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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge
Case No. 2023-CP-10-4408

Appellate Case No. 2024-002103

Crescent Homes Realty, LLC, Appellant,

v.

Brenda Kennedy, Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the lower court err in holding that Crescent Homes Realty, LLC, waived its right to compel arbitration when they knew they had an existing right to arbitrate and acted inconsistently with that right by filing a lawsuit against Brenda Kennedy.

STATEMENT OF THE CASE

The President of Crescent, Edward "Ted" Terry ("Terry") filed suit on or about June 23, 2023, against former employee Brenda Kennedy ("Kennedy") in Charleston County Magistrate Court, seeking $7,500 for draws he claimed she owed (*See*. Complaint of Crescent Homes Realty, *LLC; R. pp. 9-25)*. Kennedy denies that she owes Crescent the draws. (*See.* Answer of Brenda Kennedy at 6; R. p. 6) She asserts that Crescent misclassified her as an independent contractor, failed to pay her overtime and that any draws she is alleged to owe are offset by the damages Crescent owes her for misclassifying her and failing to pay her overtime.(*Id*.; R. p.34-35) Kennedy filed an Answer and Counterclaims on August 30, 2023, for violations of the and South Carolina Payment of Wages Act ("SCPWA'), SC Code Ann. § 41-10-10 *et. seq* and the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et. seq.* (I*d*.; R. p. 26-37)

The Magistrate Court transferred the case to Charleston County Court of Common Pleas on September 8, 2023, because Kennedy's Counterclaims exceeded the $7500 limit for smalls claim court. (*See.* Transfer Order, filed in the Court of Common Pleas on Sept. 8, 2023; R. p. 1)(hereinafter "Transfer"). After Kennedy filed her Answer and Counterclaims, Crescent decided it would fare better in arbitration, so it filed a Motion to Stay Proceedings and Compel Arbitration on October 20, 2023. (*See*. Plaintiff's Memorandum in Support of Motion to Stay and Compel Arbitration; R. p. 52) (hereinafter "Arbitration Memo"). Both parties submitted memorandums of law. *Id*. (*See* Defendant's Memorandum of Law in Opposition to Motion to Stay Proceedings and

Compel Arbitration; R. p. 56) (hereinafter "Opposition Memo"). (Plaintiff's Reply Memorandum; R. p. 61) (hereinafter "Reply Memo") (*See*. Plaintiff's Surreply Memorandum; R. p. 72) (hereinafter "Surreply"). A hearing was held before The Honorable Dale E. Van Slambrook on October 16, 2024. *(See.* Transcript of Hearing; R. p. 82*) (hereinafter"*Transcript*")* Judge Van Slambrook issued an Order on November 25, 2024) denying Crescent's Motion to Stay and Compel Arbitration. (*See.* Order Denying Motion to Stay Proceeding and Compel Arbitration Nov. 25, 2024, R. p.3). Crescent filed its Notice of Appeal on December 12, 2024. (*See.* Notice of Appeal; R. p. 74).

STATEMENT OF FACTS

Crescent was engaged in building and selling new homes throughout South Carolina. (*See* Answer at 34; R. p. 30) Kennedy was employed by Crescent as a Sales Agent from June 2018 until December 2022. (*Id.* at 34 *,73;* R. pp. 26, 30, 34) While Crescent classified her as an independent contractor and paid her on a 1099 basis, Kennedy maintains that the actual nature of the relationship was that of employer and employee. Crescent exercised substantial control over her day-to-day work and identified her as an employee on its website. *Id*.

Kennedy and Terry signed an agreement on or about July 22, 2022, titled, "Crescent Homes Realty, LLC Independent Contractor Agreement" (*See.* Agreement; R. p. 11-19, 42-49) (hereinafter "Agreement"). At the top of the agreement in bold capital letters it stated:

> **THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S. C. CODE § 15-48-10 et. seq., AND THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 et. seq**.

On June 23, 2023, approximately six months after Kennedy resigned, Crescent filed a complaint against her in Charleston County Magistrate's Court, alleging that she breached section 3B paragraph 3 of the Agreement and owed the company $7,500 in draws. (*See.* Complaint; R. p.

