THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Appellate Case No.: 2024-002137

RECEIVED
AUG 13 2025
SC Court of Appeals

Deborah Denise Harley ....Respondent,

v.

D.R. Horton, Inc., Plumbing Solutions, LLC, and John Does 1-15 ....Defendants,

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

FINAL BRIEF OF RESPONDENT

Robert T. Lyles, Jr. (SC Bar No. 10299)
Joseph Daniel Winterstein (SC Bar No. 105344)
Lyles & Associates, LLC
2113 Middle Street, Suite 200
Sullivan's Island, South Carolina 29482
(843) 577-7730
rtl@lylesfirm.com
jdw@lylesfirm.com
Attorneys for Respondent

Other Counsel of Record:

John T. Crawford Jr. (SC Bar No. 69682)
Kimila L. Wooten (SC Bar No. 64516)
David L. Paavola (SC Bar No. 100714)
W. Jacob Henerey (SC Bar No. 102268)
Amelia Farmer (SC Bar No. 105750)
KENISON, DUDLEY & CRAWFORD, LLC
325 McBee Ave., Suite 301
Greenville, SC 29601
(864) 242-4899 / (864) 242-4844
crawford@conlaw.com
wooten@conlaw.com
paavola@conlaw.com
henerey@conlaw.com
farmer@conlaw.com
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 6

SUMMARY OF THE ARGUMENT 6

ARGUMENT 7

I. The Trial Court Properly Found that D.R. Horton's Arbitration Provision is Unenforceable Because it is Unconscionable... 7

II. Severance is Against Public Policy 17

III. D.R. Horton's Arbitration Provision Lacks Mutuality and Improperly Limits the Arbitrator's Authority. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

315 Conley CW LLC v. Palmetto Bluff Development, LLC, 444 S.C. 521, 908 S.E.2d 892, 2024) 8, 13, 23

Baddorf, et al. v. D.R. Horton, Case No. 2022-CP-23-03974) (S.C. Com. Pl.) (Greenville County) 2, 8, 10

Brady v. Brady, 222 S.C. 242, 72 S.E.2d 193 (1952) 14

Brunetti v. D.R. Horton, Inc., et al., Case No. 2023-CP-08-02903) (S.C. Com. Pl.) (Berkeley County) 2, 8, 10

Buckeye Check Cashing, Inc. v. Cardengna, 546 U.S. 440 (2006) 19, 21, 22

Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) 6

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022) ....*passim*

Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011) 14

Dillon v. BMO Harris Bank NA, 856 F.3d 330, (4th Cir. 2017) 19

Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 649 S.E.2d 494 (Ct. App. 2007) 16

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (2004) 10

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999) 7

Hall v. Benefit Ass'n of Ry. Employees, 164 S.C. 80, 161 S.E. 867 (1932) 24

Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1989) 24

Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) 7, 22, 25

Howell v. D.R. Horton, Case No. 2024-CP-40-03510) (S.C. Com. Pl.) (Richland County) 2, 8, 10

Huskins v. Mungo Homes, LLC, 444 S.C., 595, 910 S.E.2d, 474 (2025) 6, 13, 16, 18, 19

Kirkman v. Parex, Inc., 369 S.C. 477, 632 S.E.2d 854 (2006) 4

Lackey v. Green Tree Financial Corp., 330 S.C. 388, 498 S.E.2d 988 (Ct. App. 1998) 11

Mart v. Great Southern Homes, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023)........19, 20, 21, 22

Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 698 S.E.2d 773 (2010)............................16

Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001).......................................7

Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 274 S.E.2d 423 (1981) 16

Pelican Bldg. Ctrs. Of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993).24

Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).................................13, 14

Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010) 19, 21, 22

Retreat at Charleston Nat'l County Club Home Owners Ass'n., Inc. v. Winston Carlyle Charleston Nat'l, LLC, WL 466562 (Ct. App. February 12, 2025) 18

Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 743 S.E.2d 778 (2013).....................6, 9

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007) 7, 15

Smith v. D.R. Horton, Inc., 417 S.C. 42 790 S.E.2d 1 (2016) .... *passim*

Oral Argument, *Smith*, 417 S.C. 42, 790 S.E.2d 1, (2016) https://media.sccourts.org/videos/2013-001345.mp4. 14

Smith v. D.R. Horton, Inc., 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013) 1

State v. Howard, 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009)...15

State v. Jones, 344 S.C.48, 243 S.E.2d 541 (2001) 15

State v. Lindsey, 394 S.C. 354, 714 S.E.2d 554 (Ct. App. 2011) 9

United States v. U.S. Smelting Ref. & Mining Co., 339 U.S. 186 (1950)..6

Upchurch v. D.R. Horton, Case No. 05CP4001231 (S.C. Com. Pl.) (Richland County)................8

White v. J.M. Brown Amusement Co., 360 S.C. 366, 601 S.E.2d 342 (2003) 13

Zitek v. D.R. Horton, et al, Case No. 2019-CP-04-01942) (S.C. Com. Pl.) (Anderson County). 2, 8, 10

Statutes

SCARC, Rule 20 .... 7, 9

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT CORRECTLY FOUND THAT D.R. HORTON'S ARBITRATION PROVISION IS UNCONSCIONABLE AND UNENFORCEABLE.

II. WHETHER THE TRIAL COURT CORRECTLY DECIDED THAT D.R. HORTON'S ARBITRATION PROVISION IS NOT SEVERABLE, OR ALTERNATIVELY, THAT BLUE-LINING IT WOULD VIOLATE SOUTH CAROLINA PUBLIC POLICY.

III. WHETHER THE TRIAL COURT CORRECTLY RULED THAT D.R. HORTON'S ARBITRATION AGREEMENT LACKS MUTUALITY AND IMPROPERLY LIMITS THE ARBITRATOR'S AUTHORITY.

STATEMENT OF THE CASE

D.R. Horton, Inc. ("D.R. Horton") presented Deborah Harley ("Harley") with its standard Purchase Agreement when she decided to purchase a new home in in the Abbey at Trolley Run in Aiken, South Carolina. D.R. Horton's standard Purchase Agreement is a boilerplate contract drafted by D.R. Horton, offered on a "take it or leave it basis." The Purchase Agreement attempts to wrongfully limit D.R. Horton's liability and unfairly "stack the deck" against new homeowners such as Harley.

D.R. Horton and its Purchase Agreement have previously been before this Court. In 2016, the South Carolina Supreme Court found the terms of the arbitration agreement in D.R. Horton's Home Purchase Agreement were unconscionable and unenforceable: "D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages are clearly one-sided and oppressive." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).[1]

In 2016, Chief Justice Toal wrote this about D.R. Horton's Home Purchase Agreement for the Smiths' purchase of a new home in Summerville:

---

[1] A majority of the South Carolina Supreme Court affirmed the Court of Appeals conclusion that D.R. Horton's arbitration provision was unconscionable in *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013).

