THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated,

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc. a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation, Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a/ Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber and Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales, Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.;

TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

v.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC, Third Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

FINAL BRIEF OF RESPONDENTS

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May 26, 2015
Charleston, South Carolina

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STATEMENT OF CASE

This appeal arises from an underlying, construction-related action commenced by Plaintiffs, One Belle Hall Property Owners Association and Brandy Ramey (hereinafter collectively referred to as "OBH"), against several defendants, including TAMKO Building Products, Inc. (hereinafter "TAMKO"), concerning construction deficiencies existing within the One Belle Hall condominium complex located in Mt. Pleasant, South Carolina.

The underlying case, commenced by OBH on November 19, 2012 in the Charleston County Court of Common Pleas, asserts a number of claims including negligence, breach of warranty, unfair trade practices, strict liability, amalgamation and breach of fiduciary duty against the parties who contributed to One Belle Hall's defective condition. (R. pp. 31-38). On December 30, 2013, OBH filed an Amended Complaint which named additional parties, including TAMKO, the manufacturer of the shingles installed at One Belle Hall.[1] (R. pp. 40, 50-52, 59-60).

On February 14, 2014, TAMKO filed an Answer to Plaintiffs' Amended Complaint, and thereafter, TAMKO filed its Motion to Dismiss and Compel Arbitration,[2] citing a purported arbitration provision contained in TAMKO's Warranty.[3] (TAMKO's Answer) (R. p. 110). In response, OBH submitted an Initial Memorandum in Opposition to TAMKO's Motion, challenging the enforceability of the arbitration provision.[4] (Int. Memo. in Opp. to Mot., pp. 2-4, 7-23) (R. pp. 118-120, 123-139).

On June 25, 2014, the Honorable J.C. Nicholson, Jr. conducted a hearing to determine the enforceability of the arbitration provision. Following the arguments presented by counsel, Judge

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[1] Plaintiffs' claim against TAMKO include negligence, breach of warranty and strict liability. (R. pp. 40, 50-52, 59-60).

[2] TAMKO's Motion to Dismiss and Compel Arbitration, filed February 28, 2014, and is hereinafter referred to as "TAMKO's Motion" or "TAMKO's Motion to Compel Arbitration".

[3] TAMKO filed a Motion for Protective Order on April 9, 2014 to stay TAMKO's obligation to participate in discovery until their Motion to Dismiss and Compel Arbitration was resolved.

[4] OBH's Initial Memorandum in Opposition to TAMKO's Motion was filed on June 24, 2014. (R. p. 117).

Nicholson took the matter under advisement. Thereafter, TAMKO filed a Supplemental Memorandum in Support of its Motion to Dismiss and Compel Arbitration and in Reply to Plaintiff's Memorandum in Opposition to its Motion to Compel Arbitration.[5] (R. p. 150). In response, OBH submitted a Supplemental Memorandum in Opposition to TAMKO's Motion, again challenging the enforceability of the arbitration provision.[6] (R. pp. 160-169).

Approximately three months later, the Circuit Court denied TAMKO'S Motion by Order[7] dated September 17, 2014, finding, among other things, that the arbitration provision is unseverable, unconscionable and unenforceable. (R. pp. 26-27).[8] This appeal follows.

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

A.) Introduction

This appeal involves a Circuit Court's refusal to enforce an unconscionable arbitration provision contained within an admittedly adhesive Warranty which consists of a number of oppressive and one-sided anti-suit provisions that, when read together, compound the arbitration provision's unconscionable nature. (R. pp. 5-20). The salient facts pertinent to the issues on appeal in this matter are limited due the contractual context in which this appeal arises and the fact that discovery has not formally occurred between these parties since the filing of TAMKO's Motion. Accordingly, OBH details below the facts considered by the Circuit Court in deciding to deny TAMKO's Motion to Compel Arbitration.

B.) Overview of the Parties and the Underlying Action

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[5] During the June 25th Motion Hearing, TAMKO provided the Circuit Court portions of its Supplemental Memorandum in Support of its Motion to Dismiss and Compel Arbitration and in Reply to Plaintiff's Memorandum in Opposition to Defendant TAMKO's Motion to Dismiss and Compel Arbitration (hereinafter referred to as "TAMKO's Supplemental Memorandum"); however, TAMKO's Supplemental Memorandum was filed five days later, on June 30, 2014.

[6] OBH's Supplemental Memorandum in Opposition to TAMKO's Motion was filed on July 2, 2014.

[7] The Order Denying TAMKO's Motion to Dismiss and Compel Arbitration is hereinafter referred to as "the Order".

[8] Due to its denial of TAMKO's Motion to Dismiss and Compel Arbitration, the Circuit Court dismissed TAMKO's Motion for Protective Order as moot. (R. p. 21).

One Belle Hall is a condominium complex consisting of four, three-story buildings featuring 59 individual condominium units located in Mt. Pleasant, South Carolina. (R. p. 9). Certain failures to properly design and manufacture the building components installed at One Belle Hall, coupled with other failures associated with the design, construction and repair of One Belle Hall, have led to construction deficiencies which, in turn, have resulted in moisture damage, water intrusion, and termite infestation affecting each of the four One Belle Hall buildings and other property. (R. p. 9).

On November 19, 2012, OBH commenced this action by filing an Initial Complaint after discovering some of the aforementioned construction deficiencies existing within One Belle Hall. (R. p. 26). Subsequently, OBH filed an Amended Complaint which named additional parties, including TAMKO, alleged to have contributed to One Belle Hall's defective condition. (R. pp. 40, 50-52, 59-60).

TAMKO is a Missouri Corporation which manufactures a diverse selection of roofing products for commercial and residential markets, and specifically, manufactures the Elite Glass-Seal (AR) 3-Tab Asphalt Shingles (the "Shingles") installed upon each of the One Belle Hall buildings. (R. p. 10). TAMKO's Elite Glass Shingles (the "Shingles") were sold with an express warranty ("TAMKO's Warranty") which guarantees the Shingles are free from manufacturing defects for a period of twenty-five years. (R. p. 10).

C.) TAMKO'S Arbitration Provision and Warranty

At issue in this appeal is the enforceability of an arbitration provision set forth within TAMKO's Warranty (R. pp. 5-20).[9] Specifically, the illegible arbitration language is couched within, or otherwise affected by, the Warranty's related "legal remedies", "exclusions from

[9] As evidenced by the Affidavit of Alex Hines, the TAMKO Warranty applicable to OBH is the Warranty appended to said Affidavit as "Exhibit D". (R. pp. 184-185).

coverage" and "transferability" provisions. *Id.* These provisions provide, in pertinent part, as follows:[10]

> Exclusions from Coverage: TAMKO shall *not* be liable *under any circumstances* for:
>
> ***
>
> (2) Damages to any building, either exterior or interior, or any property contained therein or for injuries or *damages of any kind whatsoever. . .*
>
> ***
>
> Transferability: The Owner may transfer this Limited Warranty one (1) time during the first two (2) years of the Term to a Purchaser of the building upon which the Shingles are installed. . .Neither a Purchaser *nor any other person* may transfer this Warranty.
>
> ***
>
> Mandatory Binding Arbitration: *Every claim, controversy, or dispute of any kind whatsoever including whether any particular matter is subject to arbitration* (each an "action") between you and TAMKO (including any of TAMKO's employees and agents) relating to or arising out of the shingles or this limited warranty shall be resolved by final and binding arbitration, regardless of whether the action sounds in warranty, contract, statute or any other legal or equitable theory. To arbitrate an action against TAMKO, you must initiate the arbitration in accordance with the applicable rules of arbitration of the American Association (which are available online at www.adr.org or by calling the American Arbitration Association at (800-778-7879), the judicial arbitration and mediation service or other arbitration service agreed to in writing by TAMKO, and provide written notice to TAMKO by certified mail at P.O. Box 1404, Joplin, Missouri 64802 within *the time frame described immediately below.*
>
> Legal Remedies: Except where prohibited by law, the obligation contained in this limited warranty is expressly in lieu of all other obligations, guarantees, warranties, and conditions expressed or implied, including any implied warranty or condition of merchantability of fitness for a particular purpose, *and of any other obligations or liability on the part of TAMKO Building Products, Inc.* In *no* event, shall TAMKO be liable for *consequential or incidental damages of any kind. . . .No action for breach* of this limited warranty *or any other action* against TAMKO relating to or arising out the Shingles, their purchase or this transaction *shall be brought later than one year* after any cause of action has accrued.

[10]For ease of reading purposes, the notable sections of TAMKO's Warranty are extracted and referenced specifically below. However, the exact format of these extracted sections does not mirror the format of said sections as written in TAMKO's warranty as certain items are in different color, bolded or otherwise varied.

> Any action brought by you against TAMKO will be *arbitrated* (or, if arbitration of the action is not permitted by law, *litigated*) individually and you will not consolidate, or seek class treatment for, any action unless previously agreed to in writing by both TAMKO and you.[11]

OBH contends this arbitration language is unenforceable based upon a number of valid grounds, including that the arbitration language, itself, is unconscionable and that the arbitration provision, itself, is made unconscionable by the cumulative effect of all of these provisions, none of which are severable from each other. Having considered the matter, the Circuit Court agrees; and, OBH maintains this Court should similarly agree based upon prevailing jurisprudence.

