THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Daniel Coble, Circuit Court Judge

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Appellate Case No. 2025-001789

Civil Case No.:2025-CP-40-01202

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Rumsey Construction & Renovation, LLC ................................ Appellant,

v.

Nathan Chaplin, III and Gloria Allen .....................................Respondents.

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**INITIAL BRIEF OF RESPONDENT**

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## <u>**Statement of the Case**</u>

*The Complaint*

On February 21, 2025, Rumsey filed this action in the Richland County Court of Common Pleas. Its Summons, filed the same day, stated in bold, title-case letters, that a **"Jury Trial"** was **"Demanded**." (Summons). The Complaint contained six pages, thirty-eight numbered paragraphs, and appended sixteen pages of attachments. (Complaint). It asserted four causes of action (*Id*.) While one of its causes of action (the third cause of action) was for "Foreclosure of Mechanic's Lien," the other three causes of action sought relief outside of that statute. (*Id.*). The first cause of action was a claim for breach of contract which sought recovery under the common law. (*Id.*) The second cause of action, an "Alternative Claim for Unjust Enrichment / *Quantum Meruit*" sought recovery in the law of equity. (*Id.*) And the fourth cause of action sought attorneys' fees, which Rumsey stated were collectible "pursuant to the Contract" as well as "applicable law." (*Id.*) Rumsey alleged the Court of Common Pleas had jurisdiction over "the subject matter of this action" and the Prayer for Relief noted the parties would seek "amounts that will be proven at trial" and the Caption again stated in bold, title-case letters, that a **"Jury Trial"** was **"Demanded**."

*The Answer and Counterclaim*

On March 25, 2025, at 4:48 pm, Respondents filed an answer and counterclaim. (Am Compl, ¶ 65); At 5:01 pm, Respondents served Rumsey with written discovery requests, and at 6:01 p.m. Rumsey formally served Respondents with a stipulation of dismissal of the action attempting to dispose of the lawsuit entirely. (Am Compl. ¶ 66-67; Ex. 1 and 2) The dismissal stated that it was both "with prejudice" and "without prejudice." Later on March 25, Rumsey learned that the matter could not be dismissed due to the filing of the Counterclaim. (*Id.*) Accordingly on March 26, Rumsey contacted Nathan Chaplain to "apologize" for the way things

have unfolded, "to make things right," and to attempt to confidentially settle the matter in exchange for a dismissal of this case. (*Id.*). Only after this did not succeed did Rumsey seek an extension of time to respond to the Counterclaim, retain new counsel, and then, for the first time on April 21, 2025, seek to disclaim its demand for a jury trial and compel the matter to arbitration. (*Id.*) When Respondents did not agree, Rumsey moved to compel arbitration on May 21, 2025, and replied to the Counterclaim on May 27. (*Id.*) Respondents amended their answer and counterclaim on June 26, 2025.

## **Argument**

### A. Prejudice is not the test.

Prior to the United States Supreme Court's decision in *Morgan v. Sundance, Inc.,* South Carolina courts applied an arbitration-specific waiver analysis that favored arbitration contracts over normal contracts by requiring the moving party asserting waiver of the right to arbitration to first show prejudice.

This rule rested upon a then-existing policy favoring arbitration. However, as recognized by the South Carolina Supreme Court in *Palmetto Construction Group v. Restoration Specialists LLC*, this state no longer has such a policy. 432 S.C. 633, 856 S.E.2d 150 (2021). As the supreme court reiterated earlier this year, "we dispensed with this notion" that courts should favor arbitration. *Lampo v. Amedisys Holding, LLC,* 445 S.C. 305, 317, 914 S.E.2d 139,146 (2025).

