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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Daniel Coble, Circuit Court Judge

Appellate Case No.: 2025-001789

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

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

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

Respondents' arguments on appeal misinterpret South Carolina law and ignore Appellant's right, under the Services Agreement, to file a mechanic's lien and pursue arbitration. These arguments disregard the appropriate legal analysis and application of the particular facts surrounding Appellant's decision to pursue arbitration. Under the correct analysis, Appellant did not waive its right to enforce the Services Agreement's arbitration provision.

The Court should reject Respondents' arguments and reverse the lower court's decision for the reasons set forth in Appellant's initial brief and for the reasons here.

I. South Carolina law analyzes waiver of an arbitration provision under a nuanced, fact-specific analysis.

South Carolina law is consistent in reviewing the surrounding facts and circumstances to decide whether a party waived its right to arbitrate. Respondents contend two recent decisions revolutionize the analysis of waiver of arbitration provisions and prohibit this Court from citing precedential case law. Neither case makes such sweeping change. *See Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) (holding no public policy favors arbitration in South Carolina and declining to address the defendants' argument on waiver); *see also Morgan v. Sundance*, 596 U.S. 411, 417 (2022) (limiting its ruling to restricting federal courts from "*condition[ing]* a waiver of the right to arbitrate on a showing of prejudice") (emphasis added).

Appellant's Motion to Reconsider and Initial Brief apply the fact-intensive, multi-pronged test South Carolina courts consistently use to determine whether a party can establish waiver as a defense to a contractual right to arbitrate. *Compare Hyload, Inc. v. Pre-Engineered Prods.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1991) ("There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case."), *with Palmetto*

Constr. Grp., LLC v. Restoration Specialists, LLC, 444 S.C. 328, 342-343, 907 S.E.2d 129, 136-37 (Ct. App. 2024) (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 358, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) ("'In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration. There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case.'"). After *Morgan*, moreover, South Carolina courts continue to apply this longstanding test. *See Foster v. Riviere*, No. 2025-UP-297, 2025 S.C. App. Unpub. LEXIS 293 at *2 (Ct. App. Aug. 20, 2025) (affirming the fact-specific analysis of waiver of arbitration under South Carolina law); *see also Weldon v. Dominion Clemson, LLC*, No. 2025-UP-157, 2025 S.C. App. Unpub. LEXIS 150 at *5-*6 (Ct. App. May 7, 2025) (citing the traditional test for waiver of arbitration and stating "our appellate courts have addressed . . . the issue of waiver of arbitration").[1] Even when this Court considered

[1] Respondents dispute Appellant's argument that South Carolina law never required prejudice as a condition to establish waiver of arbitration. Any prejudice requirement as a condition to establish waiver, as may have been discussed by some South Carolina courts in particular cases, originated from federal law. *See Sentry Eng'r & 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."). *Morgan* has no precedential impact on cases governed by the South Carolina Arbitration Act, as is the case here. *See Zabinski v. Bright Access Assocs.*, 346 S.C. 580, 592, 553 S.E.2d 110, 116 (S.C. 2001) ("Parties are free to enter into a contract providing for arbitration under the rules established by state law rather than rules established by the FAA."); *see also Quach v. Cal. Com. Club, Inc.*, 551 P.3d 1123, 1132 (Cal. 2024) ("While *Morgan* made clear that when the proceedings are governed by the FAA's procedural rules, it is inappropriate to apply a different standard of waiver than applies in other contractual contexts, it left open the question whether a court may properly apply an arbitration-specific standard when state procedural law governs the proceedings."); *see also Cruz v. Spec Pers., LLC*, No. X10-UWY-CV-18-5032358 S, 2025 Conn. Super. LEXIS 626, at *34-*35 (Conn. Super. Ct. Apr. 3, 2025) (affirming Connecticut law continued to require a showing of prejudice despite *Morgan* changing the standard imposed by federal law); *see also Marmo & Sons Gen. Contr., LLC v. Biagi Farms, LLC*, 478 N.J. Super. 593, 609, 317 A.3d 947, 957 (N.J. Super. Ct. App. Div. 2024) (finding New Jersey's test including prejudice "within [a] multifactor test as a non-dispositive and non-essential consideration [did] not unduly tilt the waiver analysis for or against arbitration," and therefore did not violate *Morgan*); *see also Rivas v. Molina*, No. 08-23-00102-CV, 2024 Tex. App. LEXIS 1223, at *19 fn. 5 (Tex. Ct. App. Feb. 15, 2024) (holding the application of *Morgan* "remain[ed] an open question with regard to state law and procedure"). No South Carolina court has applied *Morgan* to cases

a new standard for waiver of arbitration similar to Respondents' arguments, it found filing an answer, moving to refer the case to business court, and moving to dismiss did not waive the right to arbitrate. *Blume v. Starbucks Corp.*, No. 2025-UP-274, 2025 S.C. App. Unpub. LEXIS 264 at *2-*3 (Ct. App. July 30, 2025).

