THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Edgar Warren Dickson, Circuit Court Judge

Appellate Case No. 2011-204347
Opinion No. 5118
Heard February 14, 2013 – Filed April 17, 2013

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.

APPELLANT'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR REHEARING

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ATTORNEYS FOR APPELLANT,
D.R. HORTON, INC.

CERTIFICATE OF COUNSEL

Counsel for Appellant D.R. Horton. Inc. (hereinafter "D.R. Horton"), certifies that Respondents Gregory W. Smith and Stephanie Smith ("hereinafter "the Smiths") filed their Return to D.R. Horton's Petition for Rehearing (hereinafter "Return") on May 13, 2013, and that this Reply has been filed within 5 days thereof pursuant to Rules 240(f), 262(a), and 263(a), *SCACR*.

ARGUMENT

D.R. Horton's Petition for Rehearing plainly states the issues for which a rehearing in *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) (hereinafter "the Opinion") is appropriate. First, the Court of Appeals failed to address whether the Purchase Agreement containing the arbitration clause at issue was a contract of adhesion or whether the Smiths lacked meaningful choice supporting the unconscionability argument under *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). In addition, the Court of Appeals misapplied *Simpson* in finding unconscionability when, even assuming a contract of adhesion and/or a lack of meaningful choice, there were no terms "so oppressive that no reasonable person would make them and no fair and honest person would accept them," either in the arbitration provision at ¶ 14(g) or otherwise in the separate limitations of liability provisions. Finally, the Court of Appeals misapplied or ignored the doctrine set forth in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270

(1967), as applied in South Carolina in *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24–25 (1993), which requires an analysis of unconscionability with respect to ¶ 14(g), standing on its own, rather than conflated with the unrelated and separable provisions contained in ¶¶ 14(a)-(f) and (h)-(j).

In their Return to D.R. Horton's Petition for Rehearing, the Smiths suggest D.R. Horton must demonstrate the Court of Appeals "overlooked or misapprehended" these arguments consistent with *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001); Rule 221(a), *SCACR*. While this is a correct statement of the law, D.R. Horton has done so in its Petition for Rehearing and nothing in the Smiths' Return suggests that it is has not. Rather, as will be addressed herein the Smiths' Return misstates facts and arguments from prior proceedings, improperly characterizes case law, and ignores or misapplies relevant argument and analysis.

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.

Although the Smiths originally agreed that a finding of adhesion is the "beginning point" in the unconscionability analysis, they now attempt to misapply *Simpson* to obscure this fact. (Return, pp. 3–4). Despite these efforts, the fact remains the circuit court never made any factual findings supporting the conclusion that the Purchase Agreement constituted a contract or adhesion, and the Court of Appeals did not address this issue. Clear precedent re-

quires this issue be addressed at the start of the analysis. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

Relying upon Ohio case law cited in *Simpson*, the Smiths seem to suggest that adhesion contracts must be analyzed with "considerable skepticism." However, this misstates *Simpson*, which was quoting language concerning the analysis of sales agreements between consumers and retailers generally, not with respect to adhesion contracts, specifically. *Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669-670, quoting *Eagle v. Fred Martin Motor Co.*, 157 Ohio App. 3d 150, 2004 Ohio 829, 809 N.E.2d 1161 (Ohio Ct. App. 9th Dis. 2004). There is no evidence of a contract of adhesion, and no reason to assume based upon "considerable skepticism" that the Purchase Agreement was a contract of adhesion.