> The Agreement is organized into numbered paragraphs and lettered subparagraphs, and sets forth the various responsibilities of the parties prior to and immediately following closing. Paragraph 14 of the Agreement is titled "Warranties and Dispute Resolution," and consists of subparagraphs 14(a) through 14(j). Subparagraphs 14(c) and 14(g) contain provisions stating that the parties agree to arbitrate any claim arising out of D.R. Horton's construction of the home, as well as any disputes related to the warranties contained in the Agreement. However, in the majority of the remaining subparagraphs of paragraph 14, D.R. Horton expressly disclaims all warranties for the home—including the implied warranty of habitability—except for a ten-year structural warranty. Moreover, subparagraph 14(i) stipulates that D.R. Horton "shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages."

Smith, 417 S.C. at 45, 790 S.E.2d at 2.

D.R. Horton — undeterred by the state's highest court finding that the terms of its arbitration provision were unconscionable, one-sided and oppressive — did not change it to make it less one-sided or oppressive. Instead, D.R. Horton continued, *for years*, to use substantively the same arbitration provision that the South Carolina Supreme Court refused to enforce.[2]

This case is no different. The trial court, following prevailing Supreme Court precedent, found that D.R. Horton's arbitration provision is unenforceable because (1) it is unconscionable under *Smith* and contains essentially the same intertwined references and disclaimers of any and all implied warranties and monetary damages of any kind; and (2) it is not severable from other unconscionable terms. The trial court also ruled that, alternatively, enforcing D.R. Horton's general severability clause would violate South Carolina public policy under *Damico*. The trial court also properly found that the arbitration provision lacks mutuality and improperly limits the

[2] In fact, four other South Carolina Circuit Courts recently refused to enforce the same or similar arbitration provision in D.R. Horton's purchase agreements. (R. pp. 163-176) (*Zitek v. D.R. Horton, et al*, Case No. 2019-CP-04-01942) (S.C. Com. Pl.) (Judge Sprouse January 27, 2021 Order) (Anderson County); (R. pp. 178-189) (*Baddorf, et al. v. D.R. Horton*, Case No. 2022-CP-23-03974) (S.C. Com. Pl.) (Judge Gravely April 25, 2023 Order Denying Horton's Arbitration Motion) (Greenville County); (*Howell v. D.R. Horton*, Case No. 2024-CP-40-03510) (S.C. Com. Pl.) (Judge Rivers October 22, 2024 Order) (Richland County); (*Brunetti v. D.R. Horton, Inc., et al.*, Case No. 2023-CP-08-02903) (S.C. Com. Pl.) (Judge Doby April 14, 2025 Order Denying D.R. Horton Inc.'s Motion to Compel Arbitration) (Berkeley County).

arbitrator's authority as an additional sustaining ground. (R. pp. 3-14) (Order Denying Motion to Compel Arbitration).

D.R. Horton now appeals these well-founded rulings in attempt to get this Court to "rescue" it from the adhesive, conflicting, and oppressive terms *it drafted*, and our Supreme Court has already ruled unconscionable.

STATEMENT OF FACTS

A.) Harley's Purchase Agreement and Deed.

Harley executed the purchase contract for her home on April 21, 2021. (R. pp. 52-84) (Purchase Agreement). It is undisputed that Harley's Purchase Agreement is a boiler-plate adhesion contract that D.R. Horton offered to Harley on a take-it-or-leave-it basis. (R. p. 4) (Order Denying Motion to Compel Arbitration).

The Purchase Agreement also contains "arbitration" language in Paragraph 15 that references D.R. Horton's Warranties[3] and Disclaimers in Paragraph 14:

> **15. 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 TO 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

[3] These "Warranties" are RWC's Ten Year Warranty and all Manufacturer Warranties which are provided to homeowners after they sign their purchase agreement at closing. (R. pp. 52-84) (Purchase Agreement).

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) (Purchase Agreement ¶15) (emphasis added).

Paragraph 14 describes the Warranties, wrongfully attempts to disclaim all implied warranties,[4] and unconscionably attempts to relieve D.R. Horton of all liability for "monetary damages of any kind":

14. WARRANTIES AND DISCLAIMER.

a. **Ten-Year Limited Warranty.** Seller shall provide Buyer with a written, ten-year limited warranty on the House administered by Residential Warranty Corporation ("*RWC*") which shall be effective as of the Closing Date. The terms and conditions of, and exclusions from, the ten-year limited warranty shall be as set forth in that document published by RWC, entitled "LIMITED WARRANTY, 10 YEAR LIMITED WARRANTY FOR NEW HOMES," and referred to herein as the "*Limited Warranty*". At Closing, Seller shall deliver to Buyer the documentation necessary for Buyer to obtain the actual Limited Warranty for the House from RWC.

b. **Manufacturers' Warranties.** At Closing, Seller shall assign to Purchaser all warranties, expressed or implied, which are given by the manufacturer of any appliance or product installed in the House.

c. **Disclaimer and Limitation on Seller's Liability.** THE LIMITED WARRANTY GIVEN TO PURCHASER BY SELLER PURSUANT TO SUBSECTION 14a ABOVE IS TO THE EXCLUSION OF ALL OTHER WARRANTIES, EXPRESSED OR IMPLIED, AND **SELLER HEREBY DISCLAIMS ANY AND ALL SUCH OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF HABITABILITY, MERCHANTABILITY OR**

[4] *See, e.g., Kirkman v. Parex, Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006) (finding that disclaimers of the warranty of habitability are disfavored and ineffective in most circumstances).

> **FITNESS FOR A PARTICULAR PURPOSE**. . . **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY** OR OBLIGATON TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 9(d) ABOVE AND IN SELLER'S DEED TO PURCHASER. EXCEPT AS OTHERWISE PROVIDED IN THE LIMITED WARRANTY, **SELLER SHALL NOT BE LIABLE FOR ANY REASON, UNDER ANY CIRCUMSTANCES, TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND**, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL OR INDIRECT DAMAGES.

(R. p. 57) (Purchase Agreement ¶14) (emphasis added).

Paragraphs 14 and 15 do not contain a survival or severability clause. (R. p. 57) (Purchase Agreement). Nor is there any other applicable survival clause found anywhere in the Purchase Agreement. (R. pp. 52-84) (Purchase Agreement). However, there are survival clauses that expressly apply to other terms;[5] and, it is undisputed that D.R. Horton drafted this contract. (R. pp. 52-84) (Purchase Agreement); *see also* (R. p. 2, 7) (Order).

