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

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.

AMENDED FINAL BRIEF OF RESPONDENT

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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).

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:

> 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.[1]

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

[1] In fact, eleven other South Carolina Circuit Courts recently refused to enforce the same or similar arbitration provision in D.R. Horton's purchase agreements. *See* Argument IV(E), *infra.*

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 which 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 contains "arbitration" language in Paragraph 15 that references D.R. Horton's Warranties[2] 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 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,**

[2] 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).

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,[3] 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 FITNESS FOR A PARTICULAR PURPOSE**. . . **AFTER CLOSING, SELLER SHALL HAVE NO LIABILITY** OR OBLIGATON TO

[3] *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).

> 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;[4] 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 and Compel Arbitration ("Arbitration Motion") on March 29, 2024. (R. pp. 30-32) (Motion to Stay and Compel Arbitration.)

[4] 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).

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 as both a matter of South Carolina law under *Smith* and 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.

The only questions this Court needs to address is (a) whether Harley's Purchase Agreement for her home is an adhesive contract for a necessity that is subject to the considerable skepticism standard; (b) whether Harley's Arbitration Provision contains the same cross-references and one-sided terms as *Smith's* arbitration provision; (c) whether enforcing D.R. Horton's severability clause to re-write its Arbitration Provision would violate prevailing South Carolina Supreme Court precedent and South Carolina's long-standing policy of protecting homeowners; or, (d) whether the Arbitration Provision lacks mutuality and limits the arbitrator's authority.

This Court should find that the answer to each of these four questions is "Yes" and affirm the trial court's denial of Horton's Arbitration Motion. *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. . .").[5]

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

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

[5] *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.").

[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. Our Supreme Court has also found that contracts for a necessity such as a home are subject to considerable skepticism. *See* Argument IV(D)(2). 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).[6]

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*, 417 S.C.

[6] *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").

at 50, 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.[7]

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.

a. The Scope of Arbitration Cannot Be Defined Without Paragraphs 14 and 15 Read Together.[8]

[7] *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").

[8] *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 controls which portions of the agreement may properly be considered in conducting an unconscionability analysis).

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;[9] *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).

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

[9]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.' The arbitration provision consists of Paragraphs 14 and 15 because, like *Smith*, cross-references 'intertwine' these provisions.) (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).

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) *citing* (R. pp. 52-84) (Purchase 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); *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).

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) **the Limited Warranty pursuant to Section 14 above**. . . Any disputes arising **under the [RWC] Warranty shall be mediated, arbitrated and/or judicially resolved pursuant to the terms, conditions, procedures and rules of the [RWC] Warranty**. . .	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) **Seller's performance under any warranty contained in this Agreement**. . .If the arbitration arises out of a claim arising **under the RWC Warranty, the rules, terms and conditions in the RWC Warranty. . .control.**

Harley's Paragraph 14(c):	Smith's Paragraph 14(i):
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 fitness for a particular purpose. . .After Closing, **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**, **including secondary, consequential, punitive, general, special or indirect damages**.	**Except for** the RWC Warranty. . .Title Warranties, and . . . any warranties imposed by law, which cannot be disclaimed, Seller makes no other warranty of any kind**. All other such warranties are hereby disclaimed**. . .Seller makes no warranty as to merchantability or fitness for a particular purpose, either express or implied. . .**Seller shall not be liable for monetary damages of any kind**, 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.[10]

Second, the Purchase Agreement here still closely resembles the contract in *Smith* as opposed to the contract considered in *Damico*.[11] 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).

"*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.

[10] *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…").

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

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. 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).[12] 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 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

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

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 quotations omitted))).

II. Severance is Against Prevailing South Carolina Law and Public Policy.

The trial court also correctly decided that 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*[13] 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.

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

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 Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC*, 445 S.C. 566, 597, 915 S.E.2d 736, 752 (Ct. App. 2025) (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 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*;[14] *Buckeye*;[15] and *Rent-a-Center*[16] support severability here.

1. *Mart* Involved Two Different Contracts With a Different Builder and Unchallenged Arbitration Provisions.

First, ***Mart* did not consider 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 from a different builder. 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 unconscionable or as lacking material terms, we are handcuffed with respect to Mart's challenge of the validity of the waiver of implied warranties.").

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

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.")).[17]

2. *Buckeye* and *Rent-A-Center* Did Not Involve Either Contracts for a Home or a Challenged Arbitration Provision.

The type of contract that contains the arbitration provision is material and relevant to the Court's analysis. *Damico*, 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"); *see also* Argument IV(D)(2), *infra*. Notably, *Buckeye* and *Rent-A-Center* were decided before *Smith* and neither case deals with an arbitration provision within a home purchase agreement.[18]

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[17] 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)

[18] *Buckeye* involved an arbitration provision within a loan agreement. *Buckeye*, 546 U.S. at 442 ("[Respondent] entered into various deferred-payment transaction"); *Rent-A-Center* involved an arbitration provision within an employment contract. *Rent-A-Center*, 561 U.S. at 65 ("[Respondent] filed an employment-discrimination suit").

