The Supreme Court of South Carolina

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September 8, 2016

The Honorable Cheryl L. Graham
5200 E Jim Bilton Blvd
St George SC 29477-8020

REMITTITUR

Re: Gregory Smith v. D.R. Horton
Lower Court Case No. 2010CP1800641
Appellate Case No. 2013-001345

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: W. Kyle Dillard, Esquire
Matthew Kinard Johnson, Esquire
Phillip Ward Segui, Jr., Esquire
John T. Chakeris, Esquire
Michael A. Timbes, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.

Appellate Case No. 2013-001345

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 27645
Heard March 3, 2015 – Filed July 6, 2016

AFFIRMED

Matthew Kinard Johnson and W. Kyle Dillard, both of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Petitioner.

Phillip Ward Segui, Jr., of Segui Law Firm, of Mt. Pleasant, John T. Chakeris, of Chakeris Law Firm, and

water damage to the property. D.R. Horton attempted to repair the alleged construction defects on "numerous occasions" during the next five years, but was ultimately unsuccessful.

In 2010, the Smiths filed a construction defect case against D.R. Horton and seven subcontractors. In response, D.R. Horton filed a motion to compel arbitration. The Smiths opposed the motion, arguing, *inter alia*, that the arbitration agreement was unconscionable and therefore unenforceable.

The circuit court denied D.R. Horton's motion to compel arbitration, finding that the arbitration agreement was unconscionable. The court based its ruling on "a number of oppressive and one-sided provisions," including D.R. Horton's attempted waiver of the implied warranty of habitability, as well as subparagraph 14(i)'s prohibition on awarding money damages of any kind against D.R. Horton. D.R. Horton made a motion to reconsider pursuant to Rule 59(e), SCACR, but the circuit court again denied the motion to compel.[2]

D.R. Horton appealed, and the court of appeals affirmed the circuit court's order. *See Smith*, 403 S.C. at 10, 742 S.E.2d at 37. The court of appeals found the arbitration agreement was unconscionable, citing subparagraph 14(i) and its prohibition on awarding money damages against D.R. Horton. *Id.* at 15, 742 S.E.2d at 40–41. Further, the court of appeals *sua sponte* conducted a severability analysis to determine whether subparagraph 14(i) could be severed from the remaining provisions of the arbitration agreement. *Id.* at 17, 742 S.E.2d at 41. The court of appeals ultimately concluded that severing the subparagraph would be inappropriate. *Id.*

D.R. Horton petitioned the court of appeals for rehearing, asserting that the court of appeals made two fundamental errors. First, D.R. Horton argued that the court of appeals' unconscionability analysis was flawed because it did not discuss whether the Smiths lacked a meaningful choice in entering the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007) (stating that an unconscionability analysis has two prongs, one of which is whether one of the parties to the contract lacked a meaningful

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[2] In the second order denying D.R. Horton's motion to compel arbitration, the court elaborated on its previous finding of unconscionability, finding that the Agreement was a contract of adhesion, and that the Smiths had significantly less bargaining power than D.R. Horton.

I. *The* Prima Paint *Doctrine*

As an initial matter, we address D.R. Horton's argument regarding the court of appeals' alleged failure to heed the *Prima Paint* doctrine.[4]

In *Prima Paint*, the Supreme Court held that to avoid arbitration, a party must assert a contractual defense to the arbitration agreement itself, and not to the contract as a whole. *See* 388 U.S. at 406. Thus, for example, a party must allege that the *arbitration agreement* is unconscionable, not that the *entire contract* is unconscionable. *See S.C. Pub. Serv. Auth.*, 312 S.C. at 562–63, 437 S.E.2d at 24. Similarly, in conducting an unconscionability inquiry, courts may only consider the provisions of the arbitration agreement itself, and not those of the whole contract.

Here, the parties fundamentally disagree on the application of the *Prima Paint* doctrine to the Agreement. D.R. Horton asserts that the arbitration agreement is wholly contained in subparagraph 14(g). Therefore, according to D.R. Horton, the Court may not consider any of the remaining subparagraphs of paragraph 14—such as subparagraph 14(i)'s damages limitation—in determining whether the arbitration agreement is unconscionable. We disagree.

