

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. Supreme Court

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.

**REPLY TO RETURN TO PETITION FOR
A WRIT OF CERTIORARI**

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Petitioner D.R. Horton, Inc. has provided a comprehensive Statement of the Case in its Petition for Certiorari. Here, D.R. Horton will reply only to the following points in Respondents' Statement of the Case.¹

Respondents incorrectly state that the circuit court judge "found the arbitration provision is contained within an adhesion contract." (Return, p. 1). This overstates the circuit court's treatment of this important determination. The Order denying D.R. Horton's Motion to Compel Arbitration made no reference to adhesion contracts, much less make a finding that the Purchase Agreement was one of adhesion, despite this determination being "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). (Appx. 000005-008). The Order denying D.R. Horton's Motion for Reconsideration made no such determination; rather, it merely suggested "that the form of the contract seems to be that of a contract of adhesion." (Appx. 000010)(emphasis added). The Court of Appeals also made no such finding. (Appx. 000313-319).

Respondents also suggest the circuit court "affirmed its prior decision," upon D.R. Horton's Motion for Reconsideration. (Return, pp. 1-2; Appx. 000009-010). Although the result was the same, *i.e.*, arbitration was denied,

¹ As a minor point, Respondents note they commenced the underlying lawsuit "against several defendants, including D.R. Horton." (Return, p. 1). D.R. Horton would show that the inclusion of other defendants is no impediment to arbitration. This issue was addressed by D.R. Horton before the circuit court (Appx. 000105; 000122-124), even though it was not raised as an impediment by Respondents or the circuit court.

the circuit court's ruling on rehearing was different. The order denying D.R. Horton's Motion to Compel cited three grounds: (1) unconscionability due to allegedly oppressive and one-sided provisions; (2) the doctrine of merger by deed; and (3) failure of the arbitration agreement to meet [sic] the South Carolina Uniform Arbitration Act ("SCUAA"). (Appx. 000008). The order denying D.R. Horton's Motion for Reconsideration listed only two grounds: (1) unconscionability due to oppressive and allegedly oppressive and one-sided provisions "and that the form of the contract seems to be that of a contract of adhesion;" and (2) unequal bargaining power and insufficient consideration in exchange for Respondents' "sacrifice of certain rights." (Appx. 000010).

The circuit court failed to clarify whether merger by deed or the failure to meet the requirements of the SCUAA was implied, or withdrawn from, the decision. (Appx. 000218). As such, the circuit court's decision on D.R. Horton's Motion for Reconsideration not only did not directly affirm its prior position, it failed to provide any more guidance as to the decision-making process. As argued in the Petition for a Writ of Certiorari, the Court of Appeals provided no better analysis.

REPLY TO RESPONDENTS' STATEMENT OF THE FACTS

Several issues raised in Respondents' Statement of the Facts require a response. First, Respondents argue that the arbitration notice in the Purchase Agreement "is found on what is labeled as 'Page 4.'" (Return, p. 2). Respondents first raised this issue on appeal. (Appx. 000280). The circuit court

never made any such finding, and there is no testimony in the record in this regard. (*See also*, Appx. 000308). Respondents' argument is untimely and should be disregarded.

Respondents also suggest that ¶14(g) of the Purchase Agreement, the arbitration provision, "specifically references and incorporates the RWC Warranty throughout its terms." (Return, p. 3). However, this is factually inaccurate. Rather, ¶14(g) provides a list of disputes to be arbitrated "in accordance with this paragraph" but also states that "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 [Respondents] shall control." (Appx. 000154–156). Paragraph 14(g) also contains information concerning arbitration of claims "other than" those arising under the RWC Warranty. *Id.* Rather than incorporating the RWC Warranty arbitration process, the Purchase Agreement simply makes clear that certain claims arising under the Purchase Agreement would be arbitrable under ¶14(g), whereas others would be arbitrable under the RWC Warranty.

REPLY ARGUMENT

Respondents begin their argument (Return, p. 4) by referring to *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) while failing to note critical language in the opinion; namely that a motion to compel arbitration "should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Towles*,

338 S.C. 42-42, 524 S.E.2d 846 (emphasis added). The arbitration provision here *was* susceptible of an interpretation that could cover the asserted dispute.

