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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Case No. 2025-CP-10-01435
Appellate Case No. 2026-000293

A Site on Rivers, LLC, and Shelly Leeke Law Firm, LLC,

Appellants,

v.

Mashburn Construction Company, Inc.; Plumbing Authority, LLC; Designbuild Mechanical Corporation; Lowcountry Doors & Hardware, Inc.; Collins & Wright, Inc.; Exterior Solutions of Georgia, LLC d/b/a Bone Dry Roofing; B & C Utilities, Inc.; B&C Development, Inc.; Palmetto State Glass, Inc.; Capital Dry Wall, LLC; Air Diagnostics, Inc.; and Thermatech Services, LLC, Defendants,

Of which Mashburn Construction Company, Inc. is the Respondent,

AND

Lowcountry Doors & Hardware, Inc., Third-Party Plaintiff,

v.

Global Installation Contracting of Charleston, LLC d/b/a Global Installation Contracting, LLC, Third-Party Defendant.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN FINDING THE ARBITRATION PROVISIONS IN THE DESIGN-BUILD AGREEMENT WERE NOT UNCONSCIONABLE, WHERE APPELLANTS' CLAIMS AGAINST NUMEROUS NECESSARY SUBCONTRACTOR DEFENDANTS ARE NOT SUBJECT TO ARBITRATION, FORCING PARALLEL PROCEEDINGS AND EVIDENCE ESTABLISHES THAT APPELLANTS DID NOT NEGOTIATE THE ARBITRATION PROVISION AND WERE NOT INFORMED OF IT BEFORE EXECUTION.**
- II. WHETHER THE CIRCUIT COURT ERRED IN COMPELLING ARBITRATION UNDER ARTICLE 12.6 OF THE DESIGN-BUILD AGREEMENT, WHICH MAKES JOINDER OF ALL NECESSARY PARTIES IN A SINGLE DISPUTE-RESOLUTION PROCEEDING A CONDITION THAT CANNOT BE SATISFIED BECAUSE THE SUBCONTRACTORS ARE NOT BOUND TO ARBITRATE WITH APPELLANTS.**
- III. WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT RESPONDENT DID NOT WAIVE ITS RIGHT TO ARBITRATION THROUGH ITS CONDUCT, INCLUDING ITS ELECTION OF JUDICIAL REMEDIES BY FILING A MECHANIC'S LIEN AND ITS REFUSAL TO ENGAGE THE CONTRACTUAL DISPUTE-RESOLUTION STEPS APPELLANTS INITIATED.**

STATEMENT OF THE CASE

This is a construction-defect action arising out of the construction and renovation of a commercial property on Rivers Avenue in North Charleston, South Carolina, which Appellants A Site on Rivers, LLC and Shelly Leeke Law Firm, LLC ("Appellants") own and which serves as the Shelly Leeke Law Firm headquarters (the "Project"). [R. p. ____.] Appellants assert claims against Respondent Mashburn Construction Company, Inc. ("Mashburn"), the general contractor for the Project, and against the subcontractors who performed the work at the Project. [R. p. ____.]

Appellants commenced this action in the Charleston County Court of Common Pleas on or about March 14, 2025. [R. p. ____.] Mashburn moved on May 15, 2025, to dismiss, or in the alternative, to stay the litigation and compel arbitration [R. p. ____.] The motion was first called

on September 25, 2025, and continued by consent. It was heard on November 5, 2025, before the Honorable Jennifer B. McCoy, who took the matter under advisement. [R. p. ____; Tr. ____.] At the same hearing, the court granted Appellants' Motion to Amend the Complaint to add Global Installation Contracting of Charleston, LLC, Capital Dry Wall, LLC, Air Diagnostics, Inc., and Thermatech Services, LLC as defendants. [Tr. 23:1–10.]

On December 11, 2025, the court issued a Form 4 order granting the motion to compel arbitration and directing Mashburn to submit a formal proposed order. [R. p. ____.] On January 8, 2026, the court signed the formal Order Granting Motion to Dismiss, or in the Alternative, Stay and Compel Arbitration, which stays the claims between Appellants and Mashburn and compels those claims to arbitration.

