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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

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

Joshua Phillips, ……..... Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In November of 2019, Respondent, Renu Energy Solutions, LLC, sold a home solar panel system to Mr. Joshua Phillips for the production of solar electricity. In doing so, Respondent's sales representative induced Mr. Phillips to purchase the system by fraudulently misrepresenting the savings Mr. Phillips could expect from the solar panel system. Respondent also fraudulently and deceptively induced Mr. Phillips to purchase the panels using an illegal referral sale technique expressly prohibited by S.C. Code § 37-2-411. Contained within the installation agreement signed by Mr. Phillips is a purported arbitration clause. Whether the arbitration clause is unconscionable and, thus, unenforceable, is the central question of the present Appeal.

Mr. Phillips commenced the action below by filing a summons and complaint on November 15, 2022, asserting claims against Appellant for fraud, negligent misrepresentation, negligence, gross negligence, unconscionability, breach of contract, breach of contract accompanied by fraudulent act, referral sale, and unfair trade practices alleging that Appellant had induced Mr. Phillips to purchase the solar panel system through the use of fraudulent and deceptive sales practices. Appellant filed an answer and a motion for dismissal and to compel arbitration on January 12, 2023. Appellant then filed an untimely amended answer on February 15, 2023. On February 17, 2023, Mr. Phillips filed his response in opposition to Appellant's motion for dismissal.

On February 22, 2023, a hearing was held on the motion to compel arbitration. Based on objections to evidence submitted at the hearing by Appellant, Mr. Phillips submitted additional evidence in support of his opposition in a supplemental filing on July 11, 2023. On August 11, 2023, the lower court entered an order denying Appellant's motion for dismissal holding that the arbitration provision in question was unconscionable.

On August 17, 2023, Appellant filed a motion for reconsideration. A hearing on the motion for reconsideration was held on January 8, 2024. On February 28, 2024, the lower court entered an order denying Appellant's motion for reconsideration.

Appellant filed its notice of appeal on March 7, 2024.

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review." *Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 667, 373 S.C. 14 (S.C. 2007) (citing *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." *Id.* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)).

ARGUMENT

I. The Arbitration Provision Is Unconscionable.

"In South Carolina, unconscionability 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*, 644 S.E.2d at 668. "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 so as to avoid any unconscionable result." *Id.* (citing S.C.Code § 36-2-302(1)). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus 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)).

A. Mr. Phillips lacked any meaningful choice in agreeing to arbitrate.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* (citing *Carlson v. General Motors Corp.*, 883 F.2d 287, 295 (4th Cir.1989)). Our Supreme Court has set out factors to consider in determining whether a contract was tainted by an absence of meaningful choice including "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.* at 669.

Here, the lower court made factual findings that Mr. Phillips is an individual, not a substantial business concern, while Appellant is a corporate entity engaged in the business of selling and installing solar panels. (R. p. 3). Our Supreme Court has adopted the view of other courts that "sales agreements between consumers and retailers are subject to considerable skepticism upon review, due to the disparity in bargaining positions of the parties." *Id.* (internal quotations omitted). Consequently, there was great disparity in the Parties' bargaining power and sophistication. Further, the lower court factually found that Mr. Phillips is a consumer who was presented with a non-negotiable form contract by Appellant on a take-it-or-leave-it basis. (R. p. 3). Thus, the contract in which the arbitration clause at issue in this case is embedded is an adhesion contract about which "there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Simpson*, 644 S.E.2d at 669; *see also Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (form contract given to all homebuyers with only a few, minor blank spaces to fill was a contract of adhesion).

The lower court additionally found as fact that Mr. Phillips did not possess the business judgment necessary to make him aware of the implications of the arbitration clause, Mr. Phillips did not have a lawyer present to provide assistance in the matter, and the contract was hastily presented to Mr. Phillips for his signature after enduring lengthy, high-pressured sales tactics of the Appellant. (R. p. 4). Moreover, while certain other provisions of the contract contain bolded or all-capitalized lettering, the arbitration provision in its entirety was written in the same standard small print as the rest of the document and embedded in paragraph six (6) of eighteen (18) total paragraphs. Thus, the lower court found that the arbitration provision was inconspicuous in light of its consequences. (R. p. 3). In *Simpson*, our Supreme Court, analyzing an arbitration clause under nearly identical circumstances, held that the plaintiff had no meaningful choice in agreeing to arbitration. *Simpson*, 644 S.E.2d at 669. So too, the lower court correctly found that Mr. Phillips had no meaningful choice.

