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Nov 05 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Michael S. Holt, Circuit Court Judge

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Case No. 2022-CP-16-01053
Court of Appeals Case No. 2024-000338
Opinion No. 2025-CP-225

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Joshua Phillips, ……... Petitioner,

v.

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

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals incorrectly consider the necessity of a consumer good to be the deciding factor in analyzing whether Mr. Phillips had meaningful choice?
2. Did the Court of Appeals incorrectly and improperly base its ruling that the arbitration costs were not excessive on evidence occurring after the time of contracting?
3. Did the Court of Appeals incorrectly analyze the wrong statute section in its ruling on unconscionability and public policy?
4. Did the Court of Appeals incorrectly analyze the issue of waiver under a standard which should be overturned based on intervening precedent?

## 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, against public policy, or waived 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 Respondent 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 Respondent had induced Mr. Phillips to purchase the solar panel system through the use of fraudulent and deceptive sales practices. Respondent filed an answer and a motion for dismissal and to compel arbitration on January 12, 2023. Respondent then filed an untimely amended answer on February 15, 2023. On February 17, 2023, Mr. Phillips filed his response in opposition to Respondent'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 Respondent, 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 Respondent's motion for dismissal holding that the arbitration provision in question was unconscionable.

On August 17, 2023, Respondent 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 Respondent's motion for reconsideration.

Appellant filed its notice of appeal on March 7, 2024. Briefing was submitted and oral argument held before the Court of Appeals. On July 2, 2025, the Court of Appeals filed Unpublished Opinion No. 2025-UP-225 reversing the decision of the lower court. Petitioner Mr. Phillips filed his Petition for Rehearing with the Court of Appeals on August 14, 2025. On October 22, 2025, the Court of Appeals issued an order denying Mr. Phillips' Petition for Rehearing.

## ARGUMENT

### I. The Court of Appeals Incorrectly Considered the Necessity of a Consumer Good to Be the Deciding Factor in Analyzing Whether Mr. Phillips Had Meaningful Choice.

In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 633 (2007), this Court found whether a consumer good is "critically important" to be merely a factor in analyzing meaningful choice—not the determining factor. The Court considered many other factors in analyzing this issue in *Simpson*, including: the fact that the plaintiff did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, that she did not have a lawyer present to provide any assistance in the matter, the fact the contract was hastily presented for her signature, and the inconspicuous nature of the arbitration clause in light of its consequences.

Uncontroverted facts supporting each of these other factors were presented in the record submitted to the Court of Appeals. Mr. Phillips is an individual, not a substantial business concern,

while Respondent is a corporate entity engaged in the business of selling and installing solar panels. (R. p. 3). Mr. Phillips is a consumer who was presented with a non-negotiable form contract by Respondent on a take-it-or-leave-it basis. (R. p. 3). 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 Respondent. (R. p. 4). The arbitration provision was also inconspicuous in light of its consequences. (R. p. 3).

Yet, despite uncontroverted facts in the record supporting each of the other factors deemed by this Court to be considered in determining whether a consumer lacked meaningful choice, none of the other factors were considered at all by the Court of Appeals.

As recognized in *Simpson*, the fact that a consumer good like a house or a car may be considered a necessity in modern society may support the conclusion that a consumer has no meaningful choice but to accept the arbitration agreement—even if the consumer apprehends its consequences. The Court of Appeals incorrectly placed determinative weight on that factor while failing to consider any of the other relevant factors. This analysis, however, ignores the vast number of other consumer transactions where the product may not be a necessity on par with a house or a car but the consumer was nevertheless deprived of meaningful choice in some other regard such as when there is significant disparity in business sophistication of the parties, lack of attorney assistance, being rushed through the signature process so that the agreement is not read, and the inconspicuousness of the clause. The Court of Appeals incorrectly ignored these considerations and, in doing so, unnecessarily limited the types of consumer transactions in which unconscionability may even apply.

