THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2011204347

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

v.

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

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

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

S.C. CASES

OTHER CASES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

I. **IS THE CIRCUIT COURT THE PROPER FORUM TO DETERMINE THE GATEWAY ISSUE OF WHETHER AN AGREEMENT TO ARBITRATE EXISTED BETWEEN THE PARTIES TO THIS APPEAL?**

II. **DID THE CIRCUIT COURT PROPERLY DETERMINE THAT AN ADHESION CONTRACT'S ARBITRATION PROVISION IS UNCONSCIONABLE AND UNENFORCEABLE?**

III. **DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE MANDATORY REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT WERE NOT SATISFIED?**

IV. **DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE DOCTRINE OF MERGER EXTINGUISHED THE ARBITRATION PROVISION WHERE IT WAS NOT INCORPORATED INTO THE DEED AT CLOSING?**

STATEMENT OF THE CASE

This is a construction defect case concerning a newly-constructed home purchased by Gregory and Stephanie Smith ("Respondents") from Appellant, D.R. Horton, Inc. Respondents commenced this action in the Dorchester Court of Common Pleas against several defendants, including Appellant, alleging deficiencies in the construction of the home.[1] The suit alleges causes of action for negligence, gross negligence, recklessness, breach of contract, breach of implied warranties, and violations of South Carolina's Unfair Trade Practices Act. (R. pp. 42-59) Respondents seek actual, compensatory, and statutory and punitive damages.

On July 23, 2010, Appellant moved to compel the matter to arbitration, citing a purported arbitration provision within its contract with Respondents. (R. pp. 87-88) In response, Respondents submitted a Memorandum in Opposition to Appellant's Motion challenging the enforceability of the arbitration provision. (R. pp. 121-125) On September 9, 2010, the Honorable Edgar Warren Dickson conducted a hearing to determine the

[1] The Summons and Complaint were filed on March 5, 2010. Respondents filed an Amended Complaint on April 26, 2010 and a Second Amended Complaint on May 12, 2011.

enforceability of the arbitration provision. Thereafter, on April 12, 2011, the circuit court entered an Order denying Appellant's Motion to Compel, finding, among other things, that the arbitration provision is unconscionable and unenforceable. (R. pp. 1-4) Respondents thereafter moved the circuit court pursuant to Rule 59(e), SCRCP, to reconsider, alter or amend its prior Order. (R. pp. 126-127) A second hearing was held on August 1, 2011, and the circuit court thereafter affirmed its prior decision. The Order denying Appellant's Motion for Reconsideration was entered on December 1, 2011. (R. pp. 5-6) This appeal follows.

STATEMENT OF THE FACTS

Because discovery has not occurred in this action, the salient facts are limited. In March[2] of 2005, Respondents entered into a Home Purchase Agreement (the "Purchase Agreement") with Appellant. (R. pp. 104-113) The Purchase Agreement provided for the purchase of a new home at 4830 Harvest Moon Court, in Summerville, South Carolina. The particular home style was Appellant's "Garrett 1904A" house plan. (R. p. 110)

Respondents commenced this action after discovering numerous problems in the home as described in the Second Amended Complaint. The deficiencies include improperly installed siding, windows, structural framing and concrete slab, defective flashings, violations of applicable construction codes, and failures by Appellant to follow manufacturer's instructions in assembling or installing components of the home. (R. pp. 42-59)

At issue in this appeal is the enforceability of an arbitration provision set forth within the terms of the Purchase Agreement. Specifically, the arbitration language is found in Paragraph 14, entitled "Warranties and Dispute Resolution." This Paragraph spans three pages

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[2] There are various dates reflected on the Purchase Agreement, ranging from March 11, 2005 to March 28, 2005.

of the Purchase Agreement, from page 7 to page 9. Respondents contend Paragraph 14 of the Purchase Agreement, including the arbitration language therein, is unconscionable and unenforceable. Having twice considered the matter, the circuit court agrees.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005). Nevertheless, 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 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).

ARGUMENT AND CITATION OF AUTHORITY

The circuit court found the arbitration provision was unenforceable, and upon rehearing and reconsideration of Appellant's arguments, re-affirmed its initial conclusion. As set forth herein, the circuit court correctly determined the issues before it and properly found the arbitration agreement was unconscionable and unenforceable.

I. RESPONDENTS SPECIFICALLY CHALLENGED THE ARBITRATION PROVISION IN QUESTION, AND THE CIRCUIT COURT WAS THE PROPER FORUM TO DETERMINE ITS VALIDITY AND ENFORCEABILITY.

Beginning with its Motion for Reconsideration and continuing with its Brief before this Court, Appellant argues that Respondents have challenged the entire contract rather than the arbitration provision. (R. p. 196, lines 8-16; p. 211, lines 19-23; p. 212, lines 15-22; pp.139-141) Accordingly, Appellant argues that under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Respondents improperly attacked the arbitration provision. This

argument fails for two reasons: It is not preserved, and it completely misstates Respondents' position.