B. The arbitration provision contains oppressive and one-sided terms.

i. Excessive Fees and Costs

A main point of contention in this appeal concerns the arbitration rules the American Arbitration Association (AAA) would apply to the dispute and the resulting share of the costs and fees to be borne by Mr. Phillips. The lower court considered affidavits submitted by Mr. Phillips and his counsel as well as competing affidavits submitted by Respondent regarding the applicable arbitration rules and likely fees and costs of an arbitration proceeding pursuant to the purported arbitration clause at issue in this case. Based on evidence that the AAA had applied its Construction Industry arbitration rules to other solar panel arbitrations involving consumers, the lower court made the factual determination that the AAA would have made a similar determination in the present case. (R. p. 4; R. pp. 19-20).

Under the AAA's Construction Industry rules, cases with three arbitrators are "subject to a minimum Initial Filing fee of $4,400" which is "payable in full by a filing party when a claim . . . is filed." *See* AAA Construction Industry Arbitration Rules Administrative Fee Schedules (https://go.adr.org/constructionfeeschedule). Thus, just to file this case in arbitration, Mr. Phillips would be required to pay at least the minimum filing fee of $4,400. This is more than ten times the filing fee for federal court and more than twenty times the filing fee for state court in South Carolina.

In addition to the initial filing fee, Mr. Phillips would be required to pay his share of a final fee of $3,850 prior to any final hearing on the matter. *See* AAA Construction Industry Rules, Administrative Fee Schedules (https://www.adr.org/sites/default/files/Construction_Arbitration_Fee_Schedule_0.pdf).

The lower court considered an affidavit submitted by Mr. Phillips' counsel analyzing certain consumer arbitration statistics published by the AAA and found, as a matter of fact, that Mr. Phillips' average expected liability for arbitrator fees and costs for this case would be $25,826.41. (R. p. 6). Mr. Phillips submitted his own affidavit indicating that such costs and fees would be prohibitively expensive compared to his annual salary of $57,000 per year. (R. pp. 88-89). Based on this evidence, the lower court found that the expected costs of arbitrating the matter were prohibitively expensive both in terms of Mr. Phillips' ability to pay as well as considering the contract price for the solar panels in dispute. (R. pp. 6-7). The lower court also found that such costs would be prohibitively expensive to the majority of South Carolinians. (R. p. 11).

A significant number of federal courts, including in South Carolina, consider high arbitration fees as a factor in finding an arbitration agreement unconscionable. *See, e.g., Knox v. Joe Gibson's Autoworld, Inc.*, 2008 WL 2077361, at *3 (D.S.C. May 8, 2008) (arbitration clause

in car sale contract that imposed half of the costs of arbitration on the consumer was unconscionable, because it makes it likely that the consumer would not receive a full recovery under the deceptive trade practices act). In *Knox*, South Carolina's federal district court recognized that requiring a consumer to split the exorbitant costs of arbitration is unconscionable because it offsets a plaintiff's recovery and plaintiff "could be denied full recovery otherwise available in the instant action should this case proceed to arbitration." *Id.*, 2008 WL 2077361, at *3.

A large number of state courts have arrived at the same conclusion. *See, e.g.*, *Brunke v. Ohio State Home Services, Inc.*, 2008 WL 4615578 (Ohio Ct. App. Oct. 20, 2008) (arbitration fees under AAA construction industry rules unconscionable). Significantly, in *Brunke*, the Ohio Court of Appeals considered the costs imposed on consumers by the AAA's construction industry rules—the same rules at issue here—and found such rules and the arbitration clauses requiring them to be unconscionable in the consumer context. *Id.*

Indeed, Rules 56 and 57 of the AAA's construction rules are nearly identical to the arbitration fee splitting provision in the clause at issue in *Knox*.[1] Just as in *Knox*, Plaintiff's award in this case is at risk of being subsumed by the costs of arbitration making it likely that Plaintiff would not receive full recovery on his statutory claims should this case proceed to arbitration. Accordingly, the arbitration provision is unconscionable and unenforceable.

