THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-641

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

v.

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

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

FINAL BRIEF OF APPELLANT

September 14, 2012

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STATEMENT OF THE CASE

1. The parties and their contract.

Appellant D.R. Horton, Inc. built the house at 4830 Harvest Moon Court, Summerville, South Carolina 29420. Respondents Gregory W. Smith and Stephanie Smith bought the house from D.R. Horton. D.R. Horton and the Smiths executed a purchase agreement dated March 11, 2005. (R. 147–156). The purchase agreement's first page contains this notice, as required by the South Carolina Uniform Arbitration Act ("SCUAA"), S.C. Code Ann. §§ 15-48-10–15-48-240 (2005):

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

(R. 147).

The arbitration clause is contained in the purchase agreement's "Warranties and Dispute Resolution" section. (R. 150–152). Paragraphs 14(a)–(f), contain warranty information. The arbitration clause is in Paragraph 14(g), and it reads:

> **Mandatory Binding Arbitration.** [The Smiths] and [D.R. Horton] each agree that, to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves. The list of disputes which shall be arbitrated in accordance with this paragraph include, but are not limited to: (1) any claim arising out of [D.R. Horton]'s construction of the home; (2) [D.R. Horton]'s performance under any Punch List or Inspection Agreement; (3) [D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [Homeowners] and [D.R. Horton] agree to arbitrate.

I. If the arbitration arises out of a claim arising under the [Residential Warranty Corporation ("RWC")] Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to [Homeowners] shall control.

II. If the arbitration arises out of any claim other than a claim under the RWC Warranty, then the arbitration shall be conducted in Charleston/Dorchester/Berkeley County, South Carolina. The arbitration shall be conducted by an arbitrator or panel of arbitrators agreed upon by the parties, and to the extent possible, the proceeding shall be conducted under rules, which provide for an expedited hearing. The filing fee for such arbitration shall be paid by the party filing the arbitration demand, but the arbitrator shall have the right to assess or allocate the filing fees and any other costs of the arbitration as a part of the arbitrator's final order. The arbitration referred to in this paragraph shall be binding and any party shall have the right to seek judicial enforcement of the arbitration award.

(R. 151–152).

2. Procedural history.

A. The Smiths sue D.R. Horton.

The Smiths sued D.R. Horton alleging their house had construction defects and asserting claims for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. They filed their original complaint on March 5, 2010, an amended complaint on April 26, 2010 (R. 7–22), and a second amended complaint on May 12, 2011. (R. 42–59). The Smiths allege that D.R. Horton "designed, developed and constructed" the house, that there were "various defects and deficiencies relative to the construction of [the house]" and that D.R. Horton was "negligent, grossly negligence, care-

less, reckless, willful and wanton in constructing [the house]." (R. 9, ¶ 9; R. 10, ¶ 11; R. 10–11, ¶ 14; R. 45, ¶¶ 11 & 13; R. 46–47, ¶ 16).

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

The arbitration clause in the Smith's purchase agreement encompasses "any claim arising out of [D.R. Horton's] construction of the home" and "[D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise." (R. 151). Thus, because the Smiths' claims involve construction defects, D.R. Horton moved to compel arbitration on July 23, 2010. (R. 87–88).

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 circuit court denied D.R. Horton's motion in an order dated April 7, 2011, and filed April 12, 2011. (R. 1–4). The court denied the motion for three reasons:

> (1) the arbitration provisions supposedly fail to meet the SCUAA;
>
> (2) the arbitration provisions are allegedly unconscionable "based on the cumulative effect of a number of oppressive and one-sided provisions"; and
>
> (3) the arbitration clause in the purchase agreement was purportedly extinguished by the doctrine of merger by deed.

(R. 4).

C. D.R. Horton moves the circuit court to reconsider.

D.R. Horton filed a Rule 59(e) Motion to Alter or Amend the Court's Order ("motion for reconsideration") on April 22, 2011. (R. 126–127). Before

the circuit court ruled on the motion, D.R. Horton's counsel emailed the trial judge about the proposed order submitted by the Smiths' counsel. (R. 214–215). The email's purpose was to obtain clarification on two questions raised by the wording of the Smiths' proposed order denying the motion for reconsideration:

(1) Did the court find the entire purchase agreement unconscionable, or just the arbitration clause?

