THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Opinion No. 5118 (S.C. Ct. App. filed April 17, 2013)

Gregory W. Smith and Stephanie Smith, ...................................... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., ......................... Defendants,

of whom D.R. Horton, Inc., is the, ...................................................... Petitioner

# PETITION FOR A WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

Counsel for Petitioner D.R. Horton, Inc., certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 23, 2013.

## QUESTIONS PRESENTED

1. Whether this Court should resolve the contradictory decisions in this case and *Carlson v. Del Webb Communities, Inc.*, Op. No. 5143 (S.C. App. filed June 12, 2013)(Shearouse Adv. Sh. No. 26 at 142)?

2. Whether the Court of Appeals misapplied or ignored the *Prima Paint* doctrine?

3. Whether the Court of Appeals erred in failing to determine whether the Purchase Agreement is a contract of adhesion or whether the Smiths lacked meaningful choice?

4. Whether the Court of Appeals erred in finding the arbitration provision unconscionable?

## STATEMENT OF THE CASE

### 1. The parties and their contract.

Petitioner D.R. Horton, Inc. ("D.R. Horton"), built the house at 4830 Harvest Moon Court, Summerville, South Carolina 29420. Respondents Gregory W. Smith and Stephanie Smith ("the Smiths") bought the house from D.R. Horton. Before closing, D.R. Horton and the Smiths executed a Purchase Agreement. (R. 147–156). The Purchase Agreement's first page contains this notice, as required by the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. §§ 15-48-10–15-48-240 (2005):

> THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITATION ACT.

(R. 147).

The Purchase Agreement contains a Section 14, which is entitled "Warranties and Dispute Resolution." (R. 150–152). Paragraphs 14(a)–(f) contained warranty information, including a Residential Warranty Corporation ("RWC") structural warranty that was provided at no additional cost to the Smiths. (R. 150–151).

Paragraph 14(g), the arbitration provision, reads:

> **Mandatory Binding Arbitration.** [The Smiths] and [D.R. Horton] each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of [D.R. Horton]'s construction of the home;[1] (2) [D.R. Horton]'s performance under any Punch List or Inspection Agreement; (3) [D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths] and [D.R. Horton] agree to arbitrate.
>
> I. If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to [the Smiths] shall control.
>
> II. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the

[1] This Mandatory Binding Arbitration provision applied to "any claim arising out of [D.R. Horton]'s construction of the home." The Smiths made no argument that the arbitration provision did not cover the allegations contained in the underlying complaints. *See* Amended Complaint (R. 7–16) and Second Amended Complaint (R. 42–59).

> proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as a part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

(R. 151–152) (emphasis added).

Paragraph 14(h) allowed D.R. Horton to terminate the Purchase Agreement before closing in the case of a bona fide dispute with the Smiths, subject to a 10-day good faith resolution period, written notice, and making them whole by returning their earnest money. (R. 152). Paragraph 14(i) contains a limitation of warranties, subject to the RWC warranty and title warranty in ¶ 4, and an obligation on D.R. Horton to "repair or replace"[2] any defects as opposed to monetary damages. (R. 152; R. 148–149).

**2. Procedural history.**

**A. The Smiths sue D.R. Horton.**

The Smiths sued D.R. Horton for alleged construction defects and asserted claims for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. (R. 7–22; R. 42–59). The Smiths allege D.R.

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[2] "Repair or replace" remedies have been approved and enforced under South Carolina law. *See, e.g.*, *Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 168 n.4, 621 S.E.2d 38, 40 n.4 (2005); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 533, 183 S.E.2d 315, 319 (1971), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

Horton "designed, developed and constructed" the house, that there were "various defects and deficiencies relative to the construction of [the house]," and that D.R. Horton was "negligent, grossly negligent, careless, reckless, willful and wanton in constructing [the house]." (R. 9, ¶ 9; R. 10, ¶ 11; R. 10–11, ¶ 14; R. 45, ¶¶ 11 & 13; R. 46–47, ¶ 16).

**B. D.R. Horton unsuccessfully moves to compel arbitration.**

The arbitration clause encompasses "any claim arising out of [D.R. Horton's] construction of the home" and "[D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise." (R. 151). Thus, because the Smiths' claims involve construction defects, D.R. Horton moved the circuit court to compel arbitration. (R. 87–88).

