THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Edgar Warren Dickson, Circuit Court Judge

Case No. 2010-CP-18-00641

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.....Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On April 17, 2013, this Court entered an Opinion affirming the circuit court's Orders finding Appellant's arbitration provision unconscionable. Disappointed with that outcome, Appellant now seeks reconsideration of this Court's well-reasoned decision. The Opinion accurately sets forth the procedural posture and material facts of the case, which also have been presented previously in detail through Respondent's Brief. For sake of brevity, these matters are incorporated herein rather than repeated.

ARGUMENT AND CITATION OF AUTHORITY

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001); Rule 221(a), SCACR. It is not an opportunity to have the case tried in the appellate court a second time. *Id.* Rule 221(a) requires Appellant to state with particularity the points that were **overlooked** or **misapprehended**. *See Sloan v. Greenville County*, 2009 S.C. App. LEXIS 489, 3 (Ct. App. Jan. 7, 2009) ("After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded."). Likewise, there are none here. Appellant merely rehashes arguments raised throughout its prior briefs and again at oral argument, all of which have been considered and rejected. That the Court disagrees with Appellant's desired result is not a ground for reconsideration.

I. RECONSIDERATION IS NOT NECESSARY TO ADDRESS WHETHER THE PURCHASE AGREEMENT WAS A CONTRACT OF ADHESION.

As this Court recognized, "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." *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663 (2007). There is nothing to suggest this definition applies only to an adhesion contract. True enough, one prong of the analysis revolves around "the absence of meaning choice," but that might arise in several circumstances, only one of which is an adhesion contract. Appellant overlooks our Supreme Court's clear instruction that, "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." *Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (emphasis added). Here, after careful review both the circuit court and this Court agreed Appellant's arbitration provision is unconscionable. It just so happens that this case also involves an adhesion contract, rendering Appellant's perceived grounds for rehearing moot.

If there were any doubt that Appellant's contract was a contract of adhesion, the issue was settled at oral argument before the circuit court. There, Appellant conceded, "**If [Respondents] didn't like this deal they could have gone elsewhere.**" (R. p. 183, lines 2-3) (emphasis added). Appellant's admission represents the epitome of a "take-it-or-leave-it" contract offering. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). In the very least it is undeniable evidentiary support in the record for the circuit's similar finding. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 663 (noting, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings).

The effect of this admission is simple: "'[T]he presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.'" *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (quoting *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 1998 Ohio 294, 700 N.E.2d 859, 866 (Ohio 1998)). Thus, Respondents agree the "beginning point" for determining the unconscionability of the Purchase Agreement's arbitration provision naturally involves consideration of whether it is a contract of adhesion. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998). But, this is because an adhesion contract will be analyzed with "considerable

skepticism." *Simpson*, 373 S.C. at 27, 644 S.E.2d at 670. An express finding that Appellant's contract was a contract of adhesion is not, as Appellant's suggest, an outright condition precedent to the ultimate determination of unconscionability, and this Court need not revisit the issue. This is especially true considering Appellant's dismissive perspective about the Smith's options of either agreeing to Appellant's terms or finding someplace else to live.

Respondents incorporate the arguments raised throughout its Brief and in the Record on Appeal for additional proof that Appellant's contract was one of adhesion. (R. pp. 104-113; 115-116; 169, lines 7-10). Appellant has pointed to nothing new, and reconsideration of this matter is unnecessary. The Court's well-reasoned opinion, following its *de novo* review[1] of the issues before it, adhered to and properly applied the controlling precedent in this state, neither overlooking nor misapprehending any matter of consequence.[2]

II. THIS COURT PROPERLY APPLIED *SIMPSON* AND DETERMINED APPELLANT'S ARBITRATION CLAUSE IS UNCONSCIONABLE AND UNENFORCEABLE.

Appellant argues yet again that its arbitration provision is not unconscionable. Even a cursory reading of this Court's opinion proves this argument has been heard, carefully considered, and rejected. Nothing has been overlooked or misapprehended, and reconsideration of this issue is unnecessary.

One point is worth noting, however. In its Petition, Appellant cites to the Supreme Court's recent decision in *Gladden v. Boykin*, Op. No. 27236 (S.C. Sup. Ct., filed March 27,

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[1] "Arbitrability determinations are subject to *de novo* review." *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005).

[2] Purely for sake of argument only, even if it is perceived that this issue warrants reference in the published opinion, there is no need to rehear the case because the outcome is not affected. *See State v. Nicholson*, 366 S.C. 568, 582, 623 S.E.2d 100 (Ct. App. 2005) ("We therefore conclude that, although the argument concerning the scope of the cross-examination of Nicholson's accuser may have been overlooked in the prior opinion, the omission did not concern a material fact or point of law so as to warrant rehearing the case.").

