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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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Appellate Case No. 2011-204347

Opinion No. 5118

Heard February 14, 2013 – Filed April 17, 2013

SC 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., Myers Landscaping, Inc., Defendants,

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

PETITION FOR REHEARING

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INDEX

CERTIFICATE OF COUNSEL	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	1
ARGUMENT	4
1. THE COURT OF APPEALS FAILED TO ADDRESS THE THRESHOLD ISSUE OF WHETHER THE PURCHASE AGREEMENT WAS A CONTRACT OF ADHESION OR WHETHER THE SMITHS LACKED MEANINGFUL CHOICE.....	6
2. THE ARBITRATION PROVISION ITSELF WAS NOT UNCONSCIONABLE	9
A. The Court of Appeals' Reliance on the Limitation of Liability Provision is Misplaced.....	12
3. THE COURT OF APPEALS MISAPPLIED OR IGNORED THE PRIMA PAIN'T DOCTRINE	16
B. The Prima Paint Analysis.....	16
C. A "Severability" Analysis is Inapplicable.....	18
CONCLUSION	20

CERTIFICATE OF COUNSEL

Counsel for Appellant D.R. Horton, Inc., certifies that the Opinion upon which this Petition for Rehearing is based was filed by the Court of Appeals on April 17, 2013, and that this Petition for Rehearing has been filed within 15 days pursuant to Rule 221(a), *SCACR*.

QUESTIONS PRESENTED

1. Whether the Court of Appeals failed to address the threshold issue of whether the Purchase Agreement was a contract of adhesion or whether the Smiths lacked meaningful choice?
2. Whether the arbitration provision itself was unconscionable?
3. Whether the Court of Appeals misapplied or ignored the *Prima Paint* doctrine?

STATEMENT OF THE CASE

Respondents, Gregory W. Smith and Stephanie Smith (“the Smiths”) brought the underlying action alleging construction defect claims against Appellant D.R. Horton, Inc. (“D.R. Horton”), related to their residence. (R. 9, ¶ 9; R. 10, ¶ 11; R. 10–11, ¶ 14; R. 45, ¶¶ 11 & 13; R. 46–47, ¶ 16). D.R. Horton and the Smiths executed a Purchase Agreement for their residence. (R. 147–156).

The Purchase Agreement contained a Section 14 captioned, “Warranties and Dispute Resolution.” (R. 150–152). Paragraphs 14(a)–(f) contained warranty information, including a Residential Warranty Corporation (“RWC”) structural warranty that was provided at no additional cost to the Smiths. (R. 150–151). Paragraph 14(g), entitled “Mandatory Binding Arbitra-

tion,” was the arbitration provision. (R. 151–152). Pursuant to the arbitration provision: 1) the parties unambiguously agreed to arbitrate this dispute arising out of D.R. Horton’s construction of the Smith’s home;¹ 2) the arbitration would be conducted near the Smith’s home in Charleston, Dorchester, or Berkeley County, South Carolina; 3) the arbitration would be conducted by an arbitrator or arbitration panel agreed upon by the Smiths; 4) to the extent possible, the Smiths would be entitled to an expedited hearing; and 5) the arbitrator would be entitled to assess filing fees and any other costs of the arbitration to either party. (R. 151–152). Paragraph 14(h) was a termination provision that allowed D.R. Horton to terminate the Purchase Agreement prior to closing in the case of a bona fide dispute with the Smiths, subject to a 10-day good faith resolution period, written notice, and return of earnest money paid by the Smiths, thus making them whole. (R. 152). Paragraph 14(i) contained a limitation of warranties, subject to the RWC warranty and title warranty (¶ 4), and imposition of an obligation on D.R. Horton to “repair or replace”² any defects as opposed to monetary damages. (R. 152; R. 148–149).

¹ This Mandatory Binding Arbitration provision applied to “any claim arising out of [D.R. Horton]’s construction of the home,” D.R. Horton’s “performance under any warranty contained in [the Purchase] Agreement or otherwise,” and “any other matters as to which [the Smiths] and [D.R. Horton] agree to arbitrate.” There has been no argument that the arbitration provision did not cover the allegations contained in the Smith’s underlying complaints. See Amended Complaint (R. 7–16) and Second Amended Complaint (R. 42–59).

