THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate Case 2013-001345

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.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. IN LIGHT OF THE WELL-SETTLED RULE THAT THE ENFORCEABILITY OF ARBITRATION PROVISIONS MUST BE EVALUATED ON A CASE-BY-CASE BASIS, IS FURTHER REVIEW WARRANTED MERELY BECAUSE THE COURT OF APPEALS REACHED DIFFERENT OUTCOMES IN TWO CASES THAT ARE MATERIALLY UNALIKE?

II. DID THE CIRCUIT COURT AND THE COURT OF APPEALS PROPERLY APPLY *SIMPSON* RATHER THAN *PRIMA PAINT*, CONSIDERING THAT THE ARBITRATION PROVISION WAS SPECIFICALLY CHALLENGED AND DETERMINED TO BE UNCONSCIONABLE?

STATEMENT OF THE CASE

This construction defect case concerns a newly-constructed home purchased by Gregory and Stephanie Smith (the "Smiths") from Appellant, D.R. Horton, Inc. ("DR Horton"). The Smiths commenced this action against several defendants, including DR Horton, alleging deficiencies in the construction of the home.[1] The suit alleges causes of action for negligence, gross negligence, recklessness, breach of contract, breach of implied warranties, and violations of South Carolina's Unfair Trade Practices Act. (Appx. pp. 46-63). Respondents seek actual, compensatory, statutory and punitive damages.

DR Horton moved to compel arbitration, citing a purported arbitration provision within its contract with Respondents. (Appx. pp. 91-92). Respondents opposed DR Horton's Motion, arguing the arbitration provision is unconscionable. (Appx. pp. 125-129). A hearing was held, and the Honorable Edgar Warren Dickson denied DR Horton's Motion to Compel. Among other things, Judge Dickson found the arbitration provision is contained within an adhesion contract, is unconscionable, and unenforceable. (Appx. pp. 5-8). DR Horton sought

[1] The Summons and Complaint were filed on March 5, 2010. The Smiths filed an Amended Complaint on April 26, 2010 and a Second Amended Complaint on May 12, 2011. The alleged deficiencies include improperly installed siding, windows, structural framing and concrete slab, defective flashings, violations of applicable construction codes, and failures by DR Horton to follow manufacturer's instructions in assembling or installing components of the home. (Appx. pp. 46-63)

reconsideration, and a second hearing was held. The circuit court affirmed its prior decision. (Appx. pp. 9-10). The South Carolina Court of Appeals affirmed the circuit court and denied DR Horton's petition for reconsideration. DR Horton now seeks further review.

STATEMENT OF THE FACTS

In March[2] of 2005, the Smiths entered into a Home Purchase Agreement (the "Purchase Agreement") with DR Horton for the purchase of a new home located at 4830 Harvest Moon Court, in Summerville, South Carolina. (Appx. pp. 108-117). At issue in this appeal is the enforceability of an arbitration provision contained in the Purchase Agreement. The document contains a notice referencing the arbitration provision, but the notice is found on what is labeled as "Page 4" of the Purchase Agreement.[3] (Appx. p. 108). DR Horton did not introduce the preceding pages one through three into the record.

Paragraph 14 of the Purchase Agreement, entitled "Warranties and Dispute Resolution," contains the arbitration language. (Appx. p. 111). This Paragraph spans three (3) pages in length. (Appx. pp. 111-113). Paragraph 14(a) provides for a warranty from Residential Warranty Corporation labeled as the "RWC Warranty," which purports to be the only warranty offered by DR Horton other than warranties that cannot be disclaimed by law. Paragraph 14(b) provides the RWC Warranty is only valid for so long as DR Horton complies with RWC enrollment procedures and remains in good standing with the RWC Program. Paragraph 14(c) provides the RWC Warranty will contain its **own** arbitration clause.[4] (Appx.

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[2] There are various dates reflected on the Purchase Agreement, ranging from March 11, 2005 to March 28, 2005.