D.) *Procedural Posture*

1.) Underlying Pleadings

On November 19, 2012, OBH commenced this action by filing an Initial Complaint which asserted a number of claims including negligence, breach of warranty, unfair trade practices, strict liability, amalgamation and breach of fiduciary duty against the parties responsible for One Belle Hall's defective condition. (R. pp. 31-38). Subsequently, OBH filed an Amended Complaint on or about December 30, 2013 primarily for the purpose of naming additional parties, one of which is TAMKO.[12] (R. pp. 40, 50-52, 59-60).

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[11] Notably, the "arbitration" clause contained within the Warranty applicable to OBH is completely illegible. *See* Affidavit of Alex Hines, Exhibit D (R. p. 184-185). (Swearing Exhibit D is the warranty applicable to OBH produced to TAMKO during this litigation). OBH maintains that the illegibility of the arbitration language, itself, clearly indicates that there was no agreement to arbitrate and that this fact alone warrants affirmation of the Circuit Court's Order. *See* Transcr. at 28:9-23 (R. p. 93, lines 9-23). ("Well, I doubt if I could read [the arbitration provision] with a magnifying glass...It's absolutely illegible."); *see* Rule 220(c), SCACR, ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"). Nevertheless, and in an abundance of caution, OBH provides the purported language of TAMKO's arbitration provision as found within the Warranty appended to the Affidavit of Alex Hines as Exhibit E. *See* Affidavit of Alex Hines, Exhibit E. (R. p. 187). However, given TAMKO concedes that the Warranty containing the illegible arbitration clause referenced as Exhibit D in this same Affidavit is the Warranty applicable to OBH, OBH maintains this Court should consider only this Warranty, and that TAMKO cannot rely on the language of any other version of this Warranty in support of its argument on appeal. (*See, e.g., State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) *citing TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (holding an issue conceded in the trial court cannot be argued on appeal). The applicable and inapplicable Warranty versions are also included as "Exhibit B" to TAMKO's Supplemental Memorandum.

[12] As previously noted, Plaintiffs' claim against TAMKO include negligence, breach of warranty and strict liability. (R. pp. 40, 50-52, 59-60).

On February 14, 2014, TAMKO filed an Answer to Plaintiffs' Amended Complaint and on February 28, 2014, TAMKO filed its Motion to Compel Arbitration, citing a purported arbitration provision contained in TAMKO's Warranty. (R. p. 110).[13]

In response, OBH submitted an Initial Memorandum in Opposition to TAMKO's Motion, challenging the enforceability of TAMKO's arbitration provision as follows:

> [OBH] did not and do[es] not consent to arbitration and assert[s] a number of state-specific grounds challenging the legitimacy of TAMKO's arbitration provisions...In addition to its unconscionable nature, TAMKO's *arbitration clause* is exculpatory in nature and contrary to South Carolina law.

(R. p. 124). (emphasis added).

2.) The Motion Hearing and Subsequent Pleadings

On June 25, 2014, the Circuit Court heard oral arguments from both parties, wherein OBH specifically challenged the arbitration provision and drew the Court's attention to the similarities between TAMKO's arbitration clause and the one in *D.R. Horton*:[14]

> TAMKO's warranty, like *D.R. Horton*'s warranty, also tries to say that all disputes of any kind are subject to binding arbitration in a separate paragraph apart from this legal remedy paragraph. And most importantly TAMKO's warranty, specifically paragraph two just like *D.R. Horton*'s warranty, purports to prevent TAMKO from having any liability from damages whatsoever. The *D.R. Horton* court specifically found that these provisions usually operate so that the entire warranty is unconscionable and you can't sever these provisions because they [pervade] the warranty.

(R. p. 98, lines 15-25).

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[13] As previously noted, TAMKO also filed a Motion for Protective Order to stay TAMKO's obligation to participate in discovery until its Motion to Compel Arbitration was resolved. (*See* Mot. for Protective Order).

[14] *Smith v. D.R. Horton*, Inc., 403 S.C. 10, 14, 742 S.E.2d 37, 40 (Ct. App. 2013), *cert. granted* July 28, 2014. (holding *Horton*'s arbitration provision was unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions).

During the hearing, the Circuit Court also noted the illegibility of the arbitration provision, further supporting OBH's argument that the illegibility of TAMKO's arbitration provision indicates there is no agreement to arbitrate:

> MR. WILLIS: It's hard to read in this particular copy but at the top it says mandatory arbitration.
>
> THE COURT: Well, I doubt if I could read that with a magnifying glass. . . It's absolutely illegible.

(R. p. 88, lines 13-23; 89, line 1).

Moreover, when discussing unconscionability during the hearing, TAMKO conceded "the *D.R. Horton* case is a bad case for me. That's the case I've got to get around." (R. p. 90, lines 18-19); *see also D.R. Horton,* 403 S.C. at 14, 742 S.E.2d at 40 (finding arbitration provision unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions).

Further addressing unconscionability, TAMKO admitted the adhesiveness of its Warranty: "[I]s it a contract of adhesion? The answer is yes, it is. You can't negotiate this; it is what it is and it says what it says." (R. p. 85, lines 23-25). Also, TAMKO allowed the Circuit Court to answer questions of unconscionability as to both TAMKO's arbitration provision and the admittedly adhesive contract containing the same, stating:

> The next question Your Honor then is let's look at the arbitration provision itself. Is it unconscionable? And that's really a two-step process. Some courts . . . said all you do is look at the arbitration provisions and decide whether the arbitration provisions are unconscionable. Other courts look at both the arbitration provisions and the underlying contract to determine whether that's unconscionable. Either way, Your Honor that's for you to decide as a question of law and obviously it's our position that this is a standard contract, there's nothing unconscionable about it."

(R. p. 83, lines 21-p. 84, line 4).

Upon completion of the oral arguments, the Court took the matter under advisement. Thereafter, TAMKO filed its Supplemental Memorandum in Support of Arbitration, and in response thereto, OBH submitted a Supplemental Memorandum in Opposition, again challenging the enforceability of the arbitration provision. (R. p. 160). ("This Court should deny TAMKO's Motion to Dismiss and Compel Arbitration because the arbitration and other anti-suit provisions contained in TAMKO's Warranty are wholly unconscionable, contrary to South Carolina law, inherently ambiguous, and thus, unenforceable.").

3.) The Circuit Court's Order Denial of TAMKO's Motion

On August 14, 2014, the Circuit Court contacted counsel via e-mail to inform both parties that TAMKO's Motion was denied. The Court requested OBH submit a proposed order after circulating it to TAMKO's counsel for objections. OBH complied with the Court's request and OBH's proposed Order was submitted to the Court unopposed by TAMKO. On September 17, 2014, the Circuit Court issued its Order denying TAMKO's Motion, concluding as follows:

> Given this Court's authority to decide arbitrability issues, and this Court's authority to refuse to enforce unconscionable contract provisions under South Carolina law, this Court refuses to enforce TAMKO's Warranty limitations and disclaimers, including its arbitration provision, and thus, denies TAMKO's Motion. In sum, because (a) TAMKO's arbitration, exclusionary, remedial, and transferability provisions are wholly unconscionable and unenforceable as matter of South Carolina law; (b) the above-referenced provisions are made unconscionable and unenforceable due to the cumulative effect of a number of oppressive and one-sided Warranty terms under South Carolina law; (c) the above-referenced provisions are not severable from each other or from TAMKO's Warranty according to South Carolina law; and/or (d) TAMKO's Warranty is inherently ambiguous and void of its essential purpose, it is proper TAMKO's Motion is denied under South Carolina law.

(R. p. 20).

The Circuit Court reached this conclusion after conducting a detailed analysis of prevailing South Carolina jurisprudence and making following findings:

(a) Plaintiffs effectively challenged the arbitrability of their claims against TAMKO based upon general contract principles recognized under South Carolina law;[15]

(b) The Federal Arbitration Act ("FAA") provides arbitration clauses are unenforceable when state law or equitable principles invalidates clause provisions;[16]

(c) TAMKO'S Warranty is a contract of adhesion that is oppressively (i) limited in duration; (ii) limited in transferability; (iii) limited in compensation; and (iv) limited in available recovery avenues;[17]

(d) TAMKO's Warranty is lacking in mutuality of remedy, particularly in light of TAMKO's "exclusion" provisions which attempt to exempt TAMKO from liability for all monetary damages; TAMKO's "legal remedies" provisions which allegedly waive a number of legal remedies; and TAMKO's "transferability" provision which purportedly prevents transferability;[18]

(e) The arbitration provision and other provisions contained in TAMKO's Warranty are made unconscionable and unenforceable based on the cumulative effect of the oppressive and one-sided provisions located throughout the Warranty; [5]

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[15]S.C. Code § 15–48–10(a) (According to South Carolina law, a party may seek revocation of a contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability).

[16] 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); *see also Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64 (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA); *D.R. Horton, Inc.*, 403 S.C. at 11, 742 S.E.2d at 38 ("When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties.").

[17] *See* 2009 TAMKO Warranty (R. p. 170); *see also Simpson* 373 S.C. at 25 644 S.E.2d at 668-69 (noting "unconscionability" is defined to include both an absence of meaningful choice as well as oppressive, one-sided contractual provisions); *Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability as "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.")

[18]*D.R. Horton, Inc.*, 403 S.C. at 15, 742 S.E.2d at 40-41 (Relying on the South Carolina Supreme Court's analysis in *Simpson,* and affirming a trial court's finding of unconscionability, "*particularly in light of the lack of mutuality of remedy* imposed by Section 14(i), which purported to exempt *Horton* from liability for monetary damages.")(emphasis added); *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 ("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. . .").

