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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Patrick C. Fant, III

Circuit Court Case No. 2023-CP-02-01719
Appellate Case No. 2024-002137

Deborah Denise Harley,

Respondent,

v.

D.R. Horton, Inc. and Plumbing Solutions, LLC,

Defendants,

Of which D.R. Horton, Inc. is the

Appellant.

FINAL BRIEF OF APPELLANT

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1. The circuit court erred by ruling that the parties' agreement to arbitrate was unconscionable and unenforceable by relying on the "fiction" that the arbitration agreement contained provisions outside the four corners of the agreement.

2. The circuit court erred by ruling that the arbitration provision is not severable in the absence of explicit severability language and severability is against public policy.

3. The circuit court erred by ruling that the arbitration provision is unenforceable because it lacks mutuality and limits the arbitrator's rights.

INTRODUCTION AND STATEMENT OF THE CASE

On April 21, 2021, Deborah Denise Harley (hereinafter "Plaintiff" or "Harley") entered into a contract to purchase her home at 321 Donnington Court, Aiken, South Carolina (the "Home") from D.R. Horton, Inc. (hereinafter "D.R. Horton"). On July 31, 2023, Harley filed suit against D.R. Horton alleging defective construction of her Home. (R. p. 18 (Compl. ¶ 12).) As part of her purchase, Harley entered into an agreement with D.R. Horton (the "Home Purchase Agreement"). (R. p. 52 (D.R. Horton's Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, Aug. 29, 2024).) The Home Purchase Agreement contains an arbitration clause. (R. p. 57 (Home Purchase Agreement § 15).)

On October 11, 2023, in lieu of filing an Answer, D.R. Horton moved pursuant to the Home Purchase Agreement to stay the action and compel arbitration. (R. p. 27 (D.R. Horton's Mot. Stay & Compel Arbitration, Oct. 11, 2023).) D.R. Horton also sought a stay to allow D.R. Horton time to inspect the alleged defects, pursuant to the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -860. By agreement, D.R. Horton conducted its inspection on February 28, 2024, and was given thirty days thereafter to respond to the Complaint. On March 29, 2024, D.R. Horton responded to the Complaint by refiling its Motion to Stay and Compel Arbitration. (R. p. 30 (D.R. Horton Mot. Stay & Compel Arbitration, Mar. 29, 2024).) The lower court heard D.R. Horton's motion to compel arbitration via WebEx on September 4, 2024. (R. p. 300 (Transcript).) On November 27, 2024, the lower court denied D.R. Horton's motion to compel arbitration. (R. p. 1 (Order Denying Mot. Compel Arbitration, Nov. 27, 2024).) D.R. Horton filed a Notice of Appeal on December 19, 2024. (R. p. 286 (Notice of Appeal).) This appeal followed.

STATEMENT OF FACTS

In April 2021, Harley entered into the Home Purchase Agreement with D.R. Horton to purchase the Home, located in Aiken County. As part of the Home Purchase Agreement, Harley and D.R. Horton agreed to arbitrate any and all disputes related to construction of the Home. (R. pp. 57–58 (Home Purchase Agreement § 15).) Harley signed the Home Purchase Agreement and specifically initialed the arbitration provision. (R. pp. 58, 61 (Home Purchase Agreement at 7, 10).)

Harley filed this lawsuit complaining of defects in the construction of her Home and damages related to the same. Harley alleges that certain components of her home, including siding, windows, doors, and the mechanical, electrical, and plumbing systems were not constructed in accordance with applicable building codes and construction industry standards. (R. p. 18 (Compl. ¶¶ 12, 14).) Every cause of action asserted by Harley arises out of the construction of the Home.

Cause of Action	**Basis of Allegation**
Negligence/Gross Negligence	"Defendants breached their duties to Plaintiff Harley . . . [i]n failing to provide adequate exterior claddings, windows, doors, structural components and/or other building components for the Residence . . . [i]n failing to develop the Residence in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices . . . ." (R. pp. 23–24 (Compl. ¶ 53).)
Breach Implied Warranties	"Defendants implicitly warranted that the Residence would be developed in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, industry standards, and industry practice." (R. p. 25 (Compl. ¶ 59).)
Violation of Unfair Trade Practices	"D.R. Horton's above-described actions, including placing the defective Residence into the stream of commerce; failing to oversee and control the workmanship and material quality of the Residence; failing to properly repair defective conditions; failing to comply with the building codes, industry standards, and industry practice . . . constitute unfair and deceptive

	practices within the meaning of the Act." (R. p. 25 (Compl. ¶ 66).)