Here, the likely arbitration costs are prohibitively expensive both in terms of the contract amount for the solar panels as well as Plaintiff's (and other similarly situated consumers') ability (or inability) to pay. The exorbitant costs would also offset any damages recovered by Plaintiff

[1] The agreement in *Knox* provided that "[t]he parties agree to bear the costs of arbitration equally, which costs shall be apportioned and awarded by the arbitrator at the time of his decision[.]" *Knox*, 2008 WL 2077361, at *3. Rule 56 of the AAA's construction rules provides, in part, that the "expenses of the arbitration . . . shall be borne equally by the parties . . . unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties." R-56, AAA Construction Industry Rules (https://adr.org/sites/default/files/Construction_Rules_Web.pdf). Rule 57 of the same rules provides that "each party shall share equally in the compensation of the arbitrator, subject to reapportionment in the final award." R-57, AAA Construction Industry Rules.

thereby denying Plaintiff full recovery for his statutory claims. Moreover, the costs are far in excess of the costs for Plaintiff to litigate in court or what any reasonable, fair, and honest person would require or accept. Thus, lower court correctly found that the arbitration provision and its terms are oppressive and one-sided and, thus, unconscionable and unenforceable.

ii. Non-mutual Arbitration Protects Appellant at Mr. Phillip's Expense

To avoid paying high arbitration fees and costs itself, Appellant's arbitration clause specifically carves out the only conceivable claims it might bring against Mr. Phillips. The clause excepts "suits or claims for money owed by Purchaser under this Agreement" and "suits or claims which deal with repossession of equipment and parts subject to this Agreement" from any arbitration requirement. Because payment is Mr. Phillip's primary obligation under the agreement and payment is secured by the equipment, these two exceptions constitute all the likely claims Appellant might bring against a purchaser such as Mr. Phillips. Thus, while Mr. Phillips faces prohibitively expensive arbitration costs for bringing his claims, Appellant can avail itself of the minimal costs of proceeding with its claims in court.

Mr. Phillips concedes, and the lower court correctly ruled, that "lack of mutuality of remedy in an arbitration agreement, **on its own**, does not make the arbitration agreement unconscionable." *Simpson*, 644 S.E.2d at 672 (emphasis added). That said, the lower court correctly found that the lack of mutuality coupled with prohibitively expensive arbitration costs for Mr. Phillips but not for Appellant exacerbates the unconscionable cost burden faced by Mr. Phillips in arbitration. By drafting such an agreement, Appellant avoids high arbitration costs for its own claims while seeking to enforce prohibitively expensive arbitration costs against consumers. This dynamic deprives consumers like Mr. Phillips of any real remedy while preserving all of Defendant's potential remedies. As such, the arbitration provision is oppressive,

one-sided, and does not promote a neutral and unbiased arbitral forum. Accordingly, the lower court correctly found that the arbitration provision is unconscionable and unenforceable.

iii. Venue Provision Unconscionable and Against Public Policy

While no appellate court in South Carolina has addressed this issue, federal courts in South Carolina have recognized that S.C. Code § 15-7-120 embodies a strong public policy disfavoring venue and forum selection clauses.[2] *See Insurance Products Marketing v. Indianapolis Life*, 176 F.Supp.2d 544, 550 (D.S.C. 2001) ("[T]he fact that the statute is applicable to all civil cases across the board . . . leads the court to conclude that the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect."); *Consolidated Insured Benefits v. Conseco Medical*, 370 F.Supp.2d 397, 401 (D.S.C. 2004) ("[T]he court reaffirms its conclusion that South Carolina has a strong policy disfavoring forum selection clauses. While the legislators may not have declared the state policy in the text of the statute, the statute embodies South Carolina's policy against forum selection clauses through what it expressly allows.").

