THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2013-001345

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

v.

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

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

PETITION FOR REHEARING

July 21, 2016

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CERTIFICATE OF COUNSEL

Counsel for Petitioner D.R. Horton. Inc., certifies that the Opinion upon which this *Petition for Rehearing* is based was filed by the Supreme Court on July 6, 2016, and that this Petition for Rehearing arises out of an "action of the court ... dismissing or finally deciding a party's appeal" pursuant to Rule 240(i), *SCACR*, and has been filed within 15 days pursuant to Rule 221(a), *SCACR*.

QUESTIONS PRESENTED

I. Whether this Court overlooked or misapprehended D.R. Horton's arguments concerning the FAA, *Prima Paint*, and other binding federal precedent and their impact on its unconscionability analysis?

II. Whether this Court overlooked or misapprehended D.R. Horton's argument that there is no evidence of an adhesion contract in performing an appropriate analysis of meaningful choice?

STATEMENT OF THE CASE

A. The parties and their contract.

Respondents Gregory W. Smith and Stephanie Smith ("the Smiths") purchased their residence from Petitioner D.R. Horton, Inc. ("D.R. Horton") pursuant to a Purchase Agreement. (R. 147–156). The Purchase Agreement contains a section entitled "Warranties and Dispute Resolution." (R. 150–152). The separately numbered ¶¶ 14(a)–(f) and 14(h)–(i) address a variety of issues, including warranty information (R. 150–151), contract termination subject to a bona fide dispute subject to notice and making a "make whole" provision for the Smiths (R. 152), a limitation of warranties and D.R. Horton's obligation to "repair or replace" any defects in place of certain monetary

damages (R. 152; R. 148–149). These paragraphs do not contemplate arbitration or limit an arbitrator's authority any differently than they would a court.

D.R. Horton has argued that the arbitration provision, ¶14(g), does not waive any statutory rights or causes of action, nor does it purport to limit an arbitrator's legal authority. (Petitioner's Brief, p. 36). Therefore, under the purchase agreement "an arbitrator would have the same authority as any state or federal court to declare the limitation-of-liability clause unconscionable." (*Id.*). None of the provisions outside ¶ 14(g) limit an arbitrator's legal authority or preclude a neutral arbitrator from determining that any provision in the purchase agreement is unconscionable and invalid. As such, an arbitrator would have the same authority and prerogative as any state or federal court to declare any provision in the purchase agreement to be unconscionable and unenforceable.

The arbitration provision, contained in ¶ 14(g), was separately titled in bold font and initialed and acknowledged by the Smiths. It requires the parties to arbitrate "(1) any claim arising out of [D.R. Horton]'s construction of the home; ... (3) [D.R. Horton]'s performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths] and [D.R. Horton] agree to arbitrate." (R. 155–156). The Smiths have not disputed ¶ 14(g) covers the issues raised in the underlying lawsuit. This arbitration provision called for arbitration to occur in Charleston, Dorchester, Berkeley County, South Carolina, near the Smiths' residence. (*Id.*). The arbi-

tration provision further calls for the arbitration to be conducted "by an arbitrator or panel of arbitrators agreed upon by the parties" and, to the extent possible, on an expedited basis, granting the arbitrator the right to assess or allocate filing fees and any other costs. (*Id.*).

B. Procedural history.

The Smiths sued D.R. Horton for alleged construction defects and asserted claims for negligence, breach of contract, breaches of implied warranties, and unfair trade practices. (R. 7–22; R. 46–63). D.R. Horton's motion to compel arbitration was denied because, among others, the circuit court found "the arbitration provision<u>s</u>[1] fail to meet [requirements of the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, et seq. ("SCUAA")]" and because the arbitration provision was allegedly unconscionable "based on the cumulative effect of a number of oppressive and one-sided provisions." (R. 5–8). The provisions the circuit court found to be "oppressive and one-sided" are not found in the arbitration provision, which is captioned "Mandatory Binding Arbitration." (R. 155–156, ¶ 14(g)). Instead, the provisions are in the separate "Limitation of Liability" clause. (R. 156, ¶ 14(i)). The Court of Appeals did not identify any other "unconscionable" terms. At most, the Court of Ap-

