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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Commons Pleas

Michael S. Holt, Presiding Judge

Appellate Case No. 2024-000338

Joshua Phillips, ... Respondent,

v.

Renu Energy Solutions, LLC,.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Renu Energy Solutions, LLC ("Renu") sells and installs solar panel systems for homes. (R. p. 27, ¶ 2). Respondent, Joshua Phillips ("Phillips"), lives in Darlington County, South Carolina. (R. p. 27, ¶ 1). In November 2019, Phillips bought a solar panel system from Renu for his home. He executed the sales agreement on November 13, 2019. (R. p. 28, ¶¶ 6-7). Renu sent the contract to Phillips for an electronic signature to review at his home. (R. pp. 301-307). The contract is six pages long. (*Id.*). The first page describes the system and its costs. (R. p. 301). It contains the signatures of both parties. (*Id.*). The second and third pages contain the terms of the contract. (R. pp. 302-303). The fourth page is a guarantee of energy production. (R. p. 304). The fifth page is the right of cancellation with notice. (R. p. 305). The sixth page is a warranty. (R. p. 306). The arbitration clause is on the second page directly above Phillips' initials. It is titled "ARBITRATION" in all capital letters and reads as follows:

> 6. ARBITRATION
> With the exception of 1) suits or claims for money owed by Purchaser under this Agreement, 2) those suits or claims which deal with repossession of equipment and parts subject to this Agreement, 3) and those disputes which, by law, may not be submitted to Arbitration but must be determined by a judicial tribunal, any and all disputes arising out of or in connection with the Agreement shall, at the option of either party, be submitted to a panel of three arbitrators in the City of Charlotte, North Carolina, one to be appointed by each party, and the third by the two so chosen. If the parties agree, the dispute may be submitted to one arbitrator mutually agreeable to both parties. If there is a failure to select arbitrator(s) in this manner, then the arbitrator(s) shall be selected in accordance with the Rules of the American Arbitration Association. The decision of the arbitrator, or in the case of three arbitrators, of any two of them, shall be binding and final. The arbitration shall be held in accordance with the Rules of the American Arbitration Association. Judgment upon the award rendered may be entered in any court having jurisdiction or application may be made to such court for a judicial acceptance of the award and an order for enforcement as the case may be.

(*Id.*)

The agreement requires Renu to sell and install the solar system, with the solar panels being covered under both Renu's Limited Warranty and the Manufacturer's Warranty. (R. pp. 302, 306).

More than three years after signing the agreement, on November 15, 2022, Phillips sued Renu. (R. pp. 26-44). Phillips never requested arbitration with Renu and did not file to arbitrate with the American Arbitration Association ("AAA"). On January 1, 2023, Renu filed a motion to dismiss and compel arbitration. (R. p. 58). On February 17, 2023, Phillips filed a personal affidavit along with a brief in opposition to the motion. His affidavit admits he signed the contract and that the purchase was for personal and household use. (R. p. 81, ¶¶ 3, 4, and 5). It goes on to recite that he has "been informed and believes that the American Arbitration Association construction industry rules that would be applicable to my case would require me to pay a minimum advance filing fee of $4,400 just to initiate the arbitration." (R. p. 82, ¶ 12). He goes on to recite that he has been informed "a single arbitrator's fee can routinely exceed $35,000 through a final hearing." *Id.* at ¶ 12. He does not give a source for these hearsay allegations. Presumably, it is his lawyer who has told him this as these hearsay statements are repeated in the brief his lawyer submitted. He cites no source for these hearsay statements in his affidavit. He did not apply for arbitration with the American Arbitration Association or request arbitration with Renu. Instead, he simply brought this lawsuit. Neither Phillips nor his lawyer submitted any support for these hearsay statements in Phillips' affidavit. Counsel for Renu objected to this factual basis at the February 22, 2023, hearing.

Apparently, the Court decided to rule in favor of Phillips on February 23, 2023, as this was reported by the court's clerk to the parties. (R. pp. 109-111). This email did not reach the parties until July 24, 2023.