Here, the arbitration provision in question calls for the arbitration to take place in Charlotte, North Carolina, despite the fact that the contract was the result of a solicitation for the purchase and installation of a solar panel system in Darlington County. This venue provision favors Appellant as Appellant is headquartered in Charlotte, North Carolina, and simply adds to the disproportionate and prohibitively expensive arbitration costs to be borne by Mr. Phillips under the arbitration clause. Such a provision is oppressive, one-sided, and contrary to the public policy

[2] Defendant may rely on *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010), in support of the opposite conclusion. That decision, however, relied on the absence of controlling South Carolina appellate authority. Indeed, this issue has never been squarely decided by our Supreme Court. As some district court opinions have noted, "the court . . . finds it more suitable for . . . the South Carolina courts to espouse such a policy." *T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, C/A No. 3:10-2250-JFA, *7 (D.S.C. Nov. 17, 2010). The only way to do that, of course, is to address the issue to the lower court first and, if appealed, to subsequent appellate courts.

of South Carolina. As a result, the lower court correctly found the arbitration provision is unconscionable and unenforceable.

II. The Arbitration Provision Is Not Severable.

Our Supreme Court's recent ruling in *Damico v. Lennar Carolinas, LLC*, summarizes the law on severability of arbitration clauses:

> 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) (2003); *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903; 17A Am. Jur. 2d Contracts § 313. However, severability is not always appropriate to remedy unconscionable contractual provisions. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673; 17A Am Jur. 2d Contracts § 314. In particular, courts are reluctant to sever the unconscionable provisions when illegality pervades the entire agreement "such that only a disintegrated fragment would remain after hacking away the unenforceable parts." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); see also 17A Am Jur. 2d Contracts § 314. In those cases, judicial severing "look[s] more like rewriting the contract than fulfilling the intent of the parties." *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673 (citation omitted); see also 17A Am Jur. 2d Contracts § 313.
>
> Thus, "[c]ourts have discretion [] to decide whether a contract is so infected with unconscionability that it must be scrapped entirely, or to sever the offending terms so the remainder may survive." *Doe v. TCSC, L.L.C.*, 430 S.C. 602, 615, 846 S.E.2d 874, 880 (Ct. App. 2020); *see also Simpson*, 373 S.C. at 36, 644 S.E.2d at 674 (noting there is no specific set of factual circumstances indicating when complete invalidation of the contract is a better option than merely excising the offending clauses). In exercising their discretion, courts should be guided by the parties' intent. *Doe*, 430 S.C. at 615, 846 S.E.2d at 880; 17A Am. Jur. 2d Contracts §§ 313-14; see also 17A Am. Jur. 2d Contracts § 273 ("To assess whether unconscionable terms can be severed from a contract or whether the entire contract should be invalidated, a court considers whether the illegality is central or collateral to the purpose of the contract.").

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022).

Here, because of the "multitude of one-sided terms" present in the arbitration clause, the lower court correctly severed the arbitration clause in its entirety rather than "rewriting" the contract by severing multiple unenforceable provisions. *Simpson*, 644 S.E.2d at 674. The lower court found that if it were to sever the multiple unenforceable provisions, "there is essentially

nothing left." *Damico*, 879 S.E.2d at 759. Moreover, because the agreement is an adhesion contract, it is "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(s) ([Plaintiff]) had no hand in drafting or negotiating any of the language of the arbitration agreement." *Id.* Finally, the lower court correctly recognized that South Carolina has a public policy to protect consumers in the construction context. *Id.*

Allowing companies, like Appellant, to overreach by inserting unenforceable arbitration provisions in their contracts to carry out their intended *in terrorem* effect on consumers while only substituting narrower terms when those provisions are challenged would simply incentivize Appellant and others to continue. Thus, enforcement of the severability clause in this context would contravene public policy. *Id.* at 21. The only way to properly incentivize Appellant and other companies to refrain from contractual overreach is to refuse to enforce tainted arbitration agreements wholesale. Accordingly, this Court should affirm the lower court's refusal to enforce the arbitration clause as a whole as unconscionable and against public policy.

