IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

William C. McMaster, Circuit Court Judge
Case No.: 2024-CP-18-01431

Appellate Case No. 2025-001205

Marisol Kelly……...……...Respondent,

v.

Mid America Apartments, L.P. d/b/a Water's Edge Apartments.....Appellant.

RESPONDENT'S INITIAL BRIEF

Respondent Marisol Kelly, pursuant to Rule 208, SCACR, submits her response to Petitioner's Initial Brief. In support of her Initial Brief, Respondent states the following:

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STATEMENT OF ISSUES ON APPEAL

I. Pursuant to Rule 220(c), this Court should affirm the circuit court's ruling that the arbitration clause in the lease agreement is unconscionable and therefore, unenforceable.

II. Pursuant to Rule 220(c), this Court should affirm the circuit court's ruling that Appellant waived the ability to enforce the arbitration clause in the lease agreement by actively engaging in litigation before filing Appellant's Motion to Compel Arbitration.

STATEMENT OF THE CASE

Pursuant to S.C. App. Ct. R. (208)(b)(2), Respondent Marisol Kelly (hereinafter "Respondent") presents her own Statement of the Case. This appeal arises from a lease agreement between Respondent and Appellant Mid-America Apartments, L.P. d/b/a Water's Edge Apartments on June 9, 2022, for a lease term from June 10, 2022, to May 9, 2023. MIS Mtn. Compel, Ex.1, p.1. The lease agreement between Respondent and Appellant contains an arbitration clause with several sub-sections stating the arbitration provisions apply to all claims arising between Respondent Kelly and Appellant. MIS Mtn. Compel, Ex.1, pp.15-16. On February 20, 2023, Respondent Kelly was walking down the stairs in the common area of the apartment complex owned and operated by Appellant, when she slipped and fell on trash that accumulated on the stairs, causing Respondent Kelly to suffer significant injuries. Complaint ¶¶ 5 - 8.

Respondent Kelly filed her Complaint against Appellant in Dorchester County Court of Common Pleas on August 30, 2024. *See* Complaint, NEF 2024 Aug. 30 12:50 PM. Appellant filed an Answer to Respondent's complaint on October 8, 2024. *See* Answer, NEF 2024 Oct. 08 3:02 PM. Both parties served the other with discovery requests and both parties answered the respective discovery. MIS Mtn. Compel, Ex.2. Appellant also proceeded to send out eight subpoenas to Respondent Kelly's medical providers. MIO Mtn. Compel, pp.1-2. Almost five months after Respondent Kelly filed suit and after engaging in the discovery process, Appellant then moved to stay litigation and compel arbitration. Mtn. Compel. Appellant waited until discovery was

answered by Respondent and subpoenas were sent before submitting the motion to stay and compel arbitration. MIO Mtn. Compel, pp. 4-5. As the drafter of the lease agreement, Appellant had actual knowledge of the arbitration clause contained therein at the inception of this litigation. MIO Mtn. Compel, pp. 4-5. Appellant submitted a memorandum in support of the motion and Respondent submitted a memorandum in opposition of the motion. App MIS Mtn. Compel, Resp. MIO Mtn. Compel. The circuit court heard the motion to compel on February 24, 2025. Hearing Tr. Feb. 24, 2025. After review of the memorandums submitted by counsel and hearing oral arguments, the circuit court denied the motion to stay and compel arbitration on March 25, 2025. Order March 25, 2025.

Appellant proceeded to file a motion and supporting memorandum with the circuit court to reconsider its order on April 3, 2025. Mtn. Reconsider. Respondent filed a memorandum in opposition of the motion to reconsider. MIO Mtn. Reconsider. The circuit court denied Appellant's motion for reconsideration on May 19, 2025. Order May 19, 2025. Appellant appealed the circuit court's orders denying the motion to compel arbitration and for reconsideration.

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). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Id.* Pursuant to Rule 220(c), the Appellate Court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal. This matter should be affirmed as to both ruling as stated in the circuit court's Order Denying Defendant's Motion to Stay and Compel Arbitration.