The Court of Appeals' opinion suggests that if a consumer good is not a necessity the consumer can exercise meaningful choice by simply declining to purchase the product. Consumers, however, cannot be expected to refuse to purchase or utilize non-necessary products or services simply to avoid arbitration agreements. Arbitration provisions are ubiquitous in modern consumer contracts. Avoidance of arbitration agreements is simply impossible if consumers are engaged in any level of consumer purchasing. It is for this reason that consideration of the other factors relevant to meaningful choice is critically important. Consequently, this Court should grant Mr. Phillips' petition for a writ of certiorari to consider the other factors, reverse the Court of Appeals' opinion, and affirm the Circuit Court's decision.

## II. The Court of Appeals Incorrectly and Improperly Based Its Ruling that the Arbitration Costs Were Not Excessive on Evidence Occurring After the Time of Contracting.

The analysis of whether a contract clause is unconscionable is constrained to whether it was "unconscionable at the time it was made." S.C. Code § 36-2-302(a). By contrast, the Court of Appeal's opinion improperly considered evidence occurring after the time of contracting—Respondent's belated willingness to stipulate to rules more cost-effective for the consumer—as rendering the costs speculative. But, whether the Respondent may be willing to stipulate to some other rules for arbitration after a dispute has arisen and after the time of contracting is completely irrelevant to whether the projected arbitration costs were excessive at the time the contract was entered. For this reason, the Court of Appeal's opinion is flawed and this Court should grant Mr. Phillips' petition for certiorari, reverse the Court of Appeal's opinion, and affirm the decision of the Circuit Court.

Moreover, the Court of Appeal's opinion posits, without analysis, that its decision is also supported by the multiple methods of selecting an arbitrator. But, again, this fact suffers from the

same flaw as above. The arbitration clause indicates that there will be a panel of three arbitrators—which more than triples the cost of the arbitration—unless the parties agree to a single arbitrator. (R. pp. 1-2). The parties most certainly would not have agreed to a single arbitrator and, in fact, did not agree to a single arbitrator. Regardless, such an agreement would be after the time of contracting and thus irrelevant to the unconscionability analysis. For this reason, the Court of Appeal's opinion is flawed and this Court should grant Mr. Phillips' petition for certiorari, reverse the Court of Appeal's opinion, and affirm the decision of the Circuit Court.

## III. The Court of Appeals Incorrectly Analyzed the Wrong Statute Section in Its Ruling on Unconscionability and Public Policy.

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

Instead, the Circuit Court relied on S.C. Code § 15-7-120(A) in finding that the venue selection clause in the arbitration agreement to be both unconscionable and violative of South Carolina public policy. That statutory section is applicable to all contracts—not just arbitration clauses—and, so, it is not preempted by the FAA. The cases cited by the Circuit Court in its order make this distinction clear. *See Insurance Products Marketing v. Indianapolis Life*, 176 F.Supp.2d 544, 550 (D.S.C. 2001) ("[T]he fact that the statute is applicable to all civil cases across the board . . . leads the court to conclude that the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect."); *Consolidated Insured Benefits v. Conseco Medical*, 370 F.Supp.2d 397, 401 (D.S.C. 2004) ("[T]he court reaffirms its conclusion that South Carolina has a strong policy disfavoring forum selection clauses. While the legislators may not have declared the state policy in the text of the statute, the statute embodies South Carolina's policy against forum selection

clauses through what it expressly allows."). Each of these cases analyzed subsection (A), not (B), of S.C. Code § 15-7-120. Subsection (A) remains law in South Carolina and, as some federal courts have observed, indicates a strong public policy in South Carolina against forum selection clauses.

Yet, not all federal courts have found that S.C. Code § 15-7-120(A) indicates a strong public policy in South Carolina against forum selection clauses. *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (declining to find strong public policy against forum selection clauses based on absence of controlling South Carolina appellate authority); *T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, C/A No. 3:10-2250-JFA, *7 (D.S.C. Nov. 17, 2010) ("[T]he court . . . finds it more suitable for . . . the South Carolina courts to espouse such a policy."). This case presents an opportunity for this Court to finally declare whether S.C. Code § 15-7-120(A) indicates a strong public policy in South Carolina against forum selection clauses as the Circuit Court found.

