THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-001345

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Petitioner.

BRIEF OF PETITIONER

September 4, 2014

W. Kyle Dillard, Esq.
(SC Bar No. 69408)
Matthew K. Johnson, Esq.
(SC Bar No. 12284)
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 North Main Street
PO Box 2757
Greenville, SC 29602
(864) 271-1300 (telephone)
(864) 235-8806 (facsimile)
kyle.dillard@ogletreedeakins.com
matthew.johnson@ogletreedeakins.com

ATTORNEYS FOR PETITIONER,
D.R. HORTON, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred in affirming the trial court's finding that the arbitration provision failed to meet the requirements of the South Carolina Uniform Arbitration Act.

2. Whether the Court of Appeals erred in ignoring the trial court's failure to apply the Federal Arbitration Act.

3. Whether the Court of Appeals erred in affirming the trial judge's finding of unconscionability.

4. Whether the trial court erred in finding the arbitration provision unenforceable under an unequal-bargaining-power theory.

5. Whether the trial court erred in finding the arbitration provision unenforceable because no consideration was given.

6. Whether the Court of Appeals erred in ignoring the trial judge's finding the arbitration provision null and void due to the doctrine of merger by deed.

7. Whether the Court of Appeals' "severability" analysis is inapplicable.

STATEMENT OF THE CASE

A. The parties and their contract.

Petitioner D.R. Horton, Inc. built the house at 4830 Harvest Moon Court, Summerville, South Carolina. Respondents Gregory W. Smith and Stephanie Smith bought the house, executing a Purchase Agreement with D.R. Horton. (R. 147–156). The first page contains the notice required by the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. §§ 15-48-10–15-48-240:

> THIS CONTRACT IS SUBJECT TO MANDATORY BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITATION ACT.

(R. 147) (underlining and capitalization in original).

Section 14 of the Purchase Agreement is entitled "Warranties and Dispute Resolution." (R. 150–152). Paragraphs 14(a)–(f) contain warranty information, including a Residential Warranty Corporation ("RWC") structural warranty provided at no additional cost to the Smiths. (R. 150–151). Paragraph 14(g), the arbitration provision, reads:

> **Mandatory Binding Arbitration. [The Smiths] and [D.R. Horton] 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 [D.R. Horton]'s construction of the home;**[1] (2) [D.R. Horton]'s performance under any Punch List or Inspection Agreement; (3) [D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths] and [D.R. Horton] agree to arbitrate.
>
> I. If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to [the Smiths] shall control.
>
> II. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then **the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing.** The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but **the arbitrator shall have the right to assess or allocate the filing fees and**

[1] The Smiths' claims are necessarily related to the construction of their home and they have made no argument the arbitration provision did not cover their underlying complaints. *See* R. 7–22, 42–59.

> **any other costs of the arbitration as a part of the arbitrator's final order**. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

(R. 151–152) (emphasis added).

Accordingly the parties agreed: (1) to arbitrate "all disputes between themselves," including this dispute concerning D.R. Horton's construction of the Smiths' home; (2) the arbitration would be conducted near the Smiths' home in Charleston, Dorchester, or Berkeley County, South Carolina; (3) the arbitration would be conducted by an arbitrator or panel agreed on by the Smiths; (4) if possible, the Smiths would be entitled to an expedited hearing; and (5) the arbitrator would be entitled to assess filing fees and costs to either party. (R. 151–152).

Paragraph 14(h) allowed D.R. Horton to terminate the Purchase Agreement before closing in the case of a bona fide dispute with the Smiths, subject to a 10-day good faith resolution period, written notice, and return of earnest money paid by the Smiths, thus making them whole. (R. 152).

Paragraph 14(i) contained a limitation of warranties, subject to the RWC and title warranties (Section 4), and imposition of an obligation on D.R. Horton to "repair or replace"[2] any defects as opposed to monetary damages. (R. 152; R. 148–149).

---

[2] "Repair or replace" remedies have been approved and enforced under South Carolina law. *See, e.g., Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 168 n.4, 621 S.E.2d 38, 40 n.4 (2005) (citing repair-

B. Procedural history.

1. The Smiths sue D.R. Horton.

The Smiths sued D.R. Horton for alleged construction defects and asserted claims for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. They later filed an amended complaint and a second amended complaint. (R. 7–22; R. 42–59). The Smiths allege D.R. Horton "designed, developed and constructed" the house, that there were "various defects and deficiencies relative to the construction of [the house]," and that D.R. Horton was "negligent, grossly negligence, careless, reckless, willful and wanton in constructing [the house]." (R. 9, ¶ 9; R. 10, ¶ 11; R. 10–11, ¶ 14; R. 45, ¶¶ 11 & 13; R. 46–47, ¶ 16).

2. D.R. Horton unsuccessfully moves to compel arbitration.

Because the Smiths' claims involve construction defects, D.R. Horton timely moved to compel arbitration. (R. 87–88). D.R. Horton's motion was

---

or-replace remedy with approval, stating "Article 2 permits parties to agree to 'remedies in addition to or in substitution for those provided in [article 2] and [ ] limit or alter the measure of damages recoverable under [article 2], as by limiting the buyer's remedies . . . *to repair and replacement of the nonconforming goods or parts.*'") (*citing* S.C. Code Ann. § 36-2-719(a)(1) (2003)) (emphasis added); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (enforcing an insurance agreement's repair-or-replace provision, reasoning "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."); *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 533, 183 S.E.2d 315, 319 (1971) (enforcing a repair-or-replace provision in an insurance agreement), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

based on the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–307, **and** the SCUAA. The trial judge denied the motion because:

> (1) the arbitration provisions are allegedly **unconscionable "based on the cumulative effect of a number of oppressive and one-sided provisions**"; and
>
> (2) the deed at issue did not contain the arbitration provision in the Purchase Agreement, which was purportedly extinguished by the **doctrine of merger by deed**; and
>
> (3) "the arbitration provisions[3] **fail to meet the [SCUAA]**," although the trial judge failed to identify any deficiencies in the arbitration notice or the arbitration provision itself, even when the Purchase Agreement contained an arbitration notice in underlined, all capital letters, on its first page (R. 4; R. 147);

(R. 1–4) (emphasis added).

3. D.R. Horton moves the trial judge to reconsider.

D.R. Horton timely filed a Rule 59(e) motion to alter or amend ("motion for reconsideration"). (R. 126–127). Before the trial judge ruled, D.R. Horton's counsel emailed the trial judge about the Smiths' proposed order. (Email to Hon. W. Edgar Dickson, Nov. 4, 2011, R. 214–215). The email's purpose was to obtain clarification on two questions raised by the wording of the Smiths' proposed order denying the motion for reconsideration:

> (1) Did the court find the entire Purchase Agreement unconscionable, or just the arbitration clause?

---

[3] The use of "arbitration provisions" in the plural context is the root of many of the issues that have resulted in this appeal. D.R. Horton has asserted there is only **one** arbitration provision, found at ¶ 14(g). The unconscionability issues raised by the Smiths, the trial judge, and the Court of Appeals must be analyzed consistent with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), *i.e.*, solely with respect to the arbitration provision found at ¶ 14(g). *See*, pp. 36–41, below.

(2) Was the Smiths' proposed order correct insofar as it gave additional bases beyond those stated in the original order denying the motion to compel arbitration?

The trial judge did not respond to this email and executed the proposed order drafted by the Smiths' attorneys and without clarification as requested. The trial judge denied D.R. Horton's motion for reconsideration because:

(1) "the relevant arbitration provisions[4] are **wholly unconscionable based on the cumulative effect of a number of oppressive and one-sided provisions** and that **the form of the contract *seems* to be that of a contract of adhesion**"; and

(2) "the parties involved are **not parties of equal bargaining power** and there is **no consideration given in exchange for the sacrifice of certain rights** of [the Smiths] . . . and the provisions cannot be conscionably enforced against them."

(R. 6)(emphasis added).