Harley later received her deed when she closed in 2021 (R. pp. 157-161) (Harley Deed). Harley's deed does not contain an arbitration provision. *Id.*

B.) Procedural Background.

Harley filed a Complaint on July 21, 2023, and asserts the following claims against D.R. Horton: Negligence/Gross Negligence, Breach of Implied Warranties, and Violations of the South Carolina Unfair Trade Practices (R. pp. 15-26) (Complaint). D.R. Horton filed its Motion to Stay

---

[5] For instance, Paragraph 9(b) references Harley's obligation to indemnify D.R. Horton for pre-closing inspections—a clause that "[n]otwithstanding any other provision herein . . . shall survive closing." In a similar way, Paragraph 9(d) provides that D.R. Horton's "obligation to correct, repair or replace any items that are listed on a [pre-closing] Punch List shall survive closing." Finally, Paragraph 10 likewise provides that Harley's obligation to "indemnify and hold [D.R. Horton] harmless from" claims by real estate brokers or agents "shall survive closing." (R. pp. 55-56) (Purchase Agreement).

and Compel Arbitration ("Arbitration Motion") on March 29, 2024. (R. pp. 30-32) (Motion to Stay and Compel Arbitration.)

The trial court entered its Order Denying D.R. Horton's Arbitration Motion on November 27, 2024. (R. pp. 3-14) (Order Denying Motion to Compel Arbitration). D.R. Horton filed its Notice of Appeal on December 19, 2024. (R. pp. 286-287) (Notice of Appeal).

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47-48, 790 S.E.2d 1, 3 (2016). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

SUMMARY OF ARGUMENT

The trial court properly denied D.R. Horton's Arbitration Motion because the arbitration provision it drafted and inserted into Harley's Purchase Agreement is unenforceable for three independent reasons:

(1) It is unconscionable under *Smith*;

(2) It is inseverable under *Smith*, or alternatively, it is inseverable as a matter of South Carolina public policy under *Damico* and *Huskins*; and/or

(3) It lacks mutuality and improperly limits the arbitrator's authority.

D.R. Horton does not challenge the trial court's finding that the Purchase Agreement is an adhesion contract. That finding is the law of the case.[6] The only questions this Court therefore needs to address is (a) whether D.R. Horton's arbitration provision contains the same cross-

[6] The Law of the Case Doctrine "is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). In other words, "[a] decision on an issue of law made at one stage of a case **becomes binding precedent** to be followed in subsequent stages of the litigation" and unappealed rulings, such as this one, **must be affirmed**. *See, e.g., Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 160-61, 177 S.E.2d 544, 544 (1970) (finding an unchallenged ruling, "right or wrong, [was] the law of th[e] case").

references and one-siding terms as *Smith's* arbitration provision; or, alternatively, (b) whether enforcing D.R. Horton's arbitration severability clause to re-write these paragraphs would violate South Carolina's long-standing policy of protecting homeowners; or, (c) whether the arbitration provision lacks mutuality and limits the arbitrator's authority.

This Court should affirm the trial court's denial of arbitration if it agrees that D.R. Horton's arbitration provision is unenforceable for *any* of these three reasons. *See, e.g., Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal); Rule 220 (c) *SCACR* ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

ARGUMENT

I. The Trial Court Properly Found that D.R. Horton's Arbitration Provision is Unenforceable Because it is Unconscionable.

This Court should affirm the trial court's findings that D.R. Horton's arbitration provision is unconscionable because it is part of an adhesion contract, and the arbitration provision itself contains oppressive terms. (R. pp. 3-14) (Order Denying Motion to Compel Arbitration); *see also Smith v. D.R. Horton*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) ("[U]nconscionability is. . .the absence of meaningful choice. . .due to one-sided contract provisions, together with [oppressive] terms. . .").[7]

A. D.R. Horton's Purchase Contract is an Adhesion Contract and Harley Lacked Meaningful Choice in Her Ability to Negotiate its Terms.

[7] *See also Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007) (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). ("In analyzing claims of unconscionability 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.").

The trial court found that D.R. Horton's contract is one of adhesion, properly subject to heightened scrutiny due to the disparity in bargaining position between D.R. Horton and Harley. (R. pp. 3-14) (Order.); *see also Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 265 (2001)) ("[C]ourts tend to look upon [adhesion contracts] with 'considerable skepticism' because they give rise to 'considerable doubt that any true agreement ever existed to submit disputes to arbitration.' In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, *inter alia*, the relative disparity in the parties' bargaining power, the parties' relative sophistication"); *see also 315 Conley CW LLC v. Palmetto Bluff Development, LLC*, 444 S.C. 521, 532, 908 S.E.2d 892, 898 (2024) (finding "no conceivable potential for bargaining power" in an adhesion contract between purchasers of residential property and residential developers).

The law and facts support the trial court's conclusion. First, our Supreme Court has found a nearly identical D.R. Horton contract to be an adhesion contract and has "taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller. . ." *Smith* 417 S.C. at 50, 790 S.E.2d at 4. Similar D.R. Horton contracts have also been found to be adhesion contracts by our trial courts. (R. p. 8) (Order Denying Motion to Compel Arbitration).[8]

[8] *See Smith,* 417 S.C. at 49-50, 742 S.E.2d at 4-5; *see also* (R. pp. 252-256) (*Upchurch v. D.R. Horton*, 2005 WL 5621497, at *3 (S.C. Com. Pl.) (Judge Barber Sept. 28, 2005 Order Denying Horton's Arbitration Motion) (Richland County); (R. pp. 163-176) (2021 *Zitek* Order) ("First, this Court finds that Zitek's purchase agreement is an adhesion contract and she lacked a meaningful choice in her ability to negotiate arbitration"); (R. pp. 178-189) (2023 *Baddorf* Order) ("This Court also finds that the Arbitration Provision is unenforceable because the Purchase Agreements are adhesion contracts, and their arbitration provisions contain oppressive and unconscionable terms that are not severable" (internal citations omitted)); (2024 *Howell* Order) ("The Contract was a standard form contract produced by D.R. Horton and was offered to the Howell's on a 'take it or leave it' basis"); (2025 *Brunetti* Order) ("This Court finds that Brunetti's Purchase Contract is an adhesion contract, and she lacked a meaningful choice in her ability to negotiate arbitration").