Accordingly, rules based upon the policy favoring arbitration, and rules that apply differently to arbitration contracts as opposed to other contracts, are no longer valid in this state. This principle has been made clear in *Palmetto* and its progeny and was applied, by the United States Supreme Court, in the context of a rule that conditioned waiver of arbitration provisions upon prejudice to a non-moving party. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417-19 (2022)

(rejecting an "arbitration-specific waiver rule demanding a showing of prejudice."); *see also, SZY Holdings, LLC v. Garcia*, 2024 WL 3983944, *3 (4th Cir. 2024) (recognizing that *Morgan* "struck down the prejudice requirement" and "clarified that waiver in the arbitration context, like waiver generally, is simply 'the intentional relinquishment or abandonment of a known right.'")(quoting *Morgan,* 596 U.S. at 417).

The same is true under South Carolina law. The requirement that the party asserting waiver show prejudice—which has only been consistently applied in the arbitration context and is not applied to waiver with respect to other contracts—is no longer valid. Rather, waiver analysis for arbitration contracts must now follow waiver analysis for all other contracts, which does not require prejudice and focuses on the knowledge and conduct of the waiving party:

> A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver **must show** that **the party against whom waiver is asserted** possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. The doctrine of waiver **does not** necessarily imply that **the party asserting waiver** has been misled to his prejudice or into an altered position.

*Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-389 (1992) (emphasis added) (citing *Am Jur 2d.* Estoppel and Waiver, § 154, 158 (1966)).[1] Thus, post-*Palmetto,* an analysis of waiver in the arbitration context must focus on the waiving party's knowledge and conduct in analyzing waiver.

### B. Rumsey knew of its right to arbitrate and acted inconsistently in doing so, thus waiving its right to arbitrate.

Therefore, the Circuit Court correctly focused on whether Rumsey intentionally relinquished a known right. Plaintiff does not dispute that it knew of its alleged right to arbitrate—

[1] In referring to prejudice, the court in *Janasik* was contrasting waiver from equitable estoppel. In contrast to waiver (which does not require prejudice), "[p]rejudice to the other party is an essential element of equitable estoppel." *Janasik* at 344, 415 S.E.2d at 387

it *was* a known right. So, the question is whether Rumsey took an action inconsistent with that right. **There is no action more inconsistent with arbitration than filing a lawsuit and demanding a jury trial as to that lawsuit.** This has been recognized by this Court "Ordinarily, however, bringing a suit based on the contract instead of relying on the arbitration provision constitutes a waiver of the right to arbitrate." *Hyload, Inc. v. Pre-Engineered Products, Inc.,* 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992)

While nearly all of the cases cited by Rumsey involve defendants seeking to compel litigation instituted by a plaintiff to arbitration, Rumsey cites three South Carolina cases involving a plaintiff who sought to arbitrate. All support Respondents' position. The first, *Hyload*, found that a plaintiff had waived the right to arbitrate by filing suit and noted that ordinarily "bringing a suit based on the contract instead of relying on the arbitration provision constitutes a waiver of the right to arbitrate." *Hyload, Inc. v. Pre-Engineered Products, Inc.,* 417 S.E.2d 622, 624, 308 S.C. 277, 280 (Ct. .App.,1992) ("We hold that Hyload waived its right to compel arbitration under the contract by refusing to execute the papers necessary to commence arbitration **and electing instead to sue** on the contract.") (emphasis added). The second, *Sentry Engineering,* was the appeal of an arbitration award: the plaintiff had actually proceeded with arbitration from day one and simply sought to confirm the award in court. *Sentry Engr. & Constr., Inc. v. Mariner's Cay Dev. Corp.,* 287 S.C. 346, 338 S.E.2d 631 (1985). And in *Liberty Builders*, this Court found the plaintiff who filed the litigation waived the right to arbitrate, though the decision necessarily focused on the now-defunct prejudice analysis. *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 521 S.E.2d 749, (Ct. App. 1999).

Rumsey's brief relies upon old and inapplicable law that requires a showing of prejudice and does not comport with the general law of waiver. Although inconsistent action is the *sina qua*

*non* of waiver, Rumsey argues "Inconsistency in a party's actions, including filing suit first and then pursuing arbitration, is not conclusive of waiver." (App. Br. p. 7). However, it relies upon outdated law that cannot survive *Morgan v. Sundance*, as discussed above.