Because all of Harley's claims arise out of the construction of the Home, these disputes should be submitted to binding arbitration pursuant to the Home Purchase Agreement.

STANDARD OF REVIEW

The Court reviews legal conclusions about arbitrability de novo. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007). The trial court's factual findings are reviewed under an "any evidence" standard and will be reversed only if no evidence "reasonably supports" them. *Id.*

However, the underlying facts of this case are not in dispute. The trial court's decision hinged on its interpretation and application of relevant law. Therefore, this Court is free to correct the lower court's errors without deference to the trial court's opinion.

ARGUMENTS

The lower court improperly denied D.R. Horton's motion to compel arbitration based on its erroneous rulings that (1) the arbitration agreement is unconscionable; (3) the arbitration provision is not severable; and (3) the arbitration provision lacks mutuality and improperly limits the arbitrator's rights.

I. The Arbitration Agreement Is Not Unconscionable.

The trial court erred by expanding the arbitration agreement in section 15 of the Home Purchase Agreement to include unrelated provisions in section 14 and concluding that terms in section 14 rendered the arbitration agreement unconscionable. When the arbitration agreement is properly limited to section 15, it becomes clear that it is not unconscionable.

Significantly, Harley does not challenge any specific provision of the arbitration agreement in section 15 as unconscionable. Harley only challenges terms of the warranty provision in section 14. Challenges to contractual provisions outside of the arbitration agreement do not prevent enforcement of the parties' agreement to arbitrate. *See, e.g.*, *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70–71 (2010) ("[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate. [A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract." (second alteration in original) (citation and internal quotation marks omitted)).

The entirety of the arbitration agreement is found in section 15 of the Home Purchase Agreement:

> **Mandatory binding arbitration.** Purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding this agreement and/or the property, including but not limited to any disputes regarding: (a) seller's construction and delivery of the house; (b) seller's performance under any punch list or inspection agreement; and (c) the limited warranty pursuant to section 14 above.
>
> The arbitration shall take place in the county in which the property is located.
>
> The proceeding shall be conducted pursuant to the rules of the American Arbitration Association and, to the extent possible, under rules which provide for an expedited hearing.
>
> The filing fee for the 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 shall be binding and final, and either party shall have the right to seek judicial enforcement of the arbitration award.
>
> Notwithstanding any other provision herein, any disputes arising under the limited warranty shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of the limited warranty.

> Notwithstanding the foregoing, seller shall have the right to interplead all or any part of the earnest money into a court of competent jurisdiction as provided for in section 4 herein.

(R. pp. 57–58 (D.R. Horton's Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 15 (formatting altered)).)[1]

Nothing in the arbitration agreement is unconscionable and would justify a court in refusing to enforce it.

A. The Arbitration Agreement Consists Only of Section 15.

The trial court erred by not limiting its arbitrability review to section 15 of the Home Purchase Agreement. Under the *Prima Paint*[2] doctrine, "the first task of a court is to separate the arbitration provision from the rest of the contract." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). A court can consider only "challenges specifically [to] the validity of the agreement to arbitrate." *Rent-A-Ctr.*, 561 U.S. at 70 (citation omitted). "[A] party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." *Id.* In other words, "a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 48, 790 S.E.2d 1, 4 (2016). Plaintiff (and the trial court) avoided this limitation by imputing allegedly unconscionable terms from other sections of the contract into the arbitration agreement. (*See, e.g.*, R. pp. 7–9 (Order at 5–7).)

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[1] The arbitration agreement cited in briefing to the trial court contained minor typographical errors and an additional sentence that is not in the parties' arbitration agreement. These errors do not impact the substance of D.R. Horton's argument and have been corrected here. However, the trial court's order relied in part on the extraneous sentence. This is discussed in more detail below. *See infra* Part III.

[2] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The trial court relied heavily on *Smith* in finding that the arbitration agreement was not limited to section 15. (*See* R. pp. 8–9 (Order at 6–7).) In *Smith*, the South Carolina Supreme Court reviewed a paragraph called "Warranties and Dispute Resolution," with "more than 1,800 words" and "ten separately denominated subparagraphs." 417 S.C. at 53, 60, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting). Subparagraph (g) was specifically identified as "MANDATORY BINDING ARBITRATION" and detailed the parties' obligation to arbitrate their disputes. *Id.* at 57–58, 790 S.E.2d at 9. Notably, the agreement did not contain a severability clause. *Id.* at 50 n.6, 790 S.E.2d at 5 n.6 (majority opinion).

