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' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page(s)

Statutes

Other Authorities

I. Summary of Argument

Despite the unnecessarily convoluted arguments by Whitesides Park Townhomes Property Owners Association, Inc. ("Association")—apparently intended merely to confuse the basic issue in this appeal—the legitimacy and correctness of Appellants CalAtlantic Group, Inc., f/k/a The Ryland Group, Inc., f/k/a Standard Pacific Corp. and also d/b/a CalAtlantic Homes; and Lennar Carolinas, LLC's (collectively, "CalAtlantic") position is fairly simple. The Complaint filed by the Association, and the facts and claims alleged therein, triggered the application of the arbitration provision in the various purchase and sale documents executed by each of the individual townhome owners who are the members of the Association. It did so because the claims and allegations in the Complaint involve claims belonging to and damages allegedly suffered by the individual townhome owners.

The Association chose the facts and the claims it alleged and put in issue in its Complaint, and since CalAtlantic has the right to compel arbitration of those claims and disputes put in issue in this case, it is proper for the Court to enforce that arbitration right.

The Association clearly and unequivocally alleges in its Complaint that:

i. As the Association, it is charged with investigation, maintenance and repair of common elements at the Property. (R. 29; Complaint, ¶ 5);

ii. As the Association, it has the right and authority to bring this action on behalf of the Whitesides POA and its members. (R. 29);

iii. It is also charged with pursuing claims enumerated hereafter by virtue of having been assigned individual claims by townhome owners at this project. (R. 29).

It is thus undeniable from the allegations of the Complaint that the case is not just about the Association pursuing its charge (claims) with regard to the common elements of the property,

the case involves claims on behalf of individual townhome owners including by virtue of those individual owner claims having been assigned to the Association to pursue.

Furthermore, the remaining allegations of the Complaint leave no doubt that the claims being pursued in the case specifically and expressly include controversies, claims or disputes arising out of or relating to: the Property, the purchase or sale of the Property, and the design or construction of the townhomes which belong uniquely to the individual townhome owners. In particular, the Association claims:

i. "defects and deficiencies in and to the residence . . .," including:

   a. "In failing to use due care in . . . construction, repair and sale of the townhomes" (the sale of a townhome of course involving only the individual townhome purchaser/owner—not the Association);

   b. "In . . . constructing, and selling townhomes . . . which fail to provide sufficent barriers against water intrusion . . . resulting in damage to the units . . . .";

   c. "In improperly installing the windows, doors, and flashing" (windows and doors being uniquely the property and responsibility of individual townhome owners according to the controlling Covenants for the Project);

   d. "In improper installation [of] the heating and air condition system including duct lines and related components" (this implied warranty as a matter of law, existing only in favor of the actual purchasers of the property—the individual owner).

   (R. 38; Complaint ¶ 49, Subparts a, b, l, p)

ii. "These deficiencies as set forth above have caused damage to the wall sheathing . . . and other building components including . . . windows, doors . . . floors, and interior finishes . . . [a]ll of which has required . . . the loss of use and enjoyment of their property" (again, the windows, doors, floors and interior finishes, as well as the use and enjoyment of the property being the unique property and rights of the individual owners).

   (R. 42; Complaint ¶ 53).

iii. Breach of the implied warranty of habitability (R. 43; Complaint, ¶ 55).

At the same time the Association sued on these claims and damages, the Record reflects that the Declaration of Covenants, Conditions, Restrictions and Easements for Whitesides Park, dated September 8, 2016 (the "Covenants") (R. 71), provides that each individual owner has the direct responsibility for the:

> the maintenance and repair of the wood, drywall, plaster, or other building material on the inside of the exterior walls and ceilings forming the boundaries of the dwelling. Owners shall also be responsible for the maintenance, repair and replacement of 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. 88-89)(emphasis added).

