

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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

**RECEIVED**

JUL 29 2016

Appellate No. 2013-001345

**S.C. SUPREME COURT**

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.....Petitioner.

**RETURN TO PETITION FOR REHEARING**

**FOR THE RESPONDENTS:**

Michael A. Timbes, Esquire  
THURMOND KIRCHNER & TIMBES, P.A.  
15 Middle Atlantic Wharf  
Charleston, South Carolina 29401  
Phone: (843) 937-8000  
Facsimile: (843) 937-4200  
Email: michael@tktlawyers.com

Phillip W. Segui, Jr., Esquire  
SEGUI LAW FIRM, LLC  
864 Lowcountry Blvd., Suite A  
Mt. Pleasant, SC 29464  
Phone: (843) 884-1865  
Facsimile: (866) 884-0136  
Email: psequi@sequilawfirm.com

John T. Chakeris, Esquire  
THE CHAKERIS LAW FIRM  
231 Calhoun Street  
Charleston, South Carolina 29402  
Phone: (843) 853-5678  
Facsimile: (843) 853-5677  
Email: john@chakerislawfirm.com

## CERTIFICATE OF COUNSEL

Counsel for Respondents, Gregory and Stephanie Smith (the “Smiths”), certifies that it received by e-mail the subject Petition for Rehearing on July 21, 2016, and pursuant to Rule 240(e), SCACR, this Return is timely filed.

### PROCEDURAL AND FACTUAL BACKGROUND

The underlying factual and procedural background of this appeal is accurately set forth in this Court’s decision affirming the Court of Appeals and the circuit court. *See Smith v. D.R. Horton, Inc.*, Op. No. 27645 (S.C. Sup. Ct. filed July 6, 2016). For brevity, it is not repeated here.

On Writ of Certiorari, a majority of this Court, like the lower courts before it, considered the entirety of paragraph 14 of the parties’ Purchase Agreement as representing the agreement to arbitrate for purposes of applying the *Prima Paint* Doctrine. The majority further agreed that paragraph 14 is unconscionable as a result of the Smiths’ lack of meaningful choice in negotiating its terms and its “clearly one-sided and oppressive” provisions. *See Id.* (Shearouse Adv.Sh. No. 27 at p. 16-18).

### ARGUMENT AND CITATION OF AUTHORITY

In order to prevail on a petition for rehearing, DR Horton must demonstrate that this Court overlooked or misapprehended its argument. *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001). However, the two arguments<sup>1</sup> presented by DR Horton in its Petition for Rehearing were not overlooked or misapprehended. On the contrary, these two issues were carefully evaluated and addressed by this Court, with a majority of Justices finding the lower courts should be affirmed. *Smith*, Op. No. 27645 at

---

<sup>1</sup> Aside from the two arguments raised by DR Horton in its Petition for Rehearing, it has abandoned all other arguments it previously raised on appeal.

Justices finding the lower courts should be affirmed. *Smith*, Op. No. 27645 at p. 16-18. Here, DR Horton rehashes the same points it previously presented. The Petition for Rehearing should be denied because this Court properly determined the subject arbitration agreement consists of paragraph 14 as a whole, and the arbitration agreement is unconscionable.

**I. THIS COURT PROPERLY DETERMINED THE ARBITRATION AGREEMENT WAS CONTAINED IN PARAGRAPH 14, AS A WHOLE, AND NOT LIMITED TO SUBPARAGRAPH 14(g).**

In requesting rehearing, DR Horton contends this Court misapprehended or misapplied the law as it relates to the FAA and the *Prima Paint* doctrine by viewing the whole of paragraph 14 as the agreement to arbitrate. *See* Pet. For Rehearing at p. 7.<sup>2</sup> This is not the case. The flaw in DR Horton’s argument is that it is entirely premised on its often repeated contention that no provision other than subparagraph 14(g) pertains to arbitration. Among other things, subparagraph 14(c) and the RWC Warranty explicitly disprove that assertion. The majority recognized this self-evident point in its decision. *Smith*, Op. No. 27645 at p. 13 (“Subparagraphs 14(c) and 14(g) contain provisions stating the parties agree to arbitrate . . .”). (Emphasis added). DR Horton overlooks this fact.

