THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2018-000723

James R. Zedosky, Lenore K. Zedosky, Douglas Shea, and Sally Shea…..…..… Respondents,
v.
D.R. Horton, Inc. and Town of Blythewood…….…… Defendants,

Of Which D.R. Horton, Inc. is……. Appellant,

And Town of Blythewood is a…… Respondent.

FINAL BRIEF OF APPELLANT

January 26, 2021

s/Roy Shelley

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II. THE CIRCUIT COURT ERRED IN CONCLUDING THE ARBITRATION AGREEMENT IN THE HOME PURCHASE AGREEMENTS WAS UNENFORCEABLE UNDER AND NOT GOVERNED BY EITHER THE SOUTH CAROLINA OR THE FEDERAL ARBITRATION ACTS.

A. South Carolina precedent holds that federal arbitration law supersedes any conflicting South Carolina law which invalidates an arbitration agreement; therefore, the agreements in question are enforceable under and governed by federal and state arbitration law.

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A. The South Carolina Uniform Arbitration Act controls what relief is available with arbitration, whether an indispensable party can be required to participate in arbitration, and the judicial economy of arbitration. The SCUAA is designed to support a finding in favor of arbitration under each of these prongs.

STATEMENT OF THE CASE

James R. Zedosky, Lenore K. Zedosky, Douglas Shea and Sally Shea ("Respondents") brought this action by filing a Summons and Complaint on July 25, 2017. The Complaint alleges they purchased real property subject to certain restrictive covenants and further alleges D.R. Horton, Inc. intends to subdivide real property, which is adjacent and contiguous to the Respondents' properties, into residential lots and roads in violation of those restrictive covenants.

Respondents also filed a Notice of Motion and Motion for Preliminary Injunction on July 25, 2017. Affidavits of the four Respondents were filed simultaneously in support thereof. The Verification of the Complaint, executed by Respondent Lenore K. Zedosky, was also filed on July 25, 2017. Appellant's Motion to Stay and Compel Arbitration was filed on September 7, 2017. The Affidavit of Robert Haney was filed 2/13/18 for the motion hearing in support thereof. Appellant D. R. Horton, Inc., filed its Answer and Cross-Claim against Town of Blythewood on September 8, 2017.

D.R. Horton, Inc.'s Motion to Stay and to Compel Arbitration was heard on February 15, 2018, and the Order denying the motion was entered on March 1, 2018. D.R. Horton, Inc. filed a Motion to Alter, Amend or Reconsider the Order on March 9, 2018. An Order Denying Motion to Alter or Amend was filed on March 22, 2018. On April 19, 2018, D.R. Horton, Inc. filed and served its Notice of Appeal.

STATEMENT OF THE FACTS

While it is the Appellant's position the Circuit Court erred in several ways in denying its Motion to Stay and Compel Arbitration, the overarching issue in this appeal is whether the Circuit Court erred in determining that the dispute between the Respondents and Appellant is not to subject to the arbitration agreement provision included in the Homeowner Purchase Agreements ("HPAs") executed by the Respondents and Appellant. All the sections of Argument come back to and center on this one issue; these are the facts relevant to that issue alone.[1]

[1] It is the Appellant's position that, other than reference to the Greenway space and Paragraph 22 of the HPAs, it is unnecessary in this appeal to present a lengthy and convoluted detail of all the various sections of all the applicable Covenants, Conditions, and Restrictions ("CCRs" or "restrictive covenants"). This brief shall focus primarily on the HPAs and the arbitration agreement included therein. Appellant respectfully reserves the right to include such factual detail

On April 26, 2015, Respondents James R. Zedosky and Lenore K. Zedosky entered into a Home Purchase Agreement ("HPA") with Appellant D.R. Horton to purchase from Appellant, as Seller, a specific "parcel of land, located in Richland County, SC, with a street address of 334 Summersweet Court, Blythewood, SC, 29016, more particularly described as Lot 0175, Cobblestone Primrose Subdivision… . The interests to be conveyed pursuant to this Agreement are hereinafter collectively referred to as the 'Property.'" (R. 27; emphasis added.) Paragraph 6 of the HPA is entitled "Warranty of Title" and states, in relevant part:

> "Seller shall convey insurable fee simple title of the Property at Purchaser at Closing by special or limited warranty deed, subject to: … (c) subdivision covenants, conditions, and restrictions…" (R. 28).

Home Purchase Agreement Paragraph 14, subsection (a), grants a minimum 10-year structural warranty of the residence located on the Property, said warranty to be provided "by and from the Residential Warranty Corporation or such other national warranty provider as Seller may reasonably select (the "NWP")." (R. 31). This warranty section is separate from the paragraph on Mandatory Binding Arbitration.

Paragraph 22 of the HPA addresses and incorporates restrictive covenants. It states, in relevant part:

> "Purchaser acknowledges receipt of a copy of that Declarations of Covenants, Conditions, and Restrictions for Cobblestone Primrose Subdivision of record at **Book 1117 Page 3721**, Country Registry, together with all amendments thereto

in any reply or oral argument, to the extent Respondents raise or argue this history in this appeal. Additionally, Appellant craves reference to its Answer for its formal responses to Respondents' Complaint, with particular regard to the history of the development and the CCRs.