ARGUMENT

I. The Court should affirm the circuit court's decision that the arbitration clause is unconscionable and therefore, unenforceable, because the arbitration clause is included in an adhesion contract in which Respondent lacked any meaningful choice as to its terms, the provisions in the arbitration clause are oppressive and one-sided, and such terms cannot be severed.

Public policy in South Carolina does not favor arbitration. *Lampo v. Amedisys Holding, LLC,* 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025). The Supreme Court of South Carolina previously dispensed with this incorrect notion of favoring arbitration four years ago. *See Palmetto Constr. Grp. V. Restoration Specialists, LLC,* 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021). An arbitration contract is like any other contract, and if it exists, it will be enforced according to its terms. *See Morgan v. Sundance, Inc.,* 596 U.S. 411, 417-19, 142 S.Ct. 1708, 1712-14, 212 L.Ed 2d 753, 759-60 (2022).

When a court is determining the enforceability of an arbitration clause, the court must use the general principles of the state's contract law. *Simpson v. MSA of Myrtle Beach, Inc.* 373 S.C. at 24-25, 644 S.E.2d at 668. A party may seek revocation of a contract on the grounds of unconscionability. *Id.* "Unconscionability, as it pertains to a contractual arbitration clause, 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 25, 644 S.E.2d at 669. "Whether one party lacks meaningful choice in entering into the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process." *Gladden v. Boykin,* 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause or so limit its application as to avoid an unconscionable result. S.C. Code Ann. § 36–2–302(1).

In this matter, the circuit court found that Respondent Kelly lacked any meaningful choice in negotiating the terms of the contract and that the arbitration clause included several oppressive and one-sided terms based on the facts of this case. Order March 25, 2025, p. 2. Therefore, the circuit court correctly analyzed and applied South Carolina law and held that the arbitration clause contained in the lease agreement between Respondent Kelly and Appellant was unconscionable and unenforceable. *Id*.

A. The subject arbitration clause is included in a contract of adhesion in which Respondent Kelly lacked any meaningful choice as to the terms.

A determination of whether a contract is unconscionable depends on the facts and circumstances of the case. *Holler v. Holler,* 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005). Unsurprisingly, arbitration clauses are often found in contracts of adhesion. An adhesion contract is a standard form contract offered on a "take-it-or-leave it" basis with terms that are not negotiable. *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 541, 542 S.E.2d 260, 365 (2001). While an arbitration clause in an adhesion contract is not *per se* unconscionable, it is a strong indication that there was a lack of meaningful choice in negotiating the terms of the contract and is met with "considerable skepticism" by courts. *Simpson,* 373 S.C. at 25, 644 S.E.2d at 669. In particular, when a contract of adhesion is at issue, "there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration. *Id.* at 26, 669. In determining whether there was an absence of meaningful choice between parties, the South Carolina Supreme Court in *Simpson v. MSA of Myrtle Beach, Inc,* considered "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause". *Id.*

The Court in *Simpson v. MSA of Myrtle Beach, Inc.* dealt with an adhesion contract between

a sophisticated automobile seller and an ordinary consumer. *Id.* at 26, 669. The Court agreed with the rationale used by Ohio courts when analyzing similar contracts, which characterized automobiles as a "necessity" and factored this characterization of automobiles as a necessity into the determination of whether the consumer had meaningful choice in negotiating the arbitration agreement. *Id*. The South Carolina Supreme Court accepted the notion that agreements between consumers and sophisticated retailers are subject to considerable skepticism because of the disparity in bargaining power between the parties. *Id.* In *Simpson,* the Court found that the vehicle being purchased was intended for use as the plaintiff's primary transportation, which was "critically important" in modern society. *Id.* at 27, 670. The Court applied the same factors considered by the Fourth Circuit when analyzing arbitration clauses and found that the plaintiff was an ordinary consumer who "did not have the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter". *Id.* In *Smith v. D.R. Horton, Inc.,* the transaction involved the purchase and sale of a home by an ordinary homebuyer and a sophisticated seller of new residential housing. 417 S.C. 42, 50, 790 S.E.2d 1, 4-5 (2016). The Court in *D.R. Horton* recognized that the homebuyers in the matter did not have substantially stronger bargaining power against the seller as compared to the average homebuyer and also recognized that they were not represented by independent counsel. *Id.* at 50, 5.