For these reasons, this Court should grant Mr. Phillips' petition for certiorari, reverse the Court of Appeal's opinion, and affirm the decision of the Circuit Court including the lower court's finding that S.C. Code § 15-7-120(A) indicates a strong public policy in South Carolina against forum selection clauses.

## IV. The Court of Appeals Incorrectly Analyzed the Issue of Waiver Under a Standard Which Should Be Overturned Based on Intervening Precedent.

The Court of Appeal's opinion analyzes the issue of waiver solely under precedent requiring a showing of prejudice for waiver to invalidate an arbitration clause. This Court should overturn this precedent based on an intervening United States Supreme Court decision on the issue.

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.").

Under current South Carolina jurisprudence, waiver of rights under an arbitration clause requires a showing of prejudice to the party opposing arbitration. Such decisions should be revisited by this Court, however, 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 and overturn previous South Carolina decisions holding otherwise.

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 to this Court's consideration, 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 this 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 this 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 a right to compel arbitration has been waived 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.

For this reason, this Court should grant Mr. Phillips' petition for certiorari, overturn prior precedent requiring a showing of prejudice for waiver of a right to compel arbitration, reverse the Court of Appeal's opinion, and affirm the decision of the Circuit Court.

## V. Considerations Governing Review Support Certiorari.

*(1) Where there are novel questions of law.*

There are several novel questions of law presented in this case.

First, there has been no controlling appellate decision in South Carolina deciding whether S.C. Code § 15-7-120(A) indicates a strong public policy in South Carolina against forum selection clauses. While some federal courts have undertaken to answer this question[1], other federal courts have left the question open for this Court to rule upon[2]. This case presents this Court with an opportunity to answer this critically important question that needs to be answered. The question is particularly important to the case at hand because it bears on whether inclusion of a forum selection clause designating a foreign jurisdiction can serve as the basis for invalidating the arbitration clause in which the forum selection clause is located. Moreover, answering this question is important to ensuring that South Carolina consumers are not forced to litigate their claims in inconvenient foreign forums when litigating in federal court. Typically, federal courts enforce venue/forum selection clauses in contracts unless there is an established strong public policy in the jurisdiction against such clauses. Here, this Court has an opportunity to establish such a policy—

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[1] *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.").

[2] *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643 (4th Cir. 2010) (declining to find strong public policy against forum selection clauses based on absence of controlling South Carolina appellate authority); *T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, C/A No. 3:10-2250-JFA, *7 (D.S.C. Nov. 17, 2010) ("[T]he court . . . finds it more suitable for . . . the South Carolina courts to espouse such a policy.").

as invited by federal courts—to prevent the enforcement of such clauses against South Carolina consumers in federal court. This is an important question of law which should be addressed in this case.

Second, in the wake of *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S.Ct. 1708 (2022), this Court needs to address whether prejudice is required to have a finding of waiver of a right to compel arbitration as the present state of South Carolina jurisprudence on the issue conflicts with this decision of the United States Supreme Court.

*(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.*

As indicated above, in the wake of *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S.Ct. 1708 (2022), this Court needs to address whether prejudice is required to have a finding of waiver of a right to compel arbitration as the present state of South Carolina jurisprudence on the issue conflicts with this decision of the United States Supreme Court.

## CONCLUSION

For the reasons stated above, Mr. Phillips respectfully requests that this Court grant Mr. Phillips' petition for certiorari, decide that S.C. Code § 15-7-120(A) indicates a strong public policy in South Carolina against forum selection clauses, overturn prior precedent requiring a showing of prejudice for waiver of a right to compel arbitration, reverse the Court of Appeal's opinion, and affirm the decision of the Circuit Court.

Respectfully submitted,

By: /s/ Andrew M. Connor

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**PROOF OF SERVICE**

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I certify that I have served the Petitioner's Petition for a Writ of Certiorari on Renu Energy Solutions, LLC, by emailing copies of the same on November 5, 2025, to their attorney of record, James Edward Bradley, at his AIS email address ward@mbmlawsc.com.

CONNOR LAW, PC

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