### C. New Jersey waiver law does not save Rumsey from its decision to sue instead of arbitrate.

Around footnote 2, Rumsey's brief suggests that the common law of New Jersey could save it from *Morgan v. Sundance*, as explained in *Marmo & Sons Gen. Contr., LLC v. Biagi Farms LLC,* 317 A.3d 947, 957 (N.J. Super. Ct. App. Div. 2024). In *Marmo & Sons,* the New Jersey Court of Appeals recognized that *Morgan* disallowed the consideration of prejudice in evaluating waiver of an arbitration provision; however, it found a distinction existed if state law did not require prejudice as "a necessary element for waiver in the arbitration context." *Id.* The court held that because the common law of New Jersey applied a seven-part "test" to determine waiver, and because prejudice was not required under the test ("Our New Jersey case law does not require prejudice to prove waiver"), *Morgan* would not affect New Jersey's common law. *Id.*

As a threshold matter, Rumsey did not present this argument to the Circuit Court; therefore, it is not preserved for appellate review. However, even if it had been made it would necessarily fail, because the South Carolina law relied upon by Rumsey is the opposite of New Jersey's law with respect to prejudice.

To try and bring this matter within the New Jersey law it relies upon, Rumsey now claims "South Carolina courts have <u>never required</u> a showing of prejudice to find a party waived its right to arbitrate." (App. Br., p. 8, n. 1) (emphasis added). This is an interesting assertion. Simply looking at the cases in Rumsey's Appellate brief, with one exception,[2] each arbitration case

[2] Of the eight South Carolina decisions discussing waiver in the arbitration context cited by Rumsey, only *Hyload*—which found that a plaintiff's decision not to pursue arbitration "and

Rumsey chose to cite required a showing of prejudice to find a party waived its right to arbitrate. The following citations are in order of their appearance in Rumsey's brief, with the emphasis added by the undersigned. *Gen. Equipment & Supply Company Inc. v. Keller Rigging & Const. SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) ("In order to establish waiver, a party **must** show prejudice through an undue burden caused by delay in demanding arbitration."); *Sentry Engr. & Constr., Inc. v. Mariner's Cay Dev. Corp.,* 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985) ("Federal decisions **require** a showing of prejudice when waiver is asserted"); *Mailsource, LLC v. M.A. Bailey & Assocs.,* 356 S.C. 370, 377, 577 S.E.2d 639, 643 (Ct. App. 2003) ("All parties agree MailSource **needs** to show prejudice for waiver to exist."); *Rhodes v. Benson Chrysler-Plymouth, Inc.,* 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) ("In order to establish waiver, a party **must** show prejudice through an undue burden caused by delay in demanding arbitration.") (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999); *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.,* 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) ("In order to establish waiver, a party **must** show prejudice …"); *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76, (Ct. App. 2003) ("A party seeking to establish waiver **must** show prejudice through an undue burden caused by delay in demanding arbitration.") Indeed, Rumsey argued to the trial court: "I think my understanding of the law and maybe its changed, but … you **have to show prejudice** with that waiver and I don't know what prejudice the Defendants can show." (Tr. p. 10, ln. 13-16)

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electing instead to sue on the contract" was sufficient to show waiver—did not mention the prejudice requirement. *Hyload* at 280, 417 S.E.2d at 624. It is Rumsey's position that *Hyload* "is inapposite to the facts here." (Response to Case Law, p. 1)

Thus, even had Rumsey argued to the Circuit Court that *Morgan* was not binding on the court or did not apply because South Carolina courts "have never required a showing of prejudice," that argument is not consistent with South Carolina law and must fail.

**D. Rumsey's actions in suing the Chaplins in the Court of Common Pleas under the common law and in equity, and in demanding a jury trial are inconsistent with a desire to arbitrate.**

The record is devoid of any explanation by Rumsey as to why it did not inform the Chaplins of its supposed desire to arbitrate prior to the initiation of the Chaplins' counterclaims. It is also devoid of any explanation by Rumsey as to why it filed suit in the court of common pleas if it intended to arbitrate. And no explanation was provided—nor could one be provided—as to why Rumsey sought a jury trial if it intended to arbitrate.