Furthermore, the Court in *Simpson* also found it "necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences". *Simpson,* 373 S.C. at 27-28, 644 S.E.2d at 670. The Court found that while certain phrases within the provisions of the arbitration clause were printed in capital letters, the arbitration clause in its entirety was written in the "standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs

included on the page". *Id.* In addition, the Court recognized that there is a presumption that a party to a contract has read and understood the contract's terms while also acknowledging that the provisions were written in an inconspicuous nature by a more sophisticated party in order to contract away significant rights and remedies otherwise available to the weaker party. *Id.*

Appellant argues that the circuit court should not have determined arbitrability with "considerable skepticism" and instead should have begun with a "strong presumption in favor of the validity of arbitration agreements". App's Initial Br., p. 7. However, the lease agreement between Respondent Kelly and Appellant is clearly an adhesion contract. The lease terms were not negotiable on Respondent Kelly's behalf and were presented to her on a "take-it-or-leave it" basis. Order March 25, 2025, pp. 2-3. The subject lease agreement contains thirty-four (34) provisions, not including the numerous sub-parts of each provision. MIS Mtn. Compel, Ex. 1. The provisions governing arbitration alone have eight (8) subparts. MIS Mtn. Compel, Ex. 1, pp.15-16. Like the arbitration clause held to have lacked meaningful choice in *Simpson,* the arbitration clause here is buried in provision twenty-four (24), on pages fifteen (15) and sixteen (16) of a twenty-six (26) page standard form lease contract typed in eight (8) point font. MIS Mtn. Compel, Ex. 1, pp.15-16. There are several provisions throughout the lease that are bolded and capitalized, not just the arbitration provision, and everything remains in the same eight (8) point font. MIS Mtn. Compel, Ex. 1. The only quality separating the arbitration provisions from the other thirty-four (34) provisions in the lease are two sub-sections of the arbitration provision that have been bolded, underlined, and capitalized. MIS Mtn. Compel, Ex. 1, pp.15-16. The arbitration provisions are not in different font; are not in a larger font size; and are not in a different color than the rest of the provisions in the lease agreement. MIS Mtn. Compel, Ex. 1, pp.15-16.

Under the same rationale the Supreme Court used in *Simpson,* housing, like automobiles,

is clearly a necessity and is an important consideration when looking to whether there was meaningful choice. Respondent Kelly was an ordinary tenant, with no legal expertise in her background, seeking housing for her family. Appellant mentions Respondent Kelly's service in the Marine Corps and her enrollment in school seeking degrees in physical therapy and marketing. App's Initial Br., p.8. However, Appellant has failed to offer any facts to support the contention that these accomplishments would somehow give Respondent Kelly the same bargaining power as Appellant, a sophisticated commercial entity regularly dealing in residential leasing. Furthermore, having a background in military service or an education in physical therapy and marketing does not suggest that Respondent Kelly would understand the legal implications of an arbitration clause.

Appellant also incorrectly states that the circuit court erred when considering that Respondent Kelly did not have legal counsel present when signing the lease agreement. App's Initial Br., p. 9. While it is not dispositive as to whether a party lacked meaningful choice**,** the absence of legal counsel has been considered by courts in determining whether a party had the business judgment necessary to understand the implications of an arbitration agreement. *See Simpson,* 373 S.C. at 27, 644 S.E.2d at 670; *see also D.R. Horton,* 417 S.C. at 50, 5. Similarly to the plaintiffs in *Simpson* and *D.R. Horton* where the court found them to have had weaker bargaining power*,* Respondent Kelly was also an ordinary consumer and not a substantial business concern to Appellant. Respondent Kelly clearly lacked bargaining power, legal counsel, and the business judgment necessary to appreciate the arbitration clause's implications.