Respondents suggest two “Questions Presented.” (Return, p. 1). Their first Question Presented addresses the significance of *Carlson v. Del Webb Communities, Inc.*, Op. No. 5143 (S.C. App. filed June 12, 2013) (Shearouse Adv. Sh. No. 26 at 142). They submit that *Carlson* is insignificant because arbitration decisions must be made on a “case-by-case basis” and because *Carlson* is easily distinguished. *Id.* Although cases must be decided on a “case-by-case basis,” uniformity in decision making is important, and *Carlson* reflects a lack of uniformity when compared to this case. This Court should grant D.R. Horton’s Petition for Writ of Certiorari on this basis. Further, Respondents are simply incorrect in suggesting that *Carlson* is easily distinguished.

Respondents also claim the circuit court found the arbitration clause in question was conspicuous (Return, p. 11), and that the circuit court found the Purchase Agreement was a contract of adhesion (Return, p. 12). Neither of these assertions is accurate.

Finally, Respondents’ second Question Presented suggests *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (the “*Prima Paint* doctrine”) does not apply. (Return, p. 16). Respondents continue to misconstrue or misapprehend D.R. Horton’s argument and to misconstrue the record

below at the same time. The relevance of the *Prima Paint* argument, and the Court of Appeals' misapplication or failure to apply *Prima Paint* is addressed below.

I. *Carlson v. Del Webb* Is Significant and Indistinguishable

Respondents argue *Carlson* is inapplicable since it was decided after D.R. Horton's Petition for Reconsideration to the Court of Appeals. (Return, p. 6). Current Rule 242(d)(2)² limits a petition to "questions raised in the Court of Appeals and in the petition for rehearing. . . ." D.R. Horton has not raised additional questions; *Carlson* merely presents new arguments in favor of D.R. Horton on the questions raised from the inception of this appeal.

Respondents also argue that D.R. Horton takes a "one shoe fits all" approach to *Carlson*, whereas a "case-by-case" analysis is necessary to analyzing unconscionability. (Return, p. 6, citing *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 36, 644 S.E.2d 663, 674 (2007)). While a "case-by-case" analysis is appropriate, the analysis should be consistent between comparable cases. As in this case, *Carlson* involved construction-defect claims, an arbitration provision in the home purchase agreement, and unconscionability claims in the context of *Simpson*. *Carlson*, Op. No. 5143, pp. 143–44, 147–49. *Carlson* also involved what appear to be other similarities—a claim that "other limitations" (like the limitations of liability here) rendered the arbitration provision unconscionable. *Carlson*, Op. No. 5143, pp. 148–49.

² Respondents cite to Rule 226(d), SCACR, as evidence this argument should not be considered. However, Rule 226(d), SCACR, no longer exists.

This case and *Carlson* are factually and procedurally similar, such that even a “case-by-case analysis” should have resulted in consistent outcomes—if consistent analyses were used. Yet these cases yield inexplicably-different results. South Carolinians deserve greater certainty in judicial interpretation and enforcement of arbitration provisions in commercial contracts. Granting certiorari in this case is now the only possibility for affording that certainty.

A. This Case is Indistinguishable from *Carlson*

Respondents argue this case and *Carlson* are not comparable, in part because of different arbitration language. Citing excerpts from the arbitration language in *Carlson*, they insist it is not “multifaceted” like the agreement to arbitration here. (Return, p. 7). Respondents fail to make a fair comparison. The *Carlson* arbitration language is abbreviated, and its full complexity is unknown. *Id.*

Respondents seem to argue the arbitration provision in this instance is “multifaceted” because the arbitration provision found at ¶ 14(g) and the enforceability of ¶ 14(g) cannot be considered in isolation,³ as discussed further below. (*See, supra*, pp. 13–14). Rather, Respondents suggest ¶ 14(g) “incorporates the surrounding provisions” that relate to “the very same subject mat-

³ Respondents cite *Buice v. WMA Sec., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008), and *Skull Creek Ltd. P’ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993), for the proposition ¶14(g) cannot be considered in isolation. However, these cases are irrelevant as they deal strictly with the determination of the parties’ intent in the face of ambiguity. Since there is no evidence for assertion of ambiguity here, these cases are inapplicable.

ter.” (Return, p. 7–8). Initially, there is no such incorporation, and the subject matter, on its face, is distinct.