In the interim, Plaintiff's counsel filed two additional affidavits with the clerk on July 11, 2023, apparently five months after the motion was argued. The Court did not respond or invite counsel for Renu to respond to the untimely filed affidavits. The Court then incorporated statements from these affidavits into its order of August 11, 2023, though it had not requested the affidavits or extended counsel for Renu an opportunity to respond to the affidavits.

Judge Holt found the arbitration clause unconscionable, unenforceable, and not severable. (R. pp. 2-3). He held that Phillips "lacked any meaningful choice in agreeing to arbitrate" because there was a difference in the bargaining power between the two parties, Phillips did not have the same decision-making capacity a company would have, no lawyer was present during the signing of the agreement, Phillips was presented with an adhesion contract, and the arbitration clause was placed inconspicuously in the contract. (R. pp. 3-4).

Judge Holt also found that the arbitration provision terms were so one-sided and oppressive, such that no reasonable person would make them, and no fair honest person would accept them. (R. pp. 2-3). Phillips argued that he would incur excessive fees and costs if the parties proceeded with arbitration, forcing him to pay an initial filing fee of at least $4,400 and a final fee of $3,850. (R. pp. 4-5).

Judge Holt also found the venue selection clause was unconscionable and against public policy. (R. pp. 13-14). He held that the choice of venue in Charlotte, North Carolina disproportionately favored Renu because it is headquartered there. (R. p. 14).

Judge Holt held that the arbitration provision was not severable because of the large number of one-sided terms in the arbitration provision. (R. pp. 14-16). Judge Holt held that because Phillips was given an adhesion contract, it was unlikely that an agreement ever existed. Thus enforcing this provision would go against public policy. (R. p. 16).

Renu moved for reconsideration on August 17, 2023. (R. p. 96). Judge Holt denied Renu's motion on February 28, 2024. Renu appealed Judge Holt's refusal to enforce the arbitration clause on March 7, 2024. (R. p. 25).

STANDARD OF REVIEW

The Federal Arbitration Act ("FAA") provides for immediate appellate review upon the denial of a motion to compel arbitration. 9 U.S.C. § 16. On appeal, legal determinations of arbitrability are subject to *de novo* review. *Mart v. Great Southern Homes, Inc.*, 441 S.C. 304, 312, 893 S.E.2d 360, 364 (Ct. App. 2023). "Where there is any doubt concerning the scope of arbitration those doubts should be resolved in favor of arbitration." *Wilson v. Willis*, 416 S.C. 295, 408, 786 S.E.2d 571, 578 (Ct. App 2016). "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (cleaned up) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

ARGUMENT

"Substantive unconscionability threatens to become the exception that swallows the rule if all that must be done to avoid arbitration is to assume the most expensive possible scenario."[1] The basic purpose of the FAA is to overcome courts' refusals to enforce agreements to arbitrate. *Allied-Bruce Terminix Cos. V. Dobson*, 513 U.S. 265, 270 (1995). "[U]nless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731 (citing *Allied-Bruce*, 513 U.S. at 273–77). In evaluating whether an arbitration agreement involves interstate commerce, courts must examine

[1] *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883 (Tex. 2010) (citing *In re MHI P'ship LTD.*, 2008 Tex. App. LEXIS 4053).

"the agreement, the complaint, and the surrounding facts, focusing on what the terms of the contract specifically require for performance." *Id.* 408 S.C. at 380, 759 S.E.2d at 732. Where a contract involves the utilization of out-of-state materials, contractors, and investors, FAA provisions trump conflicting requirements of South Carolina law. *Zabinksi v. Bright Acres Assocs.*, 346 S.C. 580, 595–97, 553 S.E.2d 110, 118 (2001).