² “Repair or replace” remedies have been approved and enforced under South Carolina law. *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); *Schulmeyer*

D.R. Horton moved the circuit court to compel arbitration. (R. 87–88).

The circuit court denied D.R. Horton’s motion because:

- (1) the arbitration provision supposedly failed to meet the [South Carolina Uniform Arbitration Act];
- (2) the arbitration provision was allegedly unconscionable “based on the cumulative effect of a number of oppressive and one-sided provisions”; and
- (3) the arbitration provision was purportedly extinguished by the doctrine of merger by deed.

(R. 1–4) (emphasis added).³ All of these issues were raised on appeal, but the Court of Appeals addressed only the second. (App’t’s Br. 1).

D.R. Horton filed a Rule 59(e) Motion to Alter or Amend the Court’s Order (“motion for reconsideration”). (R. 126–127). The circuit court denied D.R. Horton’s motion for reconsideration 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 no consideration given in exchange for the sacrifice of certain rights of [the Smiths] . . . and the provisions cannot be conscionably enforced against them.”

v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); *Div. of Gen. Servs. v. Ulmer*, 256 S.C. 523, 533, 183 S.E.2d 315, 319 (1971), *rev’d on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

³ D.R. Horton’s argument that the arbitration provision was also enforceable under the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1–307, was not addressed by the circuit court or the Court of Appeals.

(R. 6)(emphasis added). Again, these issues were raised on appeal, but the Court of Appeals addressed only part of the first issue—whether there was a contract of adhesion issue or the second issue regarding equal bargaining power or consideration were not addressed. (App’t’s Br. 1; 9–11).

This appeal was perfected and oral argument was heard on February 14, 2013. The Court of Appeals subsequently affirmed the judgment of the circuit court. *Smith v. D.R. Horton, Inc., et al.*, Op. No. 5118 (S.C. Ct. App. filed April 17, 2013)(Shearouse Adv. Sh. No. 17 at 60). D.R. Horton seeks a rehearing of that decision. All documents referenced herein other than the Opinion at issue are contained in the previously filed Record on Appeal and are cited as such.

ARGUMENT

A central component of D.R. Horton’s argument, and the analysis of unconscionability itself, concerns whether or not the Purchase Agreement is a contract of adhesion. The Court of Appeals never addressed this fundamental issue. The circuit court merely concluded “that the form of the contract seems to be that of a contract of adhesion” but made no factual findings in that regard. (R. 4)(emphasis added).

The Court of Appeals relied upon *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), in finding unconscionability. *Simpson* plainly states that unconscionability involves the absence of meaningful choice and terms that are so oppressive that no reasonable person would

make them and no fair and honest person would accept them. See *Simpson*, 373 S.C. at 24–25, 644 S.E.2d at 668–669; *Herron v. Century BMW*, 387 S.C. 525, 532, 693 S.E.2d 394, 398 (2010). Despite the fact that the Smiths did not produce any evidence to support the circuit court’s finding that the Purchase Agreement was an adhesion contract or that they otherwise lacked meaningful choice in agreeing to arbitrate—half of the unconscionability analysis—the Court of Appeals improperly affirmed a finding of unconscionability.

The Court of Appeals’ unconscionability analysis dealt exclusively with its finding that the “Limitation of Liability” language in ¶ 14(i) was “oppressive and unconscionable” and lacked “mutuality of remedy,” as well as its implied argument that the termination language in ¶ 14(h) was one-sided. *Smith v. D.R. Horton, Inc., et al.*, Op. No. 5118, pp. 62, 64 (S.C. Ct. App. filed April 17, 2013) (Shearouse Adv. Sh. No. 17 at 60). This ignores half of the unconscionability analysis as set forth in *Simpson*, whether the Smiths lacked meaningful choice in the agreement to arbitrate. Further, as stated further below, with respect to the remainder of the *Simpson* analysis, ¶ 14(h) and ¶ 14(i) are not so “oppressive” or “one-sided” that they render the agreement to arbitrate unconscionable.

In addition, by looking to ¶ 14(h) and ¶ 14(i) in finding unconscionability and failing to analyze unconscionability solely in terms of the arbitration provision in ¶ 14(g), the Court of Appeals misapplied or ignored the United States Supreme Court’s holding in *Prima Paint Corp. v. Flood & Conklin*

Mfg. Co., 388 U.S. 395 (1967) (“the *Prima Paint* doctrine”). See *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (“[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.”).⁴ Similarly, the Court of Appeals’ decision appears to confuse the “separability” analysis required by *Prima Paint* with a “severability” argument,⁵ which was not raised by the parties.