The circuit court denied D.R. Horton's motion because:

(1) "the arbitration provisions[3] fail to meet the [SCUAA]";[4]

(2) the arbitration provision was allegedly unconscionable "based on the cumulative effect of a number of oppressive and one-sided provisions"; and

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3 The use of "arbitration provisions" in the plural sense is the root of many of the issues that have resulted in this appeal. D.R. Horton has asserted there is only **one** arbitration provision, ¶ 14(g). The unconscionability issues raised by the Smiths, the circuit court, and the Court of Appeals must be analyzed consistent with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), i.e., solely with respect to the arbitration provision found at ¶ 14(g). The Smiths, the circuit court, and the Court of Appeals looked beyond ¶ 14(g) to other unrelated provisions under a "collective unconscionability" theory.

4 Although the Purchase Agreement contained the required arbitration notice in underlined, all capital letters on the first page of the agreement, the circuit court did not identify any deficiencies in the arbitration notice or the arbitration provision itself. (R. 4; R. 104).

(3) the arbitration provision was purportedly extinguished by the doctrine of merger by deed.

(R. 1–4) (emphasis added). The circuit court did not address D.R. Horton's argument that the arbitration provision was also enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–307. Similarly, although the issues the circuit court addressed were raised on appeal, the Court of Appeals did not address the applicability of the SCUAA or the Smiths' merger by deed argument. (Appellant's Br. 1, 9–11).

### C. D.R. Horton moves the circuit court to reconsider.

D.R. Horton moved for reconsideration under Rule 59(e). (R. 126–127). In response to a proposed order submitted by the Smiths' counsel, D.R. Horton requested the trial judge consider two questions before ruling on the motion for reconsideration:

(1) Did the court find the entire purchase agreement unconscionable, or just the arbitration clause?

(2) Was the Smiths' proposed order correct insofar as it gave additional bases, beyond those stated in the original order denying the motion to compel arbitration?

(R. 214–215).

The trial judge did not respond. Rather, the circuit court executed the Smiths' proposed order as drafted by the Smiths' attorneys and without further clarification. (R. 5–6). The circuit court denied D.R. Horton's motion for reconsideration because:

(1) "the relevant arbitration provisions[5] are wholly unconscionable based on the cumulative effect of a number of oppressive and one-sided provisions and that the form of the contract seems to be that of a contract of adhesion"; and

(2) "the parties involved are not parties of equal bargaining power and there is no consideration given in exchange for the sacrifice of certain rights of [the Smiths] . . . and the provisions cannot be conscionably enforced against them."

(R. 6)(emphasis added).

Despite D.R. Horton's motion for reconsideration, the circuit court did not address its prior merger by deed analysis or its SCUAA finding. Further, the circuit court again failed to address the applicability of the FAA. The issues the circuit court did address were raised on appeal but, again, they were not fully addressed by Court of Appeals—it did not address whether there was a contract of adhesion issue, any evidence of unequal bargaining power, or a lack of consideration. (Appellant's Br. 1, 9–11).

**D. D.R. Horton appeals.**

D.R. Horton appealed each of these issues to the Court of Appeals. (Appellant's Br. 7–24). The Court of Appeals, however, only addressed the unconscionability issue, without addressing whether the Purchase Agreement was a contract of adhesion or the unequal bargaining power and lack of consideration issues.[6] It affirmed the judgment of the circuit court and its re-

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[5] See footnote 3 above.

[6] In addition to unconscionability, the Court of Appeals also addressed a "severability" issue raised in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 27–30, 644 S.E.2d 663, 673–674 (2007). Indeed, essentially half the

liance on the unconscionability analysis outlined in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). *Smith v. D.R. Horton, Inc.*, Op. No. 5118 (S.C. Ct. App. filed April 17, 2013) (Shearouse Adv. Sh. No. 17 at 60, pp. 63–64).

The Court of Appeals denied D.R. Horton's Petition for Rehearing on May 23, 2013, just days after D.R. Horton's Reply to Petition for Rehearing was filed on May 20, 2013.

## ARGUMENT

Because public policy favors arbitration, there is a strong presumption in favor of an arbitration agreement's validity. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010), *vacated on other grounds by Sonic Auto., Inc. v. Watts*, 131 S. Ct. 2872 (2011). The pro-arbitration policy is particularly strong in South Carolina. *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172–73, 644 S.E.2d 718, 720–21 (Ct. App. 2007) ("[W]e are constrained to resolve all doubts in favor of arbitration"). *See also Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999).

