THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2020-CP-10-02398
Appellate Case No. 2021-000779

Whitesides Park Townhomes Property Owners Association, Inc.,

Respondent,

v.

CalAtlantic Group, Inc., f/k/a The Ryland Group, Inc., f/k/a Standard Pacific Corp. and also d/b/a CalAtlantic Homes; Lennar Carolinas, LLC, Southend Exteriors, Inc., Alpha Omega Construction Group, Inc., Fogel Services Inc., Graciela Razo Rodile, and Melinda Rios Amador,

Of which CalAtlantic Group, Inc., f/k/a The Ryland Group, Inc., f/k/a Standard Pacific Corp. and also d/b/a CalAtlantic Homes; Lennar Carolinas, LLC and Lennar Carolinas, LLC are the Appellants.

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

I. WHETHER THE CIRCUIT COURT ERRED IN DENYING CALATLANTIC AND LENNAR'S MOTION TO COMPEL ARBITRATION.

A. DID THE CIRCUIT COURT ERR IN HOLDING THAT CALATLANTIC AND LENNAR MAY NOT COMPEL THE ASSOCIATION TO ARBITRATE CLAIMS PURSUANT TO THE ARBITRATION PROVISION IN THE PURCHASE AND SALE AGREEMENTS BECAUSE THE INDIVIDUAL OWNERS ARE NOT THE PLAINTIFFS IN THE ACTION AND ARE NOT SUING FOR DAMAGES ASSOCIATED WITH THEIR INDIVIDUAL UNITS—ALTHOUGH THE ASSOCIATION EXPRESSLY ALLEGES IT IS "CHARGED WITH PURSUING CLAIMS ENUMERATED [IN THE COMPLAINT] BY VIRTUE OF HAVING BEEN ASSIGNED INDIVIDUAL CLAIMS BY THE INDIVIDUAL TOWNHOME OWNERS AT THIS PROJECT?"

B. DID THE CIRCUIT COURT ERR IN HOLDING THAT "ANY ASSERTION THAT THE ASSOCIATION IS BOUND TO THE ARBITRATION PROVISIONS IN [THE PURCHASE AND SALE AGREEMENTS] IS WITHOUT MERIT"—ALTHOUGH: (1) THE ASSOCIATION EXPRESSLY ALLEGES IT IS "CHARGED WITH PURSUING CLAIMS ENUMERATED [IN THE COMPLAINT] BY VIRTUE OF HAVING BEEN ASSIGNED INDIVIDUAL CLAIMS BY THE INDIVIDUAL TOWNHOME OWNERS AT THIS PROJECT;" (2) ASSERTS A CAUSE OF ACTION FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY WHICH, AS A MATTER OF LAW, ARISES EXCLUSIVELY FROM THE SALE OF THE TOWNHOMES TO THE INDIVIDUAL TOWNHOME OWNERS BY MEANS OF THE PURCHASE AND SALE AGREEMENTS; AND (3) ASSERTS CLAIMS AND DAMAGES IN THE ACTION RELATED TO DOORS, WINDOWS AND HVAC SYSTEMS, WHICH ARE EXPRESSLY DEFINED BY THE GOVERNING DOCUMENTS FOR THE PROPERTY TO BE THE RESPONSIBILITY OF THE INDIVIDUAL TOWNHOME OWNERS AND NOT COMMON ELEMENTS FOR THE ASSOCIATION?

STATEMENT OF THE CASE

This appeal addresses the issue of whether a developer—CalAtlantic Group, Inc.[1] ("CalAtlantic")—may compel arbitration of the construction defect claims asserted by the property owners association of a townhome project—the Whitesides Park Townhomes Property Owners Association, Inc. (the "Association")—which the Association alleges have been assigned to it from the individual townhome owners (the "Owners"). Specifically, whether CalAtlantic may compel arbitration of the claims assigned by the Owners to the Association pursuant to the arbitration provisions in the Purchase and Sale Agreements executed by and between the Owners and CalAtlantic and through which the Owners acquired their interests in the townhomes.