Finally, the Record reflects that each of the individual townhome owners, on whose behalf and pursuant to the assignment from, the Association is pursuing the above-described claims and damages obtained his/her interest in the townhome and the community by virtue of a sales contract with CalAtlantic. Each of which sales contracts contained an agreement to arbitrate to the effect that:

> Any disputes or claims or controversies . . . arising out of or relating to this contract, the property or any other matter . . . relating to . . . the Project . . . the limited warranty . . . the sale of the Property . . . or the design or construction of or any condition on or affecting the Project, including without limitation construction defects . . . or disputes which allege strict liability, negligence, nuisance, breach of contract, negligent or intentional misrepresentation, or breach of implied, express or statutory warranties.

(R. 154, 157-160; Purchase Agreement, Section 12 and Dispute Resolution Agreement Addendum to Home Purchase Agreement Section 1).[1] So, the claims and damages the Association has placed in issue in its Complaint arise from the individual townhome owners, at least originally belonged to those individual owners, and expressly require arbitration.

In their opposing argument, the Association misapprehends the application of the arbitration agreement within the purchase and sale documents. Each individual townhome owner, by virtue of executing the agreement that contained the arbitration agreement, became bound to arbitrate any and all claims within the terms / scope of that agreement to arbitrate. The source, or origin of those claims does not affect the duty to arbitrate. It is the claim itself, and the fact that the origin of the claim was an individual townhome owner, that controls the obligation to arbitrate.

At the time the circuit court considered and decided CalAtlantic's Motion to Compel Arbitration, the Record before the circuit court included: (i) the Complaint; (ii) CalAtlantic's Answer; (iii) CalAtlantic's December 22, 2020, Motion to Compel Arbitration and the Exhibits thereto (Ex. A the Covenants, Ex. B the Purchase and Sale Agreement of individual townhome Owner Alex Brown, and Ex. C the declaration of Tracey Ethridge with its attached CalAtlantic Warranty); (iv) the Association's Memorandum in Opposition to the Motion to Compel Arbitration.[2]

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[1] The arbitration provision quoted herein is found in the Alex Brown purchase documents. (R.154, 157-160). The Brown contract was filed as Exhibit B to the Motion to Compel Arbitration. (R. 139). The agreements executed by some of the other individual owners are nearly identical. (R. 816, 850-853). Other individual owners executed purchase and sale documents in which they 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, . . . shall be resolved by binding arbitration under the Federal Arbitration Act . . . ." (R. 762, 765-766).

[2] The Association attached several affidavits of individual townhome owners to its Memorandum in Opposition to the Motion to Compel. Those affidavits allege that certain owners executed documents that were different from the Alex Brown Purchase and Sale Agreement. Notably, the

Although the Association filed a Motion to Strike the Declaration of Tracey Ethridge on March 22, 2021, the circuit court took no action on the Motion to Strike prior to issuing its Order Denying the Motion to Compel Arbitration on May 7, 2021. (R. 683; 1).

On May 17, 2021, CalAtlantic filed the Motion to Alter or Amend the May 7 Order, along with various additional Exhibits (purchase and sale documents for lots 1, 3, 4, 7, 8, 9, 10, 12, 13) and a Supplemental Declaration of Tracey Ethridge.[3] (R. 754 - 854). On May 20, 2021, CalAtlantic filed a Response in Opposition to the Association's March 22, 2021 Motion to Strike the original Ethridge Declaration as well as an Amended Ethridge Declaration. (R. 855).

The Association filed its Memorandum in Opposition to CalAtlantic's Motion to Alter or Amend on May 26, 2021. (R. 855). Then, on June 10, 2021, the circuit court issued its order striking the March 22, 2021 Declaration of Tracey Ethridge. (R. 15). Thereafter, on June 18, 2021, the Association filed a Motion to Strike the Ethridge Amended Declaration.

On June 21, 2021, the circuit court issued orders denying the Motion to Alter or Amend the Order Denying the Motion to Compel Arbitration as well as striking the Amended Ethridge Declaration. (R. 9).