[3] DR Horton incorrectly claims this notice is found on page one.

[4] At footnote 3 of its Petition, DR Horton claims there is only one arbitration clause and the court's use of "arbitration provisions" is the root of many problems. This is a red herring. Nevertheless, attention is drawn to Paragraph 14(g) and its arbitration language, as well as

p. 111). Paragraphs 14(d)-(f) discuss various "Punch List" and "Inspection Agreements" as well as exclusions to the warranty for landscaping. (Appx. p. 112).

Paragraph 14(g) addresses arbitration, and specifically references and incorporates the RWC Warranty throughout its terms. (Appx. p. 112). For claims arising under the RWC Warranty, Paragraph 14(g)'s arbitration language provides "the rules terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser **shall control**." (Appx. p. 112) (Emphasis added). Paragraph 14(g) also expressly references DR Horton's Punch List and Inspection Agreements mentioned in Paragraphs 14(d)-(f). DR Horton admits the arbitration language applies to these other matters, which are found throughout Paragraph 14. (Appx. pp. 171, lines 6-24; 172, line 24 – p. 173, line 2). Depending upon whether the claim arises under the RWC Warranty or otherwise, different arbitration rules apply.

In addition to Paragraphs 14(a), (b), (c), (d) and notably (g), the RWC Warranty is again cited in and discussed in Paragraph 14(i), which references not only the RWC Warranty but "other warranties" consistent with the express reference in the arbitration language within Paragraph 14(g). (Appx. p. 113). Although Paragraph 14(g) states the RWC Warranty and the rules, terms and conditions therein[5] shall control as to claims made thereunder, Paragraph 14 is silent about the Smith's remedy if DR Horton failed or refused to remain involved in the RWC Program, invalidating the warranty. (Appx. p. 111). Paragraph 14(c) states the RWC Warranty is in lieu of all other warranties, and DR Horton makes "no warranties, express or

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Paragraph 14(c), separately stating the RWC Warranty would have its own arbitration provision. The Smiths argued **both** of these provisions were unenforceable, which is certainly one explanation for the circuit court's use of the plural form of the word. (Appx. p. 5).

[5] DR Horton did not provide these materials to the circuit court.

implied, as to fitness for a particular purpose, merchantability, and habitability[6]...." (Appx. p. 111). Paragraph 14(i), in addition to referencing the RWC Warranty, states in part that DR Horton "SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL, OR INDIRECT DAMAGES." This language is in all capital letters. The arbitration language is in standard font. (Appx. pp. 112-113).

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT AND CITATION OF AUTHORITY

In South Carolina, there is a strong presumption in favor of the validity of arbitration clauses. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Despite this presumption, it is well-settled that "arbitration is a matter of contract law and is available only when the parties involved contractually agree to arbitrate." *Simpson*, 373

[6] If the RWC Warranty was to include a waiver of the implied warranty of habitability, as Paragraph 14(c) suggests, and be given to Respondents at closing (i.e., the last step in the deal), it is hard to imagine how it would have been specifically bargained for at that point. *See Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 477 (2006) (disclaimer or warranty of habitability must be specifically bargained for, among other strict requirements) (Appx. p. 178, line 12 – p. 179, line 7). The record does not contain such proof.

S.C. at 24, 664 S.E.2d at 668. *See also Aiken v. World Fin. Corp. of S. C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Zabinski*, at 596, 553 S.E.2d at 118). If it is determined that no agreement to arbitrate existed, arbitration must be denied. *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. *Towles*, 338 S.C. at 37, 524 S.E.2d at 844. Consistent with basic principles of contract law, a party may challenge the enforceability of an agreement to arbitrate under "such grounds as exist at law or in equity" including fraud, duress, and unconscionability. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. *Accord* S.C. Code Ann. § 15-48-10(a).