Appellant did not advance this argument prior to its Motion for Reconsideration under Rule 59(e). It is settled law that, "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994). *Accord McMillan v. S.C. Dep't of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (finding issues not preserved because they cannot be raised for the first time in a motion for reconsideration). Respondents timely objected to the inclusion of new materials for the first time in connection with the Motion for Reconsideration. (R. p. 190) In keeping with this rule, Appellant cannot rely on an argument that it failed to initially raise to the circuit court. Regardless, Appellant's interpretation of Respondents' challenge is completely incorrect.

From the outset, Respondents have specifically attacked the arbitration provision in question and argued that it (not the whole contract) is unconscionable and unenforceable. On the very first page of Respondents' Memorandum in Opposition, they argued, "Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable...." (R. p. 121) Respondents continued to advance this argument throughout the proceedings below. [3] (R. p. 172, line 6 –

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[3] For sake of clarity, references to the "Original Trans." relate to the hearing on the Motion to Compel conducted September 9, 2010. References to the "Reconsideration Trans." relate to the hearing on Appellant's Motion for Reconsideration held August 1, 2011. [*This footnote was included in Respondents' Initial Brief to add clarity to record cites prior to the preparation of the record on appeal. This footnote has no importance in this Final Brief, but is included to avoid making changes in the brief as directed by Rule 211, SCACR*].

176, line 23; p. 179, lines 12-25; p. 212, lines 15-24). The circuit court understood and twice found that Respondents had challenged the arbitration provision. (R. pp. 1-6) ("Plaintiffs believe that the arbitration clause in the contract for the purchase of the residence at issue is unconscionable and unenforceable.). Respondents have never attacked the enforceability of the whole contract. In fact, Respondents asserted a claim for breach of contract against Appellant, which would not lie if the entire agreement was unenforceable. (R. pp. 53-54) Therefore, Appellant's reliance upon *Prima Paint* is misplaced—*Prima Paint* does not apply because, *inter alia*, Respondents challenged the arbitration provision itself.

Appellant belatedly argues that each particular subpart or subsection of Paragraph 14 should stand alone and in isolation from the surrounding, interrelated provisions relating to dispute resolution. This argument lacks merit and puts form above function. Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). This includes the well-settled tenet of contract construction that a court should construe different provisions together that **deal with the same subject matter**. *Buice v. WMA Secs., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P'ship v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). The entirety of Paragraph 14 purports to contain the substance of the parties' agreements relating to disputes between them, including the applicable warranties, limitations on liability, bars against claims for various implied warranties, a bar against the recovery of any monetary award, and, as an integrated part and parcel thereof, the arbitrability of claims.

Appellant tries to isolate the arbitration language as though it were not an integral part of the Dispute Resolution terms in Paragraph 14. However, this effort misses the point. Arguably, the only difference between the lengthy, *single paragraph* arbitration provision in *Simpson* and the lengthy provisions of Paragraph 14 of the Purchase Agreement is that Appellant separated the interrelated portions of Paragraph 14 into subparts with the letters (a) through (j) assigned to each. Appellant cannot avoid the collective unconscionability of its Dispute Resolution terms so easily, and there is nothing in the Court's analysis or reasoning in *Simpson* that suggests the Supreme Court would have allowed that unconscionable provision to stand if only the dealership had broken up the problematic content into separately numbered subparts. Such a holding would lead to an absurd result. Moreover, by rejecting the dealership's suggestion to sever only those provisions the Court found unconscionable, it is apparent the *Simpson* Court would not embrace Appellant's attempt to separate the wheat from the chaff as it tries to do in this case. *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673-74 (striking the entire arbitration clause due to the cumulative effect of a number of oppressive and one-sided provisions contained therein).

Lest there is any doubt, a careful reading of Subparagraph 14(g) quickly reveals that Appellant did not truly intend for it to operate independently of the remaining provisions of Dispute Resolution Paragraph 14. Paragraph 14 begins with a discussion concerning the "RWC Warranty." Subparagraph 14(c) provides that the RWC Warranty[4] will contain its *own* arbitration clause (which Appellants did *not* introduce into the record). That same

[4] Interestingly, although Appellant was to provide the RWC Warranty at closing, subparagraph 14(b) indicates that the warranty is only valid for so long as *Appellant* is in good standing with the RWC Program. The contract says nothing about what remedy Respondents would have if Appellant chose not remain involved in the RWC Program, invalidating the warranty.

subparagraph also provides that Appellant is making "no warranties, express or implied, as to fitness for a particular purpose, merchantability, **and habitability**...." (R. p. 107) (Emphasis added). In other words, the RWC Warranty covers both arbitration issues and purportedly disclaimed warranties otherwise available to Respondents by law. Those provisions lie in the same subparagraph, and are related in subject matter to the general issue of dispute resolution. This is important because Subparagraph 14(g) expressly intertwines itself with the RWC Warranty provisions by calling for the arbitration of "Seller's performance under any warranty contained in this Agreement or otherwise..." (R. pp. 108-109) In the very least, this cross-reference bootstraps the RWC Warranty and Appellant's attempted exclusion of implied warranties into the arbitration provision, demonstrating that subparagraph 14(g) does not operate in isolation within Paragraph 14.