Here, the agreement is between a homeowner and a seller for the sale and installation of solar panels. The agreement requires Renu to sell and install the solar system at Phillips' home, with the solar panels being covered under both Renu's Limited Warranty and the Manufacturer's Warranty. (R. pp. 301-307). The president of Renu provided evidence that the solar panels used for Phillips' home were manufactured outside of South Carolina. (R. p. 257, ¶¶ 5-6). In addition, Renu is headquartered in North Carolina and it installed the panels across state lines in Phillips' Darlington County, South Carolina home. The contract at issue utilized interstate commerce and is subject to the FAA. *Id.*

Under the FAA, agreements to arbitrate may be invalidated upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. An arbitration clause governed by the FAA is separable from the contract it is embedded within and the issue of its validity is distinct from the contract as a whole. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)). "General contract principles of state law apply to arbitration clauses governed by the FAA." *Id.* at 539, 542 S.E.2d at 364.

I. THIS COURT SHOULD REVERSE THE TRIAL COURT BECAUSE THE ARBITRATION AGREEMENT DOES NOT IMPOSE PROHIBITIVE COSTS, AND THE VENUE PROVISION DOES NOT MAKE THE AGREEMENT UNCONSCIONABLE.

Unconscionability is 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 v. MSA of Myrtle Beach,* 373 S.C.14, 25, 644 S.E.2d 663, 668 (2007) (citing *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). In *Simpson*, our Supreme Court adopted the Fourth Circuit's analysis for evaluating unconscionability in arbitration agreements by focusing generally on whether the arbitration clause is geared towards achieving an "unbiased decision by a neutral decision-maker." *Id.* (citing *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999)). Courts evaluate this by examining whether the party seeking to invalidate the arbitration agreement had both an absence of meaningful choice and the contract contained oppressive, one-sided terms. *Id.* at 25, 644 S.E.2d at 669.

The *Simpson* court examined both prongs of the unconscionability analysis when a customer sued a car dealership after entering into an arbitration agreement for the trade-in of her car purchase of a new van. *Simpson*, at 22, 644 S.E.2d at 666. The contract limited Simpson's statutory remedies under the Regulation of Manufacturing, Distributors and Dealers Act. As a result, the Court held that the totality of the circumstances indicated a lack of meaningful choice and oppressive, one-sided terms such that the agreement was unconscionable and unenforceable. *Id.* at 37, 644 S.E.2d at 675. Unlike the contract in *Simpson*, the arbitration clause in this case does not limit Phillips' damages. He is free to pursue any damages recoverable at law in a neutral arbitral forum.

A. Phillips did not lack meaningful choice in the contract because solar panel systems are not a necessity and the arbitration agreement was not inconspicuous.

Renu offered Phillips a standard purchase form agreement provided to all consumers. A standard form agreement is not necessarily unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669 (citing *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998)). In holding that the customer in *Simpson* lacked meaningful choice, the court noted that cars are a necessity for everyday life. *Id.* at 27, 644 S.E.2d at 669–70. The court further identified that the contract was "hastily presented for signature" and "embedded in paragraph ten of sixteen including on the page." *Id.* Our Supreme Court cautioned against finding unconscionability in contracts of adhesion, "[e]ven when the substance of the terms appear grossly unreasonable, unless the circumstances surrounding its formation present such an extreme inequality of bargaining power, together with factors such as lack of basic reading ability and the drafter's evident intent to obscure the term, that the party against whom enforcement is sought cannot be said to have consented to the contract." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884–85 (2013). The *Gladden* court further clarified that contractual terms written in the same font as the other terms with no indication that the drafter intended to obscure the term do not support a finding that a party lacked meaningful choice. *Id.* at 146, 739 S.E.2d at 885.