[1] The use of "arbitration provision<u>s</u>" in the plural sense is the root of the issues that resulted in this appeal and this Petition for Rehearing. D.R. Horton has asserted there is only **<u>one</u>** arbitration provision, ¶ 14(g), and that the unconscionability issues raised by the Smiths and the courts throughout this case must be analyzed consistent with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), *i.e.*, solely with respect to the arbitration provision found at ¶ 14(g). The Smiths, the circuit court, the Court of Appeals, and now the majority of this Court have looked beyond ¶ 14(g) to other unrelated provisions.

peals suggested, without explanation, that the circuit court "viewed the Warranties and Dispute Resolution Section 14 as a whole," without any factual finding to support this claim. *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 16, 742 S.E.2d 37, 40 (Ct. App. 2013). This Court has found nothing unconscionable within the specific arbitration provision in the purchase agreement at ¶14(g).

The circuit court ignored D.R. Horton's argument that the arbitration provision was also enforceable under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–307. (R. 5–8). The Court of Appeals also failed to address the applicability of the FAA. *Smith v. D.R. Horton, Inc.*, 403 S.C. at 10–18, 742 S.E.2d at 37–42; Petitioner's Br., p. 19–26. Similarly, as discussed at length in the dissent, this Court has done likewise. *Smith v. D.R. Horton, Inc.*, Op. No. 27645 (S.C. Sup. Ct. filed July 6, 2016).

The circuit court denied D.R. Horton's motion for reconsideration under Rule 59(e). (R. 9–10). The circuit court held "the relevant arbitration provisions[2] are wholly unconscionable based on ... a number of oppressive and one-sided provisions and ... the contract ***seems*** to be that of a contract of adhesion" and because "the parties involved are not parties of equal bargaining power...." (R. 10)(emphasis added). Even so, as the majority of this Court has now done, the circuit performed no analysis of whether the Purchase Agreement was in fact an adhesion contract. The only evidence in the record is to the contrary. (Petitioner's Br., p. 28). In addition, like the circuit court before

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[2] See fn. 1 above.

it, the majority of this Court has assumed that the parties were of unequal bargaining power, despite any supporting evidence in the record.[3]

D.R. Horton appealed each of these issues to the Court of Appeals, which only addressed the unconscionability issue (ignoring issues involving application of the FAA, adhesion contract issues, and other issues). (R. 221–254). *Smith v. D.R. Horton, Inc.*, 403 S.C. at 10–18, 742 S.E.2d at 37–42. D.R. Horton's Petition for Certiorari was granted and oral argument was held February 14, 2015. Over a year later, in a 3–4 decision, this Court affirmed the Court of Appeals. *Smith v. D.R. Horton, Inc.*, Op. No. 27645 (S.C. Sup. Ct. filed July 6, 2016). D.R. Horton now files this timely Petition for Rehearing.

ARGUMENT

I. This Court overlooked or misapprehended D.R. Horton's arguments concerning the FAA, *Prima Paint*, and other binding federal precedent and their impact on its unconscionability analysis.

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[3] The majority opinion notes that this Court has "taken judicial cognizance of the fact that a modern buyer ... is ***normally*** in an unequal bargaining position as against the seller." *Smith v. D.R. Horton, Inc.*, Op. No. 27645, p. 6 (S.C. Sup. Ct. filed July 6, 2016), *citing Kennedy v. Columbia Lumber & Mfg. Co.,* 299 S.C. 335, 343, 384 S.E.2d 730, 735–36 (1989) (emphasis added). However, it appears there is no requirement that judicial notice be taken of unequal bargaining power. Further, the *Kennedy* analysis did not involve whether a builder could enforce an arbitration provision with a purchase as in this instance. For this Court to allow or require an assumption of unequal bargaining power, even without affirmative evidence thereof, that would strip away half of the unconscionability analysis in *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2006), since unconscionability requires "absence of meaningful choice" (i.e. unequal bargaining power) on the part of one party plus "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668.

This Court has held that public policy favors arbitration and that 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). Thus, a court should order arbitration unless it can say with "positive assurance" that the arbitration provision does not cover the dispute. *Zabinski v. Bright Acres Assoc.,* 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Here, this Court's opinion and those of the courts below do not reflect this policy. Having overlooked or misapprehended arguments in favor of arbitration enforcement reveals a lack of such positive assurances.