To the contrary, Rumsey's actions indicate its decision to arbitrate was merely a third attempt to hide its conduct from the public after learning the Chaplins had retained counsel. After learning the Chaplins were represented, Rumsey: (1) first, within one hour, attempted to dismiss the action without prejudice; (2) second, when that failed, the very next day, called the Chaplins directly to "apologize" for the way things have unfolded, "to make things right," and to attempt to confidentially settle the matter in exchange for a dismissal of the case; and (3) third, when that failed, informed the Chaplins it would disclaim its request for a jury trial and seek to compel the entire matter to arbitration.

In fact, the record shows Rumsey is a serial litigant against its customers that plays the judicial system and its alleged right to arbitrate as a game against its customers. The Circuit Court was presented with evidence of over 140 matters involving Rumsey filed in Richland and

Lexington. (Reply, Ex. 1 and 2).[3] Its gamesmanship was demonstrated by the example that Rumsey had appeared before the same Circuit Court judge on a nearly identical suit the week before the judge heard the motion Rumsey is now appealing. (Tr. p. 8, ln 12-18)

Three days after it sued the Chaplins in Richland County, it sued another customer, Mr. Yandell, in Richland County. (Pleadings and docket sheet from *Rumsey Construction v. Yandell*, 2025CP4001253). The suit against Mr. Yandell was filed by the same attorney as was Rumsey's suit against the Chaplins, sought relief under the same four causes of action, attached the same contract with the same arbitration clause, and just like in this case, said nothing about arbitration and instead requested a jury trial. (*Id.* ) Unlike in this case, Mr. Yandell did not obtain an attorney, did not file an answer, and no counterclaims were asserted. *Id.* So, Rumsey did not demand arbitration. Instead, it filed a motion for entry of default, followed by a motion for default judgment. *Id.*

Ironically, exactly one week before the hearing before Judge Coble on Rumsey's motion to compel arbitration against the Chaplins, Rumsey appeared in the Court of Common Pleas to obtain an order of default judgment from Judge Coble (not an arbitrator) against Mr. Yandell for "$20,265.80, plus pre-and post-judgment interest until paid, plus reasonable attorney's fees." (*Id.*) Surely, had the Yandells instead retained counsel, served Rumsey with discovery, or taken any action that Rumsey found disadvantageous in circuit court, Rumsey would have attempted to enforce a unilateral right to move the entire action to arbitration, as it did here.

Conversely, had the Chaplins not hired an attorney, Rumsey would have continued with its suit for not only mechanic's lien foreclosure but also relief under the common law and in equity,

[3] Due to lis pendens' and a few suits filed against Rumsey, the actual number of suits filed by Rumsey against its customers in these two counties in recent years is less than 140, but is nevertheless substantial. (*Id.;* Tr. p. 8, ln 10-11.)

and the Chaplins would have been the subject of a similar judgment as that entered against the Yandells. Under the waiver doctrine, however, Rumsey cannot have its cake and eat it too.

Rumsey claims this lawsuit was not inconsistent with a right to arbitrate because its customer contract gave it the right to foreclose upon a mechanic's lien. However, Rumsey cannot deny that its action went far beyond this limited relief. While one of its causes of action (the third cause of action) was for "Foreclosure of Mechanic's Lien," the other three causes of action sought relief outside of that statute. (Cmplt). The first cause of action was a claim for breach of contract which sought recovery under the common law in an amount to be determined by a jury. (*Id.*) The second cause of action sought recovery, not under the mechanic's lien statute, but in the law of equity, seeking damages in an amount to be determined by a judge, as opposed to an arbitrator. (*Id.*) And the fourth cause of action sought attorneys fees, which Rumsey stated were collectible "pursuant to the Contract" as well as "applicable law." (*Id.*)

