THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate No. 2013-001345

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

v.

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

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

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On March 5, 2010, Respondents Gregory and Stephanie Smith (the "Smiths") brought this construction defect case against Appellant, D.R. Horton, Inc. ("DR Horton") and others.[1] On July 23, 2010, DR Horton moved to compel arbitration, citing an agreement to arbitrate in the Smiths' contract. (Appx. pp. 91-97). The Smiths opposed the motion arguing, among other things, the arbitration terms are unconscionable. (Appx. pp. 125-129, 175-184). After a hearing, the Honorable Edgar Warren Dickson denied the motion to compel, finding: (1) the relevant arbitration terms in Paragraph 14 of the parties' agreement are unconscionable and unenforceable, (2) the arbitration agreement was extinguished by the doctrine of merger by deed; and (3) the arbitration agreement failed to comply with the South Carolina Uniform Arbitration Act. (Appx. pp. 5-8). DR Horton moved for reconsideration. (Appx. pp. 130-131). After a second hearing, the trial court issued an order incorporating the issues discussed in its prior order, denying arbitration, and finding: (1) the relevant arbitration provisions are unconscionable and unenforceable based upon the cumulative effect of oppressive and one-sided provisions within an adhesion contract, and (2) the parties are not of equal bargaining power and there was no consideration for the sacrifice of the Smiths' rights. (Appx. pp. 9-10).

On appeal, the Court of Appeals affirmed the trial court's finding that the terms of the agreement to arbitrate are unconscionable. Because this finding was dispositive, the court did not reach DR Horton's remaining issues on appeal. (Appx. pp. 313-319). DR Horton's Petition for Rehearing presented only three issues, arguing the Court of Appeals: (1) failed to analyze whether the Purchase Agreement was a contract of

[1] Amended Complaints added additional parties. (Appx. pp. 7-22 and 42-59).

adhesion or whether the Smiths lacked meaningful choice; (2) mistakenly found the arbitration provision was unconscionable; and (3) misapplied or ignored the *Prima Paint* doctrine. (Appx. pp. 320-341). No other questions were presented, and the Petition for Rehearing was denied. (Appx. p. 343). This Court thereafter granted DR Horton's Petition for a Writ of Certiorari for further review, which raised the same three issues.

STATEMENT OF THE FACTS

In March of 2005, the Smiths signed a Home Purchase Agreement (the "Purchase Agreement") to buy a newly constructed home from DR Horton at 4830 Harvest Moon Court, in Summerville, Dorchester County, South Carolina. (Appx. pp. 108-117 and 151-160). The Smiths brought this action after discovering numerous defects in the home. The suit alleges causes of action for negligence, gross negligence, recklessness, breach of contract, breach of express and implied warranties, and violations of South Carolina's Unfair Trade Practices Act. (Appx. pp. 11-26, 46-63).

At issue are the terms of an arbitration agreement contained in Paragraph 14 of the Purchase Agreement, entitled "WARRANTIES AND DISPUTE RESOLUTION". Paragraph 14 is comprised of ten subparagraphs 14(a)-14(j), which are set off with indentations under this single heading. (Appx. p. 154-156).

DR Horton gives a warranty from the Residential Warranty Corporation (the "RWC Warranty") under subparagraph 14(a), which "is the only warranty being offered by [DR Horton]..." (Appx. p. 154) (emphasis added). Subparagraph 14(b) states validation of the RWC Warranty is conditioned upon DR Horton complying with RWC's enrollment procedures and remaining in good standing in the program. (Appx. p. 154). Subparagraph 14(c) further explains the RWC Warranty, twice mentioning DR Horton is

disclaiming all other warranties (including the warranty of habitability), and providing that all claims relative to the home arising more than 1 year after closing fall under the RWC Warranty. (Appx. p. 154). Subparagraph 14(c) also provides, "the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration." (Appx. p. 154) (emphasis added). Subparagraphs 14(d) and 14(f) describe additional matters DR Horton does not warrant.

Subparagraph 14(g) also references arbitration. It requires arbitration of all claims arising under any warranty given under the Purchase Agreement, meaning the warranties referenced in subparagraphs 14(a)-(f). (Appx. pp. 155-156). Subparagraphs 14(g)(i) and 14(g)(ii) distinguish disputes to be arbitrated under the RWC Warranty from the arbitration of disputes not arising under the RWC. If arising under the RWC Warranty, 14(g)(i) mandates, "the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to the Smiths shall control." (Appx. p. 155) (emphasis added). Although the RWC Warranty purportedly controls disputes arising more than one year after closing, DR Horton did not introduce the RWC Warranty materials into evidence.

If a dispute arises between the parties prior to closing, subparagraph 14(h) gives DR Horton the right, in its discretion, to terminate the sale. But, 14(h) does not afford the Smiths that same right. (Appx. p. 156). Subparagraph 14(h) further provides the Smiths have no cause of action whatsoever against DR Horton should it terminate the sale in the midst of a pre-closing dispute. Subparagraph 14(i) again disclaims various implied warranties. (Appx. p. 156). Further, it states in part that DR Horton "SHALL NOT BE LIABLE FOR MONETARY DAMAGES OF ANY KIND, INCLUDING SECONDARY, CONSEQUENTIAL, PUNITIVE, GENERAL, SPECIAL, OR

INDIRECT DAMAGES." Subparagraph 14(j) provides that disputes arising within the first 365 days after closing must be submitted to DR Horton and must comply with applicable law. DR Horton then has 30 days to decide whether to fulfill the claim.

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). *See also Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007) (finding a "gateway matter" to arbitrability is the existence of an agreement to arbitrate). "In making this determination, trial courts consider 'general contract defenses' to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of 'fraud, duress, [or] unconscionability.'" *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 145 (Ct. App. 2013) (citing *Zabinski*, 346 S.C. at 593, 553 S.E.2d at 116). While this determination is reviewed *de novo*, the trial court's factual findings will not be reversed if any evidence reasonably supports the findings. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667.

ARGUMENT AND CITATION OF AUTHORITY

The Court of Appeals affirmed the trial court, agreeing that Paragraph 14 applies as a whole and is unconscionable. Because this finding was dispositive of the outcome, the Court of Appeals declined to reach DR Horton's remaining issues on appeal. (Appx. p. 319) (*Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 18, 742 S.E.2d 37, 41 (Ct. App. 2013) (stating "we need not reach the issue of whether the SCUAA or the FAA applies" and "we decline to address Horton's arguments regarding unequal bargaining power, lack of consideration, and merger by deed[]")). This Court should likewise affirm this dispositive

ruling. As discussed below, the remaining arguments asserted by DR Horton in its Brief are not preserved for review and should not be considered.

I. DR HORTON MAKES ARGUMENTS THAT ARE NOT PRESERVED

In *Camp v. Springs Mtg. Corp.*, 310 S.C. 514, 426 S.E.2d 304 (1993), this Court held that where the Court of Appeals does not reach an issue, an appellant must petition for rehearing asking the court to consider the issue in order to preserve it for review by the Supreme Court. DR Horton's Petition for Rehearing to the Court of Appeals only presented three (3) issues for rehearing, all of which related to the issue of unconscionability on which the court based its ruling. (Appx. pp. 320-341). DR Horton did not request the court to rehear and consider any of the issues the court declined to reach. This significantly affects the scope of what is preserved for review by this Court.

