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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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

Appellate Case No. 2025-001205

Marisol Kelly .....Respondent

v.

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

APPELLANT'S INITIAL BRIEF

Lee C. Weatherly, Esq.
Skyler C. Wilson, Esq.
Kierra N. Brown, Esq.
Copeland, Stair, Valz & Lovell, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
Phone: (843) 727-0307
Attorneys for Appellant

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STATEMENT OF ISSUE ON APPEAL

I. Did the Circuit Court err in finding the Agreement to Arbitrate unconscionable and refusing to compel arbitration when Respondent had a meaningful choice to easily opt out of the Agreement to Arbitrate but still rent the apartment, and the Agreement to Arbitrate did not contain any oppressive or one-sided terms that could not be severed while still compelling arbitration?

II. Did the Circuit Court err in finding that Appellant waived its right to enforce arbitration when Appellant sought to enforce arbitration less than five months after litigation began and engaged in limited, initial discovery that did not prejudice Respondent?

STATEMENT OF THE CASE

This appeal involves a personal injury action between a landlord and tenant in which the circuit court refused to stay proceedings and compel arbitration pursuant to an enforceable arbitration clause in a lease agreement when that clause was not unconscionable and Appellant did not waive its right to enforce arbitration.

Respondent Marisol Kelly was a resident at Water's Edge Apartments in Dorchester County. In order to rent an apartment, Respondent entered into a Lease Agreement on June 9, 2022. **(R. pp. 53-78)**. The first page of the Lease Agreement noted at the top in **bold**, ALL CAPS, and underlined that the Lease was subject to arbitration. The Arbitration Provision was contained in Section 24 and included many sub-sections detailing different aspects of arbitration. Section 24.2 contained the Agreement to Arbitrate, stating:

> **ALL CLAIMS THAT ARISE BETWEEN YOU AND LANDLORD WILL BE RESOLVED THROUGH BINDING ARBITRATION IN ACCORDANCE WITH THE [Federal Arbitration Act, Title 9 of the United States Code] AND THE [Commercial Arbitration Rules of the American Arbitration Association]. YOU AND LANDLORD AGREE AND UNDERSTAND THAT WE MUTUALLY CHOOSE BINDING ARBITRATION INSTEAD OF LITIGATION TO RESOLVE ALL CLAIMS. THIS MEANS THAT UNLESS YOU OPT OUT OF THIS SECTION 24.2 (AGREEMENT TO ARBITRATE DISPUTES), NEITHER YOU NOR THE LANDLORD WILL HAVE THE RIGHT TO LITIGATE A CLAIM IN COURT**

EXCEPT TO THE EXTENT PROVIDED HEREIN WITH RESPECT TO EXCLUDED CLAIMS.

(R. p. 67). Section 24.1 within the Arbitration Provision defines a claim, in pertinent part, as

> any claim, dispute, action, proceeding, cause of action or controversy of every kind and nature, whether arising in contract, tort (including, but not limited to, personal injury, death or damage to property).

(R. p. 67). Importantly, the Arbitration Agreement does not apply to Excluded Claims, which are any claims where the aggregate amount of damages do not exceed $10,000. **(R. p. 67)**. There is no dispute that the Lease Agreement was in place while Respondent was a resident at Water's Edge Apartments.

On February 20, 2023, while she was a resident, Respondent claims that she slipped on trash that had accumulated along the exterior stairwell in the common area of her building, falling down a set of five stairs and injuring herself. **(R. p. 14)**. She filed her complaint against Water's Edge Apartments on August 30, 2024, and served Water's Edge via its registered agent on September 9, 2024. In her Complaint, Respondent asserts a claim for negligence. **(R. pp. 14-16)**. The Complaint does not identify any monetary amount of claimed damages or raise the Lease Agreement. **(R. pp. 13-17)**.

Appellant timely answered the Complaint on October 8, 2024. **(R. pp. 18-22)**. As is customary, the parties began initial discovery. Appellant sent interrogatories and requests for production to Respondent that Respondent answered on November 11, 2024. **(R. pp. 80-81)**. Also as is customary, Appellant issued subpoenas to the medical providers identified in discovery. However, on January 15, 2025, Appellant moved to stay the case and compel arbitration. **(R. pp. 43-44)**. Respondent contested the motion, and each party submitted memoranda in support of their positions prior to the hearing. **(R. pp. 45-52, 146-151)**. The circuit court heard the motion to

compel on February 24, 2025. **(R. pp. 23-42)**. After hearing arguments and considering the submissions of counsel, the circuit court denied the motion to stay and compel arbitration on March 25, 2025. **(R. pp. 4-8)**.

Appellant asked the circuit court to reconsider its order, and the circuit court denied Appellant's motion for reconsideration on May 19, 2025. **(R. pp. 9-11)**. Appellant timely appealed the circuit court's orders denying the motions to stay and for reconsideration. **(R. pp. 203-204)**.

STANDARD OF REVIEW

An appellate court reviews a circuit court's decision on arbitrability de novo. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). The circuit court's factual findings, however, will not be reversed if any evidence reasonably supports the findings. *Id.* at 48, 790 S.E.2d at 3. "An error of law includes failing to consider all of the factors relevant to a particular decision." *Ex parte DeBordieu Colony Comm. Assoc., Inc.*, 442 S.C. 285, 290, 898 S.E.2d 179, 181 (Ct. App. 2024). "[T]he 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) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

ARGUMENT

There is no dispute that Respondent's claim is subject to arbitration because the claim falls within the definition of a claim under the Agreement to Arbitrate and exceeds $10,000. Instead, the questions are whether the Agreement to Arbitrate is unconscionable and whether Appellant waved its right to enforce it. As explained below, the circuit court erred in finding the agreement unconscionable and finding that Appellant waived its right to enforce arbitration.