The trial court relied heavily on *Simpson* labeling the arbitration clause as "under nearly identical circumstances." There is no evidence in the record to support the finding that the contract was hastily presented to Phillips in a face-to-face sales interaction. Instead, the contract was sent to Phillips for electronic signature to review at his own home. The contract was for the purchase of solar panels, not for a "necessity" such as a home or automobile. The trial court misapplied the test from *Simpson*, reasoning that the arbitration agreement was inconspicuous, despite the

headings appearing in all capital letters and in the same font as all other terms in the contract. In addition, the arbitration provision appears directly over Phillips' initials on the second page of the contract. The trial court identified no evidence suggesting the arbitration term was inconspicuous as required by *Gladden*. Phillips, at all times, retained the ability to decline the agreement and opt not to install solar panels on his home. Phillips retained a meaningful choice in the decision to arbitrate because the product offered was not a necessity and there is no evidence in the record to support that the contract was hastily presented to him with an inconspicuous arbitration agreement.

B. The arbitration agreement did not contain oppressive, one-sided terms such that no reasonable person would make them and no fair and honest person would accept them.

Even if this Court finds that Phillips lacked a meaningful choice in the decision to arbitrate, the trial court's finding should be reversed because the arbitration clause is not substantively unconscionable. In *Simpson*, the court found the arbitration clause was oppressive and one-sided because it limited the statutory remedies available to the customer. *Simpson*, at 29–32, 644 S.E.2d at 671–72. In fact, it limited Simpson from bringing statutorily created claims. *Id.* at 20–21, 644 S.E.2d at 666. The arbitration clause prevented Simpson from claiming punitive and treble damages and required her to bear the costs of arbitration. *Id.* The Renu arbitration clause does not limit any claims or damages. Phillips is free to bring any claims he wishes before the arbitrator.

In *Green Tree*, the Supreme Court evaluated whether an "agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide [the consumer] protection from potentially substantial costs of pursuing her . . . claims in the arbitral forum." *Green Tree*, 531 U.S. at 89. The consumer argued that the agreement's silence on the costs created a risk that she would be required to bear prohibitive costs. *Id.* at 90. The Court held that the agreement's silence on the subject of costs is "insufficient to render it unenforceable" and the

risk of prohibitive costs are "too speculative to justify the invalidation of the arbitration agreement." *Id.*

The arbitration agreement does not limit any remedies available to Phillips in court. In fact, it only requires him to bring his claims before an arbitrator. The provision that arbitration be held in accordance with the rules of the AAA does not impose prohibitive costs. Counsel for Phillips claimed that the AAA Construction Rules apply in the future arbitration proceeding with accompanying expenses. This claim is not supported by any facts. Phillips never asked Renu to arbitrate and never filed for arbitration with the AAA. As a result, any claim of excessive fees is speculative. In fact, Counsel for Phillips represents a separate consumer in another dispute with Renu, subject to the same arbitration agreement, that is currently being arbitrated before the AAA using the Consumer Rules. (Ord. of Judge Griffin, Sumter County Commons Pleas, Sept. 11, 2023, 2023-CP-43-00121). The Consumer Rules only impose a one-time filing fee of $200 on a consumer. The Consumer Rules state that "[t]he parties shall have made these Consumer Arbitration rules a part of their arbitration agreement whenever they have provided for arbitration by the AAA and . . . the arbitration agreement is contained within a consumer agreement, as defined below, that does not specify a particular set of rules." R-1, AAA Consumer Arbitration Rules.[2] Further, R-1 of the Consumer Rules defines a consumer agreement as:

> An agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. **The product or service must be for personal or household use.**

[2] (https://adr.org/sites/default/files/Consumer%20Rules.pdf).

Id. (emphasis added).

Here, Renu has stipulated it would proceed under the Consumer Rules. Despite the language in the Consumer Rules and the nature of the dispute, the trial court found that the arbitration agreement would proceed under the Construction Rules with accompanying costs. The Renu and Phillips agreement is plainly a consumer contract. The panels are for "home or personal use" and the agreement is "standardized between a business and consumer." The AAA Consumer Rules govern the dispute, and the only cost to Phillips is a $200 filing fee. The arbitration agreement requests the AAA rules apply to any dispute for the purpose of achieving an unbiased decision from a neutral decision-maker.

i. The trial court incorrectly found that the arbitration agreement required arbitration under the Construction Rules of the AAA and it wrongly speculated as to these costs.

