of the home: "Notably, the provisions of the Agreement providing for . . . 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley." Id.

In this case, the Circuit Court erred in finding that the Agreement reflected a similar relationship between developer and purchaser as in Brentwood Homes and ruled—without considering the entire Agreement—that "the essential character of the agreement" was for the purchase of a completed residence. **(R.p.6)** (citing Brentwood Homes)). Unlike the contract in Brentwood Homes, the Agreement in this case includes several specific options or customizations of the residence—the Phillips and John Wieland Homes agreed to the following items in various Addenda to the Purchase Agreement: adding custom paint colors; converting the patio and front walkway to oyster shell; adding phone/cable to the bonus room over garage; adding a dedicated receptacle for a wine cooler in butler's pantry area; reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor; constructing an additional parking pad to the drive; adding additional patio space; converting the entire house to 7 ¼ inch baseboards; and several modifications related to wiring or prewiring for surround sound. **(R.pp.161-68).**

The Circuit Court did not address the Addenda, and its discussion of the terms of the Agreement show that the Circuit Court did not consider the Addenda at all:

> Under this contract, the seller, John Wieland Homes, had a right to build as it deemed fit. It had ultimate discretion on materials. The provision of the agreement allowing the Plaintiffs to make certain selections was marked as not applicable. John Wieland Homes reserved the right to decide home placement, driveway location, number of deck steps and all exterior colors. The seller was not required to gain the purchaser's permission prior to making any of these decisions. The agreement further provided that no structural or mechanical changes could be made once framing was complete.

(R.p.5). This characterization of the Agreement makes clear the Circuit Court did not consider the Addenda which included, among other things, customizing paint colors, reframing of the stairs to accommodate hardwood treads on first flight of stairs to second floor, construction an additional parking pad to the drive, and adding additional patio space. The Circuit Court erred by only considering the original Agreement and failing to consider the Addenda to that Agreement which included the type of options and customizations that the Brentwood Homes Court explained would involve interstate commerce. See e.g., Brentwood Homes, at 455, 730 S.E.2d at 316 ("To ascertain whether a transaction involves commerce within the meaning of the FAA, the *court must examine* the agreement, the complaint, and the surrounding facts." (quoting Zabinski, at 594, 553 S.E.2d at 116) (emphasis added)). This was reversible error.

Furthermore, the Circuit Court erred in not finding that the Agreement involved interstate commerce based upon these Addenda. Each of the items included in the Addenda, which are part of the Agreement, involve interstate commerce. In fact, Dennis A. Black, the one-time Division Quality Manager for John Wieland Homes, specifically stated in his affidavit that the construction of the Phillips' home "implicates interstate commerce." **(R.p.159, ¶¶ 1, 4).** The terms of the Addenda to the Agreement and Black's affidavit that the construction of the Phillips' house involved interstate commerce unequivocally demonstrate that the Agreement involved interstate commerce. See e.g., New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 626–27, 667 S.E.2d 1, 4 (Ct. App. 2008) ("we find the trial court

properly determined the Federal Arbitration Act . . . applies to the arbitration agreement in this matter since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project . . . [the builder's] affidavit swearing the project will involve businesses and supplies from outside South Carolina.").

Therefore, because the Agreement in the case was not for the sale of a completed residence as in Brentwood Homes, but actually encompassed the customization of the construction of the residence, the Circuit Court should be reversed. See Brentwood Homes, at 458, 730 S.E.2d at 318, n. 8 ("We emphasize that had the Agreement *actually encompassed the construction of the residence*, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA." (emphasis added)).

III. The Circuit Court committed an error of law in failing to find that the Agreement expressly and unambiguously compels arbitration of all claims between the Phillips and John Wieland Homes when the Agreement specifically compels arbitration of any and all claims between John Wieland Homes and the Phillips arising out of or relating in any manner to the Phillips' home.

As explained above, the Agreement is subject to the Federal Arbitration Act. Additionally, as explained below, the scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillips in their lawsuit.

"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) (citation omitted). "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).

"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). Underlying this policy is Congress' view that arbitration constitutes a more efficient dispute resolution process than litigation. Hightower v. GMRJ, Inc., 272 F.3d 239, 241 (4th Cir. 2001). Accordingly, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself resolved in favor of arbitration." Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002) (citation omitted).

"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, at 41-42, 524 S.E.2d at 846.

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).

In this case, the Agreement unambiguously provides that any dispute relating to any warranties, tort, or property damage (among other things) between the Phillips and John Wieland Homes is subject to arbitration:

> 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 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.199-200, ¶ O).