Importantly, Appellant has incorrectly stated that there is a policy in favor of arbitration in South Carolina and as such, the circuit court should not have determined arbitrability in this case with "considerable skepticism". App's Initial Br., p. 7. The South Carolina Supreme Court has held in two recent decisions, one as recent as March 5, 2025, that there is no such policy. *See*

Lampo v. Amedisys Holding, LLC, 445 S.C. 305, 914 S.E.2d 139 (2025); *Palmetto Constr. Grp. v. Restoration Specialists, LLC,* 432 S.C. 633, 856 S.E.2d. 150 (2021). The Court reminded litigants and lower courts that the notion of a policy favoring arbitration was dispensed with in 2021. *Lampo,* 445 S.C. at 317, 914 S.E.2d 146. Therefore, the circuit court, in this matter, correctly found that the lease agreement was a contract of adhesion and did not err when determining arbitrability with "considerable skepticism". When considering all of the circumstances under which the lease agreement was entered into, it is clear Respondent Kelly entered into an adhesion contract and had no meaningful choice in agreeing to arbitrate the claim against Appellant.

Appellant also argues that the arbitration clause should be considered separate from the entirety of the lease agreement and states that providing one sub-part allowing Respondent Kelly to opt-out of the arbitration clause alone confirms that the arbitration clause is not one of adhesion and shows that Respondent Kelly had meaningful choice as to the terms of the lease agreement. App's Initial Br., pp. 7, 11. The arbitration clause is located within the lease agreement and was not a contained in a separate addendum signed by Respondent Kelly. MIS Mtn. Compel, Ex. 1. Furthermore, there is no separate initial or signature requirement under the arbitration clause. Therefore, the arbitration clause is embedded within the lease agreement, which is itself a contract of adhesion. The opt-out provision is located in Section 24.8 of the Lease Agreement is not made any more conspicuous by underlining or bolding its provisions. MIS Mtn. Compel, Ex. 1, p.16. One inconspicuous opt-out provision buried in a twenty-six (26) page lease agreement between a sophisticated corporate entity and an ordinary tenant is hardly enough to suggest Respondent Kelly had meaningful choice in agreeing to the terms of the lease or the arbitration clause contained therein.

There is no error in the circuit court's determination that the lease agreement between

Appellant and Respondent Kelly constituted a contract of adhesion and properly approached the issue of arbitrability with considerable skepticism. Respondent Kelly was an ordinary tenant seeking essential housing for her family and she lacked any meaningful opportunity to negotiate the lease terms, including the arbitration clause. The inclusion of one inconspicuous opt-out provision that only applies to the arbitration clause is hardly enough to suggest Respondent Kelly had meaningful choice when entering into the lease agreement. Consistent with the rationale in *Simpson v. MSA of Myrtle Beach, Inc.* and *Smith v. D.R. Horton, Inc.*, Respondent Kelly's lack of bargaining power, absence of legal counsel, and limited understanding of the legal implications of arbitration demonstrate the absence of a true meeting of the minds.

B. The arbitration clause contains several oppressive and one-sided terms.

In determining whether an arbitration clause is unconscionable and therefore unenforceable, South Carolina courts will also consider whether the contract contains oppressive and one-sided terms. *Id.* The general rule is that courts will not enforce a contract that violates public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan Inc. v. United HealthCare Services, Inc.,* 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004). The court in *Simpson v. MSA of Myrtle Beach, Inc.,* found that the arbitration clause's limitation on statutory remedies was oppressive and one-sided. 373 S.C. at 28-30, 644 S.E. 2d at 670-671. In *Huskins v. Mungo Homes, LLC,* the South Carolina Supreme Court found that an arbitration clause which shortened the statute of limitations for any claim brought was void and illegal as a matter of public policy and thus unenforceable as it violated S.C. Code Ann. §15-3-140 (2005). 444 S.C. 592, 910 S.E.2d 474 (2024). This statute forbids and renders void any contract clauses attempting to shorten the legal statute of limitations. S.C. Code Ann. §15-3-140(2005).