Respondents also make misleading reference to testimony before the circuit court to suggest that D.R. Horton’s own counsel suggested that ¶ 14(g) “incorporates the surrounding provisions.” (Return, fn. 8). Respondents’ misleading citation to D.R. Horton’s argument overlooks its context and purpose—to ensure completeness of the record and to ensure the circuit court was aware that D.R. Horton provided additional warranties to Respondents, for which liability is limited elsewhere in ¶ 14. (Appx. 000185–186).

Respondents insist that D.R. Horton’s provision for arbitration of certain claims under the RWC Warranty, and pursuant to ¶ 14(g) for others, “mandates [Respondents] to forego claims otherwise available to them at law, including a claim their home was inhabitable.” (Return, pp. 8–9). This is not accurate and irrelevant to distinguishing *Carlson*.

Respondents also suggest an issue with the fact that the applicable RWC Warranty provides express warranties in the place of implied warranties, such as the warranty of habitability. But they cite no authority for this position, and it is not supported by a reading of the Purchase Agreement.

In any event, even if liability limitations were an issue here, it does not make the case easily distinguishable from *Carlson*, which contained “other limitations” that the Court of Appeals determined were “not part of the arbitration clause and are irrelevant to a determination of whether the arbitra-

tion clause is unconscionable. *Carlson*, Op. 5143, pp. 148–49. A similar argument applies here with respect to the liability limitations in the Purchase Agreement outside ¶14(g).

B. The Circuit Court and the Court of Appeals did not find the Arbitration Provision at Issue to be Inconspicuous

Contrary to Respondents’ assertion, the circuit court did not find the arbitration provision in the Purchase Agreement to be “inconspicuous.” (Return, p. 11). The term “inconspicuous” was not used in the circuit court’s Order Denying Motion to Compel Arbitration or its Order Denying Motion for Reconsideration. (Appx. 000005–008; 000009–010). At most, the Order Denying Motion to Compel Arbitration vaguely suggests that “the arbitration provisions fail to meet the South Carolina Uniform Arbitration Act,” without identifying any particular deficiencies. (Appx. 000008). The Order Denying Motion for Reconsideration did not address this issue at all, despite D.R. Horton’s explicit request for clarification of this difference in the two orders. (Appx. 000218–219).

The concept of “conspicuous” notice of arbitration provisions is relevant under the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, et seq. See S.C. Code Ann. § 15-48-10(a). The arbitration notice in this instance was typed prominently, in capitalized and underlined letters, “on the

first page”⁴ of the Purchase Agreement, consistent with S.C. Code Ann. § 15-48-10(a). In addition, Respondents each initialed ¶ 14(g), among others. (Appx. 000155–156). There was simply no basis on which the circuit court could have held the parties’ agreement to arbitrate was inconspicuous.⁵

C. The Circuit Court and the Court of Appeals did not find the Purchase Agreement to be a Contract of Adhesion

Also contrary to Respondents’ assertion, the circuit court did not find the Purchase Agreement to be an adhesion contract. (Return, p. 12–16). Other than quoting *Simpson* (Appx. 000006), the adhesion contract concept is not addressed in the Order Denying Motion to Compel Arbitration. (Appx. 000005–008). Further, the term is not raised in the Order Denying Motion for Reconsideration except to conclude, without citing any relevant factual findings, “the form of the contract seems to be that of a contract of adhesion.” (Appx. 000009–010) (emphasis added).

Indeed, there is no evidence on which the circuit court could have found the Purchase Agreement was an adhesion contract—“the beginning point in the [unconscionability] analysis.” *Lackey v. Green Tree Fin. Corp.*,

⁴ Respondents’ argument that the arbitration notice is not on the “first page” also fails. (See, Return, p. 2, fn. 3). Respondents never denied that the arbitration notice appeared on the first page before the circuit court. Respondents’ argument is, therefore, untimely. Further, there is no testimony in the record on this issue to support such a finding.