Next, like *Mart*, *Buckeye* and *Rent-A-Center* involved **an arbitration provision that was not independently challenged.** *Buckeye,* 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* 561 U.S. at. 72 ("The District Court correctly concluded that Jackson challenged only the validity of the contract as a whole."). *Mart*, *Buckeye* and *Rent-A-Center* therefore have no applicability here because, unlike all three of these cases, Harley challenged *Horton's* Arbitration Provision.

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

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 Also 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 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. Horton's Argument That the Trial Court Erred in Considering the Version of Paragraph 15 That D.R. Horton Quoted in Support of its Arbitration Motion is Unpreserved.

D.R. Horton claims that the trial court erred in considering the following language of Paragraph 15 that Horton quoted in support of its arbitration argument:

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

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

Horton's argument is procedurally precluded for many reasons. First, it was D.R. Horton's Counsel who supplied this language to the Court without realizing Harley's version of Paragraph 15 did not contain this language. D.R. Horton is bound by the admissions made by its counsel.[19] Second, D.R. Horton never clarified that it had quoted the wrong language before the trial court denied D.R. Horton's Arbitration Motion. Third, D.R. Horton never asked the trial court to reconsider its arbitration denial based upon any purported Paragraph 15 differences and therefore this argument is not preserved for appellate review. *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

[19] *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.").

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 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).

2. Paragraph 15 in Harley's Purchase Contract Lacks Mutuality.

Even if this Court could consider D.R. Horton's argument, the Paragraph 15 in Harley's Purchase Contract still 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 Harley's 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) (emphasis added).

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).

The only possible claims D.R. Horton could ever have against the purchaser is for non-performance. The only possible non-performance claim would be preclosing – as the buyer fully performs, by full payment, at closing. All accounts are settled at closing. Horton would never have

a reason to assert a post-closing claim. So the only applicability the arbitration clause could have as to D.R. Horton is as to its pre-closing claims.

Preclosing, Horton has the purchaser's escrow monies. Horton can implead the purchaser's deposit on any pre-closing claim. Horton reserved the right to implead in court instead of arbitration. Therefore, when one looks behind the smoke and mirrors, there is no mandatory arbitration at all for Horton's claims, notwithstanding the mirage to the contrary. [20]

In other words, the only claims D.R. Horton can assert are preclosing claims related to earnest money. D.R. Horton can procced with these claims **in court as opposed to arbitration. Worse yet, Horton can also recover its costs (and the purchaser cannot).** There is no similar provision should Harley seek the return of her earnest money; rather, D.R. Horton intentionally drafted her contract such that it could try to compel any pre- or post-closing claims she had into arbitration.

This non-mutual arbitration obligation itself, on its face, is unconscionable. *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."); *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 *Hooters* promulgated biased arbitration rules that created an unlevel playing field). The trial court therefore did not err in finding that Paragraph 15, standing alone, lacks mutuality and is unconscionable.

[20]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. Stated differently, once D.R. Horton has been paid at closing, there is no possibility of D.R. Horton asserting a post-closing claim against Harley.

IV. The Trial Court's Arbitration Denial Should be Affirmed Because D.R. Horton's Arbitration Provision is Unconscionable and Unenforceable as a Matter of State Law

D.R. Horton amended its Final Brief to cite three trial court decisions that recently found in favor of Horton based upon Horton's flawed argument that, *e.g.*, federal law somehow applies to override this state's unconscionability laws (collectively "Horton's New Orders").[21]

This Court should find that these decisions are neither binding nor persuasive because they are all under reconsideration and are further distinguishable for following reasons:

A. There is No Federal or State Policy Favoring Arbitration.

First, all of Horton's New Orders are expressly based on the erroneous premise that there is a federal or state policy favoring arbitration. However, there is no such policy according to both our Supreme Court and the U.S. Supreme Court. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417-19 (2022); *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025).

In *Lampo*, for instance, our Supreme Court clearly explained that:

> (1) "[T]he South Carolina Supreme Court *has dispensed with the incorrect notion* that "there is a federal and state 'policy favoring arbitration'"; and
>
> (2) "The FAA requires that courts treat arbitration agreements the same as all other contracts—*no more, no less*."

Lampo, 445 S.C. at 317, 914 S.E.2d at 146 (emphasis added); *see also Palmetto Constr. Grp. V. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) (finding the notion that there is a federal policy favoring arbitration "is attributable to lower-court misrepresentation

[21] D.R. Horton amended its Final Brief on October 13, 2025 to cite three orders issued in September 2025 that granted, *albeit* erroneously, D.R. Horton's motions to compel arbitration. *Ban v. D.R. Horton, Inc*, No. 2025-CP-26-00526 (S.C. Ct. Com. Pl. Sept. 15, 2025) ("Ban Order"); *Prest v. D.R. Horton, Inc.*, No. 2025-CP-26-00484 (S.C. Ct. Com. Pl. Sept. 15, 2025) ("Prest Order"); *Vriens v. Tip-Top Roofing & Constr., LLC*, No. 2:23-cv-06797-DCN (D.S.C. Sept. 4, 2025).("Vriens Order")

of *thirty-year-old dicta*…" and holding "[t]here is … *no* public policy—federal or state—'favoring' arbitration.") (citations omitted) (emphasis added).