Despite D.R. Horton's motion for reconsideration, the trial judge did not address its prior merger-by-deed analysis or its finding that the arbitration provision(s) fail to meet SCUAA's requirements. Further, the trial judge again failed to address the FAA's applicability.

4. The Court of Appeals affirms.

D.R. Horton appealed each of these issues to the Court of Appeals. (App't's Br. 7–24). The Court of Appeals relied on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), in affirming the trial judge's

[4] See footnote 3 above.

unconscionability analysis.[5] *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013). The court's unconscionability analysis, however, ignored whether the Purchase Agreement was an adhesion contract. Further, the Court of Appeals ignored the unequal bargaining power and lack of consideration issues, whether the Purchase Agreement met the requirements of the SCUAA, and whether the doctrine of merger by deed applied. Of all the issues appealed from the trial judge, the Court of Appeals only addressed alleged unconscionability due to "the cumulative effect of a number of oppressive and one-sided provisions." (App't's Br. 1, 9–11; R. 4).

The Court of Appeals denied D.R. Horton's Petition for Rehearing just three days after D.R. Horton's Reply to Petition for Rehearing was filed. D.R. Horton filed its Petition for a Writ of Certiorari, which this Court granted on July 24, 2014.

STANDARD OF REVIEW

Unless the parties otherwise provide, the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitrability determinations are subject to *de novo* review. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012); *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667. However, a circuit court's factual findings will not be reversed if there is any evidence

[5] In addition, the Court of Appeals rejected a "severability" analysis that was never raised by the parties and was inapplicable in any respect. *Smith*, 403 S.C. at 17–18, 742 S.E.2d at 41. See pp. 48–49 below.

reasonably supporting the findings. *Bradley,* 398 S.C. at 453, 730 S.E.2d at 315. *See also, Thornton v. Trident Med. Ctr., LLC,* 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003); *MBNA Am. Bank v. Christianson,* 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008). Even so, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 91 (2000).

ARGUMENT

Because public policy favors arbitration, there is a strong presumption in favor of an arbitration agreement's validity. *Herron v. Century BMW,* 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010), *vacated on other grounds by Sonic Auto., Inc. v. Watts,* 131 S. Ct. 2872 (2011). The pro-arbitration policy is particularly strong in South Carolina. *Chassereau v. Global-Sun Pools, Inc.,* 373 S.C. 168, 172–73, 644 S.E.2d 718, 720–21 (Ct. App. 2007) ("[W]e are constrained to resolve all doubts in favor of arbitration"); *see also Towles v. United Healthcare Corp.,* 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Thus, a court should order arbitration unless it can say with "positive assurance" that the arbitration provision does not cover the dispute. *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118.

The trial judge's and the Court of Appeals' rulings do not reflect this pro-arbitration policy. The arbitration provision at issue applies directly to the controversy at hand—the construction and sale of the Smiths' house. The Smiths have not suggested otherwise, nor did the trial judge or the Court of

Appeals hold to the contrary. Instead, the trial judge held the arbitration agreement is unenforceable for a variety of reasons, none of which withstand proper scrutiny, and the Court of Appeals improperly affirmed this decision. Indeed, the Smiths produced no evidence supporting the trial judge's finding. Thus, the Court of Appeals' decision must be reversed.

Perhaps the most fundamental error by the trial judge, which the Court of Appeals simply ignored, involves the failure to apply, or misapplication of, the United States Supreme Court's holding in *Prima Paint*, 388 U.S. 395, as adopted by this Court in *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (requiring unconscionability to be analyzed based on independent challenge to the arbitration provision itself, not with respect to other aspects of the contract) (the "*Prima Paint* doctrine"). The trial judge's sole comment on this issue is his finding of unconscionability due to "the cumulative effect of a number of oppressive and one-sided provisions." (R. 4; 6). He did not further identify any such provisions within the arbitration provision at ¶ 14(i) of the Purchase Agreement.

The trial judge and the Court of Appeals also erred in their reliance on and application of *Simpson*. This error is evident in the Court of Appeals' recent contradictory decision in *Carlson v. S.C. State Plastering, LLC,* 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). These contradictory applications of *Simpson,* and the analysis of unconscionability in general, reflect the improper application of law by the courts below.

Despite their similarities and mutual reliance on *Simpson* in analyzing unconscionability, this case and *Carlson* yield inexplicably different results, leaving in a quandary D.R. Horton and others seeking to provide for arbitration in commercial contracts. Under the facts presented in this case and in *Carlson*, the panel in *Carlson*[6] would have found in D.R. Horton's favor in this case and, conversely, the panel in this case[7] would have found against enforceability of the arbitration provision in *Carlson*.

In this case, the Court of Appeals held the arbitration provision unenforceable, "particularly[8] in light of the lack of mutuality of remedy imposed by Section 14(i)," a limitation of warranties provision. *Smith*, 403 S.C. at 16, 742 S.E.2d at 41. By contrast, a different panel of the Court of Appeals in *Carlson* reversed the trial judge's refusal to enforce an arbitration provision despite numerous similarities to this case.

Both this case and *Carlson* involve efforts by a national builder to enforce an arbitration provision within a residential purchase agreement arising from alleged construction defect claims. Similarly, the homeowners in both cases argued the arbitration provisions were unconscionable and unenforceable based on *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. Further, although the Court of Appeals did not fully describe the home purchase agree-

---

[6] Williams, H. Bruce; Huff, Thomas E.; and Konduros, Aphrodite K.

[7] Short, Paul E., Jr.; Thomas, Paula H.; and Pieper, Daniel F.

[8] The Court of Appeals did not specify other reasons it found the arbitration provision unenforceable other than the limitation of warranties at ¶14(i).

ment in *Carlson*, or the related arbitration provision, it is clear the panel in *Carlson* determined the "other limitations" were "not part of the arbitration clause and are irrelevant to a determination of whether the arbitration clause is unconscionable." *Carlson*, 404 S.C. at 260, 743 S.E.2d 868, 874.

The differing results here and in *Carlson* must be corrected both to ensure that the arbitration provision between these parties is enforced to reflect the intent of the Purchase Agreement consistent with public policy, but also to give the public at large and litigants in similar legal disputes a consistent understanding concerning the enforcement of arbitration provisions, which a comparison of this case and *Carlson* will not provide.

ISSUE ONE

The Court of Appeals erred in affirming the trial court's finding that the arbitration provision failed to meet the requirements of the South Carolina Uniform Arbitration Act.

The trial judge made no factual findings supporting the conclusion "the arbitration provisions fail to meet the [SCUAA]," nor did he further explain his findings. (R. 4).[9] The Court of Appeals ignored this fact in affirming the trial court's finding that the arbitration provision was unenforceable as unconscionable. The Purchase Agreement contained an arbitration notice on the first page in underlined, all capital letters and, therefore, met the requirements of the SCUAA found at S.C. Code Ann. § 15-48-10(a).

---

[9] This same finding was not included in the subsequent order denying D.R. Horton's motion for reconsideration.

A. The arbitration provision did not fail for lack of conspicuousness under the SCUAA.

The only imaginable basis for the trial judge's finding that the SCUAA was not met is that the Purchase Agreement somehow did not satisfy the SCUAA's notice requirement: "Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a). The Smiths' Purchase Agreement contained the required notice in underlined, all capital letters on the first page. (R. 104). Still, the Smiths insisted the arbitration provision failed for "lack of conspicuousness as required under the [SCUAA]." (R. 121–25). The Smiths provided no evidence to support the trial judge's determination and the trial judge did not identify any deficiencies in the arbitration notice or the arbitration provision at ¶14(g) itself. (R. 1–4, 147, 152).