Like the lower courts, we construe the entirety of paragraph 14, entitled "Warranties and Dispute Resolution," as the arbitration agreement. As the title indicates, all the subparagraphs of paragraph 14 must be read as a whole to understand the scope of the warranties and how different disputes are to be handled. The subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the subparagraphs so as to constitute a single provision.

Thus, in accordance with the *Prima Paint* doctrine, we find that in determining whether the arbitration agreement is unconscionable, we may properly consider the entirety of paragraph 14.

II. *Unconscionability*

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[4] As will be explained further, *infra*, we must address this issue first because it controls which portions of the Agreement we may properly consider in conducting our unconscionability analysis.

twenty-seven states. Thus, the Smiths were also not a substantial business concern of D.R. Horton, as they did not comprise a large portion of D.R. Horton's clientele.

Accordingly, we find that the Smiths lacked a meaningful choice in their ability to negotiate the arbitration clause in the Agreement.

Moreover, in considering the actual provisions of the arbitration agreement, we find that D.R. Horton's attempts to disclaim implied warranty claims and prohibit *any* monetary damages are clearly one-sided and oppressive. Under the terms of paragraph 14, the only remedy provided for a defect in the home is repair or replacement—options left entirely in the discretion of D.R. Horton. This is no remedy at all because it leaves the relief to the whim of D.R. Horton while simultaneously allowing no monetary recuperation when, as here, the repairs are simply inadequate. We therefore affirm the court of appeals and hold the arbitration provision is unconscionable and thus unenforceable.[6]

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[6] Because the arbitration agreement does not contain a severability clause, we find the parties did not intend for the Court to strike unconscionable provisions from the arbitration agreement. Thus, we decline to analyze whether the unconscionable provisions are severable, as doing so would be the result of the Court rewriting the parties' contract rather than enforcing their stated intentions. *See Simpson*, 373 S.C. at 34, 644 S.E.2d at 673.

JUSTICE KITTREDGE: The underlying contract involves interstate commerce and, as a result, the Federal Arbitration Act (FAA) controls. Because I believe the majority has not followed controlling precedent of the United States Supreme Court, I respectfully dissent. In my judgment, state law does not provide a valid basis to avoid enforcing this particular agreement to arbitrate, and the court of appeals erred in upholding the circuit court's refusal to compel arbitration. I would reverse.

I.

This arbitration agreement is subject to the FAA, a fact conspicuously absent in the majority opinion. "'Generally, any arbitration agreement affecting interstate commerce is subject to the FAA.'" *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 121–22, 747 S.E.2d 461, 464 (2013) (quoting *Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013)). "The United States Supreme Court 'has previously described the [FAA]'s reach expansively as coinciding with that of the Commerce Clause.'" *Id.* at 122, 747 S.E.2d at 464 (quoting *Allied–Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 274 (1995)). "Thus, in determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce." *Id.* (citing *Episcopal Housing Corp. v. Fed. Ins. Co.,* 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977)).

In support of its motion to compel arbitration, D.R. Horton submitted affidavits from several executives indicating that D.R. Horton is a Delaware corporation with its principal place of business in Texas. These affidavits further establish D.R. Horton is engaged in the residential construction business in twenty-seven states and that many of the building materials and supplies used in constructing the Smiths' home in Summerville were obtained from suppliers outside South Carolina.[7] Because the arbitration clause at issue here is included in a contract that evidences a transaction involving interstate commerce, the FAA governs the enforceability of the arbitration provision. *See Cape Romain*, 405 S.C. at 123–24, 747 S.E.2d at 465 (citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594–95, 553 S.E.2d 110, 117–18 (2001); *Episcopal Housing,* 269 S.C. at 640, 239 S.E.2d 647 S.E.3d at 652) (observing that out-of-state materials used in construction were

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[7] These materials include rebar, framing materials, wall sheathing, windows, gypsum drywall, shingles, cabinets, carpet, vinyl flooring, plumbing fixtures, lighting hardware, and appliances.

arbitrate the dispute that has arisen; controversies as to the enforceability of any other contractual provision(s)—including those which may be so objectionable as to undermine the contract in its entirety—are to be resolved by the arbitrator.