(collectively, the "Declaration"). *Purchaser acknowledges that the Property is subject to all provisions of the Declaration*, including but not limited to provisions requiring membership … ." (R. 34; emphases except italics in original)

Paragraph 15 of the HPA addresses Mandatory Binding Arbitration. It states, in its entirety:

"Mandatory Binding Arbitration. PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THIS PROPERTY, INCLUDING BUT NOT LIMITED TO ANY DISPUTES REGARDING (A) SELLER'S CONSTRUCTION AND DELIVERY OF THE HOME; (B) SELLER'S PERFORMANCE UNDER ANY PUNCH LIST OR INSPECTION AGREEMENT; AND (C) SELLER'S WARRANTY PURSUANT TO SECTION 14 ABOVE. THE ARBITRATION SHALL TAKE PLACE IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED. THE PROCEEDING SHALL BE CONDUCTED PURSUANT TO THE RULES OF THE AMERICAN ARBITRATION ASSOCATION (THE "AAA"), AND TO THE EXTENT POSSIBLE, UNDER RULES WHICH PROVIDE FOR AN EXPEDITED HEARING. THE FILING FEE FOR THE ARBITRATION SHALL BE PAID BY THE PARTY FILING THE ARBITRATION DEMAND, BUT THE ARBITRATOR SHALL HAVE THE RIGHT TO ASSESS OR ALLOCATE FILING FEES AND ANY OTHER COSTS OF THE ARBITRATION AS A PART OF THE ARBITRATOR'S FINAL ORDER. THE ARBITRATION SHALL BE BINDING AND FINAL, AND EITHER PARTY SHALL HAVE THE RIGHT TO SEEK JUDICIAL ENFORCEMENT OF THE ARBITRATION AWARD. NOTHWITHSTANDING ANY OTHER PROVISION HEREIN, ANY DISPUTES ARISING UNDER THE STRUCTURAL WARRANTY PROVIDED TO PURCHASES BY THE NWP SHALL BE MEDIATED, ARBITRATED

AND/OR JUDICIALLY RESOLVED PURSUANT TO THE TERMS OF THAT WARRANTY PROGRAM." (R. 32; All caps in original).

Finally, the entire Home Purchase Agreement begins with the following:

"NOTE: THIS CONTRACT PROVIDES FOR MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, SECTIONS 14-48-10 [sic] ET SEQ, SOUTH CAROLINA CODE OF LAWS (1976, AS AMENDED)"

(R. 27; Bold, all caps, underline all in the original).

The Zedoskys' HPA was executed by them on April 26, 2015. (R. 35). Their mailing address on the HPA is 1553 Mt. Vernon Road, Charleston, West Virginia 25314. *Id*. D.R. Horton also executed the HPA, as Seller, on April 27, 2015. *Id.* D.R. Horton's address on the HPA is 8001 Arrowridge Blvd., Charlotte, North Carolina 28273. *Id*. The Zedoskys' phone number begins with area code (304). *Id*. The Zedoskys each initialed all pages 1 – 8 of the HPA, with page 9 containing their signatures. (R. 27 - 35).

The Home Purchase Agreement executed by the Shea Respondents is exactly the same as quoted above, including the arbitration agreement and Paragraph 22 referencing the restrictive covenants, except for the following information specific to the Sheas:

Purchasers: Douglas Shea and Sally Shea (R. 36);

Property address: 392 Summersweet Court, Blythewood, SC, Lot 0187, Cobblestone Primrose Subdivision (R. 36);

Executed on page 9 by Douglas Shea and Sally Shea on August 17, 2014. Mr. and Mrs. Shea each initialed pages 1 – 8 of the HPA (R. 44);

Sheas' then-current address: 155 Woodfield Rd., Bristol, Connecticut, 06010. The Sheas' phone numbers all begin with area code (203) (R. 44);

D.R. Horton's address: 8001 Arrowridge Blvd., Charlotte, North Carolina 28273 (R. 44).

ARGUMENT

STANDARD OF REVIEW

> "The determination whether a claim is subject to arbitration is reviewed *de novo*. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings."

Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 6, 791 S.E.2d 128, 130 (S.C. 2016) (citations in original omitted).

I. THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION AGREEMENT IN THE PLAINTIFFS' HOME PURCHASE AGREEMENTS WERE NOT APPLICABLE TO THE COMPLAINT.

A. The evidence in the record does not reasonably support the conclusion the Home Purchase Agreements do not relate in any manner to the claims of the Respondents.

In its Order dated February 27, 2018, the circuit court stated:

> "The 'property' which is the subject of the separate Agreements is, by definition in those Agreements, the homes which the Plaintiffs were each purchasing.[2]

[2] At various points in Respondents' pleadings and statements, they use the word "property" to refer to the Greenway space at issue, rather than as it should be properly used as to mean the home, real estate, and all other interests purchased by each Respondent as the "Property" under the HPAs. Appellant will insert either "woodlands" or "Greenway Space", to distinguish from the Respondents' Properties, and make clear which parcel of land is being discussed.