Importantly, on June 21, 2021, in the Order denying CalAtlantic's Motion to Alter or Amend the Order denying the Motion to Compel Arbitration, the circuit court expressly stated that

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affidavits contain no statement that the owners' individual purchase and sale documents did not contain agreements to arbitrate disputes with CalAtlantic.

[3] No Motion to Strike was filed in relation to the Supplemental Declaration of Tracey Ethridge. The circuit court expressly stated 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." (R. 12). Thus, the circuit court plainly considered the purchase and sale documents that were located by Tracey Ethridge and submitted to the court as newly discovered evidence that was not originally available despite CalAtlantic conducting a diligent search for the documents. (R. 12); *see Small v. Hunt*, 98 F.3d 789, 798 (4th Cir. 1996) (finding the lower court properly considered additional evidence that was submitted with a Rule 59(e) motion when a party provided a "'legitimate justification for not presenting' the evidence during the earlier proceeding").

its order was issued "[a]fter consideration of the record," which, at that time, still included all Exhibits filed with the Motion to Compel Arbitration, as well as the Supplemental and Amended Ethridge Declarations filed on May 17, 2021 and May 20, 2021. (R. 9).

II. Whether the circuit court erred in failing to compel the Association to arbitrate the claims pursuant to the arbitration provision in the individual owners' purchase and sale documents is preserved for review.

Contrary to the Association's arguments, the issue of whether the Association must be compelled to arbitrate the claims pursuant to the various purchase and sale documents executed by the individual townhome owners, and by which they acquired their homes, is preserved for review in this case. Specifically (1) the issue was raised in the CalAtlantic's Motion to Compel Arbitration, (2) the issue was ruled upon by the circuit court in its Order denying the Motion to Compel Arbitration, (3) the issue was raised again in CalAtlantic's Motion to Alter or Amend the order denying the Motion to Compel Arbitration, (4) the issue was ruled upon again by the circuit court in the order denying the Motion to Alter or Amend, and (5) the issue was raised in this appeal.

An issue is preserved for appeal if it is raised to and ruled upon by the circuit court. *Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009). Furthermore, the purpose of issue preservation rules is to provide the circuit court with a fair opportunity to rule on the issues, and to provide the court of appeals with a platform for meaningful appellate review. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006). It is not necessary that the issue be raised using the wording and precisely the same arguments and authorities each time. The South Carolina Supreme Court has stated that it is "mindful of the need to approach issue preservation rules with a practical eye and not in a ridged, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644–45 (2011); *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (Toal, C.J., concurring in result and dissenting in part) ("[A]n over-zealous

application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice"). Thus, for example, a party is not required to use the exact name of a legal doctrine to preserve an issue for appeal. *Herron*, 395 S.C. at 466, 719 S.E.2d at 642.

Applying these guiding principles, it is clear that CalAtlantic sufficiently raised and preserved for appeal the issue of whether the Association must be compelled to arbitrate the claims pursuant to the arbitration provision in the purchase and sale documents that were executed by the individual owners because the claims and damages at issue in this case are the claims and damages belonging to or having their origins with the individual owners who expressly agreed to arbitrate such claims. As discussed above, the Association's Complaint explicitly alleges that the Association is "pursuing claims . . . by virtue of having been assigned individual claims by the townhome owners a this project." (R. 29) (emphasis added). In its Motion to Compel Arbitration, CalAtlantic plainly raised the issue of whether the Association must arbitrate the claims pursuant to the purchase and sale document's arbitration provision. (R. 65-68). Specifically, the Motion to Compel Arbitration states:

> Whitesides brings this action. . . on behalf of the some or all individual owners of townhomes of which the Property consists. . . . Some or all owners entered into a Purchase Contract that specifically provides all disputes are subject to mandatory arbitration; some or all owners entered into a Dispute Resolution Agreement Addendum to Home Purchase Agreement that clearly provides that those individuals, as owners, and Defendants, as Seller, must follow the dispute resolution procedures set forth therein; specifically, all disputes must be submitted to arbitration.