There is more. The "Punch List" and "Inspection Agreement" provisions that are referenced, *inter alia*, in subparagraphs 14(d), (e), and (f) are likewise expressly incorporated into the arbitration provision as well. (R. pp. 108-109) Appellant admits the arbitration provision applies to these other matters, which are found elsewhere in Paragraph 14. (R. p. 167, lines 6-24; pp. 168, line 24 – p. 167, line 2) The pattern continues with the Limitations of Liability set out in subparagraph 14(i), which expressly cross-references the warranty provisions from elsewhere within Paragraph 14 in the same breath as it excludes any monetary damages and again attempts to disclaim various warranties otherwise available to Respondents by law. To suggest these provisions (or subparts, rather) are not all related and are not intertwined is to ignore the cross-references expressly written into these provisions by Appellant as well as their practical effect upon Respondents 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. *Simpson*, 373 S.C. at 33-34, 644 S.E.2d at 673-74. This analysis is evident from the four corners of the Purchase Agreement, which evidence supports the circuit court's decision.

II. THE CIRCUIT COURT PROPERLY DETERMINED UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THAT THE ARBITRATION PROVISION IS UNCONSCIONABLE AND UNENFORCEABLE.

In South Carolina, there is a strong presumption in favor of the validity of arbitration clauses. *Towles*, 338 S.C. at 37, 524 S.E.2d at 844. Despite this presumption, it is well-settled that "arbitration is a matter of contract law and is available only when the parties involved contractually agree to arbitrate." *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. *See also Aiken v. World Fin. Corp. of S. C.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008) (citing *Zabinski*, at 596, 553 S.E.2d at 118). Thus, if it is determined that no agreement to arbitrate existed, arbitration must be denied. *Simpson*, 373 S.C. at 24, 664 S.E.2d at 668. That is exactly the case here. Appellants argue this decision should be made by the arbitrator, not the court. As explained herein, Appellant's argument falls short.

A. <u>The Circuit Court Correctly Applied a "Gateway" Analysis in Determining that No Valid Agreement to Arbitrate Existed Between the Parties</u>.

Contrary to Appellant's assertion, the determination of whether an arbitration agreement exists is a matter for the circuit court to decide. *The Housing Authority of the City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). The United States Supreme Court has stated that in limited circumstances, courts must "assume that parties intended the courts, not arbitrators, to decide a particular arbitration-

related matter." *Green Tree Fin. Corp. v. Bazzle*, 156 L. Ed. 2d 414, 123 S. Ct. 2402, 2407 (2003). As an example, the US Supreme Court stated, "[Such limited circumstances] include certain gateway matters, such as whether the parties have a valid arbitration agreement at all ...." *Id.* That is precisely the case here. 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. *Id.* *See also 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). *Accord* S.C. Code Ann. 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). Appellant admits this is the correct result, and as discussed above it is clear the validity of the arbitration provision was challenged. (R. p. 211, lines 19-22) Having established that it was for the circuit court to decide whether a valid agreement to arbitrate exists in this case, the analysis turns to the invalidity of the applicable provisions.

B. The Purported Arbitration Agreement is Unconscionable, Oppressive, and One-Sided and, Therefore, Unenforceable.

Courts should apply ordinary state-law principles that govern the formation of contracts in determining whether an agreement to arbitrate exists. *Housing Authority*, at 334, 588 S.E.2d at 620; *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. Consistent with basic principles of contract law, a party may challenge the enforceability of an agreement to arbitrate under "such grounds as exist at law or in equity" including fraud, duress, and unconscionability. *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668. *Accord* S.C. Code Ann. § 15-48-10(a) (providing that an arbitration provision may be set aside "upon such grounds as exist at law or in equity for the revocation of any contract").

1. Respondents Lacked Meaningful Choice in the Negotiation of the Purchase Agreement, Which is an Adhesion Contract.

The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process of the contract in question. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (*citing Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir. 1989). In determining whether a contract is "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* (quoting *Carlson,* 883 F.2d at 293). *See also Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.") (quoting *17A Am.Jur.2d Contracts § 279* (2004)). The facts and circumstances of this case begin with the understanding that this was the purchase of a new home by a couple who dealt with a large corporation.

For sake of comparison, the South Carolina Supreme Court has stated that the purchase of a vehicle intended for use as primary transportation is "critically important in modern day society." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. It is easy to conclude that a home is at least as important to a consumer as the purchase of a car. In fact, our Supreme Court precedent has made clear the importance of properly constructed homes in South Carolina. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (1989) ("We have made it clear that it would be **intolerable** to allow builders to place defective and inferior construction into the stream of commerce.") (emphasis added). The allegations of the Second Amended

Complaint[5] cite a myriad of defects in the home constructed and sold by Appellant to Respondents and further alleges that Appellant engaged in unfair and deceptive trade practices. Frequently, as is the case here, these issues arise in a commercial setting where the respective bargaining power of the contracting parties is unequal. Therefore, the first step in the process is to consider whether the Purchase Agreement in question is an adhesion contract, because that is the beginning point in the analysis of whether the contract is unconscionable. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

(a) The Purchase Agreement is an Adhesion Contract.