The townhomes at issue in this construction litigation are located in a development known as Whitesides Park. (R. 28-29). Whitesides Park is comprised of thirteen (13) townhomes situated in four (4) buildings. (R. 29). On September 8, 2016, the Association and CalAtlantic executed the Declaration of Covenants, Conditions, Restrictions and Easements for Whitesides Park (the "Covenants"). (R. 71). By virtue of those Covenants, the Association was created and acquired its interests, rights and obligations concerning the common elements of the property. The Covenants define the scope of common elements—referred to in the Covenants as "Areas of Common Responsibility"—that are to be maintained by the Association and state that the Owners shall be responsible for the maintenance, repair and replacement of certain elements, including the windows, window casings, window shutters, exterior doors, door frames, and the heating and air conditioning systems serving the Owners' townhomes. (R. 86-89).

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[1] The Complaint collectively identifies CalAtlantic Group, Inc. f/k/a The Ryland Group, Inc. f/k/a Standard Pacific Corp. and also d/b/a Cal Atlantic Homes. (R. 28). CalAtlantic Group, Inc. was formed when The Ryland Group, Inc. merged with Standard Pacific Corp in September 2015. For the purpose of this appeal, The Ryland Group, Inc., Standard Pacific Corp. and CalAtlantic are collectively referred to as CalAtlantic. In 2017, CalAtlantic was acquired by Lennar Corporation.

The buildings were constructed and the townhome units were sold to the individual Owners between May 2016 and March 2018. Each Owner entered into a Purchase and Sale Agreement with CalAtlantic by which the Owner acquired ownership of a unit. (R. 761-853). Each Purchase and Sale Agreement executed by the individual Owners contains a valid and enforceable agreement to arbitrate any disputes or claims related to the properties. (R. 157-160; 765-766).[2] Specifically, each of the Purchase and Sale Agreements executed by the individual Owners requires the individual owner to arbitrate any and all claims or disputes arising out of or in any away relating to the Purchase and Sale Agreement, the property, or the construction of the property. (R. 157-160; 765-766).

On June 1, 2020, the Association filed a Complaint asserting various construction defect claims against CalAtlantic, Lennar, and certain subcontractors who were allegedly involved with the construction of the Whitesides Townhomes (collectively, the "Defendants"). In the Complaint, the Association specifically alleges:

> Whitesides POA is charged with, inter alia, the management and administration of Whitesides Park, the investigation, maintenance and repair of Whitesides Park's common elements, and has the right and authority to bring this action on behalf of the Whitesides POA and its members and **is also charged with pursuing claims enumerated hereafter by virtue of having been assigned individual claims by townhome owners at this project.**

(R. 29) (emphasis added). The claims that are "enumerated hereafter" in the Complaint include claims for: (1) Negligence, Gross Negligence, Carelessness, Recklessness, Willfulness and

[2] The thirteen original owners each executed one of three Purchase and Sale Agreements. Five of the original owners executed CalAtlantic Purchase and Sale Agreements of which there are two versions; however, each version contains the same agreement to arbitrate. The remaining eight original owners executed a Ryland Homes Purchase and Sale Agreement form with CalAtlantic. Despite the differences in the three Purchase and Sale Agreements, each contract contains a plain and unambiguous agreement to arbitrate claims and disputes related to the construction of properties. The differences in the agreements have no impact on the issues before the Court in this Appeal.

Wantonness; (2) Breach of Warranty of Habitability, Breach of Warranty against Latent Defects, Breach of Warranty of Workmanlike Services, Breach of Warranty for Fitness for a Particular Purpose, Breach of Warranty of Merchantability and Serviceability, and Breach of Express Warranty; (3) violation of the South Carolina Unfair Trade Practices Act; (4) Breach of Fiduciary Duty (against CalAtlantic); and (5) Declaratory Judgement / Reformation (against CalAtlantic and Lennar). (R. 37-48).

