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 REPLY BRIEF OF APPELLANT

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August 11, 2025

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ARGUMENT IN REPLY

The trial court erred in not enforcing the parties' arbitration agreement. The court failed to apply the Federal Arbitration Act and the body of substantive federal law on arbitration to this dispute. Had the lower court correctly applied the law, it would have applied the *Prima Paint* doctrine, which instructs that an arbitration agreement must be analyzed on a standalone basis and any objections to other portions of the contract are not to be considered by the court. Instead, the trial court read other provisions of the parties' contract into the arbitration provision, ruled that those provisions could not be severed from the contract, and concluded that those provisions rendered the entire agreement unconscionable and unenforceable.

The trial court also erred in concluding that the arbitration provision agreement was unenforceable because it was unfair and lacked mutuality. In addition to violating the *Prima Paint* doctrine and federal law, this ruling misconstrues state precedent.

In short, the parties agreed to arbitrate this dispute, and that agreement should be enforced.

I. The Parties' Arbitration Agreement Is Not Unconscionable.

Harley does not argue that she did not agree to arbitrate construction disputes; in fact, the Home Purchase Agreement reflects that Harley specifically initialed the arbitration agreement. (R. pp. 57–58 (Home Purchase Agreement § 15).) Harley does not even argue that any provision of the arbitration agreement itself is unconscionable. This should end the inquiry—the parties agreed to arbitrate, and no provision of that agreement is unconscionable. Any other objections Harley has to the Home Purchase Agreement should go to the arbitrator for resolution.

Harley has not identified any objectionable provisions in the arbitration agreement like those struck down by other courts as unconscionable because there are no similarly unconscionable terms in Harley's arbitration agreement. *See, e.g.*, *Huskins v. Mungo Homes, LLC*, 444 S.C. 592,

595, 910 S.E.2d 474, 476 (2024) (holding that a provision in an arbitration agreement purporting to shorten the statute of limitations was "void and illegal as a matter of public policy"); *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 615–16, 879 S.E.2d 746, 757 (2022) (agreement unconscionable where 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).

Absent any unconscionable terms, Harley is forced to contend that the arbitration agreement's two ministerial references to section 14 somehow make section 14 inextricably intertwined with section 15's arbitration agreement. This is not so. Both references simply inform the reader that any disputes arising under the limited warranty will be resolved pursuant to the terms of the limited warranty.[1] Neither reference to section 14 contains anything of substance that impacts how the arbitration will proceed (e.g., venue, number of arbitrators, governing rules), which is evident when the two references are viewed separately.

> **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.

[1] Respondent has not asserted any claims arising under the limited warranty. (*See* R. p. 22 (Compl. ¶ 41).)

> 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.**

(R. p. 57 (D.R. Horton's Mem. Supp. Mot. Stay Action & Compel Arbitration Ex. 1, § 15 (formatting altered)).) These two ministerial references do not require sections 14 and 15 to be read together.

Because Harley does not contend that she did not agree to arbitrate or that any provision in the arbitration agreement is unconscionable, the agreement should be enforced according to its terms. The lower court erred in not doing so.

II. The *Prima Paint* Rule of Severability Applies to the Home Purchase Agreement.

The *Prima Paint*[2] doctrine is part of the body of substantive federal law that applies to all transactions involving interstate commerce, including Harley's purchase of a newly constructed home from D.R. Horton. *Prima Paint*'s rule of severability means that the arbitration agreement in section 15 must be analyzed on a standalone basis without considering any other provisions of the Home Purchase Agreement at large when determining arbitrability. The lower court erred in looking outside of the arbitration agreement to deny D.R. Horton's motion to compel arbitration.

a. The FAA Controls Because New Home Construction Implicates Interstate Commerce.

If a transaction implicates interstate commerce, the Federal Arbitration Act ("FAA") controls along with its "body of federal substantive law." *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984). The United States Supreme Court has long held that the FAA supplies a body of federal

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

substantive law that applies in federal and state courts to transactions involving interstate commerce because of "Congress' broad power to fashion substantive rules under the Commerce Clause." *Id.* at 11; *see also id.* at 12 (observing that the Court's statements in *Prima Paint* "that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts"). Courts have interpreted "the words 'involving commerce' [as] the functional equivalent of 'affecting commerce,' which typically indicates Congress' intent to exercise its commerce power in full." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001).