1. A laser-printed arbitration notice satisfies S.C. Code Ann. § 15-48-10(a).

Perhaps the trial judge concluded the arbitration notice does not satisfy the SCUAA's requirements because it was not "*typed*" with a typewriter, as opposed to a computer and printer. Admittedly, this Court has required strict compliance with S.C. Code Ann. § 15-48-10(a). *See, e.g., Zabinski,* 346 S.C. 580, 588–90, 553 S.E.2d 110, 114–15 (§ 15-48-10(a) not satisfied because no notice of arbitration on first page); *Soil Remediation Co. v. Nu-Way Envtl.,*

Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (§ 15-48-10(a) not satisfied because notice of arbitration was not underlined). But those cases do not apply here.

In *Zabinski* this Court commented that the notice in *Soil Remediation* did not meet the statutory requirement, although it "was laser-printed and written in all capital letters on the first page of the contract." *Zabinski*, 346 S.C. at 588–89, 553 S.E.2d at 114. Taking this dictum out of context, one conceivably could argue that a laser-printed notice fails to meet the statutory requirement. But the problem with the notice in *Soil Remediation* was that it was not underlined, not that it was laser-printed. *Soil Remediation*, 323 S.C. at 457, 476 S.E.2d at 150–51 (disagreeing with Court of Appeals' reasoning "that one of the definitions of 'underline' is 'to emphasize or cause to stand out,' which was met under the present facts through the use of the capitalized notice provision").

Based on this Court's analysis of the definition of "underlined" in *Soil Remediation*, it merely overruled the Court of Appeals' "form over substance" decision that "underlined" could also mean "to emphasize or cause to stand out," in addition to meaning "to draw a line under." *Soil Remediation*, 323 S.C. at 456–57, 476 S.E.2d at 150. The *Soil Remediation* decision did apply a "literal meaning" analysis, but not as to whether laser-printing can meet the "typed" requirement of S.C. Code Ann. § 15-48-10(a). Indeed, none of the cases analyzing whether arbitration notices in contracts were conspicuous cited in *Soil Remediation* suggest that a laser-printed contract with a laser-printed

arbitration notice are by definition inconspicuous. *Soil Remediation*, 323 S.C. at 457–58, 476 S.E.2d at 150–51; *see also Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 424, 434 S.E.2d 281, 282–83 (1993); *Timms v. Green*, 310 S.C. 469, 472, 427 S.E.2d 642, 643 (1993); *Circle S Enters., Inc. v. Stanley Smith & Sons*, 288 S.C. 428, 429 n.1, 343 S.E.2d 45, 46 n.1 (Ct. App. 1986) (holding arbitration notice not conspicuous where not contained on first page).

Neither *Soil Remediation*, *Zabinski*, nor any of the other cases cited by the Smiths hold a laser-printed arbitration notice that otherwise meets the requirements of § 15-48-10(a) is not conspicuous. Such a finding would result in an absurd holding, namely that every contract with an arbitration provision that is not physically typed with a typewriter (which are now uncommon) or physically rubber-stamped (also uncommon), are not conspicuous and, therefore, are not arbitrable. Given modern realities, it is unthinkable that a laser-printed notice that meets the remaining requirements of § 15-48-10(a) fails simply because it is not manually "typed" on a typewriter. As such, although the Court of Appeals did not address this issue despite it having been raised on appeal below, this Court should reverse the trial judge's finding the Purchase Agreement is unenforceable under the SCUAA for lack of conspicuousness, if indeed that is the trial judge's determination.

2. The arbitration provision at Paragraph 14(g) is obvious.

The Smiths argue the arbitration provision is "inconspicuous" given that it is contained in Section 14 of the Purchase Agreement in a subsection of which the "first word of the title" is "Warranties." (Resp'ts' Br. 14). This is

misleading. First, the SCUAA supplies no basis for that argument. Also, this section is actually entitled "WARRANTIES AND DISPUTE RESOLUTION." (R. 150, ¶ 14) (capitalization in original, underlining added). The arbitration provision at ¶ 14(g), which the Smiths initialed, is entitled, "MANDATORY BINDING ARBITRATION." (R. 151, ¶ 14(g)) (capitalization in original).

Despite these conspicuous signals, the Smiths have insisted that "there is nothing to alert Respondents to the fact that an arbitration clause is at hand." (Resp'ts' Br. 14). This is simply ludicrous, particularly when the beginning of the first page of the Purchase Agreement states it is subject to "MANDATORY BINDING ARBITRATION." (R. 147) (capitalization and underlining in original). Further, the Smiths never submitted any evidence by affidavit or otherwise that they were unaware of the arbitration provision. Accordingly, there was no evidence on which the trial judge could conclude the arbitration provision at ¶ 14(g) was not obvious or conspicuous or that the Court of Appeals could have affirmed had it addressed this issue.

ISSUE TWO

The Court of Appeals erred in ignoring the trial court's failure to apply the Federal Arbitration Act.

Even if the arbitration provision did not meet the SCUAA's requirements, the trial judge was still obligated to compel arbitration under the FAA. When state law prohibits arbitration, it is displaced by the FAA. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

A. The FAA applies.

There is "a clear federal directive in support of arbitration." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002). A court must compel arbitration where: (1) there is a dispute; (2) there is a written agreement with an arbitration provision covering the dispute; (3) the transaction relates to interstate commerce; and (4) one party has refused to arbitrate. *Id.* at 500–501.

The first element of the *Adkins* test is met: there is a dispute between the parties, as evidenced by the Smiths' lawsuit. The Purchase Agreement is a written agreement including an arbitration provision. Additionally, there has been no suggestion by either the Smiths or the trial judge that the dispute is outside the arbitration agreement's scope.[10] Therefore, the second element of the *Adkins* test is met. Finally, the fourth element is met, as the Smiths have refused to arbitrate. (*See, e.g.*, R. 90, 92–93). The only issue requiring any discussion is the third element of the *Adkins* test: whether the transaction at issue implicated interstate commerce.

B. Interstate Commerce is present.

The trial judge refused to compel arbitration under the FAA because "[D.R. Horton] and [the Smiths] are both residents of South Carolina, the construction at issue took place in South Carolina, and any out-of-state

---

[10] And if there were any doubt on this point, "[t]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001).

transactional involvement is merely tangential." (R. 4). The Smiths' house is located in South Carolina, but the trial judge erred in concluding that D.R. Horton is a South Carolina resident and that the dispute does not sufficiently implicate interstate commerce.

The Smiths contend that their house was defectively constructed by D.R. Horton, a Delaware corporation that maintains its principal place of business in Texas. (R. 115, ¶ 3). D.R. Horton builds houses in approximately twenty-seven states. (R. 115, ¶ 4). It routinely engages in interstate activities, including procurement of materials and labor on an interstate basis. (R. 115, ¶ 5). Numerous materials for the Smiths' house were obtained from out of state. (R. 118–119, ¶ 4).

The interstate character of a defendant's business will bring an arbitration agreement within interstate commerce. *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (holding that FAA governed arbitration agreement between pest control agency and homeowner because company operated interstate and used raw materials purchased from out of state). Additionally, South Carolina construction projects affect interstate commerce when, as here, services or materials for the project are obtained from out of state. *See, e.g.*, *Zabinski*, 346 S.C. at 595–596, 553 S.E.2d at 118; *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 626–27, 667

S.E.2d 1, 4 (Ct. App. 2008); *Blanton v. Stathos*, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002); *Circle S. Enters.*, 288 S.C. 428, 343 S.E.2d 45.

The interstate character of D.R. Horton's business is analogous to that of the defendants whose operations were analyzed in the above-cited cases. As such, D.R. Horton's business occurs on an interstate basis and involves interstate commerce. Further, the construction of the Smiths' house, out of which this dispute arises, involved interstate commerce. Thus, in light of "the FAA's expansive view of interstate commerce," *Zabinski,* 346 S.C. at 596, 553 S.E.2d at 118, the trial judge erred in holding that the FAA does not apply.

Because the FAA applies, the arbitration provision within the parties' Purchase Agreement must be enforced even if it does not satisfy the SCUAA's requirements. *Id.,* 346 S.C. at 594, 553 S.E.2d at 117 ("Under the facts of the instant case, we find the FAA controls and compel[s] arbitration. On its facts, the instant arbitration agreement is not enforceable under South Carolina law."); *see also Concepcion,* 131 S. Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA"); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) ("[T]he FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction") (citations omitted).