On August 1, 2020, CalAtlantic and Lennar answered the Complaint. (R. 50). Thereafter, on December 22, 2020, CalAtlantic and Lennar filed a Motion to Dismiss and Compel Arbitration (the "Motion to Compel Arbitration"), arguing the Association is required to arbitrate its claims against them pursuant to the arbitration provisions in the Covenants and in the Purchase and Sale Agreements executed by the Owners. (R. 65-66). In support of the Motion to Compel Arbitration, CalAtlantic and Lennar attached the Covenants, a copy of a Purchase and Sale Agreement executed by one of the individual Owners, and the Declaration of Tracey Ethridge as exhibits. (R. 70-377).[3]

On May 7, 2021, without holding a hearing, the circuit court issued an order denying the Motion to Compel Arbitration. (R. 1).[4] On May 17, 2021, CalAtlantic and Lennar filed a Rule 59

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[3] In response to the Motion to Compel Arbitration, the Association filed a Memorandum in Opposition and a Motion to Strike the Declaration of Tracey Ethridge. (R. 378; 683).

[4] The circuit court's order makes no reference to the Association's Motion to Strike the Declaration of Tracey Ethridge or the refusal to consider the contents of the Declaration and in fact the court's order specifically acknowledges that it "conducted a thorough review of the record and analyzed in detail whether the Defendants were entitled to compel arbitration pursuant to the arbitration provisions contained in the Purchase Agreements . . . that were entered into by the individual homeowners. " (R. 12). More than a month after denying the Motion to Compel Arbitration, on June 10, 2021, the Court issued an order striking the Declaration of Tracey Ethridge. (R. 15). Tracey Ethridge's Declaration is related to the authentication of the CalAtlantic Limited Warranty and CalAtlantic's practice of providing a copy of that document to the individual owners. (R. 17). There are no arguments in this appeal related to the application of the CalAtlantic Limited Warranty's arbitration provision; therefore, the circuit court's order striking the Declaration of Tracey Ethridge has no effect on this appeal.

Motion to Alter or Amend. (R. 714). The circuit court issued an order denying the Motion to Alter or Amend on June 21, 2021. (R. 9). The circuit court erroneously denied both of the motions. In its Orders denying both the Motion to Compel Arbitration and the Rule 59 Motion to Alter or Amend, the circuit court elaborated on its decision and stated:

1. "The Court conducted a thorough review of the record and analyzed in detail whether the Defendants were entitled to compel arbitration pursuant to the arbitration provisions contained in the Purchase Agreements . . . that were entered into by the individual homeowners." (R. 12).

2. "Plaintiff's causes of action are brought by the Association under their duty to maintain and keep in good condition the common areas, and alleged defects against the Defendants for the common areas of the property, not for each individual unit." (R. 6-7).

3. "Defendants contend that Plaintiff must submit to binding arbitration pursuant to arbitration provisions contained in . . . the Purchase Contracts . . . ." (R. 3).

4. "Defendants cannot compel the Association to arbitrate pursuant to the arbitration provisions contained in the Purchase Contract . . . because the individual homeowners are not the plaintiffs in this action and are not suing for damages associated with their individual units." (R. 6).

5. "The relevant inquiry is not the arbitrability of each individual homeowner's claims against the Defendants . . . it is the arbitrability of the Association's claims regarding alleged defects in the common areas . . . ." (R. 7).

6. "[T]he Court finds the Association did not contractually agree to the arbitration provisions contained in the Purchase Contract. . . [t]herefore, any assertion that the Association is bound to the arbitration provision in [the Purchase Contract] is without merit." (R. 7).

The circuit court's Orders afford no recognition to the Association's express allegation that the Owners assigned their individual claims to the Association, or that the Association alleges it is charged with pursuing the claims enumerated in its Complaint by virtue of having been assigned

the individual claims by the Owners. Furthermore, the circuit court's Orders make no findings as to the enforceability of the arbitration provisions in the Purchase and Sale Agreements or as to the scope of the claims subject to the arbitration provisions in the Purchase and Sale Agreements.

CalAtlantic and Lennar timely filed a Notice of Appeal on July 21, 2021.