(R. 66).

Rather than properly addressing this issue and valid ground to compel arbitration as raised, the circuit court incorrectly ignored the argument and denied the Motion to Compel Arbitration. The circuit court never even addressed the issue, instead deflecting it on the sole basis that the

individual townhome owners are not the named plaintiffs in the case and are not themselves directly suing for damages associated with their individual units. (R. 1-14). This rationale and decision by the circuit court completely misses the point and fails specifically to address the asserted and valid argument that the Association was bringing claims "on behalf of", and pursuant to assignments from, the individual townhome owners and, therefore, the individual owners' agreements to arbitrate are binding on the Association just as they would be on the individual owners. The circuit court decision that the arbitration provision in the purchase and sale documents was inapplicable merely because "the individual homeowners are not the plaintiffs in this action and are not suing for damages associated with their individual units," (R. 6; 12), was error.

The circuit court, in its order denying the Motion to Compel Arbitration, failed or refused to recognize that the Association admitted it was pursuing claims "on behalf of the members" of the Association and "by virtue of having been assigned individual claims by townhome owners." (R. 29). Thus, the claims at issue in the Complaint in this case include claims belonging to the individual owners. Claims belonging to the individual townhome owners must be compelled to arbitration pursuant to the valid and enforceable arbitration provision in the purchase and sale documents.

CalAtlantic identified this error or omission by the circuit court in its Motion to Alter or Amend. Specifically, CalAtlantic argued:

- The Purchase Agreement, Addendum, Manual, and Limited Warranty (the "Purchase Documents") compel arbitration of Whitesides' claims. Although the individual property owners are not named plaintiffs, Whitesides admits that it is comprised of individual property owners and states in its Complaint that the claims therein were assigned to it by the individual property owners. *See* (R. 29; Compl. at ¶ 5 ("[Whitesides] is also charged with pursuing claims enumerated hereafter by virtue of having been assigned individual claims by townhome owners at this project.")); (R. 388; Pl.'s Opp. to Mot. at 11 (Whitesides is "comprised of homeowners")).

- Whitesides' claims are not limited to "alleged defects in the common areas," (R. 6-7), and they clearly encompass claims of the individual property owners pursuant to the Purchase Documents. Specifically, Whitesides seeks declarations from the Court pertaining to provisions in "the Governing Documents and other transaction documents," and seeks damages unrelated to common area elements. *See e.g.*, (R. 43-44; Compl. at ¶ 57 (claiming damages "in order to renovate, correct, repair and restore the townhomes, buildings, building components, and common areas")); (R. 34-35; Compl. at ¶ 35 (seeking damages to "reconstruct major portions of the townhomes," and for the "loss of use, enjoyment and depreciations of the value of their property")); (R. 36; Compl. at ¶¶ 40-42 (arguing the warranty limitations are unconscionable)); (R. 33-34; Compl. at ¶ 31 (arguing "the Governing Documents and other transaction documents" unduly restrict the remedies of both "the Plaintiff and owners")).

- Not only is Whitesides bound by the arbitration provisions in the Purchase Documents by virtue of some or all of its claims having been assigned to it by the individual landowners[4], Whitesides is also bound by the arbitration provisions in the Purchase Documents based on agency principles and the fact that Whitesides is comprised of individual homeowners. The Court does not appear to have considered these facts, or the controlling law thereon, and its ruling that Whitesides is not bound by the arbitration provisions in the Purchase Documents constitutes clear error.

(R. 754-760).

Nonetheless, the circuit court denied CalAtlantic's Motion to Alter or Amend and merely stated that "[t]his argument was previously presented to, and ruled upon by the Court." (R. 13). This statement by the circuit court alone is evidence that the issue was raised in the original Motion and has been preserved.

[4] The Association mistakenly argues in its brief that CalAtlantic "makes no reference to assignment in their Motion to Dismiss or in their Motion to Alter or Amend. (Respondent's Brief p. 8). This excerpt from CalAtlantic's Motion to Alter or Amend plainly demonstrates that the Association's assertion is false and the issue was raised to the circuit court.