[5] *D.R. Horton, Inc.*, 403 S.C. at 17, 742 S.E.2d at 41 (finding arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions" located throughout agreement).

(f) The arbitration provision and other provisions of TAMKO's Warranty are cumulatively unconscionable, and thus, unenforceable under South Carolina law;[6]

(g) Given their pervasive nature, the arbitration provision and other provisions of TAMKO's Warranty are not severable from each other;[7] and

(h) TAMKO's Warranty does not provide adequate coverage for residences which incorporate the Shingles, and thus, fails is essential purpose.

(R. pp. 7-8).

On September 29, 2014, TAMKO filed its Notice of Appeal.

STANDARD OF REVIEW

The question of the arbitrability of a claim is an issue for judicial determination. *AT & T Techs., Inc. v. Communications Workers of America,* 475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (citations omitted); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) ("The question of arbitrability of a claim is an issue for the courts."); *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (noting same). Thus, "[a]rbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.,* 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA,* 373 S.C. 14, 644

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[6] S.C. Code § 15–48–20(a); *see also D.R. Horton, Inc.,* 403 S.C. at 17, 742 S.E.2d at 41 *citing* S.C. Code § 36-2-302(1) (2003) ("[South Carolina] legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.") (internal citations omitted).

[7] *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673 ("[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . .") (internal citations omitted); *D.R. Horton,* 403 S.C. at 17, 742 S.E.2d at 41("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly *[D.R.] Horton*'s attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages.") (internal citations omitted) (emphasis added); *see also Ingle v. Circuit City Stores, Inc.,* 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.,* 406 F.Supp.2d 585, 604 (M.D.N.C. 2005)("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights. . .the Court finds that the better course of action in this case is to excise the arbitration clauses altogether.").

S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.,* 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003). "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey v. Green Tree Fin. Corp.,* 330 S.C. 388, 393–94, 498 S.E.2d 898, 901 (Ct.App.1998) (citation omitted). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Id.* at 394, 498 S.E.2d at 901 (citation omitted).

SUMMARY OF ARGUMENT

This Court should affirm the Circuit Court's Order denying TAMKO's Motion to Compel Arbitration based upon a number of grounds, any one of which supports the properness of the Circuit Court's ultimate conclusion. Contrary to TAMKO's circular contentions, OBH effectively challenged arbitrability based upon the unconscionability of the arbitration language at issue, and when such questions of arbitrability arise, the court decides whether the dispute is subject to arbitration. Here, the Circuit Court did so decide, finding no agreement to arbitrate existed between OBH and TAMKO, and this finding is supported by the record.

Indeed, a review of TAMKO's Warranty reveals strikingly similar provisions to those considered as a whole, and ultimately rejected as a whole, by this Court in *D.R. Horton.* As there is no distinctive difference between this case and *D.R. Horton,* TAMKO cannot avoid the collective unconscionability of its arbitration and anti-suit provisions – provisions which this Court should refuse to enforce in line with its prior decisions. Further, given the absence of meaningful choice necessarily involved in connection with TAMKO's Warranty, the admitted illegibility of TAMKO's arbitration provisions, and the one-sided nature of its arbitration language, the Circuit Court correctly concluded this language is unenforceable under South Carolina law.

TAMKO's arguments to the contrary are simply without merit - TAMKO's circular argument hinges upon the purported "fairness" of its arbitration language, language which is

subject to "considerable skepticism", and thus, presumptively unfair. TAMKO failed to provide sufficient evidence so as to overcome this presumption of unfairness, and cannot now do so on appeal, especially in light of TAMKO's concessions. Accordingly, the Circuit Court did not err in refusing to compel arbitration – it correctly applied this Court's analysis in *D.R. Horton* and the Supreme Court's analysis in *Simpson*, and this alone, warrants affirmance of the Circuit Court's Order.

ARGUMENT

A.) OBH Effectively Challenged TAMKO'S Arbitration Provision, and The Circuit Court Was the Proper Forum to Determine Its Validity and Enforceability.

Throughout its Brief, TAMKO argues OBH challenged the entire Limited Warranty rather than the arbitration provision. (Appellant Final Brief, pp. 5-7; 19). Essentially, TAMKO argues that under *Prima Paint,* OBH improperly attacked the arbitration provision. *Prima Flood & Conklin Mfg. Co.,* 388 U.S. 395 (1967).[19] This argument fails for three reasons: (1) TAMKO

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[19]While TAMKO cites *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 442, 126 S. Ct. 1204, 1207 (2006) and *Brown v. Green Tree Svcs.*, 585 F. Supp.2d 770, 775 (D.S.C. 2008) in support of its initial argument, the *Green Tree and Buckeye* decisions are based upon the "severability" doctrine as expressed by the United States Supreme Court in its 1967 decision of *Prima Paint Corp. v. Flood Conklin Manufacturing Co.,* 388 U.S. 395, 87 S.Ct. 1801 (1967). *Prima Paint* involved a federal court action seeking to rescind only the entire agreement between the parties on the basis the agreement itself was procured by fraud. *Prima Paint Corp.* 388 U.S. at 398. As such, *Prima Paint* has no application here because the issue in *Prima Paint* was not whether the arbitration provision was unconscionable. In fact, the word "unconscionable" is nowhere to be found within the entire *Prima Paint* decision, and the same is true of *Buckeye.* TAMKO's argument is further flawed in that TAMKO continues to ignore its own averments –TAMKO, itself, allowed the court to consider the conscionability of both its arbitration provision as well as the Warranty as a whole, rendering its "severability" argument now asserted on appeal moot:

> The next question Your Honor then is let's look at the arbitration provision itself. Is it unconscionable? And that's really a two-step process. Some Courts, the Muneo case for example of the South Carolina Supreme Court said all you do is look at the arbitration provisions and decide whether the arbitration provisions are unconscionable. Other courts look at both the arbitration provisions and the underlying contract to determine whether that's unconscionable. Either way, Your Honor that's for you to decide as a question of law and obviously it's our position that this is a standard contract, there's nothing unconscionable about it.

(R. p. 83, line 21-p.84, line 4). (emphasis added).

The Circuit Court considered both a challenge to the conscionability of TAMKO's arbitration provision and a challenge to the conscionability of TAMKO's Warranty, both based upon what TAMKO stated the court, not the arbitrator, could do. (*See* Warranty, R. p. 170). ("Any action brought by you against TAMKO will be *arbitrated* (or,

conceded OBH's challenge to arbitrability; (2) OBH did, in fact, properly challenge arbitrability; and (3) the Circuit Court correctly applied a "gateway" analysis in determining that no agreement to arbitrate existed between the parties.

1.) *TAMKO Conceded OBH Challenged its Arbitration Provision, and thus, this Issue is Not Properly Before this Court*

Although claiming otherwise on appeal, TAMKO conceded before the Circuit Court that OBH challenged the applicability of TAMKO's arbitration provision. In South Carolina, it is well-settled an issue is not preserved for appellate consideration if it was conceded in the Circuit Court. *See, e.g., State v. Benton*, 338 S.C. 151, 526 S.E.2d 228 (2000) *citing TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (holding an issue conceded in the Circuit Court cannot be argued on appeal).

Here, TAMKO's own assertions indicate that OBH challenged the applicability of TAMKO's arbitration provision. (R. p. 83, lines 21-22) ("The next question Your Honor then is let's look at the arbitration provision itself. Is it unconscionable?"); (R. p. 152) ("Plaintiffs [OBH] claim TAMKO's warranty, including the arbitration provision, are not applicable to it."); (R. p. 153) (stating "Plaintiffs claim that the arbitration provision operates to limit the POA's 'power to administrate' . . . ."). Thus, in keeping with the above-described rule, TAMKO cannot now rely on this issue it initially conceded to the Circuit Court – the issue is not preserved, and thus, is precluded from appellate consideration. While the foregoing proves procedurally dispositive of

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if arbitration of the action is not permitted by law, *litigated*"). TAMKO's argument also ignores the fact that this Court heard, and rejected, this same *Prima Paint* argument in deciding *D.R. Horton.* (Appellant Final Br., p. 5, 12). Moreover, TAMKO's suggestion that OBH *only* challenged TAMKO's Warranty is completely unsupported by the express findings of the Circuit Court - "[OBH] effectively challenged the arbitrability of their claims". (R. p. 7). Simply put, OBH has consistently argued that the arbitration provision **and** other remedial provisions in TAMKO's Warranty are unseverable, unconscionable and unenforceable. (R. p. 8). TAMKO's attempt to turn OBH's challenge into something it is not is akin to driving a square peg into round hole. *Simpson* and *D.R. Horton*, not *Prima Paint*, provide the operable framework for analysis here, a framework which the Circuit Court correctly applied and which TAMKO concedes is problematic for them. (R. p. 83, lines 18-19).

this issue, TAMKO's argument also lacks substantive merit given (a) the record clearly reflects OBH challenged TAMKO's arbitration provision based upon valid grounds; and (b) the Circuit Court correctly denied arbitration based upon the same.

2.) *OBH Properly Challenged TAMKO's Arbitration Provision Based Upon Valid Grounds*

Averring to the merits, OBH properly challenged TAMKO's arbitration provision, itself, and maintained this provision is unconscionable and unenforceable. Any argument TAMKO posits to the contrary is unavailing provided: (i) a party may effectively challenge arbitrability based upon general contract principles available under South Carolina law;[20] and (ii) OBH challenged, and continues to challenge, the legitimacy of TAMKO's arbitration provision based upon such recognized contract principles and prevailing South Carolina jurisprudence.

