THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2020-000384

Melissa Dixon and Willard Dixon ..... Respondents,

v.

Lansing Pattee, Stephanie Pattee, Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes, John Doe, A2Z Advanced Home Inspections, LLC, Fidelity and Deposit Company of Maryland, Westchester Fire Insurance Company.....Defendants,

And
Lansing Pattee and Stephanie Pattee.....Third Party-Plaintiffs

v.

Gutter Pros, LLC.....Third- Party Defendant,

Of whom Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes, is the Appellant

And
Lansing Pattee and Stephanie Pattee are Respondents.

INITIAL BRIEF OF APPELLANT WEEKLEY HOMES, LLC F/K/A WEEKLEY HOMES, L.P. D/B/A DAVID WEEKLEY HOMES

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STATEMENT OF THE CASE

On August 30, 2017, Respondents Melissa and Willard Dixon (the "Dixons") filed a complaint against Respondents Lansing and Stephanie Pattee (the "Pattees"), alleging that the Pattees sold them a home in 2017 with certain defects, including moisture intrusion issues, and that the Pattees knew of the issues but did not reveal the defects to the Dixons prior to the conveyance. **(Compl., at ¶¶ 5, 7-12)**. The Dixons alleged causes of action against the Pattees for breach of contract, fraud, fraud in the inducement, negligent misrepresentation, and violation of the South Carolina Residential Property Conditions Disclosure Act. **(Compl., at ¶¶ 28-66)**.

On July 18, 2018, the Dixons filed their First Amended Complaint, maintaining their claims against the Pattees, but also adding claims against Appellant Weekley Homes, LLC, f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes ("Weekley"), Respondent A2Z Advanced Home Inspections, LLC ("A2Z"), and Respondent John Doe (unknown construction agents). **(First Am. Compl.)**. The Dixons' First Amended Complaint asserted three causes of action against Weekley: (1) negligence and gross negligence; (2) breach of express and implied warranties; and (3) an unfair trade practice claim. **(First Am. Compl., at ¶¶ 85-108)**. In answering the Dixons' First Amended Complaint, the Pattees crossclaimed against Weekley seeking equitable indemnification. **(Pattee Ans. to Pls. First Am. Compl., at ¶¶ 49-57)**.

Weekley answered the Dixons' First Amended Complaint on August 24, 2018, asserting that the Dixons' claims should be resolved by arbitration, and answered the crossclaims for equitable indemnification asserted by the Pattees. **(Weekley Ans. to First Am. Compl., at ¶¶ 69-70; Weekly Ans. to Pattee Crossclaim)**.

On November 21, 2018, Weekley filed its Motion to Dismiss and Compel Arbitration (the "Motion to Compel Arbitration"), accompanied by the Affidavit of John Burchfield, General

Counsel for Weekley (the "Burchfield Affidavit"), seeking an Order compelling arbitration of all claims asserted against it. (**Mot. to Dismiss and Compel Arbitration; Aff. of John Burchfield**).

On January 1, 2019, the Dixons amended their complaint again. (**Second Am. Compl.**) The Dixons' Second Amended Complaint, the operative complaint in this matter, added allegations against two surety companies that allegedly issued license bonds to Weekley, Fidelity and Deposit Company of Maryland and Winchester Fire Insurance Company, and a negligence cause of action against Gutter Pros, LLC ("Gutter Pros"). (**Second Am. Compl., at ¶¶ 7, 8, 49-52**).

Additionally, the Dixons' abandoned their negligence and gross negligence claims against Weekley—the Second Amended Complaint only asserted two causes of action against Weekley: (1) breach of express and implied warranties; and (2) an unfair trade practices cause of action. (**Second Am. Compl., at ¶¶ 94-103**).

The Pattees' answer to the Dixons' Second Amended Complaint asserted the same equitable indemnification crossclaims against Weekley as they previously asserted. (**Pattee Ans. to Pls. Second Am. Compl., at ¶¶ 47-55**). Weekley timely answered the Dixons' Second Amended Complaint asserting arbitration as a defense and incorporating its pending Motion to Compel Arbitration. (**Weekley Ans. to Pls. Second Am. Compl., at ¶ 65**) ("Plaintiff's claims should be barred, and the case dismissed, or in the alternative stayed, pending a resolution of this dispute by arbitration. Weekley has filed a Motion seeking to Compel Arbitration and incorporates that motion herein."). Weekley also filed Answers in response to the Pattees and A2Z's Crossclaims. **(Weekley Ans. To Pattee Crossclaim; Weekley Ans. To A2Z Crossclaim).**

No party filed any opposition to the Motion to Compel Arbitration or any affidavit supporting their positions. Weekley filed its memorandum in support of the Motion to Compel