DR Horton raises seven (7) different issues in its Brief. However, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." *See* Rule 242(d)(2), SCACR (emphasis added). *Accord* Toal J., *Appellate Practice in South Carolina,* p. 77 (2d Ed. 2002) (a perquisite to preserving an issue for consideration by the Supreme Court is that the issue must have been raised in the petition for rehearing to the Court of Appeals). Adhering to this settled rule, this Court must not consider DR Horton's unpreserved arguments regarding the South Carolina Uniform Arbitration Act ("SCUAA") (DR Horton's Issue One); the Federal Arbitration Act ("FAA") (Issue Two); unequal-bargaining-power theory (Issue Four); lack of consideration theory (Issue Five); and merger-by-deed theory (Issue Six). None of these arguments were raised DR Horton's Petition for Rehearing to the Court of Appeals.

(Appx. pp. 320-341). Further, these questions were not presented in DR Horton's Petition for a Writ of Certiorari either. This Court has consistently held an issue which is not raised in a petition for writ of certiorari is not preserved for appellate review. *See e.g., Southerland v. State*, 337 S.C. 610, 612, n.2, 524 S.E.2d 833, 834 (1999); *McCray v. State*, 317 S.C. 557, 559, n.1, 445 S.E.2d 686, 687 (1995).

The trial court's findings relative to these issues have become the law of the case. *See Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 692 (2010) (an unpreserved issue becomes the law the case). *See also Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 175, 525 S.E.2d 869, 872 (2000) (an unchallenged ruling, "right or wrong, is the law of this case requiring affirmance").

With regard to at least the merger-by-deed doctrine, DR Horton's failure to preserve this issue is outcome determinative. The trial court's determination that the arbitration agreement was extinguished by the merger doctrine,[2] right or wrong, is now the law of this case. *Id.* This disposes of the entire appeal, because there is no arbitration provision to debate as a result. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2013) (*aff'd in part, vacated in part by Davis v. KB Home of S.C., Inc.*, 2014 S.C. Unpub. Lexis 3 (S.C., January 29, 2014) (vacating the Court of Appeals analysis of the issue of waiver because its decision on the doctrine of merger was dispositive)). In *Davis*, the Court of Appeals affirmed the trial court's finding that an arbitration clause in an employment contract was extinguished by the merger clause in a subsequent employment agreement which contained no arbitration clause. This dispositive finding rendered it unnecessary to reach the remaining issues. For this reason

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[2] DR Horton concedes the deed did not contain any reference to the arbitration clause in the Purchase Agreement. (Appx. p. 207).

alone, this Court could affirm the lower courts without the need to address the issues that are preserved for review.

The discussion on the merits that follows herein is offered as an additional sustaining ground should this Court decide the merger-by-deed ruling is not dispositive despite being the law this case. Because the evidence in the record reasonably supports the trial court's conclusion that Paragraph 14 applies as a whole, is part of an adhesion contract, and is laced with unconscionable provisions that cannot be severed, this Court should affirm on the merits as well.

II. THE RELEVANT TERMS OF THE AGREEMENT TO ARBITRATE ARE FOUND IN "PARAGRAPH 14" AS A WHOLE

Setting aside DR Horton's problems with issue preservation, the dominating issue before this Court is the unconscionability of the arbitration agreement, which lies at the core of this appeal. In order to properly frame the issue, it is first necessary to recognize a key disagreement between the Smiths and DR Horton relative to the arbitration agreement, because the parties have different views of what encompasses the arbitration terms. The Smiths have consistently argued, and the lower courts agreed, that "Paragraph 14", as a whole, contains the applicable provisions concerning arbitration. Conversely, DR Horton's entire argument rests upon the flawed premise that only subparagraph 14(g) matters. Resolution of this basic question affects the remaining analysis, so the Smiths begin with this issue, showing the whole of Paragraph 14 applies.

A. Within the Purchase Agreement, the term "paragraph" has a different meaning and usage than the term "sub-paragraph"

The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *Alexander's Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010) (*citing McGill*

v. Moore, 381 S.C. 179, 185 672 S.E.2d 571, 574 (2009). "Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." *Id.; accord Heins v. Heins,* 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (stating the court must interpret contractual language in its natural and ordinary sense). It is also a question of law for the court whether the language of a contract is ambiguous. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001). In determining the intent of the parties, the court should construe the contract as a whole, reading together different provisions that deal with the same subject matter. *Buice v. WMA Secs., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008).

When referencing a whole paragraph in the Purchase Agreement, DR Horton used the term "paragraph". DR Horton used the distinct term "subparagraph" when only a subparagraph was concerned. In the ordinary sense, "paragraph" and "subparagraph" have different meanings, and this is equally true in the Purchase Agreement.[3]

For example, Paragraph 4 requires DR Horton to convey marketable title to the Smiths. Subparagraph 14(i) cross-references "Paragraph 4" is this way: "EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE . . . ." (Appx. p. 156) (emphasis added). Similarly, Paragraph 15 contains a survival clause and states the

[3] The Smiths have consistently argued Paragraph 14 as a whole applies, but have not previously made the precise point that the Purchase Agreement itself distinguishes the terms "paragraph" and "subparagraph." This is of no consequence, because the Smiths are the prevailing party at this stage. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (stating, "the 'winner' in the lower court may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court," and confirming that the appellate court may affirm for any reason appearing in the record). It is not necessary for the Smiths to have previously made this precise argument. Regardless, this point falls within the same logic of the Smiths' overall argument that Paragraph 14 applies as a whole.

"Closing Attorney is directed to transfer this paragraph to the closing statement." (Appx. p. 156) (emphasis added). Paragraph 16 addresses various matters pertaining to the parties' respective obligations for the closing, providing in part:

> Final inspection and approval of the subject land and improvements thereon by the lender's agent, the FHA, or the VA, whichever is applicable, or final inspection of approval for occupancy by the appropriate governmental inspector shall constitute complete performance by [DR Horton] of its obligations under this paragraph.

(Appx. p. 156) (emphasis added).

Paragraph 14 continues this pattern. Subparagraph 14(g) states in part: "The list of disputes that shall be arbitrated in accordance with **this paragraph** include . . . ." (Appx. p. 155) (all emphasis added). Subparagraph 14(g)(ii) likewise provides, "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." (Appx. p. 156) (all emphasis added). Subparagraph 14(a) follows course, stating: "The RWC Warranty referred to in this paragraph[4] is the only warranty being made by [DR Horton] . . . ." Giving plain meaning to the words selected by DR Horton, the reference to "this paragraph" means the numbered Paragraph 14, as a whole, as seen with Paragraphs 4, 15 and 16 cited above.

More to this point, throughout the Purchase Agreement DR Horton used the distinct term "sub-paragraph" when referring to only a particular sub-paragraph. For example, Paragraph 2, which has several subparagraphs, explains the purchase price is

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[4] The RWC Warranty is referenced throughout Paragraph 14, including in subparagraphs 14(a), 14(b), 14(c), 14(d), 14(g), 14(h)(by reference to the preceding), and 14(i). When subparagraph 14(a) references "[t]he RWC Warranty referred to in this paragraph is the only warranty being offered ...," the only logical conclusion is that the phrase "this paragraph" means all the references throughout Paragraph 14.