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

The circuit court did not respond to this email and executed the Smiths' proposed order as drafted by the Smiths' attorneys and without clarification as requested. Hence, D.R. Horton will address in this brief all grounds for denial in the circuit court's orders on both the motion to compel and motion for reconsideration.

The circuit court's order denying D.R. Horton's motion for reconsideration is dated November 22, 2011, and it was filed December 1, 2011. (R. 5–6). The court denied the motion because:

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

(2) "the parties involved are not parties of equal bargaining power and there is not consideration given in exchange for the sacrifice of certain rights of [the Smiths] . . . and the provisions cannot be conscionably enforced against them."

(R. 6).

D.R. Horton's Notice of Appeal was served on December 7, 2011, and filed on December 8, 2011.

STANDARD OF REVIEW

Unless the parties otherwise provide, the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitrability determinations are subject to *de novo* review. *Lucey v. Meyer*, Op. No. 4960 (Ct. App. Mar. 28, 2012) (Shearouse Adv. Sh. No. 11 at 75); *Davis v. KB Home of S.C.*, 394 S.C. 116, 123, 713 S.E.2d 799, 803 (Ct. App. 2011) (quoting *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007)). However, a circuit court's factual findings will not be reversed if there is any evidence reasonably supporting the findings. *Lucey*, Op. No. 4960 at 80. *See also MBNA Am. Bank v. Christianson*, 377 S.C. 210, 213, 659 S.E.2d 209, 211 (Ct. App. 2008).

ARGUMENT

Plaintiffs did not produce any evidence supporting the circuit court's finding. Thus, the circuit court's determination must be reversed. Because public policy favors arbitration, there is a strong presumption in favor of an arbitration agreement's validity. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010), *vacated on other grounds by Sonic Auto., Inc. v. Watts*, 131 S. Ct. 2872 (2011). The pro-arbitration policy is particularly strong in South Carolina. *Chassereau v. Global-Sun Pools, Inc.*, 373 S.C. 168, 172–73, 644 S.E.2d 718, 720–21 (Ct. App. 2007) ("[W]e are constrained to resolve

all doubts in favor of arbitration"). Thus, a court should order arbitration unless it can say with positive assurance that the arbitration clause does not cover the dispute. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. Here, the arbitration clause applies directly to the controversy—the construction and sale of the Smiths' house. The Smiths have not suggested otherwise, nor did the circuit court hold to the contrary. Instead, the circuit court held the arbitration agreement is unenforceable for a variety of reasons, none of which can withstand scrutiny.

ISSUE ONE

Did the circuit court err in finding the arbitration provision unenforceable under the South Carolina Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10–15-48-240 (2005)?

1. The circuit court erred in finding the arbitration provision unenforceable under South Carolina's Uniform Arbitration Act.

The circuit court ruled that "the arbitration provisions fail to meet the [SCUAA]." (R. 4).[1] The only imaginable basis for that holding is the notion that the purchase agreement somehow did not satisfy the SCUAA's notice requirement. The SCUAA requires that a contract with an arbitration clause give notice of that fact on the first page: "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) (2005).

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

The purchase agreement for the Smiths' house contained the required notice in underlined, all capital letters on the first page of the agreement. (R. 104). Nonetheless, the Smiths insist that the arbitration clause is not conspicuous. (R. 121–25). More significantly, although the circuit court refused to compel arbitration because the purchase agreement's arbitration provisions supposedly "fail to meet the [SCUAA]," it did not identify any deficiencies in the arbitration notice or the arbitration clause itself. (R. 4).

Perhaps the circuit court concluded the arbitration notice on the purchase agreement's first page does not satisfy the SCUAA's requirements because it was not "typed" with a typewriter. The South Carolina Supreme Court has required strict compliance with S.C. Code Ann. § 15-48-10(a) (2005). *See, e.g.*, *Zabinski*, 346 S.C. at 588–90, 553 S.E.2d at 114–15 (section 15-48-10(a) not satisfied because no notice of arbitration on contract's first page); *Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996) (arbitration notice did not satisfy § 15-48-10(a) because it was not underlined).