The South Carolina Supreme Court has long held that new home construction implicates interstate commerce and the FAA.[3] This means that federal arbitration law preempts state law in transactions involving the construction of new homes. *See, e.g.*, *Damico*, 437 S.C. at 608, 879 S.E.2d at 753 (recognizing the preemptive effect of federal law).

b. The *Prima Paint* Rule of Severability Applies to Harley's Contract.

Following federal law, the *Prima Paint* rule of severability provides that the arbitration provision is severable from the remainder of the contract and should be analyzed on a standalone basis to determine if arbitration is enforceable. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (noting that "unless the challenge is to the arbitration clause itself, the

[3] *E.g.*, *Damico*, 437 S.C. at 608, 879 S.E.2d at 753 ("The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes."); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA."); *Episcopal Housing. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (observing that construction contracts for new buildings implicate interstate commerce because "it would be virtually impossible to construct [a building] with materials, equipment and supplied all produced and manufactured solely within the State of South Carolina").

issue of the contract's validity is considered by the arbitrator in the first instance"). When an arbitration agreement is analyzed under the FAA, the *Prima Paint* doctrine requires courts first "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). With the arbitration provision separated, courts should then consider only "challenges *specifically* [to] the validity of the agreement to arbitrate." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (emphasis added) (citation omitted).

In *Buckeye Check Cashing*, the borrowers argued that under Florida state law the contracts at issue charged usurious interest rates, making the contracts void or even criminal on their face. 546 U.S. at 443. The borrowers also argued that the *Prima Paint* doctrine of severability did not apply in state court and did not apply to a void contract. *Id.* at 447. The Supreme Court rejected this narrow reading of "contract" as only those contracts ultimately determined to be valid under state law and rejected any limitation of the *Prima Paint* doctrine as a rule of federal procedure. *Id.* at 447–48. The Court reaffirmed its prior rulings that "regardless of whether the challenge is brought in federal or state court, 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.

Likewise, here, federal substantive law requires the arbitration agreement to be analyzed on a standalone basis.[4] All other challenges to the contract are for the arbitrator.

[4] Contrary to Respondent's suggestion, South Carolina courts apply the *Prima Paint* doctrine under both the FAA and the South Carolina Uniform Arbitration Act ("SCUAA"). South Carolina appears to have adopted the *Prima Paint* doctrine more than thirty years ago in *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993) (per curiam). In that case, the South Carolina Supreme Court observed that an "arbitration clause is separable from the [rest of the] contract" and held that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Id.* at 562–63, 437 S.E.2d at 24. Although *Great Western* does not specify whether the decision arose under federal or state law, later case law suggests the rule is the same under statutes.

Respondent argues that objectional provisions in section 14 render the arbitration agreement in section 15 unconscionable and thus unenforceable. (Resp't's Initial Br. at 9–12.) The borrowers in *Buckeye Check Cashing* similarly argued that because the usurious interest rates made the contracts void under Florida law, they should not be required to arbitrate a contract that will later be determined void. 546 U.S. at 447. As convincing as this may sound, even under the circumstances of a potentially void contract, the Supreme Court rejected this inversion of the *Prima Paint* doctrine and confined the analysis of arbitrability to the arbitration provision alone. As the Court stated:

> It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, 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 448–49.

Because Respondent does not challenge any provision of the arbitration clause in section 15 as unconscionable, her objections to the Home Purchaser Agreement are for the arbitrator to decide.

Not long after *Great Western*, the South Carolina Supreme Court affirmed its adoption of *Prima Paint*. *See Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994) (citing *Prima Paint*, 388 U.S. 395; *Great Western*, 312 S.C. at 562–63, 437 S.E.2d at 24). In reversing the lower court's refusal to grant a stay, the court stated that "it is only when a party has valid grounds upon which to challenge *the arbitration clause itself* that arbitration may be avoided." *Id.* at 404, 440 S.E.2d at 879 (emphasis added). Notably, the court responded to criticism that its ruling would make arbitration provisions unreviewable by pointing to provisions of the SCUAA that contemplate judicial review under certain circumstances. *Id.* at 403–04, 440 S.E.2d at 879 (citing S.C. Code Ann. §§ 15-48-10(a), -20(a)–(b)). This makes sense only if the court was making clear that the *Prima Paint* doctrine applies to arbitration provisions under both the FAA and the SCUAA.