Arbitration on February 11, 2019. **(Memo. in Support of Mot. to Dismiss and Compel Arbitration)**. The Circuit Court heard arguments on Weekley's Motion to Compel Arbitration on February 12, 2019. At the hearing on February 12, 2019, counsel for the Dixons and Pattees argued that the Burchfield Affidavit was insufficient to demonstrate the transaction involved interstate commerce. **(Hr'g Tr. February 12, 2019, p. 21, l. 17-p. 28, l. 18).** In response to those arguments that were asserted for the first time at the hearing, Weekley filed the Affidavit of Tim Dupree (the "Dupree Affidavit") in further support of its Motion to Compel Arbitration. **(Aff. of Tim Dupree)**. Again, no party filed any opposing affidavits or other opposition.

The Circuit Court denied Weekley's Motion to Compel Arbitration by way of a Form 4 Order issued on October 9, 2019, which stated:

> After careful consideration, the Court respectfully denies the motion to compel arbitration, the motion to dismiss, and the motion for summary judgment. The court finds that there is sufficient evidence based upon the pleadings, discovery, motions, to withstand the motion for summary judgment and continue with the case.

(Form 4 Order dated October 9, 2019).

On October 14, 2019, Weekley timely served and filed a Motion to Reconsider, Alter, or Amend the Form 4 Order. **(Motion to Reconsider, Alter, or Amend)**. On February 10, 2020, the Circuit Court held a hearing on Weekley's Motion to Reconsider, Alter, or Amend. **(Hr'g Tr. February 10, 2020)**. The Circuit Court denied the Motion to Reconsider, Alter, or Amend by an Order filed on February 21, 2020, indicating:

> I have reviewed and considered the Motion to Reconsider and all supporting documents, affidavits and memoranda on file and, after due consideration find and conclude that the Court's previous rule should stand undisturbed.

(Order dated February 21, 2020).

On March 5, 2020, Weekley timely filed its Notice of Appeal of the Form 4 Order and Order denying its Motion to Reconsider, Alter, or Amend. **(Notice of Appeal)**.

STATEMENT OF FACTS

The Pattees entered into an agreement with Weekley on August 18, 2008 (the "Agreement"), whereby the Pattees agreed to purchase the property located at 174 Carolinian Drive, Summerville, SC 29485 and the "residential improvements constructed, *or to be constructed*, thereon." **(Aff. of John Burchfield, Ex. A, Agreement)** (italics added). John Burchfield, General Counsel for the Weekley Group of Companies, including the Appellant Weekley entity, attested that the Agreement "concerned the ***construction*** and sale of a home." **(Aff. of John Burchfield)** (double emphasis added). Construction of the subject home was not complete when the Pattees and Weekley entered the Agreement. See **(Aff. of John Burchfield, Ex. A, Agreement)** (signed by the Pattees on August 18, 2008). The Agreement specified that the closing was to be completed within five days of Weekley's completion of its "***construction obligations.***" **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 4)** (double emphasis added). According to the Complaint, the closing occurred on September 10, 2008. **(Second Am. Compl., at ¶ 14)**.

The work performed during this period between execution of the Agreement and closing included, among other things, changes and customizations of the home. **(Aff. of John Burchfield)**. For example, pursuant to Paragraph 6 of the Agreement, the Pattees were to select the following: flooring, appliances, countertops, plumbing fixtures, interior and exterior hardware, light fixtures, interior paint, and backsplash and wall tile. **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 6 and Customer Delight Checklist, at p. 2)**. The records submitted by Burchfield as exhibits to his Affidavit show that the Pattees made $15,275.00 worth of customizations. **(Aff. of John Burchfield, Ex. A, Agreement, Transaction Summary)**. Furthermore, Weekley modified the following aspects of the construction without any charge to the Pattees: hardwood floors were

extended into the family/kitchen/breakfast area, a stainless undermount sink and faucet was installed and two-piece crown was added in the family room and study. **(Aff. of John Burchfield, Ex. A, Agreement, Sales Incentive Worksheet).**

No evidence was offered controverting Burchfield's sworn affidavit that the Agreement concerned the construction of the subject property. Furthermore, by supplemental affidavit, Tim Dupree attested that the following specific materials were purchased for the Pattee's home from manufacturers or suppliers outside of the state of South Carolina:

> Appliances purchased from manufacturers or suppliers in Kentucky;
>
> Roofing shingles purchased from manufacturers or suppliers in Minnesota;
>
> Hardwood flooring purchased from manufacturers or suppliers in North Carolina;
>
> Countertops purchased from manufacturers or suppliers in Minnesota;
>
> Sinks purchased from manufacturers or suppliers in California;
>
> Faucets purchased from manufacturers or suppliers in North Carolina; and
>
> Crown molding purchased from manufacturers or suppliers in Georgia.