Here, the majority acknowledges this point of law, as it must. However, the majority nevertheless 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. This is accomplished by the fiction that the arbitration provision is the entirety of Paragraph 14, which contains more than 1,800 words. Indeed, the following is the portion of the parties' contract the majority finds to constitute the "arbitration provision":

> **14. WARRANTIES AND DISPUTE RESOLUTION**
>
> **a. Structural Warranty.** At Closing, Seller shall execute and deliver to Purchaser at no additional cost a warranty from Residential Warranty Corporation ("RWC") or such other national warranty provider as Seller may reasonably elect (the "RWC Warranty"). This RWC Warranty will provide, at a minimum, a ten (10) year structural warranty. *The RWC Warranty referred to in this paragraph is the only warranty being made by Seller, except for such warranties which may not be disclaimed by State or Federal law.* In addition, Seller hereby assigns to Purchaser all warranties, expressed or implied, which arise or are given by the manufacturer of any product installed in the home built on the Property.
>
> **b. RWC Warranty.** Purchaser has been, or will be prior to Closing, provided with a copy of the RWC Warranty book on the Ten Year Limited Warranty, which is administered by the Residential Warranty Corporation. Validation of the RWC Warranty is conditioned upon the Seller's compliance with all RWC's enrollment procedures and upon Seller remaining in good standing in the RWC Program.
>
> **c. *The RWC Warranty is provided by Seller to Purchaser in lieu of all other warranties, verbal agreements, or representations and Seller makes no warranty, express or implied, as to quality, fitness for a particular purpose, merchantability, habitability or otherwise, except as is expressly set forth in the Program or as otherwise required by Federal or State law.* Particularly, Purchaser understands and**

not liable for trees or shrubs, or damage or destruction to same. Seller makes no warranty whatsoever as to the type, location or amount of trees, which will exist on the property after construction. Seller will plant grass seeds or install sod, as the case may be, as part of its construction. Because the growth of grass seeds and the health of sod is dependent on Purchaser's care and maintenance, no warranty is provided and all grass is installed "as-is." Because prevention of erosion is dependent on Purchaser's proper maintenance of the grass and sod, Seller provides no warranty for erosion. Purchaser's closing of the sale constitutes an acceptance of Seller's drainage and erosion controls for the Property, except for matters noted on Purchaser's "Punch list." Seller shall not be responsible for the correction of any leakage or seepage caused by (i) damaged water pipes or mains, (ii) alteration of the landscaping by a party other than Seller (specifically including, without limitation, any changes which cause water to flow toward the dwelling), or (iii) prolonged direction of water against the outside foundation wall from a spigot, sprinkler, hose, or improperly maintained gutters or down spouts. Seller will not warrant any cosmetic defect post-closing unless this condition is listed on the "punch list" prior to Closing. Examples of "cosmetic defects" include sheetrock dings, dimples and nail pops, paint discoloration, chips or irregularities in marble, Formica, or tile. Unless a defect is noted on the "punch list," Seller does not warrant the installation or the quality of any carpet or flooring product (however, note that Seller assigns the manufacturer warranties to Purchaser at Closing).

Purchaser Initial(s): s/GS s/SM

e. Existing Trees: D.R. Horton will make every effort to save as many existing trees as possible during the construction process. Those trees that must be removed will be removed at the sole discretion of the Area Manager and their Field Manager. D.R. Horton reserves the right to remove any trees, which in their judgment may have roots damaged by construction to the extent that the tree would not be expected to live. Those trees that are in or within close vicinity of the home's footprint or concrete flatwork area will be removed. Additionally, trees that impede the drainage of the site, or overall community drainage plan will be removed. D.R. Horton does not guarantee the health, survival or growth of any tree after closing. Repairs to living trees and removal or

i. If the arbitration arises out of a claim arising under the RWC Warranty, the rules, terms and conditions in the RWC Warranty certificate and related materials delivered to Purchaser 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 arbitrations 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 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.