"to be as set forth in **subparagraph** [2(b)(i)(1) (handwritten)] below[]". (Appx. p. 151) (all emphasis added). Likewise, subparagraph 2(a) separates itself from subparagraph 2(b) by stating, "if **this subparagraph** is checked, **subparagraph 2(b)** shall not apply." (Appx. p. 151) (all emphasis added). There is more. Paragraph 5 provides, "If Seller is contributing to Purchaser's closing costs pursuant to **subparagraph 2(b)** above . . . ." (Appx. p. 153) (all emphasis added). The plain language of the Purchase Agreement shows DR Horton used the prefix "sub" do address a subparagraph, like 2(b), or others.

This pattern continues in Paragraph 14, where DR Horton used the term "sub-paragraph" when a subpart applies, and "paragraph" when all of Paragraph 14 apples. Subparagraph 14(h) uses the narrower term "subparagraph" when it states, "In addition to the rights and obligations of each party specified in subparagraphs (a) – (d) above[] . . . ." (Appx., p. 156) (emphasis added). Subparagraph 14(d), excludes from all warranties offered by DR Horton, "(ii) those matters excluded in sub-paragraph (f) below[] . . . ." (Appx., p. 155) (emphasis added).

Giving these terms and phrases their plain, natural, and ordinary meaning, the term "subparagraph" has a different meaning than "paragraph." It follows that when subparagraphs 14(g) and 14(g)(ii) respectively refer to "disputes which shall be arbitrated in accordance with **this paragraph**" and "arbitrations referred to in **this paragraph**," the term "paragraph" means Paragraph 14, as a whole. On page 30 of DR Horton's Brief, it implicitly acknowledges this point, describing 14(g) as a "subparagraph." If DR Horton intended for only subparagraph 14(g) to control, it should have used the term "**sub**paragraph 14(g)" as it did elsewhere in the Purchase Agreement, rather than "this paragraph" *Cf. 16 Jade Street, LLC v. R. Design Constr. Co., LLC,* 398 S.C. 338, 346,

728 S.E.2d 448, 452, n. 7 (2012) (the Canon of construction "*expressio unius est exclusion alterius*" or "*inclusio unius est exclusion alterius*" holds that to express or include one thing implies the exclusion of another).

B. Subparagraph 14(g) is not separate and distinct and must be read in the context of all of Paragraph 14

Further, Subparagraph 14(g) cannot stand in isolation as DR Horton suggests. The various subparagraphs of Paragraph 14 all deal with the same subject matter, *to wit*, "warranties and dispute resolution." Further, Paragraph 14's subparagraphs cross-reference and incorporate one another and must be read together.

Read together, subparagraphs 14(a) and 14(c) provides the RWC is the only warranty being offered and that it will contain its own arbitration provision. (Appx. 154-55). Subparagraph 14(g)(i) expressly states that arbitration of any claim under the RWC Warranty shall be governed by the terms contained in that separate document. In this way, 14(g) requires that one look beyond it to 14(c) to determine the complete agreement of the parties on the very topic of arbitration. It is impossible to say 14(g) stands alone in isolation because it points to other sources for the controlling arbitration terms. 14(g) cannot be the end-all-be-all concerning arbitration under these facts.

Further proof that Paragraph 14's various subparagraphs are related is found in the numerous cross-references found among them. A clear example is the RWC Warranty, which is referenced throughout 14(a), 14(b), 14(c), 14(d), 14(g), and 14(i). Subparagraphs 14(c), 14(h) and 14(j) simply address the DR Horton's rights to unilaterally terminate amidst pre-closing disputes and directs the Smiths on how to notify of disputes after closing. These provisions all relate to the same subject matter, they cross-reference one another, and they are inextricably intertwined on the topic of dispute

resolution. (Appx. 154-55). Subparagraph 14(i) strips the Smiths of every form of recovery in any form of dispute, which DR Horton apply in the case of an arbitration under the RWC Warranty or otherwise.

These facts are similar to those in *York v. Dodgeland*, where the Court of Appeals noted the "reverse side of [Cristy's] Buyer's Order incorporated provisions further defining the scope and terms of arbitration, including remedy and claim type limitations. *York*, 406 S.C. at 76, 749 S.E.2d at 144 (emphasis added). The same logic applies here, where the subparagraphs of Paragraph 14 relate to the same subject matter and should be read and interpreted together. *Cf. Buice*, 380 S.C. at 156-57, 668 S.E.2d at 434 (noting courts should construe different provisions together that deal with the same subject matter). These points, and the distinction between "paragraph" and "subparagraph in the Purchase Agreement, reveal Paragraph 14 applies as a whole to the issue of arbitration, not just subparagraph 14(g). This leads to the next flaw in DR Horton's argument.

III. *PRIMA PAINT* DOES NOT APPLY TO THE ANALYSIS IN THIS CASE

DR Horton's argument turns on whether *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), controls the outcome. *Prima Paint* involved an action to rescind an entire agreement on the basis it was procured by fraud. *Prima Paint,* at 398; *see also S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 562-63, 437 S.E.2d 22, 24 (1993) (where challenge was made to an entire contract as being procured by fraud, but no challenge was made to the arbitration provision). These authorities do not apply here.

A. DR Horton's *Prima Paint* argument is untimely

It is settled that, "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994)(emphasis added); *accord*

McMillan v. S.C. Dep't of Agric., 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (finding issues not preserved because they cannot be raised for the first time in a motion for reconsideration). DR Horton admits it never raised *Prima Paint* prior to its motion for reconsideration, but claims the issue did not arise until the trial court issued its April 12, 2011 Order. (DR Horton Brief, p. 39). This is not true. The issue arose months prior to the Order by virtue of the Smith's memorandum in opposition and their arguments to the trial court opposing arbitration, where the Smiths asserted from the outset that Paragraph 14 as a whole is unconscionable. (Appx. pp. 125-129, 172-184). It is this same argument that DR Horton argues violates *Prima Paint*, so DR Horton could have, and should have, raised this argument on September 9, 2010, when the Smiths made their own arguments. DR Horton was given the opportunity during the initial hearing to reply, but it did not raise *Prima Paint.* It follows that DR Horton "could have raised" *Prima Paint* at this time. *Anderson Memorial Hospital*, 313 S.C. at 498, 443 S.E.2d at 400.

In the six months between the September 9, 2010 hearing and the trial court's initial order, DR Horton did not raise *Prima Paint*. The Smith's argument did not change in this time. After the trial court ruled, DR Horton moved for reconsideration. Yet, DR Horton still did not raise *Prima Paint* among its timely arguments filed on April 25, 2011. (Appx., pp. 130-49). It was not until May 16, 2011, thirty-four (34) days after the trial court ruled, that DR Horton first raised *Prima Paint* in a "Supplemental Memorandum" raising new arguments. (Appx. p. 161-164). This is not permitted.

For the sake of argument only, If we assume DR Horton did not have to raise *Prima Paint* until the trial court issued its ruling, there still is no explanation for why DR

Horton did not raise the issue in its initial, timely Rule 59(e) motion for reconsideration.[5] Rule 59 does not provide any procedure by which DR Horton can amend or supplement its initial motion for reconsideration after the ten-day filing deadline has expired. *Cf. Gray v. Bryant*, 298 S.C. 285, 287, 379 S.E.2d 894, 895 (1989) (finding a party cannot amend its motion to add new grounds for a new trial under Rule 59 after the ten day period). The Smiths timely and specifically objected to the inclusion of new materials at the hearing on DR Horton's motion for reconsideration and these arguments should be rejected as untimely. (Appx. pp. 165-66, 190).