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

As an additional basis for refusing to enforce the arbitration agreement, the trial court held that the agreement was unenforceable because it (1) lacked "mutuality" and (2) unfairly limited the arbitrator's authority. (R. pp. 11–12 (Order at 9–10).) In so ruling, the court misconstrued the record and misinterpreted relevant law.

a. Section 15 Is Not Unconscionable for Lack of Mutuality

The trial court held that the arbitration provision in section 15 lacked mutuality because it "seeks to limit the rights of home purchasers to arbitration while at the same time reserving [Appellant's] own right to litigate." (R. p. 11 (Order at 9).) Not only did the trial court rely on language that was not part of the Home Purchase Agreement, but it misinterpreted that language. Even considering the additional language, the trial court committed an error of law by ruling that a lack of mutuality rendered the agreement unenforceable**.**

i. The Trial Court Considers Language Not Found in Section 15

Before considering the merits of this argument, Respondent argues that it is not preserved for review because Appellant did not raise it below and it contradicts statements made by Appellant's counsel. (Resp't's Br. at 23–24 & nn.22–23.) Appellant first addresses these procedural arguments, then discusses the language of the provision itself.

1. Appellant's Argument Is Based on the Record

Contrary to Respondent's suggestion, Appellant does not seek "to supplement the record with evidence [Appellant] failed to introduce below." *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989), *cited in* (Resp't's Br. at 24.) The Home Purchase Agreement—including *the full and correct language of the arbitration provision*—is part of the record. (*See* R. pp. 52, 57–58 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings Ex. 1, § 15).) Therefore,

Appellant does not ask the Court to consider something that was never presented to the trial court. Appellant simply asks the Court not to pretend the agreement says something it clearly does not.

2. Appellant's Argument Is Preserved

Respondent also argues that this argument is not preserved because it was not raised to and ruled upon by the trial court. However, Appellant has repeatedly argued that the arbitration provision is not unconscionable. (*E.g.*, R. pp. 42–44 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings at 10–12).) This is not an issue that Appellant has "raised for the first time on appeal." *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993), *cited in* (Resp't's Br. at 24.) The correct language of the arbitration agreement, without the extra clause, is also part of the record. (*See* R. pp. 57–58 (Mem. Supp. Mot. Compel Arbitration & Stay Proceedings Ex. 1, § 15).) Therefore, Appellant is not asking the Court "to reverse a trial court's decision in reliance on evidence never submitted to the trial court." *Hofer*, 298 S.C. at 513, 381 S.E.2d at 742, *cited in* (Resp't's Br. at 24.)

Appellant merely asks the Court to review the parties' contract and reverse the trial court's holding that the arbitration provision is unconscionable. The specific language Appellant cited—and the trial court relied upon in ruling that the provision is unenforceable—does not change the terms of the parties' contract. *See Curry v. Carolina Ins. Grp. of S.C., Inc.*, 428 S.C. 60, 74, 832 S.E.2d 760, 767 (Ct. App. 2019) ("Under the parol evidence rule, the terms of [an unambiguous, written contract] are controlling, even if extrinsic evidence is admitted without objection or admitted over appropriate objection." (citation omitted)); *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) (stating that when considering a motion for summary judgment, "factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether

a genuine issue of material fact exists"); *cf. Charleston Cty. Assessor v. LMP Props., Inc.*, 403 S.C. 194, 201–02, 743 S.E.2d 88, 92 (Ct. App. 2013) (Few, C.J., concurring in the judgment) (disagreeing that the court was required to interpret the statute that the parties and the lower court applied and arguing that its application was not a "ruling" of the lower court for purposes of the "law of the case doctrine" and "d[id] not preclude th[e] court from disagreeing with the basis of the lower court's analysis").

ii. The Arbitration Provision Is Not Unfair

Nonetheless, the arbitration provision is not unconscionable *even if* the Court considers the additional language at the end of section 15 of the Home Purchase Agreement.