Purchaser Initial(s): s/GS s/SM

h. In addition to the rights and obligations of each party specified in subparagraphs (a)–(d) above, in the event that a bona fide dispute, as determined by the Seller, should arise between Purchaser and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the right, upon written notice to Purchaser, to terminate this Agreement and return the Earnest Money to Purchaser, and no cause of action shall accrue on behalf of Purchaser because of such termination.

i. Limitation of liability. EXCEPT FOR THE RWC WARRANTY, AND EXCEPT FOR THE TITLE WARRANTIES SPECIFIED IN PARAGRAPH 4 ABOVE, AND EXCEPT FOR ANY WARRANTIES IMPOSED BY LAW, WHICH CANNOT BE DISCLAIMED, *SELLER MAKES NO OTHER WARRANTY OF ANY KIND, ALL SUCH OTHER WARRANTIES ARE HEREBY DISCLAIMED BY SELLER. SELLER MAKES NO WARRANTY AS TO MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EITHER EXPRESSED OR IMPLIED.* THE EXCLUSIVE REMEDY FOR ANY DEFECT OF ANY ITEM OR

arbitrator because the dispute pertains to the formation of the entire contract, rather than the arbitration agreement." (citing *Hooters of America*, 173 F.3d at 938; *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986))).

Here, the majority circumvents controlling federal law by construing the entirety of paragraph fourteen—i.e. all ten separately denominated subparagraphs—as comprising the arbitration agreement. In attempting to justify such a construction, the majority cites no supporting authority, instead reasoning that the contract groups warranties and dispute resolution together under a single heading "Warranties and Dispute Resolution" and that "[t]he subparagraphs within paragraph 14 contain numerous cross-references to one another, intertwining the paragraphs so as to constitute a single provision." Indeed, it is only by treating paragraph fourteen as a single, indivisible provision that the majority is able to transform the Smiths' objection to certain warranty and liability disclaimers into a challenge to the arbitration provision, only the latter being proper for judicial rather than arbitral determination.

I reject the majority's construction that the arbitration provision is the entirety of paragraph fourteen. In my judgment, under well-established state law, paragraph fourteen is comprised of numerous severable provisions, which include not only the parties' mutual promise to settle any disputes through arbitration, but also various other distinct provisions, including D.R. Horton's promise to provide a ten-year structural warranty, D.R. Horton's promise to assign appliance manufacturer warranties to the Smiths, mutual promises regarding which party is responsible for landscaping maintenance at various points in time, and the Smiths' promise to give written notice of any warranty claims in accordance with specified procedures, among many other things.

Specifically, I believe the challenged warranty disclaimers and liability limitations are separate and distinct from the agreement to arbitrate, in terms of both formatting and subject matter. Indeed, not only does the parties' chosen paragraph structure and subparagraph denomination spatially delineate these provisions as separate from the agreement to arbitrate, but also the gravamen of each of these terms is distinct and independently operative. Consequently, as a matter of South Carolina law, these provisions are properly viewed as discrete terms rather than as a cohesive contractual provision. *See Columbia Architectural Grp., Inc. v. Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) (explaining that a "severable contract is one in its nature and purpose susceptible of division and apportionment, having two or more parts, in respect to matters and things contemplated and

in which the parties agree to arbitrate any controversies. Accordingly, even if state law justified the majority's finding that the entirety of paragraph fourteen constitutes the relevant arbitration provision (which it does not), such a finding would in any event be in conflict with, and therefore preempted by, federal substantive law identifying only a portion of subparagraph (g) as the arbitration agreement. *See Concepcion*, 563 U.S. at 352 (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).

Because the Smiths fail to raise *any* challenge to the arbitration provision in subparagraph (g), I would find the Smiths' claims regarding unconscionability must be resolved in an arbitral forum, and I would reverse the court of appeals' decision. *Cf. Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001) ("An agreement providing for arbitration does not determine the *remedy* for a breach of contract but only the *forum* in which the remedy for the breach is determined.").

PLEICONES, C.J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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., and Myers Landscaping, Inc., Defendants,

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

Appellate Case No. 2011-204347

Appeal From Dorchester County
Edgar W. Dickson, Circuit Court Judge

Opinion No. 5118
Heard February 14, 2013 – Filed April 17, 2013

AFFIRMED

Matthew Kinard Johnson and W. Kyle Dillard, both of Ogletree Deakins Nash Smoak & Stewart, PC, of Greenville, for Appellant.

John T. Chakeris, of Chakeris Law Firm, of Charleston; Phillip Ward Segui, Jr., of Segui Law Firm, of Mount Pleasant; and Michael A. Timbes, of Thurmond Kirchner Timbes & Yelverton, PA, of Charleston, all for Respondents.