Second, the facts here are identical to those in *Smith*. There is no evidence that Harley "enjoyed a substantially stronger bargaining position against D.R Horton than the average homebuyer" or that Harley "was represented by independent counsel" at the time she signed the contract (R. pp. 248-251) (Order Denying Motion to Compel Arbitration); *see also Smith v. D.R. Horton* at 48, 790 S.E.2d at 4. In fact, it is undisputed that Harley is an unsophisticated purchaser whereas D.R. Horton is a sophisticated developer that annually constructs nearly 800,000 homes throughout the United States. (R. pp. 3-14) (Order Denying Motion to Compel Arbitration); *see also* (R. pp. 191-206)) (D.R. Horton Website). Notably, D.R. Horton does not challenge these foundational findings and therefore they stand regardless.[9]

This Court should affirm the trial court's finding that Harley's Purchase Agreement is an adhesion contract for any or all these reasons.

B. D.R. Horton's Arbitration Provision Contains Oppressive, One-Sided Terms.

The trial court properly found that D.R. Horton's arbitration provision consists of Paragraphs 14 and 15 which contains oppressive terms that, among other things, disclaim all implied warranties and waive D.R. Horton's liability "for monetary damages of any kind." (R. p. 5) (Order Denying Motion to Compel Arbitration).

1. Paragraphs 14 and 15 are "Intertwined" and Contain Unfair Terms.

The trial court properly found that the arbitration provision contains both Paragraphs 14 and 15 which are intertwined and contain oppressive terms.

[9] *See, e.g., Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *see also* Rule 220, SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

a. The Scope of Arbitration Cannot Be Defined Without Paragraphs 14 and 15 Read Together.[10]

The trial court found that it could consider Paragraphs 14 and 15 together for two reasons. First, the trial court found that, like *Smith*, it must read Paragraphs 14 and 15 together "to understand the scope of the warranties and how different disputes are to be handled. (R. pp. 8-9) (Order Denying Motion to Compel Arbitration). The [different sections of the Contract] contain numerous cross-references to one another, intertwining the [sections] so as to constitute a single provision." *Smith*, 417 S.C. at 48, 790 S.E.2d at 4;[11] *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 91, 594 S.E.2d 485, 493 (2004) ("Where one contract explains, amplifies, or limits the other, those provision will be given effect between the parties so that the whole agreement, as actually contracted by the parties, may be effected."); 1 COMMERCIAL ARBITRATION § 19:36 ("in determining if [a] severed arbitration clause is enforceable under generic principles of contract law, the court may consider the context of the arbitration clause within the four corners of the [broader] contract, looking at other parts of the contract that *relate to, support, or are otherwise entangled with the operation of the arbitration clause*.") (emphasis added).

---

[10] *See Smith* at 48 n.4, 790 S.E.2d at 3 n.4 (explaining the scope of the arbitration agreement must first be determined because it control which portions of the agreement may properly be considered in conducting an unconscionability analysis).

[11] The *Zitek, Baddorf, Howell, and Brunetti* courts also found that these two paragraphs must be read together and refused to enforce the same. (R. pp. 163-176) (2021 *Zitek* Order) ([T]his Court finds the agreement's arbitration provision contains oppressive terms that disclaim all implied warranties and waive Horton's liability 'for monetary damages of any kind.' <u>The arbitration provision consists of Paragraphs 14 and 15 because, like *Smith*, cross-references 'intertwine' these provisions.</u>) (emphasis added); (R. pp. 178-189) (2023 *Baddorf* Order) ("The Arbitration Provision (Paragraph 15) in the Home Purchase Agreements here still reference those unconscionable provisions of what is now Paragraph 14. Thus, the unconscionable provisions are still 'intertwined' with the arbitration provisions, making the arbitration provision referencing them unenforceable."); (2024 *Howell* Order) ([T]he Court concludes that like in *Smith*, this Court must read additional provisions of the Contract to 'understand the warranties and how different disputes are handled') (quoting *Smith*); (2025 *Brunetti* Order) ("The Arbitration Provision consists of Paragraphs 14 and 15 as Paragraph 15 expressly requires one to consider Paragraph 14 to determine the scope of arbitration).

Second, the trial court found that Paragraph 15 expressly refers to (1) Paragraph 14 ("Purchaser and Seller shall submit to binding arbitration any and all disputes which may arise between them…including but not limited to…and (c) the limited warranty pursuant to section 14 above") and to (2) the Limited Warranty ("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. pp. 8-11) (Order Denying Motion to Compel Arbitration); (R. pp. 52-84) (Purchase Agreement). *Lackey v. Green Tree Financial Corp.*, 330 S.C. 388, 498 S.E.2d 988 (Ct. App. 1998) (holding that an authority incorporated by reference into an arbitration clause must be read into the terms of the arbitration agreement); *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (recognizing that *Smith* held that sections incorporated by reference into the arbitration provision must be read into the agreement in determining the question of enforceability).

The trial court went on to find that the only pertinent differences between *Smith* and this case are that D.R. Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and (2) its disclaimers and limitations from Paragraph 14(i) to Paragraph 14(c). These minor differences, however, did not change the fact that Harley's Purchase Agreement with D.R. Horton contains the same references and disclaimers considered by the *Smith* court as the comparison chart below clearly shows:

Harley's Paragraph 15:	Smith's Paragraph 14(g):
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) **<u>the Limited Warranty pursuant to Section 14 above</u>**. . . Any disputes arising **<u>under the [RWC] Warranty shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of the [RWC] Warranty</u>**. . .	Purchaser and Seller each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of Seller's construction of the home; (2) Seller's performance under any Punch List or Inspection Agreement; (3) **<u>Seller's performance under any warranty contained in this Agreement</u>**. . .If the arbitration arises out of a claim arising **<u>under the RWC Warranty, the rules, terms and conditions in the RWC Warranty. . .control.</u>**
Harley's Paragraph 14(c):	Smith's Paragraph 14(i):
The limited warranty given to Purchaser by Seller pursuant to subsection 14a above **<u>is to the exclusion</u>** of all other warranties, expressed or implied, and **<u>Seller hereby disclaims any and all such other warranties</u>**, express or implied, including but not limited to any warranty of **<u>habitability</u>**, merchantability or fitness for a particular purpose. . .After Closing, **<u>Seller shall have no liability or obligation to Purchaser of any nature whatsoever except as provided for in this Section 14 of this agreement, in Section 9(d) above and in Seller's Deed to Purchaser. Except as otherwise provided in the Limited Warranty, Seller shall not be liable for any reason under any circumstances to Purchaser or anyone claiming through Purchaser for monetary damages of any kind</u>**, **<u>including secondary, consequential, punitive, general, special or indirect damages</u>**.	**<u>Except for</u>** the RWC Warranty. . .Title Warranties, and . . . any warranties imposed by law, which cannot be disclaimed, Seller makes no other warranty of any kind**.** **<u>All other such warranties are hereby disclaimed</u>**. . .Seller makes no warranty as to merchantability or fitness for a particular purpose, either express or implied. . .**<u>Seller shall not be liable for monetary damages of any kind</u>**, including secondary, consequential, punitive, general, special or indirect damages.