(Aff. of Tim Dupree, at ¶ 3). Dupree further attested that the above-noted materials were transported from outside of South Carolina to the Property. **(Aff. of Tim Dupree, at ¶ 3).**

The Agreement between Weekley and the Pattees contains a mandatory arbitration provision. **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9).** Paragraph 9 of the Agreement provides in pertinent part:

> DISPUTE RESOLUTION: ANY CLAIM, DISPUTE OR CAUSE OF ACTION INVOLVING SELLER OR PURCHASER ... ***SHALL BE RESOLVED BY BINDING ARBITRATION, IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT*** (TITLE 9, U.S. CODE) OR THE APPLICABLE STATE ARBITRATION STATUTE, IF THE FEDERAL ARBITRATION ACT DOES NOT APPLY.

a. Scope of Arbitration. The Arbitration provisions of this Agreement apply to all claims brought by through or under Purchaser, their dependents or other occupants of the Property, whether sounding in contract, tort, or otherwise, including claims for emergency or interim relief. The claims, disputes or causes of action within the scope of arbitration include, but are not limited to, those arising in connection with (I) this Agreement, including the negotiation, formation, subject matter, breach, cancellation or termination hereof; (II) the development, design, construction, preparation, maintenance or repair, of improvements to the Property; (III) marketing or sale of the Property; (IV) any representations or warranties, express or implied, relating to the Agreement or the Property; (V) any transaction, event or relationship between Purchaser and Seller, including any subsequent agreement or alleged agreement between Purchaser and Seller; (VI) any violations of any statute including, but not limited to, consumer protection, disclosure, or similar statutes or regulations; (VII) any personal injury or property damage claim; and/or (VIII) any other agreement, transaction, occurrence or event giving rise to a dispute over breach of legal duties, rights or obligations which involve Purchaser and Seller ("the Dispute"). This arbitration provision shall survive closing, breach or termination of this Agreement and shall not be superseded by the doctrines of merger or waiver.

(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9) (double emphasis added).

The signature page of the Agreement provides additional notice of the parties' agreement to arbitrate disputes involving either of them, stating:

NOTICE OF ARBITRATION AGREEMENT: The David Weekley Homes Real Estate Purchase Agreement provides that all disputes between you and David Weekley Homes (including its agents, contractors and developers) ***will be resolved by BINDING ARBITRATION***. You thus GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend your rights in connection with any claim that is within the scope of the arbitration clause (EXCEPT for matters that may be taken to SMALL CLAIMS COURT). Your rights will be determined by a NEUTRAL ARBITRATOR and NOT a judge or jury. You are entitled to a FAIR HEARING. BUT the arbitration procedures are SIMPLER AND MORE LIMITED THAN RULES APPLICABLE IN COURT. Arbitrator decisions are as enforceable as any court order and are subject to VERY LIMITED REVIEW BY A COURT. FOR MORE DETAILS, Review Section 9 of the Real Estate Purchase Agreement OR the American Arbitration Association Web site, www.adr.org

(Aff. of John Burchfield, Ex. A, Agreement, at §. 7) (double emphasis added).

Weekley, by and through a third-party, provided a limited warranty with respect to the subject property (the "Warranty").[1] The Warranty, like the Agreement, contains an arbitration section, which provides in pertinent part:

> [A]ny claim, controversy or dispute . . . between **YOU** and **US**, or parties acting on **YOUR** or **OUR** behalf, including **PWC**, and any successor, or assign of either **YOU** or **US**, which relates to or arises from this **LIMITED WARRANTY**, or the design or construction of the **HOME** or the **COMMON ELEMENTS**, or the sale of the **HOME** or transfer of title to the **COMMON ELEMENTS**, ***will be resolved solely by binding arbitration*** and not through litigation in court before a judge or jury.

(Aff. of John Burchfield, Ex. B, Warranty, at § VII) (double emphasis added).

Weekley provided the Pattees with a copy of the Warranty prior to the execution of the Agreement and closing on the sale. **(Aff. of John Burchfield, Ex. B, Warranty)**; **(Aff. of John Burchfield, Ex. A, Homeowner Portfolio Receipt)**. The Agreement expressly provides that the Pattees had an opportunity to review a copy of the Warranty prior to the execution of the Agreement and that by closing on the property, the Pattees acknowledge and accept the terms of the Warranty. **(Aff. of John Burchfield, Ex. A, at § 7(a))** ("Seller shall provide a written Home Builder's Limited Warranty . . . Purchaser acknowledges having an opportunity to review a copy of the Home Warranty prior to the execution of this Agreement. . . . By closing, Purchaser acknowledges and accepts the terms of the Home Warranty."). The Pattees executed the Agreement and initialed Page 3 thereof, the same page bearing the Warranty language. **(Aff. of John Burchfield, Ex. A, § 7(a))**. The Warranty arbitration provision goes on to specifically