Appellants filed a Rule 59(e), SCRCF motion directed at the Form 4 order on December 22, 2025, which the court denied on January 9, 2026. [R. p. ____.] On January 19, 2026, Appellants filed a second Rule 59(e) motion directed at the January 8, 2026 written order, the operative final order in this matter. [R. p. ____.] . While that motion was pending, Mashburn took the position that the time to appeal was then running. [R. p. ____.] Out of an abundance of caution, and to protect their right to appeal, Appellants served and filed their Notice of Appeal on February 9, 2026. [R. p. ____.] The circuit court thereafter denied the January 19, 2026 motion on March 11, 2026. [R. p. ____.]

Appellants then moved this Court to amend the Notice of Appeal to encompass the March 11, 2026, order and for an extension of time to serve and file this brief and the designation of matter. [R. p. ____.] By order filed June 1, 2026, this Court granted both motions and set the deadline for service and filing of this brief and the designation of matter.² [R. p. ____.] This appeal followed.

STANDARD OF REVIEW

Arbitrability determinations are subject to de novo review. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014); *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 125, 647 S.E.2d 249, 250 (Ct. App. 2007). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

FACTS

The contract for construction of the Project was a ConsensusDocs 415 Standard Design-Build Agreement, a pre-printed industry form that Mashburn presented to Appellants (the "Design-Build Agreement"). [R. p. ____.] Shelly Leeke, the managing member of Shelly Leeke Law Firm, LLC, attested that she did not negotiate, discuss, or request any revisions to Article 12 or to any arbitration or dispute-resolution provision; that she was not informed before signing that the contract contained an arbitration provision; and that she did not knowingly agree to give up her right to have disputes resolved in court by a jury. [R. p. ____.] Todd Swanson, the officer who signed the agreement for Appellants, attested that the only change the parties discussed was the contract price, that he did not participate in any markups or redlines, that the executed contract was Mashburn's standard form except for the dollar amount, and that he too was never informed the contract contained an arbitration provision. [R. p. ____.] Mashburn's own executive confirmed that the arbitration clause was never negotiated: "At no point did Mr. Swanson question the Dispute Resolution provisions within the Design-Build Agreement, nor did he ask to make any changes to those provisions." [R. p. ____.]

Article 12 of the Design-Build Agreement makes arbitration the last step in a sequence that begins with good-faith direct discussions, proceeds through a dispute-mitigation procedure and mediation, and reaches binding arbitration only if those steps fail to resolve the matter. [R. p. ____.] Article 12.6, titled "Multiparty Proceeding," promised that any dispute would be resolved with all necessary parties together in one forum: "The Parties agree that all Parties necessary to resolve a matter shall be Parties to the same dispute resolution procedure. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the joinder or consolidation of such dispute resolution proceedings." [R. p. ____.]

Many of Appellants claims for defective work implicate the subcontractors hired by Mashburn. These subcontractors include, but are not limited to: Plumbing Authority, LLC; Designbuild Mechanical Corporation; Lowcountry Doors & Hardware, Inc.; Collins & Wright, Inc.; Exterior Solutions of Georgia, LLC d/b/a Bone Dry Roofing; B & C Utilities, Inc.; B&C Development, Inc.; Palmetto State Glass, Inc.; and Pleasant Places, Inc. (the "Subcontractors"). [R. p. ____.] Appellants have no arbitration agreement with any of the Subcontractors. [R. p. ____.] Discovery further revealed that several Subcontractors hired their own subcontractors: Lowcountry Doors & Hardware, Inc. hired Global Installation Contracting, LLC d/b/a Global Instalation Contracting LLC [R. p. ____]; Collins & Wright, Inc. hired Capital Dry Wall, LLC [R. p. ____]; and Designbuild Mechanical Corporation hired Air Diagnostics, Inc. and Thermatech Services, LLC [R. p. ____]. None of these sub-subcontractors have an arbitration agreement with Appellants or with Mashburn. [R. p. ____.]

After Appellants discovered numerous construction deficiencies, they served Mashburn with a written notice of defects pursuant to S.C. Code Ann. § 40-59-840. [R. p. ____.] Mashburn did not initiate or demand the direct discussions, executive escalation, or mediation that Article

12 requires before arbitration. [R. p. ____.] Rather than engage that process, Mashburn invoked the judicial system under the same contract, filing a Notice and Certificate of Mechanic's Lien with the Charleston County Register of Deeds on May 24, 2024. [R. p. ____.] Appellants later offered Mashburn an opportunity to inspect the Project on October 21, 2024, which Mashburn did not attend. [R. p. ____.]