Here, the arbitration clause in the lease agreement between Respondent Kelly and the Appellant has a provision which purports to bar all claims older than one year in clear

contravention of S.C. Code Ann. §15-3-140 (2005). MIS Mtn. Compel, Ex. 1, p.16. The Appellant has conceded that the arbitration provision in the lease agreement contains a subsection that limits the time within which to bring a claim to one year, thus shortening Respondent Kelly's right to otherwise bring a claim under the applicable statute of limitations. App's Initial Br., p.12. Appellant has also conceded that this provision should be voided in accordance with S.C. Code Ann. § 15-3-140 (2005). App's Initial Br., p.12. Another oppressive and one-sided term in the arbitration clause includes the inability to participate in a class action. MIS Mtn. Compel, Ex. 1, p.16. Appellant argues that the Federal Arbitration Act ("FAA") is applicable to this case, citing case law which held that class action waivers in arbitration agreements subject to the FAA are not unconscionable. App's Initial Br., p.13. However, the Supreme Court of South Carolina found that "a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce." *Hicks Unlimited Inc. v. Unifirst Corporation* 439 S.C. 623, 632 889 S.E.2d 564 (2023). "To ascertain whether a transaction involved interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski v. Bright Acres Associates,* 346 S.C. 580, 592, 553 S.E.2d 100 (2001).

Appellant relies on a holding that the FAA preempted a state's common law in finding that a class action waiver is not unconscionable. *See generally AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344-52, 131 S.Ct. 1740, 1748-1753 (2011). However, the FAA clearly does not apply here because the transaction between Respondent Kelly and the Appellant does not involve interstate commerce. *See Hicks,* 439 S.C. at 632, 889 S.E.2d at 564. The arbitration clause is embedded in a residential lease agreement in South Carolina. Respondent Kelly is a South Carolina resident, and the subject premises is located at 9989 Dorchester Road, Summerville, South Carolina 29485. The obligations and relationship between the parties arises out of the contractual

relationship between Respondent Kelly and the Appellant, a Tennessee limited partnership, authorized to do business in South Carolina. Therefore, it is immaterial that the FAA allows for waivers of class actions in arbitration agreements because the FAA does not apply.

Another oppressive term in the arbitration clause is the waiver of Respondent Kelly's right to a jury trial. MIS Mtn. Compel, Ex. 1, p.16. Appellant mis-cited the court's decision in *Simpson* when making the argument that waiver of the right to a jury trial is not one sided or oppressive. App's Initial Br., p.12. The Court in *Simpson* acknowledged that while parties are "always free to contract away their rights" the court cannot ignore the "inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available…by law." *Simpson,* 373 S.C. at 28, 644 S.E.2d at 670. The right to a trial by jury is a significant statutory right and remedy that would ordinarily be afforded to Respondent Kelly. Not only does enforcing the arbitration clause limit Respondent Kelly's right to a trial by jury but the arbitration clause also states that if any portion of the arbitration clause is found invalid or unenforceable and the claim is brought in a court of competent jurisdiction, Respondent Kelly would still have to waive her right to a trial by jury. MIS Mtn. Compel, Ex. 1, pp.15-16. Like the circumstances in *Simpson,* Appellant is the superior party, as a sophisticated corporate entity, seeking to take advantage of Respondent Kelly's weaker position and diminish the statutory rights and remedies available to her under South Carolina law.

Therefore, the circuit court's decision should be upheld because the arbitration clause is unconscionable as it includes several oppressive and one-sided terms and Respondent Kelly lacked meaningful choice as to its terms.

C. The oppressive and one-sided terms in the arbitration clause cannot be severed to make an otherwise unconscionable and unenforceable arbitration clause enforceable.

