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 FINAL REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ARGUMENT

I. The South Carolina Supreme Court's recent policy pronouncement merely clarified how courts should treat arbitration provisions and did nothing to overrule prior cases discussing presumptive validity of arbitration clauses.

Respondent argues "[p]ublic policy in South Carolina does not favor arbitration[,]" citing the South Carolina Supreme Court in *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 914 S.E.2d 139 (2025). **Resp. Br. 1**. Respondent did not present this argument at any time to the lower court and, therefore, it is not within the "record" for the purposes of Rule 220(c), SCACR, and it is not preserved for appeal.

Regardless, a closer inspection of the law's status indicates it is not at all clear what the impact of the *Lampo* court's pronouncement is. The *Lampo* court stated:

> Amedisys—like many parties and some of our courts—continues to argue there is a federal and state "policy favoring arbitration." We remind our litigants and lower courts that we dispensed with this incorrect notion almost four years ago. *See Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 622, 639, 856 S.E.2d 150, 153 (2021).

Lampo, 445 S.C. at 317, 914 S.E.2d at 146. First, this pronouncement is dicta; the *Lampo* court initially recognizing that the policy issue was "not important to [its] decision." *Id.* Second, the *Palmetto Construction Group* court "dispensed" with nothing and, instead, explained how the policy favoring arbitration developed and *clarified* prior courts' statements on the policy. *See Palmetto Constr. Grp.*, 432 S.C. at 639, 856 S.E.2d at 153 (explaining that the policy favoring arbitration arose to overcome "a longstanding, policy-based rule that arbitration agreements are unenforceable[,]" and, accordingly, "when considered in the proper context, our statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions."). A plain reading of the holding indicates that the policy favoring arbitration was not "dispensed" and was instead

clarified. Along similar lines, the *Palmetto Construction Group* court noted the courts, by referencing the favoritism policy, did not intend to give arbitration law special status to supplant state procedural law but intended the policy to ensure enforceability of private agreements to arbitrate. *Id.* Thus, despite the *Lampo* court's dicta pronouncement, the policy is not dispensed but clarified.

Third, and importantly, neither court in *Lampo* nor *Palmetto Construction Group* explained or ruled on how some clarification in policy might impact the presumptive validity of arbitration agreements, which still remains in force. *See, e.g.*, *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 380, 759 S.E.2d 727, 731-32 (2014) ("Thus, in practice, arbitration agreements enjoy a strong presumption of validity in federal and state courts."). Further, the language of the South Carolina Uniform Arbitration Act indicates a presumptive validity for agreements to arbitrate when the contract contains on the first page in underlined capital letters that it is subject to arbitration. S.C. Code Ann. § 15-48-10(a) ("[A] provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. Notice that a contract is subject to arbitration . . . shall be typed in underlined capital letters . . . on the first page of the contract . . . ."). Therefore, it appears there exists under common law and the statute that there is a presumption for the validity of agreements when those agreements satisfy the notice provision under the statute.

Furthermore, although Respondent urges the Court to treat the agreement like all other contracts (**Resp. Br. 3**), Respondent proceeds to argue there is, in effect, a presumption against arbitration by relying on a vague "considerable skepticism" standard. *See* **Resp. Br. 4**. This represents a swing in the opposite direction and a harkening back to times when courts often

refused to enforce arbitration agreements out of a jealousy for their own jurisdiction, which is precisely what gave rise to the public policy favoring arbitration. *See Palmetto Constr. Grp. v. Restoration Specialists, LLC*, 432 S.C. 633, 636-37, 856 S.E.2d 150, 152 (2021). This Court should refuse to follow Respondent's arguments that would, in effect, amount to an adoption of policy disfavoring arbitration.

II. The arbitration provision was not an adhesion contract because it had a clear opt out procedure, and Respondent has not met her burden to establish facts necessary to resist arbitration.

Respondent argues that the lease agreement was an adhesion contract, which should result in a finding that the arbitration provision is unconscionable. **Resp. Br. 6**. Respondent then argues how various attributes of the entire lease agreement support that argument. **Resp. Br. 6**. Respondent's arguments are misplaced.