The parties, and the justices, in *Smith* disagreed as to whether the ten subparagraphs should be read together as the "arbitration agreement," or only the specifically labeled arbitration subparagraph (g). *Id* at 48, 790 S.E.2d at 4. The majority concluded that "[t]he subparagraphs . . . contain[ed] numerous cross-references to one another" and therefore were "intertwin[ed] . . . so as to constitute a single provision." *Id.* In a 3–2 decision, the court held that warranty disclaimers and damages limitations in various subparagraphs rendered the arbitration agreement unenforceable. *Id.* at 50, 790 S.E.2d at 5. Justice Kittredge filed a lengthy dissent, in which he noted that the plaintiffs "[did] not contend the specific agreement to arbitrate was unconscionable," and criticized the majority for relying on "the fiction that the arbitration provision [was] the entirety of Paragraph 14." *Id.* at 53, 59, 790 S.E.2d at 6, 10 (Kittredge, J., dissenting).

The trial court's decision below is based on a similar fiction—that section 15 is so intertwined with other provisions of the Home Purchase Agreement that those provisions combine with section 15 to form the arbitration agreement. (*See* R. pp. 3, 8–9 (Order at 1, 6–7).) In particular, the trial court held that section 15 was intertwined with section 14, which immediately

precedes the arbitration provision and addresses warranties.[3] (R. pp. 8–9 (Order 6–7).) Recent decisions from the South Carolina Supreme Court and South Carolina Court of Appeals have rejected this as an overreach of the law.

In *Damico v. Lennar Carolinas, LLC*, the court addressed a contract with "ten, numbered paragraphs setting forth the arbitration agreement" in a section called "Mediation/Arbitration of Disputes." 437 S.C. 596, 605, 879 S.E.2d 746, 751 (2022). The trial court held that the arbitration agreement "consisted of the entirety of the purchase and sale agreement and the [associated] limited warranty booklet" because "extensive cross-references between the two contracts combined them into a single agreement." *Id.* at 606–07, 879 S.E.2d at 752. This Court reversed, finding that "the arbitration agreement . . . was contained in a distinct, separate section of the [contract]" and "the circuit court erred by considering the contract as a whole." *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 198–99, 844 S.E.2d 66, 72 (Ct. App. 2020), *rev'd on other grounds*, 437 S.C. 596, 879 S.E.2d 746 (2022). The South Carolina Supreme Court affirmed the Court on that ground, concluding that the section with the arbitration agreement was a standalone provision that "deal[t] solely with the scope of arbitration and the requisite formalities accompanying an

[3] Curiously, the trial court stated that if the provisions were not so intertwined, "the parties did not come to an agreement on arbitration, invalidating the arbitration provision all together." (R. p. 8 n.7 (Order at 6 n.7).) The parties have not briefed this issue, and the trial court offered no explanation or authority to support this comment. Nonetheless, under South Carolina law, "[t]he familiar requisites to a binding contract are a meeting of the minds of the parties as to all essential and material terms, supported by consideration." *Lampo v. Amedisys Holding, LLC*, 437 S.C. 236, 242, 877 S.E.2d 486, 489 (Ct. App. 2022), *cert. granted*, 2024 S.C. LEXIS 22 (S.C. Feb. 7, 2024). In the context of an arbitration agreement, this requires "(1) that [the parties] had reasonable notice of an offer to enter into an arbitration agreement, and (2) that [the parties] manifested [their] assent to that agreement." *Marshall v. Georgetown Mem'l Hosp.*, 112 F.4th 211, 218 (4th Cir. 2024). This bar is easily met here, where both Plaintiff and D.R. Horton specifically signed section 15 of the Home Purchase Agreement. (R. pp. 57–58 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings Ex. 1, § 15).)

arbitration proceeding." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754. Moreover, because the arbitration agreements in both the contract and the related warranty booklet were standalone provisions, in their own sections, "it [was] legally irrelevant that the portions of the contracts outside of the arbitration agreements extensively cross-reference[d] one another and incorporate[d] one another by reference." *Id.* at 610 n.6, 879 S.E.2d at 754 n.6.