On appeal, CalAtlantic again presents this issue. In the appeal, CalAtlantic, as is proper for it to do, bolsters its argument that the Association must be compelled to arbitrate the asserted claims pursuant to the individual purchase and sale documents by further demonstrating that, in its Complaint, the Association is asserting claims that belong specifically to the individual owners. In particular, CalAtlantic documents that the Association asserts claims and damages related to and arising from property that is undeniably owned by the individual owners as established by the Covenants (windows, doors, flashing and heating and air conditioning systems). (R. 37-39; Complaint ¶ 49). Additionally, the Association has asserted claims / causes of action which, as a matter of law, belong only to the individual townhome owners who purchased the townhome. (R. 43). The claim / cause of action for breach of the implied warranty of habitability springs exclusively from the purchase or sale of the townhome and that transaction involves only the individual owners and is absolutely derived from the individual purchase and sale documents. *See Kirkman v. Parex, Inc.*, 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006) (recognizing that a claim for breach of warranty of habitability arises solely out of the sale of the home); *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."); *Champy v. Beazer Homes Corp.*, No. 3:15-CV-04098-MBS, 2016 WL 1110241, at *3 (D.S.C. Mar. 21, 2016) ("Courts will 'decline to extend liability on an implied warranty of habitability to those who were not parties to the contract of sale.'").

The issue of compelling the Association to arbitrate the claims its Complaint expressly reveals are assigned claims from the individual owners, or are claims asserted specifically on behalf of the individual owners, or which allege defects and claims for damages to property which is owned by the individual owners, or to vindicate rights / claims belonging exclusively to individual owners as a matter of law, has been preserved for review. Having asserted and

preserved the issues throughout this litigation, CalAtlantic is permitted in this appeal to bolster its argument and to provide specific examples from the record that establish clearly the basis upon which the Association is required to arbitrate the claims.

The South Carolina Supreme Court's opinion in *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), analyzed an analogous set of facts and concluded that issue preservation was not a problem. In that case, the plaintiff made an objection to the lower court and then provided a more detailed and granular argument on appeal. Specifically, in *Wilder*, the plaintiff made a general objection to the defendant's amortization schedule. On appeal, the plaintiff raised and argued the specific issues related to the amortization scheduled based upon (1) the date when interest started to accrue; (2) application of the first payment to principal; (3) the number of payments made by Buyer; and (4) accrual of interest on deferred payments. *Wilder*, 330 S.C. at 75, 497 S.E.2d at 733. The defendant argued that the plaintiff's objection to the schedule during trial was too general to preserve the specific issues for appeal. *Id.* The Court held that the plaintiff's objection was sufficiently specific to bring into focus the precise nature of the alleged error so that it could be understood by the trial court. *Id.*; *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue).

Like the plaintiff in *Wilder*, CalAtlantic raised to the circuit court the overarching issue now on appeal. In this appeal, CalAtlantic has properly bolstered its argument by arguing the specific claims and property interests that the Association is pursuing on behalf of the individual owners. As recognized by the Court in *Wilder*, CalAtlantic is permitted to provide further detail and further support for its preserved argument. Accordingly, the issues on appeal related to the

application of the arbitration provisions in the individual owners' purchase and sale documents are preserved for review.[5]

Also useful in understanding how and why the Record in this case establishes that the issues on appeal have been preserved is a clearer and more concise summary of the procedural history of this case and the materials in the Record at the time of each decision by the circuit court. The following history of events is particularly informative:

1. December 22, 2020, CalAtlantic files the Motion to Compel Arbitration along with:

   a. Exhibit A: The Covenants for the Project;

   b. Exhibit B: The Purchase and Sale Agreement executed by individual owner Alex Brown as an example of the purchase contracts used for the Project;

   c. Exhibit C: The Declaration by Tracey Ethridge which also included an example of the Warranty.

