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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable S. Bryan Doby
Circuit Court Judge

Appellate Case No.: 2025-001972
Circuit Court Case No.: 2023-CP-08-02903

Donna Brunetti, individually, and on behalf of all those similarly situated,

Respondent,

v.

D.R. Horton, Inc., Alternative Septic Services, LLC, and John Does #1-15,

Defendants,

Of Which D.R. Horon, Inc. is the

Appellant.

RESPONDENT'S RETURN IN OPPOSITION TO APPELLANT'S MOTION TO DISMISS

Appellant D.R. Horton, Inc.'s December 17, 2025, Motion to Dismiss this Appeal should be denied. The issue in this appeal – the conscionability and enforceability of D.R. Horton's arbitration provision in its form home purchase contract – is a present and unabated justiciable

controversy. This is evidenced by D.R. Horton's refusal to waive its alleged right to compel arbitration – asserting it, enforcing it, and appealing it – for the rest of the *Brunetti* case.

Even if the Court finds there is no justiciable controversy/the appeal is moot, one or more of the mootness exceptions applies and weighs against dismissal. Whether D.R. Horton's purported arbitration provision is conscionable and enforceable against the Respondent homeowners is an issue capable of repetition yet evading review. It is also an issue of public importance and of imperative and manifest urgency.

Alternatively, if the Court is inclined to entertain dismissal of the *Brunetti* Appeal, Respondent asks the Court to fix the terms of dismissal to include a permanent waiver of arbitration, so that the Respondent is not required to mount a second opposition on the exact issue briefed and now pending before this Court in this *Brunetti* Appeal.

I. The *Brunetti* Appeal Should Proceed Because the Conscionability of the D.R. Horton Arbitration Provision Is a Live and Justiciable Controversy Between D.R. Horton and Respondent

An active controversy persists here. D.R. Horton has explicitly declined to waive arbitration as it pertains to Respondent. *See* Exhibit "A" (D.R. Horton email to Respondent refusing to waive arbitration assertion and appeal rights it may have as to Respondent). *See also Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 227, 467 S.E.2d 913, 917–18 (1996) ("A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute."). Absent waiver of the right to attempt to enforce the arbitration provision forever in this case, there is no end to the ongoing dispute surrounding the D.R. Horton arbitration provision in its standard form home purchase contract, especially since this is a putative class action.

For example, absent waiver or a decision by this Court, Brunetti may see another appeal and a year or more delay in this case at a later stage in this proceeding. Horton may move to compel arbitration when Plaintiff moves for class certification, claiming different rights/parties are at issue. Alternatively, Horton may just move a second time as it has done in other cases, see below. Worst of all possibilities, Horton may boot-strap an appeal of the denial of arbitration to its future appeal of Plaintiffs' jury verdict and attempt to undo a two-week trial.

Last year, in a separate defect case in the Upstate neighborhood known as *Eagles Glen*, D.R. Horton made a blatant attempt to have a trial court, who heard and denied the enforceability of its arbitration provision in 2022, overrule itself and the law of the case. Horton styled its attempt as an "amendment" to its prior motion to compel arbitration; however, looking past the labels, D.R. Horton's "amended" motion was a second attempt to enforce its arbitration provision in contravention of the law of the case. *See* Exhibit "B," July 2, 2024 D.R. Horton Amended Notice of Motion to Stay and Compel Arbitration, *Baddorf et al. v. D.R. Horton et al.*, Greenville County Court of Common Pleas, Case No. 2022-CP-23-03974) ("Eagles Glen") *and* Exhibit "C" July 17, 2024 Order Denying D.R. Horton's Amended Notice and Motion, *Baddorf et al. v. D.R. Horton et al.*, Greenville County Court of Common Pleas, Case No. 2022-CP-23-03974. The D.R. Horton arbitration provision in Respondent Brunetti's purchase contract at the center of this Appeal is identical to the provision in *Eagles Glen*. If the Court dismisses this Appeal, absent waiver by D.R. Horton, there is nothing to stop D.R. Horton from again attempting to enforce this same arbitration clause against Respondent or against the class, just as D.R. Horton attempted in *Eagles Glen*; Respondent expects D.R. Horton's arguments will likely mirror those it iterated in its *Brunetti* Initial Reply Brief which was filed by Horton two days before it moved to dismiss the *Brunetti* Appeal.