Here, OBH undoubtedly challenged TAMKO's arbitration provision, silencing the procedural red herring TAMKO presents in comparing the instant case to *Green Tree* and *Buckeye.* (R. pp. 121, 128). As evidenced by OBH's Initial and Supplemental Memorandums in Opposition to TAMKO's Motion, OBH specifically maintains the "arbitration clause" is unconscionable, contrary to South Carolina law, inherently ambiguous, and thus, unenforceable:

> [OBH] did not and do[es] not consent to arbitration and assert[s] a number of state-specific grounds challenging the legitimacy of TAMKO's arbitration provisions...In addition to its unconscionable nature, TAMKO's *arbitration clause* is exculpatory in nature and contrary to South Carolina law.

(R. p. 124). (emphasis added); *see also* (R. p. 160). ("This Court should deny TAMKO's Motion to Dismiss and Compel Arbitration because the arbitration and other anti-suit provisions contained

[20] The FAA provides arbitration clauses are unenforceable when state law or equitable principles invalidate clause provisions. In other words, where state law governs issues concerning the validity, revocability and enforcement of contracts generally, state law also governs issues concerning the validity, revocability and enforcement of arbitration clauses. 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64 (2001) (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA).

in TAMKO's Warranty are wholly unconscionable, contrary to South Carolina law, inherently ambiguous, and thus, unenforceable.").

OBH continued to challenge the arbitration provision throughout the proceedings below. (R. p. 98: line 15 - p. 99, line 15; R. p. 100, line 19-25; R.p. 101, line 6-16). The Circuit Court understood, and ultimately concluded, that OBH successfully challenged TAMKO's arbitration provision. (R. p. 7). ("Plaintiffs effectively challenged the arbitrability of their claims against TAMKO based upon general contract principles recognized under South Carolina law."); (R. p. 17). ("TAMKO's Warranty contains arbitration and remedial provisions which mirror the provisions found unconscionable in *D.R. Horton.*"); (R. p. 5). ("[T]he arbitration provision is made unconscionable based on the cumulative effect of several ambiguous, oppressive and one-sided provisions located throughout the Warranty . . . ."). Accordingly, TAMKO's reliance on *Buckeye, Green Tree,* and implicitly, *Prima Paint* is misplaced – none apply because OBH properly challenged TAMKO's arbitration provision based upon valid grounds.

3.) *The Circuit Court Correctly Applied a "Gateway" Analysis in Determining that No Agreement to Arbitrate Existed Between the Parties.*

Even though the Federal Arbitration Act, 9 U.S.C. 1, *et seq.* ("FAA") applies to the instant case, the FAA provides arbitration clauses are unenforceable when state law or equitable principles invalidate clause provisions. 9 U.S.C. § 2 (providing written arbitration agreements may be invalid, revocable and unenforceable based upon "such grounds as exist at law or in equity for the revocation of any contract."). Thus, where state law governs issues concerning the validity,

revocability and enforcement of contracts generally,[21] state law also governs issues concerning the validity, revocability and enforcement of arbitration clauses.[22]

In other words, because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. *See Oxford Health Plans LLC v. Sutter*, 569 U.S. ___, 133 S. Ct. 2064 (2013) (noting questions of arbitrability are presumptively left for the court to decide); *Granite Rock Co. v. Int'l Bhd. Of Teamsters,* 561 U.S. 287, 296 (2010) (noting when such questions of arbitrability arise, the court, not the arbitrator, decides whether a matter should be resolved through arbitration); *AT & T Tech., Inc. v. Comm'n Workers of Am.,* 475 U.S. 643, 651 (1986) (noting same); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) ("The question of arbitrability of a claim is an issue for the courts."); *Simpson,* 373 S.C. at 23, 644 S.E.2d at 667 (the trial court should determine the validity of the arbitration agreement); *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise."); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-64 = (noting general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause governed by the FAA); *D.R. Horton, Inc.*, 403 S.C. at 14, 742 S.E.2d at 40 (arbitration provision was unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions).

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[21] According to South Carolina law, a party may seek revocation of a contract under "such grounds as exist at law or in equity," including fraud, duress, and unconscionability. S.C. Code § 15–48–10(a).

[22] As noted by Justices Breyer, Ginsburg, Sotomayor and Kagan in their dissenting opinion to *AT&T Mobility, LLC v. Concepcion*: "even though contract defenses, *e.g.,* duress and unconscionability, slow down the dispute resolution process, *federal arbitration law normally leaves such matters to the States." AT&T Mobility, LLC v. Concepcion,* 131 S.Ct. 1740, 1760 (2011) (emphasis added); *Rent–A–Center,* 130 S.Ct. at 2775 (2010) (arbitration agreements "may be invalidated by 'generally applicable contract defenses'"); *Munoz,* 343 S.C. at 539, 542 S.E.2d at 363-64 ("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 (1996); *Allied-Bruce Terminix Companies, Inc. v. Dobson,* 513 U.S. 265, 281 (1995).

Consistent with basic principles of contract law, a party may properly challenge the enforceability of an agreement to arbitrate under "such grounds as exist at law or in equity" including fraud, duress, and unconscionability. *See* S.C. Code § 15-48-10(a). *Simpson,* 373 S.C. at 24, 644 S.E.2d at 668 (the trial court should determine the validity of the arbitration agreement); *D.R. Horton,* Inc., 403 S.C. at 14, 742 S.E.2d at 40. The United States Supreme Court has noted that, in limited circumstances, a court should assume that the parties intended the court to decide certain arbitration issues in the absence of "clear and unmistakable" evidence to the contrary. *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444, 452 (2003). "These limited circumstances typically involve certain 'gateway matters,' such as whether the parties have a valid arbitration agreement at all, or whether an arbitration clause applies to a certain type of controversy." *Simpson,* 373 S.C. at 23, 644 S.E.2d at 668; *D.R. Horton, Inc.*, 403 S.C. at 15, 742 S.E.2d at 40 ("When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties."); *Hous. Auth. of the City of Columbia v. Cornerstone Hous., LLC,* 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003) ("The initial inquiry to be made by the Circuit Court is whether an arbitration agreement exists between the parties."); *Towles v. United Healthcare Corp.,* 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999) ("Arbitration is available only when the parties involved contractually agreed to arbitrate."); *see also* S.C. Code § 15-48-20 (a) (providing arbitration will be denied if a court determines no agreement to arbitrate existed).

In other words, both (a) the determination of whether an arbitration agreement exists; and (b) the determination of which disputes are subject to arbitration, are matters for the Circuit Court to decide. *Id.*; *see also Green Tree Fin. Corp. v. Bazzle*, 156 L. Ed. 2d 414, 123 S. Ct. 2402, 2407 (2003) (noting in particular circumstances courts must "assume that parties intended the courts,

not arbitrators, to decide a particular arbitration-related matter. . .[these circumstances] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all. . ."). Only where there is "clear and unmistakable evidence to the contrary" will courts find that such threshold decisions were intended to be decided by an arbitrator. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (noting that where a party challenges the validity of the arbitration agreement on the grounds that it is unconscionable, there is no "clear and unmistakable" evidence that the parties agreed to arbitrate such gateway matters); *see also* S.C. Code § 15-48-20(a) (providing that the court should decide a challenge brought by an opponent who denies the existence of the agreement to arbitrate).

Thus, in South Carolina, a party may effectively challenge arbitrability based upon the unconscionability of the arbitration language at issue, and when such questions of arbitrability arise, the court, not the arbitrator, decides whether the matter should be resolved through arbitration. Similarly stated, despite any presumption favoring 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 Partain*, 386 S.C. at 491, 689 S.E.2d at 603 ("The question of arbitrability of a claim is an issue for the courts."). Thus, if it is determined that no agreement to arbitrate existed based upon a matter of contract law, arbitration must be denied. *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668.

That is exactly the case here - OBH did not consent to arbitration; OBH asserted a number of contractual-based grounds challenging the legitimacy of TAMKO's arbitration provision; and the Circuit Court denied the Motion to Compel Arbitration based upon these same grounds. (Order, pp. 18-19). Although TAMKO avers this decision should have been made by the arbitrator, not the court, TAMKO's argument ignores the foregoing precedent which clearly indicates to the contrary. In line with the foregoing precedent, the Circuit Court correctly applied a "gateway"

analysis in determining that no agreement to arbitrate existed between these parties, and consequently, this Court should affirm the Circuit's Court Order.

B.) The Circuit Court Properly Determined TAMKO's Arbitration Provision is Unconscionable and Unenforceable Based Upon the Facts and Circumstances of this Case

Given the absence of meaningful choice necessarily involved in connection with TAMKO's Warranty, the admitted illegibility of TAMKO's arbitration provision, and the one-sided nature of its arbitration and other anti-suit provisions, the Circuit Court correctly concluded TAMKO's arbitration provision is unconscionable, and thus, unenforceable under South Carolina law. (R. p. 20) *citing* S.C. Code § 15–48–20(a); *D.R. Horton*, 403 S.C. at 17, 742 S.E.2d at 41 *citing* S.C. Code § 36-2-302(1) (2003) ("[South Carolina] legislation permits this Court to refuse to enforce any unconscionable clause in a contract or to limit its application so as to avoid an unconscionable result.") (internal citations omitted); *see also Carolina Care Plan, Inc. v. United Health Care Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (defining unconscionability as "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.").