The Smiths wrongly conclude that "[i]t just so happens that this case also involves an adhesion contract." (Return, p. 3). As argued previously, the circuit court made no such findings of fact, nor did the Court of Appeals as evidenced in the Opinion at issue. The Smiths now argue that counsel for D.R. Horton's own statements support the finding of an adhesion contract. The Smiths cite language in which counsel stated the Smiths "could have gone elsewhere" if they did not like the deal offered by D.R. Horton. (Return, p. 3; R. 183). However, a complete reading of the transcript makes clear that this misconstrues counsel's argument. Rather, discussing unconscionability in general, and whether or not the Smiths had meaningful choice, counsel

noted that the Smiths offered no evidence to suggest they "weren't allowed to change any portion of the contract or strike through something or haggle their own deal if they wanted to." (R. 181–182). Indeed, there was no such evidence. Rather, counsel stated that, with respect to the lack of meaningful choice issue, there were "plenty of home builders out there" at that time, that "even [his] dentist was a home builder back then," and that the Smiths had "plenty of choice." (R. 181–182). The argument was not one regarding whether a contract of adhesion was present, rather, it was intended to underscore the fact that the Smiths had an abundance of options in purchasing a new home and, therefore, meaningful choice regarding purchasing a new home pursuant to terms as contained in the Purchase Agreement (even if D.R. Horton had refused to negotiate the terms thereof, of which refusal, or requests by the Smiths for that matter, there is no evidence in the record). Also, there is no evidence in the record that the circuit court relied in any way on counsel's statements at oral argument or that the circuit court made any related findings of fact.

Finally, the Smiths suggest without authority or legal citation that it "cannot reasonably be disputed that ordinary consumers like [the Smiths] are not on equal footing with a corporation the size of [D.R. Horton] in terms of bargaining power." (Return, p. 5, fn. 5). As has been argued previously, there is simply no evidence to suggest that inequality existed in this instance, or that the Smiths were unable to bargain for different or better terms with re-

spect to the limitations of liability or the arbitration provision. Rather, the only evidence of this issue suggests otherwise. The Purchase Agreement plainly shows that the purchase price was stricken through and written in by hand in a different amount, other terms were written in by hand, and the Purchase Agreement provides space for handwritten "Special Stipulations," all of which suggest negotiated terms contrary to a finding of a contract of adhesion or inability of the Smiths to negotiate different terms due to a disparity in bargaining power. (R. 147–148, ¶¶ 2(b) and 3; R. 154, ¶ 20).

It may seem intuitively appealing to assume the existence of such an inequality based simply on the identities of the parties, but without **evidence** such a conclusion is in fact nothing more than an unfounded assumption. There is no evidence in the record of an inequality of bargaining power or other indicia of lack of meaningful choice. There are only two explanations for this absence. They are either: (1) none exists because the Smiths in fact had a meaningful choice and an opportunity to fairly negotiate the contact with D.R. Horton; or (2) the Smiths failed to present available evidence to the circuit court in support of their position. In either case, they should not now receive the benefit of a conclusion arising from an unfounded assumption in their favor.

In truth, the Smiths offered no evidence to support a finding of a contract of adhesion or lack of meaningful choice and counsel for D.R. Horton was simply pointing out that fact. Accordingly, as argued in D.R. Horton's Pe-

tition for Rehearing, there was no basis upon which the trial court or the Court of Appeals could reasonably conclude, based upon evidence in the record, that this was a contract of adhesion or that the Smiths lacked meaningful choice. A finding of unconscionability was, therefore, impossible, and D.R. Horton seeks a rehearing on this ground.

The Court of Appeals erroneously found unconscionability where none exists

The Smiths next address D.R. Horton's argument that, even assuming there is an adhesion contract or that there was evidence of a lack of meaningful choice, the Purchase Agreement still did not 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 669. (*See*, Return, p. 4–5). The Smiths suggest this issue was "carefully considered" and "rejected," although there is no evidence that the circuit court ever made factual findings on this issue. Additionally, it appears that the Court of Appeals' unconscionability determination is based solely on a lack of mutuality analysis, which under *Simpson* is not sufficient for a finding of unconscionability. *Simpson*, 373 S.C. at 31, 644 S.E.2d at 672, *citing Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542, 542 S.E.2d 360, 365 (2001)(holding that an arbitration agreement between a consumer and a lender was not unconscionable where it allowed the lender to seek foreclosure while requiring the consumer to arbitrate any counterclaim in the foreclosure

action); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 402, 498 S.E.2d 898, 905 (Ct. App. 1998)(same).