SHORT, J.: D.R. Horton, Inc. (Horton) appeals the circuit court's order denying its motion to compel arbitration in this construction defects action filed by Gregory and Stephanie Smith. Horton argues the circuit court erred in finding the arbitration clause unenforceable: (1) under the South Carolina Uniform Arbitration Act (SCUAA); (2) as unconscionable; (3) under an unequal-bargaining-power theory; (4) under a lack-of-consideration theory; (5) under the Federal Arbitration Act (FAA); and (6) under a merger-by-deed theory. We affirm.

I. FACTS

The Smiths purchased a house built by Horton in Summerville, South Carolina. The arbitration clause was included in the purchase agreement in Section 14, entitled "Warranties and Dispute Resolution." Section 14(a) provided for a warranty from Residential Warranty Corporation (RWC), which purported to be the only warranty extended by Horton, except for such warranties as cannot be disclaimed by law. Section 14(b) provided that validation of the RWC warranty was conditioned on Horton's compliance with all RWC's enrollment procedures and upon Horton remaining in good standing in the RWC program. Section 14(c) purported to disclaim all other warranties, express or implied, as to quality, fitness for a particular purpose, merchantability, and habitability. Section 14(c) further provided all disputes under the RWC warranty were subject to binding arbitration. Sections 14(d)-(f) provided exclusions to the warranty for landscaping. Section 14(g) addressed arbitration and provided the following:

> **Mandatory Binding Arbitration:** [The Smiths] and [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 [Horton's] construction of the home; (2) [Horton's] performance under any Punch List or Inspection Agreement; (3) [Horton's] performance under any warranty contained in this Agreement or otherwise; and (4) any other matters as to which [the Smiths and Horton] agree to arbitrate.

Section 14(h) provided that if a dispute arose prior to the closing date, Horton had the right to terminate the agreement, return the earnest money, and "no cause of action shall accrue on behalf of [the Smiths] because of such termination." Section

14(i), prefaced "Limitation of Liability," disclaimed warranties except for those specifically provided or imposed by law, including "as to merchantability or fitness for a particular purpose, either expressed or implied. . . . [Horton] shall not be liable for monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." The final clause in the "Warranties and Dispute Resolution" section of the purchase agreement, section 14(j), provided the method of notice for requests of warranty service.

Alleging extensive defects in the home, the Smiths filed this action against Horton and numerous subcontractors, asserting claims for negligence, breach of contract, breach of warranties, and unfair trade practices. Horton moved to compel arbitration. After a hearing, the circuit court denied the motion, finding the following: (1) the arbitration provision was unconscionable; (2) the purchase agreement was merged into the deed, which did not contain an arbitration provision; and (3) the arbitration provision failed to meet the SCUAA. In an order denying Horton's motion for reconsideration, the court also found the parties were not of equal bargaining power, and there was no consideration given in exchange for the Smiths' sacrifice of certain rights. This appeal follows.

II. STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). However, the trial court's "factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)). "The validity of an arbitration clause which is attacked on the grounds of unconscionability raises a question of law." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 393-94, 498 S.E.2d 898, 901 (Ct. App. 1998) (citation omitted). "In an action at law, the appellate court's jurisdiction is limited to the correction of errors of law and factual findings which are unsupported by any evidence." *Id.* at 394, 498 S.E.2d at 901 (citation omitted).

III. APPLICABLE LAW

A. Unconscionability

Horton argues the circuit court erred in denying the motion to compel arbitration based on unconscionability. We disagree.

"Arbitration is a matter of contract and controlled by contract law." *S.C. Pub. Serv. Auth. v. Great W. Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citation omitted). "[A] party may seek revocation of the contract 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 (quoting S.C. Code Ann. § 15-48-10(a) (2005)). When deciding a motion to compel arbitration under the SCUAA or the FAA, the court should look to the state law that ordinarily governs the formation of contracts in determining whether a valid arbitration agreement arose between the parties. *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 610 (D.S.C. 1998), *aff'd and remanded*, 173 F.3d 933, 941 (4th Cir. 1999); *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668.