An adhesion contract is offered on a "take-it-or-leave-it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). Adhesion contracts are not *per se* unconscionable, but in proper contexts may be viewed with "considerable skepticism." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. Here, the record reveals that the Purchase Agreement is an adhesion contract, which Respondents argued below. (R. p. 175, lines 10-23) It is obvious that the Purchase Agreement is a pre-printed form containing boilerplate language crafted by a large, multi-state business entity. (R. pp. 104-113; p 115-116; p.169, lines 7-10). In many, but noticeably not all, sections of the Purchase Agreement, there are boxes to check or blanks for Respondents' initials, but that is their only contribution to the form. There is only one place where Purchase Agreement provides space for handwritten "Special Stipulations." This section remains blank. (R. p 112). Every page of the document states "General Terms and Conditions" in the header at the top.

Further proof that this is an adhesion contract lies throughout the various pages and terms of the Purchase Agreement. For example, Paragraph 2 of the Purchase Agreement

[5] For sake of brevity herein, Respondents cite only to the most recent pleading, i.e., the Second Amended Complaint. However, Respondents specifically incorporate in every such instance the allegations of all prior pleadings filed by them.

plainly applies to a variety of purchase transactions and methods of financing, indicative of the fact that this form agreement can be used with *any* potential buyer, who merely checks the boxes that apply to him or her. Paragraphs 3 through 13 of this document are all pre-printed, with the sole exception of designating the amount of the earnest money deposit. Paragraph 16 states in part, "**If** this Agreement is for the construction of a new home...." (Emphasis added.) In other words, this pre-printed document can apply to any number of circumstances—it is not particular to Respondents' home and the overall terms plainly reveal that Respondents must conform to the way Appellant does business (*See, e.g.*, Purchase Agreement, ¶ 8 (demanding strict adherence to Appellant's rules if Respondents want to have a home inspector check on Appellant's work); ¶ 19 (giving Respondents only 14 days to make color selections and offering to meet only on certain days and times on a first-come-first-served basis among all other customers)) (R. pp. 106, 110-111) It cannot reasonably be disputed that the Purchase Agreement is anything other than a pre-printed, form agreement offered by Appellant without any meaningful negotiation by Respondents. If there is any doubt, during oral arguments on the Motion to Compel, counsel for Appellant tellingly pointed out, "**If [Respondents] didn't like this deal they could have gone elsewhere.**"[6] (R. p. 183, lines 2-3) (emphasis added).

Appellant's admission represents the epitome of a "take-it-or-leave-it" contract offering. This is significant, because "'the presumption in favor of arbitration clauses is

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[6] In the context of counsel's statement, Appellant pointed out that there were "plenty of home builders out there" and Respondents could have dealt with someone else if they wanted to. (R. p. 182, line 21 – p. 183, line 1) Again, this misses the mark and is not indicative of "meaningful choice." What matters is the lack of meaningful choice as to the terms of the Purchase Contract **in the context of Respondents' dealings with Appellant**. *See Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 ("The absence of meaningful choice in the negotiation of a contract generally speaks to the fundamental fairness of the bargaining process **of the contract in question**.") (emphasis added). That another builder might have dealt with Respondents more fairly is not only irrelevant, but mere conjecture.

substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.'" *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 1998 Ohio 294, 700 N.E.2d 859, 866 (Ohio 1998)).

(b) There is Disparity in Bargaining Power Between the Parties.

Insofar as the arbitration provision is concerned, there is no evidence whatsoever in the record that Respondents were offered options or alternatives for dispute resolution that differed from the predetermined terms imposed by Appellant. This, too, is admitted by Appellant. (R. p. 194, lines 21-25) Finally, it must be remembered that Appellant is a self-described large corporation with operations in twenty-seven states. (R. p. 115-116; p. 169, lines 5-10) It cannot reasonably be disputed that ordinary consumers like Respondents are not on equal footing with a corporation the size of Appellant in terms of bargaining power. Thus, the circuit court properly recognized the disparity in bargaining power that permeated the transaction.

Contrary to Appellant's contention that the Purchase Agreement was negotiated between the parties, the record readily reveals a different story. As mentioned above, the Purchase Agreement is a pre-printed form with blanks in certain areas simply to fill in basic factual information. Even as to such matters as interior finish selections, Respondents, like all other buyers, had little power. For example, under the Purchase Agreement the buyer must accept the home "as-is" (including finishes and options) if construction has already started. (R. p. 110) Under Paragraph 19, Respondents had just 14 days from the date the Purchase Agreement was signed to choose all color sections, otherwise *Appellant* could cancel the entire transaction *and retain* all of Respondent's earnest money. Once a selection was made,

Respondents had no power to change their mind as to such simple matters as paint colors for their own home. In stark contrast, Paragraph 19 gave *Appellant* the right to make substitutions in the home in its sole opinion should it desire to do so. It is clear Appellant leveraged its bargaining power and controlled all aspects of the transaction. In other words, there was no meaningful choice in agreeing to arbitrate. A limited choice as to paint and tile colors does not constitute meaningful negotiation of the parties' legal relationship.

(c) The Arbitration Language is Inconspicuous in Light of the Resulting Consequences under the Purchase Agreement.