This Court acknowledged this standard recently in *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023). *Mart* involved an arbitration provision "in an unnumbered, standalone paragraph." *Id.* at 307, 893 S.E.2d at 361. Other unnumbered paragraphs included a limited warranty that disclaimed all other warranties, as well as liability for consequential and punitive damages. *Id.* at 308, 893 S.E.2d at 362. The buyer "agree[d] to accept [the] limited warranty in lieu of all other rights or remedies, whether base[d] on contract or tort." *Id.* (third alteration in original) (emphasis removed). At closing, the buyer was provided with a warranty application and warranty that contained its own arbitration provision, and which likewise disclaimed all other warranties and precluded recovery of incidental and consequential damages. *Id.* at 309–11, 893 S.E.2d at 363. On appeal, the Court considered whether the trial court erred by incorporating provisions from this separate limited warranty into the parties' sales contract. *Id.* at 312, 893 S.E.2d at 364.

The *Mart* Court looked to the South Carolina Supreme Court's conclusion in *Damico* that "'the circuit court impermissibly considered the terms found in the limited warranty booklet' when analyzing the arbitration provision of the purchase and sales agreement." *Id.* at 315, 893 S.E.2d at 365 (quoting *Damico*, 437 S.C. at 607, 879 S.E.2d at 753). The Court added that "controlling case law [did] not permit [it] to consider the language of the separate limited Warranty or the propriety of the waiver of implied warranties in analyzing the standalone arbitration language of

the Sales Contract." *Id.* at 315, 893 S.E.2d at 365. To demonstrate that the arbitration provision was unconscionable and, therefore, unenforceable, the plaintiff "was required to show that the language *in the arbitration section alone* was unconscionable." *Id.* at 315–16, 893 S.E.2d at 366 (emphasis added). The plaintiff failed to do that because although "[c]hallenged terms [could] be found elsewhere in the Sales Contract and/or the Warranty agreement," the arbitration provision itself "contain[ed] no such . . . term[s]." *Id.* at 315, 893 S.E.2d at 365.

Damico and *Mart* are consistent with the United States Supreme Court's holding in *Rent-A-Center*, where a company sought to enforce a delegation provision that gave the arbitrator "exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of th[e] Agreement." *Rent-A-Ctr.*, 561 U.S. at 66 (citation omitted). Notably, "the underlying contract [was] itself an arbitration agreement" entitled "Mutual Agreement to Arbitrate Claims." *Id.* at 65, 72. The *Rent-A-Center* Court clarified that "[a]pplication of the severability rule [of *Prima Paint*] does not depend on the substance of the remainder of the contract." *Id.* at 72. No matter the underlying contract, when ruling on arbitrability a court can consider only challenges *specifically* to the provision providing for arbitration. *Id.* The *Rent-A-Center* plaintiff's unconscionability arguments—that the agreement "was one-sided" and contained a "fee-splitting arrangement" and "limitations on discovery"—were directed at the arbitration agreement *as a whole*. *Id.* at 73–74. The plaintiff "did not make any arguments *specific to the delegation provision*" or "contest the validity of *the delegation provision in particular*." *Id.* at 74 (emphasis added). *Rent-A-Center* makes clear that this is what the law requires to obtain judicial review.

In this case, the Home Purchase Agreement bears more in common with the separate arbitration provisions in *Damico* and *Mart* than the combined warranty and dispute resolution

paragraph in *Smith*. As in *Rent-A-Center*, here the arbitration clause is a standalone provision located in section 15 of the Home Purchase Agreement, whereas warranties and related disclaimers are in section 14. The trial court erred by concluding that the arbitration provision "incorporates" warranty provisions from elsewhere in the Home Purchase Agreement. (R. p. 3 (Order at 1).) The trial court made much of the fact that section 15 provides for claims under the limited warranty to be resolved according to the terms of that warranty, which is found in section 14. (R. p. 8 (Order at 6).) However, the arbitration provision in *Damico* stated that it applied to "any Dispute," including claims "arising by virtue of any . . . warranties alleged to have been made." 437 S.C. at 605, 879 S.E.2d at 751–52 (ellipsis in original). Nevertheless, as noted above, both this Court and the South Carolina Supreme Court concluded that the arbitration agreement was a standalone provision that must be interpreted on its own—despite its reference to warranties and the existence of an outside limited warranty booklet. *Id.* at 607, 879 S.E.2d at 752–53.