8-9) The complaint was signed by Terry, and the Agreement was attached. *Id.* The complaint alleges that Kennedy owed $8,991.92 in commissions but that it was reduced to $7,500 to fit within the jurisdictional limits of small claims court. (*Id*.; R. p. 9) Terry was unquestionably aware of his right to arbitrate his claims against Kennedy since he signed both the Agreement and the complaint. Nevertheless, he chose to file a lawsuit rather than pursue arbitration. This was clearly a strategic decision on his part. Kennedy contends that Terry filed a lawsuit because he wanted to take advantage of the enforcement power of the court using the threat of a court-imposed judgment as leverage against Kennedy.

Kennedy retained counsel a day or so before her Answer was due. Kennedy's counsel emailed Terry requesting an extension, when Terry did not return her counsel's request for an extension, her counsel filed an Answer and Counterclaim soon after so Kennedy would not be held in default. (*See*. Email, R. p. 60). In her Answer and Counterclaim, Kennedy contends any draws she is alleged to owe are offset by the damages Crescent owes her for misclassifying her as independent contractor and failing to pay her wages and overtime compensation. (*See.* Answer R. pp. 26-36)

According to the Agreement, Kennedy was paid 100% commissions. (*Id.* at 39, R p. 30). Kennedy contends she was non-exempt employee and was not paid overtime compensation when she worked in excess of than forty (40) hours in a work week. (*Id.* at 20, 56, 58, 69, 70 pp. 28, 32, 34). Kennedy further alleges that Crescent owes her wages for a period of approximately five (5) months in 2022 because she was prohibited from selling homes during this time and instead was required to perform administrative and data-entry tasks that she was not paid for. (*Id*. at 63). Crescent suspended all home sales company wide and returned deposits to customers already engaged in the homebuying process, causing Kennedy to lose commissions on completed sales.

(*Id.* at 62; R. p. 33) Even though she could not sell homes for several months, Crescent required Kennedy to report to work at the Sales Center to perform administrative tasks that she was not compensated for. (*Id*. at 60, 63; R. pp. 32, 33).

Kennedy maintains that she was an employee and not an independent contractor because Crescent exercised significant control over her. She was required to wear specific attire and could be disciplined for failing to do so. (*Id.* at 54; R. p. 32). She could only sell new homes built by Crescent. (*Id* at 36, 52; R. pp. 30, 32) She was required to attend mandatory trainings. (*Id*. at 47; R. p. 31) Crescent scheduled her to work from 8:00 A.M. to 6:00 P.M., at Sales Centers in neighborhoods where its homes were being constructed. (*Id*. at 49, 50; R. p 31). On her scheduled days off, Kennedy was expected to take calls and handle work-related responsibilities at Crescent's direction. (*Id*. at 53; R. p. 32). Even though she regularly worked between 45 and 55 hours per week, Kennedy received no overtime compensation. (*Id*. at 20, 57, 70; R. pp. 28, 32, 34) Accordingly, Kennedy contends that Crescent is not entitled to recover draws because the company failed to meet its wage and hour obligations under both state and federal law and therefore owes her unpaid wages.

While Kennedy filed the counterclaims as potential class actions, she does not intend to pursue class claims. At the time of filing, Kennedy believed Terry would be filing similar lawsuits against other sales agents. (*See.* Transcript; R. p. 91) Since Terry did not return her counsel's request for an extension, she pled the counterclaims as potential class actions to preserve the issue should she later discover that other agents were sued by Terry. *Id*. Now that Kennedy has had time to investigate this matter further, she does not intend to pursue class claims.

Kennedy timely filed her Answer and Counterclaim on August 18, 2023. (*See*. Answer; R. p. 26) The Magistrate's Court transferred the case to Charleston County Court of Common Pleas

on September 8, 2023, because the counterclaims exceed the $7500 for small claims court. (*See.* Transfer; R. p. 1) Crescent then decided it would fare better in arbitration, so it filed a Motion to Stay Proceedings and Compel Arbitration on October 20, 2023. The parties filed briefs, and a hearing was held. The lower court denied Crescent's motion, holding that Crescent knew of its right to arbitrate this dispute and acted inconsistently with that right by filing this lawsuit. (*See.* Order, R. pp. 3-6) The lower court also held the SCPWA and FLSA counterclaims are sufficiently related because they are relevant to whether Kennedy owes Crescents the draws. *Id.* For the reason's set forth below this Court should affirm the lower court's ruling.