C. *Bradley v. Brentwood Homes, Inc.*, requires application of the FAA.

This Court's decision in *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 730 S.E.2d 312 (2012), clarifies that the FAA applies even if the parties' agreement to arbitrate fails because the arbitration notice was "inconspicuous" under S.C. Code Ann. § 15-48-10(a). Accordingly, the Smiths' argument that placement of the arbitration provision in Section 14 (Resp'ts' Br. 14) and the alleged failure of the arbitration notice to meet the conspicuous requirements of S.C. Code Ann. § 15-48-10(a) (Resp'ts' Br. 18–21) are irrelevant.

D.R. Horton argued the trial judge should compel arbitration under the FAA or, **alternatively**, the SCUAA. (R. 87–88). D.R. Horton's position is consistent with this Court's decision in *Bradley* where, as in this case, a home purchaser initiated a lawsuit due to alleged construction defects. *Bradley*, 398 S.C. at 449, 730 S.E.2d at 313. Unlike this case, the homebuilder in *Bradley* conceded the purchase agreement did not meet the technical requirements of S.C. Code Ann. §15-48-10. *Id.* at 453, 730 S.E.2d at 315. Nevertheless, this Court noted "[t]his concession . . . is not dispositive." *Id.*

This Court went on to state that the "FAA is intended to ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." *Id. See also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012) ("[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straight forward: The conflicting rule is displaced by the FAA.") (*citing Concepcion*, 131 S. Ct. at 1747); *Volt Info v. Bd. of Trs. of Leland Stanford Jr.*

Univ., 489 U.S. 468, 476 (1989) ("[T]he federal policy [of the FAA] is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"). As such, "the FAA would preempt an application of our state law to the extent it invalidated the arbitration agreement, if interstate commerce is involved." *Bradley*, 398 S.C. 447, 454, 730 S.E.2d 312, 315; *see also Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116; *Munoz*, 343 S.C. at 539 n.2, 542 S.E.2d at 363 n.2.

Accordingly, because applying South Carolina state law would have invalidated the agreement to arbitrate, the **only** question concerning arbitrability that remained in *Bradley* was whether interstate commerce existed. On this issue, the current case is distinguishable. In *Bradley*, interstate commerce was not involved because the purchase agreement was merely for the purchase of a completed dwelling, rather than a contract for construction. *Bradley*, 398 S.C. 447, 458, 730 S.E.2d 312, 318. Even so, this Court emphasized that "had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA." 398 S.C. at 458 n.8, 730 S.E.2d at 318 n.8.

The Smiths themselves have defined the scope of the dispute to include the **construction** of the residence. Their breach of contract claim specifically states that "at all times herein, [the Smiths] entered into a contract with [D.R. Horton] for the . . . **construction**, and purchase" of their residence. (R.

53, ¶ 25) (emphasis added). The Smiths further allege that D.R. Horton breached the contract "by failing to . . . construct . . . said residence in accordance with the terms and conditions of the contract." (R. 53–54, ¶ 27).

Not only do the Smiths' allegations confirm that the Purchase Agreement was a contract for construction, the Purchase Agreement also makes this clear. Section 7 regarding "Condition of the Property," states that "[t]he property **shall be completed** in accordance with all applicable governmental regulations, ordinances, and codes." (R. 149, ¶ 7). Section 8 contemplates inspections at "appropriate stage[s] of construction." (R. 149, ¶ 8). Section 14 notes that D.R. Horton "will make every effort to save as many existing trees as possible **during the construction process**." (R. 151, ¶ 14(e)). Further, the Smiths initialed several sections in the Purchase Agreement related to the type of house to be constructed and options related thereto, including color selection, "substitutions" of "construction materials used in the construction of the home," and the use of various contractors and manufacturers during the construction process. (R. 153–54, ¶¶ 17, 18, 19(b), 19(c), 19(e), & 19(f)). The Purchase Agreement specifically contemplates completion of construction by the closing date and delays in construction. (R. 154, ¶¶ 22 & 25).

Given the Smiths' allegations concerning construction and the language of the Purchase Agreement itself, it is clear that this Purchase Agreement "actually encompassed the construction of the residence" as contemplated in *Bradley*. As such, if the SCUAA is insufficient to compel arbitration

itself, which D.R. Horton denies, *Bradley* requires the application of the FAA in compelling arbitration. The trial judge and the Court of Appeals erred in failing to address the application of the FAA.

D. The Smiths' argument that the Purchase Agreement does not specifically reference the FAA fails.

The Smiths previously suggested that the Purchase Agreement's failure to mention the FAA is fatal. (Resp'ts' Br. 21). Not so. In *Bradley* the agreement only referenced the South Carolina and North Carolina arbitration statutes. *Bradley*, 398 S.C. 447, 314, 730 S.E.2d 312, 451. Although interstate commerce was not present in *Bradley*, had it been it appears this Court would have required arbitration under the FAA, even though the FAA was never mentioned. *Id.*, 398 S.C. 447, 458, 730 S.E.2d 312, 318, fn. 8. Further, the FAA applies "since the parties did not contract to the contrary and the arbitration agreement pertains to a transaction involving interstate commerce due to the nature of the construction project." *New Hope Missionary*, 379 S.C. 620, 626, 667 S.E.2d 1, 4. Using this logic, the FAA applies here. Thus, the Smiths' argument below concerning the canon of construction "*expressio unius est exclusio alterius*" is without merit. (Resp'ts' Br. 21).[11]

[11] The Smiths' argument fails either way. The case they rely on, *16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 728 S.E.2d 448 (2012), merely cites this canon in the context of construction of a legislative statute. That case did not involve the construction of a contractual agreement, or more specifically an arbitration provision, as in this instance. Conversely, this case does not involve construction of a legislative statute.

ISSUE THREE

The Court of Appeals erred in affirming the trial judge's finding of unconscionability.

Even if the Purchase Agreement meets the SCUAA's or the FAA's basic requirements a court may invalidate an arbitration provision on general state law contract defenses, such as unconscionability. *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116. Although the trial judge and the Court of Appeals found the arbitration provisions to be unconscionable, there is insufficient evidence of unconscionability. Further, a contract may not be voided for unconscionability unless it is first shown to be an adhesion contract.[12] *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901–902 (Ct. App. 1998) (stating that determining whether a contract is an adhesion contract is "the beginning point in the [unconscionability] analysis").

A. There is no evidence that the Purchase Agreement is an adhesion contract.

Even the Smiths acknowledged "the first step . . . is to consider whether the Purchase Agreement . . . is an adhesion contract, because that is the beginning point in the analysis of whether the contract is unconscionable." (Respondents' Br. 11, *citing Lackey*, 330 S.C. at 395, 498 S.E.2d at 902). The trial judge merely stated "the form of the contract *seems to be* that of a contract of adhesion." (R. 6) (emphasis added). There is no evidence to support

---

[12] A "contract of adhesion" or "adhesion contract" is defined as a "take-it-or-leave-it" contract for which the offeree's only options are "complete adherence or outright rejection." *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669; *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901.

that finding, and it is obviously an important step in analyzing unconscionability, which the Court of Appeals never addressed.

The Smiths presented no evidence the Purchase Agreement or the arbitration provision was non-negotiable or offered on a "take-it-or-leave-it" basis. To the contrary, the only evidence in the record suggests negotiated terms. The Smiths noted the Purchase Agreement provides space for handwritten "Special Stipulations" (at R. 155), in addition to "boxes to check or blanks for Respondents' initials." (Resp'ts' Br. 11–12). There is no evidence why the "Special Stipulations" remained blank, or whether the Smiths could have, or even wanted to, include such stipulations. Perhaps more significantly, the purchase price indicated in ¶ 2, which was originally typed into the document, was stricken through and a different purchase price was handwritten into the document. (R. 147, ¶ 2). Further, the principal amount of the home loan, the term for the home loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were handwritten into the document. (R. 147–148, ¶¶ 2(b), & 3; R. 154, ¶ 20). The Smiths overlook these important handwritten additions when arguing the "boilerplate" nature of the agreement. (Resp'ts' Br. 11–12). Had the Smiths been given the Purchase Agreement on a "take-it-or-leave-it" basis, they could have, and should have, provided testimony of this fact by affidavit or otherwise.