1.) TAMKO's Arbitration Agreement is Adhesive in Nature, and thus, There Admittedly Exists an Absence of Meaningful Choice

As evidenced by the record, TAMKO concedes the adhesiveness of its Warranty. (R. p. 85, lines 23-25); See *also* Appellant Final Br., p. 14 ("TAMKO acknowledges that the contract is one of adhesion."). Given the Warranty's adhesive nature, there is clearly, and admittedly, an absence of meaningful choice, undoubtedly satisfying the first prong of the unconscionability test. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668-69 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

Moreover, the fact that TAMKO's Warranty is admittedly adhesive requires this Court to analyze the Warranty, and its arbitration provision, with "considerable skepticism." *Id.* Indeed, because TAMKO's Warranty is an adhesion contract, "the presumption in favor of arbitration is substantially weaker . . . and there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Id.* at 26, 644 S.E.2d at 669 (citations omitted) (emphasis added).

2.) The Arbitration Provision, Itself, Is Made Unconscionable by the Cumulative Effect of Oppressive and One-Sided Provisions

Specifically as to oppressive terms, TAMKO's argument that the arbitration provision should stand alone, and in isolation from, the other anti-suit provisions puts form above function and ignores our Courts' prior decisions.

Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. These general rules of contract interpretation include the well-recognized tenant that a contract should be read as a whole, especially when there are different provisions that deal with the same subject matter. *Towles,* 338 S.C. at 37, 524 S.E.2d at 844 (Ct. App. 1999); *see also Buice v. WMA Secs., Inc.,* 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008) (recognizing the contracting principle that a court should construe different provisions together that deal with the same subject matter); *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.,* 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993) (recognizing whole and different provisions dealing with the same subject matter are to be read together); *Wise v. Picow*, 232 S.C. 237, 243, 101 S.E.2d 651, 655 (1958) (different provisions dealing with the same subject matter are to be read together).

The TAMKO Warranty applicable to OBH contains numerous individual provisions that deal with the same subject matter as the arbitration provision—remedies available to OBH. Every paragraph on page two of the Warranty, where the arbitration clause is located, is of the same

subject matter or incorporated by the arbitration clause. First, "Arbitration" is explicitly referenced in the "Mandatory Binding Arbitration" provision and then again in a separate provision prohibiting class actions two paragraphs later. (R. pp. 184-185). The "Mandatory Binding Arbitration" provision expressly references "the time period prescribed immediately below" thereby incorporating the "Legal Remedies" paragraph that limits the time in which an action can be brought. The "Legal Remedies" paragraph also contains a term that purports to limit the effect of any one provision, including the arbitration clause, based on the validity of another.

The arbitration clause's reach goes well beyond just the second page. The arbitration provision indicates that notice of a claim should be mailed to TAMKO, but the conditions placed on notice are stated on page one of the Warranty in a separate paragraph. Also, because the arbitration provision has referenced the "Legal Remedies" section it has become limited by the "Exclusion of Coverage" clause on page one of the Warranty. (R. p. 171). In the "Legal Remedies" section, TAMKO has removed the ability of a party to receive consequential or incidental damages or to hold TAMKO liable for anything. Similarly, in its "Exclusion of Coverage" clause, TAMKO expressly states that is shall not be liable for "damages of any kind whatsoever." The arbitration provision's incorporation of numerous sections of the Warranty, as well as the language of the provision itself, has the deleterious effect of barring any right to a jury trial and precluding the accessibility of remedies available at law.

Based upon the foregoing, it is clear TAMKO does not truly intend its arbitration provision to operate independently of other Warranty provisions, and in fact, TAMKO's arbitration language expressly references or otherwise relates a number of these other provisions, all of which serve to wrongfully deprive OBH of any remedy. Simply put, TAMKO's Warranty purports to provide a remedy – this remedy is expressly subject to the Warranty's remedial and arbitration provisions – and these provisions collectively negate the very remedy contemplated as available under the

Warranty's terms.[23] TAMKO cannot use its arbitration clause and surrounding Warranty as both a sword and shield and cannot cherry pick the provisions which best serve its interest at any given moment.

As such, the Circuit Court correctly found that the purported agreement between OBH and TAMKO is not a proper candidate for "severability". Indeed, South Carolina courts "recognize severability is not always an appropriate remedy for an unconscionable provision. . .'[i]f illegality pervades the agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. . .'" *Simpson*, 373 S.C. at 34, 542 S.E.2d at 673;[24] *D.R. Horton*, *supra*, note 7 ("We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly *[D.R.] Horton*'s attempt to waive any seller liability for monetary damages of any kind, including secondary, consequential, punitive, general, special

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[23] TAMKO's Warranty expressly excludes from coverage "damages of any kind whatsoever" which necessarily includes: (a) direct or indirect economic damages; (b) consequential or incidental damages; and (c) special or punitive damages. Specifically, Paragraph Two of the TAMKO Warranty Section entitled "Exclusions from Coverage" provides as follows: "TAMKO shall not be liable *under any circumstance* for . . . (2) *Damage to any building,* either exterior or interior, or any property contained therein *or for injuries or damages of any kind whatsoever. . .*" (R. p. 171) (emphasis added). While TAMKO *now* maintains this exclusion does "not negate other obligations to repair or replace shingles that are determined to have manufacturing defects," TAMKO does so in an effort to try to clarify what is an obvious ambiguity in its Warranty, an ambiguity that must be construed *against TAMKO.* (R. p. 157).

[24] Contrary to TAMKO's contentions, the *Simpson* Court addressed a very similar set of circumstances in which our Supreme Court found an arbitration clause unconscionable, despite the FAA's application. In addition to analyzing the lack of conspicuousness of the arbitration provision, the *Simpson* Court focused on the other provisions of the contract limiting the recovery and claims available under its terms. Specifically, because the provisions of the contract in the *Simpson* case violated statutory law and waived important legal remedies, the Court considered these provisions oppressive, one-sided, and not geared toward achieving an unbiased decision by a neutral decision-maker. In conjunction with Simpson's lack of meaningful choice in agreeing to arbitrate, the Court found that these provisions were an unconscionable waiver of statutory rights, and therefore, unenforceable. Although it was argued in the *Simpson* case that these offending provisions should simply be severed, the Court stated:

> In this case, we find the arbitration clause, in the adhesion contract between Simpson and Addy wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina's policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23-24, 644 S.E.2d 663, 668, 62 U.C.C. Rep. Serv. 2d (Callaghan) 217 (S.C. 2007)

or indirect damages.") (internal citations omitted) (emphasis added); *see also Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding arbitration agreement wholly unenforceable because of an "insidious pattern" of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter"); *In re Cotton Yarn Antitrust Litig.*, 406 F.Supp.2d 585, 604 (M.D.N.C. 2005)("[W]here, as here, multiple provisions of the arbitration clauses are inconsistent with Plaintiffs' ability to effectively vindicate their statutory rights. . .the Court found that the better course of action in this case is to excise the arbitration clauses altogether."). This is exactly the case here - TAMKO's arbitration clause is "made unconscionable" by oppressive provisions which pervade the Warranty, thereby rendering "severability" impractical, if not impossible, as found by the Circuit Court. (R. p. 21). Also, while TAMKO attempts to characterize its arbitration provision as though it were not an integral part of other provisions, this effort misses the mark – one cannot even read the word "arbitration" in the TAMKO Warranty applicable to OBH, much less discern it separately from other provisions.[25]

Moreover, there is no distinctive difference between this case and *D.R. Horton* or this case and *Simpson*, and thus, TAMKO cannot avoid the collective unconscionability of its "remedial provisions" so easily.[26] For example, this Court in *Smith versus D.R. Horton* recently affirmed a Circuit Court's decision finding the arbitration provision contained in a *D.R. Horton* purchase contract unconscionable and unenforceable due to the "cumulative effect" of partisan provisions. *D.R. Horton, Inc.*, 403 S.C. at 15, 742 S.E.2d at 40. Confronted with a motion to compel arbitration

[25] As previously noted, TAMKO Warranty applicable to OBH is illegible, as evidenced by the Circuit Court's statement: "Well, I doubt if I could read that with a magnifying glass [...] It's absolutely illegible." (R. p. 93, lines 9-23). Further, the illegible arbitration language is couched within, or otherwise affected by other, related, Warranty provisions, including "legal remedies", "exclusions from coverage" and "transferability" provisions. (R. pp. 5-20).

[26] TAMKO admitted as much during the June 25th motion hearing, stating "[T]he *D.R. Horton* case is a bad case for me. That's the case I've got to get around." (R. p. 90, lines 18-19).

brought by *D.R. Horton*, the Circuit Court viewed the warranties and arbitration section of the purchase contract as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies. . ." *Id.* Per its review, the Circuit Court held the sections' collective attempt to disclaim implied warranty claims was oppressive and unconscionable. *Id.* The Circuit Court further found "perhaps even more stark [were] the provisions in the Limitations of Liability. . ." in which *D.R. Horton* claimed it could not be liable for monetary damages of any kind. *Id.* Based upon the foregoing, the Circuit Court concluded, and this Court subsequently affirmed, the arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." *Id.* (emphasis added).