The determination of whether an arbitration agreement exists is a matter for the circuit court to decide. *The Housing Authority of the City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). The United States Supreme Court has stated that in limited circumstances, courts must "assume that parties intended the courts, not arbitrators, to decide a particular arbitration-related matter." *Green Tree Fin. Corp. v. Bazzle*, 156 L. Ed. 2d 414, 123 S. Ct. 2402, 2407 (2003). As an example, the Supreme Court stated, "[Such limited circumstances] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all ...." *Id.* Only where there is "'clear and unmistakable' evidence to the contrary" will courts find that such threshold decisions were intended to be decided by an arbitrator. *Id. See also Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (noting that where a party challenges the validity of the arbitration agreement on the

grounds that it is unconscionable, there is no "clear and unmistakable" evidence that the parties agreed to arbitrate such gateway matters). *Accord* S.C. Code Ann. 15-48-20(a).

The Smiths contend the arbitration provision within the Purchase Agreement is unconscionable and unenforceable. After carefully considering the matter, initially and upon reconsideration, both the circuit court and the Court of Appeals agreed.

I. IT IS WELL-SETTLED THE ENFORCEABILITY OF ARBITRATION PROVISIONS MUST BE EVALUATED ON A CASE-BY-CASE BASIS, AND THERE IS NO CONTRADICTION IN THE RESULTS OF THIS CASE AND THE COURT OF APPEALS' DECISION IN *CARLSON V. DELL WEBB COMMUNITIES.*

Because a comparison of the present case to *Carlson* necessarily involves an analysis of why DR Horton's arbitration provision was unconscionable and the clause in *Carlson* was not, the Smiths respond to DR Horton's First, Third and Fourth Questions Presented within this argument heading. At the outset, however, it is noted that Carlson was decided after DR Horton filed its Petition for Reconsideration to the Court of Appeals, and thus Carlson was not included in the DR Horton's arguments. (Appx. pp. 320-342). In accordance with Rule 226(d), SCACR, this argument should not be considered. Regardless, *Carlson* does not affect the outcome this case.

DR Horton incorrectly assumes "one shoe fits all" in connection with the Court of Appeals' disposition in the case at bar and its later decision in *Carlson v. Dell Webb Communities*, 743 S.E.2d 868, 2013 S.C. App. LEXIS 163 (Ct. App. 2013). This argument overlooks this Court's clear instruction that, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability.... Instead, **we emphasize the importance of a case-by-case analysis** in order to address the unique circumstances inherent in the various types of consumer transactions." *Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (emphasis added). *See also Holler*

v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.") (quoting *17A Am.Jur.2d Contracts § 279* (2004)). That the outcomes differ in two distinct cases does not equate to a contradiction in analysis.

A. The Present Case and *Carlson* are Easily Distinguished

Even if a comparison is made between Carlson and the present case, the outcome remains the same.[7] In *Carlson*, the Court of Appeals confronted the following arbitration language:

> Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
> ...
>
> After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act.

Carlson, 743 S.E.2d at 870-871. This provision is a far cry from the multifaceted arbitration language set forth in Paragraph 14(g) of the Purchase Agreement in this matter. No other agreements, terms, provisions or limitations are incorporated in the above arbitration language above, quite unlike Paragraph 14(g) and its numerous cross-references and inclusions. In

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[7] DR Horton claims, without any explanation or support, that the *Carlson* Court would have reached a different conclusion in the present case, and the panel below would have decided *Carlson* differently. Such conclusory statements are conjecture and ignore the significant differences between these cases.