Arbitration clauses 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)).

Respondent attempts to argue around the law requiring separate consideration of an arbitration provision from the overall contract, arguing that the arbitration provision is embedded in the contract and there is no separate signature. **Resp. Br. 8**. Respondent, however, fails to cite any law or supporting authorities for her arguments. Thus, that argument is abandoned or waived. *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) (finding an issue

abandoned and not considered on appeal if the argument is not supported by authority). Nevertheless, the case law establishes that arbitration clauses are considered separately even if embedded in a contract. *See New Hope Missionary Baptist Church*, 379 S.C. at 630, 667 S.E.2d at 5–6 (stating "[a]rbitration clauses are sparable from the contracts in which they are imbedded" when determining the validity of an arbitration clause in a contract (quoting *Jackson Mills, Inc. v. BT Cap. Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994)).

Therefore, for the purpose of determining unconscionability the court must focus specifically on the arbitration clause separate from the contract as a whole. When focusing on the arbitration clause separate from the entire lease agreement, the arbitration clause was not an adhesion agreement and the length, number of provisions, or font size of the other provisions in the lease agreement are irrelevant. As argued in Appellant's Brief, the arbitration clause is not an adhesion agreement because there was a clear opt out procedure where Respondent could have rented the apartment without agreeing to arbitrate.

In addition, and with respect to the font size and location of the arbitration clause in the lease agreement as whole, Respondent appears to allege the arbitration clause was inconspicuous because it was towards the middle of the overall lease agreement and in size 8 font. **Resp. Br. 6**. However, as required by statute, the first page of the lease agreement contains a notice provision in underline, all caps, and bolded that the contract is subject to arbitration. Further, the important provisions of the arbitration clause itself are in all caps, bolded, and underlined, as explained in Appellant's Brief. If, for the purpose of validity, the statute requires only that there be a notice in all caps and underlined on the first page of the contract, then the fact that the notice on the first page is also bolded and that the arbitration provision itself is underlined, all caps, and bolded, belies this apparent argument the arbitration clause was inconspicuous because it was otherwise

located in the middle of the agreement in smaller font. Thus, the arbitration clause itself was conspicuous and triple emphasized to draw attention to it, which runs counter to unconscionability.

Respondent also argues that she lacked the business judgment or sophistication to understand the effect of the arbitration clause in the contract. **Resp. Br. 4**. Appellant disagrees. "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean*, 408 S.C. at 379, 759 S.E.2d at 731. This extends to presenting sufficient *factual* information to support arguments that an arbitration clause should be avoided on grounds of unconscionability. Here, Respondent provided no factual information to support she lacked business judgment or sophistication to understand a clearly emphasized arbitration provision in her lease agreement. Therefore, Respondent has not met her burden in order to resist arbitration. Further, as argued in Appellant's Brief the minimal information, as distinguished from evidence, in the record is that Respondent should have been able to understand the arbitration provision by virtue of her experience as a military veteran and education in pursuit of multiple degrees.

Because the information in the record indicates Respondent should have the sophistication and Respondent did not present any factual information necessary to establish lack of sophistication to resist arbitration, this Court should find that the arbitration provision is not unconscionable and is enforceable.

III. The jury trial waiver and class action waiver are not one sided or oppressive, and Respondent did not preserve the issue or argument about applicability of the FAA.

Respondent argues that the arbitration provision contained several one sided or oppressive terms that warrant a finding of unconscionability, highlighting (1) the reduction in the statute of limitations, (2) the class action waiver, (3) waiver to a jury trial. As argued in Appellant's Brief, however, these terms do not rise to the level of being one sided or oppressive that warrants avoiding arbitration.

With respect to the reduction in the statute of limitations, that term can be severed. The statute of limitations reduction provision is a separate paragraph in the lease. **(R. p. 68)**. That provision can easily be severed without affecting arbitration—which would allow arbitration to be enforced even if the typical three-year statute of limitations applies.