To support their argument, Respondents misconstrue case law and manufacture analysis to further their position. Under South Carolina law, it does not matter whether the party pursuing arbitration is the plaintiff or defendant. Yes, as Respondents quote twice, *Hyload* states bringing suit based on the contract rather than pursuing arbitration ordinarily constitutes waiver. *Hyload*, at 280, 417 S.E.2d at 624. Even with this statement, the *Hyload* court analyzed the specific facts surrounding the purported waiver and applied those facts in its analysis. *Id.* (holding the plaintiff "waived its right to compel arbitration . . . *by refusing to execute the papers necessary to commence arbitration and electing instead to sue on the contract*"). Respondents ignore the analysis of *Hyload* and ask this Court to extrapolate a novel rule based on selected sentences from the opinion.

Respondents' other references to South Carolina case law, when reviewed in their entirety, support a finding that Appellant did not waive its right to arbitrate. *See Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 668, 521 S.E.2d 749, 754-55 (Ct. App. 1999); *see also Sentry Eng'r & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985). In *Liberty*, this Court discussed a party's right to preserve a mechanic's lien and pursue a contractual right to arbitrate. *Liberty*, at 667, 521 S.E.2d at 754. This Court discussed two solutions: (1) filing the mechanic's lien and moving to stay that suit and compel arbitration at the appropriate time, or (2) restricting the scope of the arbitration clause in a contract not to include the filing of a

governed by South Carolina law. Because Appellee fails to establish that Appellant waived its right to arbitrate irrespective of the prejudice element, discussion of *Morgan's* impact on South Carolina law is unnecessary.

mechanic's lien. *Id.* Just as the plaintiff in *Sentry* did not waive arbitration by filing a mechanic's lien and pursuing arbitration for amounts owed at the appropriate time, *Sentry*, at 351, 338 S.E.2d at 634, so too Appellant protected its right to file a mechanic's lien and pursue arbitration by restricting the scope of the arbitration clause under the Services Agreement.

II. Appellant did not waive its right to arbitrate by filing this action.

At every stage of this litigation, Appellant acted with intent to preserve its right to arbitrate. Under the Services Agreement, Appellant retained a statutory and contractual right to file a mechanic's lien and pursue arbitration. One month after Appellant preserved its mechanic's lien, Respondents filed counterclaims involving Appellant's business practices, including claims for breach of contract accompanied by fraud, violation of the South Carolina Unfair Trade Practices Act, fraud, and slander of title. Faced with these counterclaims, Appellant sought to exercise its right to arbitrate before filing its Answer and asserting any defenses to Respondents' counterclaims. The pleadings in this case had not yet even been finalized at the time Appellant sought to have the claims arbitrated. Under South Carolina's holistic, fact-specific test, the evidence supports a finding that Appellant did not waive its right to arbitrate.

First, the Services Agreement sanctions Appellant's decision to file and foreclose the mechanic's lien. The other causes of action in Appellant's filing—breach of contract, unjust enrichment, and for attorney's fees and costs—represent alternative claims for relief and restatements of the legal and equitable rights arising under the mechanic's lien if the lien is found invalid. *See Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 611, 703 S.E.2d 221, 222 (2010); *see also Sentry*, at 350, 338 S.E.2d at 633.

There is no ambiguity in this provision of the Services Agreement. *See McCord v. Laurens Cnty. Health Care Sys.*, 429 S.C. 286, 292-93, 838 S.E.2d 220, 223 (Ct. App. 2020) ("To be ambiguous, contract language must be susceptible to two different but plausible meanings."). By

filing a mechanic's lien action, including the relevant, customary claims associated with such an action, Appellant acted within the express and unambiguous language of the Services Agreement.

Second, Appellant moved to compel arbitration before the pleading stage concluded. No written discovery has been exchanged. No depositions have been taken. No dispositive motions have been heard. Under South Carolina's fact-specific standard, at such nascent stage of litigation, no party can be said to have waived its right to arbitrate. Appellant initiated the mechanic's lien with no knowledge of whether Respondent would assert counterclaims, or whether those counterclaims would be subject to the parties' arbitration clause. When Respondents asserted such counterclaims subject to the parties' contractual agreement to arbitrate, Appellee had every right to move to compel the whole matter to arbitration before answering. The facts of this case overwhelmingly support a finding against waiver. *See Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (holding a party did not waive its right to arbitrate by pursuing arbitration thirteen months after the litigation was filed and engaging in limited discovery and limited use of the court's resources).