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Court of Appeals' analysis dealt with this issue. However, "severability" was not previously raised by the Smiths or D.R. Horton, and is therefore irrelevant. The "unconscionable" terms in *Simpson* were within the arbitration clause itself, unlike this case. Further, the defendant asked the trial court in *Simpson* to "sever" the allegedly unconscionable language from the arbitration provision. Thus, "severability" was an applicable concept in *Simpson*, unlike here. This severability analysis reflects the severity of error in the Court of Appeals' opinion. Here, the arbitration provision is separate and distinct from the allegedly "unconscionable" terms, so severability is inapplicable.

Thus, a court should order arbitration unless it can say with "positive assurance" that the arbitration provision does not cover the dispute. *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Here, the decision of the circuit court and the opinion of the Court of Appeals do not reflect this policy. Instead, the circuit court held the arbitration agreement is unenforceable for a variety of reasons, none of which can withstand proper scrutiny, and the Court of Appeals improperly affirmed this decision.

The Court should grant a writ of certiorari pursuant to Rule 242, *SCACR*, for several reasons. Initially, the Court of Appeals' opinion is contradictory to that in *Carlson v. Del Webb Communities, Inc.*, Op. No. 5143 (S.C. App. filed June 12, 2013)(Shearouse Adv. Sh. No. 26 at 142).

Further, the circuit court and the Court of Appeals erred in ignoring or misapplying the United States Supreme Court's holding in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), as adopted by this Court in *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (requiring unconscionability to be analyzed based upon an independent challenge to the arbitration provision itself, not with respect to other aspects of the contract) (the "*Prima Paint* doctrine").

Finally, the circuit court and the Court of Appeals erred in their reliance upon, and application of, *Simpson*. This error is evident in the Court of Appeals' recent contradictory decision in *Carlson*. These contradictory appli-

cations of *Simpson*, and the analysis of unconscionability in general create novel questions of law that beg to be resolved.

1. **This Court should resolve the contradictory opinions in this case and *Carlson v. Del Webb Communities, Inc.*, Op. No. 5143 (S.C. App. filed June 12, 2013)(Shearouse Adv. Sh. No. 26 at 142)**

In this case, the Court of Appeals held the arbitration provision unenforceable, "particularly[7] in light of the lack of mutuality of remedy imposed by Section 14(i)," a limitation of warranties provision. *Smith,* Op. No. 5118, p. 64. By contrast, a different panel of the Court of Appeals in *Carlson v. Del Webb Communities, Inc.*, Op. No. 5143 (S.C. App. filed June 12, 2013) (Shearouse Adv. Sh. No. 26 at 142), reversed the circuit court's refusal to enforce an arbitration provision despite numerous similarities to this case.

For instance, *Carlson* also involved the enforcement of an arbitration provision within a home purchase agreement, notwithstanding the homeowners' arguments that *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007), and related unconscionability issues rendered that arbitration clause unconscionable and thus unenforceable. Indeed, although the Court of Appeals' recent opinion in *Carlson* does not fully describe the home purchase agreement or related arbitration provision, it is clear that the home purchase agreement had "other limitations," which the Court of Appeals panel in *Carlson* determined were "not part of the arbitration clause

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[7] The Court of Appeals did not specify other reasons it found the arbitration provision unenforceable other than the limitation of warranties at ¶14(i).

and are irrelevant to a determination of whether the arbitration clause is unconscionable." *Carlson*, Op. No. 5143, pp. 148–49. In addition, both cases involve disputes over alleged construction defects between homeowners and builders and have overlapping counsel for the homeowners.

Despite these similarities, and despite mutual reliance on *Simpson* in analyzing unconscionability, these cases yield inexplicably different results, leaving in a quandary D.R. Horton and others seeking to provide for arbitration in commercial contracts. Undoubtedly, the panel in *Carlson* would have found in D.R. Horton's favor in this case and, conversely, the panel in this case would have found against enforceability of the arbitration provision in *Carlson*.

The Court should grant D.R. Horton's petition for a writ of certiorari to address these contradictory opinions and to ensure consistent results at the trial court level.

