

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

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OCT 13 2014

S.C. Supreme Court

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.

REPLY BRIEF OF PETITIONER

October 13, 2014

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REPLY TO RESPONDENTS' STATEMENT OF THE FACTS

The Smiths' "Statement of the Facts" is generally accurate and consistent with those contained in D.R. Horton's Initial Brief. The Smiths, however, would have this Court treat Section 14 entitled, "Warranties and Dispute Resolution" as a monolithic whole, rather than doing what the law requires—focusing on the arbitration provision in ¶ 14(g). As such, the Smiths unnecessarily refer at length to the Residential Warranty Corporation Warranty ("RWC Warranty") at ¶ 14(a), and related provisions concerning the RWC Warranty at ¶¶ 14(b) and (c), and the related limitations on liability at ¶¶ 14(d) and (i). The Smiths argue that D.R. Horton's efforts to disclaim warranties or limit its liability are improper and render the separate arbitration provision unconscionable and unenforceable. But efforts to disclaim warranties or to limit liability are not *per se* unenforceable. Regardless, even if unenforceable, they do not necessarily render a separate arbitration provision unconscionable and unenforceable.

The Smiths also refer to D.R. Horton's right under ¶ 14(h) to terminate the Purchase Agreement, attempting to portray it as unfair. (Resp'ts' Br. at 3). In truth, as stated in ¶ 14(h), D.R. Horton only has this right in a "bona fide dispute" if the dispute "cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days" and on written notice. Moreover, the Smiths would be entitled to a return of all earnest money paid. In other words, the Smiths would be made whole.

The Smiths also refer to the limitation of liability section at ¶ 14(i). (Resp'ts' Br. at 3). Keeping with their theme, they try to portray this limitation as poisoning the separate arbitration provision at ¶ 14(g), rendering it unconscionable and unenforceable. But a separate limitation-of-liability provision, even an unenforceable limitation of liability, does not render the arbitration provision unenforceable. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). The Smiths try to avoid *Prima Paint* by asking this Court to conflate ¶ 14(g) with the individual, separate provisions at ¶¶ 14(a) through 14(d) and at ¶ 14(i), but they provide no compelling argument why these disparate terms must be treated monolithically.

ARGUMENT IN REPLY

A. D.R. Horton's arguments were preserved

Hoping to keep the Court from taking on the substance of this appeal, the Smiths trot out the meritless notion that D.R. Horton failed to preserve issues for appeal. (Resp'ts' Br. at 5–7). They refer to *Camp v. Springs Mtg. Corp.*, 310 S.C. 514, 426 S.E.2d 314 (1993), and Rule 242(d)(2), SCACR, as authority for their position. But the Smiths cite no other authority to show that D.R. Horton's treatment of each of these issues at the trial court level, before the Court of Appeals, in its Petition for Rehearing before the Court of Appeals, and subsequently is insufficient. And Rule 242(d)(2), SCACR, states that “[a] question presented will be deemed to include every subsidiary question fairly comprised therein.” The three questions presented in the Petition

for Rehearing before the Court of Appeals¹ were not comprehensive of the issues “raised” therein. Rather, they were a summary, and the remaining issues the Smiths believe are unpreserved² were in fact “raised” in the Petition for Rehearing. (See Petition for Rehearing at 3).

In short, the Smiths essentially argue the Petition for Rehearing fails to preserve any issue not raised in the “Questions Presented.” But all of the issues presented in the Brief of Petitioner were raised in the Petition for Rehearing. The Smiths would have the Court require that D.R. Horton do so in a more specific, bullet-pointed, formal fashion, even though no authority require as much. This argument is particularly absurd when all of the issues raised in the Brief of Petitioner and in the Petition for Certiorari granted by this Court have been raised before the trial court, on motion for reconsideration before the trial court, before the Court of Appeals, and, as stated above, in the Petition for Rehearing before the Court of Appeals. *Cf. Atlantic Coast Builders and Contrs., LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E. 2d. 282, 287 (2012) (Toal, C.J., dissenting) (“[W]here the question of preservation is sub-

¹ These included: (1) whether the Purchase Agreement was a contract of adhesion and whether the Smiths lacked meaningful choice, (2) whether the arbitration provision itself was unconscionable, and (3) whether the Court of Appeals misapplied or ignored the *Prima Paint* doctrine.