Because there was no basis on which the trial judge could find the Purchase Agreement was an adhesion contract, the unconscionability analysis

should end here, as a contract cannot be deemed unconscionable unless it is first found to be an adhesion contract. *Lackey,* 330 S.C. at 388, 498 S.E.2d at 901–902. The Court of Appeals, however, ignored the adhesion-contract analysis and the lack of any facts on which to affirm such a finding.

B. The trial judge could not properly hold the arbitration provision itself unconscionable.

By failing to analyze the adhesion-contract question, the trial judge and the Court of Appeals skipped over a significant component of the unconscionability analysis. Unconscionability involves the absence of meaningful choice and terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *See Simpson,* 373 S.C. at 24–25, 644 S.E.2d at 668–669; *Herron,* 387 S.C. at 532, 693 S.E.2d at 398. Whether a contract of adhesion is present bears on whether there is an absence of meaningful choice.[13]

Assuming the trial judge accepted and applied the *Prima Paint* doctrine (*see* pp. 36–41 below) and focused his analysis exclusively on the arbitration provision at ¶ 14(g), there was no basis to conclude it was unconscionable. The trial judge never identified any unconscionable provision. Again, the provisions the trial judge said are "oppressive and one-sided" are not

[13] While the Court of Appeals alludes to portions of the Purchase Agreement that it suggests lack "mutuality of remedy" and that were "oppressive and unconscionable," it did not address the absence of meaningful choice. *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 15–16, 742 S.E.2d 37, 40–42. By failing to conduct an analysis of the meaningful choice element, for which there is no evidence in the record, the trial judge and the Court of Appeals ignored half of the *Simpson* unconscionability analysis.

found in subparagraph ¶ 14(g), which is captioned "Mandatory Binding Arbitration." (R. 151–152). Instead, the provisions the trial judge found objectionable are in the "Limitation of Liability" clause. (R. 152, ¶ 14(i)). The only relationship between the arbitration provision and the Limitation of Liability clause is one of arrangement of the document.

When considering the arbitration provision at ¶ 14(g) in isolation, there is no argument it is unconscionable. There is no evidence of a lack of meaningful choice or, as to the arbitration provision at ¶ 14(g) of the Purchase Agreement, evidence of one-sided contract provisions and terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them that satisfy the *Herron* and *Simpson* definitions of unconscionability. *Herron*, 387 S.C. at 532, 693 S.E.2d at 398; *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668.

1. There was no "absence of meaningful choice."

This Court has explained that "absence of meaningful choice" involves the fundamental fairness of the bargaining process. South Carolina courts consider the (i) disparity in the parties' bargaining power, (ii) the parties' relative sophistication, (iii) the nature of the injuries suffered by the plaintiff, (iv) whether the plaintiff is a substantial business concern, (v) whether there is an element of surprise in the inclusion of the challenged clause, and (vi) the conspicuousness of the clause. *Herron*, 387 S.C. at 532, 693 S.E.2d at 398; *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669. There is no evidence in the record supporting any of these points.

The Smiths argued there was a disparity in bargaining power between the parties to support their claim that they lacked "meaningful choice" pursuant to *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668. (Resp'ts' Br. 13–14). But the Smiths have not presented any dispositive evidence in this regard. They merely argued D.R. Horton is a "self-described large corporation,"[14] which is irrelevant, and that the Purchase Agreement was "pre-printed" with blanks merely to "fill in basic factual information," which is inaccurate.[15] (Resp'ts' Br. 13–14).

In *Simpson*, the finding of an absence of meaningful choice supporting unconscionability was founded on affirmative evidence presented by the plaintiff. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. For instance, the plaintiff claimed she did not possess "the business judgment necessary to make her[self] aware of the implications of the arbitration agreement," she did not

---

[14] The Smiths did not argue D.R. Horton's size was relevant to this analyis prior to this appeal. Accordingly, this argument is untimely and not preserved. *McNeely v. S.C. Farm Bur. Mut. Ins. Co.*, 259 S.C. 39, 190 S.E.2d 499 (1972)(claims or defenses not presented in the pleadings will not be considered on appeal). Regardless, even if correct, relative size does not necessitate disparity in bargaining power.

[15] The Smiths claim the Purchase Agreement was "pre-printed" with blanks merely to "fill in basic factual information," misstates the reality. As discussed above with respect to the Smiths' allegation the Purchase Agreement was a contract of adhesion (*see* pp. 27–28 above), several facts are overlooked. The Smiths clearly negotiated the purchase price and the principal amount of the home loan, the term for the home loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were handwritten into the document. (R. 147–48, ¶¶ 2, 2(b), & 3; R. 154, ¶ 20). While the Purchase Agreement was "pre-printed," like contracts generally in the modern era, there were important handwritten additions the Smiths overlook and that do not suggest disparity in bargaining power.

have a lawyer present to provide counsel, and the contract was "hastily" presented to her. *Id.* at 27, 644 S.E.2d at 670. The Smiths have provided no such affirmative evidence.

The trial judge's order denying the motion to compel references a lack of "meaningful choice" but makes no specific findings in this regard. (R. 2). There was no evidence that the Smiths had no meaningful choice in negotiating and accepting the arbitration provision or any other portion of the Purchase Agreement. Nor did the Smiths allege they were unaware of, or surprised by, the arbitration provision, or that they lacked the bargaining power or opportunity to negotiate the Purchase Agreement's terms.

To the extent the trial judge relied on *Simpson* to find lack of "meaningful choice," it erred. *Simpson* held that a car buyer lacked a meaningful choice because:

(1) the arbitration clause "was written in the standard small print, and embedded in paragraph ten of sixteen total paragraphs included on the page";

(2) it was an adhesion contract;

(3) automobile sales contracts between consumers and retailers are to be viewed with "considerable skepticism" due to a substantial disparity in bargaining power;

(4) she testified she lacked the business judgment necessary to make her aware of the implications of the arbitration agreement and she did not have a lawyer to assist her in understanding the contract; and

(5) she alleged that the contract was "hastily" presented for her signature.

Simpson, 373 S.C. at 26–28, 644 S.E.2d at 669–670. The Smiths offered no such evidence. The arbitration provision was not in small print, there was no basis for finding the Purchase Agreement was a contract of adhesion, this was not an automobile sales contract, and the Smiths offered no evidence regarding their business judgment, whether they had a lawyer at the closing, or whether the Purchase Agreement was hastily presented, as in *Simpson*.

The Purchase Agreement here gave clear notice in underlined, capital letters at the top of the first page that the parties were agreeing to mandatory, binding arbitration. (R. 147). The Smiths placed their initials directly beneath the arbitration provision to indicate their acknowledgement and agreement. (R. 151–152, ¶ 14(g)). There is no evidence that they lacked sufficient business judgment, legal counsel, or the advice of a realtor. There is no evidence they were not afforded ample time to review the contract or that they could not understand the arbitration provision. Nor is there any evidence that they were at a bargaining disadvantage, that the contract was offered on a take-it-or-leave-it basis, or that the arbitration provision was nonnegotiable. In sum, there is no evidence that the Smiths lacked meaningful choice.

Further, the arbitration provision in *Simpson* required the plaintiff to arbitrate all claims but exempted certain claims brought by the defendant dealer against the customer. It also prohibited the arbitrator from awarding punitive, exemplary, or double or treble damages. *Simpson*, 373 S.C. at 28,

644 S.E.2d at 670. The arbitration provision here is not one-sided and gives no advantage, whether procedural or substantive, to either party.