STANDARD OF REVIEW

Whether a claim is subject to arbitration is an issue for judicial determination and is subject to *de novo* review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014). "It is the policy of this state and federal law to favor arbitration[,] and 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'" *Landers v. Fed. Deposit Ins. Co.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 92 (4th Cir. 1996)). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015) (alteration in original) (quoting *Dean*, 408 S.C. at 379, 759 S.E.2d at 731).

ARGUMENTS

I. The circuit court erred in denying the Motion to Compel Arbitration.

A. The circuit court erred in holding that CalAtlantic and Lennar could not compel arbitration pursuant to the Purchase and Sale Agreements based on the proposition that the Owners are not plaintiffs in the action and are not suing for damages associated with their individual units—although the Association expressly alleges it is "charged with pursuing claims enumerated [in the Complaint] by virtue of having been assigned individual claims by townhome owners at this project."

The Association expressly alleges it is pursuing each of the claims enumerated in the Complaint that belong to the Owners and were assigned by those Owners to the Association. (R. 29). By virtue of those assignments which the Association alleges, and its charge to pursue the Owners' claims which were assigned, the Association has stepped into the shoes of those Owners.

Therefore, the Association is bound by the valid and enforceable agreements to arbitrate in the Purchase and Sale Agreements to which its assignors (the individual townhome Owners) are bound and from which they derive their ownership interests.

In ruling on the Motion to Compel Arbitration, the circuit court was required to address two gateway matters: (1) whether an applicable arbitration agreement exists, and (2) whether the specific dispute falls within the scope of the arbitration agreement. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 629, 667 S.E.2d 1, 5 (Ct. App. 2008). The circuit court erred in performing the required analysis of each of the gateway matters.

The circuit court erred in its analysis of the first gateway issue by improperly concluding that the Purchase and Sale Agreements did not provide an applicable agreement to arbitrate between the Association and CalAtlantic. The circuit court based its erroneous conclusion on an incomplete analysis and the flawed finding that the "Association did not contractually agree to the arbitration provisions contained in the Purchase Contract[s]" and "the individual homeowners are not the plaintiffs in this action and are not suing for damages associated with their individual units." (R. 6-7).

The circuit court failed to address the Association's own allegation that it had been assigned the claims of the Owners and it was pursuing the claims in the lawsuit not only in its own behalf but on behalf of the Owners pursuant to their assignments. Thus, the circuit court failed to conduct any analysis, or make any findings, related to the enforceability of the arbitration provisions in the Purchase and Sale Agreements. For example, the circuit court made no analysis and no finding regarding the scope of claims covered by the arbitration provision in the Purchase and Sale Agreements. Additionally, the circuit court made no finding regarding the enforceability of the actual arbitration provisions in the Purchase and Sale Agreements.

The circuit court's decision, and the rationale for that decision, are plain error because the Association is suing on behalf of the individual Owners, and its claims are not limited to the common elements of the property. Plain evidence in support of these conclusions exists in the Association's Complaint itself. Specifically, the Complaint alleges the Association is "charged with pursuing claims enumerated hereafter by virtue of having been assigned individual claims by townhome owners at this project." (R. 29). First, the enumerated claims in the Complaint include claims belonging only to the individual Owners (not the Association in its own right). Second, the claims enumerated by the Association do not allege only common element defects or damages—and do not exclude damages relating to individual units and Owners. In fact, in the Complaint the Association claims damages related to the cost "to renovate, correct, repair and restore the townhomes, buildings, building components, and common areas" and to "reconstruct major portions of the townhomes", (R. 34-35, 45); as well as, for the "[l]oss of use, enjoyment and depreciations of the value of their property." (R. 35). Thus, on the face of the Complaint, it appears that the Association is pursuing individual townhome owner claims by virtue of the assignment of those claims by the Owners to the Association.