² The allegedly unpreserved issues include: (1) whether the South Carolina Uniform Arbitration Act was met, (2) whether the Federal Arbitration Act applied, (3) whether Plaintiffs’ unequal bargaining power theory applied, and (4) whether Plaintiffs’ lack of consideration theory applied. (Resp’ts’ Br. at 5).

ject to multiple interpretations, any doubt should be resolved in favor of preservation.”).

The Smiths rely heavily on the trial judge’s determination that the arbitration provision was extinguished by the doctrine of merger by deed, which they argue is the law of the case due to alleged failure to preserve this issue. (Resp’ts’ Br. at 6). But this issue was raised before the trial judge in D.R. Horton’s motion for reconsideration (R. 145–148), in D.R. Horton’s final brief to the Court of Appeals (App’t’s Br. at 24–27), in the Petition for Rehearing before the Court of Appeals (Petition for Rehearing at 3–4), and in the Petition for Certiorari before this Court (Petition for Cert. at 4–6).

B. The agreement to arbitrate is separate from the other provisions of Section 14

The Smiths urge the Court to treat Section 14 of the Purchase Agreement and its individual paragraphs as unitary and indivisible. (Resp’ts’ Br. at 7–12). But to do so would run afoul of the *Prima Paint* doctrine, which requires an independent challenge to the arbitration clause itself. *S.C. Pub. Service Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993), citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Further, the Smiths’ argument is misleading. They suggest the entirety of the “Warranties and Dispute Resolution” language in Section 14 applies as a whole. Neither the Smiths, the trial judge, nor the Court of Appeals have presented a persuasive reason why this must be so. The Smiths can only muster citations to cases involving ambiguous terms. (See, Resp’ts’ Br. at 7–

8).³ Those cases do not require the Court to construe the contract “as a whole, reading together different provisions that deal with the same subject matter” because there is no ambiguity to construe. (*See*, Resp’ts’ Br. at 7–8).

Whether Section 14—entitled “Warranties and Dispute Resolution”—in its separate ¶¶ 14(a) through (j), are a whole “paragraph” with separate “sub-paragraphs,” an entire section with individual paragraphs, or otherwise, the emphasis on what to call each of these individual provisions, as found in Respondents’ Brief at pages 7–11, is ultimately irrelevant. Paragraph 14(g) can stand in isolation. Merely because ¶¶ 14(a) through (c) provide for the RWC Warranty, does not import them into the arbitration provision at ¶ 14(g). Indeed, as the Smiths assert, ¶ 14(g)(i) states that RWC Warranty claims are separately governed and therefore distinct from mandatory binding arbitration of other claims under ¶ 14(g). (*Id.*). That ¶ 14(g) lies within the broader Section 14, and is related to ¶¶ 14(a) through (c) and ¶ 14(i) based on arrangement and numbering, is meaningless. The Smiths’ argument produces an absurd result. For instance, if ¶¶ 14(a) through (j) were instead ordered numerically as separate paragraphs 14–24 or renumbered non-sequentially, the result might be different, despite the fact that the intent,

³ Citing *Alexander’s Land Co., LLC v. M&M&K Corp.*, 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010), *McGill v. Moore*, 381 S.C. 179, 185 672 S.E.2d 571, 574 (2009), *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001), and *S.C. Dep’t of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

content, and meaning of the arbitration clause and other provisions would remain identical.

Finally, the Smiths' reference to *York v. Dodgeland*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013), is perplexing. There, the court noted the “reverse side of [the plaintiff's] Buyers Order incorporated provisions further defining the scope and terms of arbitration, including remedy and claim type limitations,” explaining this was done *expressly through the incorporation* of those provisions. *York*, 406 S.C. at 76, 749 S.E.2d at 144. *York* does not require conflating separate and distinct provisions as the Smiths suggest with ¶ 14(g) and the other paragraphs of Section 14 here. There was no express incorporation of the other terms found in Section 14 into ¶ 14(g), so the Smiths' effort to conflate these distinct, separate provisions fails.