[1] Professional Warranty Service Corporation ("PWC"), a third-party, issues written warranties for Weekley and performs administrative functions, but the warranty is made by Weekley and Weekley performs all work under the warranty. **(Aff. of John Burchfield, Ex. B, Warranty, p. 2)** ("The words '**WE**', '**US**' and '**OUR**' refer to the **BUILDER** . . . **WE** have contracted with **PWC** for certain administrative services relative to this **LIMITED WARRANTY**. **PWC's** sole responsibility is to provide administrative services as set forth herein.").

provide that the agreement to arbitrate "is made pursuant to a ***transaction involving interstate commerce***, and shall be governed by and interpreted under the ***Federal Arbitration Act*** now in effect and as it may be hereafter amended (the 'FAA') to the exclusion of any inconsistent state law, regulation or judicial decision." **(Aff. of John Burchfield, Ex., B, Warranty, at § VII)** (double emphasis added). The Warranty also provides that it is transferrable to a subsequent homeowner. **(Aff. of John Burchfield, Ex., B, Warranty, Subsequent Home Buyer Acknowledgment and Transfer Form)**.

The Dixons sued Weekley for breach of express warranty, alleging that "Weekley impliedly and/or expressly warranted that the design, building, construction, and materials would be performed using the utmost skill and attention and would be of good and workmanlike quality. Further, Weekley impliedly and/or expressly warranted that the design, building, construction, and materials would be such that the Subject Residence would be habitable and fit for its intended use as a single-family residence." **(Second Am. Compl., at ¶ 95)**. The Pattees sued Weekley for equitable indemnification, seeking to recover from Weekley its attorney's fees and costs associated with defending this action on the basis that the Pattees have done no wrong and been named in this suit because of Weekley's negligence. **(Pattee Ans. to Pls. Second Am. Compl., at ¶¶ 47-55)**.

Weekley sought to compel arbitration of the Pattees' and the Dixons' claims against it. **(Mot. to Dismiss and Compel Arbitration)**. Weekley supported its Motion to Compel Arbitration with the Affidavit of John Burchfield, which included the Agreement and Warranty between Weekley and the Pattees. **(Aff. of John Burchfield, Ex. A, Agreement, and Ex. B, Warranty)**. Weekley also filed a memorandum in support of the Motion to Compel Arbitration, outlined Weekley's legal argument for enforcing the arbitration agreements. **(Memo. in Support of Mot. to Dismiss and Compel Arbitration)**. Additionally, in response to arguments raised for

the first time at the hearing on the Motion to Compel by counsel for the Dixons and Pattees, Weekley filed the Affidavit of Tim Dupree which more specifically identified the aspects of the construction of the Pattee home that involved interstate commerce. **(Aff. of Tim Dupree, at ¶¶ 3-4)**.[2]

The Circuit Court's Order denying Weekley's Motion to Compel was entered as a Form 4 Order. **(Form 4 Order dated October 9, 2019)**. Weekley timely filed a Motion to Reconsider, Alter, or Amend the Form 4 Order entered on October 9, 2019. **(Motion to Reconsider, Alter, or Amend)**. After a hearing, the Circuit Court denied the Motion to Reconsider, Alter, or Amend. **(Order dated February 21, 2020)**. This appeal followed. **(Notice of Appeal).**

STANDARD OF REVIEW

"Due to the strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid." Damico v. Lennar Carolinas, Op. No. 5730, 2020 WL 3067558, at *1 (Ct. App. filed June 10, 2020) (citing Cape Romain Contractors, Inc. v. Wando E., LLC, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013)). Determinations of arbitrability are subject to de novo review, but a circuit court's factual findings will not be reversed if reasonably supported by the evidence. Id. (citing Parsons v. John Weiland Homes and Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016); Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 316 (2012); New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). Here, the Circuit Court made no factual findings in its rulings.

[2] The Affidavit of Tim Dupree was filed on February 22, 2019, 10 days after the hearing on the Motion to Compel Arbitration, and almost 8 months prior to the Circuit Court's ruling on the Motion to Compel, which was entered on October 9, 2019. **(Aff. of Tim Dupree; Form 4 Order dated October 9, 2019)**.

"[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Dean v. Heritage Healthcare of Ridgeway, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (quoting Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 91, 121 S. Ct. 513, 517, 148 L.Ed.2d 373 (2000)).