The court in *Zabinski* commented that the notice in *Soil Remediation* did not meet the statutory requirement "because it was laser-printed and written in all capital letters on the first page of the contract." *Zabinski*, 346 S.C. at 588–89, 553 S.E.2d at 114. Taking this dictum out of context, one conceivably could argue that a laser-printed notice fails to meet the statutory requirement. But the problem with the notice in *Soil Remediation* was that it

was not underlined, not that it was laser-printed. *Soil Remediation*, 323 S.C. at 457, 476 S.E.2d at 150–51 (disagreeing with the court of appeals' reasoning "that one of the definitions of 'underline' is 'to emphasize or cause to stand out,' which was met under the present facts through the use of the capitalized notice provision"). And given modern realities, it is unthinkable that a laser-printed notice in underlined and capitalized letters does not satisfy § 15-48-10(a)'s requirement that the notice be "typed."

The arbitration notice on the front page of the Smiths' purchase agreement satisfied the SCUAA's notice requirement, and there is no other imaginable basis for holding that the arbitration agreement is unenforceable under the SCUAA. The circuit court therefore erred in holding the agreement unenforceable under that act.

ISSUE TWO

Did the circuit court err in finding the arbitration clause is unconscionable?

2. The circuit court erred in finding the arbitration clause is unconscionable.

The circuit court found that "the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." (R. 4, 6). The court also stated "the form of the contract *seems to be* that of a contract of adhesion." (R. 6) (emphasis added). There is no evidence to support these findings.

A. There is no evidence the agreement is an adhesion contract.

A contract may not be avoided on unconscionability grounds unless it is first shown to be an adhesion contract. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901–02 (Ct. App. 1998) (stating that determining whether a contract is an adhesion contract is "the beginning point in the [unconscionability] analysis"). An adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with nonnegotiable terms. *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669. In short, the offeree has two options: "complete adherence or outright rejection." *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901.

The circuit court made no factual findings to support the notion that the Smiths' purchase agreement is an adhesion contract. The court's only comment, in the order denying D.R. Horton's motion for reconsideration, was that the agreement "seems to be" an adhesion contract. (R. 6). The Smiths, however, presented no evidence that the agreement was nonnegotiable or offered on a "take-it-or-leave-it" basis. Thus, if the circuit court did indeed find the purchase agreement to be an adhesion contract, it erred.

Because there was no basis on which the circuit court could find the purchase agreement was an adhesion contract, the unconscionability analysis must end here, as a contract cannot be deemed unconscionable unless it is first found to be an adhesion contract. *Lackey*, 330 S.C. at 388, 498 S.E.2d at

901–902. Nonetheless, D.R. Horton will address the Smiths' other unconscionability theories below.

B. There is no evidence the agreement was unconscionable.

The circuit court's unconscionability holding is somewhat mystifying. If its holding is based on a portion of the purchase agreement other than the arbitration clause, then the court violated the United States Supreme Court's long-held *Prima Paint* rule. If the circuit court's holding is that the arbitration clause itself is unconscionable, then there is no factual or legal basis for its holding.

i. The circuit court violated the *Prima Paint* rule.

The circuit court concluded that "the relevant arbitration provisions are wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions." (R. 4, 6). For that holding, the court relied on the Limitation of Liability section at Paragraph 14(i), as opposed to the arbitration clause at Paragraph 14(g). It thus appears that the court intended to find the purchase agreement as a whole unconscionable.

Under United States Supreme Court and South Carolina Supreme Court precedent, a party may not avoid arbitration by seeking to rescind the entire contract on the basis of illegality or unconscionability when there is no independent challenge to the arbitration clause; rather, the arbitration clause itself must be found to be illegal or unconscionable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24–25 (1993).

In *Prima Paint*, the United States Supreme Court addressed whether, under the FAA, a claim of fraud in the inducement of the entire contract—as opposed to the arbitration clause itself—is to be resolved by the court or referred to an arbitrator. The Court held that "a federal court may consider only issues relating to the making and performance of the agreement to arbitrate" and cannot, therefore, "consider claims of fraud in the inducement of the contract generally." *Prima Paint Corp.*, 388 U.S. at 404. Some courts sought to limit *Prima Paint*'s holding to fraud in the inducement challenges, but others held that *Prima Paint* extends to *all* challenges to a contract.

South Carolina joined the latter jurisdictions in rejecting attempts to limit *Prima Paint*. *See Great W. Coal, Inc.*, 312 S.C. at 562–63, 437 S.E.2d at 24–25. "A party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause. . . . The arbitration clause is separable from the contract." *Id.* at 562–63, 437 S.E.2d at 24. *See also Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008); *Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003).