⁵ Even the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which has no conspicuousness argument, would apply even if the arbitration notice here was “inconspicuous” pursuant to S.C. Code Ann. § 15-48-10(a). See, *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (S.C. 2012).

330 S.C. 388, 395, 498 S.E.2d 898, 901–02 (Ct. App. 1998). Similarly, there was no evidentiary basis for the Court of Appeals to affirm.

An adhesion contract is a standard-form contract offered on a “take-it-or-leave-it” basis with nonnegotiable terms. *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669. In short, the offeree has two options: “complete adherence or outright rejection.” *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901. There is no support for such a finding. Respondents ignore evidence of negotiated terms

For instance, the purchase price was stricken through and handwritten in a different amount. (Appx. 000151, ¶2). The principal amount of the home loan, the term for the loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were handwritten into the document. (Appx. 000151–152, ¶2(b) & ¶3; 000158, ¶20). Indeed, the Purchase Agreement provided space for handwritten “Special Stipulations.” (Appx. 000159). Had Respondents been given the Purchase Agreement on a “take-it-or-leave-it” basis, they could have, and should have, provided testimony of this fact by affidavit or otherwise.

D. The Court of Appeals failed to Address Lack of Meaningful Choice

Unconscionability requires 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. *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 alluded to portions of the Purchase Agreement that it sug-

gests lack “mutuality of remedy” and that were “oppressive and unconscionable,” it did not address absence of meaningful choice. *Smith*, Op. No. 5118, pp. 63–64. By failing to do so, the circuit court and the Court of Appeals ignored half the *Simpson* unconscionability analysis.

II. The *Prima Paint* Doctrine Applies But Was Misapplied Or Ignored By The Court Of Appeals

Respondents argue that D.R. Horton’s reliance on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), is mistaken and, in a footnote, suggest it was untimely.⁶ (Return, p. 16, fn. 14). Respondents, however, significantly mischaracterize D.R. Horton’s *Prima Paint* argument.

According to Respondents, D.R. Horton argued that Respondents “challenged the entire [Purchase Agreement] rather than the arbitration provision,” whereas Respondents claim they have “consistently argued” the arbitration clauses in the [Purchase Agreement] “are unconscionable and unenforceable.” (Return, pp. 16–17; Appx. 000125). Respondents’ use of the plural

⁶ Respondents’ timeliness argument, while factually accurate, misses the point. The issue did not arise until the circuit court denied D.R. Horton’s Motion to Compel Arbitration, identifying several allegedly “unenforceable and unconscionable” provisions other than the arbitration provision in ¶14(g) of the Purchase Agreement. (Appx. 000005–007). Also, the cases cited by Respondents, *Anderson Mem. Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994); *McMillan v. S.C. Dept. of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005); and *Hickman v. Hickman*, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (Ct. App. 1990), are inapplicable here. Unlike this situation, those cases each involved a party seeking relief or additional affirmative defenses on grounds that existed from the onset. Once the grounds for a *Prima Paint* argument were raised by the circuit court’s denial of the Motion to Compel Arbitration, the issue was immediately addressed in D.R. Horton’s Motion for Reconsideration. (Appx. 000130–149; 000157–164).

term “arbitration clauses,” rather than referring strictly to the applicable arbitration provision found in ¶14(g), is telling. Respondents’ criticisms, indeed their entire argument for unconscionability, lie in provisions outside of ¶14(g) and, therefore, implicate *Prima Paint*. Regardless, neither the circuit court nor the Court of Appeals addressed D.R. Horton’s substantive *Prima Paint* argument—that ¶14(g) alone constitutes the parties’ agreement to arbitrate, and it should be analyzed in isolation.⁷

Respondents’ belief that D.R. Horton’s *Prima Paint* argument is flawed ignores the key distinctions between: (1) the Purchase Agreement in this case and the contract in *Simpson*; and (2) the completely unrelated character of the analyses and resulting holdings in *Simpson* versus *Prima Paint*. While instructive as to the evaluation of whether particular contract terms are substantively unconscionable, *Simpson* is so distinguishable from this case as to be essentially irrelevant.