2013) as helpful to its cause. If anything, *Gladden* further underscores the view in South Carolina that **residential builders** must be responsible to the homeowners who rely on them to properly construct homes. *Compare Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 344, 384 S.E.2d 730 (1989) ("We have made it clear that it would be **intolerable** to allow builders to place defective and inferior construction into the stream of commerce.") (emphasis added). The Majority Opinion in *Gladden* notes:

> It is one thing **to impose greater demands on the builder of a new home**, who is in a position to know of the home's defects, and another to impose a similar standard on an inspector who makes only a brief survey of the home with the buyer's full knowledge of the limited service the inspector is offering. *See Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47, 49 (2009) ("**[T]he transaction between a *builder* and a *buyer* for the sale of a home largely involves inherently unequal bargaining power**...[W]e created this narrow exception to the economic loss rule to apply solely in the residential home context.") (emphasis added). The General Assembly has imposed liability on the party with greatest access to information about the home's defects, where it most logically resides.

Gladden, p. 3 (italics in original, bold emphasis added). *Gladden* reinforces the fact that Appellant, an admitted large corporation supplying newly constructed homes to ordinary buyers,[3] is held to a greater standard in terms of its dealings with homeowners. As the **builder** of the defective home in question, Appellant cannot rely on *Gladden's* limited scope. Instead, *Gladden* reaffirms that Appellant bears responsibility for, and cannot so easily escape, the many deficiencies in its work.

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[3] Appellant admitted there is no evidence Respondents were offered options or alternatives for dispute resolution differing from the predetermined terms of the Purchase Agreement. (R. p. 194, lines 21-25). Appellant is a self-described large corporation with operations in twenty-seven states. (R. pp. 115-116; 169,.lines 5-10). It cannot reasonably be disputed that ordinary consumers like Respondents are not on equal footing with a corporation the size of Appellant in terms of bargaining power.

III. APPELLANT'S RELIANCE ON *PRIMA PAINT* IS FATALLY FLAWED AND HAS ALREADY BEEN CONSIDERED AND REJECTED.

Appellant did not advance this argument prior to its motion in the circuit court for reconsideration under Rule 59(e). "A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 443 S.E.2d 399 (Ct. App. 1994). *Accord McMillan v. S.C. Dep't of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (finding issues not preserved because they cannot be raised for the first time in a motion for reconsideration). This argument should be disregarded here.

Regardless, this argument was not overlooked or misapprehended, as this Court's Opinion discusses *Prima Paint* in Section III.B. Conducting yet another review of this failed argument is unnecessary. *Prima Paint* involved an action filed in federal court seeking to rescind the entire agreement between the parties on the basis that the agreement itself was procured by fraud. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (U.S. 1967). A similar issue existed in *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 562-563 (S.C. 1993). These authorities have no application here whatsoever, as the present facts are inapposite. In fact, the word "unconscionable" is found nowhere within the entire *Prima Paint* decision, and the same is true of *Great W. Coal*.

To suggest the "whole contract" has been challenged, is to insert words and meaning that do not exist in this Court's Opinion, and this was never Respondents' argument below. Likewise, there has been no conflation of allegedly "separate and distinct" provisions within Paragraph 14 of the Purchase Agreement as Appellant suggests. Although Appellant now

claims these provisions involve "wholly unrelated issues" (Petition, p. 10) Appellant's position before the circuit court was at first much different. Appellant argued:

> As to unconscionability, Your Honor, I think I'll – the reason why I wanted the Court to read into the record **the entire paragraph** is, actually this is in conjunction with a lot of additional warranties that D.R. Horton does provide during the first year that not every residential builder is provided or required to provide, including the RWC warranty and that type of thing. So, what this is, I **think if you read it was a whole it disclaims damages for those types of things that they're warranting and saying that they'll coming in and fix during that first year.**

(R. pp. 180-181) (all emphasis added).

Appellant's subsequent, revised argument that all of these inseparable provisions should be read in isolation from one another is contrary to common sense and well-settled rules of contract construction. [4]

In case there is any doubt, Respondents specifically challenged the arbitration language as being unconscionable. On the very first page of Respondents' Memorandum in Opposition, it was made clear, "Plaintiffs believe that the arbitration clauses in the contract for the purchase of the residence at issue and in the RWC Warranty are unconscionable and unenforceable...." (R. p. 121). Respondents continued to advance this argument throughout the proceedings below. (R. pp. 172, line 6; 176, line 23; 179, lines 12-25; 212, lines 15-24). In fact, Respondents asserted a claim for breach of contract against Appellant, which would not lie if the entire agreement was unenforceable. (R. pp. 53-54). Appellant's continued attempt to turn

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[4] Because an arbitration clause is a contractual term, general rules of contract interpretation apply where the court must determine the clause's applicability. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). This includes the well-settled tenet of contract construction that a court should construe different provisions together that **deal with the same subject matter**. *Buice v. WMA Secs., Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008).