I. This Court should reverse the circuit court and find the Agreement to Arbitrate is not unconscionable because the Agreement to Arbitrate was not an adhesion contract, Respondent could have opted out, and any unconscionable provisions could have been severed while still requiring arbitration.

South Carolina's policy favors arbitrating disputes. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000). There is a strong presumption in favor of the validity of arbitration agreements. *Dean*, 408 S.C. at 380, 759 S.E.2d at 731.

An arbitration provision is a contractual term, and general rules of contract interpretation must be applied to determine the clause's applicability to a particular dispute. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). When a contract is clear and unambiguous, the language alone determines the force and effect. *See Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002). A court must construe the language of a contract according to its plain, ordinary, and popular meaning. *Erie Ins. Co. v. Winter Const. Co.*, 393 S.C. 455, 713 S.E.2d 318 (Ct. App. 2011). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

An argument that an arbitration agreement is unconscionable and unenforceable is an attack on the existence of the arbitration agreement. *See Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 23–24, 644 S.E.2d 663, 668 (2007) (noting a challenge to an arbitration provision as unconscionable calls into question whether the arbitration agreement existed in the first place). An arbitration provision is unconscionable when there is an "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." *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)

Arbitration clauses, however, are separable from the remainder of a contract. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 5-6 (Ct. App. 2008). "An arbitration clause's validity is distinct from the substantive validity of the contract as a whole." *Id.*, 667 S.E.2d at 6. "Even if the overall contract is unenforceable, the arbitration provision is not unenforceable unless the reason the overall contract is unenforceable specifically relates to the arbitration provision." *Id.* (quoting *The Housing Authority of City of Columbia v. Cornerstone Housing, L.L.C.*, 356 S.C. 328, 340, 588 S.E.2d 617, 623 (Ct. App. 2003)). Generally, when analyzing unconscionability claims related to arbitration agreements, courts should focus on whether the arbitration clause is intended to achieve "an unbiased decision by a neutral decision maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

Here, the circuit court found that the "arbitration clause contained in section 24 of the lease agreement" was unconscionable and unenforceable. **(R. p. 5)**. The circuit court based its conclusion on Respondent's arguments that (1) the entire lease agreement is a contract of adhesion; (2) Respondent lacked significant bargaining power and meaningful choice in negotiating its terms,; (3) and the agreement contained oppressive, one sided terms, including reducing the statute of limitations to one year, jury trial waiver, appeal waiver, and Respondent would have to pay filing fees. **(R. pp. 4-8)**.The circuit court erred in its analysis and there is no reasonable *factual* support for its findings.

A. The Agreement to Arbitrate was not an adhesion contract and Respondent had a meaningful choice with respect to the Agreement to Arbitrate.

When evaluating whether an arbitration provision has an absence of meaningful choice, the court should consider (1) the nature of the plaintiff's claimed injuries; (2) "whether the plaintiff is a substantial business concern" ; (3) disparity in bargaining power; (4) the parties'

sophistication; (5) whether there is any surprise at the clause's inclusion; and (6) the clause's conspicuousness. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Adhesion contracts—form contracts that are "take-it or leave-it" with terms that are not negotiable—are not per se unconscionable. *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365. In an adhesion contract, the offeree has two choices: "complete adherence or outright rejection." *Damico v. Lennar Carolinas, LLC* 437 S.C. 596, 613, 879 S.E.2d 746, 756 (2022). However, some courts evaluating unconscionability of adhesion contracts do so with considerable skepticism. *Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (evaluating adhesion contract with skepticism in a car dealership transaction); *Damico*, 437 S.C. at 613-14, 879 S.E.2d at 756 (noting "courts tend to view adhesive arbitration agreements with 'considerable skepticism'").

A person who signs a document is responsible for reading it and understanding its contents. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003); *see also Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (noting in case involving alleged unconscionable arbitration provision that a person who can read is bound to read an agreement before signing it). Contracting parties owe each other and the public a duty to learn and understand the contents of a contract before signing. *Regions Bank,* 354 S.C. at 663, 582 S.E.2d at 440. Further, a person signing a contract has a duty of reasonable care to protect herself. *Id.* at 664, 582 S.E.2d at 440. Generally, the law does not impose a duty for one contracting party to explain the terms of the contract to the other party when the other party can learn those terms from reading the document. *See id.* There is only one exception to this rule that is strictly construed—a person can be excused for a failure to read or understand if the party is "ignorant and unwary." *Id.*