1. The Agreement Does Not Unfairly Restrict Respondent

The trial court held that the Home Purchase Agreement forced home purchasers to arbitrate all their claims against D.R. Horton, while allowing D.R. Horton to seek relief in court. (R. pp. 11–12 (Order at 9–10).) Respondent makes a similar argument in her brief and further argues that the Home Purchase Agreement is unfair because it allows D.R. Horton to interplead the earnest money paid by Respondent, with no similar provision for its return. (Resp't's Br. at 25–26.) The actual terms of the Home Purchase Agreement tell a different story.

For one, the language that Appellant mistakenly cited as part of the arbitration provision does not force purchasers to arbitrate while allowing D.R. Horton to seek relief in court. In fact, the clause specifically exempts from the arbitration provision all actions related to "a default *by* [*D.R. Horton*]." (R. p. 11 (Order at 9 (emphasis added) (capitalization altered)).) In other words, this clause explicitly allows the purchaser to litigate certain claims *against* D.R. Horton in court.

Moreover, Respondent suggests that if the purchaser defaults, the Home Purchase Agreement allows D.R. Horton to interplead the earnest money and recover costs and attorney's fees, but makes no similar allowance for a purchaser if D.R. Horton defaults. (Resp't's Br. at 26.)

Respondent ignores that, in the event of a default by D.R. Horton, a purchaser is allowed to terminate the agreement, at which time the purchaser is entitled to the return of all earnest and option money already paid. (*See* R. p. 59 (Home Purchase Agreement § 18(b)).) A purchaser should not incur any costs or fees invoking this provision, as the purchaser simply has to notify D.R. Horton in writing, rendering a fee-shifting provision unnecessary.[5] (*See id.*) The agreement also provides that, in appropriate circumstances, a purchaser "may pursue whatever remedies it may have against [D.R. Horton] *at law or in equity*." (*Id.* (emphasis added).) Therefore, the Home Purchase Agreement does not unfairly restrict purchasers.

2. Complete Mutuality Is Not Required

Nonetheless, even if the Home Purchase Agreement establishes disparate obligations and remedies, complete mutuality is not required for an agreement to be enforceable. *See, e.g.*, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 31, 644 S.E.2d 663, 672 (2007) (recognizing that "lack of mutuality of remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable"). This principle has long been established in South Carolina law. *See Alala v. Peachtree Plantations, Inc.*, 292 S.C. 160, 166, 355 S.E.2d 286, 289 (Ct. App. 1987) (noting that South Carolina rejected the idea that a party could seek specific performance only if specific performance could be sought against it (citing *Columbia Water Power Co. v. City of Columbia*, 5 S.C. 225 (1873))). Therefore, an agreement is not unconscionable simply because it requires some claims to be resolved in arbitration and allows others to be litigated in court. *See, e.g.*, *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) ("[U]nder state law, a lack of mutuality of remedy does not invalidate a contract."); *Lackey v.*

[5] Alternatively, the purchaser can seek specific performance in arbitration, (*see* R. p. 59 (Home Purchase Agreement § 18(b))), where the arbitrator has authority to allocate costs and fees to either party, (*see* R. p. 57 (*id.* § 15)).

Green Tree Fin. Corp., 330 S.C. 388, 402, 498 S.E.2d 898, 905 (Ct. App. 1998) ("[T]here is no requirement that the consideration for one party's obligation to arbitrate all issues under a contract be the other party's obligation to arbitrate all issues under that contract.").

On the other hand, Respondent has cited no authority to support the proposition that a "non-mutual arbitration obligation itself, on its face, is unconscionable." (Resp't's Br. at 25.) The cases Respondent does cite are inapposite and provide no basis for ignoring established precedent. (*See id.* (citing *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999); *Damico*, 437 S.C. at 615, 879 S.E.2d at 757).)