> Therefore, the arbitration provision in the Agreements only applies to disputes concerning the respective contracts and the respective residences which the Plaintiffs purchased from Horton." (R. 4).

But the definition of "Property" in the HPAs is broader and includes more than just the house and the land upon which it sits. "Property" is also defined to include "the interests," such as warranties, clear title, restrictive covenants, which are part and parcel to the overall purchase. This is one reason why the Appellant disputes the remainder of the paragraph in the circuit court Order:

> "The lawsuit before the Court involves neither the contract nor the properties which the Plaintiffs purchased. It involves the intended development and change of use of an entirely separate parcel of land which abuts Plaintiffs' residences. Therefore, Horton's reliance upon the arbitration provision in the Agreements is misplaced." (R. 4).

The Appellant D.R. Horton disputes this conclusion by the circuit court. It is Appellant's position the circuit court failed to utilize or abide by the legal standards in determining if a contractual arbitration agreement applies to a dispute. A *de novo* review of the record will demonstrate the dispute does involve both the HPAs and Respondents' properties, and not simply a parcel of land wholly unrelated to the Plaintiffs' HPAs.

The opinion of *Wilson v. Wills*, 416 S.C. 395, 786 S.E.2d 571 (Ct.App. 2015) is instructive in determining whether an arbitration agreement provision encompasses the dispute at issue. In *Wilson*, the plaintiffs, who were insureds and also competing agents, sued a number of insurance companies and their agents, alleging failure to supervise and numerous fraudulent and improper tactics including forging of applications. The defendant insurance companies moved to compel enforcement of the arbitration clause in its 2010 Agency Agreement with the agents. The insurers based their motion on the fact plaintiffs' causes of action were premised on alleged duties of the agents which would not have existed but for the insurance companies' contractual relationship with the agency and agents. *Wilson*, 416 S.C. at 415, 786 S.E.2d at 581. The insurance companies' argument was that the insureds could not rely on and seek damages from the insurance companies

based upon some provisions while simultaneously ignoring the arbitration clause. The insureds and the agents asserted no valid or enforceable agreement to arbitrate existed because the 2010 Agency Agreement upon which the insurers based their motion was not signed by any representative of the defendant insurance agency, as well as the fact the insureds were not signatories to the 2010 Agency Agreement.

The Court of Appeals held the circuit court erred in ruling "no valid contract containing an arbitration provision existed between the parties." 416 S.C. at 408, 786 S.E.2d at 577. The Court of Appeals agreed with the insurance companies' argument that "no requirement exists under the Federal Arbitration Act or in contract law that a contract must be signed by all parties to be enforceable." 416 S.C. at 409, 786 S.E.2d at 578. The Court of Appeals held that South Carolina law does not necessarily require both parties to sign a contract for it to be enforceable; "it may be sufficient if signed by one and accepted and acted upon by the other. " [3] 416 S.C. at 410-411, 786 S.E.2d at 579. The Court held that the defendant agents, whose improper behavior the plaintiffs alleged was not sufficiently supervised by the insurance companies, accepted and acted upon the 2010 Agency Agreement at all times alleged. *Id.*

The insurers then argued the circuit court erred in determining the plaintiffs' claims had no relation to, and were not in connection with, the performance or interpretation of the 2010 Agency Agreement. The Court of Appeals agreed.

First, the Court of Appeals cited the deference arbitration agreements are to receive when they are in review:

> "The policy of the United Stated and South Carolina is to favor arbitration of disputes. The heavy presumption of arbitrability requires that[,] when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration. A motion to compel arbitration made pursuant to an arbitration clause

[3] The *Wilson* court also found the insureds were "equitably estopped from arguing their status as non-signatories precludes enforcement of the arbitration provision when their complaints seek to benefit from the enforcement of other provisions in the 2010 Agency Agreement." 416 S.C. at 416-419, 786 S.E.2d at 582-583.

in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute."

Wilson, 416 S.C. at 413, 786 S.E.2d at 580 (emphasis added).

This deference being the background, the standard of determining the applicability of an arbitration agreement to any particular dispute was then detailed:

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id*. (emphasis added).

The policy to favor arbitration is so strong, a finding by the court that a claim is outside the scope of the arbitration clause does not end the court's required inquiry.

"Both the U.S. Court of Appeals for the Fourth Circuit and our supreme court 'have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relation exists between the asserted claims and the contract in which the arbitration clause is contained.' Thus, a claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause or if a 'significant relationship' exists between the claim and the contract."

416 S.C. at 413 - 414, 786 S.E.2d at 580 (emphasis added).

In *Wilson*, the arbitration provision in question read as follows:

"If any dispute or disagreement *arises in connection with* the interpretation of the Agreement, its performance or nonperformance, its termination, the figures and calculations used[,] or any nonpayment of accounts, the parties will make efforts to meet and settle their dispute in good faith informally. If the parties cannot agree on a written settlement…, then the matter in controversy, upon request of either party, will be settled by arbitration… ."