First, the circuit court incorrectly focused on the Lease Agreement as a whole, instead of on the Agreement to Arbitrate alone in Section 24 when discussing whether the contract was one

of adhesion. The law is clear that arbitration clauses are to be considered separate from the overall contract when determining unconscionability. Contrary to the circuit court's finding, the Agreement to Arbitrate was not an adhesion contract. Section 24.8 of the Arbitration Provision outlined a simple "Opt-Out Process" that permitted Respondent to opt out of the Agreement to Arbitrate, Section 24.2. Apartment rental was not absolutely conditioned on agreeing to arbitrate. Had Respondent wanted to avoid arbitration, Respondent had to follow a simple process: within 30 days after signing the Lease Agreement, mail to a specific address notice she wanted to opt out of arbitration. If Respondent had read the Lease Agreement and this provision, she would have known she could have rented the apartment without agreeing to arbitrate. Because Respondent could have rented the apartment and opted out of arbitration, the Lease Agreement was not an adhesion contract with respect to arbitration. *See generally Damico*, 437 S.C. at 613, 879 S.E.2d at 756 (noting adhesive agreements limit the offeree to two choices: complete adherence or outright rejection). Therefore, the circuit court erred in characterizing the Lease Agreement in its entirety as an adhesion contract, and instead should have focused on the Agreement to Arbitrate. The court should not have determined arbitrability with "considerable skepticism." Instead, the circuit court should have begun with a strong presumption in favor of the validity of arbitration agreements. *Dean*, 408 S.C. at 380, 759 S.E.2d at 731.

Second, and for similar reasons, the circuit court erred in finding Respondent lacked meaningful choice in negotiating the terms of the Agreement to Arbitrate. The circuit court found that Respondent was not given an opportunity to negotiate the terms of the Lease Agreement, she lacked significant bargaining power, and did not have an attorney present when signing. As discussed above, however, Respondent could have opted out of the Agreement to Arbitrate in

Section 24.2, enabling her to rent the apartment without agreeing to arbitrate. Thus, as a general matter, Respondent had a meaningful choice when it came to arbitration.

Courts also consider any disparity in bargaining power and the parties' relative sophistication. Respondent argued that she had no bargaining power. There is no factual support in the record for this finding, and it is solely argument of counsel that is not evidence. *See Gibson v. Wright*, 403 S.C. 32, 38, 742 S.E.2d 49, 52 (Ct. App. 2013) (noting arguments of counsel are not evidence). Because there was no factual support for finding a disparity in bargaining power and the parties' sophistication, the circuit court erred in so finding.

Nevertheless, the record indicates that Respondent was not unsophisticated or incapable of understanding the importance of lease terms. Respondent was enlisted in the Marine Corps for five years, retiring in 2021, and was enrolled in higher education classes working towards physical therapy and marketing degrees. **(R. p. 82)**. Service in the armed forces and pursuing higher education require someone to have completed at least the equivalent of a high school degree. The fact that Respondent is taking courses in higher education suggests she is capable of understanding the importance of terms in a signed agreement. Thus, Respondent is not necessarily unsophisticated. Furthermore, above where Respondent signed the Lease Agreement there is the following acknowledgement:

> BY SIGNING BELOW, RESIDENT ACKNOWLEDGES THAT HE OR SHE HAS BEEN GIVEN A SUFFICIENT OPPORTUNITY TO FULLY REVIEW THIS LEASE, HAS READ THE TERMS AND CONDITIONS OF THIS LEASE, AND UNDERSTANDS THE ABOVE LISTED LEASE TERMS AND CONDITIONS.

The law assumes that Respondent read and understood the Lease Agreement by signing it, and she expressly agreed to reading and understanding it. *See Regions Bank,* 354 S.C. at 663, 582 S.E.2d at 440.

Moreover, the Agreement to Arbitration was conspicuous and there can be no surprise at its inclusion in the Lease Agreement. The top of the first page in the Lease Agreement notes that it is subject to arbitration in bold, underline, and all caps. *See* S.C. Code Ann. § 15-48-10 (requiring contracts subject to arbitration have a notice in all caps and underlined on the first page for the arbitration to be enforceable). Thus, at the very beginning of reading the Lease Agreement Respondent was on notice of an arbitration clause. Furthermore, the arbitration clause itself was conspicuous. The sections dealing with arbitration are contained in pages 15 and 16 of the Lease Agreement, and contain multiple instances of underlined, capitalized, and bolded language to highlight and draw the reader's attention to the importance of the terms. Specifically, the Agreement to Arbitrate in Section 24.2 was nearly entirely bolded, capitalized, and underlined:

> **ALL CLAIMS THAT ARISE BETWEEN YOU AND LANDLORD WILL BE RESOLVED THROUGH BINDING ARBITRATION IN ACCORDANCE WITH THE [Federal Arbitration Act, Title 9 of the United States Code] AND THE [Commercial Arbitration Rules of the American Arbitration Association]. YOU AND LANDLORD AGREE AND UNDERSTAND THAT WE MUTUALLY CHOOSE BINDING ARBITRATION INSTEAD OF LITIGATION TO RESOLVE ALL CLAIMS. THIS MEANS THAT UNLESS YOU OPT OUT OF THIS SECTION 24.2 (AGREEMENT TO ARBITRATE DISPUTES), NEITHER YOU NOR THE LANDLORD WILL HAVE THE RIGHT TO LITIGATE A CLAIM IN COURT EXCEPT TO THE EXTENT PROVIDED HEREIN WITH RESPECT TO EXCLUDED CLAIMS.**

(R. p. 67). This clause is conspicuous, and its inclusion is not surprising.