C. The agreement to arbitrate is not made unconscionable by provisions elsewhere in the Purchase Agreement.

The trial judge and the Court of Appeals apparently based their unconscionability findings on Section 14 as a whole by referring to the Limitations of Liability in ¶14(i) and without specific reference to whether ¶ 14(g) itself is unconscionable. *Smith*, 403 S.C. at 16, 742 S.E.2d at 40-41. (R. 3–4). As discussed below, this violates the *Prima Paint* doctrine. Further, the Limitations of Liability found in ¶14(i) do not render the Purchase Agreement or the arbitration provision at ¶14(g) unconscionable.

The trial judge referenced *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006) in relation to "oppressive and one-sided terms." (R. 3–4). The sole issue in *Kirkman* was an implied warranty of habitability, *i.e.*, ¶ 14(i) of the Purchase Agreement, not its arbitration provision in ¶ 14(g). *Kirkman* merely limited the instances where the implied warranty of habitability may be disclaimed. *Kirkman*, 369 S.C. at 485, 632 S.E.2d at 858. The trial judge suggested that ¶ 14(i) is invalid as a disclaimer of the implied warranty of habitability under *Kirkman*, and it is therefore unconscionable. (R. 3–4). Invalidity does not equate to unconscionability. Even if accurate, this merely impacts ¶ 14(i) and whether such limitations of liability can be disclaimed—not the enforceability of the arbitration provision in ¶ 14(g). The

Court of Appeals merely acknowledged the trial judge took Section 14 "as a whole," with no further analysis.

The Smiths tried to draw an analogy between the disclaimer of the implied warranty of habitability in ¶ 14(i) and the *Simpson* arbitration provision, which this Court declared invalid because it violated statutory law and public policy by prohibiting the arbitrator from awarding "punitive, exemplary, double, or treble damages." (R. 122–123). The plaintiff's claims in *Simpson* involved mandatory statutory remedies. *Simpson*, 373 S.C. at 28–29, 644 S.E.2d at 670–71.[16] This Court held that a provision prohibiting the arbitrator from awarding statutorily-mandated double and treble damages was "oppressive," "one-sided," and "an unconscionable waiver of statutory rights." *Simpson*, 373 S.C. at 30, 644 S.E.2d at 671. The waiver of statutory rights in *Simpson*, however, bears no analogy whatsoever to the disclaimer of warranties here. Unlike the arbitration provision in *Simpson*, the arbitration provision in the Smiths' Purchase Agreement contains no limitation on their right to recover statutory damages, whether double, treble, or otherwise.

Similarly, the *Simpson* arbitration provision does not bear any analogy to the provision in the Smiths' Purchase Agreement disclaiming monetary damages and limiting D.R. Horton's liability to its obligation to repair or replace defects under the RWC Warranty. (R. 152, ¶ 14(i)). These liability limi-

[16] The South Carolina Unfair Trade Practices Act ("SCUPTA") requires a court to award treble damages for violations. The South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act") requires a court to award double damages for violations.

tations are common in contracts (residential construction contracts and otherwise) that provide an express warranty to the consumer or purchaser, and courts generally do not find them to be unconscionable.[17] The "Limitation of Liability" clause here does not waive any statutory rights or causes of action, nor does it purport to limit the arbitrator's legal authority, as did the arbitration provision in *Simpson*.

In fact, under this Purchase Agreement, an arbitrator would have the same authority as any state or federal court to declare the limitation-of-liability clause unconscionable and sever it from the contract. Despite their attempts to fit within the holding in *Simpson*, the Smiths have not demonstrated that enforcement of the arbitration provision would strip them of any remedy they could access through state or federal court litigation.

In sum, neither the arbitration provision nor the entire Purchase Agreement is unconscionable, and the trial judge committed error in essentially adopting the Smiths' argument and incorporating it into the orders denying D.R. Horton's motion to compel and its motion for reconsideration.

D. The Court of Appeals ignored the *Prima Paint* doctrine, which the trial judge misapplied or ignored.

The trial judge never clarified whether he determined the arbitration provision at ¶ 14(g) was unconscionable, or whether other aspects of the Purchase Agreement outside ¶ 14(g) were unconscionable, a critical distinction given the *Prima Paint* doctrine. (R. 4; R. 6). Read loosely, it appears the trial

[17] *See*, fn. 2 above.

judge relied on the Limitation of Liability section at ¶ 14(i), as opposed to the arbitration provision at ¶ 14(g). (R. 2–4; R. 5–6). The Court of Appeals assumed, perhaps correctly, the trial judge "viewed the Warranties and Dispute Resolution Section 14 **as a whole**." *Smith*, 403 S.C. at 16, 742 S.E.2d at 40 (emphasis added). It thus appears the trial judge found unconscionability outside the arbitration provision at ¶ 14(g). If so, the trial judge either ignored or misapplied the *Prima Paint* doctrine, and the Court of Appeals ignored this error.[18] *See, Prima Paint Corp.*, 388 U.S. 395, as adopted by this Court in *Great W. Coal, Inc.*, 312 S.C. 559, 437 S.E.2d 22.

Under *Prima Paint*, a party may not avoid arbitration by seeking to rescind an entire contract on the basis of illegality or unconscionability when there is no independent challenge to the arbitration provision; rather, the arbitration provision itself must be illegal or unconscionable. *Prima Paint* addressed whether, under the FAA, a claim of fraud in the inducement of the entire contract—as opposed to the arbitration provision itself—is to be resolved by the court or referred to an arbitrator. The Court held that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate" and cannot, therefore, "consider claims of fraud in the inducement of the contract generally." *Prima Paint*, 388 U.S. at 404. Some courts sought to limit *Prima Paint* to fraud in the inducement chal-

[18] If the trial judge's holding is that the arbitration provision at ¶ 14(g) itself is unconscionable, as discussed above at pp. 29–33, there is no factual or legal basis for this holding, or the Court of Appeals' affirmation thereof.

lenges, but others held that *Prima Paint* extends to *all* challenges.

South Carolina joined the latter jurisdictions in rejecting attempts to limit *Prima Paint*. *See Great W. Coal, Inc.*, 312 S.C. at 562–63, 437 S.E.2d at 24–25. "A party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract." *Id.* at 562–63, 437 S.E.2d at 24.[19] Thus, South Carolina courts must distinguish "between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged." *New Hope Missionary*, 379 S.C. at 631, 667 S.E.2d at 6; *compare Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (holding the trial court was the proper forum for determining enforceability of arbitration clause challenged unconscionable) *with Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 338–42, 588 S.E.2d 617, 622–24 (holding legality and enforceability of two contracts was for arbitrator to decide where arbitration agreement in contracts was not directly challenged).

Here, there was no independent challenge to the arbitration provision. The trial judge's determination of unconscionability was based on its finding of "oppressive and one-sided provisions," in the "Limitation on Liability" provision at ¶ 14(i), which is distinct from the arbitration provision at ¶ 14(g).

[19] *See also, Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994) ("Arbitration clauses are separable from the contracts in which they are imbedded."); *New Hope Missionary*, 379 S.C. at 630, 667 S.E.2d at 6; *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623.

(R. 2–3; R. 151–152, ¶ 14(g), (i)). The trial judge later alluded to "an entire host of attempted waivers of important legal remedies" in denying D.R. Horton's motion for reconsideration, without specifically identifying the offending language. (R. 4–5). Still, none of those provisions are contained in the arbitration provision. Hence, the trial judge found unconscionability within the Purchase Agreement at large rather than in the arbitration provision itself.

The Court of Appeals cites no other offending language other than at ¶ 14(h) or ¶ 14(i)—which are separate and distinct from the arbitration provision at ¶ 14(g)—unlike the offending language in *Simpson*, which was within the arbitration provision itself. At most, the Court of Appeals seems to have approved of the trial judge's treatment of the entirety of Section 14 **as a whole**, a proposition for which there is not legal justification.