In *Morgan*, the United States Supreme Court similarly explained that there is no policy "fostering" arbitration:

> The policy, we have explained, is merely an acknowledgement of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: **The policy is to make arbitration agreements as enforceable as other contracts, but *not* more so.** Accordingly a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation. If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it. **The federal policy is about treating arbitration contracts like all others, *not* about fostering arbitration.**

Morgan, 596 U.S. at 417-19 (internal citations and quotations omitted) (emphasis added).

All of Horton's New Orders are wrongfully premised on this *non-existent* policy:

- (Ban Order, p. 4) ("Because of the well-established *federal policy favoring arbitration* of disputes, courts must assess the validity and scope of an arbitration agreement with a heavy presumption in favor of arbitration") (emphasis added);

- (Prest Order, p. 4) ("Because of the well-established *federal policy favoring arbitration* of disputes, courts must assess the validity and scope of an arbitration agreement with a heavy presumption in favor of arbitration") (emphasis added); and

- (Vriens Order, p. 7) ("Courts recognize that *the Federal Arbitration Act* creates a strong presumption in favor of arbitration") (emphasis added).

This is an error of *both* South Carolina and federal law. *Morgan*, 596 U.S. at 417-19; *Lampo*, 445 S.C. at 317, 914 S.E.2d at 146. This error led these trial courts to commit many other errors including conducting entirely flawed unconscionability and severability analyses.[22]

[22] Respondent also recognizes that two of Horton's New Orders were drafted by D.R. Horton's Counsel and the errors in D.R. Horton's flawed analysis is what fostered these trial courts' flawed findings.

B. D.R. Horton's New Orders Rely on Cases That Do *Not* Interpret D.R. Horton Contract Language.

Second, Horton's New Orders' reliance on *Mart* and *Damico* is misplaced. (Ban and Prest Orders, p. 12); (Vriens Order, p. 18).

1. *Mart* and *Damico* Do Not Involve a D.R. Horton Contract.

Neither *Mart*[23] nor *Damico*[24] dealt with a D.R. Horton purchase contract. In fact, the *Mart* Court noted that Mart's arbitration clause materially differed from D.R. Horton's arbitration provision in *Smith*. *Id.* at 318, 893 S.E.2d at 367 *citing Smith*, 417 S.C. at 50, 790 S.E.2d at 5) ("The standalone arbitration clause here *differs* from those found unconscionable in South Carolina cases considering adhesion contracts between sophisticated builders and individual new home purchasers.") (emphasis added).[25]

The *Damico* Court similarly found that the purchase contract's arbitration clause at issue in that case was "dissimilar" from D.R. Horton's arbitration provision in *Smith*:

> Pursuant to the *Prima Paint* doctrine, the FAA requires courts to separate the validity of an arbitration clause from the validity of the contract in which it is embedded. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint*, 388 U.S. at 395, 87 S.Ct. 1801). The validity of the arbitration clause is a matter for the courts, whereas the validity of the contract as a whole is a matter for the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) ("[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.").
>
> As a result, as we stated in *D.R. Horton*, "in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract." 417 S.C. at 48, 790 S.E.2d at 4. Necessarily, then, the Court must first define the scope of the arbitration agreement before

[23] *See Mart*, 441 S.C. at 307, 893 S.E.2d at 361 (analyzing the enforceability of a **Great Southern Homes** sales contract).

[24] *See Damico*, 437 S.C. at 624, 879 S.E.2d at 762 (finding "*Lennar* furnished a grossly one-sided contract") (emphasis added).

[25] *See also* Argument II(B)(1) for additional points distinguishing the *Mart* case from this one, including the fact that the arbitration provision in *Mart* was never challenged.

considering whether that agreement is unconscionable. *Id.* 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 controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis").

In *D.R. Horton*, one of the central issues involved defining the scope of the arbitration agreement. *Id.* at 48, 790 S.E.2d at 4. The plaintiff-homeowners claimed the arbitration agreement comprised the entire section of the contract titled "Warranties and Dispute Resolution"; the defendant-homebuilder claimed the arbitration agreement was contained solely within one subparagraph of that section. *Id.*

A majority of the Court ultimately agreed with the plaintiffs, finding the arbitration agreement broadly encompassed the entirety of the "Warranties and Dispute Resolution" section of the contract. *Id.* The Court explained the various subparagraphs in the "Warranties and Dispute Resolution" section "contain[ed] numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision." *Id.*

Therefore, the Court concluded that the section as a whole—including the subparagraphs relating to arbitration *and* those relating to warranties—"*must be read [together] to understand the scope* of the warranties and how different disputes are to be handled."