1. **THE COURT OF APPEALS FAILED TO ADDRESS THE THRESHOLD ISSUE OF WHETHER THE PURCHASE AGREEMENT WAS A CONTRACT OF ADHESION OR WHETHER THE SMITHS LACKED MEANINGFUL CHOICE**

The Court of Appeals did not address the question as to whether the Purchase Agreement was a contract of adhesion, defined as a “take-it-or-leave-it” contract for which the Smith’s only options were “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

⁴ 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, 630, 667 S.E.2d 1, 6 (Ct. App. 2008); *Hous. Auth. of City of Columbia v. Cornerstone Hous.*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003).

⁵ “Severability” was raised in *Simpson*, 373 S.C. at 27–30, 644 S.E.2d at 673–674, but properly so. The “unconscionable” terms in *Simpson* were within the arbitration clause itself, unlike this case. Further, the parties raised the issue of severability because the defendant asked the trial court to rewrite the arbitration clause by severing the unconscionable language. Here, because the arbitration provision is separate and distinct from any arguably “unconscionable” terms, severability is unnecessary.

(Ct. App. 1998). The circuit court made no factual findings upon which the Court of Appeals could have made 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. 6). The Smiths presented no evidence in this regard.

At most, the only evidence on this issue is the Purchase Agreement itself, which clearly contains evidence that it was not an adhesion contract. Indeed, the first page of the Purchase Agreement plainly shows that the purchase price was stricken through and written in by hand in a different amount. (R. 147, ¶ 2). Further, the principal amount of the home loan, the term for the home loan, the amount of earnest money, and the initiation fee and dues for the homeowners association were handwritten into the document. (R. 147-148, ¶¶ 2(b), & 3; R. 154, ¶ 20). Finally, the Smiths' own brief points out that the Purchase Agreement "provides space for handwritten 'Special Stipulations.'" (Resp'ts' Br. 11; R. 155). In the absence of any evidence to the contrary, the only legitimate inference that can be drawn from the omission of such "special stipulations" from the Purchase Agreement is that none were requested by the Smiths.

As argued below, a contract may not be avoided on unconscionability grounds unless the court has first considered whether it is one of adhesion. *See Lackey*, 330 S.C. at 395, 498 S.E.2d at 901-902. Specifically, the Court of Appeals has previously stated that whether a contract is an adhesion con-

tract is “the beginning point in the [unconscionability] analysis.” *Lackey*, 330 S.C. at 395, 498 S.E.2d at 901–902. As a matter of fact, the Smiths have asserted “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.” (Resp’ts’ Br. 11, citing *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902).

In failing to analyze the adhesion contract question, the Court of Appeals has not addressed a significant component of the unconscionability analysis, which bears directly on the absence of meaningful choice. As noted in the Court of Appeals’ decision, unconscionability involves the absence of meaningful choice and terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Smith v. D.R. Horton*, Op. No. 5118, p. 63. 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. While the Court of Appeals has alluded to portions of the Purchase Contract that it suggests lack “mutuality of remedy” and that were “oppressive and unconscionable, the absence of meaningful choice element remains unaddressed. *Smith v. D.R. Horton*, Op. No. 5118, p. 64. Absent such a finding, for which there is no evidence in the record (and which is contradicted by evidence that would show handwritten, negotiated terms in the Purchase Agreement), there can be no determination of unconscionability.

2. THE ARBITRATION PROVISION ITSELF WAS NOT UNCONSCIONABLE

Even assuming that there was evidence in the record supporting a finding that the Purchase Agreement was an adhesion contract, or that there was an absence of meaningful choice otherwise, the remainder of the unconscionability analysis must still be satisfied to deny D.R. Horton the right to arbitrate pursuant to the arbitration provision. The arbitration provision must contain one-sided 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 668–669. Although the circuit court and the Court of Appeals found that the Purchase Agreement as a whole contained unconscionable terms, there has been no finding concerning the arbitration provision itself. As will be explained further below in the context of the *Prima Paint* doctrine, the asserted unconscionability of terms within the Purchase Agreement is irrelevant unless it relates to the arbitration provision itself, at ¶ 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).