E. D.R. Horton's *Prima Paint* argument was timely and necessary.

The Smiths previously argued D.R. Horton failed to timely raise *Prima Paint*. (Resp'ts' Br. 4). That argument is without merit.

1. The *Prima Paint* argument was timely.

Although D.R. Horton did not raise its *Prima Paint* argument before moving for reconsideration, the Smiths' argument misses the point. The issue did not arise until the trial judge denied the motion to compel, identifying several allegedly "unenforceable and unconscionable" provisions other than the arbitration provision in ¶ 14(g) of the Purchase Agreement. (R. 2–3).

Also, the cases cited by the Smiths stating that a party cannot use a motion to reconsider to present an issue that should have been raised previ-

ously do not apply here. For instance, in *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994), the hospital sought to recover for services provided to the defendant's deceased wife. The hospital raised additional grounds for recovery in its motion to reconsider, after judgment. *Id.* Accordingly, the hospital was essentially seeking to add an entirely new cause of action, which is simply not the case here.

Similarly, in *McMillan v. S.C. Dept. of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005), *rev'd on other grounds by* 380 S.C. 212, 670 S.E.2d 368 (2008), the defendant raised the issue of exhaustion of administrative remedies, after a special referee's initial findings, in its Rule 52(b) motion to amend. Unlike this case, the defendant was attempting to raise an affirmative defense that it had not previously raised. Similarly, in *Hickman v. Hickman*, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (Ct. App. 1990), the wife sought to have the family court apportion the husband's civil service retirement fund **after** the family court order equitably dividing the marital property by way of Rule 59(e). Unlike here, those cases each involved a party seeking relief on grounds that existed from the outset. Here, the grounds for a *Prima Paint* argument did not exist until the trial judge denied the motion to compel, at which time the issue was raised in the motion for reconsideration.

2. The *Prima Paint* argument was necessary.

It was unclear in the order denying D.R. Horton's motion to compel arbitration whether the trial judge found fault with "the Contract" as a whole,

with the unrelated limitations of liability sections[20] (*see, e.g.*, R. 150–152, ¶ 14(c)–(f) & 14(i)), or "the relevant arbitration provisions" exclusively. (R. 3–4). Thus, D.R. Horton raised *Prima Paint* in its motion for reconsideration. (*See* R. 157–160).

The necessity of D.R. Horton's *Prima Paint* argument became even more apparent when the trial judge's order denying reconsideration contained similarly inconsistent language stating the arbitration provisions (in the plural sense rather than referring solely to ¶ 14(g) were "unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." (R. 5–6). The trial judge did not clarify what these "oppressive and one-sided provisions" were, although the orders denying both the motion to compel and the motion for reconsideration each refer to "an entire host of attempted waivers of important legal remedies" contained in Section 14 generally. (R. 1–2, 5–6).

This Court should correct the trial judge's error in ignoring or misapplying the *Prima Paint* doctrine, particularly when this issue went unaddressed by the Court of Appeals.

---

[20] The Smiths argued that these separate provisions in individual subparagraphs of Section 14 unrelated to the parties' arbitration agreement must be interpreted together rather than standing alone. (Resp'ts' Br. 5–8). However, the legal authorities cited for their position involve the determination of the parties' intention in the face of ambiguity. *See Buice v. WMA Sec., Inc.*, 380 S.C. 149, 156–57, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P'ship, v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). Here, the parties' intent is clear and these cases are inapplicable.

ISSUE FOUR

The trial court erred in finding the arbitration provision unenforceable under an unequal-bargaining-power theory.

Although the issue went unaddressed in the trial judge's order denying the motion to compel, the trial judge concluded the parties were not of "equal bargaining power" in denying the motion for reconsideration. (R. 6). Because the Court of Appeals ruled on unconscionability grounds and an inapplicable severability argument, it did not address the Smiths' unequal-bargaining theory. *Smith*, 403 S.C. at 18, 742 S.E.2d at 42.

The Court of Appeals' failure to address unconscionability further evidences its error. Unconscionability requires an "**absence of meaningful choice** on the part of one party due to one-sided contract provisions," *i.e.*, unequal bargaining power. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668, *citing*, *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (emphasis added). This absence of meaningful choice is related to bargaining power, *i.e.*, "the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669, *citing*, *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). Neither of the courts below specifically addressed the absence of meaningful choice other than the trial judge's assumption that an adhesion contract was present. Moreover, had either court done so, it would be obvious that the Smiths presented no evidence of unequal bargaining power.

Even if such evidence existed, unequal bargaining power alone will not invalidate an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable"); *see also Concepcion*, 131 S.Ct. at 1749 n.5 ("Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable.") (*citing Gilmer*, 500 U.S. at 33).

Thus, the trial judge's ruling could not have been sustained on this ground alone and there were no other grounds for invalidating the arbitration provision agreed to by the parties in their Purchase Agreement. The Court of Appeals erred in failing to address this issue from either of two perspectives—as the Smiths' unique, independent theory for denying arbitration and as an element of the overall unconscionability analysis under *Simpson*.

ISSUE FIVE

The trial court erred in finding the arbitration provision unenforceable because no consideration was given.

The trial judge found that no consideration was given "in exchange for the sacrifice of certain rights" in denying D.R. Horton's motion for reconsideration. (R. 6).[21] As with the unequal bargaining power issue, the Court of Appeals did not address this issue due to its finding of unconscionability.

[21] This consideration issue was not addressed in the previous order denying D.R. Horton's motion to compel.

Smith, 403 S.C. at 18, 742 S.E.2d at 42. Regardless, the Court of Appeals erred in failing to reverse the trial judge.

The trial judge identified no facts or evidence to support a lack of consideration. (R. 1–4, 5–6). Indeed, the Smiths never offered any. This assumption by the trial judge overlooks valid consideration for the Purchase Agreement on two levels. First, the sufficiency of mutual promises to arbitrate as consideration is well-settled. *See, e.g.*, *Adkins*, 303 F.3d at 501; *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997); *Tenaglia v. Ryan's Family Steak Houses, Inc.*, No. 02-2684-25BH, 2003 U.S. Dist. LEXIS 26322, at 33 (D.S.C. May 8, 2003). The Smiths and D.R. Horton each agreed that, "to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves." (R. 151, ¶ 14(g)). In addition, the arbitration provision was part of the contract to purchase and sell real estate. The arbitration provision and the Purchase Agreement at large were supported by mutual consideration in the exchange of money for the residence. Neither the Smiths, the trial court, nor the Court of Appeals have suggested the Smiths did not receive their house as part of the overall transaction.

Because the parties' mutually binding promises to arbitrate were sufficient consideration, and there was mutual consideration in the exchange of money for the residence, the trial judge erred in finding a lack of consideration and the Court of Appeals erred in failing to correct the error below.

ISSUE SIX

The Court of Appeals erred in ignoring the trial judge's finding the arbitration provision null and void due to the doctrine of merger by deed.

The Smiths argued that the arbitration provision was extinguished by the doctrine of merger by deed, and the trial judge denied D.R. Horton's motion to compel arbitration because, in part, "the Deed at issue and which controls the relationship between the parties does not contain an arbitration provision." (R. 4). The trial judge did not address D.R. Horton's argument against the application of the doctrine of merger by deed in denying the motion for reconsideration. (R. 5–6). Similarly, although this issue was raised on appeal, it was ignored by the Court of Appeals. *Smith*, 403 S.C. at 18, 742 S.E.2d at 42. The doctrine of merger by deed does not apply here.

Under the merger doctrine, the parties' rights generally are "fixed by their expressions as contained in the deed" when it is executed and accepted, even when it varies from the terms of an antecedent contract. *Charleston & W. Carolina Ry. Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) (citations omitted). But where a deed is only part performance of a preceding contract, "other distinct and unperformed provisions of the contract are not merged in the deed." *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993); *see also Hughes v. Greenville Country Club*, 283 S.C. 448, 322 S.E.2d 827 (Ct. App. 1984) (South Carolina recognizes "contrary intent" exception to merger doctrine).