accordance with Paragraph 14's own terms, the arguments of counsel to the circuit court,[8] and applicable rules of contract construction, Paragraph 14(g) incorporates the surrounding provisions relating to the very same subject matter. *Cf. Buice v. WMA Secs., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993) (noting courts should construe different provisions together that deal with the same subject matter). The rule that arbitration clauses are separable from the contracts in which they are contained is wholly unaffected by the Court of Appeals' decision because the arbitration clause **itself** specifically incorporates other related provisions within Paragraph 14. To suggest the arbitration language in Paragraph 14(g) (which mandates the terms of the RWC Warranty control) is independent of Paragraph 14(c) (stating that RWC Warranty claims **must be submitted to arbitration** and waiving all implied warranties, **including the warranty of habitability**) is absurd and ignores the plain text of the document. In other words, DR Horton's arbitration provision requires the Smiths to arbitrate claims under the RWC Warranty in accordance with a separate arbitration provision it did not provide to the Court, except that we know Paragraph 14 mandates the

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[8] DR Horton argued to the circuit court:

> As to unconscionability, Your Honor, I think I'll – the reason why I wanted the Court to read into the record **the entire paragraph** is, **actually this is in conjunction with a lot of additional warranties** that D.R. Horton does provide during the first year that not every residential builder is provided or required to provide, including the RWC warranty and that type of thing. So, what this is, I **think <u>if you read it was a whole</u> it disclaims damages for those types of things that they're warranting and saying that they'll coming in and fix during that first year.**

(Appx. pp. 185-186) (all emphasis added). (*See also* Appx. pp. 171, lines 6-24; 172, line 24 – p. 173, line 2).

Smiths to forego claims otherwise available to them at law, including a claim their home is inhabitable. The Court in *Carlson* did not face such issues.

There is more. The "Punch List" and "Inspection Agreement" provisions referenced, *inter alia*, in Paragraphs 14(d), (e), and (f) also are expressly incorporated into Paragraph 14(g). (Appx. pp. 112-113). DR Horton **admits** the arbitration provision applies to these other matters. (Appx. p. 171, lines 6-24; pp. 172, line 24 – p. 173, line 2).

The pattern continues with the Limitations of Liability in subparagraph 14(i), which cross-references the warranty provisions from elsewhere within Paragraph 14 in the same breath as it excludes any monetary damages and again attempts to disclaim various warranties otherwise available to the Smiths by law. To suggest these terms are not inseparably intertwined is to turn a blind eye toward DR Horton's own drafting of these provisions. *Buice*, 380 S.C. at 156-157, 668 S.E.2d at 434. When read as a whole, the cumulative, oppressive result is plainly evident. *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673-74. Under Paragraph 14, DR Horton would force the Smiths to waive their right to a jury trial, DR Horton would avoid warranties implied by law, including the warranty of habitability, and would escape monetary damages damages of any kind, even those for unfair and deceitful trade practices.[9] It is obvious Paragraph 14 is designed to strip away the remedies the Smiths ordinarily would have in connection with the single largest investment most consumers will ever make. *Compare Simpson,* 373 S.C. at 27, 644 S.E.2d at 670 (noting the stricken arbitration provision

[9] The Smiths allege DR Horton engaged in unfair and deceptive trade practices in violation of the South Carolina Unfair Trade Practices Act, which provides for statutory treble damages. *See* S.C. Code Ann. § 39-5-10 *et seq*. If it is shown DR Hroton is guilty of such violations, Paragraph 14 would deny the Smiths the award to which they are statutorily entitled because DR Horton escapes all monetary damages. As a matter of public policy, Courts must not enforce an adhesion contract that has the effect of denying the weaker party remedies to which it is statutorily entitled. *Simpson*, at 30, 644 S.E.2d at 671.

resulted in a loss of a right to a jury trial and required plaintiff to forego remedies provided by statute). These facts are evident from the four corners of Paragraph 14, which is evidence to support the result below. *Carlson* did not face these questions.