B. The Smiths never challenged the "whole contract"

Prima Paint addressed whether the Court or an arbitrator should decide whether a contract had been fraudulently induced. *Prima Paint*, 388 U.S. at 396. There was no challenge in *Prima Paint* to the enforceability of arbitration agreement itself. *Prima Paint* did not involve any analysis of the arbitration provision or whether it contained unconscionable terms. In fact, the word "unconscionable" is not found in the entire text of the *Prima Paint* decision, and the same is true of *Great W. Coal.*

In what is akin to driving a square peg into a round hole, DR Horton tries to force the instant facts into the context of *Prima Paint* by manufacturing an argument the

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[5] DR Horton's motion for reconsideration only argued 14(g) was not unconscionable. It never argued the *Prima Paint* doctrine applied. DR Horton cannot belatedly rely on its conclusory, passing reference in its memorandum in support of its motion for reconsideration wherein it suggested the Smiths challenged the "whole contract." (Appx. pp. 140, 143). An appellant must bring into focus the precise nature of the issue so that it can be reasonably understood by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Failure to raise a specific argument to the trial court will render that argument not preserved. *See e.g. Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 368 S.C. 410, 423, 629 S.E.2d 635, 639 (2006) (although making a general argument, the failure to make a specific argument rendered that specific argument not preserved for appeal).

Smiths never made. Specifically, DR Horton first hinted in its memorandum in support of its motion for reconsideration that the Smiths challenged the "whole contract" rather than the terms of arbitration agreement. (Appx. pp. 140, 143). To be clear, the Smiths always argued Paragraph 14, together with its subparagraphs, forms the arbitration agreement and is unconscionable. The Smiths never challenged the "whole contract." Instead, the Smiths always argued, "Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable . . . ." (Appx. p. 125) (emphasis added). They made this argument throughout the proceedings below. (Appx., pp. 176-183, 216). The trial court understood and twice found the Smiths challenged the arbitration provision. (Appx. pp. 5-10).

As an aside, the Smiths asserted a claim for breach of contract against DR Horton, which would not lie if they had sought to rescind the entire agreement. (Appx. pp. 57-58). DR Horton is attempting to turn the Smiths' challenge into something it is not. As the Smiths pointed out when DR Horton first attempted this slight of hand:

> [DR Horton is] trying to make a distinction from the *Simpson* case and indicated that the one sided provisions and the arbitration provisions are in two different spheres in this case. It's all tied to Paragraph 14, Your Honor, where they attempt to deny the remedies and also try to force them into arbitration, all Paragraph 14.

(Appx., p. 216) (emphasis added). A challenge to Paragraph 14 is not an attack on the whole contract. This Court should consider the Smiths' argument as it was made, not as DR Horton has twisted it. Whether the terms of the agreement to arbitrate are embodied in Paragraph 14 as a whole is matter of contract construction, not "separability."

There is a final point to consider. At the first hearing on DR Horton's motion to compel, the Smiths argued (as they have throughout) that various provisions of Paragraph

14 had to be considered together, justifying a finding of unconscionability. After the Smiths focused on various troublesome provisions such as subparagraph 14(i), DR Horton responded:

> As to unconscionability, Your Honor, I think I'll – the reason why I wanted the Court to read into the record the entire paragraph is, actually this is in conjunction with a lot of additional warranties that D.R. Horton does provide during the first year that not every residential builder is provided or required to provide, including the RWC warranty and that type of thing. So, what this is, I think if you read it as a whole it disclaims damages for those types of things that they're warranting and saying that they'll coming in and fix during that first year.

(Appx. pp. 185-186) (emphasis added). DR Horton's point seems to be that one must not read any one part of a related set of terms in isolation. That is precisely the Smith's point when they argue one must not read subparagraph 14(g) separate from the surrounding provisions that pertain to it and to dispute resolution. *Cf. Buice*, at 156-57, 688 S.E.2d at 434. DR Horton cannot have it both ways.

IV. THE ARBITRATION AGREEMENT CONTAINED IN PARAGRAPH 14 OF THE PURCHASE AGREEMENT IS LACED WITH UNCONSCIONABLE TERMS

Having shown the Smiths challenged Paragraph 14 as the parties' arbitration agreement, the discussion turns to whether it contains unconscionable terms. Despite the strong presumption in favor arbitration, it is well-settled that "arbitration is a matter of contract law and is available only when the parties involved contractually agree to arbitrate." *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668; *see also Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007); *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. If it is determined that no agreement to arbitrate existed, arbitration must

be denied. *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Consistent with basic principles of contract law, a party may challenge the enforceability of an agreement to arbitrate under "such grounds as exist at law or in equity" including fraud, duress, and unconscionability. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668; *accord Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) ("General contract principles of state law apply to arbitration clauses governed by the FAA." (citing *Doctor's Assoc., Inc., v. Casarotto,* 517 U.S. 681, 685)); *see* 9 U.S.C. § 2 (providing grounds "at law or in equity for the revocation of any contract" remain applicable); S.C. Code Ann. § 15-48-10(a) (same).

From the outset, the Smiths argued *Simpson* provides the framework for analyzing Paragraph 14. As in *Simpson*, here the arbitration terms are found in an adhesion contract and the relevant provisions are unconscionable. The record supports these conclusions.

A. The Purchase Agreement is an adhesion contract

"[T]he presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears[6] to be adhesive in nature. In this situation there arises

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[6] On page 27 of its Brief, DR Horton attacks the trial court's determination that "the form of the contract seems to be that of contract of adhesion." (Emphasis supplied by DR Horton). In *Simpson* this Court used phrases such as "strong indications" and "appears to be" adhesive to set the bar. At a minimum the trial court's order follows this logic, finding the Purchase Agreement "seems" to be a contract of adhesion. The trial court also found, "The [Purchase Agreement] between the parties in the instant case has oppressive and one-sided terms ...." (Appx. pp. 7, 10). It is apparent the trial court found the Purchase Agreement was, in fact, a contract of adhesion.

considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (quoting *Williams v. Aetna Fin. Co.*, 700 N.E.2d 859, 866 (Ohio 1998)) (emphasis added). An adhesion contract will be analyzed with "considerable skepticism." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670; *York*, 406 S.C. at 86, 749 S.E.2d at 149.

An adhesion contact is offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Id.*; *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365. From the beginning, the Smiths argued the Purchase Agreement is an adhesion contract. (Appx. pp. 126-27, 175). DR Horton asserts error because the Court of Appeals did not address this finding, but that is not the proper question. Under the standard of review, the proper question is whether there is any evidence reasonably supporting the trial court's finding. *Simpson,* 373 S.C. at 22, 644 S.E.2d at 667. There is.

From the four-corners of the Purchase Agreement it is evident the document is a pre-printed form containing boilerplate language crafted by DR Horton. (Appx. pp. 151-160). Every page of the document states "General Terms and Conditions" in the header at the top, with the form document bearing a specific title, "HOME PURCHASE AGREEMENT BC40-0085[.]" In the headers and footers of the Purchase Agreement are document revision dates, including a reference to "1999 D.R. Horton, Inc. – Torrey, Revised March 16, 2005..." (emphasis added). *See York*, 460 S.C. at 86, 749 S.E.2d at 149 (finding a "drafting date of '5/10/04' and a revision date of '06/09/06' further support the notion is was a form document[]" warranting considerable skepticism).