Neither the Court of Appeals nor the Smiths addressed D.R. Horton's argument that it provided an additional RWC Warranty in lieu of disclaimed warranties, along with a host of other provisions such as those concerning trees and landscaping or warranty service that were either equally applicable or favorable to the Smiths. (R. 150–152). These would impact the analysis of whether there were indeed one-sided, oppressive terms such that "no reasonable person would make them and no fair and honest person would accept them." We only know that the Smiths accepted them; perhaps they could have put evidence into the record to support a finding that these terms were undesirable to them at the time the Purchase Agreement was signed, but they either did not or could not.

In ascribing unconscionability, the Court seems to have been most concerned with the Limitation of Liability clause set forth as ¶ 14(i). D.R. Horton has already shown that such a provision, even if it were part of the agreement to arbitrate and therefore germane to the analysis, which it is not (as discussed in more detail below) would not render the entire Purchase Agreement or the self-contained arbitration provision at set forth at ¶ 14(g), unconscionable. (*See*, Petition for Rehearing, pp. 12–15). Indeed, *Gladden v. Boykin*, Op. No. 27236 (S.C.Sup.Ct. filed Mar. 27, 2013)(Shearouse Adv. Sh.

No. 14 at 50), made plain that the South Carolina Supreme Court viewed limitations of liability favorably in not dissimilar circumstances.

At most, the Smiths attempt to distinguish *Gladden* by arguing it suggests a different analysis of the unequal bargaining power element of the lack of meaningful choice aspect of unconscionability.[1] (Return, pp. 4–5). Even if true, this would not change the fact that *Gladden* establishes that the Appellate Court erred in deeming the limitation of liability set forth at paragraph 14(i) to be the unconscionable.

The Smiths' discussion of *Gladden* also fails on the issue of unequal bargaining power between the parties. (See, Return, p. 5). Although the Smiths' citation to *Gladden* references unequal bargaining power between a builder and a home buyer, it does so only in discussing public policy related to the relationship between a home inspector and a home buyer while citing Ohio law related to the economic loss rule, in a separate discussion from the Supreme Court's analysis of the unconscionability. *Gladden v. Boykin*, Op. No. 27236, p. 53, *citing Sapp v. Ford Motor Co.*, 386 S.C. 143, 148, 687 S.E.2d 47-49 (2009).

The Smiths' discussion of *Gladden* also suggests it reinforces "the fact that" D.R. Horton is "an admitted large corporation" that should be held to a

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[1] For the sake of consistency of argument structure, D.R. Horton is addressing the Smiths' *Gladden* argument here since D.R. Horton raised *Gladden* in the context of analyzing limitations of liability under the "one-sided, oppressive terms" element of the *Simpson* unconscionability analysis . However, the Smiths' usage of *Gladden* here likely relates to D.R. Horton's "meaningful choice" analysis at p. 2–6 herein.

"greater standard in terms of its dealings with homeowners." (Return, p. 5). Although not explicitly stated, it appears this is an argument to support their claim of lack of meaningful choice pursuant to *Simpson*, which is untrue and unsupported. The Smiths fail to cite any provision of *Gladden* or other case law to support this notion in the context at hand.

Rather, the Smiths cite to argument by D.R. Horton's counsel before the circuit court, but do so in an extremely misleading fashion. Whereas the Smiths suggest D.R. Horton's counsel "admitted there is no evidence [the Smiths] were offered options or alternatives for dispute resolution," they avoid the more significant part of that argument. (Return, p. 5, fn. 3). Counsel for D.R. Horton acknowledged that there was no such evidence, but did so in the context of showing to the trial court that there was no evidence whatsoever upon which the circuit court could find unconscionability. (R. 194). Indeed, counsel specifically stated "neither is there any record that the [arbitration] provision itself was non-negotiable." (R. 194).[2]

Similarly, counsel's argument in that same paragraph reflected the holding in *Gladden*, which is to suggest that limitations of liability are not inherently unenforceable and are "routinely entered into" and are "commer-