There is another important distinction. The arbitration provision in *Carlson* pertains to both pre-closing disputes and disputes arising "After closing." Much to the contrary, DR Horton's Purchase Agreement requires disparate remedies prior to closing and after. For example, prior to the closing, Paragraph 14(k)[10] provides if there is an unresolved dispute between the parties DR Horton can, in its sole discretion, simply terminate the Purchase Agreement. (Appx. p. 113). The Smiths have no such right under the Purchase Agreement prior to closing. Further, if DR Horton chooses to terminate, the Smiths are left with "no cause of action...because of such termination" against DR Horton, and there is no indication the Smiths could arbitrate any disagreement they had over DR Horton's termination pre-closing. After the closing (i.e., once DR Horton has been paid in full), the Purchase Agreement would require the Smiths to arbitrate its claims against DR Horton under the terms of the RWC Warranty and its controlling terms control per Paragraph 14(g), with DR Horton having no exposure to monetary damages whatsoever. DR Horton would enforce this "intolerable" result, regardless of the severity of the defects in the home or its habitability, or any unfair and deceitful trade practices DR Horton committed. This flies in the face of *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (1989), wherein this Court "made it clear that it would be **intolerable** to allow builders to place defective and inferior construction into the stream of commerce.") (Emphasis added). Again, *Carlson* did not face such facts.

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[10] In keeping with the pattern of cross-references throughout Paragraph 14, the rights set forth in Paragraph 14(k) reference the provisions of 14(a)—(d), just as these provisions are linked into Paragraph 14(g) by references to the RWC Warranty as well.

There also are specific findings made by the circuit court in the case before the Court, which were not made in the *Carlson* case. These findings and the evidence that supports them are discussed separately below.

B. The Circuit Court Found the Arbitration Clause in Question is Inconspicuous

Unlike the facts in *Carlson*, the circuit court below specifically found the arbitration language in the Purchase Agreement is inconspicuous. (Appx. p. 8). The conspicuousness of an arbitration provision is a factor in the analysis of a lack of meaningful choice. *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670. One need only refer to the Purchase Agreement for evidence to support the circuit court's determination.

The first word of the title of the Paragraph 14, in which the arbitration language is contained, is "Warranties," and the first several provisions that follow all are related to warranties and purported disclaimers. There is nothing to set the arbitration language apart from the initial warranty language, especially considering the numerous cross-references to the RWC Warranty in the arbitration language. Paragraph 14 is three (3) pages in length, easily the single longest section of related terms in the Purchase Agreement. The arbitration language is the same size and style font used in all of the surrounding provisions of Paragraph 14, except the Limitation of Liability language, which is set out in ALL CAPITAL LETTERS to catch the reader's attention. It is the only type that is designed to draw attention. DR Horton demonstrated the ability and knowhow to use such conspicuous drafting techniques, yet inexplicably chose not to apply them in connection with the arbitration language within the same Paragraph. That Paragraph 14(g) contains arbitration language in standard font amongst its many and lengthy provisions is telling.

Simpson relied upon similar facts, such as certain phrases within other provisions of the additional terms and conditions of the contract being printed in all capital letters, but the arbitration clause was written in the standard small print and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. *Simpson*, 373 S.C. at 27-27, 644 S.E.2d at 670. "Although this Court acknowledges that parties are always free to contract away their rights, **we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law.**" *Id.* (Emphasis added). The present case is on all fours with *Simpson* and does not conflict with *Carlson.*

C. The Circuit Court Found the Purchase Agreement is a Contact of Adhesion and the Smiths had no Meaningful Choice

Determining the Purchase Agreement is a contract of adhesion simply affects the presumption that applies. "[T]he presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears[11] to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (quoting *Williams v. Aetna Fin. Co.,* 83 Ohio St. 3d 464, 1998 Ohio 294, 700 N.E.2d 859, 866 (Ohio 1998)). Thus, an adhesion contract will be analyzed with "considerable skepticism." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. In this way, the fact that DR Horton's contract is one of adhesion simply affects the lens through

[11] On page 14 of its Petition, DR Horton takes issue with the circuit court's determination that the Purchase Agreement "seems to be" a contract of adhesion. This Court in *Simpson* used words such as "strong indications" and "appears to be adhesive". DR Horton's point seems to make a distinction without a difference.

which this Court views the arbitration clause in question in the face of the Smith's challenge on the issue of unconscionability.