Respondent and the circuit court also incorrectly considered that Respondent did not have an attorney present when signing the Lease Agreement to support its finding of unconscionability. The circuit court cited *Simpson* and noted that when determining unconscionability, the court considers whether the consumer had a lawyer present to provide assistance in negotiating the arbitration agreement. **(R. p. 5)**. *Simpson*, however, did not find that the presence of a lawyer is

a determining factor for unconscionability. Agreeing with the rationale of Ohio courts and in the context of an automobile retailer and consumer adhesion contract, the *Simpson* court "acknowledged" that the offeree "did not have a lawyer present to provide any assistance in the matter." *Id.* at 27, 644 S.E.2d at 670. The present transaction was not similar to the transaction in *Simpson* and, therefore, it is easily distinguishable. But even if it was, the Ohio courts *Simpson* relied on do not give much weight to the presence of an attorney in consumer transactions to determine unconscionability because "it is common sense that most people do not hire lawyers to accompany them every time they are required to sign a form contract." *See Simpson*, 373 S.C. at 26, 644 S.E.2d at 669 (citing *Long v. N. Ill. Classic Auto Brokers*, 2006 WL 3783507 (Ohio Ct. App. 9th Dist. 2006)); *see also Broughsville v. OHEC, LLC*, 2005 WL 3483777, *5 (Ohio Ct. App. 9th Dist. 2005) ("While having an attorney present is a factor to be considered, it is in no way dispositive of the issue. We think it common sense that most people do not hire lawyers to accompany them every time they are required to sign a form contract."). Thus, the fact that Respondent may not have had an attorney present when signing the agreement should not have been given much weight, especially considering there are no allegations that Respondent did not have an opportunity to consult with an attorney if she so chose, and the Lease Agreement expressly provided she had time.

In sum, the circuit court erred when it found Respondent had the absence of meaningful choice because the Agreement to Arbitrate was not an adhesive agreement. The Lease Agreement allowed Respondent to opt out of the Agreement to Arbitrate, meaning she could have rented the apartment without being forced to arbitrate. Therefore, there was a strong presumption in favor of the validity of the Agreement to Arbitrate. Respondent had a meaningful choice when it came to the Agreement to Arbitrate because she could have opted out (i.e., had a choice in the bargaining

process), and the provision was conspicuous. Further, there is no evidence to suggest Respondent was incapable of understanding the provision, especially when she expressly agreed she understood and the common law imposed upon her an obligation to read and understand the provisions of the Lease Agreement she signed. Accordingly, this Court should reverse the circuit court, stay litigation, and compel arbitration.

B. The circuit court incorrectly determined many of the terms of the Agreement to Arbitrate were one-sided or oppressive.

"[A]dhesive contracts are not unconscionable in and of themselves so long as the terms are even-handed." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756. "After all, unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms." *Id.* Mutuality is an important consideration to assess substantive unconscionability. 17A Am. Jur. 2d *Contracts* § 272. Also relevant to determine the one sidedness or oppressiveness of terms is whether the terms are still designed to obtain an unbiased decision by a neutral decision maker. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673. If so, then the terms are not one-sided or oppressive. *See id.*

An example of a one-sided term is a term in a contract that gave the drafting party the sole discretion to decide what parties could attend the arbitration when, under normal circumstances, the plaintiff is the master of the complaint and has the right to choose who to sue. *Damico*, 437 S.C. at 615, 879 S.E.2d 757. In addition, a term that gives the drafting party the ability to manipulate and create a procedural defense unavailable to other participants is one-sided and oppressive. *See id.* (finding provision in arbitration agreement gave drafter ability to create a procedural defense unavailable to other parties).

Here, the Respondent argued and the circuit court apparently found, that the arbitration clause contained the following oppressive terms: reducing the statute of limitations to one year,

jury trial waiver, inability to appeal the arbitration decision, inability to participate in a class action, and putting the burden of paying arbitration filing fees on the Respondent. **(R. pp. 5-6)**. Admittedly, the Arbitration Provision contains a subsection that limits the time within which to bring a claim to one year. **(R. p. 68)**. This section is void pursuant to S.C. Code section 15-3-140. *See Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 594, 910 S.E.2d 474, 476 (2024). However, the remaining clauses cited by the court are not one sided or oppressive.

Agreeing to waive a jury trial right is not one sided or oppressive. As the *Simpson* court noted, "[t]he loss of the right to a jury trial is an obvious result of arbitration" and "parties are always free to contract away their rights." 373 S.C. at 27-28, 644 S.E.2d at 663. First, the jury trial waiver provision applied only if the claims were brought in civil court as opposed to arbitration. Second, waiver of the jury trial applied equally to both parties and, therefore, was not one sided. Third, the term is not designed to avoid a neutral decision maker, it just makes the neutral decision-maker the judge and not the jury. Last, parties are free to contract away their rights, and the jury trial waiver was conspicuous, and Respondent agreed to it. Therefore, the jury trial waiver provision was not one-sided or oppressive.

Moreover, the circuit court misinterpreted the provisions related to appealing an arbitration award, and such decisions can be appealed. The Agreement to Arbitrate indicates that *arbitration* includes waiving the right to appeal: **OTHER RIGHTS THAT YOU WOULD HAVE IN COURT ALSO MAY NOT BE AVAILABLE OR MAY BE LIMITED IN ARBITRATION, INCLUDING YOUR RIGHT TO APPEAL . . . ." (R. p. 67)**. The Lease Agreement otherwise indicates that the arbitrator's decision can be appealed by either party under the FAA and applicable South Carolina statutes. **(R. pp. 67-68)**. There is no provision in the Agreement to Arbitrate indicating that, if the claims are brought in civil court instead of arbitration for whatever

reason, there is no right to appeal. Therefore, there is no appeal waiver as the circuit court noted, and the Lease Agreement is mutual in its application of appellate rights in the arbitration context. Therefore, there is no one-sided or oppressive appellate-right waiver in the Lease Agreement.