Similarly, the arbitration agreement in *Mart* applied to "[a]ny dispute between the parties . . . arising out of [the] contract." 441 S.C. at 307, 893 S.E.2d at 361. "Any dispute" is broad enough to encompass warranty claims, which the agreement addressed (and severely restricted) shortly before the arbitration provision. *Id.* at 308, 893 S.E.2d at 362. Nonetheless, this Court refused to read these terms into the arbitration provision. *See id.* at 315–16, 893 S.E.2d at 366.

Under "federal law, the relevant arbitration provision consists of only that portion of [section 15] in which the parties agree[d] to arbitrate any controversies." *Smith*, 417 S.C. at 62, 790 S.E.2d at 11 (Kittredge, J., dissenting); *see also Prima Paint Corp.*, 388 U.S. at 404 (holding that when ruling on arbitrability, a court "may consider only issues relating to the making and performance of the agreement to arbitrate"). The arbitration provision in both *Damico* and *Mart*

referred to warranty claims; the arbitration provision in *Damico* did so explicitly. Nonetheless, in both cases courts concluded that it was improper to read the terms of the warranty into the arbitration provision. In this case, the relevant arbitration provision consists of the stipulation in section 15 that the "purchaser and seller shall submit to binding arbitration any and all disputes which may arise between them regarding th[e] agreement and/or the property." (R. p. 57 (Mem. Supp. Mot. Compel Arbitration Ex. 1, § 15 (capitalization altered)).) The Court should follow *Damico* and *Mart* and refuse to read extraneous provisions into a standalone, unchallenged arbitration provision. Plaintiff's challenges to those other provisions in the Home Purchase Agreement are "for the arbitrator." *Rent-A-Ctr.*, 561 U.S. at 72.

B. The Arbitration Agreement Contains No Unconscionable Terms.[4]

The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; *see also* S.C. Code Ann. § 15-48-10(a). Therefore, "courts may invalidate arbitration agreements on general state law contract defenses, such as fraud, duress, and unconscionability." *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016) (citation and internal quotation marks omitted). "In South Carolina, unconscionability 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." *Simpson v. MSA of Myrtle*

[4] As discussed above in Part I.A, any challenge that section 14 of the Home Purchase Agreement is unconscionable should be addressed in arbitration, not by a court, because Plaintiff has not specifically challenged the arbitration agreement. *See Smith*, 417 S.C. at 48, 790 S.E.2d at 4 (majority opinion) ("[I]n conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.").

Beach, Inc., 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). In short, an agreement is unconscionable if it both reflects "an absence of meaningful choice" *and* contains "oppressive, one-sided terms." *Id.* at 25, 644 S.E.2d at 669.

"The touchstone of the analysis begins with the presence or absence of meaningful choice." *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. This requires courts to "consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial business concern of the defendant." *Id.* at 613, 879 S.E.2d at 755.

The trial court analyzed the Home Purchase Agreement as an "adhesion contract" and concluded that Plaintiff lacked a meaningful choice in accepting it. (R. p. 7 (Order at 5).) "Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). D.R. Horton disputes that the Home Purchase Agreement was an adhesion contract. Plaintiff was free to purchase a home from another builder, to purchase a pre-existing home from a homeowner, or to purchase no home at all. Moreover, Plaintiff was able to personalize the contract by selecting various options that were offered, some of which came with an additional cost, and for which she separately signed. (R. pp. 62–66 (Home Purchase Agreement Ex. A).) Plaintiff freely assented to D.R. Horton's contractual terms, including arbitration of construction disputes, and there was nothing inherently unfair about this bargaining process.

However, assuming *arguendo* that the trial court was correct, "[a]dhesion contracts . . . are not per se unconscionable." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669; *cf. Munoz* at 541 n.5, 542 S.E.2d at 365 n.5 (noting that, under federal law, "[i]nequality of bargaining power alone will not invalidate an arbitration agreement"). As the South Carolina Supreme Court has made clear,

"adhesive contracts are not unconscionable . . . so long as the terms are even-handed." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (emphases removed).