   (R. 65 - 377).

2. March 22, 2021, the Association files its Memorandum in Opposition to the Motion to Compel Arbitration and a Motion to Strike the Ethridge Declaration. (R. 378; 683).

3. May 7, 2021, the circuit court issues its Order denying the Motion to Compel Arbitration, having taken no actions on the Motion to Strike the Ethridge Declaration and having issued no Order Striking the Declaration from the Record. (R. 1).

4. May 17, 2021, CalAtlantic files the Motion to Alter or Amend the May 7 Order denying the Motion to Compel Arbitration. (R. 754).

[5] The Association also relies on CalAtlantic's decision not to move to assert additional affirmative defenses or file a Motion to Dismiss the claims as a basis for supporting its preservation argument. (Respondent's Brief p. 10). CalAtlantic has maintained that the Association must arbitrate the claims and, therefore, decisions related to the merits of the claims are for the arbitrator—not the court. Accordingly, CalAtlantic had no obligation to move to dismiss those claims until the matter is compelled to arbitration.

5. May 20, 2021, CalAtlantic files its Memorandum in Opposition to the Motion to Strike the Ethridge Declaration, and along with it files an Amended Ethridge Declaration. (R. 855).

6. May 26, 2021, the Association files its Memorandum in Opposition to the Motion to Alter or Amend the Order denying the Motion to Compel Arbitration. (R. 868).

7. June 10, 2021, the circuit court issues its Order granting the Motion to Strike the [Original] Ethridge Declaration. (R. 15).

8. June 18, 2021, the Association files its Motion to Strike the Amended Ethridge Declaration.

9. June 21, 2021, the circuit court issues its Order denying the Motion to Alter or Amend the Order denying the Motion to Compel Arbitration (saying expressly that it was denied because "this argument was previously presented to, and ruled upon by the Court.")[6]. (R. 9).

10. June 21, 2021, the circuit court issues its Order granting the Motion to Strike the Amended Ethridge Declaration.

III. The purchase and sale documents are not unconscionable and the circuit court did not find the arbitration provision in the purchase and sale documents is unconscionable.

The Association asserts: "The Purchase and Sale Agreements were properly found to be unconscionable at the circuit court level." (Respondent's Brief p. 16). This assertion by the Association is patently incorrect. The circuit court never even purported to address or find unconscionability in connection with the purchase and sale documents. While the circuit court announced its conclusion that the "Covenants are unconscionable,"[7] the circuit court never even

[6] At the time the circuit court ruled on the Motion to Alter or Amend, the exhibits to the Motion to Alter or Amend—including the additional purchase and sale documents—were in the record in this case and the circuit court expressly stated that it "conducted a rigorous analysis of the arbitration provisions contained in the Purchase Agreements." (R. 13).

[7] The circuit court generically stated the "Covenants are unconscionable" in denying the Motion to Compel Arbitration. (R. 4). However, the circuit court's analysis is limited to the concept that no agreement to arbitrate exists because the Covenants were executed by an individual that the circuit court concluded had a conflict of interest in representing both CalAtlantic and the Association. The circuit court made no specific finding as to whether a particular term of the Covenants is unconscionable. Moreover, in ruling on a Motion to Compel Arbitration, the circuit court was limited to an analysis of whether the arbitration provision was unconscionable—not the

discussed an unconscionability analysis of the purchase and sale documents, let alone a finding that such agreements were unconscionable. (R. 4).

The circuit court, in both the Order denying the Motion to Compel Arbitration and the Order denying the Motion to Alter or Amend the original Order, refused to compel arbitration pursuant to the purchase and sale documents exclusively on the erroneous premise that the individual townhome owners were not themselves named plaintiffs in the action and the allegations were not in connection with defects in an individual unit. (R. 6-7; 12-13).