The Supreme Court of South Carolina has found that sections of arbitration clauses that

purport to shorten the statute of limitations are material to the whole of the arbitration clause and have declined to salvage the remaining sections of the arbitration requirement, instead finding the entire arbitration provision unenforceable. *Huskins v. Mungo Homes, LLC,* 444 S.C. 592, 597, 910 S.E.2d 474, 477 (2024). "In general whether an agreement can be modified so its remaining provisions survive depends upon what the parties intended. South Carolina law does not allow courts to rewrite contracts; subject to a few exceptions, courts will enforce agreements according to their terms. This is true even when the parties include a severability term." *Id.* at 595, 476. If a court finds a contract clause unconscionable, the court may refuse to enforce the contract clause, or it may limit the application of the unconscionable clause so as to avoid any possible unconscionable result. S.C. Code Ann. §36-2-301(1) (2003). "However, severability is not always appropriate to remedy unconscionable contract provisions". *Simpson, 373 S.C. at 34, 644 S.E.2d at 673.*

In *Huskins v. Mungo Homes, LLC,* South Carolina Supreme Court declined to sever a clause shortening the statute of limitations from the remainder of the contract's arbitration clause because changing the statute of limitations could "determine the outcome of many disputes by calling time on any claim not raised within ninety (90) days." *Huskins,* 444 S.C. at 597, 910 S.E.2d at 477. The Court goes on to say that lifting out the clause that shortened the statute of limitations would rewrite the arbitration provision to provide for the state's legal statute of limitations, which would "expand the statute of limitations by several orders of magnitude." *Id.* The Court held the clause shortening the statute of limitations was found to be a manipulative tactic employed by Mungo in order to skirt around South Carolina public policy and that this "weighed heavily against severance." *Id.*

The contract at issue in *Damico v. Lennar Carolinas, LLC,* included a severability clause

but the Court declined to sever the unconscionable terms and went as far to say that severing terms from an unconscionable contract of adhesion discourages fair, arms-length transactions and would encourage sophisticated parties to intentionally insert unconscionable terms in the contract. 437 S.C. 596, 604, 879 S.E.2d 746, 751 (2022). The Court in *Damico* recognized that "where a contract would remain one-sided and be fragmented after severance, the better policy is to decline the invitation for judicial severance". *Id.* The Court also distinguished arbitration clauses found in adhesion contracts from those found in a regular contract, finding that given the adhesive nature of the contract at issue it was "considerably doubtful any true agreement ever existed to sever any oppressive provisions from the arbitration agreement, particularly given that the less sophisticated and less powerful party had no hand in drafting or negotiating any of the language of the arbitration agreement." *Id.* at 621, 760.

The South Carolina Supreme Court made an effort to emphasize the importance of public policy concerns when the contract involves a consumer purchase of a new home and made it a point to protect home buyers from "unscrupulous and overreaching terms" and held that applying severance in these contexts would "erode that laudable public policy". *Id.* at 597, 476. *See Damico,* 437 S.C. at 622, 879 S.E.2d at 760. ("We are specifically concerned that honoring the severability clause here creates an incentive for…home builders to overreach, knowing that if the contract is found unconscionable, a narrower version will be substituted and enforced against an innocent, inexperienced homebuyer."). "To hold otherwise, parties who impose standard form adhesion contracts on weaker parties would have no downside to throwing in blatantly illegal terms betting they will go unchallenged, or at worst, that courts will throw them out and enforce the rest." *Huskins,* 444 S.C. at 598, 910 S.E.2d at 478.