The circuit court determined the Purchase Agreement is a contract of adhesion. Whether the Court of Appeals needed to expressly address this finding in its opinion is not the correct question. The circuit court found the Purchase Agreement to be contract of adhesion, noting, "The [Purchase Agreement] between the parties in the instant case has oppressive and one-sided terms ...." (Appx. pp. 7, 10). The Court of Appeals affirmed the circuit court's decision. The proper question is whether there is any evidence reasonably supporting the circuit court's finding. *Simpson*, 373 S.C. 14, 644 S.E.2d 663 (noting the "any evidence" standard or review). The record contains ample evidence, *Simpson* provides the applicable guidance.

The Court in *Simpson* first noted the purchase of a vehicle intended for use as primary transportation is "critically important in modern day society." *Id.* at 27, 644 S.E.2d at 670. It is easy to conclude, as the circuit court did, that a new home is at least as important to a family as the purchase of a car, considering this Court has extolled the importance of properly constructed homes in South Carolina. *See Kennedy*, 299 S.C. 335, 344, 384 S.E.2d 730 (finding it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce).

An adhesion contract is offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not *per se* unconscionable, but in proper contexts may be viewed with "considerable skepticism." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Here, the record

reveals that the Purchase Agreement is an adhesion contract, which the Smiths argued from the very start. (Appx p. 179, lines 10-13).

From the four-corners of the Purchase Agreement it is evident the document is a pre-printed form containing boilerplate language crafted by an admittedly large, multi-state business entity. (Appx. pp. 108-117; pp. 119-120; p. 173, lines 7-10). Every page of the document states "General Terms and Conditions" in the header at the top. Paragraph 2 of the Purchase Agreement applies to a variety of purchase transactions and methods of financing, indicating this form document can be used with **any** potential buyer, who merely checks the boxes that apply to him or her. Paragraphs 3 through 13 of the document are pre-printed, with the sole exception of designating the amount of the earnest money deposit. Paragraph 16 states in part, "**If** this Agreement is for the construction of a new home...." (Emphasis added). In other words, this pre-printed document can apply to any number of circumstances—it is not particular to the Smith or their home. Moreover, the overall terms demonstrate the Smiths must conform to the way DR Horton does business (*See, e.g.*, Purchase Agreement, Paragraph 8 (demanding strict adherence to DR Horton's rules if the Smiths desire to have a home inspector check on DR Horton's work); Paragraph 19 (giving the Smiths only 14 days to make color selections and offering to meet only on certain days and times on a **first-come-first-served basis among all other customers**)). (Appx. pp. 110, 114-115).

In the end, DR Horton admits there is no evidence the Smiths were offered options or alternatives for dispute resolution that differed from the predetermined terms imposed by the Purchase Agreement.[12] (Appx. p. 198, lines 21-25). Finally, it must be remembered that

[12] DR Horton claims there is no evidence of a lack of meaningful choice. The record belies this statement. Even as to finish selections, the Smiths had little power. Under Paragraph 19, the Smiths had just 14 days from the date the Purchase Agreement was signed to choose all

Appellant is a self-described large corporation with operations in twenty-seven states. (Appx. pp. 119-120; p. 173, lines 5-10). It cannot reasonably be disputed that ordinary consumers like the Smiths are not on equal footing with a corporation the size of DR Horton in terms of bargaining power. Thus, the circuit court properly recognized the disparity in bargaining power that permeated the transaction. *See Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) ("[T]he transaction between a **builder** and a **buyer** for the sale of a home largely involves inherently unequal bargaining power.").