When analyzing conscionability in the context of arbitration agreements, "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. That is the "general rubric" a court must use to "determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Id.* at 25, 644 S.E.2d at 669. However, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability." *Id.* at 36, 644 S.E.2d at 674. Rather, courts should examine arbitration clauses for conscionability on a "case-by-case" basis. *Id.*

Here, the arbitration provision in the Home Purchase Agreement is a far cry from provisions that courts have found to be unconscionable. "On the rare occasion when a court has determined that arbitral procedures render an arbitration agreement unenforceable, the one-sided provisions have been so pervasive and extreme that the arbitration provision created a 'sham system unworthy even of the name of arbitration.'" *LaPoint v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, No. 0:08-3553-CMC, 2009 U.S. Dist. LEXIS 146577, at *18–19 (D.S.C. Dec. 1, 2009) (quoting *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999)). For example, in *Damico*, the court concluded that the arbitration agreement was unconscionable because it gave the homebuilder too much control over the process: only the homebuilder could join contractors and other third parties, and findings would not be binding in other proceedings without mutuality of parties, which the homebuilder had unilateral power to prevent. 437 S.C. at 615–16, 879 S.E.2d at 757. Recently, in *Huskins v. Mungo Homes, LLC*, the

South Carolina Supreme Court declared that a provision in an arbitration agreement purporting to shorten the statute of limitations was "void and illegal as a matter of public policy." 444 S.C. 592, 595, 910 S.E.2d 474, 476 (2024).

In contrast, the arbitration provision in the Home Purchase Agreement easily satisfies the fairness standard discussed above. In relevant part, the arbitration provision (1) binds both D.R. Horton and Plaintiff to arbitrate construction defect disputes; (2) provides for arbitration in Plaintiff's home county; (3) provides for American Arbitration Association ("AAA")[5] rules and an expedited hearing schedule; (4) gives the arbitrator discretion to assess the filing fees and costs against D.R. Horton; and (5) allows any party to seek judicial enforcement of the arbitrator's decision. There is nothing "so oppressive" about these terms such "that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. To the contrary, these are reasonable and customary terms in an arbitration agreement and should be enforced.[6]

II. The Arbitration Agreement Is a Standalone Agreement and Severable from the Rest of the Home Purchase Agreement.

The trial court declined to sever section 15 from the rest of the Home Purchase Agreement and held that doing so would violate public policy. (R. pp. 3, 9–11 (Order at 1, 7–9).) This ruling conflicts with established law. The Court must sever section 15 from the other provisions of the Home Purchase Agreement and enforce its terms as written.

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[5] The AAA is a "well-known arbitration forum[]" that courts have recognized as "consumer friendly and affordable." *Whitman v. Legal Helpers Debt Resolution, LLC*, No.: 4:12-cv-00144-RBH, 2012 U.S. Dist. LEXIS 176480, at *8 (D.S.C. Dec. 13, 2012) (citation omitted).

[6] Moreover, as discussed in more detail in Part II, because the Home Purchase Agreement contains a severability clause, (R. p. 59 (Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 23)), to the extent the Court disagrees, it can sever any provisions it finds unconscionable.

Properly construed, the arbitration provision is limited to the standalone provision in section 15. This provision contains no unconscionable terms and "as a matter of substantive federal arbitration law . . . is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). The arbitration provision is also severable under relevant state law. In short, because severance of *the arbitration provision* is required, severance of *unconscionable terms* is not necessary. However, even if the arbitration agreement itself were not severable from the Home Purchase Agreement, unconscionable terms in the agreement are severable from the rest of the provision. Therefore, there are multiple bases on which this holding of the trial court should be reversed.

The United States Supreme Court addressed a state court's refusal to enforce an arbitration provision on the ground of public policy in *Buckeye Check Cashing*. *Id.* at 446. In that case, the plaintiffs alleged that certain loan agreements violated Florida law and were therefore "criminal on [their] face." *Id.* at 443. The Florida Supreme Court refused to sever and enforce the arbitration provision in the agreements because the contracts were "challenged as unlawful." *Id.* On certiorari to the U.S. Supreme Court, that Court noted that it had "rejected the view that the question of 'severability' was one of state law." *Id.* at 445. The Court made clear that whether an arbitration agreement is enforceable is based on *federal law, not state public policy*. *Id.* at 446. The Court closed its opinion by reiterating that "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Like the Florida Supreme Court in *Buckeye Check Cashing*, the trial court in this case refused to sever the arbitration provision from the remainder of the Home Purchase Agreement on public policy grounds. (R. pp. 9–11 (Order at 7–9).) In so doing, the trial court disregarded that federal law preempts state public policy on the issue of an arbitration agreement's enforceability.