Respondent's challenge into something it is not is akin to driving a square peg into round hole. *Simpson*,[5] not *Prima Paint*, provides the operable framework for analysis here, which this Court correctly recognized and applied.

As Respondents pointed out to the circuit court when Appellant first made this argument at the rehearing stage, "[Appellant is] trying to make a distinction from the *Simpson* case and indicated that the one sided provisions and the arbitration provisions are in two different spheres in this case. **It's all tied to Paragraph 14, Your Honor, where they attempt to deny the remedies and also try to force them into arbitration, all Paragraph 14.**" (R. p. 212).[6] For example, Paragraph 14(a) provides for the RWC warranty, then Paragraph 14(c) requires arbitration of the RWC warranty, which is cross-referenced again in Paragraph 14(g) calling for arbitration of "any warranty." Paragraph 14(i) attempts to disclaim various warranties and dramatically limit Appellant's exposure to liability. The "Punch List" and "Inspection Agreement" provisions that are referenced, *inter alia*, in subparagraphs 14(d), (e), and (f) are likewise expressly incorporated into the arbitration provision as well. (R. pp. 108-109) Appellant admits the arbitration provision applies to these other matters, which are

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[5] Arguably, the only difference between the lengthy, *single paragraph* arbitration provision in *Simpson* and the combined provisions of Paragraph 14 of the Purchase Agreement is that Appellant separated the interrelated portions of Paragraph 14 into subparts with the letters (a) through (j) assigned to each. Appellant cannot avoid the collective unconscionability of its Dispute Resolution terms so easily, and there is nothing in the Court's analysis or reasoning in *Simpson* that suggests the Supreme Court would have allowed that unconscionable provision to stand if only the dealership had broken up the problematic content into separately numbered subparts. Such a holding would lead to an absurd result.

[6] Appellant's suggestion at page 12 of its Petition that Respondents never made this argument below is incorrect, as the Record on Appeal reflects. More interesting is that Appellant was the party who first wanted to emphasize the importance of reading Paragraph 14 "as a whole" at the initial hearing before the circuit court. (R. pp. 181-182).

found elsewhere in Paragraph 14. (R. pp. 167, lines 6-24; 168, line 24, 167, line 2). Appellant's suggestion that Paragraph 14 as a whole does not reflect its dispute resolution process, including its inseparable arbitration language, is without factual or legal support.

In any event, Appellant is correct that it never sought to sever any of the provisions of Paragraph 14, below or on appeal.[7] This might be explained by Appellant's shift towards relying on *Prima Paint* by the time it moved for reconsideration. Respondents, on the other hand, correctly pointed to *Simpson* for guidance from the outset. Before the circuit court and before this Court, Respondents consistently argued the arbitration clause was unconscionable and it should **not** be severed. (R pp. 173-175). This Court agreed. Rehearing the same issues again is unnecessary.

CONCLUSION

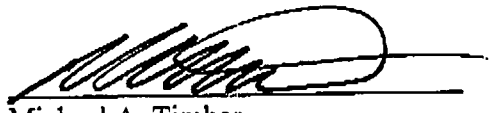
For the foregoing reasons, Respondents respectfully request that this Court deny Appellant's Petition for Rehearing.

Respectfully submitted,

Signature of Counsel to Follow

[7] That said, Appellant **did** argue below, and continue in its Petition to argue, that the **arbitrator** could sever any terms it found unenforceable. (R. p. 203, lines 12-15; Appellant's Petition, pp. 15-16).

THURMOND KIRCHNER TIMBES YELVERTON, P.A.

By: 

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

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

May 13, 2013
Charleston, South Carolina

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AFFIDAVIT OF SERVICE

I, Moira W. Kerrigan, an employee of Thurmond Kirchner Timbes & Yelverton, P.A., attorneys for the Respondents, do hereby certify that I have on this date served via U.S. Mail a true and correct copy of Respondent's Return to Appellant's Petition for Rehearing upon the following ounsel of record:

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

Moira W. Kerrigan
Legal Assistant to Michael A. Timbes

May 13, 2013
Charleston, South Carolina