Here, a review of TAMKO's Warranty reveals strikingly similar provisions to those considered as a whole, and ultimately rejected as a whole, by this Court in *D.R. Horton* and our Supreme Court in *Simpson.* By rejecting appellants' efforts to sever the provisions at issue in these cases, it is apparent neither this Court, nor the Supreme Court, would allow TAMKO's attempt to "separate the wheat from the chaff" in this case. *Simpson,* 373 S.C. at 33-34, 644 S.E.2d at 673-74 (denying a motion to stay litigation pending arbitration on the ground that the arbitration clause was unconscionable); *D.R. Horton*, 403 S.C. at 16-17, 742 S.E.2d at 41 (striking the entire arbitration clause due to the cumulative effect of a number of oppressive and one-sided provisions contained therein).[27] Simply put, to suggest these remedial provisions are not all related and are

[27] Notably, TAMKO relies on *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 5-6, 2008 S.C. App. 176, 12 (S.C. Ct. App. 2008) for its assertion that "[a]rbitration clauses are separable from the contracts in which they are imbedded." (Appellant Final Br., 6). However, TAMKO conveniently excludes the fact that *New Hope* distinguished itself from *Simpson*, noting severability is "not always an appropriate remedy" for an unconscionable arbitration provision:

> In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the South Carolina Supreme Court recently noted that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause especially in situations where

not intertwined is to ignore their practical effect upon OBH when read together. *Buice,* 380 S.C. at 156-157, 668 S.E.2d at 434. When these provisions are read together, the cumulative, oppressive result is plainly evident. *D.R. Horton, supra* (striking the entire arbitration clause due to the cumulative effect of a number of oppressive and one-sided provisions contained therein); *Simpson,* 373 S.C. at 33-34, 644 S.E.2d at 673-74. This analysis is evident from the four corners of the Limited Warranty, evidence which supports the Circuit Court's decision.

3.) The Language of the Arbitration Provision, Itself, is Unconscionable and Unenforceable

Not only is TAMKO's arbitration provision made unconscionable by the cumulative effect of a number of oppressive and one-sided terms, the arbitration language, itself, is illegible and unconscionable.

First and foremost, a review of the Warranty applicable to OBH indicates TAMKO's arbitration language is "absolutely" illegible and inconspicuous – the language, buried within boiler-point paragraphs on the second page of TAMKO's adhesive Warranty, is blurred, indecipherable, and indiscernible. (R. p. 93, lines 11-20). (According to the Circuit Court, the arbitration provision is "absolutely illegible" and it's doubtful one "could read [it] with a magnifying glass."). Even TAMKO admits "it's hard to read" the words "mandatory arbitration" – so much so that TAMKO had to reference another version of its Warranty in describing the purportedly "clear" arbitration language. Clearly, where one cannot even read the words

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> 'illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts. **This situation is not presently before us since the Church has made no claims regarding the unconscionability of its *Contract* with Paragon Builders**. The Supreme Court emphasized the importance of a case-by-case analysis to address unique circumstances surrounding the evaluation of an arbitration clause for unconscionability and further distinguished *Simpson* from cases such as the one *sub judice* by holding the arbitration clause in *Simpson* is unconscionable due to a multitude of one-sided terms.

New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 630, 667 S.E.2d 1, 5, 2008 S.C. App. 176, 12-14 (S.C. Ct. App. 2008) (citations omitted) (emphasis added).

"mandatory arbitration," one cannot be said to have somehow agreed to the same, especially in the context of an adhesion contract. Stated differently, no reasonable person, especially an unsophisticated party such as OBH, would be able to detect that a purported agreement to arbitrate even existed within TAMKO's Warranty. This simple fact, in and of itself, renders the arbitration language, itself, unenforceable.

Second, TAMKO's entire argument assumes that's its arbitration provision is severable from its other Warranty provisions which expressly reference or otherwise relate to its arbitration provision. As discussed in detail above, TAMKO's assumption is an erroneous one based upon prevailing South Carolina jurisprudence – TAMKO's arbitration provision is not severable from the Warranty's other anti-suit provisions, and thus, it's the language of all these provisions which this Court must consider. Accordingly, TAMKO's reliance on *Simpson* is misplaced – here, like *Simpson*, the entirety of TAMKO's arbitration language is not geared toward achieving an unbiased decision by a neutral decision-maker.[28]

TAMKO's reliance on *Carlson* and *York* is similarly misplaced – *Carlson* did not involve an adhesion contact and *York* involved an arbitration clause, which TAMKO characterizes as "similar to that in *Simpson*," the Court deemed unconscionable and unenforceable. (Appellant Final Br., 10). Expanding on the foregoing, TAMKO incorrectly assumes "one shoe fits all" in connection with the Supreme Court's decision in *Carlson.* TAMKO's argument overlooks the Supreme Court's clear instructions that "there 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

[28]As previously mentioned, TAMKO conveniently ignores the fact that its arbitration provision expressly incorporates all other paragraphs located "immediately below" it on page two of its adhesive Warranty. The language of these paragraphs result in (a) the loss of the right to a jury trial; (b) the loss of the ability to commence an action within the statutorily prescribed statute of limitations; (c) the loss of the ability to maintain a class action; and, most importantly, (d) the loss of the ability to hold TAMKO liable for anything. (R. pp. 15-18); (R. p. 171).

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); s*ee 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.") (citations omitted).

Even if a comparison is made between *Carlson* and the present case, the outcome remains the same. In *Carlson,* the Court of Appeals was confronted with legible arbitration language whereas here "it's hard to read"[29] the arbitration language at issue. *Carlson,* 743 S.E.2d at 870-871. Moreover, according to the arguments of counsel to the Circuit Court and applicable rules of contract construction, this Court can refer to surrounding unconscionable provisions in order to render its arbitration provision unconscionable.[30] Additionally, there are specific concessions and findings made in this case which were not made in the *Carlson* case – namely the adhesive nature of TAMKO's arbitration language and the waiver of rights and remedies available by law contained in the same. (R. pp. 15-18); (Appellant Final Br., 10). The Court need only refer to this evidentiary support contained in the record to affirm the Circuit Court's ultimate conclusion. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal"); *Simpson,* 373 S.C. at 26, 644 S.E.2d at 669 ("[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. . .In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.").

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[29] (R. p. 93, lines 13-15).

[30] As previously noted, TAMKO presented the unconscionability of both its arbitration provision as well as the Warranty as a whole to the court by stating, "Either way, Your Honor that's for you to decide as a question of law and obviously it's our position that this is a standard contract, there's nothing unconscionable about it." (R. p. 83, lines 21-25 –p. 84, lines 1-4).

A comparison of this case to *York* also results in the same outcome – further support for the Circuit Court's conclusion to deny TAMKO's Motion to Compel Arbitration. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013). In *York*, this Court analyzed the unconscionability of two arbitration clauses, finding "one *word-for-word identical* to the oppressive provision in *Simpson*." *Id.* at 88, 749 S.E.2d at 150 (emphasis in the original). As discussed in detail above, the arbitration language at issue here is similar to the arbitration language considered, and rejected, by both the Supreme Court in *Simpson* and this Court in *D.R. Horton*. Already tainted with an absence of meaningful choice, and thus, viewed with considerable skepticism, TAMKO's arbitration language operates to wrongfully deprive OBH of a remedy. Under our state law principles of contract interpretation, such limitations offered on a take it or leave it basis and which serve to wrongfully deprive substantial rights while concomitantly eviscerating all means of recovery are unconscionable.

C.) As an Additional Sustaining Ground, the Circuit Court did not Violate the Prima Paint Rule or Deprive an Arbitrator the Power to Determine Whether the Warranty was Unconscionable

Having establishing OBH effectively challenged the arbitrability of its claims and that the Circuit Court did not err in deciding this question of arbitrability, TAMKO's arguments on appeal primarily rests on the theory that, after finding TAMKO's arbitration clause unconscionable, the Circuit Court erred in deciding on the "merits" of the Warranty. The answer to this question does not change the ultimate result – OBH challenged TAMKO's arbitration provision, itself, and the Circuit Court, applying South Carolina law, correctly concluded that this arbitration provision was unconscionable and unenforceable.[31] Because the ultimate result does not change, this Court does

[31]Because TAMKO's arbitration provision is unconscionable and unenforceable, this Court should affirm the Circuit Court's Order in this respect despite TAMKO's conclusory contentions to the contrary. Rule 220(c), SCACR (providing an appellate court may affirm any ruling, order, decision, or judgment upon any ground in the record.). As previously noted, the circuit court was the proper forum for determining the enforceability of the arbitration clause in TAMKO's Warranty. *Simpson*, 373 S.C. at 23, 644 S.E.2d at 667; Although the clause provided arbitration applied to

not need even consider this issue. *Davis v. KB Homes of SC, Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011) *vacated on other grounds. Davis v. KB Home of South Carolina, Inc.*, Op. No. 27386 (S.C. Sup. Ct. filed Jan. 29, 2014). ("Appellants argue the circuit court erred in finding the arbitration agreement was an unconscionable contract of adhesion. Because we hold the merger clause in the employment agreement nullified the existence of the arbitration clause contained in the employment application, we need not reach the merits of this issue.") *citing Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (stating an appellate court need not address remaining issues on appeal when the resolution of a prior issue is dispositive); *see also* Rule 220(c), SCACR (noting an appellate court may affirm any ruling, order, decision, or judgment upon any ground in the record). Nevertheless, OBH addresses this in opposition to TAMKO's claim that the Circuit Court erred in depriving the arbitrator the power to decide whether TAMKO's Warranty was unconscionable, and provides six supporting arguments as discussed in detail below.