ARGUMENT

I. DID THE CIRCUIT COURT ERR IN FINDING THE ARBITRATION PROVISION IN THE DESIGN-BUILD AGREEMENT WAS NOT UNCONSCIONABLE?

The circuit court erred in compelling arbitration as the arbitration provision is unconscionable, both substantively and procedurally. An arbitration agreement is subject to generally applicable contract defenses, including unconscionability, under both the Federal Arbitration Act and the South Carolina Uniform Arbitration Act. *See* 9 U.S.C. §2; S.C. Code Ann. §15-48-10, *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 611, 879 S.E.2d 746, 754 (2002).

An arbitration agreement is unconscionable when there is both (1) an absence of a meaningful choice in entering the agreement (procedural unconscionability), and (2) oppressive and one-sided terms (substantive unconscionability). *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 531, 908 S.E.2d 892, 897 (Ct. App. 2024). Unconscionability is "the 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." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668-69 (2007). The two prongs are evaluated on a sliding scale, under

which strong evidence of one prong reduces the showing required of the other. *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. Here, both prongs are satisfied.

A. Did the circuit court err in finding the arbitration provision is not substantively unconscionable, where Appellant's claims against numerous necessary subcontractors are not subject to arbitration and compelling arbitration forces parallel proceedings?

The circuit court erred in finding the arbitration provision was not substantively unconscionable because compelling arbitration of the claims against Mashburn alone forces Appellants into parallel proceedings that impair their ability to recover, and the record contains no evidence that the necessary subcontractors are bound to arbitrate. This is the precise conflict our Supreme Court held substantively unconscionable in *Damico*.

In *Damico*, the South Carolina Supreme Court held an arbitration provision substantively unconscionable where the plaintiffs had claims against numerous parties who were not bound to arbitrate, because the provision could force the plaintiffs to litigate the same defects against those parties separately in circuit court. 437 S.C. at 616–17, 879 S.E.2d at 757. The Court explained that such a structure permits the arbitration defendants to blame the absent circuit-court defendants, and the circuit-court defendants to blame the absent arbitration defendants, so that the plaintiffs could lose in both forums, and “critically, it is not [the plaintiffs’] choice that those defendants are absent.” *Id.* That risk renders the provision substantively unconscionable because it impairs the plaintiffs’ ability to recover their damages fully. *Id.*

This case is *Damico*. Appellants assert defect claims against Mashburn and against a long list of subcontractor-defendants, none of whom has an arbitration agreement with Appellants. [R. p. ____.] Discovery confirmed that the fracturing extends even further: Mashburn subcontractors, Lowcountry Doors & Hardware, Collins & Wright, and Designbuild Mechanical Corporation, retained their own subcontractors, Global Installation Contracting, Capital Dry Wall, LLC, Air

Diagnostics, Inc. and Thermatech Services, LLC, which likewise have no arbitration agreement with Appellant or Mashburn. [R. p. ____.] Compelling arbitration of the claims against Mashburn alone, while the identical defect claims against the subcontractors proceed in circuit court, produces precisely the empty-chair prejudice *Damico* condemned: each set of defendants may attribute the defects to the absent parties, and Appellants may be left unable to recover fully in either forum, through no choice of their own.

The circuit court distinguished *Damico* on the grounds that “Defendant submitted evidence that its subcontractor agreements contain arbitration provisions” requiring the subcontractors to participate in the same proceeding. [R. p. ____ (Order).] The subcontracts Mashburn handed up at the hearing do not bear the weight the circuit court placed on them. [Tr 11:21-24.] The court’s finding is improper for three reasons.

First, those subcontracts are agreements between Mashburn and its subcontractors. They create no agreement to arbitrate between the subcontractors and Appellants, who are strangers to them. Arbitration is a matter of consent, and a party cannot be compelled to arbitrate, or to have its claims arbitrated, absent and explicit agreements to do so. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019); *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843 (Ct. App. 1999). Appellants cannot be forced to arbitrate their direct claims against Subcontractors as no explicit agreement between Appellants and the Subcontractors exist.