Similarly, the majority opinion ignores the "clear federal directive in support of arbitration." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002). Throughout the pendency of this case, the circuit court, the Court of Appeals, and this Court have never addressed whether the FAA applies, or the impact of federal precedent. Specifically, the courts throughout have never appropriately considered whether the FAA and related federal precedent impacts the courts' key finding—that arbitration is improper due to unconscionability related to provisions within the purchase agreement other than those in ¶ 14(g), the only paragraph in the entirety of the purchase agreement to contemplate arbitration. This suggests a fundamental misapprehension of D.R. Horton's argument and applicable law contrary to state and federal public policy favoring arbitration.

D.R. Horton has argued from the outset that the FAA controls. Yet the courts have consistently ignored this point, now with the sole exception of the dissent. Because interstate commerce is unquestionably present, the FAA controls.[4] This is significant because this Court's approach in conflating the entirety of Section 14 with the separate and distinct arbitration provision at ¶ 14(g) violates *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and other federal precedent.[5] As the dissent notes, it ignores substantive federal arbitration law that "an arbitration provision is severable from the remainder of the contract." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). Also, the United States Supreme Court has identified an arbitration provision as consisting of the "specific written provision to settle by arbitration a controversy," and therefore not the unrelated provisions outside ¶ 14(g). *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010) (internal quotation marks omitted). Similarly, our Fourth Circuit has held the permissible scope of a court's analysis of arbitrability is "highly circum-

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[4] The FAA requires arbitration to be compelled where: (1) there is a dispute; (2) there is a written agreement with an arbitration provision covering the dispute; (3) the transaction relates to interstate commerce; and (4) one party has refused to arbitrate. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500–501 (4th Cir. 2002). The analysis of this precedent to the present facts has been addressed previously. (Petitioner's Br., p. 20–26).

[5] Furthermore, this Court, like the courts below, cites no legal precedent to support conflating the separate and distinct provisions of Section 14. As argued previously, the only relationship between the allegedly offending provisions is one of arrangement of the document. (Petitioner's Br. 29–30). If arrangement alone is a sufficient basis, an absurdity results. For instance, it must be assumed that if ¶¶ 14(a)–(j) were instead renumbered as ¶¶ 14–24 the result might be different, even though the intent, content, and meaning of the arbitration provision would remain identical.

scribed" and must relate "specifically to the arbitration clause." *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

Consequently, this Court's conflation of the "specific written provision to settle by arbitration" with the other separate and distinct provisions in Section 14 is in conflict with, and preempted by, federal substantive law for that reason. *See AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011) (finding state law rules that conflict with or "stand as an obstacle to the accomplishment and execution of the full purposes and objectives [of the FAA]" are preempted and invalidated); *see also DirecTV, Inc. v. Imburgia*, 136 S.Ct. 463, 468–69 (2015) (*citing* U.S. Const. art. VI, cl. 2) (reaffirming the holding in *Concepcion* that state contract principles which conflict with the FAA are preempted).

The general notion that *Prima Paint* requires that the arbitration agreement itself be unconscionable, but not the contract as a whole, seems to be acknowledged by the majority of this Court. Nevertheless, in analyzing the components of the arbitration provision itself as compared to the entirety of Section 14, this Court then "adopts the findings of the trial court, which circumvent the application of these legal principles by expanding the relevant scope of the contractual language at issue to include matters beyond the arbitration provision." *Smith v. D.R. Horton, Inc.*, Op. No. 27645, p. 11 (S.C. Sup. Ct. filed July 6, 2016)(Kittredge, J., dissenting). This is inconsistent with applicable federal law requiring that the claim of unconscionability must go to

the arbitration clause itself, otherwise, the issue of enforceability must be resolved by the arbitrator, not by the courts. *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 305 (4th Cir. 2001). This specific point was made by D.R. Horton but has been overlooked or misapprehended by the courts below and by this Court. (See, p. 4, supra).