The trial court incorrectly interpreted the plain language of the agreement finding that (1) the arbitration clause required submission to the AAA, (2) arbitration must proceed before a panel of three arbitrators, and (3) the AAA would apply its Construction Rules to any dispute arising under the contract. The agreement only requires arbitration "be held in accordance with the Rules of the [AAA]," not that the AAA administer arbitration. In *York v. Dodgeland of Columbia, Inc.*¸ this Court found that when a specified arbitrator is not present in agreement, it is the "exact situation to which Section 5 of the FAA applies." 406 S.C. 67, 82, 749 S.E.2d 139, 147 (Ct. App. 2013) (citing 9 U.S.C. § 5). Section 5 of the FAA provides that:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed . . . or if for any reason there shall be a lapse in the naming of an arbitrator, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require.

9 U.S.C. § 5.

Here, the arbitration agreement does not provide for a specified arbitrator. The arbitration clause actually provides three ways for the parties to select an arbitrator: (1) Each party may select one and the two arbitrators select the third, (2) the parties agree to one arbitrator, and (3) the AAA procedure is followed. In fact, Renu stipulated at the trial court that it wished to proceed under the Consumer Rules and would consent to any order requiring those Rules be applied. (R. p. 212). Therefore, the proper solution is to follow the procedure outlined in section 5 of the FAA. And, Phillips' lawyer's speculation regarding costs is an improper basis to conclude that arbitration is unconscionable.

ii. The dispute over AAA rules was improper for the trial court to consider and should have been placed before an arbitrator.

Our Supreme Court has considered whether injunctive relief is proper following judicial action when two parties cannot agree which set of AAA Rules should govern. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 545, 627 S.E.2d 687, 689 (2006). In that case, BCS argued that because the parties could not agree as to which set of AAA rules to apply to their dispute, arbitration was futile. *Id.* at 546, 627 S.E.2d 689. The court expressly rejected this argument finding that injunctive relief was not proper because an adequate remedy of law existed under arbitration. *Id.* The court reasoned that any disagreement over the rules was properly heard at arbitration. *Id.* at 545, 627 S.E.2d at 690.

This dispute over arbitration rules should be heard before an arbitrator instead of a court. Finding in favor of Phillips would undermine any arbitration agreement that specifies a ruleset for the sake of identifying material terms. Such a ruling would allow for arbitration agreements to be invalided over any dispute in the rules to apply.

The AAA rules assume that the Consumer Rules apply to this dispute because Phillips is a consumer and Renu is a commercial entity. Renu has consented to the AAA Consumer Rules.

Phillips has produced no evidence that the Consumer Rules do not apply. And he has not even attempted to invoke arbitration as required by the contract he signed. As a result, there is no evidence that the AAA would apply any rules other than the Consumer Rules.

iii. The trial court erred in finding that Phillips had carried his burden of proof in demonstrating prohibitive costs in the arbitral forum.

"Unconscionability is gauged at the time the contract was made." *Doe v. TCSC, LLC,* 430 S.C. 602, 612, 846 S.E.2d 874, 879 (Ct. App. 2020). A party challenging arbitration on the basis of prohibitive costs bears the burden of showing the likelihood of incurring such costs. *Green Tree*¸ 531 U.S. at 92. The "risk" that a party resisting arbitration will face prohibitive costs is "too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91.