DR Horton cannot reasonably claim the Purchase Agreement is anything other than a pre-printed form offered to its buyers. If there is any doubt about whether the Purchase Agreement is a contract of adhesion with no meaningful choices being offered to the Smiths, DR Horton tellingly pointed out to the circuit court, **"If [Respondents] didn't like this deal they could have gone elsewhere."**[13] (Appx. p. 187, lines 2-3) (emphasis added). DR Horton's admission represents the epitome of a "take-it-or-leave-it" contract offering. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). In the very least it is

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color sections, or DR Horton could cancel the transaction and retain their earnest money. (Appx. pp. 114-115). Once selections were made, the Smiths had no power to change their mind on simple matters as paint colors for their own home. In stark contrast, DR Horton had the right to make substitutions in the home in its sole opinion should it desire to do so. A limited choice as to paint and tile colors does not constitute meaningful negotiation of the parties' legal relationship.

[13] In the context of counsel's statement, DR Horton pointed out there were "plenty of home builders out there" and the Smiths could have dealt with someone else if they wanted to. (Appx. p. 186, line 21 – p. 187, line 1). Again, this misses the mark and is not indicative of "meaningful choice." What matters is the lack of meaningful choice as to the terms of the Purchase Contract **in the context of the Smiths' dealings with DR Horton**. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (**"The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process of the contract in question.**"). (Emphasis added). That another builder might have dealt with Smiths more fairly is irrelevant to the determination.

undeniable evidentiary support in the record for the circuit's factual finding and the Court of Appeals' decision to affirm. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 663.

Citing to *Simpson* and considering the numerous points discussed above and herein, the circuit court and the Court of Appeals determined the arbitration provision is unconscionable and cannot be enforced. "[U]nconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *See Simpson*, 373 S.C. 14, 24-25, 644 S.E.2d 663. As explained above, the sheer magnitude of the unconcsionability that pervades DR Horton's arbitration clause renders it unconscionable and unseverable, and the Court of Appeals and circuit court were correct to analyze this case under *Simpson*, reaching the same result.

II. BECAUSE THE ISSUE BEFORE THE COURT IS THE UNCONCSIONABILITY OF THE ARBITRATION CLAUSE, NOT THE RESCISSION OF THE WHOLE CONTRACT, *PRIMA PAINT*[14] DOES NOT APPLY, AND *SIMPSON* CONTROLS THE ANALYSIS.

DR Horton continues to mistakenly argue the Smiths challenged the entire contract rather than the arbitration provision, citing to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). (Appx. p. 200, lines 8-16; p. 215, lines 19-23; p. 216, lines 15-22; pp.143-144). This argument completely misstates the Smiths' position.

Prima Paint involved a federal court action seeking to **rescind the entire agreement** between the parties on the basis the agreement itself was procured by fraud. *Prima Paint*

[14] DR Horton did not advance this argument prior to its Motion for Reconsideration under Rule 59(e). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994). *Accord McMillan v. S.C. Dep't of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (finding issues not preserved because they cannot be raised for the first time in a motion for reconsideration). The Smiths timely objected to the inclusion of new materials for the first time in connection with the Motion for Reconsideration. (R. p. 190).

Corp. 388 U.S. at 398. A similar issue existed in *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 562-563 (1993). These authorities have no application here whatsoever, because the issue in *Prima Paint* was not whether the arbitration provision was unconsionable. In fact, the word "unconscionable" is nowhere to be found within the entire *Prima Paint* decision, and the same is true of *Great W. Coal*. To suggest the "whole contract" has been challenged is to insert words and meaning that do not exist into the orders by the circuit court and the Court of Appeals, and this was never the Smith's position. Likewise, there has been no conflation of allegedly "separate and distinct" provisions within Paragraph 14 of the Purchase Agreement as DR Horton suggests. As discussed throughout, to suggest these provisions involve "wholly unrelated issues" is ludicrous and contrary to the plain, unambiguous text of the Purchase Agreement, Paragraph 14, and Paragraph 14(g).