Further, the balance of the Purchase Agreement contains standard pre-printed provisions that apply to any number of DR Horton transactions and are presumptively

non-negotiable. This, too, was noteworthy in *York. Id.*, (noting, "the remaining terms of sale, many of which are quite significant, were pre-printed and, presumptively, non-negotiable[]"). Paragraph 1 reveals the Purchase Agreement applies to homes anywhere in the "Charleston/Dorchester/Berkeley County, South Carolina" area, yet the Smiths' particular home is only in Dorchester. (Appx. p. 151). Paragraph 20 applies to a number of development sites, leaving a blank to simply fill in which neighborhood covenants will apply. (Appx. p. 158). Paragraph 2 applies to a variety of purchase transactions and methods of financing, indicating this form document can be used with any potential buyer. Paragraph 17 allows for the selection of a house plan and, and then states, "Purchaser acknowledges that each home is handmade and unique . . . " indicating the agreement applies to an array of houses, not just the Smiths. (Appx. p. 157). Paragraph 16 states in part, "*If* this Agreement is for the construction of a new home (i.e., a presale or a home which is to be built)," additional terms apply. (Appx. p 156) (emphasis added).

The Purchase Agreement also has strict rules the Smiths must follow as DR Horton customers. For example, subparagraph 19(b) gives the Smiths only 14 days to schedule a color selection meeting and restricts the scheduling to certain days and times on "a first-come-first-served basis." (Appx. p. 157) (emphasis added). Subparagraph 8(a) states in part, "D.R. Horton recognizes that buyers may desire" an independent home inspection. (Appx. p. 153) (Emphasis added, noting the plural form of "buyers"). Additional restrictions that affected the Smiths are cited, *infra*, in the discussion on the lack of meaningful choice. Paragraphs 3 through 13, and 15 through 30 of the document are pre-printed, boilerplate terms, except for the occasional blank to fill.

On page 28 of its Brief, DR Horton argues the Purchase Agreement is not an adhesion contract because the purchase price was originally typed in the agreement, but then stricken through with a handwritten notation.[7] Other "handwritten" terms pointed out by DR Horton are: (i) the principal amount of the home loan, (ii) the term of the loan, and (iii) the amount of earnest money the Smiths had to pay. These arguments are unavailing. Filling in a floor plan, color selection, or lending term on a pre-printed form document does not remove it from being an adhesion contract, just like inserting the final price, model number, down payment, and loan terms into the purchase contracts in *York* and *Simpson* was unimportant to finding those were contracts of adhesion. *See, e.g., York* 406 S.C. at 86-7, 749 S.E.2d at 149 (finding Cristy's Buyers Order and Installment Contract were adhesion contracts although they contained a particular vehicle VIN, agreed upon purchase price, trade allowance, interest rate, etc. specific to Cristy's transaction).

If there is any doubt the Purchase Agreement is an adhesion contract, during oral arguments on the motion to compel, counsel for DR Horton tellingly argued, "If [the Smiths] didn't like this deal they could have gone elsewhere."[8] (Appx. p. 187) (emphasis added). This admission represents the epitome of a "take-it-or-leave-it" contract offering.

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[7] DR Horton fails to mention the change resulted in a higher price. (Appx. p. 231).

[8] DR Horton argues the Smiths take this statement out of context, asserting its counsel was merely showing there were "plenty of home builders out there" and the Smiths had other options if they were dissatisfied with DR Horton's requirements. (Appx., pp. 186-87). This argument misses the mark and is irrelevant to the analysis of "meaningful choice." What matters is the lack of meaningful choice as to the terms of DR Horton's Purchase Agreement. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 ("The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process of the contract in question.") (emphasis added). That another builder might have dealt with the Smiths more fairly is irrelevant.

In the very least, it is evidentiary support for the trial court's finding and the Court of Appeals' decision to affirm. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 663.

B. The terms of the arbitration agreement contained in Paragraph 14 are unconscionable and unenforceable

Adhesion contracts are not *per se* unconscionable, but in proper contexts may be viewed with "considerable skepticism." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Viewing DR Horton's adhesion contract with considerable skepticism, as *Simpson* and *York* require, it is evident Paragraph 14 is unconscionable. Unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 24-25, 644 S.E.2d at 668. In this way, unconscionability is "due to both an absence of meaningful choice and oppressive, one-sided terms." *Id.* at 25, 644 S.E.2d at 669.

1. The absence of meaningful choice

The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process of the contract in question. *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). *See also York* 406 S.C. at 86, 749 S.E.2d at 149. In determining whether a contract is "tainted by an absence of meaningful choice," courts should take into account the following factors: the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (quoting *Carlson*, 883 F.2d at

293). As this Court noted in *Simpson*, the "loss of the right to a jury trial" and statutorily provided remedies are also relevant to this determination. *Id.* at 27, 644 S.E.2d at 670. *See also York*, 406 S.C. at 86, 749 S.E.2d at 149 (same).

The *Simpson* Court noted the purchase of a vehicle intended for use as primary transportation is "critically important in modern day society." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. It is easy to conclude, as did the trial court, the purchase of a home is no less important, because this Court has extolled the importance of properly constructed homes in South Carolina. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (finding it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce). Here, the Smiths have alleged a myriad of construction defects in the home. These include improperly installed siding, windows, structural framing, and concrete slab, defective flashings, violations of applicable construction codes, and failures by DR Horton to follow manufacturer's instructions in assembling or installing components of the home. (Appx. pp. 11-26, 46-63). In addition, the Smiths assert DR Horton violated the South Carolina Unfair Trade Practices Act. (Appx. pp. 60-62).

DR Horton admits there is no evidence the Smiths were offered options for dispute resolution that differed from the preprinted terms imposed by the Purchase Agreement. (Appx. p. 198). But, DR Horton also claims there is no evidence from the Smiths of a lack of meaningful choice. The record belies this statement.

Even as to finish selections for their home, the Smiths had little power under the Purchase Agreement. Under Paragraph 19, the Smiths had just 14 days from the date the agreement was signed to choose all color sections, or DR Horton could cancel the sale

and retain the Smiths' earnest money. (Appx. pp. 157). Once selections were made, the Smiths could not change their mind on simple matters as paint colors for their own home. In stark contrast, DR Horton had the right in its discretion to make substitutions should it desire to do so. (Appx. 157). A limited choice of paint and tile colors subject to DR Horton's right to substitute another product in its sole discretion does not constitute meaningful choice within the parties' legal relationship.

DR Horton also limited the Smith's ability to have their home and its work inspected by an independent home inspector. For example, subparagraph 8(a) and its subparts reveal DR Horton will not address any recommendation by the inspector that is not building code related, DR Horton must be allowed to accompany the inspector, and DR Horton can refuse access to the property at any time. (Appx. p. 153). Paragraph 8 further provides that DR Horton will only correct punch-list items if it agrees to fix them, and if the Smiths tried to delay the closing in order to have DR Horton correct agreed upon punch-list items, DR Horton could cancel the whole deal and return their earnest money, with "absolutely no further obligation to the Purchaser." (Appx. p. 153). There is another point here. Considering the Purchase Agreement in several places reserved to DR Horton the right to simply refund the Smiths' earnest money deposit (and in some cases keep it), cancel the deal and move on to the next buyer if the Smith's asserted a pre-closing dispute, or insisted on DR Horton completing its punch-list before closing, failed to attend a color-selection meeting, etc., the only reasonable inference from the documents itself is that the Smiths were not a substantial business concern to DR Horton. *See York*, 406 S.C. at 87, 749 S.E.2d at 149 (noting "Cristy's single purchase was not a

substantial business concern to Jim Hudson Hyundai and a significant disparity existed between the parties' relative bargaining power").