STANDARD OF REVIEW

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). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Thornton v. Trident Med. Ctr., L.L.C*., 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

ARGUMENT

I. CRESCENT WAIVED ITS RIGHT TO ARBITRATE BASED ON THE TEST SET FORTH IN THE UNITED STATES SUPREME COURT'S DECISION IN *MORGAN V. SUNDANCE,* BECAUSE THEY KNEW THEY HAD EXISTING RIGHT TO ARBITRATE AND ACTED INCONSISTENTLY WITH THAT RIGHT BY FILING A LAWSUIT.

In *Morgan v. Sundance, Inc*., 596 U.S. 411, 142 S. Ct. 1708, 212 L. Ed. 2d 753 (2022), the Supreme Court unanimously rejected the prejudice-focused arbitration waiver inquiry. Prior to *Morgan,* South Carolina, like most jurisdictions, required a party asserting waiver to show they were prejudiced. *See e.g. Rhodes v. Benson Chrysler-Plymouth-Jeep, Inc*., 301 S.C. 219, 221, 391 S.E.2d 576, 577 (Ct. App. 1990) ("A party may waive its right to arbitration if it acts inconsistently with that right and causes prejudice to the other party.") The *Morgan* Court rejected the prejudice

requirement holding that federal courts may not condition waiver of arbitration on a showing of prejudice. *Morgan*, 596 U.S. at 414. Instead, courts must consider whether the party knowingly relinquished the right to arbitrate and acted inconsistently with that right. *Id.* at 411,412.

The *Morgan* Court made clear that courts may not craft arbitration-specific procedural rules under Section 6 of the FAA. That provision "is a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." 596 U.S. at 419. "To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party." *Id.* at 417, 142 S. Ct. at 1713. South Carolina law is consistent with this approach. In *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) our Supreme Court stated that it dispensed with the notion there is a federal and state "policy favoring arbitration. "The FAA requires that courts treat arbitration agreements the same as all other contracts—no more, no less." *Id*. at 241, 877 S.E.2d at 489. *See Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("There is . . . no public policy—federal or state—'favoring' arbitration."). 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). Since both South Carolina courts and the U.S. Supreme Court in Morgan have made clear that arbitration agreements must be treated like any other contract, the same waiver principles apply.

Applying these principles, Crescent knowingly and voluntarily waived its right to arbitrate its dispute with Kennedy when it filed suit in magistrate court to recover the same draws that it now seeks to arbitrate. There is no dispute that Crescent clearly knew of its right to arbitrate, as evidenced by the agreement it attached with summons and complaint. (*See* Complaint of Crescent Homes Realty, LLC, filed July 14, 2023). By initiating this lawsuit instead of seeking to arbitrate,

Crescent acted inconsistently with that right and thereby waived it. Lastly to the extent Crescent claimed it did not waive its right to arbitrate FLSA and SCPWA collective and class claims, Kennedy has not moved to certify a class, nor does she intend to. Therefore, the lower court correctly held that according to the test articulated in *Morgan*, Crescent waived its right to arbitrate

II. CRESCENT'S ARGUMENT THAT KENNEDY'S COUNTERCLAIMS ARE UNRELATED LACKS LEGAL OR FACTUAL SUPPORT.

Crescent argues that Kennedy's counterclaims are unrelated to its claim for repayment of draws. This argument lacks merit. Kennedy's counterclaims arise from the same Agreement that Crescent is seeking to enforce. She contends that the Agreement's labeling of her as an independent contractor is unenforceable to the extent it misclassifies her. Kennedy contends that she was an employee. This classification is central to determining whether Crescent has a right to recover draws and whether Kennedy is entitled to wages and damages. Additionally, Kennedy has asserted that any amounts allegedly owed to Crescent are offset by the unpaid wages and damages Crescent owes her. Her counterclaims are therefore not merely related; they go directly to the heart of Crescent's claim and operate as both a defense and an offset.

Crescent's argument that her claims aren't related because she could have filed a lawsuit regardless of whether Crescent sued her is flawed. The fact that Kennedy could have initiated a separate lawsuit does not mean her claims are unrelated for purposes of compulsory counterclaims. As the South Carolina Supreme Court has made clear, "[b]y definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Tr. Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991). This is precisely the case here, both parties' claims stem from the same underlying employment relationship and the same operative facts.