An assignee, such as the Association alleges it is, stands in the shoes of the assignor—the individual Owners. *Moore v. Weinberg*, 373 S.C. 209, 220, 644 S.E.2d 740, 745-46 (Ct. App. 2007), *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). The Association (as an assignee) has the same rights **and obligations** of the individual Owners (the assignor). *See Twelfth RMA Partners, L.P. v. Nat' l Safe Corp.*, 335 S.C. 635, 639-40, 518 S.E.2d 44, 46 (Ct. App. 1999). As an assignee, the Association can have no greater rights on the assigned claims than the individual Owners. *See Murphy v. Jefferson Pilot Commc'ns Co.*, 657 F. Supp. 2d 683, 690 (D.S.C. 2008) (applying South

Carolina law and finding a plaintiff assignee can have no greater rights on the assigned claims than the assignor himself would have had if the assignor chose to pursue the claims).

In this case, the Association has alleged specific claims that may be brought only by the individual Owners; namely, claims related to alleged defects or damages associated with the windows, doors, and HVAC systems at the Project, and the specific claim for breach of the implied warranty of habitability. (R. 38-39; 43). Therefore, by virtue of the alleged assignments, the Association is obligated to arbitrate the assigned claims because the individual Owners are obligated to arbitrate those claims pursuant to the valid and enforceable arbitration provisions in the Purchase and Sale Agreements. *See* 1 DOMKE ON COM. ARB. § 13:18 *Successor in interest—Assignees* ("An assignee cannot resist arbitration on the grounds that it was not a party to the original agreement, as its obligations come from those of the assignor.").

B. The circuit court erred in holding that "any assertation that the Association is bound to the arbitration provisions in [the Purchase and Sale Agreements] is without merit"—although the Association expressly alleges it is "charged with pursuing claims enumerated [in the Complaint] by virtue of having been assigned individual claims by the individual townhome Owners at this project," asserts a cause of action for breach of the implied warranty of habitability which, as a matter of law, arises exclusively from the sale of the townhomes to the individual townhome Owners by means of the Purchase and Sale Agreements, and asserts claims and damages in the action related to doors, windows, and HVAC systems, which are expressly defined by the Covenants and the responsibility of the individual townhome Owners and not common elements for the Association.

1. Claims related to the windows, doors, and HVAC belong to the Owners and, absent the alleged assignment of claims by the individual owners, could not be maintained by the Association.

Traditionally, in South Carolina a homeowners' association has standing to pursue construction defect claims in the common elements that it has a duty to maintain. *Queen's Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int'l Corp.*, 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985) ("A property regime has standing to bring an action for construction defects in common

elements that the regime has the duty to maintain."). The common elements of the property are defined or enumerated by the Covenants.

In this case, the Covenants charge the Association with maintaining and keeping the "Area of Common Responsibility" in good condition, order, and repair. (R. 86). The Covenants do not include windows, doors, or the HVAC systems as common elements. Instead, they define the "Area of Common Responsibility" to include:

> (i) exterior maintenance of all dwellings including, but not limited to, painting, repairing, replacing and caring for the following:
>
> 1. roofs (including the roof joists and trusses, crossbeams, roof decking and underlaying, and shingles or other covering and surface materials);
>
> 2. gutters and downspouts;
>
> 3. exterior walls and surfaces, including the brick, siding, or other building material forming the exterior walls of any dwelling and/or garage (but not including the wood, drywall, plaster or other building material on the inside of any dwelling or garage, and not including foundations and footings below any dwelling or garage);
>
> 4. exterior stoops, landings, railings and steps;
>
> 5. projecting cornices and copings; and
>
> 6. shutters.

(R. 87).

Conversely, the Covenants expressly define as individual Owners' property, and place the responsibility for maintenance of certain enumerated areas on the Owners. Those components which are not the "Area of Common Responsibility" and are specifically the responsibility of the Owners include:

> . . . **the windows, window casings, window shutters, exterior doors and door frames** (including any and all front doors, back doors, sliding glass doors, and garage doors); and all hardware which is part of any window or door; and screens and exterior lights,

> if any, serving the Owner's Townhouse. Further, **the maintenance and repair of those portions of the heating and air conditioning systems serving a Townhouse**, including the air conditioning compressor and condenser located outside a dwelling, shall be the responsibility of the Owner of such Townhouse.