ARGUMENT

The Circuit Court erred in failing to compel arbitration because the claims asserted by the Pattees and Dixons are within the scope of enforceable arbitration agreements and the Federal Arbitration Act ("FAA") governs because: (1) the Agreement and Warranty expressly provide that the transaction involved interstate commerce and that the FAA would apply to any claim, dispute, or cause of action; and (2) the transaction did in fact involve interstate commerce. As explained in detail below, the Circuit Court erred by not determining the FAA applies and that under the FAA, the Pattees' and Dixons' claims against Weekley are subject to arbitration. Therefore, the Circuit Court should be reversed, and arbitration ordered.

I. The Circuit Court erred in denying a motion to compel arbitration where an enforceable arbitration agreement covered the scope of the claims asserted in this dispute[3] and the agreement explicitly provided that the transaction involved interstate commerce and that the Federal Arbitration Act would apply to the resolution of any claim, dispute, or cause of action involving the agreement.

The FAA provides: "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract, transaction, or refusal, 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 by not finding that the FAA applied because

[3] The enforceability and scope of the arbitration agreement are discussed in detail in section III and IV, *infra*.

the Agreement and Warranty expressly provided for mandatory, binding arbitration, that the transaction involved interstate commerce, and that the FAA would apply.

An agreement providing that a transaction involves interstate commerce is enforceable "like any other contract term." Damico v. Lennar Carolinas, Op. No. 5730, 2020 WL 3067558 at *1 (Ct. App. filed June 10, 2020). In Damico v. Lennar Carolinas, a group of homeowners sued Lennar Carolinas, LLC ("Lennar") alleging construction deficiencies. Id. Lennar moved to compel arbitration of the homeowners' claims based upon a provision in the parties' purchase and sale agreements that provided in pertinent part: "The parties to this Agreement specifically agree that this transaction involves interstate commerce and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) and not by or in a court of law or equity. . ." Id. The circuit court denied Lennar's motion to compel arbitration. Id.

This Court reversed the circuit court's denial of Lennar's motion to compel arbitration, finding as follows:

> We first consider whether the FAA applies. We hold it does, for two reasons. First, the PA [the Purchase and Sales Agreement] provides the parties 'specifically agree that this transaction involves interstate commerce.' We must enforce this agreement like any other contract term. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E. 2d 360, 363-64 (2001) (finding FAA applied because the parties had agreed contract involved interstate commerce).

Id.

As in Damico, the parties here agreed that the transaction between them involved interstate commerce. **(Aff. of John Burchfield, Ex., B, Warranty, at § VII)** ("This arbitration agreement is made pursuant to a transaction involving interstate commerce ...").

The parties also agreed that the FAA would govern disputes arising out of the construction, sale, and warranty of the subject Property. Both the Warranty and the Agreement in unequivocal terms specify that the FAA shall govern. **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9)** ("Any claim, dispute, or cause of action involving Seller or Purchaser . . . shall be resolved by binding arbitration, in accordance with the Federal Arbitration Act."); **(Aff. of John Burchfield, Ex. B, Warranty, at § VII)** ("This arbitration agreement .... shall be governed by and interpreted under the Federal Arbitration Act now in effect and as it may be hereafter amended . . . to the exclusion of any inconsistent state law, regulation or judicial decision.").

In addition to this Court, the South Carolina Supreme Court has held that an agreement among parties that a contract shall be subject to the Federal Arbitration Act is binding and enforceable. Specifically, in Munoz v. Green Tree Fin. Corp., the Supreme 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. Arbitration agreements, like other contracts, are enforceable in accordance with their terms." 343 S.C. 531, 539, 542 S.E.2d 360, 363-64, 148 L.Ed.2d 373 (2001) (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L.Ed.2d 488 (1989)); see also, 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").

Here, the Circuit Court erred in refusing to enforce the provisions of the Agreement and Warranty providing that the FAA applies and the transaction involved interstate commerce. The Circuit Court should be reversed, and arbitration ordered.

II. The Circuit Court erred in denying a motion to compel arbitration where an enforceable arbitration agreement covered the scope of the claims asserted in this dispute[4] and the transaction involved interstate commerce, thereby implicating the Federal Arbitration Act.

In addition to the contract provisions discussed above, the transaction in fact involved interstate commerce and the Circuit Court committed error of law in failing to find the FAA applied for that reason.

"Unless the parties have contracted to the contrary, the FAA applies in federal or state courts to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538-39, 542 S.E.2d 360, 363 (2001) (internal citations omitted). The evidence in this case is that the transaction did involve interstate commerce. "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, 115 S.Ct. 834, 130 L.Ed.2d 753 (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) (internal citation omitted). "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 (citing Allied-Bruce Terminix Companies, 513 U.S. at 270). "While the parties may agree to enforce arbitration agreements under

[4] The enforceability and scope of the arbitration agreement are discussed in detail in section III and IV, *infra*.

state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." Zabinski, 346 S.C. at 592, 553 S.E.2d at 116.