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[2] Again, the circuit court's order does not quote any language from counsel's argument and there is no evidence that it made any findings of fact on this basis. Respondents are essentially asking the Court of Appeals to now consider selected excerpts from D.R. Horton's oral argument to the circuit court, often taken grossly out of context, as findings of fact below. If this is the Smith's position, logical consistency demands that counsel's entire argument be treated as dispositive, which will of course result in a reversal of the circuit court's order.

cially 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 would otherwise be unable to afford it." *Gladden v. Boykin*, Op. No. 27236, p. 54 (internal citations omitted). Counsel for D.R. Horton made nearly the same argument, suggesting that the cost of construction and price of the home may have been higher if, for instance, the arbitration clause was not present. (R. 194).

The Court of Appeals misapplied or ignored the *Prima Paint* doctrine

The Smiths also argue that D.R. Horton's reliance on *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), is flawed and was previously considered and rejected by the Court of Appeals. In part, the Smiths' belief that D.R. Horton's *Prima Paint* argument is flawed, and perhaps the circuit court's and Court of Appeals' decisions in this regard, ignores the key distinctions between: (1) the Purchase Agreement in this case and the contract in *Simpson*; and (2) the completely unrelated characters of the analyses and resulting holdings in *Simpson* versus *Prima Paint*. While instructive as to the evaluation of whether particular contract terms are substantively unconscionable, *Simpson* is so distinguishable from this case as to be essentially irrelevant.

In *Simpson*, the Court was presented with a situation in which there was no dispute as to which portions of the contract constituted the arbitration clause. There was no question but that the provisions being challenged

as unconscionable were part and parcel of the agreement to arbitrate, and the defendant did not assert that they were not. In fact, the defendant accepted that they were part of the agreement to arbitrate, but asked that they be severed.

This case is completely different, but in rendering its Opinion, the Court of Appeals seems to have ignored this important distinction. D.R. Horton maintains that ¶ 14(g), standing alone, constitutes the entirety of the agreement to arbitrate and that it should be evaluated as such. The Smiths, conversely, take the position that the agreement to arbitrate should be conflated with ¶¶ 14(a)-(f) and (h)-(j) and seek to impute the allegedly unconscionable nature of certain provisions contained within those paragraphs to the p¶ 14(g) agreement to arbitrate. D.R. Horton maintains that ¶¶ 14(a) through (j) are distinct and ***separable*** from one another, and that the *Prima Paint* doctrine requires that the agreement to arbitrate at paragraph 14(g) be evaluated on its own merit.[3]

Simpson does not address this question at all and it is wholly inapposite to the present case on this issue. Accordingly, the ultimate decision in this case cannot appropriately be grounded in *Simpson*, as the Smiths would suggest, and as the Opinion for which rehearing is sought seems to be grounded. Rather, the Court should look to the *Prima Paint* analysis and con-

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[3] Further to the point of the standard for a motion for rehearing, it should be noted that this question of what provisions of the contract constitute the agreement to arbitrate is one that was briefed by the parties, and is central to the dispute, but which was not analyzed in the Court's opinion.

clude that the agreement to arbitrate, ¶ 14(g), when properly considered standing alone, is wholly enforceable, leaving it to the discretion of the arbitrator to hear and decide any challenges that the Smiths might raise to the enforceability of any other provision of the Purchase Agreement, whether designated as a subparagraph of Paragraph 14 or otherwise.

Moving on to additional issues raised in the Smiths' Return, the Smiths suggest that D.R. Horton's *Prima Paint* argument should be disregarded because it was not raised until the Motion for Reconsideration pursuant to Rule 59(e). (Return, p. 6; R. 126, 128–145). The Smiths previously argued this same point. (Resp't's Brief, p. 4). As stated in D.R. Horton's Reply, the cases the Smiths cite fail for a number of reasons. (App't's Reply Brief, pp. 7–8). In those cases, the argument being precluded was one in which a party sought relief on appeal based upon grounds that existed and needed to have been argued prior to the motion to reconsider. *See, Anderson Mem. Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994); *McMillan v. S.C Dept. of Agric.*, 364 S.C. 60, 67, 611 S.E.2d 323, 327 (Ct. App. 2005, reversed on other grounds by 380 S.C. 212, 670 S.E.2d 368 (2008); and *Hickman v. Hickman*, 301 S.C. 455, 457, 392 S.E.2d 481, 482 (Ct. App. 1990). In this case, D.R. Horton's *Prima Paint* argument only became necessary when the Circuit Court's Order denying the Motion to Compel Arbitration was issued (improperly conflating unrelated provisions of the Purchase Agreement to the agreement to arbitrate as explained above), at which time