Crescent relies on Ford *v. UHG I LLC, Case No. 22-cv-00840-LKG, 2023 U.S. Dist. LEXIS 31069* however, *Ford* is distinguishable from the facts here. In *Ford,* the party seeking arbitration was the defendant, who invoked its right to arbitrate after being sued. There the court found no waiver because the party seeking to enforce the arbitration agreement didn't initiate the court proceedings. By contrast, Crescent affirmatively filed a lawsuit against Kennedy in magistrate court, invoking the judicial process and thus acting inconsistently with a right to arbitrate.

The circuit court made specific factual findings regarding Crescent's litigation conduct and waiver of arbitration and did not find Crescent's argument that the claims were unrelated compelling. Under the applicable standard of review, those findings should not be disturbed on appeal because they are supported by evidence in the record. See *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003) ("The factual findings of the trial court will not be disturbed on appeal if there is any evidence to support them."). The lower court questioned Crescent's counsel on this point.

> COURT: I guess, the posture that the case is in now the suit by the plaintiff of the recovery of the commissions that, I guess, what they're saying is the defense, well, we don't owe you the money, because I guess I've earned it, and y'all are not doing the right thing or improperly paying me or not paying me according to the National Standards. So that appears to be the defense and that certainly appears interrelated and is that not or wouldn't that be a mandatory counter [claim][1]? (*See.* Transcript p.11 ln. 25-26 – p.12 ln. 1-7)

Moreover, the Court made the following findings of fact in its Order,

> The Court finds that Defendant's SCPWA and FLSA counter claims are sufficiently related to the debt-collection claim since Defendant filed the claims in defense of the action that Plaintiff initiated. Additionally, the SCPWA and FLSA claims are relevant to whether Defendant owes the debt. (*See*. Order November 25, 2023, p. 3)

[1] The transcript states "mandatory counter playing" however Respondent contends this is an error in transcribing and what the court said was "mandatory counter claim' not "mandatory counter playing'

Thus, the circuit court's factual findings regarding Crescent's litigation conduct formed the basis for its conclusion that Crescent waived its right to arbitration. Because those findings are supported by the record, they should not be disturbed on appeal.

The facts of this case closely parallel those in *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 660, 521 S.E.2d 749, 750 (Ct. App. 1999), where the South Carolina Court of Appeals found waiver of arbitration. In that case, Liberty Builders filed for a mechanics' lien and then filed an action to foreclose on that mechanics' lien. The homeowners answered and counterclaimed alleging that Liberty used defective materials in construction. The parties pursued this litigation for two and one-half years before Liberty Builders moved to stay the action in favor of arbitration. The court held that Liberty waived its right to arbitration by filing suit and invoking the judicial process in a manner inconsistent with the arbitration agreement.

The same reasoning applies here. Crescent initiated this action in magistrate court to enforce an Agreement that contained an arbitration clause. Kennedy then filed counterclaims, and the case was removed to circuit court. Only after Kennedy asserted rights under the contract, including her contention that she was misclassified and is owed wages, did Crescent attempt to invoke arbitration. Just as in *Liberty Builders*, Crescent's decision to pursue judicial relief, rather than arbitration, reflects conduct inconsistent with preserving a right to arbitrate. Moreover, *Liberty Builders* was decided before the U.S. Supreme Court's ruling in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022), which clarified that a showing of prejudice is not required for waiver. Under *Morgan*, the focus is squarely on whether a party knowingly engaged in litigation conduct inconsistent with its claimed right to arbitrate. *Liberty Builders* supports waiver even under the stricter pre-*Morgan* standard; thus, *Liberty Builders* provides even stronger support for finding

waiver under the current framework. Crescent's actions here meet that standard, and its request to compel arbitration should be denied.

II. CRESCENT'S RELIANCE ON *MICROSTRATEGY, INC. V. LAURICIA* IS MISPLACED, BECAUSE IT PREDATES *MORGAN V. SUNDANCE, INC.*, WHICH EXPRESSLY REJECTED THE REQUIREMENT THAT A PARTY DEMONSTRATE PREJUDICE TO ESTABLISH WAIVER.