There is no error in any of these findings. The trial court was correct to conclude that under *Smith,* and well recognized contracting principles, it could consider these two paragraphs together as a single arbitration provision.

b. The Arbitration Provision's Terms are Oppressive and One Sided.

Harley's arbitration provision contains the same implied warranty disclaimers and prohibitions on monetary recovery as Smith's arbitration provision. It is South Carolina law that D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages" are "clearly one-sided and oppressive." *Smith v. D.R. Horton*, 417 S.C. at 48, 790 S.E.2d at 4. In fact, D.R. Horton has not once argued to the contrary. *See generally* (R. pp. 33-51) (D.R. Horton's Memorandum in Support); *see also* (D.R. Horton's Initial Brief). Rather, D.R. Horton simply asserts that these oppressive terms are numerically separated and cannot be considered. As discussed above, this is the same argument the *Smith* court rejected because of the "[]paragraphs. . .contain numerous cross-references to another, intertwining the []paragraphs so as to constitute a single provision." *Id.*

Further, our courts have consistently held that limitations on statutory rights are both unconscionable and illegal. D.R. Horton's attempted limitation of damages violates Harley's statutory rights to recover treble damages and attorney's fees under the South Carolina Unfair Trade Practices Act. *See Conley*, 444 S.C. at 534, 908 S.E.2d at 899 (finding unconscionability where limitation on damages deprived "[p]laintiffs of their statutory right to treble damages for the SCUTPA claim."); *See also Huskins*, 444 S.C. at 595, 910 S.E.2d at 476 (finding a clause limiting the statute of limitations void and illegal as a matter of public policy) (*relying on White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371-72, 601 S.E.2d 342, 345 (2003) (contracts violating public policy expressed in statutory law are unenforceable.).

The trial court therefore correctly found "the arbitration provision contains oppressive terms that disclaim all implied warranties and waive D.R. Horton's liability 'for monetary damages of any kind'" (R. p. 6) (Order).

c. *Prima Paint* Does Not Preclude Finding Paragraphs 14 and 15 Constitute the Arbitration Provision.

D.R. Horton wants to point to *Prima Paint* and *Damico* – these cases do not save D.R. Horton.

First, *Prima Paint does* not preclude courts from considering provisions that are "referenced by" an express arbitration provision.[12]

Second, the Purchase Agreement here still closely resembles the contract in *Smith* as opposed to the contract considered in *Damico*.[13] In fact, the *Damico* court found the arbitration provision at issue in that case was "**dissimilar from that found in [*Smith*]**" because the arbitration provision there did not "refers to the limited warranty booklet or incorporates it by reference. *Damico,* 437 S.C. at 610, 879 S.E.2d at 754. (emphasis added).

[12] *Prima Paint* stands for the proposition that a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406-07 (1967). So long as there is a challenge to the arbitration provision, like here, then courts can decide the "arbitrability" issue and, in doing so, can also consider both the arbitration provision and its affiliated provisions. As Justice Toal aptly explained in the oral arguments for *Smith*, *Prima Paint* "simply says you have to look at the arbitration provision" and "does not stand for the proposition that one can cherry pick out" certain language of a provision one drafted and which includes express references to other provisions. Oral Argument at 6:05, *Smith*, 417 S.C. 42, 790 S.E.2d 1, https://media.sccourts.org/videos/2013-001345.mp4. And, since *Prima Paint*, our courts have looked beyond arbitration provisions "themselves" to assess their enforceability. *See, e.g., Smith*, 417 S.C. 42, 790 S.E.2d 1; *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 126 n.3, 713 S.E.2d 799, 804 n.3 (Ct. App. 2011) ("...Appellants contended this court is bound to reviewing the terms of the arbitration clause itself in determining its validity. We disagree. The South Carolina Supreme Court has looked outside the language of the arbitration clause to determine its enforceability.") (emphasis added), *partially vacated on other grounds by, Davis v. K.B. Home of S.C. Inc.*, 292 S.C. 634, 36, 842 S.E.2d 653, 654 (2014) ("We...vacate part II of the Court of Appeals' opinion addressing the issue of waiver"); *see also Brady v. Brady*, 222 S.C. 242, 246-47, 72 S.E.2d 193, 195 (1952) ("[I]t is proper to read together the different provisions therein dealing with the same subject matter...").

[13] *Damico* observed that the arbitration provision contained no "refer[ence] to the limited warranty" and did not "incorporate it by reference").

"*Prima Paint* does not preclude courts from considering provisions that are "referenced by" an express arbitration provision. (R. pp. 8-9) (Order Denying Motion to Compel Arbitration) (internal citations omitted) (emphasis in original). Based on this precedent, the trial court correctly considered both Paragraphs 14 and 15 as one "single provision" and this Court should affirm the same.

C. Severance of Paragraph 14 from Paragraph 15 is Impossible Because the Paragraphs are Intertwined.

This Court should also affirm the trial court's finding that Paragraph 15 is not severable from Paragraph 14 because of these same cross-references in *Smith*, 417 S.C. at 49, 90 S.E.2d at 4 (finding "cross-references" "intertwined" Horton's arbitration and liability limitations Paragraph "so as to constitute a single [arbitration] provision"). Notably, this Court in *Smith* acknowledged that "an arbitration clause is separable from the contract in which it is embedded;" however, this Court did **not** sever its arbitration and liability limitations paragraphs for the same reasons that it should not sever the same paragraphs here. *Smith*, 403 S.C. at 16, 742 S.E.2d at 41. ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for 'monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (emphasis added); *see also Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (recognizing that "severability is not always an appropriate remedy for an unconscionable provision…'[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts…'" (citations omitted).

D. Alternatively, Re-Writing the Arbitration Provision Is Not the Intent of the Parties.

D.R. Horton cursorily argues that this Court should re-write the Purchase Agreement because they contend it was the intent of the parties. This argument is not supported with either fact or law and should be rejected for this reason alone. *See State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority); *see also State v. Jones*, 344 S.C.48, 58-59, 243 S.E.2d 541, 576 (2001) (stating an argument is deemed abandoned on appeal when conclusory and without supporting authority).

This argument also fails on the merits because D.R. Horton did not and cannot meet its "intent" burden.