Further, the court in *York* affirmed the trial judge's finding compelling arbitration. A valid arbitration agreement existed, the contested arbitration agreement involved interstate commerce and complied with the FAA, the contested arbitration agreement evidenced an agreement to arbitrate, the agreement did not incorporate inconsistent or irreconcilable terms, and there was no finding of absence of meaningful choice or oppressive, one-sided terms, so no unconscionability. *York*, 406 S.C. at 78–89, 749 S.E.2d at 144–151. The logic and analysis employed by the court in *York* would apply under the present facts, yielding a much different result.

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

Whether unconscionability is found in the arbitration provision itself, or elsewhere in the Purchase Agreement, is critical per *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967). *Prima Paint* held that a 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.” 388 U.S. at 404. South Carolina adopted the *Prima Paint* doctrine in *S.C. Pub. Service Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24–25 (1993). “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.” *Great W. Coal*, at 562–63, 437 S.E.2d at 24. Accordingly, the Smiths’ challenge must be to the arbitration provision itself, as found in ¶ 14(g).

The Smiths contend that D.R. Horton’s *Prima Paint* argument was untimely because it was not argued until the Motion for Reconsideration below. (Resp’ts’ Br. 4). While factually accurate, this misses the point. The issue did not arise until the trial judge denied the motion to compel arbitration in an order identifying several allegedly “unenforceable and unconscionable” provisions other than the arbitration provision in ¶ 14(g) of the Purchase Agreement. (R. 2–3). Until the trial court did that, it was unclear whether the trial judge found fault with “the Contract” as a whole, with the unrelated limitations of liability sections (*see, e.g.*, R. 150–152, ¶ 14(c)–(f) & 14(i)), or “the rel-

evant arbitration provisions” exclusively. (R. 3–4). Thus, D.R. Horton first raised *Prima Paint* in its Motion for Reconsideration. (See R. 157–160).

It became even clearer that the trial judge did not understand the *Prima Paint* doctrine when the judge denied the motion for reconsideration. That order contained similarly inconsistent language stating the *arbitration provision* was “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 original order denying the motion to compel arbitration and the order denying the motion for reconsideration each refer to “an entire host of attempted waivers of important legal remedies” contained in the Section 14 generally. (R. 1–2, 5–6). Plainly, the trial judge looked beyond the terms of the arbitration provision at ¶ 14(g), which is inconsistent with *Prima Paint*.

Also, the cases cited by the Smiths stating that a party cannot use a motion to reconsider to present an issue the party should have raised previously 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.* Thus, the hospital was essentially seeking to add an entirely new cause of action, which is simply not the case here.

In *McMillan v. South Carolina 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 exhaustion of administrative remedies, after a special referee's initial findings, in its Rule 52(b) motion to amend. Unlike here, the defendant was attempting to assert an affirmative defense not previously raised. Similarly, in *Hickman v. Hickman*, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (Ct. App. 1990), a 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 this situation, those cases each involve a party seeking relief on grounds that existed from the onset. Here, the grounds for a *Prima Paint* argument did not exist until the trial judge denied the motion to compel arbitration, at which time D.R. Horton raised the issue in its motion for reconsideration.

The Smiths' timeliness argument is interesting in light of their argument—at page 13 of their brief—that the *Prima Paint* issue arose before the trial judge's order denying the motion to compel arbitration. (Resp'ts' Br. at 13). The Smiths suggest this issue arose when they first submitted their memorandum in opposition, handed to the trial judge and counsel at oral argument. (*See*, R. 175). Thus, the Smiths' argument would either require D.R. Horton to foresee the Smiths' interpretation and analysis of Section 14 “as a whole,” or would have litigants prepare supplemental briefs in every instance

in which an opposing party fails to identify its arguments by brief or otherwise before oral argument. That would put litigants and courts in the untenable position of having to draft and consider supplemental briefs in most, if not all, instances where oral arguments are heard on motions where both parties have not fully briefed the issues in advance of oral argument.

Further, this argument that the *Prima Paint* issue “arose” either when oral argument was held or when they submitted their memorandum in opposition is itself untimely. This is the first time they have raised that factual argument. It was not raised below and is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

The Smiths further argue D.R. Horton’s *Prima Paint* argument was untimely because it was first included in a supplemental memorandum in support of its motion for reconsideration. *See*, R. 161–164. Again, this issue was brought to the trial court’s attention well before the trial judge’s order denying D.R. Horton’s Motion for Reconsideration. (R. 9–10). As such, the *Prima Paint* doctrine was raised for the trial judge’s consideration in a timely manner and the Smiths’ timeliness argument fails.