Thus, "precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged." *New Hope Missionary Baptist*

Church, 379 S.C. at 631, 667 S.E.2d at 6. *Compare Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (holding the circuit court was the proper forum for determining the enforceability of an arbitration clause challenged on the grounds of unconscionability) *with Cornerstone Hous.*, 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).

Here, the circuit court's conclusion was that the "oppressive and one-sided provisions" were in the "Limitation on Liability" clause at ¶ 14(i)), which is separate and distinct from the arbitration clause at ¶ 14(g). (R. 151–152, ¶ 14(g), (i)). Hence, the court appears to have found the purchase agreement unconscionable, as opposed to the arbitration clause. And under the *Prima Paint* doctrine as applied by South Carolina courts, the Smiths cannot avoid arbitration on that basis. Whether the agreement as a whole is unconscionable must be determined by an arbitrator, not by the circuit court.

ii. The circuit court could not properly hold the arbitration clause itself unconscionable.

There is no basis to conclude the circuit court held the arbitration clause itself unconscionable. Again, the provisions the circuit court said are "oppressive and one-sided" are not found in the arbitration subparagraph, which is captioned "Mandatory Binding Arbitration." (R. 151–152, ¶ 14(g)). Instead, the provisions the court found objectionable are in the "Limitation of Liability" clause. (R. 152, ¶ 14(i)). The only relationship between the arbitra-

tion clause and the Limitation of Liability clause is one of arrangement of the document. The circuit court never identified any language in the separate arbitration clause that was unconscionable.

Furthermore, the arbitration clause is not unconscionable. Unconscionability is the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Herron*, 387 S.C. at 532, 693 S.E.2d at 398; *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668.

The South Carolina Supreme Court has explained that "absence of meaningful choice" involves the fundamental fairness of the bargaining process. South Carolina courts consider the (i) disparity in the parties' bargaining power, (ii) the parties' relative sophistication, (iii) the nature of the injuries suffered by the plaintiff, (iv) whether the plaintiff is a substantial business concern, (v) whether there is an element of surprise in the inclusion of the challenged clause, and (vi) the conspicuousness of the clause. *Herron*, 387 S.C. at 532, 693 S.E.2d at 398; *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

The circuit court's order denying the motion to compel references a lack of "meaningful choice," but makes no specific findings in this regard. (R. 2). And there was no evidence that the Smiths had no meaningful choice in negotiating and accepting the arbitration clause or any other portion of the purchase agreement. Nor did the Smiths allege that they were unaware of, or

surprised by, the arbitration clause, or that they lacked the bargaining power or opportunity to negotiate the purchase agreement's terms.

To the extent the circuit court relied on *Simpson*, it erred. *Simpson* held that a car buyer lacked a meaningful choice because:

> (1) the "arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten of sixteen total paragraphs included on the page,"
>
> (2) the automobile trade-in contract was an adhesion contract,
>
> (3) automobile sales contracts between consumers and retailers are to be viewed by South Carolina courts with "considerable skepticism" due to a substantial disparity in bargaining power,
>
> (4) Simpson claimed she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement and she did not have a lawyer present to assist her in understanding the contract, and
>
> (5) Simpson alleged that the contract was "hastily" presented for her signature.

Simpson, 373 S.C. at 26–28, 644 S.E.2d at 669–670.

The Smiths offered no such evidence. The purchase agreement gave clear notice in underlined, capital letters at the top of the first page that the contract was subject to mandatory binding arbitration. (R. 147). The Smiths each placed their initials directly beneath the arbitration clause to indicate their acknowledgement and agreement. (R. 151–152, ¶ 14(g)). There is no evidence that they lacked sufficient business judgment, legal counsel, or the advice of a realtor. There is no evidence that the Smiths were not afforded ample time to review the contract or that they could not understand the arbitra-

tion clause. Nor is there any evidence that they were at a bargaining disadvantage, that the contract was offered on a take-it-or-leave-it basis, or that the arbitration clause was nonnegotiable. In sum, there is no evidence to that the Smiths lacked meaningful choice.

Further, the arbitration clause in *Simpson* required the plaintiff to arbitrate all claims but exempted certain claims brought by the defendant dealer against the customer. It also prohibited the arbitrator from awarding punitive, exemplary, or double or treble damages. *Simpson*, 373 S.C. at 28, 644 S.E.2d at 670. The arbitration clause here is not one-sided and gives no advantage, whether procedural or substantive, to either party.

iii. The arbitration clause is not made unconscionable by other provisions in the purchase agreement.