416 S.C. at 414, 786 S.E.2d at 580-581 (italics in original; underline added).

The Court of Appeals held the arbitration provision "was sufficiently broad to encompass a wide array of claims and should be construed accordingly." 416 S.C. at 414, 786 S.E.2d at 582. It reasoned the next step in the analysis was: "[i]n broadly construing the arbitration provision, we must determine whether the claims against the Insurers are encompassed by the language of the arbitration clause or if the claims bear a significant relationship to the 2010 Agency Agreement." 416 S.C. at 415, 786 S.E.2d at 581. The Court of Appeals accepted the Insurers' assertion that the Insureds' and Agents' claims were 'inextricably linked" to the Insurers' duties to train, supervise, audit, investigate, but then went further to give examples of how the claims were actually linked to each duty as outlined in the Agency Agreement and as compared to the allegations made by the plaintiffs. In the matter currently before this Court, a comparison of the court filings and other evidence properly before the circuit court shows without reservation that the Respondent Homeowners' claims are "inextricably linked" to the contractual HPAs and that the properties purchased by the Respondents are indeed "involved."

The arbitration agreement provision in the HPAs reads, in relevant part:

> PURCHASER AND SELLER SHALL SUBMIT TO BINDING ARBITRATION ANY AND ALL DISPUTES WHICH MAY ARISE BETWEEN THEM REGARDING THIS CONTRACT AND/OR THIS PROPERTY, …. (e.g., R. 41).

Compare this language to the language analyzed by the *Wilson* court ("<u>If any dispute or disagreement</u> *arises in connection with* … the Agreement… ."). These two phrases are on par in nature and scope. The HPA arbitration agreement clause is unambiguously intended to be so broad as to capture <u>any</u> dispute connected with <u>either</u> the HPA <u>or</u> the property (the homeowners' homes and real property), or both simultaneously. The language following the word "property" is "including but not limited to." This language is clarifying – what follows are *examples*, not limitations, of the types of disputes that would be encompassed by the provision. The circuit court's Order employed the definitions of "property" and "contract" and the language of the HPA

arbitration agreement so that it appears the arbitration agreement is limited to claims involving construction, workmanship, delivery, and warranty, to the exclusion of the remainder of the HPA. This is error, and there is no evidence to support this result. In fact, to the contrary.

An in-depth review of the Respondents' pleadings shows clearly that the Respondents' claims involve both the HPAs' contractual provision regarding the restrictive covenants found at ¶ 22 of the HPAs, and the "Property" purchased under them. (e.g., R. 43).

The Complaint itself triggers the application of the arbitration provision. Plaintiffs allege they are "owners of property located in … Cobblestone Park." (R. 12). The Respondents allege they "each purchased their respective properties subject to certain restrictive covenants…" (R. 13) [4] The Respondents allege the existence and/or applicability of many restrictive covenants that involve the entire history of the Cobblestone development.[5] (R. 13 - 16). The Respondents' fundamental concern is that an alleged "greenspace" in the Cobblestone Primrose, a/k/a Cobblestone Park, subdivision will be developed by Appellant to include more homes. (R. 14). Respondents allege Appellant's development of the greenspace will violate a covenant, the "Greenway Covenant", they allege is applicable to their properties. (R. 14). The Respondents explicitly allege:

> Upon information and belief, the property subject to the Greenway Covenant which Horton intends to further subdivide is adjacent and contiguous to the properties of

[4] Interestingly, Respondents do not mention in their Affidavits and pleadings the HPAs that memorialized not only the purchase of their Properties, but also contain by incorporation the restrictive covenants in effect at the time of their purchases.

[5] Appellant reiterates its statement found at footnote number 1.

> Plaintiffs, and will have a material adverse effect on Plaintiffs' rights under the Greenway Covenant, including but not limited to a devaluation of the value of the Plaintiffs' respective properties and a significant disruption of the quiet enjoyment by Plaintiffs of their property resulting from the loss of the property a green space or as a golf course. (R. 14).

Other statements by the Respondents further show how the factual allegations are "encompassed by" and "inextricably linked" to the HPAs as contracts overall. The Affidavit of Lenore Zedosky, one of four offered in support of Respondents' Motion for Temporary Injunction, reveals the contractual nature of their dispute with Appellant D.R. Horton. Paragraph 4 states, in relevant part: "When we purchased our home, it was adjacent to undeveloped woodlands. I understood that our property and the woodlands were subject to restrictive covenants, that limited the woodlands to development of a Nine (9) hole golf course. That is one of the reasons we purchased our home. …" (R. 23). Mrs. Zedosky goes further in showing the contractual nature of the Respondents' allegation when she states, "I believe that development of the property (that is, the woodlands) as D.R. Horton intends to do and has asked the Town of Blythewood for permission to do <u>is directly contrary to the restrictive covenants that I relied upon</u>." (R. 24; emphasis and parenthetical added). That the whole dispute centers on the Respondents' homes, real property, and interests as defined in the HPAs is made clear when Mrs. Zedosky states: "Developing the property (that is, the woodlands) for something other than a Nine (9) hole golf course will be severely disruptive of the enjoyment of the peace and quiet <u>of my house and property.</u>" (R. 24; emphasis and parenthetical added).