The waiver of a class action right is not oppressive. The term is not designed to avoid a determination by a neutral decision maker, it merely prevents any of Respondent's claims from being heard as a class. There would still be a neutral decision maker—the judge or arbitrator. Further, as *Simpson* noted, parties are free to contract away their rights. Also, the Court must enforce an agreement as written despite any apparent unreasonableness or a party's failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994). Moreover, the Supreme Court of the United States determined that class action waivers in arbitration agreement subject to the FAA are not unconscionable. *See generally AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-52 (2011) (finding the FAA preempted California's common law rule that found class action waivers unconscionable and explaining why class actions are inconsistent with the goals of the FAA such that a class action waiver is not necessarily unenforceable). Respondent acknowledged reading and understanding the provisions, signed the agreement, and absent some statute or explicit public policy to the contrary, the circuit court erred in finding the provision waiving class action rights one sided or oppressive.

Finally, the circuit court and Respondent misinterpreted the fee provision in the Arbitration Provision. The Arbitration Provision does not require Respondent to pay any filing fees that she would not have had to pay if the claim was brought in civil court: "Initially, You will only be responsible for paying Your share, if any, of the arbitration fees required by the applicable Rules, which amount will not exceed the filing fees that You would have incurred if the Claim had been brought in the appropriate state or federal court closest to where the Property is located." **(R. p.**

68). Thus, Respondent's fees are initially the same as she would have to pay to file and maintain a lawsuit in civil court. Further, the Arbitration Provision states the landlord is initially responsible for the remainder of the arbitration fees. Whoever is not the prevailing party at the end of the arbitration shall have to pay costs—a provision that applies equally to both parties. Because Respondent's potential arbitration filing fees would be capped at whatever amount she would have had to have paid to litigate in civil court, and the provision is otherwise mutual, the circuit court erred in finding it was oppressive to have Respondent pay arbitration fees.

In sum, the circuit court erred in finding the majority of the terms one-sided or oppressive by misinterpreting provisions or not considering that the terms applied equally to both parties. Because the terms were not sufficiently one sided and oppressive, this Court should reverse the circuit court and enforce the Agreement to Arbitrate.

C. Even if sections in the Arbitration Provision were unconscionable and unenforceable, the circuit court erred in not severing the unconscionable terms and enforcing the Agreement to Arbitrate in Section 24.2.

Because state and federal policies favor arbitration, severability clauses can act to remove unconscionable provisions from arbitration clauses without affecting the intent of the parties. *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673. In addition, by statute the court can refuse to enforce unconscionable clauses or limit their application to avoid an unconscionable result. S.C. Code Ann. § 36-2-302(1). "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." *Damico*, 437 S.C. at 618, 879 S.E.2d at 758.

Courts will not sever unconscionable portions of an arbitration clause, however, when doing so would leave "only a disintegrated fragment" of the agreement. *Id.* (quoting *Simpson*, 373 S.C. at 34, 644 S.E.2d at 673). In those scenarios, severing offending portions is more akin to the

court rewriting the contract rather than fulfilling the parties' intent. *Id.* When assessing whether unconscionable terms can be severed, courts determine whether the illegality is central or collateral to the purpose of the contract. *Id.* at 619, 879 S.E.2d at 759 (refusing to sever contract drafter's "choice of parties" clause from arbitration agreement because the right to choose who to sue is a material term, which the court considered rewriting the contract to strike the provision).

Contracts that contain severability clauses indicate the intent is that the unoffending provisions of a contract should remain enforceable, especially when striking the offending portion "does not disrupt the core of the parties' bargain." *Does v. TCSC, LLC*, 430 S.C. 602, 615, 846 S.E.2d 874, 881 (Ct. App. 2020) (finding remainder of arbitration provision enforceable after severing the unconscionable portion that would have required arbitration of disputes not related to the consumer transaction based purely on the relationship between the parties).

Here, the Lease Agreement contains two clauses evidencing an intent that the remaining portions of the Lease Agreement will be enforceable if other provisions are found to be invalid or unenforceable. The first clause is within the Arbitration Provision in Section 24. Section 24.5 states "If any portion of this Section 24 is deemed invalid or unenforceable for any reason, it will not invalidate the remaining portions of this Section 24 or the lease, each of which will be enforceable regardless of such invalidity." **(R. p. 68)**. The Lease Agreement's second severability clause is in Section 30.4: "If any provision of this Lease is invalid, such provision shall be considered deleted from this Lease, and shall not invalidate the remaining provisions." **(R. p. 69)**. Thus, the express terms of the agreement intended that invalid terms could be severed from otherwise valid ones, such as arbitration.

The circuit court should have severed the offending provisions, enforced the Agreement to Arbitrate, and compelled arbitration. The circuit court noted the following terms were

troublesome: reducing the statute of limitations to one year, jury trial waiver, inability to appeal the arbitration decision, inability to participate in a class action, and putting the burden of paying arbitration filing fees on Respondent. **(R. pp. 5-6)**. However, every clause noted was either mischaracterized or could have been severed without impacting the core of the parties' agreement.

The circuit court easily could have removed Section 24.7 that reduced the statute of limitations without impacting the core of the agreement to arbitrate. Respondent would be permitted to bring claims pursuant to the applicable statute of limitations, but would have to do so in arbitration pursuant to the Agreement to Arbitrate in Section 24.2.