The trial court relied on a series of federal cases to find that Phillips' counsel's speculative affidavit carried his burden of proving unconscionable costs in arbitration. Namely, the trial court stated an "identical" fee splitting arrangement exists in the Construction Rules in the case of *Knox*. *Knox v. Joe Gibson's Autoworld, Inc.* 2008 WL 2077361 at *3 (D.S.C. May 8, 2008). In *Knox*, the arbitration agreement contained a provision requiring a 50% splitting of arbitration costs between parties. *Id.* The court ultimately found the fee-splitting provision to be unconscionable. *Id.*

There is no fee splitting provision like this in the Renu Contract or the AAA Consumer Rules. In fact, the arbitration clause has no provision on splitting fees and neither does the AAA Consumer Rules. The trial court assumed some fee structure from the AAA Construction rules without any basis in fact. The arbitration agreement between Renu and Phillips does not contain a fee-splitting provision. Further, Phillips provided no evidence of a contemplated fee-splitting arrangement at the time the contract was made. Phillips instead submitted affidavits of personal

capacity to pay and his lawyer's experience in some other case.[3] Here, as in *Green Tree*, Phillips has merely presented evidence that he believes a dispute proceeding to arbitration *could* apply the Construction Rules. The language of the Consumer Rules applies to this dispute and the rules require only a $200 filing fee and impose no fee splitting on the consumer for the remaining costs. Phillips' speculation as to the risk of over-burdensome fees is insufficient to carry the burden of showing prohibitive costs for the purposes of unconscionability. If Phillips is concerned with his speculation as to excessive fees, the proper remedy is judicial appointment of arbitrators in accordance with the Consumer Rules - not a finding of substantive unconscionability.

iv. The trial court erred in finding the venue selection clause of the arbitration agreement as unconscionable and against public policy.

South Carolina Code Section 15-7-120(B) states that a provision within an arbitration agreement requiring proceedings to be held outside the state of South Carolina is not enforceable. The remaining provisions of the arbitration agreement remain enforceable consistent with the FAA and "applicable rules of arbitration." S.C. Code Ann. § 15-7-120(B).

Here, the provision of the arbitration agreement requiring arbitration to take place in Charlotte, North Carolina, contradicts the South Carolina Code. Therefore, that provision is unenforceable, but according to the statute does not affect the enforceability of the remaining arbitration provisions. Renu stipulated it would consent to arbitration in the state of South Carolina. (R. p. 198). The venue provision does not render the entire arbitration agreement unenforceable and does not contribute to the analysis of oppressive, one-sided terms for the purpose of

[3] The trial court's reliance on Phillips' affidavit is in error. The most recent publication of the AAA Consumer Arbitration report contains 148 instances of a company with "Solar" included in its name where the dispute type is not "financing" and involves disputes similar to this one. (https://www.adr.org/consumer)

unconscionability. Renu requests this Court strike out the venue provision and reverse the trial court's finding that it contributed to any alleged unconscionability within the arbitration agreement because the South Carolina code expressly requires that the remaining arbitration provisions be enforced. *Id.*

Therefore, Renu requests this Court reverse the trial court's findings that the arbitration agreement is unconscionable based on prohibitive costs and choice of venue because the plain language of the agreement contains no unconscionable terms, Phillips failed to show prohibitive costs, and the choice of venue provision does not render the remaining provisions of the agreement unenforceable.

v. The trial court improperly relied on hearsay statements.

The trial court ruled the arbitration agreement was unenforceable in part due to statements made concerning the cost of arbitration. This was improper first because the statements were made on hearsay and not first-party knowledge. Rule 56 requires supporting and opposing affidavits to be made on "personal knowledge." SCRCP Rule 56(e). The affiant must set forth the facts as would be admissible in evidence and "show affirmatively that the affiant is competent to testify to the matters stated therein." *Id.* Speculation and conjecture are not a substitute for probative facts. *Lavender v. Kurn*¸ 327 U.S. 645, 653 (1946). "Hearsay is not admissible except as provided by the [South Carolina Rules of Evidence] or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Phillips stated in his affidavit that the "projected average cost of $25,826.41 to pursue my claims in arbitration according to the terms of the arbitration clause would be nearly half of my annual salary." (R. p. 89, ¶ 7). The purported projected average cost came directly from the affidavit of Phillips' counsel, where he relies on "several cases" he has filed where the AAA