### 2. The Court of Appeals misapplied or ignored the *Prima Paint* doctrine

The circuit court concluded that "the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions" unrelated to the arbitration provision itself. (R. 4; R. 6). Similarly, the Court of Appeals stated, without explanation, that the circuit court "viewed the Warranties and Dispute Resolution Section 14 as a whole," in apparent affirmation of that viewpoint. *Smith,* Op. No. 5118, p. 64. These arguments ignore or misapply *Prima Paint*

*Corp.*, 388 U.S. 395 (1967), as adopted by the South Carolina Supreme Court in *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993).

In *Prima Paint*, the United States Supreme Court addressed whether, under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, a claim of fraud in the inducement of the entire contract—as opposed to the arbitration provision itself—is to be resolved by the court or referred to an arbitrator. The Court held that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate" and cannot, therefore, "consider claims of fraud in the inducement of the contract generally." *Prima Paint*, 388 U.S. at 404. Some courts sought to limit *Prima Paint's* holding to fraud in the inducement challenges, but others held that *Prima Paint* extends to *all* challenges to a contract.

South Carolina joined the latter jurisdictions in rejecting attempts to limit *Prima Paint. See Great W. Coal, Inc.*, 312 S.C. at 562–63, 437 S.E.2d at 24–25. "A party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract." *Id.* at 562–63, 437 S.E.2d at 24; *see also Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994) ("Arbitration clauses are separable from the contracts in which they are imbedded."); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App.

2008); *Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003).

Thus, South Carolina case law requires that courts distinguish "between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged." *New Hope Missionary*, 379 S.C. at 631, 667 S.E.2d at 6. *Compare Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (holding the circuit court was the proper forum for determining enforceability of arbitration clause challenged unconscionable) *with Cornerstone Hous.*, 356 S.C. at 338–42, 588 S.E.2d at 622–24 (holding legality and enforceability of two contracts was for arbitrator to decide where arbitration agreement in contracts was not directly challenged).

Here, the circuit court's determination of unconscionability was based on its finding of "oppressive and one-sided provisions," which it identified in the "Limitation on Liability" provision at ¶ 14(i), which is separate and distinct from the arbitration provision at ¶ 14(g). (R. 2–3; R. 151–152, ¶ 14(g), (i)). The court later generally alluded to "an entire host of attempted waivers of important legal remedies" in denying D.R. Horton's motion for reconsideration, without specifically identifying the offending language. (R. 4–5). But none of those provisions are contained in the arbitration provision. Hence, the circuit court found unconscionability within the Purchase Agreement at large rather than in the arbitration provision itself.

The Court of Appeals cites no other offending language other than at ¶ 14(h) or ¶ 14(i), which, unlike the offending language in *Simpson*, are separate and distinct from the arbitration provision at ¶ 14(g). Under the *Prima Paint* doctrine, as applied by South Carolina courts, the Smiths cannot avoid arbitration on that basis.

**3. The Court of Appeals erred in failing to determine whether the Purchase Agreement is a contract of adhesion or whether the Smiths lacked meaningful choice**

Determining whether a contract is an adhesion contract[8] is "the beginning point of the unconscionability analysis." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901–02 (Ct. App. 1998). As argued below, arbitration may not be rejected on unconscionability grounds unless the court has first considered whether the contract is one of adhesion. *See Lackey*, 330 S.C. at 395, 498 S.E.2d at 901–02. Indeed, the Smiths acknowledge "the first step in the process is to consider whether the Purchase Agreement in question is an adhesion contract, because that is the beginning point in the analysis of whether the contract is unconscionable." (Respondents' Br. 11, *citing Lackey*, 330 S.C. at 395, 498 S.E.2d at 902).

But here, the Court of Appeals did not address the adhesion question. In *Carlson*, the Court of Appeals noted there was no evidence of a contract of

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[8] A "contract of adhesion" or "adhesion contract" is defined as a "take-it-or-leave-it" contract for which the offeree's only options are "complete adherence or outright rejection." *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998).

adhesion, and found in favor of arbitration. *Carlson*, Op. No. 5143, p. 148. Here, the circuit court made no factual findings the Court of Appeals could have relied on to make such a finding. The circuit court's only comment, in the order denying D.R. Horton's motion for reconsideration, was that the agreement "seems to be" an adhesion contract. (R. 6). The Smiths presented no evidence that the agreement was nonnegotiable or offered on a "take-it-or-leave-it" basis. Thus, the Court of Appeals should have found there was no evidence of an adhesion contract.