In addition to its apparent overlooking or misapprehending of these arguments, this Court also overreached in its analysis given public policy in favor of arbitration. The asserted unconscionability of terms within the purchase agreement is irrelevant unless it relates to the arbitration provision itself, specifically ¶ 14(g). *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 14 (Ct. App. 2008) (*citing Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003) ("Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision") (emphasis added)). As stated in *Simpson*, the "Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–669 (*citing Hooters of Am., Inc.*, 173 F.3d at 938). There is no evidence that this arbitration provision will not result in an unbiased decision by a neutral decision-maker, and Court's opinion appears to overlook or misapprehend this argument favoring an analysis of the absence of meaning-

ful choice and oppressive, one-sided terms under this general rubric. Cf. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668–669. In overreaching in its effort to thwart public policy favoring arbitration, this Court has overlooked or misapprehended this argument.

II. <u>This Court overlooked or misapprehended D.R. Horton's argument that there is no evidence of an adhesion contract in performing an appropriate analysis of meaningful choice.</u>

Determining whether a contract is an adhesion contract[6] is "the beginning point of the unconscionability analysis." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 901–02 (Ct. App. 1998). Indeed, the Smiths acknowledge "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." (R. 272, *citing Lackey*, 330 S.C. at 395, 498 S.E.2d at 902). Despite alleged public policy in favor of arbitration this Court, like the courts below, has overlooked this issue. Rather, it appears this Court simply adopted the circuit court's assertion, without performing a *de novo* review or addressing whether there was evidence of an adhesion contract. *Smith v. D.R. Horton, Inc.*, Op. No. 27645, at fn. 2 (S.C. Sup. Ct. filed July 6, 2016). This Court either overlooks or misapprehends D.R. Horton's arguments as to whether an adhesion contract is present.

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[6] A "contract of adhesion" or "adhesion contract" is defined as a "take-it-or-leave-it" contract for which the offeree's only options are "complete adherence or outright rejection." *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 669; *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998).

Had this Court or the courts below properly addressed the adhesion contract question, it would be clear there are no facts in the record upon which to make such a finding. The circuit 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. 10) (emphasis added). The Smiths presented no evidence that the agreement was nonnegotiable or offered on a "take-it-or-leave-it" basis. Indeed, the only evidence in the record suggests negotiated terms—such as evidence the purchase price was stricken through and written in by hand in a different amount, a space for handwritten "Special Stipulations," and other handwritten terms. (R. 151, ¶ 2; R. 151–152, ¶¶ 2(b) and 3; R. 158, ¶ 20; R. 159). The Smiths have provided no evidence of an adhesion contract or of a lack of meaningful choice.[7]

By failing to analyze the adhesion contract question, this Court and those below have overlooked D.R. Horton's arguments on a significant component of the unconscionability analysis, which bears directly on whether an absence of meaningful choice exists that, if combined with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them, can render an arbitration provision unconscionable. *Smith v. D.R. Horton, Inc.*, Op. No. 27645, at fn. 2 (S.C. Sup. Ct. filed July 6, 2016); *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct.

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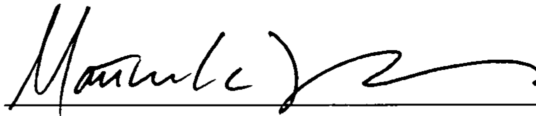
[7] For instance, there is no evidence in the record whether or not other homebuilders were for sale at comparable prices in the area, the level of competition among sellers for home purchasers at that time and in the area, or any other evidence that could have proven a lack of meaningful choice.

App. 2013); R. 5–10. *See Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–669; *Herron*, 387 S.C. at 532, 693 S.E.2d at 398.

CONCLUSION

For the foregoing reasons, it is clear that the Court overlooked or misapprehended Petitioners' arguments and, therefore, the Court should grant Petitioner D.R. Horton, Inc.'s *Petition for Rehearing*.

Respectfully submitted,



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

PROOF OF SERVICE

I certify that I have served the *Petition for Rehearing* 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:

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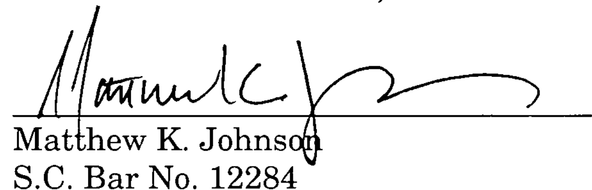
July 21, 2016



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