See Buckeye Check Cashing, 546 U.S. at 446. The trial court's refusal to enforce the arbitration agreement, based on application of "state severability rules to the arbitration agreement," was an error of law and should be reversed. *Id.*

The arbitration agreement is also severable under state law, which provides an independent basis for enforcing the provision. Under South Carolina law, "[a] severable contract is one . . . susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be." *Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (citation omitted). On the other hand, a contract should be treated as a single, integrated agreement "when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent." *Id.* (citation omitted). Whether or not a contract is severable "depends primarily upon the intent of the parties." *Id.* (citation omitted).

Here, the evidence suggests that the parties intended to treat section 15 as separate from the rest of the Home Purchase Agreement, including section 14. Plaintiff "separately initialed [section 15] titled 'MANDATORY BINDING ARBITRATION,'" which "indicates the parties themselves viewed these terms as distinct contractual provisions to which they separately consented." *Smith*, 417 S.C. at 61, 790 S.E.2d at 11 (Kittredge, J., dissenting). The Court should give effect to this intention.

Finally, to the extent the Court disagrees that the arbitration provision in section 15 can be severed entirely from section 14, the Home Purchase Agreement contains a severability clause, (R. p. 59 (Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 23)), and the Court can sever any provisions it finds unconscionable.

The *Damico* court's refusal to sever the arbitration provision under its review was based, at least in part, on "the *pervasive* presence of oppressive terms in the arbitration provision." 437 S.C. at 622, 879 S.E.2d at 760 (emphasis added); *see also infra* Part III (discussing numerous provisions in *Damico* that the South Carolina Supreme Court found to be unfair). "If, however, only some of an arbitration agreement's provisions are invalid or unenforceable, the severability of the offending provisions—rather than invalidation of the arbitration agreement—would be the appropriate remedy." *Whitman*, 2012 U.S. Dist. LEXIS 176480, at *5. The trial court identified two isolated provisions of section 14 of the Home Purchase Agreement as oppressive terms that render the arbitration agreement unconscionable. (R. p. 8 (Order at 6).) These terms are hardly "pervasive" and can easily be severed from the remainder of the Home Purchase Agreement. The trial court's failure to sever the terms it found to be unconscionable "completely invalidate[d] the parties' agreement to arbitrate," in violation of the FAA, and should be reversed. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (2001); *cf. AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011) (noting that "the FAA's pre-emptive effect might extend even to grounds traditionally thought to exist at law or in equity for the revocation of *any* contract" and holding that the FAA preempted a state law that declared class action waivers in consumer contracts to be unconscionable (emphasis added) (citation and internal quotation marks omitted)).

III. The Arbitration Provision Is Fair and Mutuality Is Not Required.

The trial court identified two additional factors that, in its view, rendered the arbitration agreement unconscionable: lack of mutuality of remedies and limits on the arbitrator's authority. (R. pp. 11–12 (Order at 9–10).) Neither provides a basis for refusing to compel arbitration in this case.

The trial court cited a specific sentence of the arbitration provision to show a lack of mutuality—"THE ARBITRATION PROVISIONS OF THIS SUBSECTION (B) SHALL NOT APPLY IN THE EVENT THAT THE DISPUTE RELATES TO A DEFAULT BY THE SELLER." (R. p. 11 (Order at 9).) However, this language is not actually in the Home Purchase Agreement. (*See* R. pp. 57–58 (Mem. Supp. Mot. Compel Arbitration Ex. 1, § 15).) D.R. Horton mistakenly included this language in its briefing to the trial court. (R. p. 34 (Mem. Supp. Mot. Compel Arbitration at 2); *see also supra* note 1.) D.R. Horton uses this opportunity to correct the record.

Nonetheless, even if the Home Purchase Agreement contained such a provision, the trial court's ruling that a "non-mutual arbitration obligation itself, on its face, is unconscionable," (R. p. 12 (Order at 10)), is contrary to established law. The South Carolina Supreme Court has explicitly recognized that "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable." *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672.