It also matters that DR Horton is a self-described large corporation with operations in twenty-seven states. (Appx. pp. 119-120; p. 173). It should be without question that ordinary consumers like the Smiths are not on equal footing with a multi-state corporation the size of DR Horton in terms of bargaining power. The trial court properly recognized this disparity in bargaining power, just as this Court has in prior decisions. *See Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) ("[T]he transaction between a builder and a buyer for the sale of a home largely involves inherently unequal bargaining power.").

Finally, the evidence reasonably supports the trial court's finding that the arbitration language in the Purchase Agreement is inconspicuous. (Appx. p. 8). Paragraph 14 is three (3) pages in length, easily the single longest section of related provisions in the Purchase Agreement. (Appx. pp. 154-156). Arbitration is referenced in more than one location within Paragraph 14 (i.e., subparagraphs 14(c) and 14(g)). The arbitration language is the same size and style font used in all of the surrounding provisions of Paragraph 14, with the exception of the limitation of liability language in subparagraph 14(i), which is set out in ALL CAPITAL LETTERS to catch the reader's attention.[9] The title of Paragraph 14 begins with "Warranties" and both subparagraphs

[9] S.C. Code Ann. § 36-2-316 requires disclaimers of implied warranties to be "conspicuous." Here, DR Horton used "ALL CAPS" to make its disclaimer in subparagraph 14(i) "conspicuous." If it wanted to make the balance of its arbitration terms similarly conspicuous, it has demonstrated the knowhow to do so. It did not. Nearly every heading in the Purchase Agreement is in all caps, so capitalizing the first words of subparagraph 14(g) does nothing to draw particular attention to it among all the other parts of the document.

that reference arbitration (again, 14(c) and 14(g)) reference warranties as well. In fact nearly every provision within Paragraph 14 concerns warranties in some manner. DR Horton claims the arbitration terms cannot be inconspicuous because the Smiths placed their initials below subparagraph 14(g). This act is not noteworthy. The Smiths signed their initials twenty-eight (28) other times in the agreement. (Appx. pp. 151-160).

Simpson relied upon similar facts, including the fact that certain phrases within other provisions of the terms and conditions were printed in all capital letters, but the arbitration clause was written in the standard small print and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. "Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law." *Id.* (emphasis added). The present case is on all fours with *Simpson* and, consequently, the circumstances reveal the Smiths had no meaningful choice in agreeing to the arbitration language within DR Horton's adhesion contract. This is especially true considering the oppressive and one-sided terms it contains. *See Id.* at 24-25, 644 S.E.2d at 670.

2. Paragraph 14 is laced with oppressive and one-sided terms

Presumably, there is no debate that the forfeiture of a right to a trial by jury is a substantial right that is lost under Paragraph 14. *See Id.* at 27, 644 S.E.2d at 670. Paragraph 14 further seeks to avoid various warranties implied by law for the protection of consumers. For example, subparagraph 14(c), which discusses the requirement arbitrate claims under the RWC Warranty, provides that DR Horton is disclaiming a host of implied warranties, including the implied warranty of habitability. Paragraph 14(i)

contains the same exclusionary language regarding warranties. Yet, Paragraph 14(i) goes much further. After disclaiming all other warranties yet again, it states DR Horton will not be liable of any monetary damages of any kind. (Appx., p. 156). In other words, no matter how egregious and deserving of punitive damages DR Horton's conduct might be, no arbitrator could assess a money award against DR Horton because DR Horton is insulated from such in the resolution of any dispute. The Smiths brought a claim against DR Horton for violations of the South Carolina Unfair Trade Practices Act ("SCUTPA"), which provides for statutory treble damages. *See* S.C. Code Ann. § 39-5-10 *et seq.* If the Smiths prove DR Horton violated SCUTPA,[10] the remedies otherwise available under the Act would be denied to them, because subparagraph 14(i) would prohibit such remedies in arbitration. *Simpson* tells us an arbitration clause of this nature is unconscionable:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. [] In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 373 S.C. at 29-30, 644 S.E.2d at 671 (emphasis added).

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[10] South Carolina's appellate courts have previously recognized the strong public policy notions behind the enactment of the SCUPTA. *See, e.g., Simpson*, 373 S.C. at 30, n. 7, 644 S.E.2d at 671; *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 326, 396 S.E.2d 105, 108 (Ct. App. 1989) (defining an unfair trade practice as a practice which is "offensive to public policy or which is immoral, unethical, or oppressive"), *aff'd in part, rev'd in part, on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992) (per curiam).

Seemingly acknowledging the unconscionability of subparagraph 14(i), DR Horton argues an arbitrator would have the same authority as any court to declare the limitation of liability clause unconscionable and sever[11] it from the contract. DR Horton's fails to explain why the arbitrator could not have likewise ruled the unconscionable provisions in *Simpson* and *York* should not be enforced (as the courts did). The answer is simple: Before the matter can be compelled to arbitration, the purported agreement to arbitrate must survive the considerable skepticism this Court should apply to its collective oppressive and one-side terms contain in it. The provisions in *Simpson* and *York* failed for their collective unconscionability and violation of clear public policy, and Paragraph 14 should likewise fail. It is apparent that Paragraph 14 is designed to strip away the remedies Respondents ordinarily would have in connection with the single largest investment most consumers ever make.

There also is a disparity in remedies under the Dispute Resolution provisions of Paragraph 14. During construction and prior to the closing (meaning DR Horton has not yet been paid the purchase price and could cancel the deal and sell the home to anyone else), subparagraph 14(h) provides that if there is an unresolved dispute between the parties DR Horton can, in its sole discretion, simply terminate the Purchase Agreement and return the Smith's earnest money. (Appx., p. 156). Conversely, the Paragraph 14 does not give the Smiths the ability to terminate prior to closing. Further, if DR Horton does terminate prior to closing, the Smith's have no ability to compel DR Horton to arbitrate or litigate any pre-closing dispute or assert any claim against DR Horton to try and protect their interest in owning the home they selected. This is true because

[11] This is closest DR Horton comes to making an argument on severability.

subparagraph 14(h) provides that "no cause of action shall accrue on behalf of [the Smiths] because of such termination." (Appx., p. 156) (emphasis added).

In sum, DR Horton restricts the Smiths rights to buy the home they desire by reserving the right to cancel the deal in its discretion, without recourse, if a dispute arises prior to closing. Once DR Horton has been paid at closing, Paragraph 14 subjects the Smiths to a whole host of attempted disclaimers and limitations of liability designed to strip the Smiths of virtually every right or recovery the law would allow.[12]

The only meaningful difference between the lengthy, singularly numbered paragraph in *Simpson* and Paragraph 14 of the Purchase Agreement is that DR Horton separated the integrated portions of Paragraph 14 into subparts with the letters (a) through (j) rather than using block text like in *Simpson*. DR Horton cannot avoid the collective unconscionability of its "Dispute Resolution" terms so easily, and there is nothing in this Court's analysis or reasoning in *Simpson* to suggest this Court would have allowed the unconscionable provision in that case to stand if only the dealership had labeled the content into separately numbered but related subparts. Such a holding would lead to an absurd result, elevating form over unconscionable substance, and allowing creative drafting to skirt accomplish what this Court has announced is unconscionable.