Respondents' alleged evidence of waiver in this case is inapposite to the waiver analysis. Appellant's prior counsel reaching out to dismiss this matter after Respondents filed counterclaims or attempts to settle this matter;[2] Appellant's request of a jury trial in its mechanic's lien action; and Appellant's purported involvement in other legal actions[3] have never been considered by any

[2] Whether prior counsel tried to dismiss this matter or pursue settlement after counterclaims were filed is irrelevant to the waiver analysis before this Court. Acting with intent to resolve this matter has no bearing on an intent to pursue arbitration.

[3] Respondents spend considerable time discussing Appellant's alleged involvement in previous civil actions in South Carolina. Such references are wholly inappropriate and irrelevant to the court's analysis of waiver in this case. Appellant's other legal actions to collect amounts owed are not indicative of anything, including waiver of arbitration in this matter. There is no evidence before this court regarding what contracts, if any, were involved in those cases or whether those

South Carolina court as evidence supporting a party's assertion that another party has waived an otherwise valid agreement to arbitrate. Nor is it in fact evidence of such matter. None of these facts contradict Appellant's intent to file its mechanic's lien action and preserve its right to pursue arbitration should Respondent raise counterclaims governed by the parties' agreement to arbitrate.

III. The Services Agreement is not unconscionable.

Respondents conclude by arguing the Service Agreement is unconscionable because it is allegedly one-sided by providing Appellant the right to file a mechanic's lien action in circuit court and requires Respondents to pursue arbitration of any claims subject to the arbitration provision in the Services Agreement. But Respondents wholly miss the mark here. Excepting a party's right to file a mechanic's lien in circuit court, which is specifically required under South Carolina statutory law, is not one-sided or oppressive. South Carolina statutory law requires it, and the arbitration clause in the Services Agreement merely acknowledges that fact. The parties' obligation to arbitrate all other claims subject to the Services Agreement applies uniformly between Appellant and Respondents, subject to any valid, contractual defense thereto. That is, Respondents had every right to move to compel arbitration of Appellee's contractual and equitable claims, asserted in the alternative to the mechanic's lien action, after Appellant filed its Complaint. Moreover, Appellant has every right to insist on arbitration of all claims after Respondents asserted counterclaims subject to the parties' arbitration agreement too. This right applies uniformly to the parties. Even if the court somehow considered the exception for filing a mechanic's lien in the parties' arbitration agreement to suggest a lack of mutuality of remedy, our courts have rejected that as making an arbitration agreement unconscionable. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 31, 644 S.E.2d 663, 672 (2007) ("Our courts have held that lack of mutuality of

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contracts had arbitration clauses. Nor has Respondent asserted or even attempted to argue issue preclusion or res judicata for example.

remedy in an arbitration agreement, on its own, does not make the arbitration agreement unconscionable.").

To establish unconscionability as a defense to an otherwise valid agreement to arbitrate, an arbitration clause must have an "absence of meaningful choice on the part of one party due to one-sided contact provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Id.* at 25, 644 S.E.2d 663, 668. South Carolina courts review the particular facts of each case to determine whether an arbitration clause is unconscionable. *See id.* at 26, 644 S.E.2d at 669. In *Simpson*, the court found an arbitration clause unconscionable when that clause (1) was inconspicuous in nature, written in small standard print, and embedded in the contract; (2) required the plaintiff to forgo double and treble damages as provided by statute; (3) allowed the defendant to bring a judicial proceeding which disregarded the plaintiff's pending claims in arbitration; and (4) required specific federal claims to be arbitrated which, as a matter of public policy, could not be arbitrated. *Id.* at 27-33, 644 S.E.2d at 670-73. No such unconscionable clauses are included in the arbitration clause in the Services Agreement.

CONCLUSION

For these and the many reasons argued in Appellant's Initial Brief, the Court should reverse the lower court's Order denying Appellant's Motion to Compel Arbitration. The lower court ignored the underlying facts and did not analyze the doctrine of waiver under South Carolina law. Even on this court's de novo review of this issue, if the lower court applied the relevant facts, Respondents have failed to establish that the defense of waiver applies here, under both the express language of the Services Agreement and South Carolina law, where the pleadings and claimed defenses are not finalized.

Because the evidence supports a finding that Appellant did not waive its right to arbitrate, the Court should reverse.

Respectfully submitted,

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