D. There is no evidence the Purchase Agreement is an adhesion contract

The Smiths insist the arbitration agreement is “laced with unconscionable terms.” (Resp’ts’ Br. at 16). But they have not identified any unconscionable terms within the arbitration clause itself. Rather, the Smiths look to

other provisions within Section 14, “Warranties and Dispute Resolution,” in arguing unconscionability.

Most of this argument involves whether the Purchase Agreement is an adhesion contract. (Resp’ts’ Br. at 17–21). A contract may not be avoided on unconscionability grounds unless it is first shown to be an adhesion contract. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901–02 (Ct. App. 1998). Neither the trial judge nor the Court of Appeals addressed this beginning point of the unconscionability analysis. Rather, the Smiths, the trial judge, and the Court of Appeals rely on the trial judge’s decision that the Purchase Agreement “seems to be” an adhesion contract. (R. 10).

At most, the Smiths have shown that the Purchase Agreement contains “boilerplate language” and is a “pre-printed form.” (Resp’ts’ Br. at 18). Contrary to the Smiths’ claim, these provisions are not “presumptively non-negotiable.” (See, Resp’ts’ Br. at 18–19). There can be no presumption here. Rather, the Smiths bore the burden of proving the Purchase Agreement was a contract of adhesion, which they did not do. The Smiths presented no evidence that the Purchase Agreement was on a “take-it-or-leave-it” basis with non-negotiable terms as in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C., 14, 24–25, 644 S.E.2d 663, 669 (2007). Likewise, the Smiths have not shown they had but two options, either “complete adherence or outright rejection,” consistent with *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901.

Further, the Smiths ignore aspects of the Purchase Agreement that were obviously negotiated, such as the purchase price (which was originally typed into the document but was stricken through with a different purchase price and written into the document), principal loan amount, loan term, earnest money amount, and initiation fees and dues for the homeowners association, which were also handwritten into the document. (See, R. 151, ¶ 2; 151–152, ¶¶ 2(b) and 3; 158, ¶ 20). The Smiths overlook these negotiated terms and fail to proffer any evidence beyond asking this Court to make assumptions based on the four corners of the Purchase Agreement.

E. There is no absence of meaningful choice due to oppressive and one-sided terms

The Smiths correctly note that unconscionability in this context requires a finding of “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 or honest person would accept them.” *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668.

With respect to the absence of meaningful choice, the Smiths say that D.R. Horton “admits there is no evidence the Smiths were offered options for dispute resolution.” (Resp’ts’ Br. at 22, citing R. 198). This does not equate to a lack of meaningful choice, particularly without any affirmative evidence. Further, this takes out of context a statement by D.R. Horton’s counsel at oral argument before the trial judge. Counsel merely acknowledged the rec-

ord lacked evidence of specific negotiation related to the arbitration provision and also whether it was non-negotiable. (R. 198).

The Smiths must prove non-negotiable terms creating a lack of meaningful choice, and, therefore, must present evidence on these issues. They merely point to terms in the Purchase Agreement itself, rather than other evidence of lack of meaningful choice. (Resp'ts' Br. at 22–24). The items referred to by the Smiths (timing of color selections, cancellation of the Purchase Agreement, choice of paint and tile colors, use of an independent home inspector, and punch list issues, as an example) are unrelated to whether the arbitration provision itself is subject to negotiation or whether they lacked meaningful choice in that respect. Indeed, there is no affirmative evidence they lacked meaningful choice in any respect as relates to the Purchase Agreement, including the arbitration provision at ¶ 14(g), which they separately initialed. (R. 151–2).

The Smiths further argue the terms of the arbitration provision—as incorrectly defined by the Smiths to encompass all of Section 14—were unconscionable and unenforceable due to oppressive and one-sided terms. Again, the Smiths identify no oppressive or one-sided terms within the arbitration clause itself. In large part, the Smiths argue oppressive and one-sided terms related to their claim for damages under the South Carolina Unfair Trade Practices Act (“SCUTPA”), which they claim is precluded by the limitation of liabilities at ¶ 14(i). (See, Appellant’s Brief at 25–27). Although the

court in *Simpson* held an arbitration clause containing a prohibition against double and treble damages, which would be recoverable under the SCUTPA, to be unconscionable, that argument does not apply here. *Simpson*, 737 S.C. at 29–30, 644 S.C.2d at 671.