C. The unconscionable terms of Paragraph 14 cannot be severed from the Purchase Agreement

Because DR Horton has rested its case on the theory that only subparagraph 14(g) applies, it has never argued the Court should sever any unconscionable provisions that

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[12] Even as to the RWC Warranty, seemingly the only remedy that does survive, Paragraph 14 is utterly silent about what remedy the Smith's would have if DR Horton failed or refused to comply with all of RWC's enrollment procedures, a condition which DR Horton must satisfy in order for the RWC Warranty to remain valid per subparagraph 14(b). (Appx. p. 154).

exist. Thus, this argument is not available to DR Horton should this Court agree Paragraph 14 as a whole applies and contains unconscionable terms as described above.

Although DR Horton claims the Smiths also never argued severability to the trial Court, this is not correct. Before the trial court and the Court of Appeals, the Smiths consistently argued the unconscionable terms of Paragraph 14 should not be severed. (Appx. pp. 177-179). Here, just as in *Simpson*, where the relevant provisions of the agreement to arbitrate in Paragraph 14 are laced with unconscionable terms, it is not appropriate for the Court to attempt to re-write the Purchase Agreement by severing away multiple unenforceable terms. *Simpson*, 373 S.C. at 33-35, 644 S.E.2d at 673-74.

D. The Court of Appeals' decision in Carlson is easily distinguished

DR Horton argues the Court of Appeals' decision in *Carlson v. Dell Webb Communities*, 402 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) is contradictory to its decision in the present case. This argument falls short. "[T]here is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability.... Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (emphasis added); *see also Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.") (quoting *17A Am.Jur.2d Contracts* § 279 (2004)). That the outcome differs between two distinct cases does not equate to a contradiction in analysis. *Carlson* is easily distinguished.

DR Horton claims, without any explanation or support, that the *Carlson* Court would have reached a different conclusion in the present case, and the panel below would have decided *Carlson* differently. This conclusory statement is nothing more than conjecture, and it ignores the significant differences between these two cases. In *Carlson*, the Court of Appeals confronted the following arbitration language:

> Any controversy or claim arising out of or relating to this Agreement or Your purchase of the Property shall be finally settled by arbitration administered by the American Arbitration Association in accordance with its Arbitration Rules for the Real Estate Industry and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.
>
> . . .
>
> After Closing, every controversy or claim arising out of or relating to this Agreement, or the breach thereof shall be settled by binding arbitration as provided by the South Carolina Uniform Arbitration Act.

Carlson, 402 S.C. at 255, 743 S.E.2d at 870-871.

The arbitration provision in *Carlson* applies to both pre-closing disputes and disputes arising "After closing." Much to the contrary, DR Horton's Paragraph 14 creates disparate remedies prior to closing and after. As noted above, prior to the closing, subparagraph 14(h) gives DR Horton the power and sole discretion to terminate the Purchase Agreement if a dispute arose with the Smiths. (Appx. p. 156). The Smiths have no such right. DR Horton's ability to cancel the deal is without any recourse. Because subparagraph 14(h) precludes any claim against DR Horton should it terminate, the Smiths could not require DR Horton arbitrate (or litigate) any dispute they have with DR Horton prior to closing. DR Horton, in essence, holds all the cards prior to closing. *Carlson* did not involve such disparate remedies and one-sided terms.

Once the deal closes and DR Horton has received the purchase price from the Smiths, Paragraph 14 seeks to force the Smiths to arbitrate any claim they have against DR Horton without the possibility of recovering any monetary damages, regardless of how egregious DR Horton's conduct may have been. This was not the case in *Carlson*. *Carlson* cites to a provision challenged by the plaintiff because it limited the statute of limitations bringing claims to two years. This is a far cry from the language in DR Horton's Paragraph 14, which violates statutory law and public policy by attempting to deprive the Smiths of mandatory remedies available under SCUTPA for any deceitful conduct the Smiths may prove at trial.

In addition, the arbitration language cited by the Court of Appeals in *Carlson* is simple, balanced, and straightforward. No other agreements, terms, provisions or limitations are incorporated by reference or further define the arbitration language in *Carlson*. Here, Paragraph 14, and specifically subparagraphs 14(c) and 14(g), do cross-reference and incorporate other subparagraphs within Paragraph 14, all of which deal with the same subject matter, *to wit*, "warranties and dispute resolution". *Cf. Buice*, at 156-57, 668 S.E.2d at 434. The rule that arbitration clauses are separable from the contracts in which they are contained is wholly unaffected by the lower courts' rulings in the instant matter because here the arbitration clause is found in the related provisions of Paragraph 14 as a whole, like *Simpson* and *York*. And, when read as a whole, the cumulative, oppressive result of Paragraph 14 is evident. *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673-74.

Further, the trial judge below made specific findings that do not appear to have been made in *Carlson*. The trial judge in Carlson found the defendant had waived the

right to arbitrate based on a delay in filing to motion to compel arbitration. That is not the issue in the present case. The issue of unconscionability was asserted only as an additional sustaining ground in Carlson, and the Court of Appeals observed there was "no evidence in the record" to support that conclusion. Moreover, the Court of Appeals specifically found the arbitration clause was conspicuous in *Carlson*, whereas the trial court in the instant matter found DR Horton's was not as discussed above. The record in this case contains evidence reasonably supporting the trial court's specific findings, which was not the case in *Carlson*.

Finally, the fact that subparagraph 14(c) requires arbitration under the terms of an RWC Warranty that is not a part of the record, despite its controlling terms for claims arising more than 1 year after the closing, was not an issue in *Carlson*.

In sum, *Carlson* does not create a contradictory result. When the particular facts and circumstances of this case are evaluated in the case-by-case manner that is required, it is evident that *Carlson* does not create a contradictory result.

V. DR HORTON'S SEVERAL UNPRESERVED ARGUMENTS ALSO FAIL ON THE MERITS

As noted at the outset, DR Horton failed to preserve its arguments relative to (1) the application of the SCUAA, (2) the application of the FAA, (3) the merger-by-deed theory, (4) the unequal-bargaining power theory, and (5) the lack of consideration theory by not including these arguments in its Petition for Rehearing or Petition for a Writ of Certiorari. As an additional sustaining ground in the event this Court considers any of these arguments, none of them have merit.

A. The notice does not comply with SCUAA

Should the Court reach this issue, it is disposed of easily. In the bottom left-hand corner of the page on which the arbitration notice is found is plainly labeled "Page 4"

(Appx. p. 154). The remaining pages of the Purchase Agreement are sequentially numbered five through thirteen,[13] inferring this is not a scrivener's error. SCUAA provides in part, "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) (emphasis added). The South Carolina Supreme Court has consistently held that these requirements must be strictly followed. *See Zabinski*, 346 S.C. at 588-90, 553 S.E.2d at 114-15; *Soil Remediation Co. v. Nu-Way Envtl., Inc.* 323 S.C. 454, 459-60, 476 S.E.2d 149, 152 (1996). What DR Horton calls the "first page" is actually "Page 4". This flaw violates SCUAA.