Further, neither the jury trial waiver nor the class action waiver are one sided or oppressive. Relevant in determining the one sidedness or oppressiveness of terms is whether the terms are designed to obtain an unbiased decision by a neutral decision maker. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 34, 644 S.E.2d 663, 673 (2007). If the terms are not designed to avoid an unbiased decision by a neutral decision maker, then the terms are not one sided or oppressive. *See id.* 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. In addition, mutuality of a provision favors finding against unconscionability. *See Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 260, 743 S.E.2d 868, 874 (Ct. App. 2013) (finding an arbitration clause not unconscionable because the clause was mutually applicable to all parties to the contract).

Here, the jury trial waiver is mutual—both parties are agreeing to waive the right to a jury trial: "**THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL.**" **(R. p. 68)**. Because it is mutual, it is not one sided. Moreover, it is not designed to avoid an unbiased decision by a neutral decision maker, it is merely the judge who would be the neutral decision maker.

For similar reasons, the waiver of a class action 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. Respondent's arguments also ignore that parties are free to contract away their rights, as the *Simpson* court noted.

Respondent for the first time in her response brief raises arguments about the FAA not applying because of a purported lack of connection to interstate commerce, in a bid to characterize the class action waiver as oppressive. **Resp. Br. 10-11**. Respondent's arguments are unpersuasive. First, Respondent never contested the application of the FAA before the lower court and, therefore, arguments the FAA does not apply are not preserved for appeal. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."). Second, the FAA's applicability to arbitration is not determinative in this appeal on whether a class action waiver is one sided or oppressive under South Carolina law. Appellant cited Supreme Court case law that indicates class action waivers in agreements subject to the FAA are not unconscionable. *See generally AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344-52 (2011). That finding, however, was in the face of a California common law that held class action waivers unconscionable. *See id.* There is no South Carolina common law of which Appellant is aware that states class action waivers are unconscionable, and Respondent cites no authority to the opposite. Relying instead on *Simpson*, the class action waiver is not oppressive because it is not designed to avoid an unbiased decision from a neutral decision maker. Also relevant, class action is not at issue in this case, which is fact specific to Respondent's claims. Therefore, the class action waiver provision is not oppressive or unconscionable and the circuit court erred.

IV. Contrary to Respondent's arguments, any offending provisions in the arbitration clause can and should be severed while enforcing arbitration.

Respondent argues as a general proposition that our supreme court "has found that sections of arbitration clauses that purport to shorten the statute of limitations are material to the whole of

the arbitration requirement, instead finding the entire arbitration provision unenforceable," citing *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 910 S.E.2d 474 (2024). **Resp. Br. 11-12**. Respondent misinterprets *Huskins*, however, and it does not require a finding that a clause shortening the statute of limitations always requires finding an arbitration provision unenforceable.

Huskins involved a contract to purchase a home with an arbitration provision that limited the statute of limitations to 90 days. *Id.* at 594, 910 S.E.2d at 476. The contract *did not* contain a severability clause. *Id.* Thus, while the court suggested the law, with few exceptions, does not permit the court to rewrite contracts and stated "this is true even when the parties include a severability term", that suggestion is inapplicable dicta because the arbitration provision in *Huskins* did not have a severability clause. Further, the *Huskins* court cites no support for a finding that courts will refuse to sever contractual terms even if an agreement contains a severability clause. *See id.*

In addition, the *Huskins* court evaluated the parties' intent from the terms of the contract. In the absence of a severability clause and noting the arbitration provision was an adhesive contract, the court found it was not the parties' intent to allow severance. *Id.* at 597, 910 S.E.2d at 477. The parties' intent is derived from the language of the contract, and the lease agreement contained two severability clauses, one within the arbitration clause and one in general. **(R. pp. 68-69)**. 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." Thus, the express terms of the agreement intended that invalid terms could be severed from otherwise valid ones. Because the parties' intent was to sever terms within the arbitration provision invalid for unconscionability, *Huskins* is

inapplicable and the lower court should have severed any terms it found unconscionable while enforcing arbitration.