The arbitration provision in *Simpson* itself contained the limitation on treble damages. *Simpson*, 373 S.C. at 20, 644 S.E.2d at 666 (“in no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages”). Here, ¶ 14(g) contains no such limitation. Further, to the extent ¶ 14(i) contains liability limitations, they relate to warranties, not claims unrelated to warranty claims, expressly or otherwise. (R. 156, ¶ 14(i). Indeed, neither the arbitration provision itself at ¶ 14(g) nor the “limitation of liability” clause at ¶ 14(i) constitute a waiver of any statutory rights or causes of action; nor do they purport to limit the arbitrator’s legal authority, as did the arbitration clause itself in *Simpson*. In fact, under the Purchase Agreement an arbitrator would have the same authority and prerogative as any state or federal court to declare the limitation of liability clause unconscionable and invalid.

F. *Carlson* is not sufficiently distinguishable

The Smiths argue that *Carlson v. Del Webb Communities*, 402 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013), is “easily distinguished.” (Resp’ts’ Br. at 29). They point out minor differences between the arbitration language in *Carlson* and various provisions within Section 14 of the Purchase Agreement. These minor differences are overshadowed by the similarities. Both *Carlson*

and this case involve enforcement of an arbitration provision in a home purchase agreement and claims by the homeowner that *Simpson* renders the arbitration provisions unconscionable and unenforceable due to “other limitations” found outside the agreements to arbitrate. (Cf., *Carlson*, 402 S.C. at 254–260, 743 S.E.2d at 870–874, with Resp’ts’ Br. at 2–4 & 17).

Despite the similarities, the court in *Carlson* and the court in this case reached inexplicably-different results. This inconsistency has left sellers and purchasers of homes, lawyers, and courts, not to mention D.R. Horton, in a quandary when considering arbitration in commercial contracts. That uncertainty is inconsistent with South Carolina’s pro-arbitration public policy. See *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (210), *vacated on other grounds by Sonic Automotive, Inc. v. Watts*, 131 S.Ct. 2872 (2011).

Although *Carlson* and this case bear similarity to *Simpson*, there are distinctions. Unlike *Simpson*, *Carlson* and this case involve a lack of evidence regarding whether the agreements at issue were adhesion contracts. *Carlson*, 404 S.C. at 260, 743 S.E.2d at 873–74. Similarly, unlike *Simpson*, the arbitration clauses here and in *Carlson* did not waive rights or remedies otherwise available by law. 404 S.C. at 260, 743 S.E.2d at 874. Further, the plaintiffs in *Carlson* pointed to “other limitations” outside the arbitration clause itself as the Smiths do here. *Id.* The court in *Carlson* held these considerations irrelevant to a determination of whether the arbitration clause itself is

unconscionable. *Id.* In *Simpson*, the unconscionable terms were in the arbitration provision itself. *Simpson*, 373 S.C. at 19-20, 644 S.E.2d at 665.

Finally, unlike *Simpson*, the arbitration requirement here and in *Carlson* did not lack mutuality as it applied to both parties. 404 S.C. at 260, 743 S.E.2d at 874. Given these similarities, particularly given the differences with *Simpson* upon which the Smiths rely heavily, the results here and in *Carlson* appear inconsistent.

G. The arbitration notice complies with the SCUAA

The South Carolina Uniform Arbitration Act (“SCUAA”), S.C. Code Ann. § 15-48-10, *et seq.*, requires arbitration notices be conspicuous by being “typed in underlined capital letters, or rubber-stamped permanently on the first page of the contract.” S.C. Code Ann. § 15-48-10(a). The Smiths argue the notice here is not on the first page and is not “typed” or “rubber-stamped.” (Resp’ts’ Br. at 32–33).

There is no record evidence supporting an argument by the Smiths that the Purchase Agreement contained additional pages or that the page in question was not the “first page.” (R. 151). Further, the Smiths did not make this argument before the trial judge or at any time before appeal, meaning D.R. Horton did not have the opportunity to present testimony negating it. In light of the lack of evidence supporting their claim, and given their failure to timely raise it, this argument fails.