The circuit court's order denying D.R. Horton's motion to compel arbitration references *Kirkman v. Parex, Inc.*, 369 S.C. 477, 632 S.E.2d 854 (2006). The sole issue in *Kirkman* was the implied warranty of habitability, i.e., Paragraph 14(i) of the Agreement, not the arbitration clause in Paragraph 14(g). In *Kirkman*, the South Carolina Supreme Court held that to be valid, a disclaimer of the implied warranty of habitability must be (i) conspicuous, (ii) known to the buyer, and (iii) specifically bargained for. The circuit court appears to suggest in its order that paragraph 14(i) is not a valid disclaimer of the implied warranty of habitability under *Kirkman*.

The Smiths tried to draw an analogy between the disclaimer of the implied warranty of habitability in their purchase agreement and the *Simpson*

arbitration clause, which the South Carolina Supreme Court declared invalid because it violated statutory law and public policy by prohibiting the arbitrator from awarding "punitive, exemplary, double, or treble damages." (R. 122). The plaintiff in *Simpson* asserted claims under the South Carolina Unfair Trade Practices Act ("SCUPTA") and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act") both of which involve mandatory statutory remedies. *Simpson*, 373 S.C. at 28–29, 644 S.E.2d at 670–71.

The SCUTPA *requires* a court to award treble damages for violations of the statute. Similarly, the Dealers Act *requires* a court to award double damages for violations of the statute. The court in *Simpson* held that a provision prohibiting the arbitrator from awarding these statutorily-mandated double and treble damages was "oppressive," "one-sided," and "an unconscionable waiver of statutory rights." *Simpson*, 373 S.C. at 30, 644 S.E.2d at 671. The waiver of statutory rights in *Simpson* bears no analogy whatsoever to the disclaimer of warranties here. Unlike the arbitration clause in *Simpson*, the arbitration clause in the Smiths' purchase agreement contains no limitation on their right to recover statutory damages, whether double, treble, or otherwise.

Similarly, the *Simpson* arbitration clause does not bear any analogy to the provision in the Smiths' purchase agreement disclaiming monetary damages and limiting D.R. Horton's liability to its obligation to repair or replace

defects under the Residential Warranty Corporation ("RWC") Warranty. (R. 152, ¶ 14(i)). These liability limitations are common in contracts (residential construction contracts and otherwise) that provide an express warranty to the consumer or purchaser, and courts generally do not find them to be unconscionable.[2] The "Limitation of Liability" clause here does not constitute a waiver of any statutory rights or causes of action, nor does it purport to limit the arbitrator's legal authority, as did the arbitration clause in *Simpson*.

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

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[2] *See, e.g., Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 168 n.4, 621 S.E.2d 38, 40 n.4 (2005) (citing defendant's repair-or-replace remedy with approval, stating "Article 2 permits parties to agree to 'remedies in addition to or in substitution for those provided in [article 2] and [ ] limit or alter the measure of damages recoverable under [article 2], as by limiting the buyer's remedies to return of the goods and repayment of the price or *to repair and replacement of the nonconforming goods or parts.*") (citing S.C. Code Ann. § 36-2-719(a)(1) (2003)) (emphasis added); *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (enforcing an insurance agreement's repair-or-replace provision, reasoning "[t]he cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language."); *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 533, 183 S.E.2d 315, 319 (1971) (enforcing a repair-or-replace provision in an insurance agreement covering a school building), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

For the reasons stated, neither the arbitration clause nor the entire Agreement is unconscionable and the circuit court committed error in essentially adopting the Smiths' argument and incorporating it into the orders denying D.R. Horton's motion to compel and its motion for reconsideration.

ISSUE THREE

Did the circuit court err in finding the arbitration clause unenforceable under an unequal-bargaining-power theory?

3. The circuit court erred in finding the arbitration clause unenforceable on an unequal-bargaining-power basis.

In its order denying D.R. Horton's motion for reconsideration, the circuit court concluded the parties were not of "equal bargaining power." Inequality of bargaining power alone will not invalidate an arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable"). *See also AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 n.5 (2011) ("Relationships between securities dealers and investors, for example, may involve unequal bargaining power, but we [have] nevertheless held . . . that agreements to arbitrate in that context are enforceable.") (citing *Gilmer*, 500 U.S. at 33). Thus, the circuit court's ruling cannot be sustained on this ground alone, and as shown throughout this brief, there are no other grounds for invalidating the parties' arbitration agreement.