As previously mentioned, the arbitration clause in the lease agreement between

Respondent Kelly and the Appellant has a provision which purports to bar all claims older than one year in clear which limits the applicable three-year statute of limitations otherwise available to Respondent Kelly. MIS Mtn. Compel, Ex. 1, p.16. Appellant has conceded that this provision is oppressive. App's Initial Br., p.12. However, Appellant suggests this provision shortening the statute of limitation should simply be severed from the arbitration provision because state and federal policies favor arbitration and that severability clauses can act to remove unconscionable provisions from arbitration clauses without affecting the intent of the parties, citing *Simpson v. MSA of Myrtle Beach, Inc.* App's Initial Br., pp.15-16. As previously mentioned, the Supreme Court of South Carolina has held on two separate occasions there is no such policy favoring arbitration. *Lampo* 445 S.C. at 317, 914 S.E.2d at 146; *Palmetto Constr. Grp.* 432 S.C. at 639, 856 S.E.2d at 153. Furthermore, the Supreme Court of South Carolina declined to sever this kind of provision to otherwise save the arbitration clause because this a provision shortening the statute of limitations is material to the whole of the arbitration clause. *Huskins,* 444 S.C. at 597, 910 S.E.2d at 477. These decisions were reached by the Supreme Court of South Carolina after the Court's decision in *Simpson v. MSA of Myrtle Beach, Inc.* in 2007, rendering the *Simpson* holding in regard to severability and a policy favoring arbitrability moot. Removing the provision with the bar to the statute of limitations in the arbitration clause in this case would have the same material affect the South Carolina Supreme Court describes in *Damico* and *Huskins.* Furthermore, the public policy concerns of the Court regarding contracts between ordinary homebuyers and sophisticated sellers can and should also be applied to contracts between ordinary tenants and sophisticated landlords. Severing the provision in the subject lease agreement that shortens the statute of limitations would only encourage the conduct criticized by the Court on several occasions. Under the rationale of the *Damico* and *Huskins* Court*,* Appellant cannot be rewarded for including blatantly illegal provisions

within the lease agreement with Respondent Kelly.

Therefore, the provision shortening the applicable statute of limitations cannot be severed because it is material to the whole of the arbitration clause and renders the arbitration clause illegal and unenforceable.

II. The Court should affirm the circuit court's decision finding that Appellant waived its ability to enforce arbitration by participating in litigation.

"Waiver is the voluntary and intentional relinquishment of a known right." *Provident Life & Accident Ins. Co. v. Driver,* 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). The ability to enforce an arbitration clause may be waived. *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 665 521 S.E.2d 749, 753 (1999). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on facts of each case." *Id.* South Carolina courts have typically considered three factors in the determination of whether a party has waived the ability to enforce arbitration: (1) whether a substantial length of time has passed between commencement of the action and the commencement motion to compel arbitration; (2) whether the parties have engaged in extensive discovery; and (3) whether the non-moving party was prejudiced by the delay in the moving party seeking arbitration. *Carlson v. South Carolina State Plastering LLC,* 404 S.C. 250, 256, 743 S.E.2d 868, 872 (Ct. App. 2013). A substantial length of time varies from one case to the other and depends on the "extent of discovery conducted and the corresponding presence or absence of prejudice to the party opposing arbitration." *Rhodes v. Benson Chrysler-Plymouth, Inc.* 374 S.C. 122, 126, 647 S.E.2d 249, 251 (2007). To establish prejudice, the non-moving party must show something more than "mere inconvenience." *Evans v. Accent Manufactured Homes, Inc.,* 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (2003). Importantly, courts have consistently rejected attempts by parties to "test the waters" of litigation before seeking to compel arbitration. *Id.*

Historically, South Carolina courts have required a party seeking to establish waiver to show prejudice through an undue burden caused by a delay in the demand for arbitration. *Sentry Engineering & Construction*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). To ascertain whether the non-moving party was prejudiced, courts often look at whether the party requesting arbitration took advantage of the judicial system by engaging in discovery. *Evans v. Accent Manufactured Homes, Inc.* 352 S.C. 544, 548, 575 S.E.2d 74, 76 (2003). However, in *Morgan v. Sundance* the U.S. Supreme Court ruled that a party may waive their right to arbitration by engaging in litigation without needing to show prejudice to the other party. 596 U.S. 411, 142 S.Ct. 1708, 212 L. Ed. 2d 753 (2022). The Court held that simply participating in litigation can be considered a waiver of the right to arbitrate, even if the non-moving party was not harmed in seeking arbitration. The court emphasized that arbitration agreements must be treated like other contracts and that requiring a showing of prejudice improperly favors arbitration. *Morgan v. Sundance,* 596 U.S. at 415 142 S.Ct. at 1711.