allegedly applied the Construction Rules to the dispute. (R. p. 91, ¶¶ 12-13). Phillips then relies on data from the AAA filtered to only include construction disputes, without published data on the amount in controversy and other crucial variables to arrive at a projected average cost of $25,826.41. (R. pp. 93-94, ¶¶ 25-34). The trial court used this exact projected average cost, based on information outside the personal knowledge of both Phillips and his lawyer, to support its finding of unconscionability. (R. p. 6). In fact, Phillips' lawyer has personal knowledge of an ongoing dispute with Renu in Sumter County which is in arbitration under the AAA Consumer Rules. Therefore, the trial court erred in relying on hearsay evidence because the information contained in Phillips' affidavits exceeded the scope of the affiants' personal knowledge and incorporated out-of-court statements to speculate as to costs.

vi. The trial court erred by incorporating affidavits filed five months after oral arguments and did not provide Renu an opportunity to respond.

Rule 56 requires a response affidavit for summary judgment to be served two days before a hearing. SCRCP Rule 56(c). "The trial court may refuse to consider materials that were not timely served such that the opposing party had no time to prepare a response." *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997). Phillips' additional affidavits used by the trial court were filed five months after the hearing. (R. pp. 88-95). Renu did not have the opportunity to respond to these affidavits through argument or affidavit.

Phillips filed two additional affidavits incorporated into the trial court's order five months after the hearing. On August 11, 2023, the trial court issued its order incorporating the statements from Phillips' affidavits. The trial court did not extend an opportunity to respond to Renu. Therefore, the trial court improperly relied on these untimely affidavits in drafting its order and prejudiced Renu by not affording an opportunity to respond.

vii. The trial court erred by finding lack of mutuality made the arbitration agreement unconscionable.

The arbitration agreement excepts collection actions, repossession and any actions which must be decided by a court. As a result, the trial judge found it unconscionable because it lacked mutuality. The trial judge was wrong in this conclusion. Lack of mutuality does not make an arbitration agreement unenforceable. *Munoz v. Green Tree Financing Corp*., 343 S.C. 531, 524 S.E.2d 360 (2001). In Munoz, the plaintiff argued an arbitration agreement that allowed a lender to judicially foreclose a mortgage but required the borrower to arbitrate claims was unconscionable. It noted that the arbitration agreement did not determine the remedy for the borrower's claims. Instead, the arbitration agreement only provided for the forum in which to bring the claims. Just like Phillips, the Munozes were not deprived of a remedy. They merely had to seek their remedy through arbitration to which they agreed. As a result, the arbitration clause is not void for lack of mutuality.

II. THIS COURT SHOULD SEVER ANY UNCONSCIONABLE PORTIONS OF THE ARBITRATION AGREEMENT AND ENFORCE THE ARBITRATION AGREEMENT.

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. § 36-2-302(1). The "cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016).

In *Huskins,* this Court ruled that unconscionable portions of an arbitration provision in a home purchase agreement were severable. *Huskins v. Mungo Homes*, LLC, 439 S.C. 356, 371, 887 S.E.2d 534, 542 (Ct. App. 2023). The buyers entered a purchase agreement with the sellers for a new home. *Id.* at 360, 887 S.E.2d at 541. The agreement contained an arbitration provision with

two unconscionable sentences reducing the statutory limitations period. *Id.* at 371, 887 S.E.2d at 542. The court held that even where there is a lack of a severability clause, the court should "simply delete the offending language without affecting the basis of the parties' bargain or rewriting their agreement." *Id.*