In this case, the provisions the circuit court said are “oppressive and one-sided” are not found in the arbitration provision, which is captioned “Mandatory Binding Arbitration.” (R. 1–4; R. 5–6; R. 151–152, ¶ 14(g)). Instead, the provisions the circuit court found objectionable were in the separate “Limitation of Liability” clause. (R. 1–4; R. 5–6; R. 152, ¶ 14(i)). The Court of Appeals did not identify any other “unconscionable” terms. At most, the Court of Appeals has 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*, Op. No. 5118, p. 64.

Furthermore, no legal precedent has been cited by the circuit court or the Court of Appeals to support conflating the separate and distinct provisions within Section 14. As argued previously, the only relationship between the Mandatory Binding Arbitration provision and the Limitation of Liability clause is one of arrangement of the document. (App’t’s Br. 13–14).

Arrangement alone is insufficient to construe all of the various provisions in Section 14 together, particularly when they involve wholly unrelated issues. Assuming arrangement alone is the basis for the circuit court’s finding, or the Court of Appeals’ affirmation thereof, this interpretation produces an absurd result. For instance, it must be assumed that if Paragraphs 14(a)–(j) were instead either Paragraphs 14–24 or renumbered as Paragraphs 4–7, 12–13, 17, and 22–24 the result might be different, despite the fact that the

intent, content, and meaning of the arbitration clause would remain identical.

For example, the RWC Warranty discussed at ¶¶ 14 (a)–(d) is unrelated to the discussion of trees to be saved during construction at ¶ 14(e), the survival of landscaping components after closing in ¶ 14(f), or instructions on requesting warranty service in ¶ 14(j). Indeed, the Smiths separately acknowledged and initialed ¶¶ 14(a)–(c), ¶ 14(d), ¶ 14(e), ¶ 14(f), and ¶ 14(g). (R. 150–152). Nevertheless, the circuit court and the Court of Appeals unnecessarily and improperly combined all of the separate and distinct provisions of Section 14 rather than focusing on whether the arbitration provision in ¶ 14(g) itself was unconscionable.

Had the circuit court or the Court of Appeals engaged in an analysis of whether ¶ 14(g) was itself unconscionable, the result would necessarily be different.

Unlike *Simpson*, the arbitration provision here has no limitations or liability, no limitations on available damages, or other one-sided provisions. *See Simpson*, 373 S.C. at 19–21, 27–33 644 S.E.2d at 666, 670–673. Rather, as stated previously, the arbitration provision agreed to by the parties required arbitration to be conducted near the Smith’s home in Charleston, Dorchester, or Berkeley County, South Carolina, by an arbitrator or arbitration panel agreed upon by the Smiths, who could assess filing fees and any other costs of the arbitration to either party. Further, the arbitration provision al-

lowed for the Smiths to receive an expedited hearing. (R. 151–152). There were no oppressive or one-sided provisions within ¶ 14(g).

Neither the circuit court nor Court of Appeals provided any argument as to why each of these disparate provisions should be read “as a whole.” *Smith v. D.R. Horton*, Op. No. 5118, p. 64. The Smiths belatedly argued that the separate and distinct provisions of Section 14 that are unrelated to the parties’ agreement to arbitrate must be interpreted together rather than standing alone, but had not previously raised this argument before the circuit court. (Resp’ts’ Br. 5–8). However, the only legal authorities cited for this position are contractual construction cases that involve the determination of the parties’ intent in the face of an ambiguity. *See Buice v. WMA Sec., Inc.*, 380 S.C. 149, 156–57, 668 S.E.2d 430, 434 (Ct. App. 2008); *Skull Creek Club Ltd. P’ship, v. Cook & Book, Inc.*, 313 S.C. 283, 286, 437 S.E.2d 163, 165 (Ct. App. 1993). Here, the parties’ intent is clear, so there is no ambiguity and no need to engage in contractual construction. As such, these cases are inapplicable and there is no basis upon which to construe Section 14 as a whole.