In *Simpson*, there was no dispute as to which portions of the contract constituted the arbitration clause. The provisions being challenged as unconscionable were unquestionably part and parcel of the agreement to arbitrate. *Simpson*, 373 S.C. at 19–21, 644 S.E.2d at 666. The defendant did not assert that they were not, but asked that they be severed. 373 S.C. at 33–35, 644

⁷The Court of Appeals’ treatment of *Prima Paint* is limited to a citation in support of the proposition that an arbitration clause is “separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.” Op. No. 5118 at 64–65, citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (internal citations omitted).

S.E.2d at 673-674. This case is completely different, but in rendering its Opinion, the Court of Appeals ignored this distinction.

Respondents argue, in an apparent effort to confront the *Prima Paint* dilemma, that the agreement to arbitrate, itself, is in fact being challenged. (Return, p. 17). However, this is not the case. The agreement to arbitrate is at ¶ 14(g) and Respondents have not criticized this provision. Rather, Respondents conflate the arbitration agreement with provisions appearing elsewhere as subparagraphs of ¶ 14. Respondents argue the entirety of ¶¶ 14(a) through (j) fail due to a “collective unconscionability” for which Respondents offer no legal support. (Return, p. 18). Given these separate provisions concern distinct and substantively unrelated subjects, e.g., trees and landscaping requirements, third party warranties, etc. (Appx. 000150–152), this argument fails, particularly given the *Prima Paint* doctrine. This distinction is fundamental to this case, and neither the circuit court nor the Court of Appeals properly addressed it.

D.R. Horton maintains that ¶ 14(g), standing alone, constitutes the entirety of the agreement to arbitrate and that it should be evaluated as such. Respondents, conversely, insist that the agreement to arbitrate should be conflated with ¶¶ 14(a)–(f) and (h)–(j), and they seek to impute the allegedly unconscionable nature of certain provisions within those paragraphs to the ¶14(g) agreement to arbitrate. D.R. Horton maintains that ¶¶ 14(a) through (j) are distinct and **separable** from one another, and that the *Prima Paint*

doctrine requires that the agreement to arbitrate at ¶ 14(g) be evaluated on its own merit.

Simpson does not address this question at all, and it is wholly inapposite to the present case on this issue. Accordingly, the ultimate decision in this case cannot appropriately be grounded purely in *Simpson*, as Respondents would suggest, and as the Court of Appeals appears to do.⁸ Instead, the *Prima Paint* analysis is required and when the agreement to arbitrate, ¶14(g), is properly considered standing alone, it is wholly enforceable.

Further, the arbitration provision would leave it to the arbitrator's discretion to hear and decide any challenges that Respondents might raise to the enforceability of any other provision of the Purchase Agreement, whether designated as a subparagraph of ¶ 14 or otherwise.

Respondents suggest *Prima Paint* is inapplicable since the word "unconscionable" is not found in that opinion, or in *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24–25 (1993). (Return, p. 17). Again, this is misleading; *Great Western Coal* states 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." 312 S.C. 559, 562–563, 437 S.E.2d 22, 24. That is the issue here. Contrary to Respondents' suggestion, *Prima Paint* applies

⁸ Indeed, the Court of Appeals does not even address D.R. Horton's *Prima Paint* argument, contrary to Respondents' claim. (Return, p. 17; see, Op. No. 5118 at 60–66).

to the analysis of challenges to the enforceability of arbitration provisions grounded in assertions of unconscionability.

CONCLUSION

For the foregoing reasons, and those previously stated in its Petition for a Writ of Certiorari, Petitioner D.R. Horton, Inc., asks the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,



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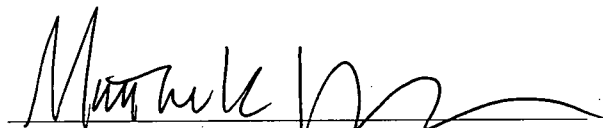
D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., Defendants,

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

PROOF OF SERVICE

I certify that I have served the *Reply to Return to Petition for a Writ of Certiorari* and *Appendix* of Petitioner 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 Michâel A. Timbes, Esq., Thurmond, Kirchner, Timbes & Yelverton, P.A., 15 Mid-Atlantic Wharf, Suite 101, Charleston, SC 29401

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