Second, even on their own terms, the subcontracts do not satisfy Article 12.6, which requires that all necessary parties be joined in “the same dispute resolution procedure.” [R. p. ____ .] The subcontracts prescribe a different procedure. For example, the Plumbing Authority, LLC subcontract requires the parties to select an arbitrator and submit to arbitration before the American Arbitration Association, which is not the dispute resolution procedure set out in the

Design-Build Agreement between Appellant and Mashburn. [Tr. 15:14-19.] Two different procedures in two different contracts cannot produce the single, combined proceeding Article 12.6 requires.

Third, the fracturing extends below the first tier of subcontractors. Discovery revealed lower tier subcontractors, including Global Installation Contracting, LLC d/b/a Global Instalation Contracting LLC, Capital Drywall, LLC, Air Diagnostics, Inc., and Thermatech Services, LLC, none of which has an arbitration agreement with Appellants or Mashburn. Therefore, these parties cannot be compelled to arbitrate at all.

For these reasons, the existence of arbitration clauses in Mashburn's subcontracts does not bind the necessary parties into a single proceeding with Appellants, and the circuit court's contrary conclusion was an error. Mashburn's effort to distinguish *Damico* on the grounds that its subcontracts, unlike the contract there, supposedly mandate joinder misses the controlling point: the dispositive fact in *Damico*, as here, is that the plaintiffs hold claims against parties who are not bound to arbitrate with them, leaving the Appellants exposed to the empty chair in both forums. The provision is substantively unconscionable, and the order compelling arbitration should be reversed.

B. Did the circuit court err in finding the arbitration provision is not procedurally unconscionable, where the undisputed evidence shows Appellants never negotiated the provisions and were never informed of it?

The circuit court erred in finding the arbitration provision was not procedurally unconscionable, because the undisputed evidence establishes that Appellants never negotiated the arbitration provision and were never informed of it before signing. Procedural unconscionability turns on the absence of meaningful choice in entering the agreement, considering the fairness of the bargaining process, the relative sophistication and bargaining

power of the parties, and whether the contract is one of adhesion. *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016); *Damico*, 437 S.C. at 613, 879 S.E.2d at 755. A standard-form contract offered on a take-it-or-leave-it basis is a strong indicator that a party lacked meaningful choice, and courts view adhesive arbitration clauses with considerable skepticism. *Simpson*, 373 S.C. at 26–27.

The Design-Build Agreement is a standard ConsensusDocs 415 form prepared and presented by Mashburn. [R. p. ____.] The uncontradicted affidavit testimony establishes that Appellants did not negotiate the arbitration provision. Shelly Leeke, the Appellant’s managing member, attested that she did not negotiate the agreement, did not request or make any revisions to Article 12 or to any arbitration provision, was not informed before execution that the contract contained an arbitration provision, and did not knowingly waive her right to have disputes resolved in court. [R. p. ____ (Leeke Aff. ¶¶ 5–13).] Todd Swanson, the Appellant’s Chief Financial Officer who signed the agreement, attested that the only negotiated change was the contract price, that he did not participate in any markups or redlines, that the executed version was Mashburn’s standard form except for the dollar amount, and that he was not informed of the arbitration provision. [R. p. ____ (Swanson Aff. ¶¶ 6–13).]

Mashburn’s own evidence confirms the point. Its executive, Richard Kinard, testified that, although the parties negotiated other terms, “At no point did Mr. Swanson question the Dispute Resolution provisions within the Design-Build Agreement, nor did he ask to make any changes to those provisions.” [R. p. ____ (Kinard Aff. ¶ 10).] In other words, every witness, including Respondent’s, agrees that the arbitration clause itself was never negotiated.

The circuit court nonetheless found that “Plaintiffs did in fact make such revisions, including noted changes to the Arbitration provision being questioned before this Court.” [R. p.

___ (Order).] That finding is contradicted by the entire record, including Mashburn's own affidavit, and cannot support the order.

The same record defeats any conclusion that Appellants knowingly and voluntarily waived their constitutional right to a jury trial. The right to a jury trial is fundamental, and there is a presumption against its waiver, which may be relinquished only knowingly, voluntarily, and intentionally. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). A clause that was neither negotiated nor disclosed to Appellants, and that the Appellants' principals attested they were never informed of, cannot satisfy that standard. Under South Carolina's sliding-scale analysis, the strong substantive unconscionability shown in Part I requires only a modest showing of procedural unconscionability, *Damico*, 437 S.C. at 612, 879 S.E.2d at 755, and the unnegotiated, undisclosed character of this clause more than meets that threshold. The provision is unenforceable.