The circuit court misinterpreted the jury trial waiver, and even if it did not, that provision could have been severed without impacting the core of the Agreement to Arbitrate. By its terms, the jury trial waiver applied only if the Agreement to Arbitrate in Section 24.2 was found invalid or unenforceable. Of course, the arbitration process does not include a jury trial. Thus, the term is inconsequential to the core of the Agreement to Arbitrate. Also, parties are free to contract away their rights, and the agreement to waive a jury trial applied equally to both parties. Even if the term was unconscionable, it could have been severed pursuant to the express terms of the Lease Agreement.

The circuit court also misinterpreted the provision discussing appealability and it could have been severed if it was unconscionable. The Agreement to Arbitrate indicates that *arbitration* includes waiving the right to appeal. Similar to the jury trial waiver, the right to an appeal is lost naturally by function of the arbitration process and rules. Regardless, the Lease Agreement expressly allowed either party to appeal the arbitrator's decision. There is no provision in the Agreement to Arbitrate indicating that, if the claims are brought in civil court instead of arbitration for whatever reason, there is no right to appeal. Even if there was language in Section 24 that

waived an appellate right, the circuit court could have severed that portion under the express terms of the Lease Agreement.

In addition, the circuit court could have severed the provision waiving class action participation. Assuming the class action waiver was unconscionable, the provision was easily severable from the remainder of the Arbitration Provision. The class action waiver is contained in Section 24.3, which is separate from the Agreement to Arbitrate in Section 24.2. Although arbitration naturally excludes proceeding as a class, the court could have severed that waiver from the Arbitration Provision without affecting the Agreement to Arbitrate.

Last, the circuit court could have severed any unconscionable provisions requiring Respondent to pay filing fees. As argued above, the provision for filing fees is initially capped at the amount Respondent would have to pay to file in civil court. **(R. p. 68)**. Therefore, the provision is not oppressive or one sided. But even if there was an unconscionable term requiring Respondent to pay filing fees in Section 24.2.3, that section is separate from the Agreement to Arbitrate. Because responsibility for paying fees is not at the core of the Agreement to Arbitrate and is separate, Section 24.2.3 could have been severed while continuing to enforce the Agreement to Arbitrate.

In sum, the circuit court erred when it refused to compel arbitration based on the allegedly unconscionable terms in the Arbitration Provision, because the circuit court either misinterpreted the terms or the terms were easily severable without impacting the core of the Agreement to Arbitrate. Therefore, this Court should reverse the circuit court and compel arbitration.

II. This Court should reverse the circuit court and find that Appellant did not waive its right to enforce the Agreement to Arbitrate, because Appellant moved to compel arbitration less than five months after litigation began and utilized non-prejudicial initial discovery.

The right to enforce an arbitration clause may be waived. *See Carlson v. South Carolina State Plastering, LLC*, 404 S.C. 250, 256, 743 S.E.2d 868, 872 (Ct. App. 2013). "Although the right to enforce an arbitration clause may be waived, federal and state courts have recognized a strong policy favoring arbitration." *Rich v. Walsh*, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003).

However, there is no set rule as to what constitutes a waiver of the right to arbitration, as such is dependent upon the facts of each case. *See Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). In determining whether a party has waived its right to compel arbitration, South Carolina courts consider: (1) whether a substantial length of time has transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Carlson*, 404 S.C. at 257, 743 S.E.2d at 872.

A. A substantial length of time did not pass between the commencement of litigation and the request to compel arbitration, and the parties conducted only limited discovery.

What constitutes "substantial length of time" is fact specific and depends on the extent of discovery conducted during that period and how close the case is to trial. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126-27, 647 S.E.2d 249, 251 (Ct. App. 2007) (collecting cases demonstrating when certain lengths of time and extent of discovery will and will not cause waiver of the right to arbitrate). Generally, seeking arbitration in less than a year after suit is brought suggests a substantial length of time has not passed to warrant waiver. *Id.* at 128, 647

S.E.2d at 252. But waiver is more likely to be found when trial is imminent, and the party seeking arbitration has taken multiple depositions. *Id.* (noting the case was set on the upcoming trial docket and the party seeking arbitration had taken five depositions before moving to compel arbitration).

For example, a thirteen-month period with limited discovery including one deposition did not demonstrate waiver in *Rich v. Walsh*. 357 S.C. at 72, 590 S.E.2d at 507; *see also Carlson*, 404 S.C. at 257, 743 S.E.2d at 872 (finding a period of over two years did not demonstrate waiver); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period did not demonstrate waiver when the party requesting arbitration had not availed themselves of the court's assistance, and had engaged in limited written discovery but no depositions); *Gen Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period did not demonstrate waiver when the "litigation consisted of routine administrative matters and limited discovery which did not involve the taking of depositions or extensive interrogatories")

On the other hand, a nineteen-month period with the parties exchanging initial and supplemental written discovery, conducting two depositions, and appearing on a trial roster did demonstrate waiver in *Evans v. Accent Manufactured Homes, Inc.* 352 S.C. 544, 548, 575 S.E.2d 74, 75-76 (Ct. App. 2003); *see, e.g.*, *Liberty Builders, Inc.*, 336 S.C. at 668, 521 S.E.2d at 754 (finding a plaintiff waived the right to enforce arbitration when it filed the lawsuit in circuit court, and litigated the matter for two and half years during which the parties availed themselves of the court on 40 motions); *see also Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 526 (Ct. App. 2004) (finding waiver of arbitration when the party seeking arbitration after five and half years of litigation successfully fought the other party's request for arbitration, exchanged thousands of documents in discovery, sought court assistance with motions and

hearings, and allowed the case to progress through the first phase of a phased trial before seeking arbitration).