By failing to analyze the adhesion-contract question, the Court of Appeals skipped over a significant component of the unconscionability analysis, which bears directly on the absence of meaningful choice and terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Smith,* Op. No. 5118, p. 63. *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–669; *Herron*, 387 S.C. at 532, 693 S.E.2d at 398.

While the Court of Appeals alludes to portions of the Purchase Contract that it suggests lack "mutuality of remedy" and that were "oppressive and unconscionable," it did not address the absence of meaningful choice element. *Smith,* Op. No. 5118, p. 64. By failing to conduct an analysis of the meaningful choice element, for which there is no evidence in the record,[9] the

[9] Indeed, the only evidence in the record suggests negotiated terms—such as evidence the purchase price was stricken through and written in by hand in a different amount, a space for handwritten "Special Stipulations,"

circuit court and the Court of Appeals ignored half of the *Simpson* unconscionability analysis.

4. **The Court of Appeals erred in finding the arbitration provision unconscionable**

The unconscionability findings of the circuit court and the Court of Appeals further reflect the courts' error, and the need for this Court to grant a writ of certiorari. *Carlson* resulted in a contradictory conclusion, despite similar facts, reliance upon *Simpson*, opinions issued close in time, and some of the same attorneys for the homeowners. This Court should resolve this inconsistent interpretation of *Simpson* and the more pervasive issue involving analysis of the general enforcement of arbitration provisions.

Even assuming the existence of an adhesion contract and an absence of meaningful choice under *Simpson*, the arbitration provision must also contain one-sided terms that are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–669. Although the circuit court and the Court of Appeals found that the Purchase Agreement as a whole contained unconscionable terms, there has been no finding concerning the arbitration provision itself, and the existence of other limiting provisions does not make the arbitration provision *per se* unenforceable.

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and other handwritten terms. (R. 147, ¶ 2; R. 147–148, ¶¶ 2(b) and 3; R. 154, ¶ 20; R. 155; Resp'ts' Br. 11).

The asserted unconscionability of terms within the Purchase Agreement is irrelevant unless it relates to the arbitration provision itself, specifically ¶ 14(g). *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 14 (Ct. App. 2008) (*citing Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003) ("Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision") (emphasis added)). As stated in *Simpson*, the "Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–669 (*citing Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). There is no evidence that this arbitration provision will not result in an unbiased decision by a neutral decision-maker, so the circuit court and the Court of Appeals erred in failing to analyze absence of meaningful choice and oppressive, one-sided terms under this general rubric. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–669.

In this case, the provisions the circuit court said are "oppressive and one-sided" are not found in the arbitration provision, which is captioned "Mandatory Binding Arbitration." (R. 1–6; R. 151–152, ¶ 14(g)). Instead, the provisions are in the separate "Limitation of Liability" clause. (R. 1–6; R. 152, ¶ 14(i)). The Court of Appeals did not identify any other "unconscionable"

terms. At most, the Court of Appeals has suggested, without explanation, that the circuit court "viewed the Warranties and Dispute Resolution Section 14 as a whole," without any factual finding to support this claim. *Smith,* Op. No. 5118, p. 64.

Furthermore, no legal precedent has been cited by the circuit court or the Court of Appeals to support conflating the separate and distinct provisions within Section 14. As argued previously, the only relationship between the Mandatory Binding Arbitration provision and the Limitation of Liability clause is one of arrangement of the document. (Appellant's Br. 13–14).

Arrangement alone is insufficient to construe all of the various provisions in Section 14 together, particularly when they involve wholly unrelated topics. If arrangement alone is the basis for the circuit court's finding, or the Court of Appeals' affirmation thereof, this interpretation produces an absurd result. For instance, it must be assumed that if ¶¶ 14(a)–(j) were instead either ¶¶ 14–24 or renumbered as ¶¶ 4–7, 12–13, 17, and 22–24, the result might be different, even though the intent, content, and meaning of the arbitration provision would remain identical.

For example, the RWC Warranty discussed at ¶¶ 14 (a)–(d) is unrelated to the discussion of trees to be saved during construction at ¶ 14(e), the survival of landscaping components after closing in ¶ 14(f), or instructions on requesting warranty service in ¶ 14(j). Indeed, the Smiths separately

acknowledged and initialed ¶¶ 14(a)–(c), ¶ 14(d), ¶ 14(e), ¶ 14(f), and ¶ 14(g). (R. 150–152).