Page 154 of the Appendix speaks for itself, and the record is devoid of any evidence establishing the content of the first three pages of these materials. Without such information, this Court cannot evaluate DR Horton's claim that page "4" of the Purchase Agreement is actually page "1" when the text states otherwise. *See State v. 192 Coin Operated Video Game Machines,* 338 S.C. 176, 195, 525 S.E.2d 872, 882 (2000) (Appellant has the burden of providing an adequate record review).

Further, prior decisions of this Court indicate the notice also fails because it is not "typed," or rubber stamped. In *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 149 (1996), this Court overturned a divided Court of Appeals after it upheld a defective notice on the grounds that substance should apply over form in order to avoid absurd results. Among the problems noted by this Court was that the notice was laser-

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[13] The quality of the reproduction in the Appendix is poor, making the page number harder to read than at prior stages of the proceedings. But, pages "10 and 11" of the Purchase Agreement are more discernable on pages 157-58 of the Appendix. By counting backwards from pages 10 and 11, one can confirm the notice falls on page 4.

printed, observing that, "The terms of the statute are clear; therefore, the court must apply those terms according to their literal meaning." *Id.* at 457, 476 S.E.2d at 151. This Court also agreed with Chief Judge Howell's dissent in the Court of Appeals, to the extent that if a literal interpretation of the statute led to a result not intended by the contracting parties, "it is a matter for the legislature to act upon." *Id.* (emphasis added). That doctrine is as true today as it was in 1996 when *Soil Remediation* was decided.

When *Zabinski* was decided, this Court revisited *Soil Remediation* and again commented that the laser-printed notice did not meet the requirements of SCUAA. The Justices stated:

> The notice provision in the *Soil Remediation* contract did not meet the statutory requirement because it was laser-printed and written in all capital letters on the first page of the contract. The notice provision must be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract. No other variation is acceptable.

Zabinski, 346 S.C. at 588-89, 553 S.E.2d at 114 (emphasis added). Whether such an interpretation is not business-minded or practical in today's society, although many might agree, is irrelevant because this Court has already said "No other variation is acceptable." *Id.* It is for the legislature to correct this concern, not the courts. *See Vaughan v. McLeod Regional Medical Center*, 372 S.C. 505, 510, 642 S.E.2d 744, 747 (2007) ("[W]here the language [of a statute] is clear and explicit, the courts cannot rewrite the statute and inject matters into the statute which are not in the legislature's language.").

B. The FAA does not apply

Even if this argument is preserved, it is unavailing to DR Horton. If we assume the construction of the home involved interstate commerce, the FAA still does not apply. "General contact principles of state law apply in a court's evaluation of the enforceability

of an arbitration clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (*citing Munoz*, 343 S.C. at 539, 542 S.E.2d at 364). The FAA applies only to valid arbitration agreements. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . ." *Zabinski,* 346 S.C. at 592, 553 S.E.2d at 116. "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citations omitted).

Here, the trial court made the gateway determination that no privately negotiated, enforceable agreement existed because the applicable provisions of the Purchase Agreement were unconscionable and unenforceable. In the absence of a valid agreement to arbitrate, the FAA has no application to this case whatsoever. That the agreement to arbitrate was extinguished by the doctrine of merger-by-deed is also dispositive.

C. The evidence supports the trial court's finding that the arbitration agreement is extinguished by the doctrine of merger

Even if this Court finds this unpreserved issue is not the law of the case requiring it to affirm, there is sufficient evidence supporting the trial court's finding that the arbitration agreement was extinguished by the doctrine of merger by deed. First, DR Horton concedes the deed did not incorporate the arbitration clause from the Purchase Agreement. (Appx. p. 207). But, DR Horton summarily argues the doctrine of merger does not apply where "distinct" and "unperformed" obligations arising under the Purchase Agreement were not intended to be merged into the deed. DR Horton cites to a portion the "Survival" clause in Paragraph 15 of the Purchase Agreement as support. What DR Horton fails to acknowledge, however, is that Paragraph 15 also clearly states, "(Closing Attorney is directed to transfer this paragraph to the closing statement.)".

(Appx., p. 156) (emphasis added). Thus, the Purchase Agreement provided certain obligations would be made a part of the closing documents by inclusion or attachment.

Another example is found within Paragraph 14 itself. Subparagraph 14(c) provides, "[The Smiths shall execute an acknowledgement that [DR Horton] makes no warranties express or implied, as to fitness for a particular purpose, merchantability, or habitability as set forth above [in subparagraph 14(a)] at Closing, which statement shall be fixed to the Purchaser's deed." (Appx. p. 154) (emphasis added). Also, the "RWC Warranty" as it is described in Paragraph 14 was a separate document to be given to Respondents at the closing. "At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from [RWC] ...." (Purchase Agreement, ¶ 14(a)).

This evidence reveals DR Horton had a procedure for ensuring certain provisions survive the Deed—either it attaches a statement to the Deed or delivers a separate document at closing. *Cf. Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 781 (10th Cir. 1998) (arbitration provision presumed to survive the merger of a contract unless there is express or implied evidence the parties intended otherwise). The terms of Purchase Agreement, which expressly or impliedly evidence DR Horton's practice of incorporating at closing those obligations intended to survive, reasonably support the trial court's conclusion that the doctrine of merger by deed applies.

As a final point, even if this Court determines this issue is preserved and that the doctrine of merger does not apply, such a ruling would not require reversal because Paragraph 14 is unconscionable.

D. The trial court's finding of lack of consideration must be affirmed.

Like the others, this unpreserved issue lacks merit, and there is evidence in the record to support this finding, at least insofar as the attempted waiver of the implied warranty of habitability mentioned in subparagraphs 14(c) and 14(i). There was never an assertion that the entire contract failed for want of consideration. The Smiths simply argued the disclaimer of the implied warranty of habitability was not specifically bargained for. *See Kirkman v. Parex Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006) (stating the a waiver of an implied warranty of habitability is void if it is not conspicuous, known to the buyer, and specifically bargained for). (Appx. p. 179). DR Horton conceded, "I'm not saying that there's evidence in the record that the arbitration provision [illegible] was specifically negotiated." (Appx. p. 198, ln. 21-23). DR Horton carries the burden of proof because the attempted waiver is void unless the *Kirkman* factors are satisfied. Here, they are not, which supports the trial court's finding.

CONCLUSION

The Smiths request that this Court dispose of this appeal on the basis that it is the law of this case that the doctrine of merger-by-deed extinguished the arbitration agreement, requiring this Court to affirm. Should this Court reach the merits of the limited arguments that are preserved, the Smiths ask for consideration of the points and authorities set forth herein and the issuance of an order affirming the lower courts in light of the evidence reasonably supporting the findings below.

****Signature of counsel on following page****

Respectfully submitted,

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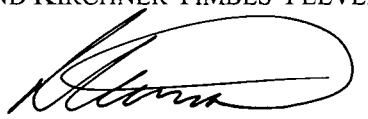
By: 

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October 3, 2014
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
The Honorable Edgar Warren Dickson, Circuit Court Judge

Appellate No. 2013-001345

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

v.

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

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

PROOF OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for Respondents, do hereby certify that I have on this date, mailed, postage prepaid, a true and correct copy of the Brief of the Respondents to the following counsel of record:

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