First, TAMKO waived any ability to challenge the applicability of *Prima Paint* by allowing the Circuit Court to assess the unconscionability of both TAMKO's arbitration provision as well as TAMKO's Warranty.[32] TAMKO clearly submitted all questions of unconscionability to the Circuit Court for consideration, rendering its "severability" argument now asserted on appeal moot. The Circuit Court considered both a challenge to the conscionability of TAMKO's

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issues involving "arbitrability," OBH challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place. *Id.* at 22-23, 644 S.E.2d at 667(noting when arbitrability is questioned there can be no "clear and unmistakable" evidence the parties agreed to arbitrate). Under these circumstances, especially given the admittedly adhesive nature of TAMKO's Warranty, the question of this provision's validity is clearly for the court to decide. *Id.* Because OBH challenged this provision on grounds of unconscionability, "there can be no 'clear and unmistakable' evidence that the parties actually agreed to arbitrate the gateway matter of [this provision's] validity." *Id.* at 24, 644 S.E.2d 66. Accordingly, the Circuit Court "did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration." *Id.*

[32] (R. p. 83, lines 21-25-p. 84, lines 1-8.) *supra* note 19, 30 (TAMKO submitting all questions of unconscionability to the Circuit Court).

arbitration provision and a challenge to the conscionability of TAMKO's Warranty, both based upon what TAMKO allowed the court to do. (R. pp. 20-21); *see also* TAMKO's Warranty ("Any action brought by you against TAMKO will be *arbitrated* (or, if arbitration of the action is not permitted by law, *litigated*. . .") (R. p. 170).

Second, the Circuit Court, relying upon *D.R. Horton* and *Simpson*, found TAMKO's arbitration provision, itself, was unconscionable. (R. p. 20). This conclusion, founded upon decisions which considered, and rejected, *Prima Paint*'s applicability, also moots TAMKO's argument. For example, D.R. Horton maintained the same *Prima Paint* argument asserted by TAMKO – "The circuit court violated the *Prima Paint* rule"; yet, this Court affirmed the denial of arbitration in *D.R. Horton*, and should similarly do so here. (Appellant Final Br. at 11, *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013).

Third, it is proper to challenge an arbitration agreement on the same grounds as the underlying contract. *Prima Paint* involved a suit for rescission of a consulting agreement on the grounds of fraudulent inducement. The *Prima Paint* Court considered "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." 388 U.S. at 402. The Court held that under the FAA, a court must order the parties to proceed to arbitration if it is satisfied that "the making of the agreement for arbitration . . . is not in issue." *Id.* at 403 (citations omitted). By the same token, however, the Court also recognized that "if the claim is fraud in the inducement of the arbitration clause itself - an issue which goes to the 'making' of the agreement to arbitrate - the federal court may proceed to adjudicate it." *Id.* at 403-04. In *Prima Paint*, there was no challenge to the agreement to arbitrate, and the trial court properly allowed the arbitration to proceed. *Id.* at 406-07. Thus, the problem in *Prima Paint* was not that the arbitration agreement was challenged on the same ground as the

contract as a whole, but that the challenger had not challenged the agreement to arbitrate at all, unlike the case here.[33]

In *Buckeye*, relied on heavily by TAMKO, the plaintiff argued that the illegal interest rate provided for in the contract voided the entire contract, including the arbitration clause. *Id.* at 443-44. There was no argument that the arbitration clause itself was unconscionable. The *Buckeye* Court held that when a party claims the contract as a whole is illegal, but does not challenge the arbitration clause, the arbitrator should decide whether the contract is illegal. *Id.* at 449. The court did not change the rule that when the validity of the arbitration agreement, itself, is at issue, the courts must first determine whether there was a valid agreement to arbitrate. *Id.* at 445 (noting an arbitrator should consider the validity of a contract "*unless* the challenge is to the arbitration clause itself.") (emphasis added).

The current appeal is factually and legally distinguishable from *Buckeye*. First, as has previously been stated, the arbitration clause in this case is an illegible adhesion contract. (R. pp. 184-185). Second, as explained above, TAMKO admitted that the validity of the arbitration agreement is question for the Circuit Court and allowed the Circuit Court to assess the same. (R. p. 83, lines 21-25-p. 84, lines 1-8.). *Buckeye's* holding is also partially based on the idea that an arbitration clause is severable from the rest of an agreement – here, as discussed above, TAMKO's arbitration provision is not severable from the rest of the agreement.[34]

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[33] Here, OBH unquestionably pled that the arbitration provision, itself, was unconscionable and unseverable. OBH's assertion clearly qualifies as an independent challenge, and this challenge allows the court, and not the arbitrator, to address issues of unconscionability. *S.C. Pub. Serv. Auth. v. Great W. Coal (Ky), Inc.*, 312 S.C. 559, 562-563, 437 S.E.2d 22, 24 (1993) ("We hold a party cannot avoid arbitration through rescission of the entire contract *when there is no independent challenge to the arbitration clause. .* ."); *Cornerstone Housing, LLC*, 356 S.C. at 338-42, 588 S.E.2d at 622-24 (holding the legality and enforceability of two contracts was for the arbitrator to decide *where the arbitration agreement in the contracts was not directly challenged*).

[34] *See also* FN 27, *supra*

Fourth, in determining the validity and scope of TAMKO's arbitration provision, the Circuit Court is not required to examine it in a vacuum; rather, the Circuit Court is allowed to view the arbitration provision in combination with other Warranty provisions. *Towels,* 338 S.C. at 37, 524 S.E.2d at 844 (Ct. App. 1999). To approach this situation any other way would misconstrue and over broaden the holding in *Buckeye* and would ignore other Supreme Court precedent like *Litton.* Under *Litton,* "[w]hether or not a party is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court, and a party cannot be forced to "arbitrate the arbitrability question." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208, 111. Ct. 2215; 115 L. Ed. 2d 177 (1991) *citing AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 651, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). Thus, courts, not arbitrators, decide the validity of arbitration agreements. *Litton*, 501 U.S. at 209 ("Although doubts should be resolved in favor of coverage, we must determine whether the parties agreed to arbitrate this dispute, and *we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.*")(emphasis added).

Adopting TAMKO's argument would render these basic contract and arbitration principles meaningless, something the Supreme Court did not intend when deciding *Buckeye*. In a situation like this, where OBH contends that the arbitration agreement is unconscionable, it is proper for the Court to determine the validity of the arbitration agreement. *Id.*; *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 627, 105 S.Ct. 3346, 3354 (1985) *citing* 9 U.S.C. § 2 ("Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.").

Fifth, in South Carolina, it takes a conscionable contract to have a valid contract with an arbitration provision. S.C. Code § 15-48-10. The FAA conditions the effectiveness of an arbitration

provision on compliance with state law applicable to contracts generally, and thus, it follows that if state law serves to invalidate an unconscionable contract containing an arbitration clause, no agreement to arbitrate can exist.[35] In *Prima Paint*, the Court noted that when enacting the FAA, Congress intended "to make arbitration agreements as enforceable as other contracts, but not more so." 388 U.S. at 404 n.12. Interpreting the FAA, the Court has applied this neutrality test in determining whether state law renders a purported arbitration clause invalid. 9 U.S.C. § 2 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract.") (emphasis added); *see also Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281 (1995); *accord Doctor's Associates v. Casarotto,* 517 U.S. 681,686-687 (1996).

Under the FAA, the application by courts of "ordinary state-law principles that govern the formation of contracts" pertains to the validity of contracts containing embedded arbitration clauses. With respect to "a contract evidencing a transaction involving commerce," the power of an arbitrator depends upon "[a] written provision in. . .a contract. . .to settle by arbitration a controversy thereafter arising out of such contract. . .or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract. . ." 9 U.S.C. § 2. Thus, the FAA speaks of both (a) an arbitration clause embedded in "a contract" and (b) an agreement created to arbitrate an existing controversy arising out of "a contract."[36]

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[35] The FAA provides that an arbitration provision shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. State-law contract rules govern the validity of arbitration agreements. 9 U.S.C. § 2.

[36] With respect to an embedded arbitration clause, Section 2 necessarily requires "a contract" and that the contract be valid under law applicable to "any contract." The first three times the term "contract" appears in Section 2, it refers to an underlying agreement. There is no suggestion that when the term appears for the fourth time - conditioning validity on compliance with law applicable to "any contract" - such compliance with law is not required for the underlying agreement.

To premise an agreement to arbitrate on an arbitration provision embedded in an underlying contract, there must be an underlying agreement. Thus, the existence of a valid embedded arbitration provision depends on the existence of a valid underlying contract. A court cannot find an embedded arbitration clause effective under the FAA without finding the existence of an underlying contract valid under law applicable to "any contract." Applying this logic to the present case, especially when coupled with the foregoing arguments, the Circuit Court did not err in addressing the unconscionability of TAMKO's Warranty - it takes a conscionable contract to have valid agreement, arbitration or otherwise, under South Carolina law. S.C. Code § 15-48-10.