III. The Appellant Waived Any Right to Compel Arbitration.

Under generally applicable principles of contract law, "[w]aiver is an intentional relinquishment of a known right." *Edwards v. Rouse*, 351 S.E.2d 174, 176, 290 S.C. 449, 450 (Ct. App. 1986) (citing *Ellis v. Metropolitan Casualty Insurance Co.*, 187 S.C. 162, 197 S.E. 510 (1938)). Because "arbitration is simply a matter of contract between the partes," *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-944 (1995), to which ordinary principles of contract law generally apply, a party may waive its right to compel arbitration, just as it may waive any other contractual right. *See Liberty Builders, Inc. v. Horton*, 336 S.C.658, 665, 521 S.E.2d 711, 753 (Ct. App. 1999) ("It is generally held that the right to enforce an arbitration clause may be

waived."); 21 Samuel Williston, Treatise on the Law of Contracts § 47:14 (Richard A. Lord ed., 4th ed. 1992) ("An arbitration agreement, like any other contract, is subject to generally applicable contract defenses, whether in a federal or state action or proceeding, including the defenses of unconscionability, illegality, fraud, coercion or duress, laches, the running of the applicable limitations period, and waiver.").

Here, Appellant cites authority for the proposition that waiver of rights under an arbitration clause requires a showing of prejudice to the party opposing arbitration. Those authorities are outdated in the wake of a recent United States Supreme Court decision which recognized that the requirement of a showing of prejudice was specially applicable only to waiver of arbitration clauses and there was no requirement to show prejudice for waiver of contract rights generally. The U.S. Supreme Court, therefore, abolished any requirement to show prejudice and returned the waiver standard for arbitration clauses to that generally applicable to all contracts. This Court should follow the reasoning of that decision and reject a requirement of prejudice. Whether or not prejudice remains a requirement, the Circuit Court Judge correctly found that Appellant had waived any right to compel arbitration.

A. Prejudice should no longer be required to find waiver.

In cases implicating the Federal Arbitration Act (FAA), South Carolina courts have looked to, and adopted, federal jurisprudence to determine when a party has waived its right to enforce an arbitration clause. *Sentry Engineering and Const., Inc. v. Mariner's Cay Development Corp.*, 338 S.E.2d 631, 287 S.C. 346, 351 (1985) (looking to and adopting federal decisions on waiver issue). In *Sentry Engineering*, the South Carolina Supreme Court followed reasoning from the federal Second Circuit in adopting a requirement that prejudice is the determining factor in whether a party has waived its right to compel arbitration. *Sentry Engineering*, 287 S.C. at 351 ("Federal decisions

require a showing of prejudice when waiver is asserted. *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir.1968) holds that it is not inconsistency, but the presence or absence of prejudice which is determinative.").

Recently, however, the United States Supreme Court struck down that very same Second Circuit decision in *Carcich* along with decades of federal circuit and district court decisions requiring a showing of prejudice in determining whether a party had waived its right to compel arbitration. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S.Ct. 1708 (2022). The *Morgan* opinion focused on the FAA's policy to make "arbitration agreements as enforceable as other contracts, but not more so." *Id.* at 142 S.Ct. 1713 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n. 12 (1967)). The Supreme Court recognized that, outside the context of arbitration, waiver of contractual rights does not require a showing of prejudice. *Id.* The Court concluded that arbitration provisions should, therefore, not be afforded more protection than other types of contract clauses and held that a showing of prejudice is not required to show waiver of an arbitration agreement. *Id.* at 142 S.Ct. 1714.

Of particular importance in the present case, the *Morgan v. Sundance* opinion traced the origins of the federal requirement of a showing of prejudice to "a decades-old Second Circuit decision," *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968). *Id.* at 142 S.Ct. 1713. This same decades-old Second Circuit decision was cited by our own state Supreme Court when, in 1985, it first decided prejudice would be required to show waiver of an agreement to arbitrate. *Sentry Engineering*, 287 S.C. at 351. Thus, *Morgan v. Sundance* upended the entire basis for South Carolina courts to require prejudice in determining whether the right to compel arbitration has been waived.

By comparison, both prior to *Sentry Engineering*, and since, prejudice has not been required to show waiver of any other contractual right in South Carolina. *Edwards v. Rouse*, 351 S.E.2d 174, 176, 290 S.C. 449, 450 (Ct. App. 1986) ("Waiver is an intentional relinquishment of a known right.") (citing *Ellis v. Metropolitan Casualty Insurance Co.*, 187 S.C. 162, 197 S.E. 510 (1938)); *Covil Corp. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 436 S.C. 85, 93, 870 S.E.2d 191, 196 (Ct. App. 2022) (citing *Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994)).