ISSUE FOUR

Did the circuit court err in finding the arbitration clause unenforceable under a lack-of-consideration theory?

4. The circuit court erred in finding the arbitration clause was unenforceable because no consideration was given.

In denying D.R. Horton's motion for reconsideration, the circuit court found that no consideration was given "in exchange for the sacrifice of certain rights." (R. 6). The circuit court's order identifies no facts or evidence supporting this conclusion. Instead, it refers back to the order denying the motion to compel, which likewise contains no factual finding supporting a lack of consideration.

The purchase agreement was supported by valid consideration on two levels. First, the arbitration agreement was part of the contract to purchase and sell real estate. Therefore, the agreement was supported by mutual consideration in the exchange of money for the residence. Neither the Smiths nor the circuit court have suggested that the Smiths did not receive their house as part of the transaction reflected in the purchase agreement, which contained the arbitration agreement.

Second, mutual promises to arbitrate are sufficient consideration. The Smiths and D.R. Horton each agreed that, "to the maximum extent allowed by law, they desire to arbitrate all disputes between themselves." (R. 151, ¶ 14(g)). The sufficiency of mutual promises to arbitrate as consideration is well-settled. *See, e.g.*, *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 501 (4th Cir. 2002); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997);

Tenaglia v. Ryan's Family Steak Houses, Inc., 2003 U.S. Dist. LEXIS 26322, *33 (D.S.C. May 8, 2003).

The parties' mutually binding promises to arbitrate were sufficient consideration. The circuit court therefore erred in concluding that the parties' arbitration agreement fails for lack of consideration.

ISSUE FIVE

Did the circuit court err in finding the arbitration provision was not enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.?

5. The circuit court erred in finding the arbitration provision is not enforceable under the Federal Arbitration Act.

There is "a clear federal directive in support of arbitration." *Adkins*, 303 F.3d at 500. Thus, a court must compel arbitration under the FAA where: (1) there is a dispute between the parties; (2) there is a written agreement that includes an arbitration provision covering the dispute; (3) there is a relationship of the transaction at issue to interstate commerce; and (4) one party has refused to arbitrate the dispute. *Id.* at 500–501.

The first element of the *Adkins* test is met, as there is a dispute between the parties, as evidenced by the Smiths' lawsuit. The purchase agreement is a written agreement including an arbitration provision. Additionally, there has been no suggestion by either the Smiths or the circuit court that the dispute is outside the arbitration agreement's scope.[3] Therefore, the se-

[3] And if there were any doubt on this point, "[t]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open

cond element of the *Adkins* test is met. Finally, the fourth element of the *Adkins* test is met, as the Smiths have refused to arbitrate despite the purchase agreement's arbitration clause and despite D.R. Horton's requests to arbitrate. (*See, e.g.*, R. 90, 92–93).

Thus, the only issue requiring any discussion is whether the third element of the *Adkins* test is met: whether the transaction at issue implicated interstate commerce.

The circuit court refused to compel arbitration under the FAA because "[D.R. Horton] and [the Smiths] are both residents of South Carolina, the construction at issue took place in South Carolina, and any out-of-state transactional involvement is merely tangential." (R. 4). The Smiths' house is located in South Carolina, but the circuit court erred in concluding that D.R. Horton is a South Carolina resident and that the dispute does not sufficiently implicate interstate commerce.

The transaction at issue is the construction and sale of the Smiths' house. The Smiths contend that the house was defectively constructed by D.R. Horton. D.R. Horton is a Delaware corporation that maintains its principal place of business in the state of Texas. (R. 115, ¶ 3). D.R. Horton builds houses in approximately twenty-seven states. (R. 115, ¶ 4). D.R. Horton routinely engages in interstate activities, including procurement of materials

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to question, a court must decide the question in favor of arbitration." *Long v. Silver*, 248 F.3d 309, 316 (4th Cir. 2001).

and labor on an interstate basis. (R. 115, ¶ 5). Numerous materials for the Smiths' house were obtained from out of state. (R. 118–119, ¶ 4).