First, there is no general severability clause within the arbitration agreement. (R. pp. 52-84) (Purchase Agreement).[14] Next, there is a general merger clause stating that the document contains the "sole and entire agreement" and may not be modified "except by a writing signed by both parties." (R. p. 59) (Purchase Agreement) Moreover, this is an adhesion contract, evidencing D.R. Horton's intent that it "not be tinkered with". *See Huskins* 444 S.C. at 596, 910 S.E.2d at 477 (2024) ("[Seller] presented the contract as a 'take it or leave it' proposition. [Seller] wrote the contract and deemed its terms nonnegotiable. . . [t]his forceful proof of [Seller's] intent that the contract not be tinkered with convinces us that we should not rewrite it now'). "[D.R. Horton] insisted upon an adhesion contract so its terms could not be varied and would stick. [D.R. Horton] is stuck with that choice. *Huskins* at 598, 478.

D.R. Horton drafted a rigid, take-it-or-leave-it contract. Given this context, this Court must construe any doubt, uncertainty, or ambiguity of intent against D.R. Horton. *See Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 308, 698 S.E.2d 773, 778 (2010) ("[A] court will construe

---

[14] The Purchase Agreement does contain a general severability clause.

any doubts and ambiguities in an agreement against the drafter of the agreement."); *Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC,* 374 S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007) ("Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *(quoting Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (internal quotation marks omitted))).

II. Severance is Against Public Policy.

The trial court also correctly decided that, alternatively, enforcing D.R. Horton's general severability clause to rewrite these Paragraphs would violate South Carolina public policy. *Damico*, 437 S.C. 596 at 624, 879 S.E.2d at 761. ("Given that the subject matter of the contract involves new home construction, and South Carolina has an extensive history of expanding its common law on contracts so as to protect new homebuyers, we find that honoring the severability clause here – particularly because it goes to a material term of the arbitration agreements – would violate public policy."). "[L]egislation permits this Court to 'refuse to enforce' any unconscionable clause in a contract to 'limit its application so as to avoid an unconscionable result." *Smith*, 403 S.C. at 17, 742 S.E.2d at 41 (quoting S.C. Code Ann. § 36-2-302(1) (2003).

A. Unconscionable Language in the Arbitration Provision Cannot Be Blue-Penciled to Enforce Arbitration.

In *Damico*, our Supreme Court recently held that it was against South Carolina public policy to enforce a general severability clause that would give national builders like D.R. Horton an unfair advantage over South Carolina homeowners:

We first note the unconscionable portion of the agreement Lennar presumably wishes us to sever from the remainder of paragraph 4 deals with the proper, "agreed upon" parties to the arbitration proceeding. We decline to blue-pencil that provision.

It goes without saying that the clause of a contract that names the persons or entities that may properly be joined as parties to proceedings arising from any dispute involving that contract is a material term of the agreement. . . . Were we to sever such a clause from the arbitration agreement here, it would be the opposite of excising an 'ancillary logistical concern." Rather, we would be materially rewriting the contract by controlling who will—or will not—participate in arbitration.

Blue-penciling an agreement is, of course, within the Court's discretion. Here, we decline to excise a material term of the arbitration agreement and enforce the remaining, fragmented agreement. . . .

There are two additional, important considerations in this case that bear on severability. The first of these two considerations is that this arbitration agreement—and, indeed, the purchase and sale agreement as a whole—is a contract of adhesion. . . .

The second additional consideration of which we take note is that this contract involves a consumer transaction. . . . **More specifically, this contract involves the purchase of a new home, South Carolina has a deeply-rooted and long-standing policy of protecting new home buyers.** . . . As we stated over thirty years ago, **it is "intolerable to allow builders to place defective and inferior construction into the stream of commerce.**" . . . Thus, the fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis of this consumer transaction.

Generally, courts will not enforce contracts that violate public policy. . . .

A refusal to enforce a contract on the grounds of public policy is distinguished from a finding of unconscionability; rather than focusing on the relationship between the parties and the effect of the agreement upon them, public policy analysis requires the court to consider the impact of such arrangements upon society as a whole. . . .

Given the pervasive presence of oppressive terms in the arbitration provision, we find the severability clause here, in an unconscionable, adhesive home construction contract, is unenforceable as a matter of public policy. **We are specifically concerned that honoring the severability clause here creates an incentive for Lennar and other home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer.**

Damico, 437 S.C. at 619-22, 879 S.E.2d at 759-60 (emphasis added) (internal citations omitted).

Our Supreme Court recently affirmed its *Damico* holding in *Huskins*[15] by similarly refusing to sever unconscionable language from an arbitration provision in an adhesion contract because:

> [P]arties who impose standard form adhesion contracts on weaker parties would have no downside to throwing blatantly illegal terms betting they will go unchallenged or, at worst, that courts will throw them out and enforce the rest.

Id. at 598, 910 S.E.2d at 478 (citing *Damico*, 437 S.C. at 622, 879 S.E.2d at 760); *see also Retreat at Charleston Nat'l*, 2025 WL 466562, at *14 (finding in a commercial context "provisions… replete with terms that violate South Carolina law and public policy" could not be "effectively severed.").

Both *Damico* and *Huskins* acknowledge that South Carolina's deeply rooted and longstanding public policy of protecting homebuyers outweighs any benefit of severing offensive terms to salvage an "agreement" to arbitrate. *Damico*, 437 S.C. at 619-22, 879 S.E.2d at 759-60, ("[We] find severing terms from an unconscionable contract of adhesion (in this case, an arbitration agreement, discourages fair, arms-length transactions); *Huskins*, 444 S.C. at 597, 910 S.E.2d at 477 (citing *Dillon v. BMO Harris Bank NA*, 856 F.3d 330, 337 (4th Cir. 2017) ("When a party uses its superior bargaining power to extract a promise that offends public policy, courts generally opt not to redraft an agreement to enforce another promise in that contract").

D.R. Horton is doing exactly what the *Damico* and *Huskins* courts predicted and took the necessary steps to prevent. The Purchase Agreement is a gross overreach, and one D.R. Horton knew was unconscionable because of *Smith*. Now, D.R. Horton seeks a judicial lifeline in the form of blue-penciling the very unconscionable terms and contract it drafted. This Court must put an end to this blatant violation of South Carolina public policy and should affirm the trial court's

[15] *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 910 S.E.2d 474 (2024), *reh'g denied* (Jan. 16, 2025).

finding that Paragraph 15 is not severable from Paragraph 14. In doing so, this Court should additionally affirm the trial court's refusal to enforce D.R. Horton's general severability clause to "rescue" D.R. Horton as a matter of public policy.

B. No Relevant Case Law Supports Severability.

D.R. Horton incorrectly contends *Mart*;[16] *Buckeye*;[17] and *Rent-a-Center*[18] support severability here.