With the United States Supreme Court's overturning of a prejudice requirement in *Morgan v. Sundance*, there is no longer any federal precedent underlying and supporting a requirement of prejudice in South Carolina state courts. Moreover, with our own state Supreme Court's re-affirmation that arbitration clauses are not entitled preferential treatment over other contract clauses, there is no viable state-level legal or policy reason to require a showing of prejudice for waiver of arbitration agreements when the same is not required for other contractual obligations. *See Palmetto Constr. Grop., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021) ("our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitration as it respects and enforces all contractual provisions"). Accordingly, whether Defendant waived its right to compel arbitration should be decided under generally applicable contractual principles without requiring a showing of prejudice and not under any "bespoke rule of waiver for arbitration." *Morgan v. Sundance*, at 142 S.Ct. at 1713.

B. The Circuit Court Judge correctly held that Appellant had waived any right to compel arbitration.

Under the generally applicable doctrine of waiver, "[a] waiver is an intentional relinquishment of a known right." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158, 355 S.E.2d 282, 285 (Ct. App. 1987) (citing *Bonnette v. State*, 277 S.C. 17, 282 S.E.2d 597 (1981)); *see also Morgan v. Sundance*, at 142 S.Ct. at 1713 ("Waiver, we have said, is the intentional relinquishment or abandonment of a known right."). "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Id.* (citing *Pitts v. New York Life Insurance Company*, 247 S.C. 545, 148 S.E.2d 369 (1966)). "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." *Morgan v. Sundance*, 142 S.Ct. at 1713.

In the present case, Appellant proceeded to engage in discovery with the service of requests to admit on Mr. Phillips on January 24, 2023. (R. pp. 184-185). As such, Appellant availed itself of litigation procedures in the lower court which would be unavailable in arbitration.

By litigating in the lower court and actively propounding discovery requests to Mr. Phillips, Appellant took advantage of the discovery mechanisms under the rules of procedure which would not otherwise be available in arbitration and, thus, has waived its right to compel arbitration. *See Davis v. KB Home of S.C., Inc.*, 713 S.E.2d 799 (S.C. Ct. App. 2011) (waiver after engaging in discovery).

By seeking discovery from Mr. Phillips while simultaneously moving to compel arbitration, Appellant took advantage of the discovery process while also seeking to prevent Mr. Phillips from engaging in further discovery directed to Appellant. While prejudice should no longer be a required showing for waiver, Appellant's active engagement in discovery and seeking

to compel arbitration certainly prejudiced Mr. Phillips both in terms of the cost of answering discovery and as well as in being prevented from seeking further discovery if Appellant's request had been granted. For this reason as well, Appellant waived its right to compel arbitration. *See Tech. in P'ship, Inc. v. Rudin*, 538 Fed. Appx. 38 (2d Cir. 2013) (it would prejudice plaintiff to have to switch to arbitration after having produced discovery and while awaiting reciprocal discovery from party seeking arbitration); *Garcia v. Wachovia Corp.*, 699 F.3d 1273, 1278 (11th Cir. 2012) (finding prejudice because, inter alia, "Wells Fargo benefited from conducting discovery of the plaintiffs, a benefit to which it would not have been entitled during arbitration"); *Republic Ins. Co. v. PAICO Receivables, L.L.C.*, 383 F.3d 341, 347 (5th Cir. 2004) (finding prejudice when party sought discovery not available in arbitration); *PPG Indus., Inc. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 109 (2d Cir. 1997) ("We have held that sufficient prejudice to sustain a finding of waiver exists when a party takes advantage of pre-trial discovery not available in arbitration."); *Stifel, Nicolaus & Co. v. Freeman*, 924 F.2d 157, 159 (8th Cir. 1991) ("[p]rejudice may result from . . . use of discovery methods unavailable in arbitration").

Accordingly, the lower court correctly held that Appellant waived its right to compel arbitration.

CONCLUSION

For the reasons stated above, Mr. Phillips respectfully requests that this Court affirm the Circuit Court's Order denying Appellant's motion to compel arbitration.

Respectfully submitted,

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RULE 211(b) CERTIFICATION OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and the Respondent's Certification of Counsel on Renu Energy Solutions, LLC, by emailing copies of the same on August 5, 2024, to their attorney of record, James Edward Bradley, at his AIS email address ward@mbmlawsc.com.

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