Likewise, the Smiths assert that the arbitration notice is not “typed” or “rubber-stamped” consistent with S.C. Code Ann. § 15-48-10(a), *Zabinski v.*

Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001), and *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996). Neither *Zabinski* nor *Soil Remediation* held that a laser-printed or otherwise printed contract containing an arbitration notice fails simply because it was neither “typed” or “rubber-stamped.” In *Zabinski*, § 15-48-10(a) was not satisfied due to the lack of notice on the first page. 346 S.C. at 588–89, 553 S.E.2d at 114. In *Soil Remediation*, § 15-48-10(a) was not met because the notice was not underlined. 323 S.C. at 457, 476 S.E.2d at 50–51. The Smiths misconstrue *Soil Remediation* in arguing it precludes a laser-printed contract. Although *Soil Remediation* did conclude that when terms of a statute are “clear,” the court should apply them “according to their literal meaning,” the context was not with respect to “typed,” rubber-stamped, or laser-printed. Rather, this Court was analyzing the meaning of “underlined.” *Id.* at 457, 476 S.E.2d at 151. Given modern realities, it is unthinkable that a laser-printed notice in underlined and capitalized letters does not satisfy § 15-48-10(a)’s requirement that notice be “typed.”

H. The FAA applies

The Smiths essentially acknowledge the FAA applies if an otherwise enforceable arbitration provision exists. (Resp’ts’ Br. at 34–35). They instead argue the FAA only applies in enforcing an arbitration provision if it is otherwise a valid arbitration agreement, which D.R. Horton does not dispute. For the reasons stated herein, and in prior briefs to the lower courts, a valid agreement exists and the FAA applies. This is particularly the case given the

Smiths' arguments that this agreement is unenforceable under the SCUAA. See, Resp'ts' Br. at 32–34. *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117 (“Under facts of the incident case, we find the FAA controls and compel[s] arbitration. On its facts, the instant arbitration agreement is not enforceable under South Carolina law.”).

I. The doctrine of merger by deed is inapplicable

The Smiths' merger-by-deed argument fails. When parties accept a deed that varies from the terms of the antecedent contract, their rights generally are “fixed by their expressions as contained in the deed.” *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, 450–51, 322 S.E.2d 827, 828 (Ct. App. 1984) (recognizing “contrary intent” exception to merger doctrine where agreements that are not intended to be merged in a deed are not merged); *Meurer v. Tribby (In re Tribby)*, 241 B.R. 380, 383 (Bankr. E.D. Va. 1999) (merger by deed “is not absolute.”). The deed is final only on subjects it addresses, and the deed “rarely purports to cover all elements of the original contract for sale. *Id.* at 383. Thus, other documents, including an executory contract, “may be considered to determine obligations collateral to the fact of conveyance.” *Id.*

Further, an arbitration clause is presumed to survive the merger of a contract unless there is express or implied evidence 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)).

Here, the deed was only part performance of the Purchase Agreement. Other distinct and unperformed (i.e., post-closing) provisions were not intended to be merged in the deed. For instance, D.R. Horton's obligation to complete "punch list" items (R. 106, ¶ 8), D.R. Horton's obligation to complete any repairs due to wood infestation (R. 107, ¶ 12), the parties' agreement to arbitrate "all disputes between themselves" arising out of D.R. Horton's construction of the home, Punch List and Inspection Agreement issues, and subsequent performance of warranty service work (R. 108–109, ¶ 14(g) and R. 109, ¶ 14(j)), which provisions and obligations were naturally intended by the parties to continue beyond closing.

Finally, in *Carlson v. Del Webb Communities, Inc.*, 404 S.C. 250; 743 S.E.2d 868 (Ct. App. 2013), the Court of Appeals essentially clarified the doctrine of merger by deed does not apply here. Similar to *Carlson*, the Purchase Agreement contains a survival clause stating "Any condition or stipulation not fulfilled at the time of Closing shall survive the Closing . . . until such conditions or stipulations are fulfilled. (Closing Attorney is directed to transfer this paragraph to the closing statement.)". (R. 152, ¶ 15). *Cf.*, *Carlson*, 404

S.C. at 261, 743 S.E.2d at 874 (“The covenants, disclaimers and agreements contained in this Agreement shall not be deemed to be merged into or waived by the instruments executed at Closing, but shall expressly survive the Closing and continue to be binding upon both parties.”). Thus, the parties “did not intend for the arbitration clause to be superseded by the subsequently-executed deed.” *Carlson*, 404 S.C. at 261, 743 S.E.2d at 874.