The South Carolina Supreme Court's concern about mutuality in *Damico* stemmed from the fact that the agreement gave the builder the sole power to join third parties in the arbitration, which indirectly allowed the builder to control the presentation of evidence and created a procedural defense to the plaintiff's claims. *Damico*, 437 S.C. at 615–16, 879 S.E.2d at 757. In *Hooters*, the federal district court criticized the company's arbitration protocol for a possible "lack of mutuality in the 'bindingness' of any award," where it was unclear an employee had the same right to appeal a decision as the company. 39 F. Supp. 2d at 619–20. That was just one way in which "the obligations of the two parties [were] not in equilibrium," with the result being a "sham arbitration, deliberately calculated to advantage [the company] in any proceeding in which claims [were] initiated against it." *Id.* at 617–18, 620. The Fourth Circuit affirmed the district court, describing the protocol as "a sham system unworthy even of the name of arbitration." *Hooters*, 173 F.3d at 940.

The Home Purchase Agreement and the arbitration provision are easily distinguishable from these objectionable provisions. In *Hooters*, the district court identified "five essential elements" to a valid arbitration agreement:

> (1) a third party decision maker; (2) a mechanism for ensuring neutrality with respect to the rendering of the decision; (3) a decision maker who is chosen by the parties; (4) an opportunity for both parties to be heard; and (5) a binding decision.

39 F. Supp. 2d at 618–19 (citing *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 872 (Ct. App. 1996)). The arbitration provision the parties agreed to here provides for arbitration before the American Arbitration Association ("AAA"), in Respondent's home county and under AAA rules, and allows the arbitrator to assess costs and fees against either party. (R. p. 57 (Home Purchase Agreement § 15).) The AAA is a "well-known arbitration forum[]" recognized as being "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); *see also Brown v. Ryan's Family Steak Houses, Inc.*, No. 2:03-2582, 2004 U.S. Dist. LEXIS 27456, at *30 n.15 (D.S.C. Feb. 26, 2004) (noting that the AAA's discovery rules "allow additional discovery where necessary to a full and fair exploration of the issues in dispute" (citation and internal quotation marks omitted)), *aff'd*, 113 F. Appx. 512 (4th Cir. 2004). Indeed, a senior vice president of the AAA testified that the rules promulgated by Hooters "so deviated from minimum due process standards that the [AAA] would refuse to arbitrate under [them]." *Hooters*, 173 F.3d at 939. Here, Respondent has the ability to present her case to a fair and impartial decision maker, as agreed by the parties, which satisfies the first four criteria recognized by the district court. *See Hooters*, 39 F. Supp. 2d at 618–19 (citation omitted).

The arbitration provision also stipulates that the arbitrator's decision is "binding and final," and either party may seek judicial enforcement of that decision. (R. p. 57 (Home Purchase Agreement § 15 (capitalization altered)).) This satisfies the final element identified by the district court. *See Hooters*, 39 F. Supp. 2d at 619 (citation omitted). Combined with the requirement that arbitration take place under the auspices of the AAA, the arbitration provision therefore ensures

that the parties' dispute ends with "an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

Properly analyzed, the arbitration provision of the Home Purchase Agreement is not unconscionable for lack of mutuality.

b. The Trial Court Erred by Relying on Section 14

As discussed above, *supra* Part II, the trial court's review should have been limited to section 15, the arbitration provision. The *Prima Paint* doctrine and relevant case law forbids consideration of other provisions when analyzing an arbitration agreement. However, the trial court interpreted and relied on section 14 to find that the agreement attempted to limit the arbitrator's authority. (R. p. 12 (Order at 10).) This was error, and the court should be reversed on that basis alone. Nonetheless, even considering section 14, the arbitration agreement does not improperly limit the arbitrator's authority.

Relying on *Damico* and *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016), the trial court held that section 14 of the Home Purchase Agreement limited the arbitrator's authority by preventing the arbitrator from awarding monetary damages. (R. p. 12 (Order at 10).) Respondent makes a similar argument in her brief. (Resp't's Br. at 22–23.) However, the language and cases the trial court and Respondent rely on are easily distinguishable from the agreement in the instant case.