Here, in contrast to *D.R. Horton*, there is a distinct section of the purchase and sale agreement that sets forth the entirety of the arbitration agreement. As correctly noted by the court of appeals, Section 16 of the agreement—titled "Mediation/Arbitration of Disputes"—deals solely with the scope of arbitration and the requisite formalities accompanying an arbitration proceeding, such as the procedural rules and the number of arbitrators required to resolve the dispute. Within Section 16, *there is nothing that refers to the limited warranty booklet or incorporates it* by reference. Rather, Section 16 is a standalone arbitration provision, dissimilar from that in *D.R. Horton*.

Damico, 437 at 609-610, 879 S.E.2d at 753-754 (emphasis added).

In contrast to *Mart* and *Damico*, Harley's Arbitration Provision expressly incorporates "Section 14 above" and contains the same one-sided and oppressive terms as those in Smith's Arbitration Provision. *Smith*, 417 S.C. at 50, 790 S.E.2d at 5; *Damico*, 437 S.C. at 624, 879 S.E.2d at 761. *Smith* is controlling; *Smith* involved a D.R. Horton contract; and therefore *Smith* is the roadmap that this Court should follow.

2. Horton's New Orders are Based on The *Smith* Dissent but the *Smith* Majority Governs.

D.R. Horton's amended argument maintains that this Court should ignore the *Smith* majority, disregard D.R. Horton's self-serving disclaimers, and follow the same *Prima Paint*/severability roadmap as Horton's New Orders. What D.R. Horton does not explain is that its new argument is entirely based on Justice Kittredge's dissent in *Smith. See Smith*, 417 S.C. at 51-63, 790 S.E.2d at 6-10 (Kittredge, J., dissenting).

First and foremost, this dissent has no authoritative force and should not be followed by this Court. *See Matthews v. Clark*, 105 S.C. 13, 89 S.E. 471, 472 (1916) ("A dissenting opinion shows that the case has been thoroughly considered. The opinions of the majority govern.") (emphasis added); *see also State of Ga. v. Stanton*, 73 U.S. 50, 69, 18 L. Ed. 721 (1867) ("The dissent, however, is only a dissent. It has no authoritative force."); *State v. Batson*, 107 S.C. 460, 93 S.E. 135, 135 (1917) ("The majority opinion shows what is the law, and the dissenting opinion shows what is not the law**.**") (emphasis added).

a. The Trial Court Did Not Err Under *Prima Paint.*

Justice Kittredge's first point – that D.R. Horton's warranty and arbitration paragraphs should not constitute the arbitration agreement "itself" for purposes of *Prima Paint* – was addressed by Kittredge himself in *Damico.*

Following a lengthy *Prima Paint* explanation, Justice Kittredge compared *Damico's* arbitration clause to the *Smith* arbitration clause and found that "within [Damico's] arbitration clause there [was] nothing that refers to the limited warranty booklet or incorporates it by reference. . .dissimilar from that in [*Smith*]." *Damico*, 437 S.C. at 610, 879 S.E.2d at 754.

Justice Kittredge also relied on *Smith* in defining "the scope of [Damico's] arbitration agreement *before* considering whether that agreement is unconscionable." *Damico*, 437 S.C. at 609, 879 S.E.2d at 753 (first analyzing whether or not various subparagraphs were intertwined so as to constitute a single provision before analyzing unconscionability) (emphasis added).

In doing so, Justice Kittredge respected the decision of the *Smith* majority, and their finding that D.R. Horton's warranty and arbitration paragraphs constitute the Arbitration Provision itself. *See Matthews*, 105 S.C. 13, 89 S.E. at 472 ("When that question arises in future cases the dissenting justice is as much bound by the decision of the majority as is the justice who wrote the prevailing opinion"). This Court should do the same.

b. The Trial Court Did Not Err in Finding That Paragraphs 14 and 15 Are Not Severable.

Justice Kittredge's second point – that severability depends on the intent of the parties – was recently addressed by our Supreme Court in *Huskins.* According to the *Huskins* Court:

> The severability analysis is the same regardless of whether a clause is unenforceable due to legislation, unconscionability, or some other public policy. *See* Restatement (Second) of Contracts § 178 comment a. The comments to § 184 emphasize that "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." *Id.* at comment b.
>
> Determining the intent of contracting parties can be a factual question, but here there is no question of fact left to be determined for three reasons. First, there is no severability clause. Second, there is a merger clause in the contract that declares the contract "embodies the entire agreement" and that it can only "be amended or modified" by a writing executed by both the Huskins and Mungo. Third, Mungo has conceded, as it must, that this is an adhesion contract. This means Mungo presented the contract as a "take it or leave it" proposition. Mungo wrote the contract and deemed its terms nonnegotiable.
>
> Huskins could not even edit it. This forceful proof of Mungo's intent that the contract not be tinkered with convinces us that we should not rewrite it now.