Further, the arbitration provision here called for the parties to “arbitrate *all* disputes between themselves,” irrespective of the timing of the closing. (R. 155, ¶ 14(g)). Again, this is consistent with *Carlson*. 404 S.C. at 261, 743 S.E.2d at 874 (“After closing, every controversy or claim arising out of or relating to this Agreement . . . shall be settled by binding arbitration.”). As in *Carlson*, the clear and unambiguous terms of the Purchase Agreement supports a finding that the parties did not intend for the arbitration provision to be merged into the deed at closing so the presumption the arbitration survived merger by deed is not overridden.

J. The Smiths’ lack-of-consideration argument contradicts their argument that Section 14 must be read “as a whole”

Ironically, the Smiths’ lack-of-consideration argument now attempts to isolate the implied warranty of habitability mentioned in ¶¶ 14(c) and (i) from the arbitration provision in ¶ 14(g), or the Purchase Agreement at large. The Smiths argue the disclaimer of the implied warranty of habitability fails to meet the criteria in *Kirkman v. Parex, Inc.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). They insist this disclaimer is separate from the remainder of

the contract and not subject to specifically-bargained-for consideration. (Resp'ts' Br. at 37). Even if true, the disclaimer is irrelevant to the question of arbitration enforcement. The arbitration provision found at ¶ 14(g) is enforceable in and of itself under *Prima Paint*. Whereas the Smiths previously argued for analysis of the arbitration provision as part of the "whole" of Section 14, they now seek to narrow the scope of analysis, which is inconsistent with their overall argument

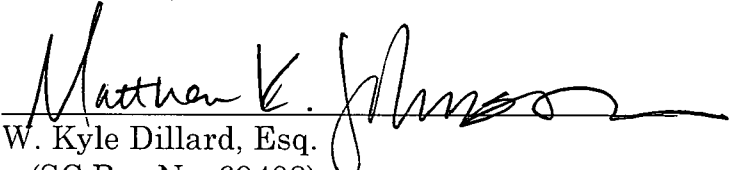
Either all of Section 14 must be read "as a whole" and, therefore, there was valid consideration for the whole, or, as the Smiths now argue, the disclaimer of the implied warranty of habitability and the arbitration provision are isolated, separate provisions, for which they claim there was no specifically bargained for consideration. Irrespective of whether the disclaimer of the implied warranty of habitability is enforceable, the Smiths' argument on this point finally acknowledges that provisions within Section 14 are capable of analysis in isolation. If the Smiths are correct and the disclaimer of the implied warranty of habitability must be analyzed in isolation, so too must the arbitration provision, consistent with *Prima Paint*. Even if the disclaimer of warranties lacks consideration and is unenforceable, this has no bearing on the question of arbitration. Rather, the arbitrator would have the right under the Purchase Agreement to analyze validity of the disclaimer of warranties, whether or not they are valid is irrelevant to enforcement of the arbitration

provision at ¶ 14(g). Cf. *Prima Paint*, 388 U.S. at 402–408; *Carlson*, 404 S.C. at 258-260, 743 S.E.2d at 873–874.

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' decision on unconscionability and "severability," including all related findings such as the application of the South Carolina Uniform Arbitration Act, the application of the Federal Arbitration Act, unequal bargaining power, lack of consideration, and merger-by-deed, 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,


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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

S.C. Supreme Court

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-001345

Gregory W. Smith and Stephanie Smith, Respondents,

v.

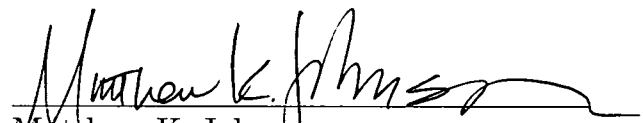
D.R. Horton, Inc., Tom's Vinyl Siding, LLC, Lützen
Construction, Inc., Boozer Lumber Company, All
American Roofing, Inc., Myers Landscaping, Inc., Defendants,

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.

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