All of the above demonstrates that the Respondents' Properties – that is, "by definition … the homes which the Plaintiffs were each purchasing." (R. 4) – are unquestionably encompassed

by the language of the arbitration agreement of the HPA. At a minimum, a significant relationship is established. The nature of the Respondents' allegations and statements also make clear that the underlying nature of their dispute is that D.R. Horton has breached the contract of the HPAs and the CCRS incorporated by reference into those HPAs at ¶ 22. [6] (e.g., R. 34). There are two ways the HPA arbitration agreement language can be triggered – for "ANY AND ALL DISPUTES" involving the HPA contract, or for "ANY AND ALL DISPUTES" involving their home and real property, as defined in the HPA. (e.g., R. 41). Respondents have triggered both, and even a limited *de novo* review of the record shows the arbitration agreement provision in the HPAs is applicable to the dispute raised by the Respondents. As such, the Order of the circuit court denying arbitration should be reversed.

II. THE CIRCUIT COURT ERRED IN CONCLUDING THE ARBITRATION AGREEMENT IN THE HOME PURCHASE AGREEMENTS WAS UNENFORCEABLE UNDER AND NOT GOVERNED BY EITHER THE SOUTH CAROLINA OR THE FEDERAL ARBITRATION ACTS.

A. South Carolina precedent holds that federal arbitration law supersedes any conflicting South Carolina law which invalidates an arbitration agreement; therefore, the agreements in question are enforceable under and governed by federal and state arbitration law.

[6] That there is a contractual nature to Respondents' claims make sense, given that restrictive covenants "…in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App. 2006).

The Order of the circuit court has very little to say about the South Carolina Arbitration Act and the Federal Arbitration Act. In fact, the only statement in the Order about the two Acts is this:

> "As additional support for Horton's motion, Horton contends that this dispute involves interstate commerce and the arbitration provisions found in the Agreements and CCRs are thus enforceable under the Federal Arbitration Act found at 9 U.S.C. § 1 *et seq*. even though they fail to comply with the South Carolina Uniform Arbitration Act found at South Carolina Code Ann. § 15-48-10 *et seq*." (R. 3).

The Order makes no findings of fact demonstrating how D.R. Horton failed to comply with the South Carolina Arbitration Act. The Order has no discussion about Appellant's compliance, or failure to comply, with the Federal Arbitration Act. Unfortunately, the Order leaves the parties and this court with very little to go on as far as written findings and conclusions are concerned.

A good faith review of the transcript of the hearing does not shed light on the matter. Appellant stated the arbitration agreements are valid under the Federal Arbitration Act. (R. 84). After this statement, there are a number of discussions thrown about amongst the court and counsel, with many statements about whether arbitration is mandatory, what relief, such as a permanent injunction, is available with arbitration, whether the Town of Blythewood is an indispensable party required to participate in arbitration, and the judicial economy of allowing the matter to proceed through the court system as opposed to enforcing the arbitration agreements. (R. 85 - 89). D.R. Horton requested clarification of this issue in its Motion to Alter or Amend, however, the court's Order denying it simply states:

> After careful consideration of the Defendant's Motion and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES … . (R. 10).

The Appellant recognizes the appellate courts will not issue advisory opinions and will not speculate as to the inner workings of the lower court without some basis or direction. However, Appellant must preserve its argument that the arbitration agreements found in the HPAs are valid and enforceable under the Federal Arbitration Act, especially in light of the circuit court's concrete conclusion that the HPA provisions do not (somehow) comply with the South Carolina Arbitration Act. Therefore, Appellant will assume, for the sake of preserving its argument, that the circuit court made an explicit conclusion that the HPA arbitration agreements also do not comply with the Federal Arbitration Act.

The South Carolina Supreme Court opinion of *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 553 S.E.2d 110 (S.C. 2001) paints the clearest picture of the analysis necessary when an arbitration agreement provision is found to not comply with the South Carolina Uniform Arbitration Act ("SCUAA"). In this case, the South Carolina Supreme Court effectively found that the arbitration agreement in question did not comply with S.C. Code Ann. Sec. 15-48-10(a), which required that the face of the agreement be stamped with a notice provision. However, our Supreme Court held that the failure of the agreement to comply with state statutory technical requirements did not end the inquiry, as it was now necessary to determine the impact of the Federal Arbitration Act ("FAA"). 346 S.C. at 590, 553 S.E.2d at 115.

Our Supreme Court first noted that the United States Supreme Court has interpreted the FAA as to have "essentially 'federalized' the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause." *Id*.

> "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. The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements."

Zabinski, 346 S.C. at 590 - 591, 553 S.E.2d at 115.

Much like S.C. Code Ann. §15-48-10(a), the FAA creates a presumption that an arbitration agreement is "valid, enforceable, and irrevocable." [7] Only a showing of legal or equitable grounds that would cause the revocation of the entire contract will upend this presumption.

Our Supreme Court recognized that "parties are free to enter into a contract providing for arbitration under rules established by state law rather than rules established by the FAA." 346 S.C. at 592, 553 S.E.2d at 116. However, while this premise is true, "the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate." *Id*.