In light of the continuing dispute as to the D.R. Horton arbitration provision in the Brunetti purchase contract, the Court may and, respectfully, should decline to dismiss this Appeal and instead decide the appealed issue – the provision's conscionability and enforceability – on its merits. See Rule 260(c), SCACR ("An appeal or other proceeding ***may*** be dismissed on motion of the appellant or petitioner upon such terms as may be fixed by the court.") (emphasis added).

II. Even If The *Brunetti* Appeal Issue Is Found to Be Moot, The Appeal Should Proceed Because It Is Capable of Repetition Yet Evading Review

D.R. Horton's conduct has demonstrated that this issue is capable of repetition yet evading review. *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001) (If the issue raised is capable of repetition but evading review, an appellate court can take jurisdiction despite mootness).

In this matter, Respondent Brunetti, individually and on behalf of two hundred and forty-six (246) other homeowners in the French Quarter Creek neighborhood in Huger, South Carolina, filed their putative class action Complaint in the Berkeley County Court of Common Pleas on October 16, 2023.[1] As of today, 2 years, 2 months, and 6 days have passed without any progress as to the merits of the underlying case; additionally, the issue on appeal – D.R. Horton's arbitration provision – remains entirely unresolved and hotly contested and no closer to resolution than it was in 2023, given D.R. Horton's simultaneous refusal to waive the issue of arbitration and its withdrawal of this Appeal before it was decided.

In addition to the two-plus years during which Respondent has been unable to advance the merits of the case, additional examples of D.R. Horton's dilatory actions in this case are as follows:

- **472 days (1 year, 3 months, and 21 days)** have lapsed between D.R. Horton being served with the underlying lawsuit, and it's filing its Motion to Compel Arbitration in the state court action. *Compare* Affidavit of Service, Exhibit "D" (indicating D.R. Horton was

[1] The suit concerns defective and/or unsuitable septic systems and the resulting surfacing of fluids in yards.

served on October 23, 2023), *with* D.R. Horton Motion to Compel Arbitration, filed in the state court action on February 6, 2025.

- **300 days (9 months, 25 days)** have lapsed between the case being remanded to state court and D.R. Horton filing its Motion to Compel Arbitration in the underlying case. *Compare* Fourth Circuit Order denying appeal, filed April 12, 2024, Exhibit "E," *with* D.R. Horton Motion to Compel Arbitration, filed in the state court action on February 6, 2025.

- **197 days (6 months, 14 days)** have lapsed between D.R. Horton filing its Notice of Appeal and filing this Motion, attempting to drop its appeal, only after the parties had completed all initial briefing.

This Appeal is not the only time D.R. Horton has delayed and successfully avoided adjudication and resolution of the issue on appeal in *Brunetti*. Between November 15, 2024, and December 17, 2025, D.R. Horton filed and then sought to dismiss ten appeals (including this one) concerning the enforceability of its form arbitration provision.[2] By withdrawing its appeals pre-determination, D.R. Horton has ensured that a decision on its arbitration provision evades review. This process of initiating appeals and later dismissing them after briefing is complete or nearly complete in at least three of these cases, demonstrates this issue is not only capable of repetition, but has been repeated already. *See, supra*.

III. A Second Mootness Exception Applies Here; Even If The Issue Is Found to Be Moot, The Appeal Should Proceed Because It Is An Issue of Important Public Interest of Imperative and Manifest Urgency

Further, the conscionability of one of South Carolina's largest homebuilder's purported arbitration provisions within its home purchase contract is an issue of notable import. *Curtis,* 345

[2] *Steven D. Abatiello v. D.R. Horton, Inc.*, Appellate Case No. 2025-001781; *Michael English, Jr. v. D.R. Horton, Inc.*, Appellate Case No. 2025-001783; *Lawrence S. Marcuson v. D.R. Horton, Inc.*, Appellate Case No. 2025-001785; *Amanda L. Wildy v. D.R. Horton, Inc.*, Appellate Case No. 2025-001786; *Jane E. Faherty v. D.R. Horton, Inc.*, Appellate Case No. 2025-001802; *Matthew Henry v. D.R. Horton, Inc.*, Appellate Case No. 2025-001803; *Teela Miles v. D.R. Horton, Inc.*, Appellate Case No. 2025-001804; *Deborah Denise Harley versus D.R. Horton, Inc*., Appellate Case No. 2024-002137; *Sherman Howell versus D.R. Horton, Inc.*, Appellate Case No. 2024-001963 and this Appeal, *Donna Brunetti versus D.R. Horton, Inc.*, Appellate Case No. 2025-001084.