Moreover, Respondent's arguments taken to their logical conclusion suggest that *Huskins* would require courts to refuse to sever unconscionable statute-of-limitations shortening terms in arbitration provisions and refuse arbitration regardless of the parties' intent, represented by a severability clause. If the parties' intent is that an invalid term can be severed without impacting the enforceability of other terms, then Respondent's arguments would amount to courts rewriting the agreements contrary to the parties' intent, which the court is prohibited from doing. Indeed, prior courts determining unconscionable arbitration provisions have ignored statute-of-limitations shortening terms outside of arbitration provisions in the same contract when refusing to find an arbitration provision unconscionable. *See Carlson*, 404 S.C. at 260, 743 S.E.2d at 874 (ignoring provision outside of arbitration clause shortening statute of limitations to two years as irrelevant to whether an arbitration clause was severable). This would also run counter to the court's requirements to give effect to all provisions if possible, and to enforce a contract's terms regardless of the parties' wisdom or folly. *See Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 569, 772 S.E.2d 882, 890 (Ct. App. 2015); *see also Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

In sum, the lower court should have severed the statute of limitations shortening provision based on the express intent of the parties to sever invalid terms in the arbitration provision as such would not be a forbidden rewriting of the lease agreement even under *Huskins*.

V. South Carolina courts still require a showing of prejudice to establish waiver of the right to arbitrate.

Respondent argues that *Morgan v. Sundance*, 596 U.S. 415 (2022) is persuasive authority that courts should not require a showing of prejudice to establish waiver. **Resp. Br. 16**. Appellant disagrees.

As argued in Appellant's Brief, *Morgan v. Sundance* involved federal law and explicitly refused to consider the application of state law on the requirement of prejudice for establishing waiver. Undoubtedly, prejudice is still a factor under state law. When the South Carolina Supreme Court clarified the policy favoring arbitration in *Palmetto Construction* in 2021, it struck a portion of the Court of Appeals portion discussing waiver. 432 S.C. at 640, 856 S.E.2d at 153 ("The court of appeals erred, however, in addressing the defendants' argument they did not waive their right to arbitration."). When the case made its way back to the Court of Appeals in 2024, the Court of Appeals addressed waiver and noted establishing waiver required the party to "show prejudice through an undue burden caused by delay in demanding arbitration." *Palmetto Construction Grp., LLC v. Restoration Specialists, LLC*, 444 S.C. 328, 343, 907 S.E.2d 129, 137 (2024). The parties in that appeal did not further appeal to the South Carolina Supreme Court. Thus, even after *Morgan* and the South Carolina Supreme Court's clarification on policies favoring arbitration our courts still require prejudice to establish waiver. Therefore, the circuit court erred when it did not evaluate prejudice, which warrants this Court reversing the waiver finding.

Otherwise, Respondent has not sufficiently established an undue burden caused by delay in demanding arbitration. Respondent highlights that Appellant sent eight subpoenas to support the waiver argument. **Resp. Br. 17**. Sending subpoenas to third parties cannot have caused Respondent any prejudice, as Respondent had no burden relative to the subpoenas—it would have been entirely at Appellant's costs. Further, the subpoenas were withdrawn prior to receiving

responses in favor of pursuing arbitration. As argued in Appellant's Brief, there is simply no reasonable factual support for finding prejudice and this Court should reverse the circuit court's finding of waiver.

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. Respondent's arguments regarding the policy of favoring arbitration and waiver do not change the outcome. Despite the Supreme Court of South Carolina clarifying the policy on arbitration, there is still a presumptive validity of arbitration clauses if the Arbitration Act is complied with. Further, focusing specifically on the arbitration provision itself, the terms are not sufficiently oppressive or one sided such that they cannot be severed and arbitration must be avoided. Finally, the circuit court erred in finding waiver without addressing prejudice and, even if it had, Respondent did not suffer an undue burden as established under South Carolina case law by virtue of the limited discovery and delay in compelling arbitration.

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December 30, 2025.

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PROOF OF SERVICE

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

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This 30th day of December, 2025.

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