D.) As an Additional Sustaining Ground, the Circuit Court Did Not Err in Finding TAMKO's Warranty Was Void of Its Essential Purpose and Basing its Refusal to Compel Arbitration Upon This Alternative Finding[37]

As evidenced repeatedly in the record, OBH is an unsophisticated consumer who is subject to an adhesion contract containing illegible and unconscionable arbitration language. *See Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027 (D.S.C. 1993) (finding there is a higher need to protect the consumer compared to a commercial buyer who enters freely into a mutual contract). TAMKO's adhesive Warranty purports to offer coverage, while also expressly denying recovery of "damages of any kind whatsoever." (R. p. 170); Order, pp. 3-18; R. pp. 5-20). TAMKO's ambiguous Warranty indicates TAMKO will not repair an issue with a defective shingle itself, let alone, any other damages that arise from their defective shingles. *Myrtle Beach*

[37]Akin to the above argument outlined in Section C, OBH submits this argument in the alternative. Given the Circuit Court's ultimate conclusion cited alternate findings for its ruling, this Court can affirm the Circuit Court's Order based solely on the arguments set forth in Sections A and B above without addressing the issues presented in either this Section or Section C. (R. pp. 20-21). ("This Court. . .denies TAMKO's Motion. . .because (a) TAMKO's arbitration, exclusionary, remedial, and transferability provisions are wholly unconscionable and unenforceable as matter of South Carolina law; (b) the above-referenced provisions are made unconscionable and unenforceable due to the cumulative effect of a number of oppressive and one-sided Warranty terms under South Carolina law; (c) the above-referenced provisions are not severable from each other or from TAMKO's Warranty according to South Carolina law; and/**or** (d) TAMKO's Warranty is inherently ambiguous and void of its essential purpose, it is proper TAMKO's Motion is denied under South Carolina law.") (emphasis added).

Pipeline Corp. 843 F. Supp at 1046 (holding that a warranty fails its essential purpose when seller will not repair or replace a defective product.).

Simply stated, TAMKO's Warranty provisions negates the very damages separately classified, calculated and contemplated as available under the Warranty's terms. Accordingly, TAMKO's Warranty does not provide innocent consumers such as OBH "the possibility of recovery" – there is no recovery to be had per the Warranty provisions drafted by TAMKO. Rather, the Warranty provisions create an internal inconsistency within the Warranty itself by negating all meaningful warranty coverage for the primary risk associated with said Warranty – damage arising out of or to TAMKO's Shingles. Like the defendants in both *D.R. Horton* and *Simpson*, TAMKO takes the position its Warranty relieves *TAMKO of all liability for this very damage under any conceivable set of circumstances*. This renders the Warranty (a) void of its essential purpose; (b) lacking in mutuality; and (c) procedurally and substantively unconscionable.[38] (R. p. 17) (finding the Warranty provisions create an internal inconsistency by negating all coverage for the primary risk associated with the Warranty).

Moreover, if this Court agrees OBH successfully challenged arbitrability, which it should do under *D.R. Horton* and *Simpson*, it naturally follows the Circuit Court did not "err" in also concluding TAMKO's Warranty failed its essential purpose. (R. p. 170) ("Any action brought by

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[38] Under our jurisprudence, such internal inconsistencies render TAMKO's Warranty inherently ambiguous and unconscionable, and therefore, this Court declines to enforce the same. In the insurance context, for example, the South Carolina Court of Appeals in *Isle of Palms Pest Control Company versus Monticello Insurance Company*, directly confronted a similar "internal inconsistency" issue, concluding as follows:

> [T]he internal inconsistency created by [a policy exclusion] which *purports to bar coverage for claims arising out of the very operation sought* to be insured renders [the policy] *ambiguous in favor of coverage.*

319 S.C. 12, 19, 459 S.E.2d 318, 321 (Ct. App. 1994), *reh'g denied*, (Aug. 4, 1995 (emphasis added); *see also Hooters of Augusta, Inc. v. American Global Ins. Co.*, 272 F. Supp.2d 1365, 1378 (S.D. Ga. 2003) (noting "[i]nsures must not deceive insurance purchasers into believing they have coverage only to have an exclusionary provision entirely nullify it").

you against TAMKO will be *arbitrated* (or, if arbitration of the action is not permitted by law, *litigated.*"). There's nothing for the arbitrator to decide since the matter is not going to arbitration. The Circuit Court was aware of this Court's decision in *D.R. Horton* and our Supreme Court's decision *Simpson* – it correctly applied the *Horton/Simpson* framework – it found the arbitration provision, itself, was unconscionable and went on to find the underlying agreement, itself, unconscionable as well. Even if the Circuit Court somehow erred in making this determination, this error is harmless in light of the Circuit Court's alternate findings that TAMKO's arbitration provision is unconscionable. Despite TAMKO's averments to the contrary, errors in an Order not affecting the ultimate result are not enough to reverse the Order, and this Court may affirm the Circuit Court for *any reason* appearing in the record. *Hossenlopp v. Cannon*, 285 S.C. 367, 329 S.E.2d 438 (1985); *Jensen v. Conrad* 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987). Here, this Court's decision in *D.R. Horton*, and the Supreme Court's decision in *Simpson* allows this Court to affirm the Circuit Court's Order – the ultimate conclusion reached in both *D.R. Horton* and *Simpson* is the same conclusion which the Circuit Court reached in this case, a conclusion which this Court should again uphold.

CONCLUSION

The Circuit Court correctly denied TAMKO's Motion to Compel Arbitration. Although OBH maintains each of the above-referenced arguments provides more than adequate grounds for affirming the Circuit Court's Order, this Court need not agree with everything provided herein. The Circuit Court's Order is not legally deficient as TAMKO's circular argument suggests – and this Court may affirm the Order based upon any ground appearing in the record. Thus, for all the reasons stated herein, any one of which warrants affirmance, OBH respectfully requests that this Court:

(a) Deny TAMKO's Appeal;

(b) Affirm the Order of the Circuit Court;

(c) Remand this Case to the Circuit Court for Further Proceedings; and

(d) Award Such Other Relief as this Court Deems Just and Equitable.

Respectfully Submitted,

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Attorneys for the Respondent

May 26, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated,

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc. a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation, Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a/ Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber and Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales, Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing

Products, Inc.; VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

v.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC, Third Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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Attorneys for the Respondent

May 26, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-7594

Case Tracking No. 2014-002115

One Belle Hall Property Owners Association, Inc. and Brandy Ramey, individually, and on behalf of all others similarly situated,

Respondents,

v.

Trammell Crow Residential Company; TCR NC Construction I, LP; Belle Hall Direct 101, LP; TCR RLD Condominiums, Inc.; CS 101 Belle Hall, LP; TCR Southeast, Inc.; TCR Carolina Properties, Inc.; TCR SE Construction, Inc.; TCR SE Construction II, Inc.; TCR Construction, a division of Trammell Crow Residential; TCR Development, a division of Trammell Crow Residential; Trammell Crow Residential Carolina, a division of Trammell Crow Residential; and Tauer Consulting Company, Inc. a division of Trammell Crow Residential, each individually, and collectively d/b/a "Trammell Crow Residential," "Trammell Crow" or "TCR"; Halter Properties, LLC; Halter Realty, LLC; and Halter Realty Group, LLC, each individually, and collectively d/b/a "Halter Companies", Jane Doe 1-5; ABG Caulking & Waterproofing of Morristown, Inc. a/k/a ABG Caulking Contractors; Advanced Building Products & Services, LLC; BASF Corporation, Budget Mechanical Plumbing, Inc.; Builders First Source – Southeast Group, LLC; Builders Services Group, Inc., individually, and d/b/a/ Gale Contractor Services, Inc.; Century Fire Protection, LLC; Cline Design Associates, P.A. and Gary D. Cline; Coastal Lumber and Framing, LLC; Dodson Brothers Exterminating Co., Inc. a/k/a Dodson Pest Control; First Exteriors, LLC; Flooring Services, Inc.; General Heating & Air Conditioning Company of Greenville, Inc. d/b/a General Heating and Air; Jimmy Warner, individually, and d/b/a Warner Heating & Air; Glazing Consultants, Inc.; GWC Roofing, Inc., individually, and d/b/a Southcoast Exteriors, Inc.; Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric; KMAC of the Carolinas, Inc.; P&P Metal Sales, Co., Inc. a/k/a P&P Metal Sales, LLC a/k/a P&P Metal Sales, Inc. a/k/a Carolina Metals; Pleasant Places, Inc.; Raymond Building Supply Corporation d/b/a Energy Saving Products of Florida, Inc. a/k/a Energy Saving Products of Florida, RS Custom Homes, LLC; Southern Specialties, Inc.; Structural Contractors South, Inc.; Superior Construction Services, Inc., individually, and d/b/a Superior Masonry Unlimited, Inc.; TAMKO Building Products, Inc. f/k/a TAMKO Roofing Products, Inc.; VNS Corporation,

individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Inc.; What Don't We Do; and John Doe 1-25, Defendants,

Of whom TAMKO Building Products, Inc., is the Appellant.

v.

VNS Corporation, individually, and d/b/a Wholesale Building Products f/k/a Wholesale Building Materials, Third-Party Plaintiff,

v.

Billy Gray, d/b/a United Builders, LLC, Third Party Defendant,

Houston Stafford Electrical Contractors, LP a/k/a IES Residential, Inc. d/b/a Houston Stafford Electric, Third-Party Plaintiff,

v.

J. Correa Electrical Company, LLC, Third-Party Defendant.

PROOF OF SERVICE

The undersigned hereby certifies that on May 26, 2015

, a true copy of the attached and foregoing Final Brief of Respondents, together with this Certificate of Service, has been served upon all parties by causing a copy of the same to be placed in the United States Mail, sufficient postage prepaid, to Richard H. Willis, Angela G. Strickland and Paula M. Burlison at 1441 Main Street, Suite 1200, Columbia, SC 29201.

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May 26, 2015
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