THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

Case No. 2022-CP-16-01053
Appellate Case No. 2024-000338

Joshua Phillips, ……... Appellant,

v.

Renu Energy Solutions, LLC,……..……... Respondent.

PETITION FOR REHEARING

The Appellant Joshua Phillips hereby petitions for rehearing as to this Court's Unpublished Opinion No. 2025-UP-225, filed July 2, 2025 (the "Opinion"). As set forth below, Mr. Phillips respectfully submits that the Court of Appeals incorrectly placed inordinate weight on whether solar panels are a necessity, incorrectly applied a post-hoc analysis on whether the terms of the arbitration clause were oppressive because of cost, and analyzed the wrong statute section in its ruling on unconscionability and public policy. Moreover, the Court failed to analyze the issue of waiver under the correct standard. For these reasons, the Court should withdraw the Opinion and issue a corrected opinion upholding the Circuit Court's decision.

I. The Court of Appeals incorrectly considered the necessity of a consumer good to be the deciding factor in analyzing whether Mr. Phillips had meaningful choice.

In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 633 (2007), our Supreme Court found whether a consumer good is "critically important" to be merely a factor in analyzing

meaningful choice—not the determining factor. The Court considered many other factors in analyzing this issue in *Simpson*, including: the fact that the plaintiff did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, that she did not have a lawyer present to provide any assistance in the matter, the fact the contract was hastily presented for her signature, and the inconspicuous nature of the arbitration clause in light of its consequences. Uncontroverted facts supporting each of these factors are presented in the record before the Court. Yet, the factors were not considered at all in the Opinion.

As noted by the Court and recognized in *Simpson*, the fact that a consumer good like a house or a car may be necessities in modern society may support the conclusion that a consumer has no meaningful choice but to accept the arbitration agreement—even if the consumer apprehends its consequences. The Court's Opinion incorrectly places determinative weight on that factor. This, in turn, ignores the vast number of other consumer transactions where the product is not a necessity but the consumer was deprived of meaningful choice in some other regard such as when there is significant disparity in business sophistication of the parties, lack of attorney assistance, being rushed through the signature process so that the agreement is not read, and the inconspicuousness of the clause. The Court's Opinion incorrectly ignores these considerations and, in doing so, unnecessarily limits the types of consumer transactions in which unconscionability may even apply.

The Court should consider the other factors and uphold the Circuit Court's decision.

II. The Court of Appeals incorrectly and improperly based its ruling that the arbitration costs were not excessive on evidence occurring after the time of contracting.

The analysis of whether a contract clause is unconscionable is constrained to whether it was "unconscionable at the time it was made." S.C. Code § 36-2-302(a). By contrast, the Court's

Opinion improperly considered evidence occurring after the time of contracting—Respondent's belated willingness to stipulate to rules more cost-effective for the consumer—as rendering the costs speculative. But, the fact the Respondent is willing to stipulate to some other rules for arbitration after a dispute has arisen and after the time of contracting is completely irrelevant to whether the projected arbitration costs were excessive at the time the contract was entered. For this reason, the Court's Opinion is flawed.

Moreover, the Court's Opinion posits, without analysis, that its decision is also supported by the multiple methods of selecting an arbitrator. But, again, this fact suffers from the same flaw as above. The arbitration clause indicates that there will be a panel of three arbitrators—which more than triples the cost of the arbitration—unless the parties agree to a single arbitrator. The parties most certainly would not have agreed to a single arbitrator but, regardless, such an agreement would be after the time of contracting and thus irrelevant to the unconscionability analysis.

III. This Court incorrectly analyzed the wrong statute section in its ruling on unconscionability and public policy.

This Court incorrectly cited S.C. Code 15-7-120(B) in its Opinion. While the Court correctly notes that subsection (B) has been ruled preempted by the FAA, that is not the subsection relied on by the Circuit Court in its decision.

Instead, the Circuit Court relied on S.C. Code § 15-7-120(A) in finding that the venue selection clause in the arbitration agreement to be both unconscionable and violative of South Carolina public policy. That statutory section is applicable to all contracts—not just arbitration clauses—and, so, it is not preempted by the FAA. The cases cited by the Circuit Court in its order make this distinction clear. *See Insurance Products Marketing v. Indianapolis Life*, 176 F.Supp.2d 544, 550 (D.S.C. 2001) ("[T]he fact that the statute is applicable to all civil cases across the board

. . . leads the court to conclude that the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect."); *Consolidated Insured Benefits v. Conseco Medical*, 370 F.Supp.2d 397, 401 (D.S.C. 2004) ("[T]he court reaffirms its conclusion that South Carolina has a strong policy disfavoring forum selection clauses. While the legislators may not have declared the state policy in the text of the statute, the statute embodies South Carolina's policy against forum selection clauses through what it expressly allows."). Each of these cases analyzed subsection (A), not (B), of S.C. Code § 15-7-120. Subsection (A) remains law in South Carolina and, as federal courts have observed, indicates a strong public policy in South Carolina against forum selection clauses. Thus, the inclusion of an unenforceable forum selection clause in the arbitration agreement at issue is violative of public policy and unconscionable.

The Court should correct its Opinion and uphold the decision of the Circuit Court.

IV. This Court incorrectly analyzed the issue of waiver under a standard which should be overturned based on intervening precedent.

The Court's Opinion analyzes the issue of waiver solely under precedent requiring a showing of prejudice for waiver to invalidate an arbitration clause. As detailed in Mr. Phillip's brief and the Circuit Court's decision, waiver should no longer be a requirement based on intervening United States Supreme Court precedent on the issue.

The Court should correct its Opinion and uphold the decision of the Circuit Court on the issue of waiver.

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In conclusion, the Court of Appeals incorrectly decided the issues before it and should grant Appellant's petition for rehearing for the reasons set out above and in Appellant's briefing previously submitted to this Court.

Respectfully submitted,

By: /s/ Andrew M. Connor

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