The court expressed concern about mutuality in *Damico* because the agreement gave the builder sole discretion to join third parties, such as contractors, while also mandating that findings in one proceeding could not be used in another unless there was mutuality of parties. 437 S.C. at 615–16, 879 S.E.2d at 757. This violated the "fundamental principle of law that the plaintiff is the master of his own complaint." *Id.* at 616, 879 S.E.2d at 757. It also "create[d] the possibility of inconsistent factual findings that would preclude [homeowners] from recovery on a purely procedural (rather than a merit) basis." *Id.* at 616, 879 S.E.2d at 757. The builder's control created the possibility of parallel "empty chair" defenses, where an arbitration defendant could blame an absent party, while in court, a litigation defendant could blame the parties that submitted to arbitration. *Id.* As the court noted, "[w]ere the respective fact finders to agree with the defendants'

arguments to that effect, [homeowners] could lose in both forums merely because the fact finder believes the absent defendants to be at fault, and, critically, it is not [the homeowners'] choice that those defendants are absent." *Id.* (emphasis removed). Moreover, because findings would not be binding in other proceedings without mutuality of parties, *which the homebuilder had unilateral power to prevent*, homeowners "could not even use the fact that the arbitrator had found [the builder] was not at fault when pursuing liability against the remaining circuit-court defendants, or vice versa." *Id.* It was this "procedural defense to liability" that the court found "wholly unreasonable and oppressive," *id.*, not the fact that some claims were subject to arbitration and others to litigation.

The Home Purchase Agreement contains no such imbalanced provision. As noted above, the arbitration provision requires D.R. Horton *and* homebuyers to arbitrate all construction defect claims and allows any party to seek judicial enforcement of an arbitration decision. (R. p. 57 (Mem. Supp. Mot. Compel Arbitration Ex. 1, § 15).) There is no lack of mutuality in these provisions; even if there were, there are certainly no unconscionable terms like those that concerned the *Damico* Court.

Finally, there is nothing unconscionable about the arbitral procedures the agreement dictates or the limits it places on an arbitrator's authority. In *Hooters*, the court found that the promised arbitration was a "sham" because the company "was responsible for setting up . . . a [neutral] forum by promulgating arbitration rules and procedures," but instead established rules that were "so one-sided that their only possible purpose [was] to undermine the neutrality of the proceeding." 173 F.3d at 938, 940. Among the many problems, the company was "not required to file any responsive pleadings or to notice its defenses"; "the employee [had to] provide the company with a list of all fact witnesses with a brief summary of the facts known to each," but the

company had no obligation to reciprocate; the company could expand the scope of arbitration "to any matter," whereas the employee was limited to the issues in the initial claim; the company had the right to record audio or video of the arbitration hearing, but the employee did not; and only the company could "bring suit in court to vacate or modify an arbitral award." *Id.* at 938–39. Moreover, although both parties got to choose one arbitrator, who would then choose a third, "the employee's arbitrator and the third arbitrator [had to] be selected from a list of arbitrators created exclusively by [the company]." *Id.* The court concluded "that the promulgation of so many biased rules—*especially the scheme whereby one party to the proceeding so control[led] the arbitral panel*—breache[d] the contract entered into by the parties." *Id.* at 940 (emphasis added).

The Home Purchase Agreement contains no such egregious provisions. As noted above, it provides for arbitration before the American Arbitration Association, a forum that is "well-known," "consumer friendly," and "affordable." *Whitman*, 2012 U.S. Dist. LEXIS 176480, at *8 (citation omitted). Moreover, the arbitration provision allows for either party to seek judicial enforcement of an arbitration award. (R. p. 57 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings Ex. 1, § 15).) These provisions are consistent with the goal of "achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

The propriety of any other provisions should be determined by the arbitrator. Even the *Hooters* court recognized that "[g]enerally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance." 173 F.3d at 941. The *Hooters* court undertook the review it did only because the company had a contractual duty to promulgate rules for arbitration and its "material breach of th[at] duty warranting rescission [was] an issue of substantive arbitrability and thus [was] reviewable before arbitration." *Id.* The court made clear that the case was "the exception that proves the rule: *fairness objections should generally be made to the*

arbitrator." *Id.* (emphasis added). There are no such extenuating circumstances present here; therefore, "the rule" applies, and any questions about conscionability or fairness must be resolved in arbitration, not by a court.

CONCLUSION

D.R. Horton asks the Court to reverse the decision of the trial court. The arbitration provision in the Home Purchase Agreement mandates arbitration is a standalone provision, in a single section, with no unconscionable terms. To the extent the Court disagrees, any unconscionable terms can easily be severed from the Home Purchase Agreement. All other challenges to the agreement must be made in arbitration. Therefore, D.R. Horton asks the Court to reverse the decision below and direct the trial court to enter an order granting D.R. Horton's motion to compel arbitration.

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