This Court properly observed that, “the parties fundamentally disagree on the application of *Prima Paint* doctrine to the Agreement.” *Id.* at 16. This “paragraph 14 vs. subparagraph 14(g)” argument has been the central disagreement between the parties from

---

<sup>2</sup> The Smiths argued that DR Horton’s arguments regarding the FAA are not preserved (*See* Respondent’s Brief p. 5-7), and, alternatively, that the FAA does not apply because it applies only to valid arbitration agreements. (*See* Respondent’s Brief p. 34-35). The Smiths incorporate these arguments here, although as a practical matter the outcome is the same given the majority’s conclusion that the whole of paragraph 14 represents the arbitration agreement for purposes of *Prima Paint* and it is unconscionable.

the beginning. In a manner devoid of any ambiguity, the majority revealed in footnote 4 of the decision its appreciation of the importance of its review under *Prima Paint*, because it controls which provisions within paragraph 14 of the Purchase Agreement are subject to an unconscionability analysis. This central issue was fully developed and argued to the Court, and there is no point of law or fact raised by DR Horton that was overlooked or misapprehended.

As this Court ruled, subparagraph 14(g) cannot stand in isolation. *Id.* at 16. The various subparagraphs of paragraph 14 all deal with the same subject matter, *to wit*, “warranties and dispute resolution.” Further, the various subparagraphs cross-reference and incorporate one another to such an extent that they are so intertwined as to create a single provision.

Read together, subparagraphs 14(a) and 14(c) provide the Residential Warranty Corporation’s Warranty (the “RWC”) is the only warranty being offered and that it will contain its own arbitration provision. (Appx. 154-55). Subparagraph 14(g)(i) expressly states that arbitration of any claim under the RWC Warranty shall be governed by the terms contained in that separate document. It is impossible to say 14(g) stands alone in isolation because it explicitly points to other sources for the controlling arbitration terms.

The RWC Warranty and its arbitration requirements, whatever they are, is referenced throughout 14(a), 14(b), 14(c), 14(d), 14(g) and 14(i). Similarly, subparagraphs 14(c), 14(h) and 14(j) address DR Horton’s rights to unilaterally terminate amidst pre-closing disputes and directs the Smiths on how to notify of disputes after closing. On this same topic, subparagraph 14(i) strips the Smiths of every form of recovery in any dispute they have with DR Horton. All of these provisions concern the scope and terms of

arbitration, just as the majority of this Court concluded. *See also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 76, 749 S.E.2d 139, 144 (Ct. App. 2013) (observing that one side of a contract contained a general notice of arbitration and the other side “incorporated provisions further defining the scope and terms of arbitration, including remedy and claim type limitations.”). Despite the fact that the various portions of the arbitration provision were located in separate areas of the document, the Court in *York* considered the language on both sides of the contract together, in a singular analysis. *Id.* The majority applied the same logic here, because the various subparagraphs of paragraph 14 are properly read and interpreted together, as a whole.

Additional support for the majority’s decision is found in the plain text of the parties’ Purchase Agreement. In the ordinary sense, the words “paragraph” and “subparagraph” have different meanings. “Where the contract’s language is clear and unambiguous, the language alone determines the contract’s force and effect.” *Alexander’s Land Co., L.L.C. v. M&M&K Corp.*, 390 S.C. 582, 598, 703 S.E.2d 207, 215 (2010) (citing *McGill v. Moore*, 381 S.C. 179, 185 672 S.E.2d 571, 574 (2009)); accord *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (stating the court must interpret contractual language in its natural and ordinary sense).

In drafting the Agreement, DR Horton’s intent to differentiate between the terms “paragraph” and “subparagraph” is demonstrated often, but most significantly at subparagraph 14(g). It specifically states: “The list of disputes that shall be arbitrated in accordance with *this paragraph* include . . . .” (Appx. p. 155) (all emphasis added). Sub-subparagraph 14(g)(ii) likewise provides, “The arbitration referred to in *this paragraph* shall be binding . . . .” (Appx. p. 156) (all emphasis added). Subparagraph 14(a) adds:

“The RWC Warranty referred to in this paragraph<sup>3</sup> is the only warranty being made by [DR Horton]. . . .” The words “this paragraph” plainly mean the whole of paragraph 14.