Nevertheless, the circuit court and the Court of Appeals unnecessarily and improperly combined all of the separate and distinct provisions of Section 14, rather than focusing on whether the arbitration provision in ¶ 14(g) itself was unconscionable.

Had the circuit court or the Court of Appeals engaged in an analysis of whether ¶ 14(g) is itself unconscionable, the result would necessarily be different.

Unlike *Simpson*, the arbitration provision here has no limitations of liability, no limitations on available damages, or other one-sided provisions. *See Simpson*, 373 S.C. at 19–21, 27–33 644 S.E.2d at 666, 670–673. Rather, as stated previously, the arbitration provision required arbitration to be conducted near the Smith's home in Charleston, Dorchester, or Berkeley County, South Carolina, by an arbitrator or arbitration panel agreed upon by the Smiths, who could assess filing fees and any other costs of the arbitration to either party. Further, the arbitration provision allowed for the Smiths to receive an expedited hearing. (R. 151–152). There were no oppressive or one-sided provisions within ¶ 14(g).

Neither the circuit court nor Court of Appeals provided any reasoning explaining why each of these disparate provisions should be read "as a whole." *Smith,* Op. No. 5118, p. 64. In fact, the Court of Appeals in *Carlson*

suggests that reading the various provisions "as a whole" is improper. The opinion of the Court of Appeals here is in error, and in conflict with *Carlson*. Either limiting language in a home purchase agreement renders an arbitration provision unenforceable, as suggested by the Court of Appeals here, or it does not, as suggested by the Court of Appeals in *Carlson*

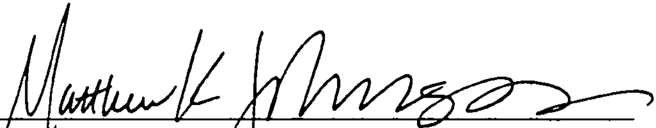
A writ of certiorari is proper, and necessary, to rectify the Court of Appeals' differing analyses of this issue to determine whether similar contracts should be read "as a whole" in analyzing unconscionability and, if so, whether limiting language such as the limitation of liability provision at ¶ 14(i) renders the arbitration provision unenforceable for unconscionability.

In this case, the arbitration provision does not waive any statutory rights or causes of action, nor does it purport to limit the arbitrator's legal authority, as did the arbitration provision in *Simpson*. In truth, as D.R. Horton has argued previously, the Purchase Agreement would afford an arbitrator the same authority and prerogative as any state or federal court to declare the limitation of liability in ¶ 14(i) unconscionable and to refuse to enforce it. Neither the circuit court nor the Court of Appeals offered any analysis as to why the limitations of liability provisions at ¶ 14(i) render the arbitration provision unconscionable. Accordingly, the circuit court and the Court of Appeals improperly relied on the limitation of liability in ¶ 14(i) in finding unconscionability.

## CONCLUSION

For the foregoing reasons, Petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER
D.R. HORTON, INC.

June 21, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

RECEIVED
JUN 21 2013
S.C. Supreme Court

Edgar Warren Dickson, Circuit Court Judge

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Opinion No. 5118 (S.C. Ct. App. filed April 17, 2013)

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Gregory W. Smith and Stephanie Smith,.................................... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc.,.......................... Defendants,

of whom D.R. Horton, Inc., is the,...................................................... Petitioner

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## PROOF OF SERVICE

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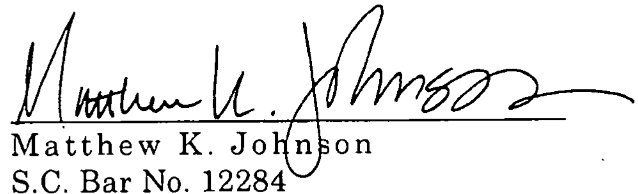
I certify that I have served the *Petition for a Writ of Certiorari* and *Appendix* of Appellant D.R. Horton, Inc., on Respondents Gregory W. Smith and Stephanie Smith by sending to their attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: Phillip W. Segui, Jr., Esq., Segui Law Firm, PC, 864 Lowcountry Blvd., Suite A, Mt. Pleasant, SC 29464; John T. Chakeris, Esq., 231 Calhoun Street, P.O. Box 397, Charleston, SC 29402; and Michael A. Timbes, Esq., Thurmond, Kirchner, Timbes & Yelverton, P.A., 15 Mid-Atlantic Wharf, Suite 101, Charleston, SC 29401

June 21, 2013



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