1. *Mart*

First, ***Mart* did not deal with a D.R. Horton purchase contract.** Rather, *Mart* involved two separate arbitration clauses in two separate documents: Mart's purchase contract and Mart's post-closing Limited Warranty. The *Mart* court ultimately upheld the arbitration clause in Mart's purchase contract because **unlike here**:

- Mart's arbitration clause was a stand-alone clause that did not reference other terms in the contract;
- Mart's arbitration clause was mutual and geared towards an unbiased decision by a neutral decision maker;
- Mart's arbitration clause did not attempt to disclaim "all monetary damages of any kind"; and
- **Mart did not challenge the arbitration clause "as unconscionable or lacking material terms."**

Id. at 316, 893 S.E.2d at 366 (emphasis added).

The *Mart* court therefore "was handcuffed" in its ability to judge the validity of the clause's waiver of implied warranties and had no choice but to compel arbitration. *Id.* ("Because Mart did not separately challenge the standalone arbitration provision in the GSH Sales Contract as

---

[16] *Mart v. Great Southern Homes*, 441 S.C. 304, 893 S.E.2d 360 (Ct. App. 2023).
[17] *Buckeye Check Cashing, Inc. v. Cardengna*, 546 U.S. 440 (2006).
[18] *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

unconscionable or as lacking material terms, we are handcuffed with respect to Mart's challenge of the validity of the waiver of implied warranties.").

On the contrary, **the arbitration provision here contains *the same* one-sided and oppressive terms as the arbitration clause in the *Smith* case** and that are unconscionable, inseverable, and unenforceable for the same reasons the Supreme Court articulated in that case.

In fact, the *Mart* court, like *Damico*, expressly noted that Mart's arbitration clause **materially differed from D.R. Horton's arbitration clause** in the *Smith* case. *Id.* at 318, 893 S.E.2d at 367 ("The standalone arbitration clause here differs from those found unconscionable in South Carolina cases considering adhesion contracts between sophisticated builders and new homeowners.") (citing *Smith*, 417 S.C. at 50, 790 S.E.2d at 5) (finding arbitration provision unconscionable and unenforceable where relief was left "to the whim of D.R. Horton while simultaneously allowing no monetary [recovery] when, as here, the repairs are simply inadequate.")).[19]

2. *Buckeye* and *Rent a Center*.

The type of contract an arbitration provision is in is material and relevant to the Court's analysis. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. at 621, 879 S.E.2d at 760. ("[T]he fact that the arbitration agreement contained within the purchase and sale agreement involves the construction and sale of a new home is relevant to our analysis if this consumer transaction").

[19] The *Mart* court further acknowledged that "*Damico* governs [the] inquiry in this dispute". *Mart*, 441 S.C. at 314 (referencing *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022). The *Damico* court refused to compel arbitration because the **arbitration provision - standing alone** - contained oppressive and one-sided terms rending the provisions unconscionable and against public policy. *Id.* at 604. (emphasis added)

Notably, *Buckeye* and *Rent-A-Center* were decided before *Smith v. D.R. Horton*, and neither case deals with an arbitration provision within a home purchase agreement.[20]

Next, *like Mart, Buckeye* and *Rent-A-Center* involved **an arbitration provision that was not independently challenged.** *Buckeye Check Cashing, Inc.* 546 U.S. at 446. ("[W]e conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract"); *Rent-A-Center, W., Inc.*, 561 U.S. at. 72. ("The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole.").

The facts of *Mart, Buckeye* and *Rent-A-Center* are distinguishable and do not support severability here.

III. D.R. Horton's Arbitration Provision Lacks Mutuality and Improperly Limits the Arbitrator's Authority.[21]

The trial court also properly found that D.R. Horton's Arbitration Provision "standing alone" lacks mutuality and improperly limits the arbitrator's authority. (R. pp. 11-12) (Order Denying Motion to Compel Arbitration)..

A. The Arbitration Provision Lacks Mutuality and Improperly Limits the Arbitrator's Authority.

The trial court correctly found the arbitration provision lacks mutuality and improperly limits the arbitrator's authority. (R. p. 3, 11-12) (Order Denying Motion to Compel Arbitration). As reiterated by *Smith*, and as perhaps first eloquently stated by the Fourth Circuit in *Hooters*, the essence of the Court's analysis of an arbitration provision is to determine whether its terms

[20] *Buckeye* involved an arbitration provision within a loan agreement. *Buckeye Check Cashing, Inc. v. Cardengna*, 546 U.S. 440 (2006) ("[Respondent] entered into various deferred-payment transaction"); *Rent-A-Center* involved an arbitration provision within an employment contract. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 65 (2010) ("[Respondent] filed an employment-discrimination suit").

[21] This Court does not need to consider these arguments if this Court finds either the arbitration provision is unconscionable, or severance would violate public policy.

promote a level playing field or stack the deck against disadvantaged parties such as Harley. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (defining unconscionability); *see also Hooters of Am., Inc. v. Phillips,* 39 F.Supp.2d 582 (D.S.C. 1998), *aff'd and remanded*, 173 F3d 933, 940 (4th Cir. 1999) (finding recission to be the appropriate remedy where arbitration provision was not geared to foster a level playing field.; *Damico*, 437 S.C. at 615; 879 S.E.2d at 757 (citing 17A Am. Jur. 2d *Contracts* § 272 ("Mutuality [ ] is a paramount consideration when assessing the substantive unconscionability of a contract term.")).

Here, D.R. Horton's arbitration provision "stacks the deck" against Harley. D.R. Horton seeks to limit the authority of any arbitrator that may decide a "post-closing" dispute by disclaiming its own liability beforehand:

> **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY** OR OBLIGATION TO PURCHASER OF ANY NATURE WHATSOEVER EXCEPT AS PROVIDED IN THIS SECTION 14 OF THIS AGREEMENT, IN SECTION 9(d) ABOVE AND IN SELLER'S DEED TO PURCHASER. EXCEPT AS OTHERWISE PROVIDED IN THE LIMITED WARRANTY, **SELLER SHALL NOT BE LIABLE FOR ANY REASON, UNDER ANY CIRCUMSTANCES, TO PURCHASER OR ANYONE CLAIMING THROUGH PURCHASER FOR MONETARY DAMAGES OF ANY KIND**...

(R. p. 57) (Purchase Agreement). "This language that purports to prevent the arbitrator from finding D.R. Horton liable for any type of monetary award prevents the arbitrator from making a fair, unbiased decision and is therefore invalid." (R. p. 12) (Order Denying Motion to Compel Arbitration) ("In analyzing claims of unconscionability in the context of arbitration agreements...courts...focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker.")); *see also Smith*, 417 S.C. at 50, 790 S.E.2d at 5 (finding arbitration provision unconscionable and unenforceable where relief was left "to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate"); *Conley*, 444 S.C. at 534, 908 S.E.2d at 899 (finding

unconscionability where limitation on damages deprived "[p]laintiffs of their statutory right to treble damages for the SCUTPA claim.").