Here, the circuit court erred in finding Appellant waived its right to compel arbitration. The circuit court did not make any express finding that a substantial length of time had passed between when litigation commenced and when Respondent moved to compel arbitration. This alone should be considered an error of law because the Court did not address all of the factors to support a finding of waiver. *See Ex parte DeBordieu Colony Comm. Assoc., Inc.*, 442 S.C. at 290, 898 S.E.2d at 181 ("An error of law includes failing to consider all of the factors relevant to a particular decision.").

Nevertheless, the circuit court noted that five months passed between when Respondent filed the complaint (August 30) and when Appellant moved to compel arbitration (January 15). **(R. p. 6)**. Under the circumstances, the four and a half month period is not a substantial length of time. In general, when less than a year has passed it suggests that a substantial amount of time has not passed. *Rhodes*, 374 S.C. at 128, 647 S.E.2d at 252. Four and a half months is an insubstantial length of time, and no cases in South Carolina suggest the contrary.

Moreover, Appellant did not engage in sufficient litigation conduct and a trial was not imminent when Appellant moved to compel arbitration, which supports finding no waiver. The circuit court relied on the parties exchanging initial written discovery and that Appellant sent eight subpoenas. Appellant withdrew the subpoenas in conjunction with moving to compel arbitration. Nevertheless, our courts indicate that this type of routine initial discovery does not result in waiver of the right to compel arbitration. When the litigation conduct includes taking multiple depositions, or seeking relief from the court through motions and hearings, that conduct can result in waiver. Appellant did not take any depositions and never sought relief from the court other than

its motion to compel arbitration. Appellant did not engage in significant litigation conduct or avail itself of the court's assistance prior to seeking arbitration.

Also relevant, the parties agreed in the Lease Agreement that "**THE INSTITUTION AND MAINTENANCE OF AN ACTION FOR JUDICIAL RELIEF IN A COURT SHALL NOT CONSTITUTE A WAIVER OF THE RIGHT OF ANY PARTY TO COMPEL ARBITRATION OF CLAIMS OTHER THAN EXCLUDED CLAIMS . . . .**" **(R. p. 68)**. Respondent is charged with knowledge of this term by signing the Lease Agreement, and the Court is bound to enforce the Lease Agreement pursuant to its unambiguous language despite a party's failure to safeguard its own rights. Because the parties agreed maintaining an action for judicial relief would not result in a waiver, this circuit court erred by ignoring this language and finding waiver for Appellant participating in an action for judicial relief.

In sum, there was no reasonable factual support for finding Appellant waived its right to compel arbitration by engaging in routine initial discovery across a four-and-a-half-month period. A four-and-a-half-month period is an insubstantial length of time and Respondent did not take any depositions or avail itself of the court's assistance. Therefore, the circuit court erred in finding Appellant waived its right to compel arbitration and this Court should reverse, compelling the parties to arbitrate.

B. The circuit court erred by not making a finding on prejudice, and there is no reasonable factual support for a prejudice finding.

As a threshold matter, the circuit court erred in not evaluating and making specific findings on whether Respondent was prejudiced by the delay in seeking to compel arbitration. The circuit court acknowledged South Carolina courts require a showing of prejudice, but then apparently discarded the prejudice requirement by relying on a 2022 SCOTUS case indicating that federal courts no longer require a showing of prejudice to determine waiver of a right to arbitration. **(R.**

p. 5). (citing *Morgan v. Sundance, Inc.*, 596 U.S. 411, 416 (2022)). The circuit court did not make clear whether it was dispensing with the prejudice factor South Carolina courts require. Regardless, the circuit court did not make any findings that Respondent was prejudiced by the delay.

The circuit court erred in not evaluating the prejudice prong because *Morgan* does not apply when this case concerns state statutory rights and law, rather than only rights asserted under federal law. In *Morgan*, the Court noted that federal courts had created a requirement to show prejudice in order to avoid arbitration based on federal policy favoring arbitration, which was impermissible and that the usual federal rule of waiver focused on the actions of the person who held the right, not including a showing of prejudice. 596 U.S. at 417-18. However, the Court specifically refused to address the role state law played in determining the loss of a contractual right to arbitrate. *Id.* at 416-17 (limiting holding to finding that federal courts cannot "create arbitration-specific variants of federal procedural rules, like those concerning waiver, based on the [federal policy favoring arbitration]").

At least one state court has refused to abolish its state-required showing of prejudice to establish waiver of the right to arbitrate in light of *Morgan*. *See Desert Reg'l Med. Ctr., Inc. v. Miller*, 87 Cal. App. 5th 295, 322, 303 Cal. Rptr. 3d 412, 432 (2022) ("This case is distinguishable from *Morgan* in that the instant case concerns state statutory rights and law, rather than rights asserted under federal law."). South Carolina courts appear to still require a showing of prejudice to establish waiver of the right to compel arbitration after *Morgan*. *See, e.g.*, *Palmetto Construction Group, LLC v. Restoration Specialists, LLC*, 444 S.C. 328, 343, 907 S.E.2d 129, 137 (Ct. App. 2024) (confirming prejudice as a factor in South Carolina waiver law).