In our view, the clause shortening the statute of limitations was material because it could determine the outcome of many disputes by calling time on any claim not raised within ninety days. The clause was no mere "ancillary logistical concern" of the arbitration agreement; it was a brash push to accomplish through arbitration something our statutory law forbids. *See Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 619–20, 879 S.E.2d 746, 759 (2022).

If we lifted out the clause, the legal statute of limitations period (which in most cases allows claims to be filed within three years of their reasonable discovery) would drop in. This would rewrite the arbitration agreement to expand the statute of limitations by several orders of magnitude. The whole point of an arbitration provision is to provide an alternative way to resolve disputes *in a fair and efficient manner*. Yet Mungo designed its arbitration provision not to streamline the resolution of disputes but to reduce their number. One sure way to reduce the number of disputes is to shrink the time in which they may ordinarily be brought under applicable law. We conclude Mungo's manipulative skirting of South Carolina public policy *goes to the core of the arbitration agreement and weighs heavily against severance. See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 35 n.9, 644 S.E.2d 663, 674 n.9 (2007) (discussing severability); *see Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 337 (4th Cir. 2017) ("[W]hen 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." (citing Restatement (Second) of Contracts § 184 comment. b)); Farnsworth, *supra*, at § 5-10; *Williston on Contracts* § 19:70.

As in *Damico*, we decline to salvage the arbitration agreement by severing out the statute of limitations clause. *This is an adhesion contract, meaning it is highly doubtful the parties truly intended for severance to apply. Damico*, 437 S.C. at 624, 879 S.E.2d at 761. The contract was *for a consumer purchase of a new home*, which brings into play public policy concerns *Damico* eloquently addressed. We have been steadfast in protecting home buyers from unscrupulous and overreaching terms, and applying severance here would erode that laudable public policy. *See id.* at 624, 879 S.E.2d at 761–62 (holding unconscionable terms in arbitration agreement would not be severed despite presence of severability clause in contract, stating: "[b]ecause this is a contract of adhesion, and because the transaction involves new home construction, we decline to sever the unconscionable provisions for public policy reasons").

Mungo insisted upon an adhesion contract so its terms could not be varied and would stick. Mungo is stuck with its choice. Were we to hold otherwise, parties who impose standard form adhesion contracts on weaker parties would have no downside to throwing in blatantly illegal terms betting they will go unchallenged or, at worst, that courts will throw them out and enforce the rest.

Huskins, 444 S.C. at 596-98, 910 S.E.2d at 477-78 (emphasis added).

Here, like in *Huskins*, Harley's purchase contract is an adhesive contract for a necessity. *See* Argument D (2), *infra.* Also like in *Huskins*, the terms in Harley's Arbitration Provision that disclaim D.R. Horton's implied warranties and all monetary liability are both (1) material "because [they] could determine the outcome of many disputes" and (2) unfair because "they stack the deck" in favor of D.R. Horton. *See Huskins*, 444 S.C. at 596-98, 910 S.E.2d at 477-78.

Our Courts have repeatedly held that in this scenario "it is doubtful the parties truly intended for severance to apply" and "applying severance here would erode [our] laudable public policy" of protecting South Carolina homeowners. *See Huskins*, 444 S.C. at 597, 910 S.E.2d at 477. The trial court followed these prevailing decisions and did not in err in refusing to sever Paragraph 14 from Paragraph 15.

D. D.R. Horton Never Previously Challenged Harley's Lack of Meaningful Choice, and Even if D.R. Horton Had, the Court Did Not Err in Reaching This Conclusion as a Matter of South Carolina Law.

D.R. Horton never made the argument it just now makes here that Harley had a meaningful choice in the purchase of her home. D.R. Horton first made this argument on appeal in 2025 and therefore it is not preserved for review. *Lucas v. Rawl Family Ltd. P'ship.*, 359 S.C. 505, 510–11, 598 S.E.2d 712, 715 (2004) ("It is well settled that. . .an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.") (emphasis added); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion).

Further, the trial court's finding that Harley lacked meaningful choice is supported by specific facts (*e.g.*, that D.R. Horton is a sophisticated builder based on its website and Harley's contract was offered on a take-it-or-leave-it) that D.R. Horton has not, and still does not, challenge.

Rule 220, *SCACR* ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

In addition to being procedurally precluded, D.R. Horton's meaningful choice argument is substantially flawed for four other reasons.

1. Harley Had Exponentially Less Bargaining Power Compared to D.R. Horton.

First, it is settled South Carolina law that there is "no conceivable potential for bargaining power" between home purchasers and residential developers. *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.); *see also Huskins*, 444 S.C. at 596, 910 S.E.2d at 477 ("[T]his is an adhesion contract [which] means Mungo presented the contract as a 'take it or leave it' proposition")*; Damico*, 437 S.C. at 613, 879 S.E.2d 756 ("A take-it-or-leave-it contract of adhesion. . .may indicate one party lacked a meaningful choice"); *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (explaining adhesion contracts are "standard form contracts offered on a take-it or leave-it basis with terms that are not negotiable").