While it is understood that parties are always free to contract away certain rights, the conspicuousness of an arbitration provision is a factor in the analysis of a lack of meaningful choice. *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670. Here, the arbitration provision was inconspicuous in nature and drafted by the superior party, as found by the circuit court. Appellant challenges the circuit court's perceived lack of reasoning, but one need only refer to the Purchase Agreement for proof that the arbitration language was not conspicuous. The first word of the title of the Paragraph 14, in which the arbitration clause is contained, is "Warranties," and the first several provisions that follow are all related to warranties. Without a close reading to decipher the interrelation of these first provisions with those that follow, there is nothing to alert Respondents to the fact that an arbitration clause is at hand.

Paragraph 14 continues on the following page with a lengthy discussion of various exclusions related to trees, landscaping, punch lists, inspection agreements, and the like. All of these ultimately play a role in the arbitration provision at hand, but that is not apparent at first blush. Paragraph 14 carries over to yet another page of the Purchase Agreement with a discussion of additional warranty information as well as Appellant's purported "Limitation of

Liability" clause. Inserted among these various lengthy boilerplate provisions are the sentences relied upon by Appellant for its assertion that there was a negotiated agreement to arbitrate. The language is in the same size and style font used in all of the surrounding provisions of Paragraph 14, except the Limitation of Liability language, which is set out in capitalized letters. Appellant demonstrated the ability and knowhow to use such conspicuous drafting techniques, yet inexplicably chose not to apply them in connection with the arbitration language within the same Paragraph. In fact, Paragraph 14, which spans three pages, is easily the single longest section of related terms in the entire Purchase Agreement. That it contains the arbitration provision in standard font is telling of its inconspicuous nature.

In finding an arbitration clause unenforceable, the *Simpson* Court relied upon similar facts, such as the fact that certain phrases within other provisions of the additional terms and conditions were printed in all capital letters, but the arbitration clause was written in the standard small print and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. *Simpson*, 373 S.C. at 27-27; 644 S.E.2d at 670. "Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law." *Id.*

2. The Dispute Resolution Terms Set Forth in Paragraph 14 of the Purchase Agreement Are Oppressive and One-Sided.

Presumably, there is no debate that the forfeiture of a right to a trial by jury is a substantial right that is lost to Respondents' if Appellant's Dispute Resolution provision is upheld. When it is considered that through Paragraph 14 Appellant also seeks to avoid various implied warranties, including the implied warranty of habitability, and to be relived of any

monetary damages of any kind, it is apparent that Paragraph 14 is designed to strip away the remedies Respondents ordinarily would have in connection with the single largest investment most consumers will ever make. *Compare id.* at 27, 644 S.E.2d at 670 (noting that the stricken arbitration provision not only resulted in a loss of a right to a jury trial, but also required the plaintiff's to forego certain remedies provided by statute).

Respondents also allege that Appellant engaged in unfair and deceptive trade practices in violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), which provides for statutory treble damages. *See* S.C. Code Ann. § 39-5-10 *et seq*. If it is shown that Appellant is guilty of such violations, the effect of Paragraph 14 is to deny Respondents the award to which they are statutorily allowed in a court of law because all monetary damages are removed for Appellant. Appellant's Dispute Resolution provisions plainly violate the public policy behind the remedies available under SCUTPA, and Courts must not enforce an adhesion contract that has the effect of denying the weaker party remedies to which it is statutorily entitled. *Simpson*, at 30, 644 S.E.2d at 671.

Appellant belatedly argues that the arbitrator could simply decide that this provision is unconscionable and sever just that portion of the Dispute Resolution clause from the Purchase Agreement. (R. p. 203, lines 12-15) This argument was never made to the circuit court prior to Appellant's Motion for Reconsideration. *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482 (noting a party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not). In addition, Appellant's argument misses the point—there is no agreement to arbitrate when the relevant provisions are unconscionable to begin with. That is precisely the "gateway" analysis that the US Supreme Court said must be done by the courts. *Green Tree*, 123 S. Ct. at 2407. And *Simpson* advises that where the entirety of the relevant

provisions are laced with unconscionable terms, it is not appropriate for the Court to attempt to re-write the agreement by severing away multiple unenforceable terms. *Simpson*, 373 S.C. at 33-35, 644 S.E.2d at 673-74.

Considering the attempts to disclaim remedies otherwise available at law along with a complete bar against recovery of any monetary damages, including those allowed under SCUTPA in the interest of public policy, it is evident that unconscionable, one-sided provisions pervade Paragraph 14. The circuit court quickly understood that this point was made by Respondents. (R. p. 175, line 24 – p. 176, line 8) When these unconscionable provisions are read in light of the remaining, intertwined provisions of the Dispute Resolution Paragraph, *including the arbitration provisions*, the "considerable skepticism" that should blanket this adhesion contract and the subparagraphs in question takes effect and demands that the arbitration provision must fail. Just as in *Simpson*, the cumulative effect of the unconscionable and one-side provisions of Appellant's Dispute Resolution section cannot be severed, requiring that the circuit court be affirmed.