A. The Court of Appeals’ Reliance on the Limitation of Liability Provision is Misplaced

The Court of Appeals did not identify specifically why the termination provision in ¶ 14(h) the limitation of liability provision in ¶ 14(i) rendered either the arbitration provision at ¶ 14(g) or the entire Purchase Agreement

unconscionable other than to imply that ¶14(h)⁶ and ¶ 14(i) resulted in “lack of mutuality of remedy.” As discussed above, even assuming *arguendo* that this were true, there is no evidence of the other element of unconscionability—lack of meaningful choice. Furthermore, these commonplace contractual terms do not render either the entire Purchase Agreement, or specifically the arbitration provision at ¶14(g), unconscionable due to being “one-sided” or “oppressive” for at least two reasons.

First, a recent South Carolina Supreme Court illustrates a proper analysis with respect to the limitation of liability in ¶ 14(i). In *Gladden v. Boykin*, Op. No. 27236 (S.C.Sup.Ct. filed Mar. 27, 2013)(Shearouse Adv. Sh. No. 14 at 50), the Supreme Court stated, in the context of a home inspection contract containing limitations of liability:

Courts should not refuse to enforce a contract on grounds of unconscionability, even when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract.

⁶ Unfortunately, the Court of Appeals never explicitly states why ¶ 14(h) is problematic other than to note that if D.R. Horton terminate prior to the closing, “no cause of action shall accrue on behalf of [the Smiths....” It is difficult to see why this would be “unconscionable” when it is only contemplated in the case of a bona fide dispute and subject to a 10-day good faith resolution period, written notice, and return of earnest all money to the Smiths. Additionally, since this provision clearly does not survive the closing and therefore would not limit the Smiths in pursuing any remedy or damages related to their home, it is immaterial to the analysis.

Gladden v. Boykin, Op. No. 27236, p. 55)(emphasis added). Here there is no evidence of inequality of bargaining power or other evidence that would suggest the Smiths “cannot be said to have consented to the contract.”

As our Supreme Court recognized, limitations of liability “are routinely entered into. Moreover, they are commercially reasonable in at least some cases, since they permit the provider to offer the service at a lower price, in turn making the service available to people who otherwise would be unable to afford it.” *Gladden v. Boykin*, Op. No. 27236, p. 54), citing, *Head v. U.S. Inspect DFW, Inc.*, 159 S.W.3d 731, 748-49 (Tex. App. 2005). Indeed, the Supreme Court concluded that it could not say that a limitation of liability clause in that circumstance was “so oppressive that no reasonable person would make it and no fair and honest person would accept it.” *Gladden v. Boykin*, Op. No. 27236, p. 54. The Supreme Court refused even to go further and address the issues of whether the plaintiff lacked meaningful choice due to one-sided contract provisions. *Gladden v. Boykin*, Op. No. 27236, p. 54.

In *Gladden*, the limitation on liability section limited damages to the amount the plaintiffs paid for the home inspection and report. *Gladden v. Boykin*, Op. No. 27236, p. 54. This is not qualitatively different than the Purchase Agreement at hand, which disclaims certain warranties, but replaces them with the RWC Warranty, and limits monetary liability to a “repair or replace” remedy. As the Supreme Court concluded in *Gladden*, the mere presence of a limitation of liability clause does not make this circumstance

“so oppressive that no reasonable person would make it and no fair and honest person would accept it.” *Gladden v. Boykin*, Op. No. 27236, p. 54. Likewise, here when there is no evidence in the record regarding the circumstances of the Smiths execution of the Purchase Agreement other than an indication of the existence of handwritten, negotiated terms, and the mere existence of limitations of liability, there is no basis upon which to conclude that they were “so oppressive that no reasonable person would make it and no fair and honest person would accept it” other than the fact that the Smiths did.

In addition, the circuit court and the Court of Appeals have done little more than cite to the existence of the Limitations of Liability as evidence of unconscionability. In truth, the limitations of liability in ¶ 14(i) have no bearing on the purpose of analyzing claims of unconscionability in the context of arbitration agreements, which is to “focus generally on whether the arbitration clause is geared towards an unbiased decision by a neutral decision-maker.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669; citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999). Nothing in the arbitration provision would suggest anything other than an unbiased decision by a neutral decision-maker.

In this case, the arbitration provision 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 truth, the Purchase Agreement would afford an arbitrator the same authority and pre-

rogative as any state or federal court to declare the limitation of liability in ¶ 14(i) unconscionable and to refuse to enforce it. Accordingly, the circuit court and the Court of Appeals improperly relied upon the limitation of liability in ¶ 14(i) in finding unconscionability.