Prima Paint was raised in the motion for reconsideration to address the trial court's error. (R. 87–88, 94–102, 126–127, 157–160).

The Smiths next mischaracterize the Court of Appeals' Opinion as it relates to *Prima Paint*. The Smiths suggest that the Court of Appeals "discusses" *Prima Paint* in Section III.B. of the Opinion. (Return, p. 6). As discussed above, the Court of Appeals' Opinion does not meaningfully address the *Prima Paint* analysis in this case, and it in fact does not even reject D.R. Horton's argument on this subject. The Court of Appeals' only treatment of *Prima Paint* is limited to a citation in support for the proposition, with which D.R. Horton agrees, that an 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." Op. No. 5118 at 64–65, *citing Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (*citing Prima Paint*, 388 U.S. 395, 87 S.Ct. 1801 (1967). This hardly suggests that D.R. Horton's *Prima Paint* analysis is a "failed argument" as suggested by the Smiths or that the Court of Appeals meaningfully and correctly analyzed the agreement to arbitrate under *Prima Paint*. (Return, p. 6). Indeed, the Court of Appeals made its reference to *Prima Paint* in connection with its discussion of "severability" (an issue not raised by the parties); whereas *Prima Paint* is concerned with "separability" (an issue squarely of significance to Appellant's argument). This suggests a misapprehension of the *Prima Paint*

argument and a corresponding misapplication of the same in the Court of Appeals' Opinion.[4]

The Smiths also suggest *Prima Paint* is inapplicable since the word "unconscionable" is not found within that opinion, or within *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24–25 (1993). (Return, p. 6). Again, this is misleading given that *Great Western Coal* states 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." *S.C. Pub. Service Auth. v. Great W. Coal*, 312 S.C. 559, 562–563, 437 S.E.2d 22, 24. That is the issue here. Contrary to the Smiths' suggestion, *Prima Paint* applies to the analysis of challenges to the enforceability of arbitration provisions grounded in assertions of unconscionability.

The Smiths also argue, in an apparent effort to confront the *Prima Paint* analysis, that the agreement to arbitrate, itself, is in fact being challenged. (Return, p. 7). However, as explained above, the only way to reach the result the Smiths desire is to conflate the actual agreement to arbitrate, ¶ 14(g), with all other provisions appearing as subparagraphs of Paragraph 14, thereby arguing that the <u>entirety</u> of ¶¶ 14(a) through (j) are the "the arbitration language," despite the fact these are plainly separate provisions concern-

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[4] The Smiths even acknowledge D.R. Horton never made a "severability" argument, except to the extent an arbitrator would have the ability to sever unenforceable terms, which is irrelevant here. (Return, p. 9).

ing distinct and substantively unrelated subjects, *e.g.*, trees and landscaping requirements, third party warranties, etc. As already explained, this distinction is fundamental to this case, and neither the circuit court nor the Court of Appeals properly addressed it.