Although less significant than the concerns addressed above, it bears mentioning that there also exists a disparity in remedies under the Dispute Resolution provisions of Paragraph 14. Prior to the closing (the point at which Appellant is paid for the home and title is transferred), Paragraph 14 provides that if there is an unresolved dispute between the parties Appellant can, in its sole discretion, simply terminate the Purchase Agreement. Respondents have no such right under the Purchase Agreement and, if Appellant chooses to terminate, Respondents presumably would not even be able to compel arbitration of a pre-closing matter in dispute in an effort to protect their interest in owning the home they selected. This is simply another oppressive, unconscionable provision within Paragraph 14, all of which is plainly

evident within the four corners of the Purchase Agreement. Considering the cumulative effect of the problems described herein, Appellants' disparate remedies render the provision one-sided and oppressive. *Simpson,* 373 S.C. at 28-33, 644 S.E.2d at 670-673. (R. p. 174, line 9 – p. 176, line 8)

III. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ARBITRATION PROVISION FAILS TO SATISFY THE REQUIREMENTS OF THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, AND THE FEDERAL ARBITRATION ACT DOES NOT APPLY.

The Purchase Agreement in question provides, "THIS CONTRACT IS SUBJECT TO MANDATORY ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT." When drafting the Purchase Agreement, Appellant chose for the provisions of the South Carolina Uniform Arbitration Act (the "UAA") to apply. In its Statement of the Case, however, Appellant argues, "D.R. Horton's motion to compel was based on the Federal Arbitration Act ("FAA"), 9 U.S.C. 1-307 and the SCUAA." The Purchase Agreement violates the UAA, and there is no reference to the FAA therein.

A. The Arbitration Provision Violates the UAA.

The UAA provides in part that, "Notice that a contract is subject to arbitration pursuant to this chapter shall be **typed** in underlined capital letters, or rubber-stamped prominently, **on the first page** of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration." S.C. Code Ann. § 15-48-10(a) (emphasis added). The South Carolina Supreme Court has consistently held that these requirements must be strictly followed. *See Zabinski*, 346 S.C. at 588-90, 553 S.E.2d at 114-15; *Soil Remediation Co. v. Nu-Way Envtl., Inc.* 323 S.C. 454, 476 S.E.2d 149 (1996). Failure to meet these mandatory requirements is fatal to the enforceability of the clause, as stated in Section 15-48-10(a).

The Purchase Agreement was carefully reviewed by the circuit court during the underlying proceedings. (R. p. 166, lines 15-22; p. 167, lines 6-24; p. 176, line 24 – p. 179, line 11) Reference is drawn to the page on which Appellant attempted to satisfy the requirements of Section 15-48-10(a) by inclusion of the notice of arbitration pursuant to the UAA. In the bottom left-hand corner of the page is plainly written "**Page 4**." (R. p. 104) The following pages of the Purchase Agreement are numbered five through thirteen, sequentially, inferring this was not a scrivener's error. Appellant did not provide the circuit court with any evidence of the terms or contents set forth on pages one, two and three of these papers.

Giving plain meaning to Appellant's own contract pagination, Appellant's attempt to satisfy the requirements of the UAA must fail, because the notice falls on the fourth page, not the first page. While Appellant may point to the contract terms on page four and invite this court to believe that the "agreement" began at that point, there is nothing in the record to establish the content of the first three pages of the materials. Without such information, this Court cannot evaluate any such argument, because only pages four through thirteen of the Purchase Agreement were entered into the record. *See State v. 192 Coin Operated Video Game Machines,* 338 S.C. 176, 525 S.E.2d 872 (2000) (Appellant has the burden of providing the Court with an adequate record upon which it can make a decision). Nevertheless, nothing in Section 15-48-10(a) suggests that the legislature intended that "first page" should mean anything other than what it is says. The fact that Appellant's notice clearly falls on page "four" of whatever materials were offered to Respondents establishes the nonconformity of the notice to the rule.

In addition, the notice is not "typed," or rubber stamped, which Appellant concedes. Contrary to Appellant's suggestion, this, too, is forbidden by the UAA, and the Court's

comments in *Zabinski* are not dictum. The analysis starts with *Soil Remediation*, where the notice in question was written in all capital letters, but neither typed, rubber stamped, nor underlined. *Soil Remediation Co. v. Nu-Way Envtl.*, 323 S.C. 454, 476 S.E.2d 149 (1996). A divided Court of Appeals upheld the notice, reasoning that substance should apply over form in order to avoid absurd results. On further review, the Supreme Court overturned this analysis. *Id.* at 457, 476 S.E.2d at 150-51. Specifically, the Supreme Court pointed out in its decision that the notice was laser-printed. The Court went on to hold that, "The terms of the statute are clear; therefore, the court must apply those terms according to their literal meaning." *Id.* The Supreme Court also agreed with Chief Judge Howell's dissent to the extent that if a literal interpretation of the statute led to a result not intended by the contracting parties, "**it is a matter for the legislature to act upon.**" *Id.* (emphasis added). That is as true today as it was in 1996 when *Soil Remediation* was decided.