On the other hand, the term “subparagraph” is used by DR Horton when only a subpart of a full paragraph is referenced. *See e.g.* (Appx., p. 156, at subparagraph 14(h) (employing the narrower term “subparagraph” when it states, “In addition to the rights and obligations of each party specified in **subparagraphs (a) – (d)** above[] . . . .”) (emphasis added); *see also* (Appx., p. 155 at subparagraph 14(d) (excluding from all warranties offered by DR Horton, “those matters excluded in **subparagraph (f)** below[] . . . .”) (emphasis added).

The distinction between “paragraph” and “subparagraph” is significant. When subparagraphs 14(g) and 14(g)(ii) respectively refer to “disputes which shall be arbitrated in accordance with this paragraph” and “arbitrations referred to in this paragraph,” the term “paragraph” means what it says, *to wit*, “paragraph” 14 as a whole. If DR Horton intended for only subparagraph 14(g) to control, it would have used the term “subparagraph 14(g)” as it did elsewhere in the Purchase Agreement.” *Cf. 16 Jade Street, LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 346, 728 S.E.2d 448, 452, n. 7 (2012) (the Canon of construction “*expressio unius est exclusion alterius*” or “*inclusio unius est*

---

<sup>3</sup> The RWC Warranty is referenced throughout paragraph 14, including in subparagraphs 14(a), 14(b), 14(c), 14(d), 14(g), 14(h)(by reference to the preceding), and 14(i). When subparagraph 14(a) discusses “[t]he RWC Warranty referred to in this paragraph is the only warranty being offered . . . .” the only logical conclusion is that the phrase “this paragraph” means all the references in paragraph 14. No other reading makes sense.

*exclusion alterius*” holds that to express or include one thing implies the exclusion of another).<sup>4</sup>

Therefore, a majority of this Court properly considered the entirety of paragraph 14 of the Purchase Agreement in determining whether the arbitration agreement was unconscionable. DR Horton’s Petition for Rehearing should be denied, because this Court’s analysis comports with *Prima Paint*.

**II. THIS COURT PROPERLY CONCLUDED THAT THE TERMS OF THE ARBITRATION AGREEMENT CONTAINED IN PARAGRAPH 14 ARE UNCONSCIONABLE AND UNENFORCEABLE.**

Despite DR Horton’s assertion in its Petition for Rehearing, there is ample evidence in the record that the Purchase Agreement is an adhesion contract. In repeating the arguments it previously made, DR Horton has failed to reveal any point of law or fact that was overlooked or misapprehended.

An adhesion contract “is a standard form contract offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27 (2007) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541 (2001) (making clear that an adhesion contract is not *per se* unconscionable but it gives rise to “considerable doubt that any true agreement ever existed”)). As the record reflects, during the hearing on DR Horton’s motion to compel, it tellingly argued, “If [the Smiths] didn’t like this deal they could have gone elsewhere.” (Appx. p. 187). This represents the epitome of a “take-it-or-leave-it” contract. There is more.

---

<sup>4</sup> Interestingly, despite the actual language used in its Purchase Agreement, on appeal DR Horton refers to paragraph 14 as “Section 14” instead. Likewise, rather than referring to “subparagraph 14(g),” as that term is used in the Purchase Agreement, DR Horton calls it “Paragraph 14(g).” *See e.g.* Pet. for Rehearing p. 9-10. No matter how presented, these issues have been fully considered.

From the four-corners of the Purchase Agreement it is self-evident the document is a pre-printed form containing boilerplate language crafted by DR Horton. (Appx. pp. 151-160). Every page states “General Terms and Conditions” in the header at the top, with the form document bearing a specific title, “HOME PURCHASE AGREEMENT BC40-0085[.]” In the headers and footers of the Purchase Agreement are document revision dates, including a reference to “1999 D.R. Horton, Inc. – Torrey, Revised March 16, 2005...” (emphasis added). *See York*, 460 S.C. at 86, 749 S.E.2d at 149 (finding a “drafting date of ‘5/10/04’ and a revision date of ‘06/09/06’ further support the notion is was a form document[.]” warranting considerable skepticism).