The Agreement and Warranty in this case both concerned the *construction* and sale of the subject home. South Carolina courts have consistently held that a contract that involves the construction of a residence, by its very nature, involves interstate commerce. See, e.g., Damico v. Lennar Carolinas, Op. No. 5730, 2020 WL 3067558 at *2 (Ct. App. filed June 10, 2020) (holding that where a residential real estate transaction also involved the construction of the residence, the FAA governs); Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 730 S.E.2d 312, 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."); Zabinski v. Bright Acres Associates, 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001). Likewise, where materials are produced, manufactured, and/or furnished to a construction project from outside South Carolina, South Carolina Courts have found that the contract necessarily involves interstate commerce. See 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); 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).

These cases are distinguished from contracts solely for the purchase and sale of residential real estate. In Bradley v. Brentwood Homes, the South Carolina Supreme Court held that the sale and purchase of residential real estate was a purely intrastate activity. Bradley v. Brentwood

Homes, 398 S.C. 447, 458, 730 S.E.2d 312, 317 (2012). In considering the applicable contract, the complaint, and the surrounding facts, 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 'New Construction,' 'House Plan,' 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley." Id. In finding that contracts that concern the purchase and sale of residential real estate solely involved intrastate commerce, the Court noted: "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." Id. at n. 8 (2012); see also Damico v. Lennar Carolinas, Op. No. 5730, 2020 WL 3067558 at *2 (Ct. App. filed June 10, 2020) (drawing the same distinction between purchase and sale agreements that also contain a construction component and citing to footnote 8 of Brentwood Homes).

Under Brentwood Homes, the reviewing court "must examine the agreement, the complaint, and the surrounding facts" to ascertain whether the transaction involves commerce within the meaning of the FAA. Id. at 458. The only evidence before the Circuit Court in this case was the sworn affidavits of John Burchfield and Tim Dupree, the Agreement, Warranty, and related documents.

The Agreement itself, applicable pleadings, and the surrounding facts only support a finding that the transaction involved interstate commerce. The transaction between Weekley and the Pattees was not limited to the purchase and sale of a completed home. Rather, the transaction involved the *construction* and sale of a new home to the Pattees. **(Aff. of John Burchfield, at ¶ 3, and Ex. A, Agreement)**.

Burchfield attested that the Agreement "concerned the *construction* and sale of a home" and that the construction component of the Agreement, including the customization of the subject home, implicated interstate commerce. **(Aff. of John Burchfield, at ¶¶ 3-4)** (italics added). An uncontroverted affidavit swearing that a construction project involved interstate commerce is sufficient to support a finding that the FAA applies. See New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 626-27, 667 S.E.2d 1, 4 (Ct. App. 2008) ('[W]e 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."); see also Blanton v. Stathos, 351 S.C. 534, 540-41, 570 S.E.2d 565, 568-69 (Ct. App. 2002) ("Stathos argues, because construction had not yet begun, and all work was done by individuals residing in South Carolina, the contract did not evidence interstate commerce. Yet, Blanton submitted an affidavit in which she asserted the contract affected interstate commerce. ... Stathos did not dispute Blanton's affidavit. The nature of the project and the affidavit by Blanton are sufficient to uphold the decision of the Circuit Court that the contract evidences a transaction involving interstate commerce.").

Further, any doubt that this Agreement involved interstate commerce is refuted by the Agreement itself and the Affidavit of Tim Dupree. The Agreement includes several specific options for customization or changes to the residence. **(Aff. of John Burchfield, at ¶ 4 and Ex. A, Agreement, at ¶ 6).** The documents associated with the Agreement show that the Pattees' made numerous construction decisions and over $15,000 of customizations. **(Aff. of John Burchfield, Ex. A, Agreement, Transaction Summary and Sales Incentive Worksheet).**

Additionally, Weekley purchased appliances, hardwood floors, countertops, sinks and faucets, and crown molding from manufacturers and suppliers located in states outside South Carolina specific to the construction and customization of the Pattee residence. (**Aff. of Tim Dupree, at ¶ 3**). These products were manufactured outside South Carolina, distributed and transported across state lines into South Carolina. (**Aff. of Tim Dupree, at ¶ 3**).

This evidence – the only evidence in the record on this issue - shows that the Agreement and Warranty encompassed the completion of construction and customization of the subject residence. Therefore, under the cases cited herein—including Bradley v. Brentwood Homes—this Agreement and Warranty is subject to the FAA. Therefore, the Circuit Court should be reversed and arbitration compelled.

III. The Circuit Court erred in denying a motion to compel arbitration with respect to the claim the Pattees asserted against Weekley where the Pattees' claim falls within the scope of the arbitration agreements and it is undisputed that the agreement is enforceable.