When *Zabinski* was decided, the Supreme Court revisited its analysis in *Soil Remediation*. In its decision, the Supreme Court removed any question about whether the fact that the notice in *Soil Remediation* was laser-printed had an impact on the analysis. The Justices stated:

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

Zabinski, 346 S.C. at 588-89, 553 S.E.2d at 114 (emphasis added). This is not dictum. If in today's society such requirements are not business-minded or practical, it is for the legislature to address, not the courts. *See Vaughan v. McLeod Regional Medical Center*, 372 S.C. 505,

510, 642 S.E.2d 744, 747 (2007) ("[W]here the language [of a statute] is clear and explicit, the courts cannot rewrite the statute and inject matters into the statute which are not in the legislature's language."). The failure of the notice provision to meet the statutory requirements of the UAA serves as an independent and additional basis to affirm[7] the circuit court's Order.

B. The FAA Does Not Apply.

There is no mention of the FAA in the Purchase Agreement. To the contrary, Appellant made the conscious, express decision to rely upon the applicability of the UAA, as stated in its flawed notice provision. By selecting the applicability of the UAA without reference to the FAA, it is assumed that Appellant intended to exclude the applicability of the FAA. *See 16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 2012 S.C. LEXIS 73 (Supreme Court Op. No. 27107) (the Canon of construction "*expressio unius est exclusion alterius*" or "*inclusio unius est exclusion alterius*" holds that to express or include one thing implies the exclusion of another). "General contact principles of state law apply in a court's evaluation of the enforceability of an arbitration clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (*citing Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

Regardless, the FAA applies only to valid arbitration agreements. "[T]he FAA does not require parties to arbitrate when they have not agreed to do so . . . ." *Zabinski,* 346 S.C. at 592, 553 S.E.2d at 116. "[The FAA] simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Id.* (citations omitted). Here, the circuit court made the gateway determination that no privately negotiated, enforceable agreement existed because the applicable provisions of the Purchase Agreement

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[7] *See Hossenlopp v. Cannon,* 285 S.C. 367, 329 S.E.2d 438 (1985) (noting this Court may affirm upon any ground appearing in the record).

were unconscionable and unenforceable. In the absence of a valid agreement to arbitrate, the FAA has no application to this case whatsoever.

IV. AS AN ADDITIONAL SUSTAINING GROUND, THE CIRCUIT COURT PROPERLY DETERMINED THAT THE ARBITRATION CLAUSE WAS EXTINGUISHED BY THE DOCTRINE OF MERGER BY DEED.

As an independent and additional ground upon which to deny Appellant's Motion to Compel, the circuit court determined that the Doctrine of Merger barred the enforcement of the arbitration clause. It is undisputed that the Deed given by Appellant to Respondents at the closing did not contain an arbitration provision. Citing to *Wilson v. Landstrom*, 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984), the circuit court determined that the Deed extinguished the arbitration agreement because it contained terms that varied from the Purchase Agreement. Appellant points to several authorities suggesting that, in this instance, the Deed should not extinguish the arbitration provision. However, these authorities are misplaced and Appellant's logic falls short.

Appellant set out examples in its Purchase Agreement of when it intended matters to survive the closing. For example, in Paragraph 8, Appellant wrote, "Seller's obligation to complete any 'punch list' items, which it has agreed to complete, **shall survive closing.**" (R. p. 106) (Emphasis added.) The same is true of repairs relating to the wood infestation report under Paragraph 12 of the Purchase Agreement, which provides that Appellant many "complete such repairs **following closing.**"[8] (R. p. 107) Unlike these matters, Appellant did

[8] It is obvious reading these several provisions together that Appellant did not want to delay the closing for reasons relating to any obligations *it* had not yet completed. Thus, it specifically and expressly contracted that these matters would survive the closing.

not expressly provide that the arbitration provision would survive closing. Having demonstrated its intent in one instance, the later exclusion of similar language is telling.

Appellant argues that unperformed provisions of the underlying Purchase Agreement were not merged into the Deed. But, Appellant's focus on this general proposition ignores the explicit and implicit intent that is to be gleaned from the Purchase Agreement itself, including from within Paragraph 14.

As mentioned above, "punch list" items (if agreed to Appellant) survived the closing. In contrast, a review of the various parts of Paragraph 14 reveals that the closing was the end date of Appellant's obligations in many regards. (R. p. 108, ¶ 14(d), (e), (f)) (noting no guarantees after closing unless specifically agreed to prior to closing; Appellant is not responsible for various problems after closing, etc.). More particularly, the "RWC Warranty" as it is described in Paragraph 14 was a separate document to be given to Respondents at the closing. "At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from [RWC] ...." (R. p. 107, ¶ 14(a)). Plainly, this was a document to be executed and delivered separate and apart from the Purchase Agreement and even the Deed. We know this because Paragraph 14 later provides that "Purchaser acknowledges and understands[9] that the RWC Warranty includes a provision requiring all disputes that arise under the RWC Warranty to be submitted to binding arbitration." Plainly this was a stand-alone agreement to be delivered at closing.

Also interesting is the fact that Paragraph 14 expressly provides that "Purchaser shall execute an acknowledgement that Seller makes no warranties express or implied, as to fitness

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[9] It is curious how Respondents could have "understood" anything about the purported RWC Warranty and its alleged arbitration agreement considering the document was not to be delivered until the closing that occurred months after the Purchase Agreement was signed.

for particular purpose, merchantability, and **habitability** as set forth in the above **at Closing, which statement shall be affixed to Purchaser's deed.**" (R. p. 107, ¶ 14(c)). Thus, despite the Limitation of Liability language in the Purchase Agreement, Appellant expressly provided in the Purchase Agreement that Respondents would execute a separate statement that was to be attached to the Deed. Again, Appellants have demonstrated their procedure for ensuring such provisions survive the Deed—either it attaches a statement to the Deed or delivers a separate document at closing. A pattern is quickly revealed.