The balance of the Purchase Agreement contains standard, pre-printed provisions applicable to any number of DR Horton transactions and are presumptively non-negotiable. This, too, was noteworthy in *York*. *See id.*, (noting, “the remaining terms of sale, many of which are quite significant, were pre-printed and, presumptively, non-negotiable[.]”). Paragraph 1 reveals the Purchase Agreement applies to homes anywhere in the “Charleston/Dorchester/Berkeley County, South Carolina.” (Appx. p. 151). Paragraph 20 applies to a number of development sites, leaving a blank to simply fill in which neighborhood covenants will apply. (Appx. p. 158). Paragraph 2 applies to a variety of purchase transactions and methods of financing, indicating this form document can be used with any potential buyer. Similar boilerplate terms can be found throughout the Purchase Agreement, such as in paragraphs 3, 8(a), 13, 15, 16, 17 and elsewhere.

Contrary to DR Horton’s assertion, this is clear evidentiary support for the conclusion that the subject agreement was an adhesion contract. *Simpson*, 373 S.C. at 22,

644 S.E.2d at 663. Further, the record supports this Court’s conclusion that the arbitration agreement contained in paragraph 14 is 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.” *Simpson*, 373 at 24-25, 644 S.E.2d at 668. In this way, unconscionability is “due to both an absence of meaningful choice and oppressive, one-sided terms.” *Id.* at 25, 644 S.E.2d at 669. Thus, the test for unconscionability is two-fold, with the first prong focused on the lack of meaningful choice, and the second prong evaluating the oppressiveness of the terms. *Id.*; *see also Smith*, Op. No. 27645 at p. 17, n. 5.

In its decision, the majority correctly analyzed the fundamental fairness of the bargaining process, and in so doing it considered the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, whether the parties were represented by independent counsel, and whether the plaintiff is a substantial business concern. *Smith*, Op. No. 27645 at p. 17.<sup>5</sup> In the context of residential home building, this Court long ago recognized “that a modern buyer of new residential housing is normally in an unequal bargaining position as against the seller.” *Id.* (*citing Kenney v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989)). In light of this core reasoning, and upon evaluating the applicable considerations, this Court rightfully concluded the Smiths lacked a meaningful choice in the ability to negotiate the arbitration clause in the Purchase

---

<sup>5</sup> DR Horton does not seek rehearing on this portion of the analysis, instead alleging only a lack of evidence demonstrating that the Purchase Agreement is an adhesion contract—an argument that is invalidated in this Return.

Agreement. Given the oppressive, one-sided nature of the actual terms of arbitration agreement, the majority properly concluded that it is unconscionable and unenforceable.

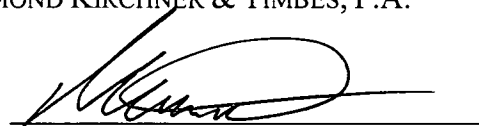
**CONCLUSION**

Because DR Horton has failed to demonstrate any preserved argument that was overlooked or misapprehended by this Court, the Smiths respectfully request that its Petition for Rehearing be denied.

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

By:



Michael A. Timbes  
15 Middle Atlantic Wharf, Suite 101  
Charleston, South Carolina 29401  
Phone: (843) 937-8000  
Facsimile: (843) 937-4200  
michael@tktylawyers.com

-AND-

John T. Chakeris  
THE CHAKERIS LAW FIRM  
Post Office Box 397  
Charleston, SC 29402  
Phone: (843) 853-5678  
Facsimile: (843) 853-5677  
john@chakerislawfirm.com

Phillip W. Segui, Jr.  
SEGUI LAW FIRM, LLC  
864 Lowcountry Blvd., Suite A  
Mt. Pleasant, SC 29464  
Phone: (843) 884-1865  
Facsimile: (843) 884-0136  
psegui@seguilawfirm.com

*Attorneys for Respondents*

July 28, 2016.  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

RECEIVED

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

JUL 29 2016

S.C. SUPREME COURT

Appellate No. 2013-001345

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.....Petitioner.

PROOF OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for Respondents, do hereby certify that I have on this date, mailed, postage prepaid, a true and correct copy of the Return to Petition for Rehearing to the following counsel of record:

FOR THE APPELLANT:

W. Kyle Dillard, Esquire  
Matthew K. Johnson, Esquire  
OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, PC  
Post Office Box 2757  
Greenville, SC 29602  
Phone: (864) 271-1300



Moira W. Kerrigan  
Paralegal to Michael A. Timbes

July 29, 2016  
Charleston, South Carolina