The Smiths continue to maintain that *Buice v. WMA Securities, Inc.*, 380 S.C. 149, 156-157, 668 S.E.2d 430, 434 (Ct. App. 2008), allows them to construe these various provisions together since they allegedly "deal with the same subject matter." (Return, p. 7, fn. 4). As explained previously, *Buice v. WMA Securities* and *Skull Creek Club Ltd. Partnership v. Cook & Book, Inc.*, 313 S.C. 283, 437 S.E.2d 163 (Ct. App. 1993), are irrelevant as they deal strictly with the determination of the parties' intent in the face of ambiguity. Since there is no evidence or even assertion of such an ambiguity, these cases are inapplicable. (*See,* App't's Reply Brief, p. 9, fn. 1). It is also unclear how the Smiths suggest the separate and distinct provisions of ¶¶ 14(a)-(j) "deal with the same subject matter" when it is readily apparent that the structural warranty, RWC warranty, tree and landscaping provisions, limitations of liability, and warranty service provisions are unrelated to whether or not the parties agreed to arbitrate in ¶ 14(g).

Other than a self-serving reference to the Smiths' attorney's own argument before the circuit court (Return, p. 8), the Smiths' only other factual argument that the separate and distinct provisions should be read together is based upon a mischaracterization of D.R. Horton's attorney's argument be-

fore the circuit court. (Return, p. 7). Counsel for D.R. Horton did request the circuit court "read into the record the entire paragraph" and referenced reading it "as a whole." (Return, p. 7; R. 181–182). However, the purpose there was to ensure completeness of the record in the first instance and to ensure that the circuit court was aware of additional warranties D.R. Horton provided to the Smiths for which liability is limited elsewhere in Paragraph 14. (R. 181–182).

The Smiths also suggest treating ¶¶ 14(a) through (j) each separately would lead to an "absurd result." (Return, p. 9, fn. 6). This is untrue and illogical. To the contrary, the absurdity lies in the interpretation promoted by the Smiths. If anything, the limitation of liability contained in ¶ 14(i) can form nothing more than a putative defense that may be asserted by D.R. Horton in its discretion. D.R. Horton has never taken the position in this case, and in fact has vehemently disputed, that ¶ 14(i) constrains the ability of an arbitrator to award damages. Rather, it maintains that an arbitrator may interpret the Purchase Agreement and the respective rights and obligations of the parties and award damages, if appropriate in his judgment, just as a jury or judge in the circuit court. It is the Smiths who seek to impose upon D.R. Horton an obligation to assert as a defense a limitation on the authority of an arbitrator which D.R. Horton does not recognize or intend. This is effectively nothing more than contractually interpretive gamesmanship designed to create a means of absolving the Smiths of a contractual obligation where no le-

gitimate "out" exists. The Smiths have cited no case law that supports their attempt to impose such an interpretation. To allow the Smiths to prevail on the basis of this gambit, ultimately founded upon nothing but the numerical/alphabetical organization of the document, would be truly absurd, and manifestly unjust.

Finally, the Smiths would ignore *Prima Paint* due to a "collective unconscionability" argument. (*See*, e.g., Return, p. 8, fn. 5). This is effectively just a re-casting of the same argument that is refuted above. Again the Smiths cite no legal authority to support such a theory, much less authority overruling *Prima Paint* or the South Carolina Supreme Court's decision in *Great Western Coal,* both of which require a narrow analysis of unconscionability tied solely to the arbitration provision, *i.e.*, ¶ 14(g) and not the unrelated provisions of ¶¶ 14(a)-(f) and (h)-(j). Again, to the extent any provision outside the agreement to arbitrate at ¶ 14(g) is unconscionable or otherwise unenforceable, this would be for the arbitrator, the same as any state or federal court, to determine within the scope of the arbitration process, a fact the Smiths have never addressed or denied and that neither the circuit court nor the Court of Appeals has addressed. Simply put, the unconscionability analysis should be limited to the arbitration clause itself, meaning ¶ 14(g) alone , and the arbitrator must then rule upon the enforceability of the remaining provisions, just as a circuit court would. (App't's Brief, p. 18; Petition for Rehearing, pp. 15–16).

CONCLUSION

For the foregoing reasons, despite the arguments set forth in the Smiths' Return, Appellant respectfully asserts that the Court of Appeals overlooked, misapprehended, or simply misapplied Appellant D.R. Horton, Inc.'s arguments as to material facts and/or principles of law at issue in this case and that the Court should grant its Petition for Rehearing.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I certify that I have served the *Reply to 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

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