The Circuit Court committed reversible error by not compelling arbitration with respect to the claim the Pattees asserted against Weekley. As outlined above, the Pattees agreed to arbitrate claims related to the Agreement and Warranty and also agreed that the transaction involved interstate commerce and the FAA would apply. Further, the Pattees relied on the Agreement to allege a special relationship between themselves and Weekley, allegedly giving rise to a claim for equitable indemnification. (**Pattee Ans. to Second Am. Compl., at ¶ 48**). The Agreement and Warranty in very clear terms provided for mandatory, binding arbitration under the FAA as its dispute resolution mechanism. (**Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9 and Ex. B, Warranty, at § VII**). The Pattees initialed every page of the Agreement, including those containing the arbitration provisions, fully executed the signature page of the Agreement, (which provided a special notice of arbitration), and acknowledged receipt of a sample of the Professional

Warranty Service Corporation (PWC), Home Builders Limited Warranty and Warranty Performance Standards, which contained the relevant Warranty arbitration provisions. **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9 and Ex. B, Warranty at p. 25).**

The Pattees were signatories to the agreement to arbitrate provided in the Agreement and acknowledged receipt of the Warranty, which contained an independent agreement to arbitrate disputes, claims, or controversies related to the construction of the home. **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9 and Ex. B, Warranty at p. 25).** Therefore, arbitration is required. See generally, New Hope Missionary Baptist Church v. Paragon Bldrs., 379 S.C. 620, 627, 667 S.E.2d 1, 4 (Ct. App. 2008) ("Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.").

The Pattees have not asserted any basis for avoiding the arbitration agreements contained in the Agreement and Warranty, other than their assertion that the FAA does not apply. Nor have the Pattees disputed that their claim against Weekley for equitable indemnification is within the scope of the arbitration agreements contained in the Agreement and Warranty.

The Pattees' claims arise out of allegations of construction defects, which is clearly within the scope of the arbitration agreements. **(Pattee Ans. to Pls. Second Am. Compl., at ¶ 53)** ("Had Weekley and its subcontractors not been negligent and grossly negligent in the construction of the home, the Defendants would not have been named in this action."). Pursuant to the terms of the arbitration provisions of both the Agreement and Warranty, the Pattees' claim against Weekley is subject to arbitration. Under the Agreement, "any claim, dispute, or cause of action involving the Seller [Weekley] or Purchaser [the Pattees] shall be resolved by binding arbitration." **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9).** This expressly includes all claims arising in

connection with "the development, design, construction, preparation, maintenance or repair, of improvements to the Property." **(Aff. of John Burchfield, Ex. A, Agreement, at ¶ 9(a)).**[5]

The Warranty arbitration provision similarly provides that: "Disputes subject to binding arbitration include, but are not limited to: (C) Any alleged breach of this **LIMITED WARRANTY**; ... (J) Any other claim arising out of or relating to the sale, design, or construction of **YOUR HOME** or the **COMMON ELEMENTS**, including, but not limited to any claim arising out of, relating to or based on any implied warranty or claim for negligence or strict liability not effectively waived by this **LIMITED WARRANTY**." **(Aff. of John Burchfield, Ex. B, Warranty, at § VII (C), (J)).**

Moreover, even if there were some doubt as to the scope or applicability of the relevant arbitration agreements, such doubts should be resolved in favor of arbitration given the FAA's "liberal federal policy favoring arbitration agreements." Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L.Ed.2d 765 (1983). Underlying this policy is Congress' view that arbitration constitutes a more efficient dispute resolution process than litigation. Hightower v. GMRI, 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) (quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475-76, 109 S. Ct. 1248, 1254, 103 L.Ed.2d 488 (1989). "[I]n applying

[5] 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).

[common law] principles of contract interpretation to the interpretation of an arbitration agreement within the scope of the [FAA], due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself are resolved in favor of arbitration. [A]ny doubts concerning the scope of arbitral issues should be resolved in favor of arbitration[.]"). United States v. Bankers Ins. Co., 245 F.3d 315, 319 (4th Cir. 2001) (quoting Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 475-76, 109 S. Ct. 1248, 1254, 103 L.Ed.2d 488 (1989).

Therefore, for these reasons, the Circuit Court should be reversed, and arbitration ordered.

IV. The Circuit Court erred in denying a motion to compel arbitration with respect to the claims the Dixons asserted against Weekley where the causes of action asserted by the Dixons against Weekley are dependent upon the agreements that require arbitration and are within the scope of the arbitration agreements.

The arbitration agreements contained in the Agreement and Warranty are enforceable against the Dixons because, while they are not parties or signatories to the relevant agreements, the Dixons expressly rely on the Agreement and Warranty in alleging their causes of action against Weekley.