"In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668 (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.* at 25, 644 S.E.2d at 668. Our supreme court adopted the Fourth Circuit's view, and noted "[i]t is under this general rubric that we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

In *Simpson*, the plaintiff sued the defendant auto dealer for alleged violations of the South Carolina Unfair Trade Practices Act, among other causes of action. *Id.* at 21, 644 S.E.2d at 666. The plaintiff signed a contract that included an arbitration clause, and the auto dealer sought to stay the court proceeding and compel arbitration. *Id.* at 19-21, 644 S.E.2d at 666. Our supreme court upheld a denial of the auto dealer's motion to compel arbitration finding, *inter alia*, a lack of mutuality of remedy because the defendant had the right to proceed in court while "completely disregard[ing] any pending consumer claims that require[d]

arbitration." *Id.* at 31, 644 S.E.2d at 672. The court emphasized that lack of mutuality of remedy alone does not make an arbitration agreement unconscionable. *Id.* The court noted, "there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an arbitration clause for unconscionability. . . . Instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions." *Id.* at 36, 644 S.E.2d at 674.

In this case, the circuit court viewed the Warranties and Dispute Resolution Section 14 as a whole, finding it "referenced that certain disputes are to be resolved by mandatory binding arbitration along with an entire host of attempted waivers of important legal remedies . . . ." The court found the attempts to disclaim implied warranty claims were oppressive and unconscionable. The court also found "perhaps even more stark are the provisions in the Limitations of Liability in sub-section [14](i) . . . in addition to the attempted waiver of various important remedies" in which Horton claimed it could not be liable for monetary damages of any kind. The court concluded the relevant arbitration provision was "wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions."

Relying on the supreme court's analysis in *Simpson*, we affirm the trial court's finding of unconscionability, particularly in light of the lack of mutuality of remedy imposed by Section 14(i), which purported to exempt Horton from liability for monetary damages.

B. Severability

Horton next argues the arbitration clause is not made unconscionable by the other allegedly unconscionable provisions in the agreement, and it should be severed from any unconscionable terms of the agreement. We disagree.

"[A]n arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). However, "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Great W. Coal (Kentucky), Inc.*, 312 S.C. at 562-63, 437 S.E.2d at 24. Our supreme court acknowledged that "in light of the state and federal policies favoring arbitration, many courts view severing the offending

provision and otherwise proceeding with arbitration to be the preferred remedy for an unconscionable provision in an arbitration clause." *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674 n.9. However, the court found invalidation of the arbitration clause in its entirety was the appropriate remedy because there were three unconscionable provisions, and two of the provisions were unconscionable because they contravened state and federal consumer protection law. *Id.* The court concluded, "The sheer magnitude of unconscionability present in a provision that prevents a party from vindicating the party's statutory rights, along with the fact that such a grossly unconscionable provision occurred not once, but *twice*, requires that we give significant consideration to a remedy in this situation that best serves the interests of public policy." *Id.* The supreme court also stated the following:

> [L]egislation permits this Court to "refuse to enforce" any unconscionable clause in a contract or to "limit its application so as to avoid an unconscionable result." S.C. Code Ann. § 36-2-302(1) (2003).
>
> At the same time, courts have acknowledged that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. Although, "a critical consideration in assessing severability is giving effect to the intent of the contracting parties," the D.C. Circuit recently cautioned, "If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties." *Booker v. Robert Half Int[]'l Inc.*, 413 F.3d 77, 84-85 (D.C. Cir. 2005) (citations omitted). Similarly, the general principle in this State is that it is not the function of the court to rewrite contracts for parties. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002).

Id. at 34, 644 S.E.2d at 673-74; *see also Hooters of Am., Inc.*, 173 F.3d at 940 (finding rescission to be the appropriate remedy where Hooters promulgated so many biased arbitration rules that the contract created "a sham system unworthy even of the name of arbitration").

We conclude the arbitration clause in this case should not be severed from the numerous unconscionable provisions and particularly Horton's attempt to waive any seller liability for "monetary damages of any kind, including secondary, consequential, punitive, general, special or indirect damages." Because we affirm the finding of unconscionability and find the provision should not be severed, we need not reach the issue of whether the SCUAA or the FAA applies. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

IV. CONCLUSION

Because we affirm the circuit court's finding of unconscionability and find the arbitration clause should not be severed from the purchase agreement, we decline to address Horton's arguments regarding unequal bargaining power, lack of consideration, and merger-by-deed. *See id.* (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal).

AFFIRMED.

THOMAS and PIEPER, JJ., concur.