Crescent's reliance on *MicroStrategy, Inc. v. Lauricia,* 268 F.3d 244 (4th Cir. 2001), is misplaced. That decision is fundamentally at odds with the Supreme Court's ruling in *Morgan. MicroStrategy* held that a party asserting waiver of arbitration must show that it suffered "actual prejudice." 268 F.3d at 249 (*citing Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc*., 817 F.2d 250, 252 (4th Cir. 1987)). Yet in *Morgan*, the Supreme Court rejected the prejudice requirement outright, holding that courts "may not make up a new procedural rule based on the FAA's policy favoring arbitration." *Morgan*, 596 U.S. at 417. The *Morgan*, Court clarified that the proper test is whether the party seeking arbitration "knowingly relinquished" the right to arbitrate by acting inconsistently with that right. Id. at 419. Because *MicroStrategy* applies a now-rejected legal standard, it is not controlling and cannot save Crescent from waiver.

While Crescent contends that MicroStrategy remains good law in part, particularly its discussion of whether the prior litigation and claims are "factually and legally" related, this argument fails. The "relatedness" analysis is inherently fact-specific, and in this case contrary to Crescent's claims, the dispute arises from the same Agreement and set of facts. Namely, whether Kennedy was misclassified and whether she owes or is owed money under that agreement. Moreover, this argument overlooks that the lower made a factual finding that the claims and counterclaims are related.

III. THIS CASE IS SIMILAR TO *ROPER V. OLIPHANT FIN., LLC*, WHERE THE COURT FOUND DEFENDANT OLIPHANT FIN. LLC WAIVED ITS RIGHT TO COMPEL ARBITRATION.

The facts in this case are similar to the facts in *Roper v. Oliphant Fin., LLC*, No. 23-2112-BAH, 2024 U.S. Dist. LEXIS 164090, at *19 (D. Md. Sep. 12, 2024) *17 (D. Md. Feb. 23, 2023). In that case the Plaintiff Thelma Roper(“Roper”) obtained a personal loan (the "Loan") in the amount of $16,900 through a website operated by Lending Club Corporation. ("LendingClub") *Id*. at *2. Roper’s Loan was sold and assigned to Oliphant; Roper defaulted on the loan. *Id*. Oliphant brought a debt-collection action against Roper in the District Court of Maryland. *Id.* Roper filed a motion to dismiss, arguing that the claim was barred by the statute of limitations. *Id*. at *3. The court granted the motion to dismiss. *Id*. Roper subsequently filed a putative class action alleging violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA"), the Maryland Consumer Debt Collection Act, Md. Code Ann. Com. L. § 14-201 et seq. ("MCDCA"), and the Maryland Consumer Protection Act, Md. Code. Ann. Com. L. § 13-101 et seq. ("MCPA”) Id. at *2. Oliphant filed a motion to compel. Id. at *3. Roper argued that Oliphant waived the right to compel arbitration by filing a debt collection lawsuit against her. *Id*. at *7.

The court agreed, holding Oliphant had the right to arbitrate its debt-collection claims against Roper, but explicitly chose not to do so by filing a lawsuit to collect the debt. *Id*. at *18 Moreover, the court held that the FDCPA, MCDCA, and MCPA claims were sufficiently related to the claims in the prior debt-collection to show that the defendant waived the right to compel arbitration. *Id*. The court distinguished its ruling from the *Ford v. UHG I LLC* decision, stating that, unlike Ford, where the plaintiffs would have brought the action regardless of the underlying debt-collection suit because it involved matters that predated the lawsuit, Roper’s case arose exclusively out of defendants' conduct in the prior litigation. *Id*. at *19. The court pointed out that the defendants initiated and fully participated in litigation, and when the propriety of that litigation was challenged, the defendants, for the first time, invoked the arbitration provision as a defense

even though the claims grew directly out of the adverse judgment in the previous suit. *Id*. at *19-20.

The facts here are similar to *Roper v. Oliphant* and not *Ford v. UHG I LLC.* Kennedy's counterclaims, like Roper's claims, are related to the lawsuit that Crescent initiated against her. Moreover, had Crescent not initiated its action against Kennedy, she would not have filed a separate action against Crescent. She filed her counterclaims as defense and/or off set against the draws Crescent alleges she owes.

CONCLUSION

The lower court properly held Crescent waived its right to compel arbitration when they relinquished their right arbitrate and filed a lawsuit Kennedy. The circuit court's factual findings are supported by the record and are entitled to deference. This Court should affirm the denial of Crescent's Motion to Stay and Compel Arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October 2025, I caused a copy of the foregoing Respondent's Final Brief to be served upon counsel for Appellant by electronic mail addressed as follows:

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