Even the *Damico* court found that the homeowners lacked "meaningful choice" in entering their purchase contracts:

> Here, we find it manifest *that the purchase and sale agreement is a contract of adhesion* given by Lennar to all of the homebuyers in the Abbey, with only a few blank spaces to fill in, including the buyer's name, the relevant property address, and the purchase price. Other than those type of minor blank spaces, the terms of the purchase and sale agreement—particularly those of any consequence to Lennar—are non-negotiable, with some terms not even applying to specific homebuyers.
>
> Moreover, the sophistication of Petitioners, as individual homebuyers, *pales in comparison* to Lennar. Given that Lennar *has sold thousands of homes* in the

> Carolinas, whereas Petitioners will likely only purchase, at best, a handful of homes in their entire lifetime, we find it fair to characterize *Lennar as significantly more sophisticated than Petitioners* in home buying transactions. These factors combine to highlight the significant disparity in the parties' bargaining power, with Lennar *enjoying a much stronger bargaining position* than Petitioners. **We therefore find Petitioners lacked a meaningful choice in their ability to negotiate the arbitration agreement**. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) ("We have [ ] 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.").

Damico, 437 S.C. at 614-615, 879 S.E.2d at 756-757 (emphasis added).

In fact, this Court recently invalidated one-sided terms in a contract *between two sophisticated parties* – a material supplier and an installer – because it found:

> **[I]t inconceivable that [an installer] with even a semblance of bargaining power** who understood the implications of the language in these agreements **would sign them unless there existed a total absence of meaningful choice**.

Retreat at Charleston Nat'l Country Club Home Owners Ass'n, Inc. v. Winston Carlyle Charleston Nat'l, LLC, 445 S.C. 566, 599, 915 S.E.2d 736, 753 (Ct. App. 2025) (emphasis added).

Here, Harley, an unsophisticated purchaser, is certainly in a more disparate bargaining position than the installer in *Retreat at Charleston Nat'l*. Like *Smith*, Harley is "not a substantial business concern of D.R. Horton because Harley does "not comprise a large portion of Horton's clientele." *Smith*, 417 S.C. at 50, 790 S.E.2d at 5.

It follows then that the trial court did not err in finding that Harley "lacked a meaningful choice in [her] ability to negotiate the arbitration clause"[26] due to the disparity in bargaining position between Harley and D.R. Horton, America's No. 1 Home Builder.

[26] *Id.; see also 315 Conley,* 444 S.C. at 531, 908 S.E.2d at 897.

2. Harley's Contract is For a Necessity.

The trial court also did not err in finding that Harley's purchase contract is properly subject to heightened scrutiny because it is a contract for a home. Our Supreme Court made clear in *Simpson* that adhesion contracts for necessities such as houses must be viewed with "considerable skepticism":

> The Ohio courts characterize automobiles as a "necessity" and factor this characterization into a determination of whether a consumer had a "meaningful choice" in negotiating the arbitration agreement. *See, e.g., Eagle,* 809 N.E.2d at 1175; *Cf. Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 161 A.2d 69, 85 (1960) (invalidating auto manufacturer's standard-form disclaimers of implied warranties because such disclaimers frustrated consumer protection legislation given that in modern times, "automobiles are a common and necessary adjunct of daily life"). In this same context, the Ohio courts have adhered to the idea that sales agreements between consumers and retailers "*are subject to considerable skepticism* upon review, due to the disparity in bargaining positions of the parties." *Eagle,* 809 N.E.2d at 1179. Under the Ohio courts' rationale, "the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.

Simpson, 373 S.C. at 26, 644 S.E.2d at 669 (emphasis added) *citing Eagle* v. *Fred Martin Motor Co.*, 157 Ohio App. 3d 150, 809 N.E.2d 1161 (9th Dist. 2004) ("[I]n consumer transactions, and *especially those involving necessities* as automobiles, the trial and appellate courts should pay *closer attention to the terms of the arbitration clause*") (emphasis added) *citing Battle v. Bill Swad Chevrolet, Inc.*, 140 Ohio App.3d 185, 192, 746 N.E.2d 1167 (2000) ("*Transactions involving modern-day necessities deserve especially close scrutiny* before an arbitration clause is enforced by the courts."); *see also Huskins*, 444 S.C. at 597-598, 910 S.E.2d at 477 (finding homebuilder contracts for the "consumer purchase of a new home … brings into play public policy concerns"); *Damico*, 437 S.C. at 714-15, 879 S.E.2d at 756 (finding homebuyers had unequal bargaining

power compared to a large builder, and the contract was standard form with minimal blanks); *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").