The Dixons sued Weekley for breach of warranty with respect to its construction of the subject residence, alleging that: "Weekley impliedly and/or ***expressly warranted*** that the design, building, construction, and materials would be performed using the utmost skill and attention and would be of good and workmanlike quality. Further, Weekley impliedly and/or ***expressly warranted*** that the design, building, construction, and materials would be such that the Subject Residence would be habitable and fit for its intended use as a single-family residence." (**Second. Am. Compl., at ¶ 95**) (emphasis added). The Dixons also asserted a cause of action against Weekley under S.C. Code § 39-5-20. (**Second. Am. Compl., at ¶¶ 98-103**).

The Dixons should not be permitted to sue Weekley directly on the Warranty without also being subject to the arbitration provision therein and the arbitration provision of the related Agreement. See Pearson v. Hilton Head Hosp., 400 S.C. 281, 297, 733 S.E.2d 597, 605 (Ct. App. 2012) ("Because both of these 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."). This principal was recently applied in the precise context currently before the Court. See Damico v. Lennar Carolinas, Op. No. 5730, 2020 WL 3067558 at *1 (Ct. App. filed June 10, 2020) ("All of the Respondent homeowners, except Lenna Lucas, purchased new homes to be constructed in the development. As part of the transaction, they signed a ten page Purchase and Sales Agreement (PA) containing an arbitration section. Lucas is the second owner of a home, but in her amended complaint, she alleges a breach of contract cause of action based upon the PA."). In Damico, this Court reversed the circuit court's order denying Lennar's motion to compel arbitration, enforcing the arbitration agreement contained against a subsequent purchaser that was a non-signatory to the agreement to arbitrate but had alleged breach of the agreement containing a mandatory arbitration clause. Id. Therefore, the Circuit Court should be reversed, and arbitration ordered.

It is worth noting, the same legal standard discussed above concerning the scope and enforceability of the arbitration provisions is equally applicable to the Dixon's claims. Therefore, for the same reasons discussed above, the Dixons' causes of action against Weekley fall within the scope of the arbitration provisions. See **(Aff. of Burchfield, Ex. A, at ¶ 9(a))** ("The claims, disputes, or causes of action within the scope of arbitration include, but are not limited to, those arising in connection with: ... (vi) any violations of any statute"); **(Aff. of Burchfield, Ex. B, at § VII (D))** ("Disputes subject to binding arbitration include, but are not limited to: (D) Any alleged

violation of consumer protection, unfair trade practice, or any other statute); **(Aff. of Burchfield, Ex. B, at § VII (C), (J))** ("Disputes subject to binding arbitration include, but are not limited to: (C) Any alleged breach of this LIMITED WARRANTY. . . ").

Therefore, for all these reasons, the Circuit Court should be reversed and arbitration ordered with respect to both the Pattees' and the Dixons' claims against Weekley.

CONCLUSION

For the foregoing reasons, the Circuit Court's Form 4 Order Denying the Motion to Compel Arbitration filed by Weekley and the Order Denying Weekley's Motion to Reconsider Alter or Amend the Form 4 Order should be **REVERSED,** and the Pattees and Dixons should be compelled to arbitrate their claims against Weekley.

Respectfully Submitted,

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July 8, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2020-000384

Melissa Dixon and Willard Dixon ..... Respondents,

v.

Lansing Pattee, Stephanie Pattee, Weekley Homes, LLC f/k/a Weekley Homes, L.P. d/b/a David Weekley Homes, John Doe, A2Z Advanced Home Inspections, LLC, Fidelity and Deposit Company of Maryland, and Westchester Fire Insurance Company..... ..... Defendants,

And

Lansing Pattee and Stephanie Pattee ..... Third Party-Plaintiffs,
v.

Gutter Pros, LLC ..... Third- Party Defendant

Of Which Weekley Homes, L.P. d/b/a David Weekley Homes is the Appellant.

PROOF OF SERVICE

I certify that I have served the **Appellant's Initial Brief and Designation of Matter** by electronic mail and by U.S. Mail on July 8, 2020, addressed to their attorneys of record.

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July 8, 2020

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Honorable Jenny Abbott Kitchings
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Re: Dixon v. Weekley Homes, LLC, f/k/a Weekley Homes, L.P., d/b/a David Weekley et al.
Appellate Case No. 2020-000384
WGFL File No.: 8039.004

Dear Ms. Kitchings:

Enclosed please find the Appellants' Initial Brief, Designation of Matter, and Proof of Service with a copy of the sent email to counsel.

Thank you for filing the enclosures with the Court. With kind regards, I am.

Sincerely yours,

WALKER GRESSETTE FREEMAN & LINTON, LLC

John P. Linton, Jr.

Enclosures (As Stated)

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SC Court of Appeals

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