The Smiths have consistently argued, "Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable...." (Appx. p. 125). They advanced this argument throughout the proceedings below. (Appx. pp. 176, line 6; 180, line 23; 183, lines 12-25; 216 lines 15-24). The circuit court understood and twice found the Smiths had challenged the arbitration provision. (Appx. pp. 5-10). The Smiths never attacked the enforceability of the whole contract. In fact, they asserted a claim for breach of contract against DR Horton, which would not lie if they sought to rescind the entire agreement. (Appx. pp. 57-58). DR Horton's attempts to turn the Smiths' challenge into something it is not is akin to driving a square peg into round hole. *Simpson*, not *Prima Paint*, provides the operable framework for analysis here, which the circuit court and the Court of Appeals correctly recognized. As the Smiths pointed out to the circuit court when DR Horton first made this argument, "[DR Horton is] trying to

make a distinction from the *Simpson* case and indicated that the one sided provisions and the arbitration provisions are in two different spheres in this case. **It's all tied to Paragraph 14, Your Honor, where they attempt to deny the remedies and also try to force them into arbitration, all Paragraph 14.**" (Appx. p. 216) (Emphasis added).

The only meaningful difference between the lengthy, singularly numbered paragraph in *Simpson* and Paragraph 14 of the Purchase Agreement is that DR Horton separated the integrated portions of Paragraph 14 into subparts with the letters (a) through (j). DR Horton cannot avoid the collective unconscionability of its "Dispute Resolution" terms so easily, and there is nothing in this Court's analysis or reasoning in *Simpson* to suggest this Court would have allowed the unconscionable provision in that case to stand if only the dealership had labeled the content into separately numbered but expressly integrated subparts (a) through (j) as DR Horton attempted. Such a holding would lead to an absurd result, elevating form over unconscionable substance. Before the circuit court and the Corut of Appeals, the Smiths consistently argued the arbitration clause was unconscionable and that it should <u>not</u> be severed. (Appx. pp. 177-179).

When these unconscionable provisions are read in light of the remaining, intertwined provisions of the Dispute Resolution Paragraph 14, **including the arbitration language**, the "considerable skepticism" that should blanket this adhesion contract and the arbitration language in question takes effect and demands that the arbitration provision must fail. Just as in *Simpson*, where the entirety of the relevant provisions are laced with unconscionable terms, it is not appropriate for the Court to attempt to re-write the agreement by severing away multiple unenforceable terms. *Simpson*, 373 S.C. at 33-35, 644 S.E.2d at 673-74.

CONCLUSION

For the foregoing reasons, the Smiths respectfully request that this Court deny DR Horton's Petition for Writ of Certiorari. This Return addresses the arguments advanced by DR Horton in its Petition, without waiver of the DR Horton's efforts to distinguish this case from the sound logic in *Simpson* is simply misplaced, as is the suggestion that *Carlson* and this action are anything alike. DR Horton crafted an arbitration clause that, within its very text, expressly incorporates unconscionable provisions that pervade the Paragraph 14 of the adhesion contract presented to the Smiths. Their home is defective, and DR Horton seeks to deprive them of their lawful remedies. This cannot be condoned. The circuit court found as much, and the Court of Appeals agreed. In similar fashion, this Court should deny DR Horton's petition.

Respectfully submitted,

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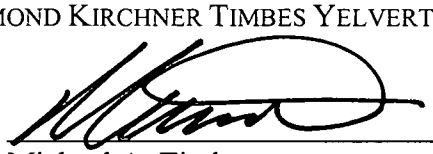
By: 

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AUGUST 21, 2013
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-001345

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.

AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for the Respondents, do hereby certify that I have on this date, served a true and correct copy of the Respondent's Return to Petition for a Writ of Certiorari via UPS Overnight Delivery and facsimile to the following counselors of record:

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Charleston, South Carolina