II. DID THE CIRCUIT COURT ERR IN COMPELLING ARBITRATION UNDER ARTICLE 12.6 OF THE DESIGN-BUILD AGREEMENT, WHICH MAKES JOINDER OF ALL NECESSARY PARTIES A CONDITION THAT CANNOT BE SATISFIED?

The circuit court erred in compelling arbitration because Article 12.6 of the Design-Build Agreement conditions arbitration on the joinder of all necessary parties in a single proceeding, and that condition cannot be met here. Article 12.6 of the Design-Build Agreement, titled "Multiparty Proceeding," provides: "The Parties agree that all Parties necessary to resolve a matter shall be Parties to the same dispute resolution procedure. Appropriate provisions shall be included in all other contracts relating to the Work to provide for the joinder or consolidation of such dispute resolution proceedings." [R. p. ____.]

By its own terms, Article 12.6 requires single-forum resolution of all necessary parties and conditions that result on Mashburn's having included joinder and consolidation provisions in

its other contracts. Arbitration is a creature of contract, and the same rules that govern any contract govern an agreement to arbitrate. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). A court must give effect to the plain language the parties chose and read the contract as a whole. The plain language of Article 12.6 reflects a bargained for promise: any dispute would be resolved with all necessary parties together, in one forum, under the same dispute resolution procedure. While Appellants do not believe they knowingly agreed to arbitrate, if the Court finds Appellants did agree to arbitration, they did not agree to arbitrate against Mashburn in isolation. They agreed to arbitrate only within a single, consolidated proceeding that includes every party necessary to resolve the matter.

If we read the Design-Build Agreement as Mashburn urges, Article 12.6 would do something no contract can do. Mashburn treats the provision as if it sweeps into a single arbitration anyone Mashburn later deems "necessary to resolve a matter," whether or not that party ever agreed to arbitrate. But a provision in the contract between Appellants and Mashburn cannot bind a stranger to that contract. Arbitration is a matter of consent, and a party cannot be compelled to arbitrate absent its own agreement to do so. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019). Two contracting parties cannot, by agreement between themselves, strip a third party of its right to resolve disputes in court. Article 12.6 therefore cannot mean that every party Mashburn labels "necessary" is bound to the same arbitration. It can operate only where the necessary parties have themselves agreed, in their own contracts, to be joined in that same procedure. Here, they have not. The subcontractors never agreed to arbitrate with Appellants, the lower-tier subcontractors never agreed to arbitrate with anyone, and Article 12.6's promise of a single combined proceeding is, on this record, impossible to keep.

Article 12.6 requires not merely that the necessary parties arbitrate, but that they do so in "the same dispute resolution procedure." The subcontracts Mashburn produced prescribe a different procedure. The Plumbing Authority, LLC subcontract, for example, requires the parties to select an arbitrator and submit to arbitration before the American Arbitration Association, which is not the procedure set out in the Design-Build Agreement. [Tr. 15:14-19; R. p. ____.] By the letter of the contract, those are not the same dispute resolution procedure, and Article 12.6 is not satisfied. The condition fails for the further reason that several necessary parties cannot be compelled into any shared proceeding at all: Appellants have no arbitration agreement with the subcontractors, and the lower-tier subcontractors, including Global Installation Contracting, LLC d/b/a Global Instalation Contracting LLC, Capital Dry Wall, LLC, Air Diagnostics, Inc., and Thermatech Services, LLC, have no arbitration agreement with anyone. [Tr. 15:25-16:5.] Because arbitration rests on consent, those parties cannot be joined into a single proceeding with Appellants. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019).

The circuit court reasoned that severance of the subcontractors "does not defeat" the agreement between the two signatories. [R. p. ____ (Order).] That reasoning rewrites the bargain rather than enforcing it. Reading Article 12.6 to permit a Mashburn-only arbitration, while the same defect claims against the subcontractors proceed separately in circuit court, produces the very fracturing the provision was written to prevent and reads the words "the same dispute resolution procedure" out of the contract. A court may not interpret a contract in a manner that renders its provisions meaningless. The only reading that gives Article 12.6 effect is that arbitration was conditioned on a single, combined proceeding of all necessary parties. Where, as here, that proceeding is impossible, compelling a fractured, two-party arbitration enforces a term to which Appellants never agreed and warrants reversal.