While it was addressed in federal authority assessing waiver, the recent United States Supreme Court decision in *Morgan v. Sundance*, provides persuasive authority that prejudice need not be considered to determine whether a party waived its arbitration right. Appellant's contention of a strong state and federal policy favoring arbitration is directly contrary to the Supreme Court's holding in *Morgan.*

In this case, Appellant's actions have been inconsistent with an intent to enforce arbitration. Rather than timely assert its supposed arbitration right, Appellant instead chose to actively engage in litigation for five months. First, Appellant's answer did not raise Appellant's purported right to enforce arbitration as a defense, despite having the lease agreement and being the original author of the lease agreement. If Appellant wished to enforce arbitration, Appellant's first responsive

pleading in litigation should have expressed such an intent. Second, Appellant propounded written discovery to Respondent Kelly, as well as answered Respondent's discovery requests. Third, Appellant has sent out eight subpoenas since the commencement of this action, fully participating in the discovery process.

Appellant argues that the parties have only engaged in "limited written discovery". App's. Initial Br., p.18. However, the underlying personal injury action between Respondent Kelly and Appellant is not a complex one. The level of discovery completed between the parties is proportionate to the nature of the relatively straightforward personal injury claim that this issue originates from. Respondent provided comprehensive responses to Appellant's written interrogatories and requests for production, including the production of medical records, wage information, and other documents bearing directly on her damages. MIS Mtn. Compel, Ex. 2. Appellant took advantage of court supervised discovery and sent Respondent a Rule 11 letter seeking additional responses to its written interrogatories and requests for production. Hearing Tr. 16:22-17:25. Using Rule 11, SCRCP, to enforce Respondent's response to Appellant's discovery is a benefit Appellant would not otherwise receive in arbitration. Appellant also sent out eight subpoenas in connection with the underlying litigation. MIO Mtn. Compel, p.5. Most notably, Appellant sent out a subpoena on January 31, 2025, two weeks after filing the motion to compel arbitration. Hearing Tr. 17:4-6. Appellant's conduct, even after filing the motion to compel arbitration has been inconsistent with the intent to arbitrate the claim with Respondent Kelly.

Respondent Kelly has suffered clear prejudice as a result of Appellant's delay in filing the motion to compel arbitration. Respondent Kelly has expended time and resources pursuing litigation in reliance of Appellant's choice to also pursue litigation, as Appellant's conduct clearly suggested. During this period of litigation, Appellant availed itself to the benefits of court-

supervised discovery while also attempting to preserve the option to switch to arbitration after discovery was completed. Moreover, Appellant cannot establish that the same scope of discovery would have been available in arbitration. It is uncertain whether Appellant would have been entitled to obtain the breadth of information Respondent Kelly produced in litigation, or whether Appellant would have been permitted to issue the same subpoenas. The prejudice to Respondent Kelly, coupled with Appellant's tactical use of the judicial forum, demonstrates that the circuit Court did not err in denying Appellant's motion to compel arbitration.

CONCLUSION

For the foregoing reasons, the circuit court did not err in holding that the arbitration clause contained in the lease agreement is unconscionable and unenforceable. Respondent Kelly lacked meaningful choice as to the terms of the arbitration clause and the clause contained several oppressive and one-sided material terms that cannot be severed from the clause. Further, Appellant waived its ability to enforce arbitration by failing to timely file the motion to compel arbitration, engaging in extensive discovery given then straightforward nature of the underlying personal injury case, and compelling arbitration would demonstrate great prejudice to Respondent Kelly. Therefore, this Court should affirm the circuit court's decision.

[SIGNATURE PAGE TO FOLLOW]

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