S.C. at 568, 549 S.E.2d at 596 (An appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.); *see, e.g., Storm M.H. ex rel. McSwain v. Charleston Cnty. Bd. of Trs.,* 400 S.C. 478, 487, 735 S.E.2d 492, 497 (2012) (finding "the instant case presents issues of important public interest and a resolution would promote judicial economy" where the issues on appeal included, *inter alia*, whether a student could enroll in a county magnet school if domicile by child and parent in county was not established prior to the start of the academic year, even though the student subsequently purchased real property in the county and enrolled in the magnet school on the first day of the school's academic year, noting the inadequacy of administrative remedies given the immediacy of the student's enrollment date and the potential delay of an administrative appeal) (emphasis added).

Appellant D.R. Horton promotes itself as "America's Largest Homebuilder."[3] As noted above, this is not a private contractual matter between two parties; this is a controversy between more than two hundred South Carolinians who live in D.R. Horton-built homes and D.R. Horton. Respondent avers that the conduct of this builder, in setting out an unconscionable arbitration provision within a form purchase contract, during most citizens' single most important purchase of their lifetime, the purchase of a home, should be viewed as both an alleged injustice and an important issue of public interest. Respondent would further aver that a resolution, on the conscionability of D.R. Horton's arbitration provision, is needed for present and future guidance for thousands of South Carolina homeowners. This issue may also be properly viewed as one of imperative and manifest urgency, given a motion hearing on the *Vriens*[4] Plaintiffs' Motion for

[3] For example, as of December 22, 2025, if one searches "D.R. Horton" on Google.com, the title link to D.R. Horton's website, https://www.drhorton.com/, reads "D.R. Horton America's Largest Home Builder | Homes For Sale."

[4] The *Vriens et al. v. D.R. Horton, Inc. et al.*, No. 2:23-cv-06797-DCN matter is discussed further below.

Reconsideration of the conscionability and enforceability of an identical D.R. Horton arbitration provision appearing in a D.R. Horton form purchase contract, is scheduled to move forward on January 26, 2026 before the South Carolina District Court, and the putative class members in this action are members of the putative roofing class in *Vriens*. Certainly, a merits ruling in this Appeal would affect the future conduct of D.R. Horton and Respondent. *See Holden v. Cribb*, 349 S.C. 132, 138, 561 S.E.2d 634, 638 (Ct. App. 2002) (noting "even though we agree that technically the case is moot, it falls within a well-recognized exception to the mootness doctrine and should not have been dismissed on this basis" when sheriff refused non-cash bid entered at a judicial sale, and the bid was withdrawn and the sale cancelled, because the issues raised – including plaintiff's contention that if the sale were to be reinstituted, she would make the same bid and the sheriff would again reject her non-cash bid – were "capable of repetition, yet evading review, <u>and will affect the future conduct of these parties and others attending public sales</u>") (emphasis added).

Review and resolution of this Appeal on its merits is warranted; Respondent requests, as a result, that the Court rule against dismissal. *See Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The utilization of an exception under the mootness doctrine is flexible and discretionary pursuant to South Carolina jurisprudence, not a mechanical rule that is automatically invoked.").

In considering this Opposition by Respondent, it is important to note the context of this current motion to dismiss this Appeal. As seen by prior briefing and the appeals cited herein, most South Carolina trial courts have refused to enforce the D.R. Horton arbitration provision. However, in the case known as *Vriens et al. versus D.R. Horton, Inc. et al.*, No. 2:23-cv-06797-DCN, the U.S. District Court recently ignored this Court's holding in *Smith versus D.R. Horton, Inc.*, 417 S.C. 42, 45–46, 790 S.E.2d 1, 2–3 (2016), and compelled arbitration. Plaintiff Vriens has moved

for the District Court to reconsider its decision in a lengthy and detailed Motion to Reconsider. Plaintiff Vriens has also suggested that the District Court consider certifying the determinative question(s) to the South Carolina Supreme Court.