That Rumsey could have operated differently while perfecting its mechanic's lien is well illustrated by *Sentry Engr. & Constr., Inc. v. Mariner's Cay Dev. Corp.,* 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). Rumsey claims *Sentry* involved a plaintiff taking "inconsistent" positions by first filing suit and "then pursuing arbitration." (App. Br. p. 7) (citing *Sentry* as the sole support for the proposition that "Inconsistency [such as] filing suit first and then pursuing arbitration, is not conclusive of waiver."). However, in *Sentry* the contractor "simultaneously" filed a claim with the AAA in the amount of its mechanic's lien and "filed a petition in Circuit Court to foreclose its lien." *Id.* at 348, 338 S.E. 2d at 633. The court held that a subsequent petition to the circuit court to access the work site was not inconsistent with the previous arbitration demand. *Id.* In other words, in *Sentry,* the court held Sentry's filing was <u>not</u> inconsistent with arbitration, because it simultaneously pursued arbitration while filing a foreclosure petition in circuit court. This is a far

cry from Rumsey's actions seeking to litigate every possible claim under the law—the mechanic's lien statute, the common law, and in equity—while demanding a jury trial. Rumsey did not pursue or request arbitration simultaneously with these actions, and only did so after Rumsey saw the Chaplins retain counsel and after Rumsey's efforts to dismiss its suit or to confidentially settle the matter failed.

In its Reply, Rumsey is invited to explain why, if its suit in common pleas was consistent with its intention to arbitrate, it attempted to dismiss the suit within an hour of learning the Chaplins had retained counsel. Similarly, if the suit was consistent with an intention to arbitrate, why did Rumsey reach out directly to the Chaplins to apologize after Rumsey's attempt to dismiss the suit was unsuccessful?

**E. As an additional sustaining ground, to the extent Rumsey's arbitration agreement provides it the sole right to elect arbitration, regardless of whether it files suit, it is unconscionable.**

It is apparently Rumsey's position that it wrote its customer contract in a fashion in which it can have both have its cake and eat it. Rumsey sued the Chaplins, and requested a jury trial for everything it could—breach of contract, equitable relief under *quantum meruit*, attorneys fees, and foreclosure of a mechanics lien. Rumsey now claims that a right to foreclose upon a mechanics lien without waiving arbitration meant that Rumsey also had the unilateral right to sue its customers in circuit court for any relief, under the contract or in equity, outside of arbitration.[4] Yet, it claims the Chaplins had no similar right. The Chaplins, according to Rumsey, have waived their

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[4] To the extent that Rumsey claims its contract was ambiguous enough to allow it to sue the Chaplins for breach of contract and in equity, it is well settled that contractual ambiguities must be construed against the drafter. *See, e.g. Southern Atlantic Financial Services, Inc. v. Middleton*, 349 S.C. 77, 84, 562 S.E.2d 482, 486 (Ct. App. 2002) It is well settled that ambiguities arising within a contract must be construed against the drafter. This rule applies with particular force in cases involving a contract of adhesion.")

rights to a jury trial if Rumsey chooses, but must go through with a jury trial if Rumsey so chooses. And if Rumsey chooses a jury trial, as it did here, it can freely and unilaterally renege on that choice and seek to arbitrate after all!

Such an arbitration clause (or at least such an interpretation of one) may be many things, but one thing it is not is even-handed. Rumsey is a sophisticated commercial entity and as demonstrated to the Circuit Court is well experienced in the field of suing its customers. (Ex. 1 and 2 to Reply to Response to Case Law). These filings, made available to the lower court as a matter of public record, show that Rumsey uses the same form contract, with no changes that are signed by their customers (often homeowners under some degree of duress after suffering a water loss). This is a classic adhesion contract. If Rumsey's interpretation of that contract is correct—if Rumsey has the sole choice of what matters can be arbitrated and what can be tried to a jury, and if Rumsey is allowed to go back and forth on that decision—then it is oppressive, one-sided, and patently unconscionable. *See, e.g. Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 32 644 S.E.2d 663, 672 (2007).This is an additional sustaining ground supporting the lower court's decision.

**<u>Conclusion</u>**

For all of these reasons, the lower court's order should be affirmed.

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