At the closing, Respondents were to receive a separate warranty agreement containing whatever that document might say about arbitration. That document is not in the record before the Court, but ostensibly would stand alone as new and independent agreement, if enforceable. *192 Coin Operated Video Game Machines,* 338 S.C. at 195, 525 S.E.2d at 882 (Appellant has the burden of providing the Court with an adequate record). Further, Appellant apparently intended to have a separate statement regarding the waiver of various implied warranties.[10] Although Appellant sought to introduce the Deed for the first time as part of its Rule 59(e) Motion for Reconsideration, the aforementioned statement is not included in the Court's record, if it exists. What is important from this exercise is that Appellant demonstrated its practice for ensuring that "unperformed" matters survive the closing, and it did so by and through the delivery of separate written instruments or purported attachments to the Deed itself. The record contains no evidence whatsoever that Appellant included the arbitration

[10] If the statement was to include a waiver of the implied warranty of habitability, as Paragraph 14(c) suggests, and was going to be given by Respondents at closing (i.e., the last step in the deal), it is hard to imagine how it would have been specifically bargained for at that point. *See Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 477 (2006) (disclaimer or warranty of habitability must be specifically bargained for, among other strict requirements) (R. p. 174, line 12 – p. 175, line 7)

provision from the Purchase Agreement in the Deed, as an attachment thereto, or in any other instrument delivered at the closing, despite the fact that it was their practice to do so. When viewed in this manner, Appellant's argument that the arbitration provision is simply an unperformed obligation that survived the closing loses steam and must be rejected.

It appears that no South Carolina appellate court has specifically addressed the applicability of the Doctrine of Merger to an arbitration provision in an antecedent contract. Even if such precedent existed, the validity and enforceability of an arbitration provision must be determined on a case by case basis. *Simpson*, 373 S.C. at 36, 644 S.E.3d at 674. Considering the instant facts, there is more than enough evidence in the record to affirm the circuit court's decision to deny arbitration. Even if this Court determines that the Doctrine of Merger should not apply here, that does not affect the ultimate result in this case as discussed elsewhere herein. *Moorhead v. First Piedmont Bank and Trust*, 273 S.C. 356, 256 S.E.2d 414 (1979) ("No principle in the disposition of appeals is more firmly established then that a right decision upon a wrong ground will be affirmed.").[11]

CONCLUSION

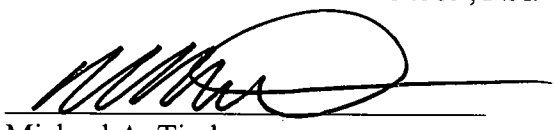
For the foregoing reasons, Respondents respectfully request that this Court affirm the ruling of the circuit court and remand this action for further proceedings and, ultimately, a trial by jury in the circuit court.

Signature of Counsel to Follow

[11] This same principle would apply to Appellant's criticism of the circuit court for finding that it is a resident of South Carolina. Even if this is not the case, the result must be affirmed for the several other reasons set forth herein.

Respectfully submitted,

THURMOND KIRCHNER TIMBES YELVERTON, P.A.

By: 

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Attorneys for Respondents

September 17, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2011204347

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

v.

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

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

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the Final Brief of the Respondents complies with Rule 211(b), SCACR.

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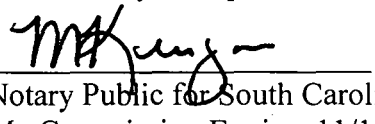
Sworn to and subscribed before me
This 17th day of September.



Notary Public for South Carolina
My Commission Expires 11/16/2020.

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September 17, 2012

VIA FACSIMILE & U.S. MAIL
The Honorable Jenny Abbot Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter Street
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Fax to: (803) 734-1839

Re: ***Case Tracking No. 2011204347***
Gregory W. Smith and Stephanie Smith v. D.R. Horton, Inc., et al.
Case No.: 2010-CP-18-00641

Dear Ms. Kitchings:

Enclosed herewith for filing in connection with the above-referenced appeal, please find the following documents:

1. The original and sixteen (16) copies of the Final Brief of Respondents, including one unbound copy;

2. The original and one (1) copy of the Certificate of Counsel.

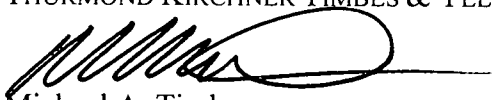
Please file these papers with the Court and return one (1) file-stamped copy of each of the above to me in the self-addressed stamped envelope provided.

By copy of this letter, I hereby certify that I have served one (1) true and correct copy of the foregoing upon counsel for the Appellants. Your assistance with this matter is greatly appreciated.

With kindest regards, I remain

Very truly yours,

THURMOND KIRCHNER TIMBES & YELVERTON, P.A.



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Enclosures as stated.
cc: All Counsel of Record (via hand-delivery)