In *Damico*, the provision the court found so objectionable related to the builder's control over the *procedure* of the arbitration. *Damico*, 437 S.C. at 615–17, 879 S.E.2d at 757–58 (concluding that an arbitration provision was unconscionable because it gave the homebuilder too much control over the parties that could be joined and the evidence that could be presented). The court characterized other provisions of the agreement as "absurd, factually incorrect, and grossly

oppressive," including statements suggesting that the parties jointly prepared and negotiated the contract and that the purchasers agreed to accept $0 as valuable consideration for waiver of the implied warranty of habitability. *Id.* at 617, 879 S.E.2d at 758. In contrast, the Home Purchase Agreement does not purport to give D.R. Horton such control over the arbitral proceedings, nor does it include any such obviously false statements.[6]

In other cases, the distinction between the Home Purchase Agreement and provisions that courts have found objectionable is even greater, as those provisions attempt to control the arbitrator and the arbitral proceedings directly. Respondent cites one case where the arbitration provision precluded recovery of statutory treble damages. (Resp't's Br. at 23 (citing *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 534, 908 S.E.2d 892, 899 (Ct. App. 2024)).) The provision there stated that "[n]o consequential, lost profits, diminution in value, lost opportunity, intangible, emotional, trebled, enhanced[,] or punitive damages *may be awarded in said arbitration*." *Corley*, 444 S.C. at 534, 908 S.E.2d at 899 (second alteration in original) (emphasis added). Another oft-cited case[7] discussed an arbitration provision that provided, "*In no event shall the arbitrator be*

[6] Although the language in *Smith* is closer to the language at issue here, it too is distinguishable. The limitation of liability provision in that case stated that, in the event of a defect, the "seller's obligation shall be the correction of such defect by repair or replacement, in its discretion. . . . [The] [s]eller shall not be liable for monetary damages of any kind . . . ." *Smith*, 417 S.C. at 59, 790 S.E.2d at 9 (Kittredge, J., dissenting) (capitalization and formatting altered). On the other hand, the disclaimer in the Home Purchase Agreement states that, "*except as otherwise provided in the limited warranty*, seller shall not be liable for . . . monetary damages of any kind." (R. p. 57 (Home Purchase Agreement § 14(c) (emphasis added) (capitalization altered)).)

Therefore, unlike the provision in *Smith*, the disclaimer here does not categorically limit recovery to repair or replacement; monetary damages would be available to the extent they are consistent with the associated warranty, which is not currently part of the record.

[7] (*See, e.g.*, Resp't's Br. at 7 n.7, 15.)

authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party." *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666 (emphasis added). Another case, which appears in the trial court's lengthy quotation of *Damico*, (R. p. 10 (Order at 8 (citing *Damico*, 437 S.C. at 621, 879 S.E.2d at 760))), revolved around an agreement stipulating that "[t]he arbitrators *shall have no power to award* any punitive or exemplary damages *or to vary or ignore* the terms of th[e] [a]greement," *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 548, 606 S.E.2d 752, 754 (2004) (emphasis added).[8]

The provisions in *Simpson*, *Corley*, and *Carolina Care Plan* reflect attempts to control the arbitrator directly. The agreement in *Damico* gave the builder extensive control over *who* could join in proceedings and *what evidence* could be presented. Those provisions clearly attempted to shape the arbitral proceedings themselves, turning what should be "a system whereby disputes are fairly resolved by an impartial third party" into "a sham system unworthy even of the name of arbitration." *Hooters*, 173 F.3d at 940. In contrast, section 14(c) is simply a damages waiver and does not attempt to restrict an arbitrator's ability to determine whether it is unconscionable under South Carolina law. Therefore, although the Court should not look to section 14(c) because it is outside the arbitration provision, it contains nothing that would render that provision unenforceable.

[8] Nonetheless, in that case, the South Carolina Supreme Court affirmed an order *dismissing* the plaintiff's claim that the agreement was unconscionable because it prevented recovery of statutory damages. *Carolina Care Plan*, 361 S.C. at 557, 606 S.E.2d at 759. The court held that the plaintiff's claim was premature, as it was unknown whether the arbitrator would find the statute violated and, if so, whether the arbitrator would characterize statutory damages as punitive or compensatory. *Id.*

CONCLUSION

For the reasons expressed above and in Appellant's initial brief, the trial court erred by refusing to enforce the parties' agreement to arbitrate. The arbitration provision is severable; consists only of section 15 of the Home Purchase Agreement and should not be intertwined with other provisions of the Home Purchase Agreement; and is not unconscionable, whether for lack of mutuality or any other reason. Therefore, this Court should reverse the trial court and remand for entry of an order compelling arbitration consistent with the parties' agreement.

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August 11, 2025