The doctrine of merger "is not absolute." *Meurer v. Tribby (In re Tribby)*, 241 B.R. 380, 383 (Bankr. E.D. Va. 1999) (citation omitted). *Tribby* explains that the deed is final as to every subject it undertakes to deal with, but typically a deed represents only that **part** of the contract dealing with transfer of title. The deed "rarely purports to cover all elements of the original contract for sale." *In re Tribby*, 241 B.R. at 383. Thus, other documents, including the executory contract, "may be considered to determine obligations collateral to the fact of conveyance." *Id.*[22]

An arbitration provision is presumed to survive the merger of a contract unless there is express or implied evidence that the parties intended to override the presumption. *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998) (citing *Nolde Bros. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243, 255 (1977)). *See also Primex Int'l Corp. v. Wal-Mart Stores, Inc.*, 89 N.Y.2d 594 (1997) (holding that, despite merger clause in contract that did not contain an arbitration clause, arbitration clauses in prior, expired agreements were enforceable).

Here, the deed was only part performance of the antecedent contract, *i.e.*, the Purchase Agreement. Other distinct and unperformed (*e.g.*, post-

---

[22] *See also* Charles S. Parnell, Annotation, *Deed as Superseding or Merging Provisions of Antecedent Contract Imposing Obligations upon the Vendor*, 38 A.L.R.2d 1310 § 6 (1954) ("where the antecedent contract contains provisions imposing obligations on the vendor other than those relating to title or possession, and so far collateral thereto as to indicate that their omission from the deed was without any deliberate intent to preclude their survival of that instrument, such collateral provisions will be held to survive the deed").

closing) provisions of the Purchase Agreement that define certain obligations occurring after conveyance of land were not intended to be merged in the deed, such as D.R. Horton's obligation to complete "punch list" items (R. 149, ¶ 8), D.R. Horton's obligation to complete repairs due to wood infestation (R. 150, ¶ 12), the parties' agreement to arbitrate[23] (R. 151–152, ¶ 14(g)), and the Smiths' obligation to make written requests for warranty service within the first 365 days after closing (R. 152, ¶ 14(j)).

All of these provisions were "distinct," "unperformed" (at the time of closing), and "collateral to the fact of the conveyance of land" and, thus, were not extinguished by the doctrine of merger.

Further, the Purchase Agreement contained a "Survival" clause: "Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled." (R. 152, ¶ 15). This language evidences broad intent for conditions remaining unfulfilled at the time of closing to survive the closing. Because ownership of the residence would not attach until the closing, the arbitrability of construction defects related to the house must necessarily survive beyond the closing. Similarly, other aspects of the Purchase

---

[23] Again, this agreement encompassed "all disputes between themselves," including, but not limited to, "(1) any claim arising out of [D.R. Horton]'s construction of the home; (2) [D.R. Horton]'s performance under any Punch List or Inspection Agreement [obviously referring to D.R. Horton's post-closing performance]; (3) [D.R. Horton]'s performance under any warranty contained in this [Purchase] Agreement or otherwise [again, obviously referring to D.R. Horton's post-closing performance]."

Agreement such as the Warranty of Title (R. 148–149, ¶ 4), conditions pertaining to existing trees (R. 151, ¶ 14(e)), conditions related to heating and air-conditioning (R. 154, ¶ 23), and conditions relating to insulation (R. 154, ¶ 26), would be "merged" into the deed under the Smiths' theory. If this were the case, purchasers like the Smiths would lose significant rights, which result is unintended by the doctrine of merger by deed.

ISSUE SEVEN

The Court of Appeals' "severability" analysis is inapplicable.

In addition to unconscionability, the Court of Appeals also addressed a "severability" issue. *See Simpson*, 373 S.C. at 27–30, 644 S.E.2d at 673–674. Doing so was in error for at least two reasons. First, the Court of Appeals suggests D.R. Horton raised and argued this issue. This is untrue and reflects the severity of the Court of Appeals' error. Further, the severability issue raised in *Simpson* is inapplicable.

The Court of Appeals appears to confuse the "separability" analysis required by *Prima Paint* with the "severability" argument raised in *Simpson*, 373 S.C. at 27–30, 644 S.E.2d at 673–674, although they are wholly unrelated concepts. In *Simpson* the "separability" analysis was necessitated by the defendant's request that the trial judge rewrite the single paragraph containing the arbitration provision by severing the unconscionable language therefrom. *Simpson*, 373 S.C. at 19–21, 644 S.E.2d at 666. Unlike this case, the language the defendant sought to "sever" was within the arbitration provision itself.

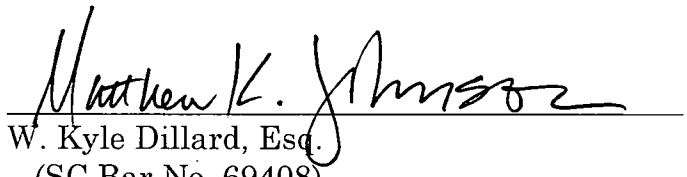
Because the "unconscionable" provisions were within the arbitration provision itself, *Prima Paint* did not apply, and was not addressed, in *Simpson*. On the other hand, the structure of the Purchase Agreement at hand contains separate and distinct sections with respect to arbitration and the limitations of liability that the circuit court and the Court of Appeals have found "unconscionable." Because they are maintained in separate and distinct sections, *Prima Paint* applies, as argued above. *Prima Paint* is not a "severability" doctrine—it is a "separability" doctrine that limits judicial determination to an analysis of the arbitration provision itself.

In this case, the arbitration provision at ¶ 14(g) is wholly separate and distinct from the allegedly unconscionable limitations of liability found at ¶ 14(g), so "severability" is inapplicable, unlike in Simpson. Thus, "severability" was never raised by D.R. Horton or by the Smiths.

CONCLUSION

For the foregoing reasons, and for the reasons expressed by D.R. Horton in its briefs to the courts below, this Court should reverse the Court of Appeals' affirmance of the trial judge's findings on unconscionability and "severability," and require the Smiths' claims to be referred to binding arbitration, consistent with the parties' Purchase Agreement, the SCUAA and FAA, and the *Prima Paint* doctrine.

Respectfully submitted,



W. Kyle Dillard, Esq.
(SC Bar No. 69408)
Matthew K. Johnson, Esq.
(SC Bar No. 12284)
OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, P.C.
300 North Main Street
PO Box 2757
Greenville, SC 29602
(864) 271-1300 (telephone)
(864) 235-8806 (facsimile)
kyle.dillard@ogletreedeakins.com
matthew.johnson@ogletreedeakins.com

ATTORNEYS FOR PETITIONER,
D.R. HORTON, INC.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-001345

Gregory W. Smith and Stephanie Smith, ... Respondents,

v.

D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lutzen Construction, Inc., Boozer Lumber Company, All American Roofing, Inc., Myers Landscaping, Inc., ... Defendants,

of whom D.R. Horton, Inc., is the, ... Petitioner.

PROOF OF SERVICE

I certify that I have served the Brief of Petitioner D.R. Horton, Inc., on Respondents Gregory W. Smith and Stephanie Smith by sending to their attorneys of record a copy of the same via first class mail, properly addressed, postage prepaid at the following addresses: Phillip W. Segui, Jr., Esq., Segui Law Firm, PC, 864 Lowcountry Blvd., Suite A, Mt. Pleasant, SC 29464; John T. Chakeris, Esq., 231 Calhoun Street, P.O. Box 397, Charleston, SC 29402; and Michael A. Timbes, Esq., Thurmond, Kirchner, Timbes & Yelverton, P.A., 15 Mid-Atlantic Wharf, Suite 101, Charleston, SC 29401.

September 4, 2014

Matthew K. Johnson
S.C. Bar No. 12284