In this case, the venue provision should be severed because the agreement to arbitrate is easily ascertainable despite the alleged unconscionable provisions. Similar to *Huskins,* the trial court held only a small portion of Renu's arbitration agreement is unconscionable. In the contract, the venue provision in the arbitration clause requires arbitration be held, "in the City of Charlotte, North Carolina." (R. p. 302, ¶ 6). The arbitration clause specifies the type of disputes subject to arbitration, allows a claim to be filed to a panel of three arbitrators if the parties cannot agree on one arbitrator, adopts the procedure of the AAA for choosing an arbitrator, and incorporates the Rules of the AAA. *Id.* Counsel for Renu stipulated at trial that Renu is willing to find another location to arbitrate that is "mutually agreed-upon with all the parties." (R. p. 198, ll. 23-24). Additionally, the trial court's finding of unconscionability based on prohibitive costs cannot invalidate an agreement to arbitrate "in accordance with the rules of the AAA." (R. pp. 302-303, ¶ 6). The contract does not even require that the parties use AAA services. The trial court incorrectly ruled that the alleged unconscionable provisions in the arbitration agreement are not severable. If the court finds some provision of the arbitration clause unconscionable, it should sever just that portion.

III. RENU DID NOT WAIVE ARBITRATION BY FILING A REQUEST TO ADMIT DAMAGES CONCURRENTLY WITH ITS MOTION TO DISMISS AND COMPEL ARBITRATION.

"The party seeking to establish waiver has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration." *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 513, 788 S.E.2d 216, 219 (2016) (citing *Gen. Equip. & Supply Co.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001)). "Mere inconvenience or delay is insufficient to establish prejudice on its own." *Id.* (citing *Toler's Cove Homeowners Ass'n Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003)). The FAA requires courts to resolve "any doubts concerning the scope of arbitrable issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Dean v. Heritage Healthcare of Ridgeway*, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). Thus, there is a presumption against finding a party has waived its right to compel arbitration. *Id.* Specifically, the party seeking to avoid arbitration "must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* (citing *Liberty Builders Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999).

In *Rich v. Walsh*, this Court examined whether a bank had waived its right to arbitrate after filing its answer, counterclaims, taking a deposition, and waiting thirteen months to file a motion to compel arbitration. *Rich v. Walsh*, 357 S.C. 64, 66–67, 590 S.E.2d 506, 507 (Ct. App. 2003). This Court held that the bank had not waived its right through "minimal discovery efforts" such as submitting one set of interrogatories, one set of requests, filing a motion to compel discovery responses, and taking a brief deposition. *Id.* at 72–73, 590 S.E.2d at 510. Further, the Court held that a speculative assertion that the bank had accessed information in pretrial discovery unavailable in arbitration was insufficient to establish waiver. *Id.* at 73, 590 S.E.2d at 511.

The trial court incorrectly held that Renu "availed itself of litigation procedures in this Court which would be unavailable in arbitration." (R. p. 76). Here, Renu concurrently filed a request to admit damages as less than $75,000 with their Answer and Motion to Dismiss and Compel Arbitration. (R. p. 186). Question three on both the Consumer and Construction Arbitration Demand Forms provided by the AAA requests the claimant provide the amount in dispute.[4] Therefore, Renu has not accessed litigation procedures unavailable in arbitration. Further, the trial court referenced a series of cases stating a party waives their right to compel arbitration after participating in discovery. (R. pp. 20-23). Phillips must show that Renu participated in "extensive discovery" and that Phillips suffered prejudice as a result of that delay. Here, Phillips demonstrated no prejudice as a result of Renu's filing because the Requests to Admit, Answer, and Motion for Dismissal and to Compel Arbitration were filed concurrently, only three months after Phillips' Complaint was filed. (R. p. 186, ¶ 1).

CONCLUSION

This Court should reverse the trial court's denial of Renu Energy Solution's Motion for Dismissal and to Compel Arbitration because the plain language of the arbitration agreement does not produce an unconscionable result, any unconscionable provisions of the agreement are severable, and Renu did not substantially engage in the discovery process so as to waive its right to compel arbitration.

[4] *See* AAA Construction Arbitration Rules Demand for Arbitration (https://www.adr.org/sites/-default/files/Construction_Demand_Form.pdf); AAA Demand for Arbitration Consumer Arbitration Rules (https://adr.org/sites/default/files/Consumer_Demand_for_Arbitration_Form-_1.pdf).

Respectfully submitted,

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