More importantly, this Court granted Rule 204, SCACR, certification to nine cases concerning the conscionability and enforceability of D.R. Horton's arbitration provision on November 18, 2025.[5] Five days prior, on November 13, 2025, D.R. Horton requested that its appeals of seven of the trial court decisions denying its motions to compel arbitration be dropped, six of which were granted Rule 204 review by this Court. By November 20, 2025, orders dismissing those seven appeals were entered, while three of the certified appeals continued forward.[6] Plaintiff Vriens wrote the District Court on November 21, 2025, noting the foregoing and politely suggested that the District Court should stand down in deference to this Court's anticipated decisions in this Appeal and the two other pending, certified appeals. Ten days later, on December 1, 2025, D.R. Horton sought Respondent's consent to dismiss this Appeal. Respondent provided language to Appellant which would waive its alleged arbitration rights against Brunetti upon dismissal of this Appeal on December 4, 2025, however, on December 16, 2025, D.R. Horton rejected it. *See* Exhibit "A." On December 18, 2025, at D.R. Horton's requests to withdraw two of the three remaining certified appeals that it commenced (*Harley* and *Howell*), both were dismissed. This Appeal is the last of the nine appeals certified by the Supreme Court for review.

It is patently obvious that D.R. Horton is seeking to prevent this Court from deciding whether D.R. Horton's reorganized arbitration provision complies with or violates the mandates

[5] The Court granted Rule 204 review of all of the appeals identified in footnote two except *English*.
[6] The three that remained pending were this Appeal, and the *Harley* and *Howell* Appeals.

of *Smith v. D.R. Horton* – so that the District Court does not reconsider its holding enforcing D.R. Horton's arbitration provision. D.R. Horton seeks to have the *Vriens* Order compelling arbitration as the lead order in its arsenal against homeowners going forward. This Court should not condone such obvious court shopping – and should not advance it by dismissing the fully briefed *Brunetti* Appeal without a decision on the merits.

III. Should the Court Consider Dismissal, Respondent Respectfully Requests the Terms Fixed By the Court Include a Waiver of Arbitration By D.R. Horton in the Instant Matter

Alternatively, Respondent proposes that the Court "fix" the "terms" of the dismissal, pursuant to Rule 260(c), SCACR, to clarify that the South Carolina courts of appeal will not consider another appeal of an arbitration decision in this matter, effectively operating as a waiver of D.R. Horton's ability to bring the issue of arbitration to this Court for a second time.

This Court is undoubtedly aware that D.R. Horton has, either with or without the consent of Respondent's counsel, successfully dismissed nine (9) appeals pending before this Court which concern the same arbitration clause at issue in this case. In seven of those cases, D.R. Horton expressly waived its ability to move to compel arbitration again. *See* Exhibit "F" (D.R. Horton's Ltr. to Hon. J. Kitchings, Nov. 13, 2025) ("In so stipulating, Horton *acknowledges* that it waives its right to seek arbitration in the above cases.") (emphasis added). As to the other two appeals (*Howell* and *Harley*), nothing in the appellate record indicates that D.R. Horton took a position on waiver, only that it conceded that the Howell Respondents won the motion to compel arbitration that it appealed from. *See* (Horton's Reply to Return, *Howell v. D.R. Horton*, filed Dec. 8, 2025, *App. C/N* 2024-001963) ("Respondents won the motion and Appellant has acquiesced to Respondents' demand by dismissing the appeal.").

In this case, a putative class action, D.R. Horton explicitly refused to consent to a waiver. *See* (Exhibit "A"). The obvious implication in that refusal is that D.R. Horton is reserving its option to move to compel arbitration again, and—D.R. Horton could attempt to bring this appeal back to the South Carolina courts of appeal. To allow D.R. Horton to do so would be a gross waste of judicial time and resources and would be highly prejudicial to Respondent.

Respondent respectfully submits that, should this Court be inclined to grant Appellant's Rule 260(c) Motion over Respondent's objection, the Court exercise its discretion to set the terms of its order - to be a dismissal of D.R. Horton's motion to compel arbitration *with prejudice*.[7]

Additionally, Respondent would ask this Court grant Respondent its fees and costs associated with briefing this appeal and this motion.

CONCLUSION

For all of the reasons noted above, this Court should deny D.R. Horton's Motion to Dismiss the *Brunetti* Appeal and grant such other and further relief as is just and proper. Or, in the alternative, fix the terms of dismissal as including waiver of D.R. Horton's arbitration rights as to Respondent.

(SIGNATURE ON FOLLOWING PAGE)

[7] Respondent believes that relevant precedent dictates that D.R. Horton has already waived its ability to seek this Court's review of a second motion to compel arbitration in this case and would be precluded from attempting to do so again regardless of whether the Court dismisses the appeal with or without prejudice. However, D.R. Horton clearly disagrees, as it refused to "acknowledge" a waiver as it did in other arbitration cases pending before the Court; and has historically felt free to move to compel arbitration a second time – see discussion of *Eagles Glen* above.

Respectfully submitted,

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