III. DID THE CIRCUIT COURT ERR IN FINDING RESPONDENT DID NOT WAIVE ITS RIGHT TO ARBITRATION BY REFUSING THE CONTRACTUAL DISPUTE RESOLUTION PROCESS AND ELECTING TO PURSUE ITS OWN REMEDY?

Even if the arbitration provision were enforceable, the circuit court erred in finding Mashburn did not waive it. A party may waive its right to enforce an arbitration clause through conduct inconsistent with arbitration. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999) ("It is generally held that the right to enforce an arbitration clause may be waived."); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992). There is no fixed rule for what constitutes waiver; the question depends on the facts of each case. *Liberty Builders*, 336 S.C. at 665, 521 S.E.2d at 753.

The parties agreed in Article 12 to resolve construction disputes through a defined sequence: direct discussions, dispute mitigation, mediation, and then binding arbitration only if those steps failed. [R. p. ____.] When a dispute arose, Mashburn refused to follow it. After Appellants served written notice of defects on January 12, 2024, and invited resolution, Mashburn never initiated or demanded the direct discussions, executive escalation, or mediation Article 12 requires. [R. p. ____.] Mashburn instead advised Appellants, in correspondence dated February 28, 2024, that rather than continue working toward a resolution it would "proceed with protecting its lien rights." [R. p. ____.] Mashburn then recorded a mechanic's lien on May 24, 2024, and later ignored Appellants' October 21, 2024 inspection offer. [R. p. ____.] Mashburn raised arbitration only after Appellants, having received no engagement with the contractual process, were left to file suit in March 2025. A party that spurns the dispute-resolution process its contract requires, and demands that process only once the other side is forced into court, has acted inconsistently with the right to arbitrate. See *Hyload*, 308 S.C. at 280, 417 S.E.2d at 624

(party waived arbitration by refusing to commence arbitration and electing instead to sue on the contract).

The circuit court excused this conduct by relying on S.C. Code Ann. § 15-48-220, which provides only that "[n]othing in this chapter shall preclude the filing and perfecting of a mechanics lien by any party to an arbitration agreement." [R. p. ____ (Order).] That statute does not carry the weight the court placed on it. Section 15-48-220 permits a party to preserve a lien; it says nothing about waiver, and it does not relieve a party of its obligation to follow the contractual dispute-resolution process for the underlying dispute. The statute and the agreement are not in conflict. Mashburn was free to record its lien to preserve priority, but Section 15-48-220 did not permit Mashburn to refuse the dispute-resolution process the parties agreed to and then, once sued, demand that Appellants submit to the arbitration Mashburn itself had bypassed.

CONCLUSION

The arbitration provision in the Design-Build Agreement is unconscionable and cannot be enforced. It is substantively unconscionable because it forces Appellants to arbitrate their claims against Mashburn while litigating the identical defect claims against the subcontractors and sub-subcontractors in circuit court, none of whom have arbitration agreements with Appellants, leaving Appellants exposed to the empty chair in both forums. It is procedurally unconscionable as the undisputed evidence establishes that the arbitration provision was never negotiated or disclosed to Appellants before they signed.

Article 12.6 independently bars the circuit court's order. The provision conditions arbitration on the resolution of all necessary parties in a single, combined proceeding under the same dispute-resolution procedure. That condition cannot be met. The subcontractors and

sub-subcontractors never agreed to arbitrate with Appellants, the subcontracts prescribe a different procedure, and no provision in the contract between Appellants and Mashburn can bind those strangers to arbitration. Compelling a fractured, two-party arbitration enforces a term which is not in the arbitration provision.

Finally, even if the arbitration provision were enforceable, Mashburn waived it. Mashburn refused the dispute resolution process Article 12 requires, elected to pursue its own remedy and demanded arbitration only after Appellants were forced to file suit. S.C. Code Ann. § 15-48-220 may have permitted Mashburn to preserve its lien, but it did not excuse Mashburn's refusal of the contractual process it now seeks to enforce against Appellants.

For these reasons, Appellants respectfully request that this Court reverse the order compelling arbitration and staying the action, and remand this matter for further proceedings in the circuit court.

Respectfully submitted,
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