3. THE COURT OF APPEALS MISAPPLIED OR IGNORED THE *PRIMA PAIN* DOCTRINE

Not only was it unnecessary to interpret the arbitration provision in the context of the other unrelated terms, it was improper to do so. To the extent 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” unrelated to the arbitration provision itself, it did so in violation of the *Prima Paint* doctrine. (R. 4, 6). Similarly, the Court of Appeals appears to have misapplied or ignored the *Prima Paint* doctrine in its finding, without explanation, that the circuit court “viewed the Warranties and Dispute Resolution Section 14 as a whole” and the Court of Appeals apparent affirmation of that viewpoint. *Smith v. D.R. Horton*, Op. No. 5118, p. 64.

B. The Prima Paint Analysis

In *Prima Paint*, the United States Supreme Court addressed whether, under the Federal Arbitration Act, 9 U.S.C. § 1 et seq., a claim of fraud in the inducement of the entire contract—as opposed to the arbitration provision 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.*, 383 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.*, 312 S.C. at 403, 440 S.E.2d at 879 (“Arbitration clauses are separable from the contracts in which they are imbedded.”); *New Hope Missionary*, 379 S.C. at 630, 667 S.E.2d at 6; *Cornerstone Hous.*, 356 S.C. at 340, 588 S.E.2d at 623.

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 determination of unconscionability was based on its finding that of "oppressive and one-sided provisions," which the circuit court identified were in the "Limitation on Liability" provision at ¶ 14(i), which is separate and distinct from the arbitration provision at ¶ 14(g). (R. 2-3; R. 151-152, ¶ 14(g), (i)). The circuit court later generally alluded to "an entire host of attempted waivers of important legal remedies" in denying D.R. Horton's motion for reconsideration, without specifically identifying the offending language. (R. 4-5). Regardless, such language does not appear in the arbitration provision. Hence, the circuit court appears to have found unconscionability only within the Purchase Agreement at large rather than in the arbitration provision itself. The Court of Appeals has cited no other offending language other than at ¶ 14(h) or ¶ 14(i) upon which to affirm. Under the *Prima Paint* doctrine as applied by South Carolina courts, the Smiths cannot avoid arbitration on that basis.

C. A "Severability" Analysis is Inapplicable

The Court of Appeals draws heavily upon *Simpson* in concluding that the arbitration provision "should not be severed from the numerous unconscionable provisions contained in the limitations of liability section within the Purchase Agreement. However, reliance upon *Simpson* and this severability analysis is misplaced for at least two reasons. First, neither D.R. Horton nor

the Smiths raised the severability issue addressed in *Simpson*. Further, the severability issue raised in *Simpson* is inapplicable.

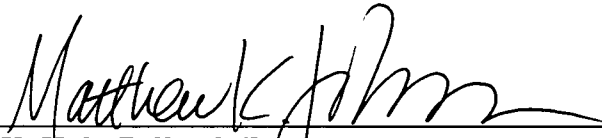
In *Simpson*, the Supreme Court was faced with a significantly different scenario. There, the severability issue involved a single paragraph within the automobile trade-in contract for which the automobile dealership sought to enforce arbitration against its customer. *Simpson*, 373 S.C. at 19–21, 644 S.E.2d at 666. The single paragraph at issue there was an arbitration provision that included within the arbitration language itself numerous limitations of liability and one-sided provisions favoring the automobile dealership. Because the “unconscionable” provisions were within the arbitration provision itself, *Prima Paint* did not apply, and was not addressed, in *Simpson*. On the other hand, the structure of the Purchase Agreement at hand contains separate and distinct sections with respect to arbitration and the limitations of liability that the circuit court and the Court of Appeals have found “unconscionable.” Because they are maintained in separate and distinct sections, *Prima Paint* applies.

As addressed above, *Prima Paint* is not a “severability” doctrine—it is a “separability” doctrine that limits judicial determination to an analysis of the arbitration provision itself. Accordingly, because the parties have not raised the issue of severability, but have raised the *Prima Paint* doctrine, the Court of Appeals analysis should have focused on that issue.

CONCLUSION

For the foregoing reasons, the Court of Appeals should grant Appellant D.R. Horton, Inc.'s Petition for Rehearing.

Respectfully submitted,



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May 2, 2013

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.

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: 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

May 2, 2013


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