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[7] S.C. Code Ann. §15-48-10(a): "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 U.S.C. § 2: "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… shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Referring to and relying upon its earlier opinion of *Soil Remediation Co. v. Nu-Way Envtl., Inc*., 323 S.C. 454, 476 S.E.2d 149 (1996), as well as the United States Supreme Court opinion of *Doctor's Assocs. V. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996), the *Zabinski* court found that the FAA preempted section 15-48-10(a) and therefore controlled and compelled arbitration in the matter before it. Citing to its then recent opinion of *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001), the Supreme Court clarified:

> "…[t]he result in *Soil Remediation* hinged on the fact that the application of state law would have rendered the arbitration agreement completely unenforceable under section 15-48-10(a). State law was therefore preempted to the extent it would have invalidated the arbitration agreement. The parties to a contract are otherwise free to agree that our state Arbitration Act will apply and this agreement shall be enforceable even if interstate commerce is involved."
>
> 346 S.C. at 593 - 594, 553 S.E.2d at 117.

The arbitration agreement in *Zabinski* effectively allowed a party to "opt out" of arbitration simply because the required notice was defective. Thus, "[o]n its facts, the instant arbitration agreement is not enforceable under South Carolina law." *Id*. Precedent required that the FAA step in to validate the deficient agreement and give it enforceability. The parties in *Zabinski*, despite the failure of the arbitration agreement to comply with some aspect of South Carolina arbitration law, nonetheless were left with an agreement that was valid under federal law and enforceable under state law.

In the matter before this Court, we know the circuit court found that the HPA arbitration agreements failed to comply with the SCUAA in some undefined way. Although it is not stated exactly which provision of the statute was violated, the precedent in South Carolina is that the FAA will preempt that provision, so that the HPA arbitration agreement of the parties is not invalidated and can be enforced. Arbitration is heavily favored in the United States and in South Carolina, and this precedent bears this sentiment out.

The Order of the circuit court also does not make a definitive finding on Appellant's evidence of interstate commerce. Appellant referenced at the hearing the affidavit of Robert L. Haney which had been filed in support of its argument that interstate commerce was involved and therefore the FAA applied. (R. 84). No evidence controverting Mr. Haney's affidavit was submitted. Appellant presents the following to the extent its arbitration agreements were held not subject to the FAA because of a failure to engage in interstate commerce.

The *Zabinski* court also addressed the issue of whether the partnership in question was engaged in interstate commerce as contemplated by the FAA. The partnership was formed "in 1980 in order to buy, renovate, and sell thirty apartments and approximately twenty-six acres of land on Hilton Head Island". 346 S.C. at 586, 553 S.E.2d at 112. This fact is critical to this matter.

"To ascertain whether a transaction involves commerce with the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." 346 S.C. at 594, 553 S.E.2d at 117. Reliance on affidavits is proper. *Id.* At the core of the interstate commerce question before the *Zabinski* court was the partnership's sale and development of real property on Hilton

Head Island. Although the Court stated "the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity." *Id.*, the Court also noted:

> "[h]owever, the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors. *See generally, Munoz* (finding interstate commerce in an installment contract case where builder was domiciled in South Carolina, but assigned rights to Delaware Creditor, agreement was prepared in Minnesota, and proceeds disbursed from Minnesota); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977)(holding construction contract involved interstate contract where materials, equipment, and supplies were produced and manufactured out-of-state); *Circle S. Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 (Ct.App.1986)(finding construction contract involved interstate commerce where equipment, materials, and subcontractors were furnished from out-of-state). *See also, Roberson v. Money Tree of Alabama, Inc.*, 954 F.Supp. 1519 (M.D.Ala.1997)(Alabama district courts find transactions between lenders and borrowers are ones "involving commerce" within the meaning of the FAA)."
>
> 346 S.C. at 595, 553 S.E.2d at 118. @ 595 (emphasis added; citations in original).

Our Supreme Court in *Zabinksi* found that, "[b]ecause of the FAA's expansive view of interstate commerce", the FAA covered the partnership's agreement, the conflicting state provision was preempted, and arbitration was required. *Id.* This finding should be the same in Appellant's case because the transactions at issue involved interstate commerce, all of which is borne out by the evidence in the record.

First, there is the affidavit of Robert L. Haney, submitted by Appellant at the motions hearing and filed accordingly. (R. 65 - 66). Mr. Haney attests he is an officer with D.R. Horton in its West Columbia office. (R. 65). He states he has been employed with D.R. Horton for

approximately 10 years and is "familiar with the development and construction of houses in the Cobblestone development, including the houses at issue in the lawsuit filed by Mr. and Mrs. Zedosky and Mr. and Mrs. Shea." (R. 65).

Mr. Haney confirms that D.R. Horton is a Delaware corporation with its principal place of business in TX, and that it develops properties and constructs houses in over twenty states. (R. 65). Mr. Haney states:

> "Many of the building materials and supplies used in constructing D.R. Horton's houses are obtained from suppliers and distributors in states other than the state where the homes are constructed. These materials often include structural materials, plumbing, HVAC and other mechanical supplies, carpets and other flooring, cabinets and other built-in items, lighting equipment, roofing materials, and appliances. This includes houses constructed in the Cobblestone development, including the houses at issue in the lawsuit filed by Mr. and Mrs. Zedosky and Mr. and Mrs. Shea." (R. 65).