B. Paragraph 15, Standing Alone, Is Still Unconscionable.

Even if this Court considers Paragraph 15, standing alone, it is unconscionable because D.R. Horton limits Harley's remedies to arbitration while reserving its own rights to litigate the only claims it would ever bring against a purchaser.

1. D.R. Horton is Procedurally Barred from Supplementing the Record on Appeal.

First, D.R. Horton contends that the trial court erred in relying on language it supplied from its own filings that were inconsistent with the terms of the Purchase Agreement.[22] Specifically, D.R. Horton included the following addition to Paragraph 15:

> ". . . (B) SHALL NOT APPLY IN THE EVEN THAT THE DISPUTE RELATES TO A DEAFAULY BY THE SELLER UNDER SECTION 16(F) OF THIS AGREEMENT".

(R. p. 34) (D.R. Horton Memorandum in Support of Motion to Compel Arbitration).

The contention that the trial court erred in relying on this language is a moot point. D.R. Horton failed to raise that issue with the trial court, and it therefore cannot be considered here. *See Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989) ("[T]his Court will take notice that something within the record was clearly not introduced into evidence below. To hold otherwise would encourage litigants to attempt to supplement the record with evidence they failed to introduce below. It would be utterly inappropriate for an appellate court to reverse a trial court's decision in reliance on evidence never submitted to the trial court for its consideration.") *see also*

[22] Notably, the extra language supplied by D.R. Horton to the trial court is not included in the "Pertinent Facts" section of the Order reciting Paragraph 15. (R. p. 4) (Order Denying Motion to Compel Arbitration). There is no evidence in the record to suggest that the inclusion of 13 additional words (supplied by D.R. Horton's counsel to the trial court), was material in determining the arbitration provision lacks mutuality.

Pelican Bldg. Ctrs. Of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) (where an issue is neither raised nor ruled on by the trial court, the issue is not preserved for appellate review). Further, D.R. Horton is bound by the admissions made by its counsel in the trial court proceedings.[23]

2. D.R. Horton's Argument Fails Even If It Were Properly Preserved.

Even if this Court could consider this assertion, D.R. Horton's argument still fails.

i. Paragraph 15 Lacks Mutuality.

D.R. Horton argues that, *e.g.*, "arbitration is binding on both Plaintiff and D.R. Horton." (R. p. 44) (D.R. Horton Memorandum in Support). This is a *blatant misrepresentation of the contract.* In addition to attempting to limit its liability beforehand, D.R. Horton seeks to limit the rights of Harley to arbitration while at the same time reserving its own right to litigate if it so chooses:

> **...NOT WITHSTANDING 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. 57-28) (Purchase Agreement ¶ 15).

This non-mutual arbitration obligation itself, on its face, is unconscionable. *Damico v. Lennar Carolinas*, 437 S.C. 596, 615, 879 S.E.2d 746, 757 (2022) (citing 17A Am. Jur. 2d Contracts § 272) ("Mutuality [ ] is a paramount consideration when assessing the substantive unconscionability of a contract term."); *see also Hooters of Am., Inc. v. Phillips*, 39 F.Supp.2d 582 (D.S.C. 1998*), aff'd and remanded*, 173 F3d 933, 940 (4th Cir. 1999) (finding decision to be the

[23] *See Hall v. Benefit Ass'n of Ry. Employees*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court or elsewhere, touching matters looking to the progress of the trial.").

appropriate remedy where *Hooters* promulgated so biased arbitration rules that the contract created a "sham system unworthy of the name of arbitration.")

ii. D.R. Horton is not Obligated to Arbitrate the Only Claims It Would Have Against Harley.

Any assertion that D.R. Horton might assert a claim and demand arbitration against Harley is illusory. According to the Purchase Agreement, binding arbitration specifically applies to 1) D.R. Horton's construction and delivery of the house; 2) D.R. Horton's performance under any punch list or inspection agreement and 3) the Limited Warranty pursuant to Paragraph 14. (R. pp. 52-84) (Purchase Agreement) Each of the categories involve the D.R. Horton's obligations, such that the D.R. Horton has no reason to assert a claim and demand arbitration. For all practical purposes, the arbitration agreement applies only to purchasers who have claims arising after closing.

D.R. Horton is permitted to file an action for interpleader of the earnest money paid by the Purchaser. According to Paragraph 4, D.R. Horton may interplead the earnest money into a court and shall be entitled to recover the costs of the interpleader, *including reasonable attorney's fees*. (R. pp. 53-54) (Purchase Agreement). There is no similar provision should Harley seek return of her earnest money. For practical purposes, the only dispute D.R. Horton might have is related to earnest money or purchase money, and for this it is **entitled to file in court and shall recover its costs and attorney's fees**. This lack of mutuality is further evidence of the one-sided nature of the arbitration agreement.

3. D.R. Horton's One-Sided Arbitration Clause is Unenforceable.

The trial court correctly found that Paragraph 15, standing alone, lacks mutuality and is unconscionable. Further, the assertions that D.R. Horton is bound to arbitrate claims is disingenuous because D.R. Horton reserved its right to bring any claim it would ever make against

Harley in court. This Court should reject any argument made by D.R. Horton to the contrary. This Court must affirm the trial court's finding that Paragraph 15, standing alone, lacks mutuality and is unconscionable.

CONCLUSION

D.R. Horton has flagrantly ignored the rulings of South Carolina appellate courts regarding the unconscionability of its agreements — which the courts should not tolerate — and its Purchase Agreement continues to include an arbitration provision that is unconscionable and violates public policy. It cannot and should not be severed.

The trial court properly found the D.R. Horton's arbitration provision unenforceable because it either (1) is unconscionable under *Smith;* (2) is not severable from other unconscionable terms under *Smith* or *Damico*; and/or (3) lacks mutuality and improperly limits the arbitrator's authority. (R. pp. 3-14) (Order Denying Motion to Compel Arbitration).

For all these reasons, Respondent respectfully asks this Court to affirm the trial court's findings and denial of D.R. Horton's Motion to Stay and Compel Arbitration.

s/Robert T. Lyles, Jr.
Robert T. Lyles, Jr. (SC Bar No. 10299)
Joseph Daniel Winterstein (SC Bar No. 105344)
Lyles & Associates, LLC
2113 Middle Street, Suite 202
Sullivan's Island, SC 29482
(843) 577-7730
rtl@lylesfirm.com
jdw@lylesfirm.com
Attorneys for Respondent

Sullivan's Island, South Carolina
August 11, 2025