In short, the "necessity" aspect of a contract heightens its adhesive nature because it removes meaningful choice — the consumer is "forced" to agree by circumstance, not by free choice.[27]

3. The Vriens Order's Cite to *Smith* is Error.

Third, D.R. Horton's meaningful choice argument relies on the *Vriens* Order; yet, this Order is flawed because it wrongfully cites to *Smith* in support of its conclusory finding that the plaintiffs in that case "had a meaningful choice to enter into the Homeowner Contracts with D.R. Horton. . ." (Vriens Order, pp. 17-18) (*citing Smith*, 417 S.C. at 49-50, 790 S.E.2d at 4).

Smith does not support this finding. In fact, the *Smith* Court held the exact opposite:

> We have [ ] 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." *Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989); *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147–48, 687 S.E.2d 47, 49–50 (2009) (stating that South Carolina's "courts have shifted from following the doctrine of *caveat emptor* ('let the buyer beware') to the doctrine of *caveat venditor* ('let the seller beware')"). There is no indication in the record that the Smiths enjoyed a substantially stronger bargaining position against D.R. Horton

[27] The general rule of thumb is that a contract for a necessity becomes an adhesion contract when:

- The essential nature of the good/service means the weaker party must accept to meet basic needs;
- The terms are non-negotiable and dictated by the stronger party; and
- The weaker party lacks bargaining power because refusing means losing access to the necessity.

See generally, Simpson, 373 S.C. at 27, 644 S.E.2d at 670. Harley's Contract satisfies all three requirements.

> than the average homebuyer, or that they were represented by independent counsel. Moreover, the Smiths were a single client to a corporation that constructs houses in twenty-seven states. Thus, the Smiths were also not a substantial business concern of D.R. Horton, as they did not comprise a large portion of D.R. Horton's clientele.
>
> Accordingly, we find that *the Smiths lacked a meaningful choice* in their ability to negotiate the arbitration clause in the Agreement.

Smith, 417 S.C. at 49-50, 790 S.E.2d at 4-5 (emphasis added).

Harley is in the exact, same position as *Smith* and there is "no indication in the record" showing otherwise. *Id.*

4. The Fact that Smith Separately Initialed D.R. Horton's Arbitration Provision Did Not Affect the *Smith* Majority's Meaningful Choice Analysis.

Finally, D.R. Horton's new argument that Harley had "meaningful choice" because she separately initialed her Arbitration Provision is again wrongfully premised on Justice Kittredge's *dissent* in *Smith*. *Smith*, 417 S.C. at 61, 790 S.E.2d at 11 (Kittredge, J. dissenting) ("Further, I emphasize the fact that the Smiths separately initialed subparagraph (g) title 'Mandatory Binding Arbitration'…, **which in my judgment** indicates the parties themselves viewed these terms as distinct contractual provision to which they separately consented.") (emphasis added).

Smith also initialed subparagraphs strikingly similar to the subparagraphs initialed by Harley in this case. The *Smith* majority, however, did not consider the presence or absence of these initials in deciding whether Smith had meaningful choice. Rather, the *Smith* majority set out the following meaningful choice test which makes no mention of initials:

> 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, whether the parties were represented by independent counsel, and whether the plaintiff is as substantial business concern.

See, e.g., Smith, 417 S.C. at 49, 790 S.E.2d at 4 (internal quotations omitted).

Controlling South Carolina law[28] - and the *Smith* majority's test for assessing meaningful choice in the specific context of a D.R. Horton contract– is the law this Court should follow in analyzing the enforceability of Harley's Arbitration Provision here.

E. There Have Been Many Trial Court Orders Since *Smith* that have found D.R. Horton's Arbitration Provision Unconscionable and Inseverable

Finally, D.R. Horton may have had three trial courts recently rule in its favor, but the homeowners have had at least eleven trial courts recently rule in theirs:

1. *Zitek v. D.R. Horton, et al.*, No. 2019-CP-04-1942 (S.C. Ct. Com. Pl.) (Judge Maddox Jan. 27, 2021 Order Denying Horton's Arbitration Motion and Granting Class Certification) (Anderson County) (finding D.R. Horton's arbitration provision was unenforceable because it was unconscionable, not severable, and extinguished by the Merger Doctrine).

2. *Baddorf, et. al. v. D.R. Horton*, No. 2022-CP-23-03974 (S.C. Com. Pl.) (Judge Gravely Apr. 25, 2023 Order Denying Horton's Arbitration Motion) (Greenville County) (finding D.R. Horton's arbitration provision was unenforceable because it was unconscionable, not severable, extinguished by the Merger Doctrine and violated South Carolina's public policy of protecting homeowners).

3. *Howell v. D.R. Horton, et al.*, No. 2023-CP-02-01719 (S.C. Ct. Com. Pl.) (Judge Fant Nov. 27, 2024 Order Denying D.R. Horton's Arbitration Motion) (Richland County) (finding D.R. Horton's arbitration provision was unenforceable because it is embedded in an unconscionable adhesion contract, incorporates oppressive and non-mutual warranty disclaimers, and undermines South Carolina's public policy favoring homeowners).