Additional support for a finding that interstate commerce was involved in the sale of the Respondents' homes is found in the HPAs themselves. (R. 27 – 35). The final page of each HPA includes the then-current contact information of all the parties. At the time of executing their HPA, the Zedoskys' mailing address was 1553 Mt. Vernon Road, Charleston, West Virginia 25314. Their phone number began with area code (304), which is not a South Carolina area code. D.R. Horton's address on the HPA is 8001 Arrowridge Blvd., Charlotte, North Carolina 28273. When the Sheas executed their HPA on August 17, 2014, their mailing address was 155 Woodfield Rd.,

Bristol, Connecticut, 06010. The Sheas' phone numbers all begin with area code (203), which again is not local to South Carolina. (R. 36 – 44).

Thus, not only is there uncontroverted evidence in the record that the construction of the Respondents' home in the Cobblestone development involved interstate commerce (supplies and materials in particular) at all stages of construction, but there is uncontroverted evidence the actual sales of the homes in question were also completed interstate, between parties domiciled all over the country. Our Supreme Court noted in *Zabinski* that the United States Supreme Court has interpreted the words "involving commerce" broadly, as "the functional equivalent of 'affecting commerce.'" 346 S.C. at 591, 553 S.E.2d at 115. The uncontested evidence in this matter is that interstate commerce was involved and affected as to the specific houses at issue. As in *Zabinski*, the result in this matter should be that "the FAA covers the [] agreement… the FAA provisions trump conflicting requirements of South Carolina law, and arbitration is required." 346 S.C. at 596, 553 S.E.2d at 118.

III. THE CIRCUIT COURT ERRED IN DETERMINING THE CLAIMS BETWEEN PLAINTIFFS AND RESPONDENT WERE NOT SUBJECT TO ARBITRATION UNDER THE RESTRICTIVE COVENANTS

A. The South Carolina Uniform Arbitration Act controls what relief is available in arbitration, whether an indispensable party can be required to participate in arbitration, and the judicial economy of arbitration. The SCUAA is designed to support a finding in favor of arbitration under each of these prongs.

It is undisputed the restrictive covenants incorporated in the Plaintiffs' HPAs contain a mandatory arbitration provision:

> ARTICLE 14
>
> ALTERNATIVE DISPUTE RESOLUTION & LITIGATION
>
> 14.1 Agreement to Avoid Costs of Litigation and to Limit Right to Litigate Disputes.
>
> The Declarant, Association, Owners, and any person not otherwise subject to the Declaration who agrees to submit to this Article (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving this Declaration or the Development, and to avoid the emotional and financial costs of litigation. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Declaration or the Development (but not matters applicable solely under a Covenant to Share Costs), including without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement thereof (collectively "Claims"), except for "Exempt Claims" under Section 14.2, are subject to [arbitration]. (R. 193).

However, Respondents assert that, because the Town of Blythewood is an indispensable party and is not bound by this provision, none of Plaintiffs' claims are subject to arbitration. The circuit court accepted this argument. This is error.

First, as the Complaint makes clear, the "claims" against the Town involve only whether it should issue or deny permits *based on the resolution of the claims made by Plaintiffs against D.R. Horton.* Those claims are based on the restrictive covenants. As the Town has argued throughout, they are not parties to the restrictive covenants; therefore, the resolution of the merits of Plaintiff's claims are entirely an issue between Plaintiffs and D.R. Horton. The town is not an indispensable party to those claims.

The Town can be made a party to the arbitration (See S.C. Code Ann. § 15-48-60), or the action against the Town can be stayed until the arbitration is concluded.

The circuit court, at the hearing and in the order, also cited a perceived lack of judicial economy, such as delay, and the possibility of inconsistent results when it denied the Motion to Stay and Compel Arbitration. (R. 5; R. 88 - 89). These reasons also do not invalidate arbitration agreements.

The Court of Appeals, in determining the so-called "intertwining doctrine," considered the issues of lack of judicial economy and possible inconsistent results in the opinion of *Wellman v. Square D Co.*, 366 S.C. 61, 620 S.E.2d 86 (Ct.App.2005). In refusing to adopt the intertwining doctrine, the Court of Appeals reviewed S.C. Code § 15-48-20(d), which reads, in part: "[a]ny action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section, … ." The Court analyzed:

> "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. The words of a statute 'must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.' Looking to the language of the South Carolina Arbitration Act, we find no indication the legislature intended for the courts to be able to ignore an otherwise valid arbitration provision for the sake of judicial economy. The (South Carolina) Arbitration Act clearly provides the trial court must enforce an arbitration provision unless grounds 'exist at law or in equity for the revocation of any contract."
> 366 S.C. at 70 - 71, 620 S.E.2d at 91(citations omitted).

The Court of Appeals held that the "court must enforce an unambiguous contract according to its terms, regardless of the wisdom or folly or the parties' failure to guard their rights carefully.

Furthermore, 'if arbitration defenses could be foreclosed simply by adding as a defendant a person not a party to an arbitration agreement, the utility of such agreements would be seriously compromised.' We conclude a trial court may not refuse to enforce an otherwise valid arbitration provision on the basis of judicial economy." *Id*.