(R. 89). Therefore, under South Carolina law, the Association does not have independent standing to bring claims related to or arising from the construction, maintenance, or repair of the windows, exterior doors or HVAC systems for the individual townhomes. Yet, the Association's Complaint specifically and expressly includes claims and seeks damages based upon alleged defects in the windows, doors and HVAC systems. (R. 38-39).

Despite the circuit court's erroneous conclusion that the Association's claims involve only common elements of the Property, and not individual townhomes or claims belonging to individual Owners, the fact is that the Association's Complaint specifically asserts claims and seeks damages based upon and related to alleged defects in:

1. "the windows, doors, and flashing"; and
2. "the heating and air conditioning system including duct lines and related components."

(R. 38-39). Under controlling law and the controlling documents, the Association could only pursue claims related to the windows, doors, or HVAC systems through the assignment of the claims by the individual Owners. And, that is exactly what the Association alleges it is doing. The Purchase and Sale Agreements which bind those individual Owners obligate them to arbitrate such claims. Therefore, as assignee of those claims, the Association, is obligated to arbitrate those claims just as the individual Owners were so obligated. *See Rutledge v. Santander Consumer USA Inc.*, No. 6:20-CV-04214-DCC, 2021 WL 2949860, at *8 (D.S.C. July 14, 2021) (granting a motion to compel arbitration and stating that in the context of the assignment of rights under an agreement there is no functional difference between a signatory to the agreement and an assignee);

see also Cone Constructors, Inc. v. Drummond Community Bank, 754 So. 2d 779, 779 (Fla. 1st DCA 2000) (compelling an assignee of a claim to arbitrate its claims against a defendant pursuant to the arbitration provision in the contract between the assignor and the defendant). Accordingly, the circuit court erred in concluding that the Association is not required to arbitrate its claims based on assignments from the individual Owners pursuant to the Purchase and Sale Agreements on the grounds that the individual Owners are not direct parties to this lawsuit. Those claims assigned to the Association by the Owners are subject to arbitration under the Purchase and Sale Agreements and the Association cannot avoid that obligation to arbitrate merely by not including the assigning Owners as named plaintiffs in the action.

2. **The claim made in the Complaint by the Association for Breach of Warranty of Habitability arises from the sale of the unit and belongs only to the parties to the contract for the sale of property; therefore, for the Association to pursue such a claim it must be doing so pursuant to the assignments from the individual Owners who were parties to the contracts for sale of the property (which the Association was not).**

In its Complaint, one of the Association's expressly "enumerated" claims is a purported claim for Breach of Warranty of Habitability. (R. 43). As a matter of law, a claim for breach of warranty of habitability arises solely out of the sale of the home. *Kirkman v. Parex, Inc.*, 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006); *Arvai v. Shaw*, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986). An owner who is not a party to the contract for the sale of the property does not have a claim for breach of the implied warranty of habitability. *Holder v. Haskett*, 283 S.C. 247, 249, 321 S.E.2d 192, 192 (Ct. App. 1984) ("We decline to extend liability on an implied warranty of habitability to those who were not parties to the contract of sale."). Thus, on its own, the Association cannot allege or pursue a claim for breach of the warranty of habitability. Yet it does. The only justification for this claim made by the Association are the assignments it allegedly holds from the individual Owners. Without those assignments, as alleged, the Association lacks standing

to pursue a claim for breach of the warranty of habitability. Yet, as further evidence the Association's Complaint includes claims belonging to the individual Owners—whether or not they are named plaintiffs—the Association purports to pursue the habitability claim. (R. 43). The individual Owners' claims are all subject to the arbitration provisions in their respective Purchase and Sale Agreements. Therefore, the Association's claim for breach of the warranty of habitability must be compelled to arbitration pursuant to those agreements because the Association may only pursue such a claim based on the assignment by the Owners who are obligated to arbitrate that claim. Accordingly, the Court must reverse the circuit court and find that the Association is bringing claims on behalf of the Owners and those claims are subject to the arbitration agreements in the respective Purchase and Sale Agreements.