Now, aside from the false argument that the circuit court found the purchase and sale documents to be unconscionable, the Association attempts to argue that they, nonetheless, are unconscionable. It premises this entire argument on the proposition that the arbitration provision in the purchase documents states:

> BUYER MAY COMMENCE THE ARBITRATION PROCESS BY FILING A COMPLETED "REQUEST FOR ARBITRATION" FORM WITH COLUMBIA NATIONAL RISK RETENTION GROUP, INC. ("**CLAIMS ADMINISTRATOR**"), 100 BANK STREET, SUITE 610, P.O. BOX 350, BURLINGTON, VERMONT, 05402-0530. . . .
>
> THE DISPUTE WILL BE SUBMITTED TO AN INDEPENDENT ARBITRATION SERVICE CHOSEN BY THE CLAIMS ADMINISTRATOR WITHIN TWENTY (20) DAYS AFTER THE CLAIMS ADMINISTRATOR'S RECEIPT OF YOUR REQUEST FOR ARBITRATION. THE PARTIES AGREE THAT DEMARS AND ASSOCIATES, LTD. . . . ("DEMARS") IS AN ACCEPTABLE ARBITRATION SERVICE AND AGREE TO USE THE DEMARS CONSTRUCTION ARBITRATION PROGRAM.
>
> BUYER MAY OBJECT TO THE USE OF DEMARS OR THE ARBITRATION SERVICE APPOINTED BY THE CLAIMS ADMINISTRATOR (BUT NOT TO THE BINDING

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entirety of the Covenants. *See The Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 338-39, 588 S.E.2d 617, 622 (Ct. App. 2003) (holding that in ruling on a motion to compel arbitration the court is limited to an analysis of whether the arbitration provision is unconscionable—not whether the entire agreement is unconscionable).

> ARBITRATION PROCEDURE ITSELF). IF BUYER OBJECTS TO THE ALTERNATIVE INDEPENDENT ARBITRATION SERVICE DESIGNATED BY CLAIMS ADMINISTRATOR, EITHER PARTY MAY, PURSUANT TO THE APPLICABLE PROVISIONS OF THE FEDERAL ARBITRATION ACT, APPLY TO A COURT OF COMPETENT JURISDICTION TO DESIGNATE AN ARBITRATION SERVICE PROVIDER. THIS DESIGNATION WILL BE BINDING UPON BOTH PARTIES.

(R. 157-158).

Furthermore, the Association now argues that because the designated Claims Administrator may be an entity associated with Lennar Carolinas, LLC, this provision in the arbitration agreement must be held to be oppressive and one-sided and, therefore, unconscionable. However, the Association's argument fails to acknowledge that the arbitration provision at issue expressly provides that the Buyer may object to the recommended arbitration service, and then provides that the terms of the Federal Arbitration Act provide for a court of competent jurisdiction to designate an arbitration service provider.

This same issue of unconscionability associated with a provision such as this was resolved in the case of *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 399-400, 498 S.E.2d 898, 904 (Ct. App. 1998). In the *Lackey* decision, the Court recognized that provisions related to the selection of an arbitrator by one party do not render an arbitration provision unconscionable. In *Lackey*, the subject arbitration provision allowed Green Tree to select an arbitrator with the consent of the plaintiff. The Court found this provision did not render the arbitration provision unconscionable because the FAA accounts for such terms and provides a remedy. Specifically, the Court in *Lackey* found:

> The FAA provides in applicable part:
>
> > If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if ... a method be provided and any party thereto shall fail to avail himself of

> such method, *or if for any other reason there shall be a lapse in the naming of an arbitrator* ... then upon the application of either party to the controversy the court shall designate and appoint an arbitrator....
>
> 9 U.S.C. § 5 (1970) (emphasis added).
>
> Under this provision, the respondents are protected because the clear language of the agreement allows them to block Green Tree's selection of arbitrators by simply disagreeing with it. Without their agreement, no arbitrator can be selected by Green Tree. Under the default provisions of the FAA, a court then makes the selection of an impartial arbitrator upon application of either party. **There is nothing inherently unfair or oppressive about this process.**

Lackey, 330 S.C. at 399-400, 498 S.E.2d at 904 (emphasis added).