4. *Brunetti v. D.R. Horton*, No. 2023-CP-08-02930 (Judge Dobey Apr. 13, 2025 Order Denying D.R. Horton's Arbitration Motion) (Charleston County) (finding D.R. Horton's arbitration provision was unenforceable because it was unconscionable, not severable, improperly limited the arbiter's rights, and violated South Carolina's public policy of protecting homeowners; also finding D.R. Horton's arbitration provision did not bind subsequent purchasers who never agreed to arbitrate), *appeal docketed*, 2025-0011084 (Ct. App. 2025).

[28] Horton's New Orders also reference *LaPoint* when considering this issue. *LaPoint* also fails to control because it is an unpublished district court opinion that predates *Smith*. *LaPoint v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, No. 0:08-3553-CMC, 2009 WL 10684895 (D.S.C. Dec. 1, 2009).

5. *Marcuson v. Horton*, No. 2025-CP-32-00257 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would contravene South Carolina's strong public policy of protecting homeowners), *appeal docketed*, 2025-001785 (Ct. App. 2025).

6. *Abatiello v. Horton*, No. 2025-CP-32-00293 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would endorse "the very imbalance our Supreme Court condemned: an overarching builder dictating procedure, forum, and remedy against an unsophisticated buyer stripped of any meaningful recourse."), *appeal docketed*, 2025- 001781 (Ct. App. 2025).

7. *English v. Horton*, No. 2025-CP-32-00254 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would endorse "the very imbalance our Supreme Court condemned: an overarching builder dictating procedure, forum, and remedy against an unsophisticated buyer stripped of any meaningful recourse."), *appeal docketed*, 2025-001783 (Ct. App. 2025).

8. *Wildy v. Horton*, No. 2025-CP-32-00265 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would endorse "the very imbalance our Supreme Court condemned: an overarching builder dictating procedure, forum, and remedy against an unsophisticated buyer stripped of any meaningful recourse."), *appeal docketed*, 2025-001786 (Ct. App. 2025).

9. *Faherty v. Horton*, No. 2025-CP-32-00255 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would endorse "the very imbalance our Supreme Court condemned: an overarching builder dictating procedure, forum, and remedy against an unsophisticated buyer

stripped of any meaningful recourse."), *appeal docketed*, 2025-001802 (Ct. App. 2025).

10. *Henry v. Horton*, No. 2025-CP-32-00256 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would endorse "the very imbalance our Supreme Court condemned: an overarching builder dictating procedure, forum, and remedy against an unsophisticated buyer stripped of any meaningful recourse."), *appeal docketed*, 2025-001803 (Ct. App. 2025).

11. *Miles v. Horton*, No. 2025-CP-32-00259 (Judge Fant July 1, 2025 Order Denying D.R. Horton's Arbitration Motion) (Lexington County) (finding D.R. Horton's arbitration provision was unenforceable because it was embedded in an adhesion contract and contained oppressive warranty disclaimers that were interwoven with other unconscionable terms and severance would endorse "the very imbalance our Supreme Court condemned: an overarching builder dictating procedure, forum, and remedy against an unsophisticated buyer stripped of any meaningful recourse."), *appeal docketed*, 2025-001804 (Ct. App. 2025).

In sum, it has been ten years since *Smith*; and Harley's Paragraphs 14 and 15 *still* contain the same cross-reference and the same unfair terms that the *Smith* court found were one-sided and oppressive. *See Smith*, 417 S.C. 50, 790 S.E.2d at 5 ("D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages are clearly one-sided and oppressive."). The only change D.R. Horton made was to add a general severability clause in the hopes that this Court would "rescue them" by enforcing it to separate Paragraph 14 from Paragraph 15.[29]

Our Supreme Court and eleven other trial courts including the Harley Court have rightfully refused to rescue D.R. Horton.[30] This Court should affirm this result by finding that the Harley

[29] D.R. Horton's severability argument, in effect, is that this Court should (1) preempt South Carolina's public policy of protecting homeowners by (2) severing Paragraph 14 from Paragraph 15.

[30] Notably, D.R. Horton did not appeal the *Baddorf* and *Zitek* arbitration denials. Harley's Contract has the same cross-reference between Paragraph 14 and Paragraph 15 as both the Baddorf and Zitek contracts. Harley's Contract also has the same severability provision as the Baddorf contract.

Court did not err in refusing to enforce D.R. Horton's severability provision (either as a matter of contracting principles or public policy) and similarly did not err in finding that Paragraph 14 and 15, when read together as intended, and Paragraph 15, standing alone, are 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 blue-penciled to save it.

The trial court properly found that D.R. Horton's Arbitration Provision is unenforceable for three independent reasons: (1) it is unconscionable under *Smith;* (2) it is not severable from other unconscionable terms under *Smith* or *Damico*; and, (3) it lacks mutuality and improperly limits the arbitrator's authority. (R. pp. 3-14) (Order Denying Motion to Compel Arbitration).

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.

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