Assertions of indispensable parties, lack of judicial economy, or possibly inconsistent results cannot invalidate the agreement to arbitrate between Plaintiffs and D.R. Horton. Neither can the erroneous belief that arbitration panels cannot award permanent injunctions.

The Respondents seek to extend their preliminary injunction into one that is permanent. Whether an arbitration panel could award such relief was mentioned at the motions hearing. At this point, the court orally denied the Motion to Compel Arbitration. (R. 88). In fact, the authority to make an award of practically any nature is broad and awards made by arbitrators are given extreme deference in South Carolina.

The South Carolina Arbitration Act is written in such a way that it appears very few, if any, forms of relief are <u>not</u> available to arbitrators. Sec. 15-48-90 is entitled "Award". Subsection (a) simply states "The award shall be in writing and signed by the arbitrators joining in the award." Sec. 15-48-150 states: "Upon the granting of an order confirming, modifying, or correcting an award, judgment or decree <u>shall</u> be entered in conformity therewith and <u>be enforced as any other judgment or decree</u>." (Emphasis added). Sec. 15-48-160(a) directs the activities of the clerk of court: "(a) On entry of judgment or decree, the clerk of court shall prepare the judgment roll consisting, to the extent filed, of the following: … (2) the award,… (4) A copy of the judgment or decree." Subsection (b) states, significantly: "The judgment or decree may be docketed as if

rendered in an action." Finally, sec. 15-48-180 defines the scope of authority of the court in matters of arbitration:

> "The term 'court' means any court of competent jurisdiction of this State. The making of an agreement described in sec 15-48-10 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this chapter and to enter judgment on an award thereunder. Unless otherwise provided by the arbitration agreement, when a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact." (Emphasis added).

Awards made by arbitrators are of course reviewable by the courts. But the breadth and depth of the deference afforded such awards is eye-opening. The Supreme Court of South Carolina outlined the standards for a court reviewing an arbitration award in *Pittman Mortg. Co. v. Edwards*, 327 S.C. 72, 488 S.E.2d 335 (1997). It stated: "Arbitration is a favored method of settling disputes in South Carolina. When a dispute is submitted to arbitration, the arbitrators determine questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will only be vacated under narrow, limited circumstances." 327 S.C. at 75 - 76, 488 S.E.2d at 337. In *Pittman Mortg*., the Supreme Court did in fact vacate one portion of an employee's award where the arbitration panel awarded her the money value of the stock she claimed was owed to her, rather than the stock itself. The court analyzed:

> "The question of whether arbitrators have exceeded their powers relates to the arbitrability of the issue they have attempted to resolve. Arbitrators exceed their powers only if the issue resolved by them is not within the scope of the agreement to arbitrate. Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of a decision so long

> as the arbitrators do not exceed their powers. …Arbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.' If the grounds for the award can be inferred from the facts, the award should be confirmed."
>
> 327 S.C. at 76 - 77, 488 S.E.2d at 338.

In *Pittman Mortg*., the arbitrators exceeded their powers by awarding the employee the liquid monetary value of her shareholder's equity, a form of relief she had not requested in her pleadings. "Because the pleadings represented the arbitration agreement in this case, [8] absent an amendment of the pleadings or implied consent to consider relief not requested in the pleadings, the panel could only consider the issues contained within the pleadings and could only award the parties relief they requested in the pleadings." *Id.*

So, it appears that a party is most likely entitled to the relief outlined in his or her last amended pleadings, exactly as would be the case if the matter were being tried in court. The idea that the relief sought by any of the parties in this matter is not available to them simply because the matter is arbitrated is erroneous.

The circuit court's concerns regarding indispensable parties,[9] inconsistent results, lack of judicial economy, and availability of a requested relief are all addressed by either the SCUAA

[8] In *Pittman Mortg*., there was no prior arbitration agreement in existence or at issue, as in the present matter. Instead, the parties agreed to binding arbitration after completing discovery.

[9] Appellant notes that the Order denying its motions devoted a significant portion of reasoning to the supposed inapplicability of the arbitration clause found in the CCRs, specifically because the Town was thought to be an indispensable party not required to participate in arbitration. Appellant does not abandon its assertion that CCR arbitration is a valid option to enforce arbitration. In fact, to the extent the validity of the CCR provision is tied up with the indispensable party issue, it is

directly or by case law, and none are the proper basis for denying Appellant's Motion to Stay and to Compel Arbitration in this matter. The circuit court's Order should be reversed.

CONCLUSION

Appellant has shown there is no evidence which reasonably supports the circuit court's denial of its Motion to Stay and Compel Arbitration. The Plaintiffs' Home Purchase Agreements contain a broad arbitration provision of any matter related to their purchase, and the claims in their Complaint are based on their purchase; the restrictive covenants require arbitration of Plaintiffs' claims against D.R. Horton; and both the Federal and the State Arbitration Acts require arbitration. The Order of the circuit court denying Appellant's Motion to Stay and to Compel Arbitration should be reversed, Plaintiffs' claims against D.R. Horton should be ordered to be arbitrated, and any claims involving the Town of Blythewood should be stayed (unless the Town joins or is added to the arbitration proceedings).

Appellant's position that a reversal on the grounds stated in § II. B. should leave the CCR provision intact and available for future use.