Because *Morgan* dealt solely with federal law's prejudice requirement and expressly refused to evaluate what impact state law has on the finding prejudice, and our state precedent

requires a showing of prejudice to establish waiver even after *Morgan*, the circuit court should have required Respondent to show prejudice. The circuit court committed an error of law by ignoring precedent and not addressing all factors to find waiver. *See Ex parte DeBordieu Colony Comm. Assoc., Inc.*, 442 S.C. at 290, 898 S.E.2d at 181 ("An error of law includes failing to consider all of the factors relevant to a particular decision."). Accordingly, this Court should reverse the circuit court's decision on waiver and require a showing of prejudice, which it can address on appeal in the interest of judicial economy.

On the merits, there is no reasonable factual support in the record to establish Respondent experienced sufficient prejudice to warrant a finding Appellant waived its right to compel arbitration.

The party wanting to avoid arbitration by establishing waiver has the burden to show prejudice caused by the delay. *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). "Mere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate." *Evans*, 352 S.C. at 550, 575 S.E.2d at 76-77. "Neither delay nor the filing of pleadings by the party seeking a stay will suffice, without more, to establish waiver of arbitration." *Rich*, 357 S.C. at 71, 590 S.E.2d at 510 (quoting *MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 249 (4th Cir. 2001)).

Prejudice can be found where the party resisting arbitration has been forced to incur attorney's fees and litigate in court for an extended period prior to arbitration being sought. *Liberty Builders, Inc.*, 336 S.C. at 666, 521 S.E.2d at 753 (noting it was to the defendant's prejudice that the plaintiff delayed for two and a half years and filed 40 motions in court forced the defending party to incur attorney's fees, and which allowed the plaintiff to "test the waters" of litigation); *see also Rhodes*, 374 S.C. at 128-29, 647 S.E.2d at 252 ("Benson, with full knowledge of its right to

arbitrate this dispute, cannot invoke and enjoy the full benefits of discovery and then belatedly assert a right to arbitrate at the eleventh hour with the case approaching trial.").

There is no reasonable factual support that Respondent has experienced prejudice by the delay and limited discovery. Respondent's counsel undoubtedly has the case on contingency and, therefore, Respondent has not necessarily incurred any "attorney's fees." Respondent has not been required to defend or participate in depositions that would not necessarily be permitted in arbitration. Other than opposing the motion to compel arbitration, Respondent has not had to prepare for and defend motions, and has not been responsible for any relief a court has awarded Appellant. Also, Respondent is not prejudiced by having to respond to initial discovery requests in litigation because that discovery is very similar to the exchange of information in arbitration. **(R. p. 50-52)**. In other words, Appellant has not obtained an advantage by engaging in initial discovery that it would not have available in arbitration. Therefore, Respondent has not been prejudiced by these limited exchanges of discovery and the circuit court should have compelled arbitration. Because no reasonable factual support warrants a finding Respondent was prejudiced by the delay in Appellant moving to compel arbitration, this Court should reverse the circuit court and compel the parties to arbitrate.

CONCLUSION

Reviewing this case de novo, but allowing the circuit court's factual determinations to stand if reasonably supported by the evidence, this Court should reverse the circuit court, find the Agreement to Arbitrate valid and enforceable, and compel arbitration. The Agreement to Arbitrate is not unconscionable where Respondent could have opted out of arbitration and still rented the apartment, the terms were not one-sided or oppressive, and any offending terms should have been severed without affecting the Agreement to Arbitrate. Further, Appellant did not waive its right

to compel arbitration when Appellant's litigation conduct spanned only four-and-a-half-months in which Appellant engaged in limited written discovery, without availing itself of the court's assistance or taking depositions. The circuit court erred in failing to address prejudice in determining waiver, but even if it did, there was no prejudice by the limited litigation conducted. Therefore, this Court should reverse the circuit court and compel arbitration.

COPELAND, STAIR, VALZ & LOVELL, LLP

December 23, 2025.

s/Skyler C. Wilson
Lee C. Weatherly, Esq.
Skyler C. Wilson
Kierra N. Brown, Esq.
40 Calhoun Street, Suite 400
Charleston, SC 29401
lweatherly@csvl.law
swilson@csvl.law
kbrown@csvl.law
Phone: (843) 727-0307
Attorneys for Appellants

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

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

Appellate Case No. 2024-000786

Marisol Kelly .....Respondent

v.

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

PROOF OF SERVICE

I certify that I have served ***Appellant's Initial Brief*** upon the parties below by electronic mail, addressed as follows:

Sydney K. Catlett, Esq.
Patrick T. Yanoti, Esq.
Ryan K. Miller, Esq.
Miller, Dawson, Sigal & Ward, LLC
4969 Centre Pointe Drive, Suite 103B
North Charleston, SC 29418
sydney@mdswlegal.com
patrick@mdswlegal.com
miller@mdswlegal.com
Counsel for Respondent

[SIGNATURE PAGE TO FOLLOW]

This 23rd day of December, 2025.

COPELAND, STAIR, VALZ & LOVELL, LLP

s/Skyler C. Wilson
Lee C. Weatherly
S.C. Bar No.: 71109
Skyler C. Wilson
S.C. Bar No.: 102865
Kierra N. Brown
S.C. Bar No.: 103143
Attorneys for Appellant

40 Calhoun Street, Suite 400
Charleston, SC 29401
lweatherly@csvl.law
swilson@csvl.law
kbrown@csvl.law
Phone: (843) 727-0307