C. The circuit court erred in failing to consider the second gateway matter and determine whether the Association's claims fall within the scope of the Purchase and Sale Agreements' arbitration provisions.

After concluding that the Association—as the assignee of the individual Owners' claims—is bound by the agreements to arbitrate in the Purchase and Sale Agreements, the circuit court was required to review the arbitration provisions in those Agreements and determine that the Association's claims are within the scope of the claims covered by those agreements to arbitrate.

The Purchase and Sale Agreements contain valid and enforceable agreements to arbitrate any disputes or claims related to the properties. The CalAtlantic form Purchase and Sale Agreement requires the individual Owners to arbitrate "any disputes or claims or controversies," relating to or arising out of the property, the design, or construction. (R. 154). The CalAtlantic form Purchase and Sale Agreement defines "Dispute" as:

> [A]ny and all actions or claims by, between or among any Seller party and any Owner arising out of or in any way relating to the Property, the Project, the Contract, . . . or duties or liabilities as between any Seller party and an Owner relating to the sale of the

> Property, . . . or the design or construction of or any condition on or affecting the Project . . . .

(R. 157). Similarly, the individual owners who executed the Ryland form Purchase and Sale Agreement agreed to arbitrate:

> **ANY CONTROVERSY, CLAIM OR DISPUTE ARISING OUT OF OR IN ANY WAY RELATING TO (A) THIS AGREEMENT, (B) THE PROPERTY, (C) YOUR PURCHASE OF THE PROPERTY, (D) OUR CONSTRUCTION OF THE HOME, OR (E) ANY PERSONAL INJURY OR PROPERTY DAMAGE THAT YOU ALLEGE TO HAVE SUSTAINED ON THE PROPERTY . . . .**

(R. 725).

The claims assigned to the Association by the individual Owners are undeniably within the scope of disputes that must be compelled to arbitration pursuant to the arbitration provisions in the Purchase and Sale Agreements. The Association has asserted claims on behalf of the individual Owners for negligence, breach of warranty of habitability, breach of warranty of workmanlike services, breach of express warranty. All of these claims relate to the property and the design, construction, or sale of the property. (R. 37-43).

The circuit court never analyzed the application of the arbitration provisions to the claims in this case. The circuit court erred in refusing to recognize that the Association is asserting claims that have been assigned to it by the individual Owners and, thus, never analyzed the arbitrability of those claims under the controlling agreements to arbitrate.

The Court must reverse the erroneous decision by the circuit court. Additionally, the Court must determine the proper remedy for the circuit court's failure to analyze whether the Association's claims are within the scope of the Purchase and Sale Agreements' arbitration provisions. Since the issue of whether a claim must be compelled to arbitration is subject to *de novo* review, *Dean*, 408 S.C. at 379, 759 S.E.2d at 731, and there is no doubt that the Association's

claims are within the scope of disputes covered by the arbitration provisions in the Purchase and Sale Agreements, it is appropriate for this Court to also reverse the circuit court, and find the Association's claim are within the scope of the applicable arbitration provisions. Thus, it is proper for this Court to issue an order compelling the Association to arbitrate its claims and staying the remainder of the case pending the resolution of the arbitration. Furthermore, at a minimum, this Court should remand the case for the circuit court to conduct a proper review of whether the Association's claims are within the scope of the controlling arbitration provisions in the Purchase and Sale Agreements.

CONCLUSION

For the foregoing reasons, the circuit court erred in denying the Motion to Compel Arbitration because the Association is pursuing claims assigned to it by the Owners and those claims are subject to the arbitration provisions in the Purchase and Sale Agreements that were executed by the Owners. Accordingly, CalAtlantic and Lennar respectfully request the Court issue an order reversing the circuit court, ordering that the Association is compelled to arbitrate its claims, and staying the remainder of the case—or, at a minimum, remanding the matter to the circuit court with instructions for the circuit court to conduct its gatekeeper function and compel the Association to arbitrate its claims against CalAtlantic and Lennar.

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March 29, 2022