The interstate character of a defendant's business will bring an arbitration agreement within interstate commerce. *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273 (1995) (holding that FAA governed arbitration agreement between pest control agency and homeowner because company operated interstate and used raw materials purchased from out of state). Additionally, South Carolina construction projects affect interstate commerce when, as here, services or materials for the project are obtained from out of state. *See, e.g.*, *Zabinski*, 346 S.C. at 595–596, 553 S.E.2d at 118; *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *New Hope Missionary Baptist Church*, 379 S.C. at 626–27, 667 S.E.2d at 4 (Ct. App. 2008); *Blanton v. Stathos*, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002); *Circle S. Enters., Inc., v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 (Ct. App. 1986).

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

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

ISSUE SIX

Did the circuit court err in finding the arbitration clause null and void under a merger-by-deed theory?

6. The circuit court erred in finding the arbitration clause was null and void due to the doctrine of merger by deed.

In denying D.R. Horton's motion to compel, the circuit court declared: "[T]he Deed at issue and which controls the relationship between the parties does not contain an arbitration provision." (R. 4). Apparently, the court agreed with the untenable merger-by-deed theory for invalidating the arbitration agreement set forth in the Smiths' memorandum in opposition to D.R. Horton's motion to compel. (*See* R. 123–24). South Carolina recognizes the merger-by-deed doctrine, but it does not apply here.

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

The doctrine of merger "is not absolute." *Meurer v. Tribby (*In re *Tribby)*, 241 B.R. 380, 383 (Bankr. E.D. Va. 1999) (citation omitted). The court in *Tribby* explained that the deed is final as to every subject it undertakes to deal with, but typically a deed represents only that part of the contract dealing with transfer of title. The deed "rarely purports to cover all elements of the original contract for sale. *Id.* at 383. Thus, other documents, including the executory contract, "may be considered to determine obligations collateral to the fact of conveyance." *Id.*[4]

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

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

Here, the deed was only part performance of the preceding contract, i.e., the purchase agreement. Other distinct and unperformed (i.e., post-closing) provisions of the agreement, which define certain obligations collateral to the fact of the conveyance of land, were not intended to be merged in the deed. Those provisions and obligations intended by the parties to continue beyond closing include:

- D.R. Horton's obligation to complete "punch list" items (R. 106, ¶ 8);
- D.R. Horton's obligation to complete any repairs due to wood infestation (R. 107, ¶ 12);
- The parties' agreement to arbitrate "all disputes between themselves," including, but not limited to, "(1) any claim arising out of [D.R. Horton]'s construction of the home; (2) [D.R. Horton]'s performance under any Punch List or Inspection Agreement [obviously referring to D.R. Horton's post-closing performance]; (3) [D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise [again, obviously referring to

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vival of that instrument, such collateral provisions will be held to survive the deed").

D.R. Horton's post-closing performance]." (R. 108–109, ¶ 14(g)); and

- [The Smiths'] obligation to make written requests for warranty service within the first 365 days after closing (R. 109, ¶ 14(j)).

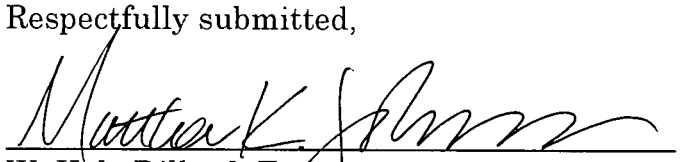
All of these provisions were "distinct," "unperformed" (at the time of closing), and "collateral to the fact of the conveyance of land" and, thus, were not extinguished by the doctrine of merger.

Further, the Agreement contained a "Survival" clause: "Any condition or stipulation not fulfilled at time of Closing shall survive the Closing, execution and delivery of the Warranty Deed until such conditions or stipulations are fulfilled." (R. 152, ¶ 15). The arbitration clause must be presumed to survive the merger at closing absent any evidence that the parties intended to override the presumption. There is no evidence that the Smiths and D.R. Horton intended the purchase agreement, or the arbitration clause in particular, to expire upon closing. Thus, if the circuit court's intent was to deny the motion to compel based on the arbitration clause having been extinguished by the doctrine of merger by deed, it was in error.

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's denial of D.R. Horton's Motion to Compel and/or the circuit court's denial of D.R. Horton's Motion for Reconsideration, and Respondents' claims should be referred to binding arbitration under the SCUAA and/or the FAA consistent with the parties' agreement.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

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

v.

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

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

CERTIFICATE OF COUNSEL

I certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

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

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