The scope of the arbitration provision in the Agreement encompasses every claim raised by the Phillips in their lawsuit—the Phillips have asserted causes of action in negligence, contract and implied warranty all seeking recovery for property damage, **(R.pp.18-20, ¶¶ 33-49).** Such claims are within the scope of the arbitration agreement as quoted above. 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."); 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."); 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.").

Because these claims are within the scope of the Agreement, they are subject to mandatory, binding arbitration. Accordingly, the Circuit Court erred in failing to find the Phillips claims against John Wieland Homes were subject to arbitration. For the foregoing reasons, the Circuit Court should be reversed and this Court should enforce the parties' agreed-upon arbitration clause by compelling the Phillips to submit their claims against John Wieland Homes to binding arbitration.

IV. The Circuit Court committed an error of law in failing to compel the Phillips to arbitrate their claims against the Trade Contractors when their claims against the Trade Contractors are all dependent upon the Phillips' Agreement with John Wieland Homes, which requires arbitration.

In addition to erring in failing to compel the Phillips to arbitrate their claims against John Wieland Homes, the Circuit Court erred in failing to compel the Phillips to arbitrate their claims against the Trade Contractors. Both the Agreement between the Phillips and John Wieland Homes and the agreements between John Wieland Homes and the Trade Contractors expressly and unambiguously permit John Wieland Homes to add the Trade Contractors as parties to any arbitration between John Wieland Homes and the Phillips, and the Phillips' claims are all dependent upon their contract with John Wieland Homes, which expressly requires arbitration.

The arbitration provision in the Agreement between the Phillips and John Wieland Homes provides, in pertinent part:

> If Wieland so chooses, Wieland may have its supplier(s) and contractor(s) whose work or supplies are involved in the dispute included as parties to the arbitration. Questions of whether issues are arbitrable and the actual interpretation of terms needing definition in order to arbitrate an issue shall be determined by the arbitrator.

(R.p.200, §V, ¶ O). Moreover, John Wieland Homes' contracts with each of the Trade Contractors provides as follows:

> Cooperation in Arbitration. Upon request and at no expense to Wieland, Trade Contractor *shall cooperate and participate in*, as may be reasonably directed by Wieland, *any arbitration proceedings arising out of the home warranty coverage provided by Wieland or otherwise related to or arising out of the construction of the homes by Wieland.*

(R.p.221, ¶7, R.p.223, ¶7, & R.p.225, ¶7 (emphasis added)).

Because the Phillips' claims against the Trade Contractors are based in whole or in part on their Agreement with John Wieland Homes, the Federal Arbitration Act applies to the Phillips' claims against the Trade Contractors for the same reasons discussed above relating to their claims against John Wieland Homes. Therefore, the same legal standard favoring arbitration is applicable to these claims. See e.g. Moses H Cone Mem'l Hosp., 460 U.S. at 24 (stating that the Federal Arbitration Act reflects "a liberal federal policy favoring arbitration agreements.").

Although the Trade Contractors are non-signatories to the Agreement between the Phillips and John Wieland Homes, the Complaint alleges the Trade Contractors performed work as subcontractors pursuant to subcontracts with John Wieland Homes, entered into by virtue of the contract between John Wieland Homes and the Phillips. **(R.pp.23-231, ¶¶ 53-62; R.pp.24-25, ¶¶66-75; & R.pp.26-28, ¶¶79-88)**. The Phillips allege that bilateral contracts were created between themselves and the Trade Contractors and that the Trade Contractors breached those contracts. **(R.pp.22-23, ¶¶ 53-62; R.pp.24-25, ¶¶66-75; & R.pp.26-28, ¶¶79-88).** Because the Phillips' breach of contract claims against the Trade Contractors are predicated upon the existence of multiple contracts, including the Phillips' contract with John Wieland Homes, all of

the claims the Phillips assert against the Trade Contractors are subject to the arbitration provision of the contract between the Phillips and John Wieland Homes.

This Court recently decided a case involving similar facts. See Pearson v. Hilton Head Hosp., 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) (reversing the circuit court's denial of a defendant's motion to compel arbitration). In Pearson, the plaintiff, Dr. Pearson, an anesthesiologist, entered into a contract with LocumTenens.com ("Locum"), an online medical professional placement corporation, to place him in Hilton Head Hospital ("the Hospital") for 40 days in 2007. Id. at 285-86, 733 S.E.2d at 599. The Hospital had a contract with Locum, but not with Pearson. See id. at 286, 733 S.E.2d at 599. Pearson was fired and sued both Locum and the Hospital. See id. Both the Hospital's contract with Locum and Locum's contract with Pearson provided for mandatory arbitration of all claims arising out of the contract or relationship of the parties. See id. Both defendants moved to compel arbitration. See id. The circuit court granted Locum's motion since he had a contract with Pearson, but denied the Hospital's motion. See id. The Hospital argued on appeal that "Dr. Pearson [was] bound by the arbitration clause both as a nonsignatory to the Hospital and Locum's agreement and as a signatory to his and Locum's agreement." Id. at 296, 733 S.E.2d at 605. This Court ultimately sided with Hospital and offered several rationales for its decision, some of which are relevant and compelling in this case. For example, this Court found it significant that Pearson's causes of action relied on the existence of Locum's contract with the Hospital as a prerequisite to his claim:

> . . . looking at the Hospital as a nonsignatory in the contract between Dr. Pearson and Locum, Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital. Because both of those contracts have arbitration clauses, **he should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions** . . .

Id. at 297, 733 S.E.2d at 605 (emphasis added).

Like in Pearson, the Phillips' suit against each of the Trade Contractors involves two contracts—the Phillips' Agreement with John Wieland Homes and John Wieland Homes' contract with each Trade Contractor. Just as in Pearson, the Phillips are signatories to one of the contracts and non-signatories to the other. Notably, the Phillips' causes of action against the Trade Contractors rely on the existence and validity of the contract between themselves and John Wieland Homes. **(R.p.22, ¶ 54)** (alleging that "[t]he Plaintiffs, by virtue of their contract with Defendant John Wieland Homes, entered into a subcontract with Defendant Fogel Services by which Defendant Fogel Services would install or oversee the installation of plumbing and gas lines in the Plaintiffs' home in a workmanlike manner"); **(R.p.22, ¶55)** ("This agreement entered into by Defendant John Wieland Homes, on behalf and for the benefit of the Plaintiffs constituted a contract between the Plaintiffs and Defendant Fogel Services"); **(R.pp.22-23, ¶¶ 53-62)** (alleging breach of this contract and breach of implied warranty of work manlike service as to Defendant Fogel Services); and **(R.pp.24-25, ¶¶ 66-75 and R.pp.26-28, ¶¶ 79-88)** (alleging similar contract formation, breach, and breach of implied warranties as to AAA Plumbing and Charleston LEC)).

Because the arbitration provision of the Agreement in this case provides for binding, mandatory arbitration and John Wieland Homes' contracts with the Trade Contractors require those parties to participate in and cooperate with any arbitration, the Phillips are required to arbitrate their claims against John Wieland Homes and the Trade Contractors.

Therefore, for the reasons discussed above, the Circuit Court erred in failing to compel the Phillips to arbitrate their claims against the Trade Contractors and should be reversed, and this Court should enforce the parties' agreed-upon arbitration clause by compelling the Phillips to submit their claims against the Trade Contractors to binding arbitration.

CONCLUSION

In determining whether the Phillips' Agreement with John Wieland Homes was subject to the Federal Arbitration Act, the Circuit Court incorrectly ignored that the Phillips and John Wieland Homes specifically agreed that the Agreement involved interstate commerce and that it would be governed by the Federal Arbitration Act. The Circuit Court further erred by not considering the Addenda to the Agreement and Dennis Black's affidavit, which unequivocally demonstrate that the Agreement did in fact involve interstate commerce. Finally, the Circuit Court also committed an error of law in failing to enforce the terms of the arbitration agreement, which clearly and unambiguously encompasses all of the Phillips' claims against John Wieland Homes and the Trade Contractors.

For the foregoing reasons, the Circuit Court's Order Denying the Motion to Compel Arbitration filed by John Wieland Homes and the Order Denying John Wieland Homes' Motion to Reconsider Alter or Amend the Order Denying the Motion to Compel Arbitration should be **REVERSED,** and the Phillips should be compelled to arbitrate their claims against John Wieland Homes and the Trade Contractors.

Respectfully Submitted,

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April 29, 2014
Charleston, South Carolina

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Civil Action No. 2012-CP-10-03870
Appellate Case No. 2013-001449

Peter T. Phillips and Summar C. Phillips ..... Respondents,

v.

Omega Flex, Inc., John Wieland Homes and Neighborhoods of the Carolinas, Inc., AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., ... Defendants,

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

And Omega Flex, Inc, AAA Plumbing, Fogel Services, Inc., Charleston LEC, Inc., are..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final 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 Final Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc.; Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply to Respondent Omega Flex, Inc.; and Final Reply Brief of Appellant John Wieland Homes and Neighborhoods of the Carolinas, Inc. in Reply Respondents Peter T. Phillips and Summar C. Phillips were served on this 29th day of September, 2014 via U.S. mail, postage prepaid, upon the following counsel of record:

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