Thus, the Association's argument fails to establish unconscionability in the arbitration provision of the purchase documents. Like the court in *Lackey*, this Court should find that a dispute related to the method for selection of an arbitrator does not render the arbitration provision unconscionable. In fact, the arbitration provision specifically accounts for such an issue and expressly adopts the FAA provisions regarding judicial involvement with the selection of an arbitrator. Therefore, the only provision of the purchase and sale documents that the Association argues is unconscionable has been recognized as being fair, valid and enforceable. Accordingly, the Court should reject the Association's argument that the arbitration provision in the purchase and sale documents is unconscionable based on the provision for use of a particular claims administrator and the method for selection of the arbitrator. There is nothing inherently unfair or oppressive about the arbitration provision's designated process for selecting an arbitrator. It is not unconscionable and does not provide a justification for the Court to refuse to enforce the arbitration provision.

IV. The Association is required to arbitrate all claims it asserts on behalf of the individual owners because the individual owners agreed to arbitrate the claims at issue in this

case—regardless of whether the individual owners' claims are based in contract, tort, statute, warranty, or equity.

The Association's arguments regarding the source of the claims asserted in this case (i.e., from the Covenants or from common law) as affecting the applicability of the arbitration agreement in the purchase documents to which each individual townhome owner is bound are utterly and totally misplaced. As discussed above, what is clear from the allegations of the Association's Complaint is that it seeks to pursue and to vindicate claims, and to recover damages belonging to the individual owners.

Regardless of the basis or source of those claims, each individual owner agreed in his/her respective purchase documents that such claims, disputes or controversies would be resolved in and through arbitration. The arbitration agreement expressly says that any and all

> actions or claims . . . arising out of or in any way relating to the Property, the Project, the Contract, the Limited Warranty . . . any other agreements or duties or liabilities as between any Seller party and an Owner . . . regarding the use or condition of the Property, or the design or construction of or any condition on or affecting the Project, including . . . construction defects . . . or disputes which allege strict liability, negligence, nuisance, breach of contract, negligent or intentional misrepresentation, or breach of implied, express or statutory warranties . . . or repairs or replacements . . . [will be subject to binding arbitration].

(R. 160).

What matters in deciding that the claim is subject to arbitration is not from which agreement the claim arises, or which common law duty, or which statutory duty; what matters is that the claim and issue—the damages at issue—originally belonged to an individual owner who agreed to the arbitration provision. *See Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 356 S.C. 202, 210, 588 S.E.2d 136, 140 (Ct. App. 2003) ("if the clause contains language compelling arbitration of any dispute arising out of the relationship of the parties, it does not matter whether the particular claim relates to the contract containing the clause;

it matters only that the claim concerns the relationship of the parties"); *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 270, 776 S.E.2d 91, 93 (Ct. App. 2015) (compelling a borrower to arbitrate claims arising from statutory obligations pursuant to a loan agreement); *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 103, 739 S.E.2d 209, 210 (2013) (compelling an employee to arbitrate tort claims pursuant to an employment agreement).

It makes no difference that the Association has filed the claim "on behalf of" the individual owners, or as an agent or representative of the individual owner, or by virtue of some assignment by the individual owners. The Association cannot avoid the individual owners' obligation to arbitrate when the claim asserted or damages sought have their anchor with the individual owner. *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) ("An assignee stands in the shoes of its assignor."); *see also 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); 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.").

CONCLUSION

The circuit court erred in denying the Motion to Compel Arbitration because the Association is expressly pursuing claims on behalf of the individual townhome owners pursuant to the assignment of claims by those individual townhome owners, and all claims originating from those original townhome owners must be compelled to arbitration. Accordingly, CalAtlantic respectfully requests the Court issue an order reversing the circuit court, staying the case, and

ordering that the Association is compelled to arbitrate the claims.

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