RECEIVED
Aug 26 2026
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

Court of Common Pleas 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 RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

<u>Statutes, Rules, and Regulations</u>

<u>Other Authorities</u>

STATEMENT OF ISSUES ON APPEAL

1. **Whether the circuit court's January 8, 2026, Order staying the proceedings and compelling arbitration, together with its subsequent Orders denying Appellants' Motions for Reconsideration, are immediately appealable.**

2. **Whether the circuit court correctly determined that Appellants had a meaningful choice in entering the arbitration agreement and, therefore, that the arbitration provision is not procedurally unconscionable.**

3. **Whether the circuit court correctly determined that the arbitration provision is not substantively unconscionable based on Article 12.6's requirement in the Design-Build Agreement that all parties necessary to resolve a matter participate in the same dispute-resolution procedure.**

4. **Whether the circuit court correctly determined that Article 12.6 of the Design-Build Agreement does not make the joinder of all necessary parties a condition precedent to arbitration.**

5. **Whether the circuit court correctly determined that Respondent did not waive its contractual right to arbitration by filing a mechanic's lien prior to compelling arbitration.**

6. **Whether the circuit court correctly determined that Respondent did not waive its contractual right to arbitration by failing to initiate the contractual pre-arbitration dispute-resolution procedures where Respondent was not the party that asserted claims against Appellants.**

STATEMENT OF THE CASE

This appeal arises from a commercial construction dispute between Appellants A Site on Rivers, LLC and Shelly Leeke Law Firm, LLC (collectively, "Appellants") and Respondent Mashburn Construction Company, Inc. ("Respondent" or "Mashburn"). In 2021, Appellants retained Mashburn to construct and renovate commercial property located on Rivers Avenue in North Charleston, South Carolina, for use as the headquarters of Shelly Leeke Law Firm (the "Project"), an established South Carolina law firm operating multiple locations throughout the State. Order dated January 8, 2026, p. 2 (R. p. ____); Compl. ¶ 14 (R. p. ____); Kinard Aff. ¶ 4 (R. p. ____). The parties ultimately memorialized their agreement in a modified ConsensusDocs 415 Standard Design-Build Agreement (the "Design-Build Agreement"). Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A (R. pp. ____); Kinard Aff. ¶ 4 (R. p. ____). The Design-Build Agreement contains a dispute-resolution procedure culminating in binding arbitration. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 29-31 (R. pp. ____). After disputes arose concerning the construction, Appellants filed suit in the Charleston County Court of Common Pleas on March 14, 2025, against Mashburn and numerous subcontractors. *See generally*, Compl. (R. p. ____). On May 15, 2025, Mashburn moved to dismiss the claims against it or, alternatively, to stay those claims and compel arbitration pursuant to the Design-Build Agreement. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration (R. pp. ____).

The circuit court heard Mashburn's Motion to Compel Arbitration on November 5, 2025. At the hearing, the parties addressed Appellants' arguments that the arbitration provision was unconscionable, that the contractual dispute-resolution procedures had not been completed, that Mashburn waived arbitration by filing a mechanic's lien, and that Appellants' lack of arbitration agreements with the subcontractors precluded arbitration between Mashburn and Appellants. *See generally*, Transcript, Nov. 5, 2025 (R. p. ____). Further at the hearing, Mashburn submitted copies of its subcontracts for the parties that were also sued by Appellants in the same lawsuit and informed the court that those agreements contained arbitration requirements applicable to disputes arising from the subcontractors' work at the Project. *Id.* at 11:15-12:8, 22:12-17 (R. p. ____); *see also*, *see also* R. p. ___ (excerpts from Mashburn subcontract agreements). At the same hearing, the circuit court granted Appellants' motion to amend their complaint to add additional "lower-tier" subcontractors, while expressly stating that its ruling on the amendment did not indicate how it would resolve the arbitration issue. Transcript, p. 23 (R. p. ____). The court thereafter took Mashburn's Motion to Compel Arbitration under advisement.

On December 11, 2025, the circuit court granted Mashburn's Motion to Compel Arbitration via a Form 4 Order and directed Mashburn to submit a formal order. Order dated December 11, 2025 (R. p. ____). The court thereafter entered its formal Order Granting Mashburn's Motion to Compel Arbitration on January 8, 2026, staying the claims between Appellants and Mashburn and compelling them into arbitration. Order dated Jan. 8, 2026 (R. p. ____). Appellants sought reconsideration pursuant to Rule 59(e), SCRCP on two different occasions: after the December 11, 2025, Form 4 Order and after the January 8, 2026, formal written Order, both of which do not substantively argue the grounds for reconsideration other than claiming "that the Court misunderstood or failed to fully consider the issues raised[.]" Pls.' Mot. to Reconsider filed Dec. 22, 2025 (R. p. ____); Pls.' Mot. to Reconsider filed Jan. 19, 2026 (R. p. ____). After the circuit court t denied their first Motion for Reconsideration pursuant to its January 9, 2026, Form 4 Order, Appellants pursued this appeal. Order dated Jan. 9, 2026 (R. p. ____). The court thereafter denied Appellant's second Motion for Reconsideration on March 11, 2026. Order dated March 11, 2026

(R. p. ____). The Court of Appeals subsequently permitted Appellants to amend their original Notice of Appeal to encompass the circuit court's March 2026 denial of their second Motion for Reconsideration.

Appellants now challenge the circuit court's stay of Appellants' claims against Mashburn and the enforcement of the parties' agreement to arbitrate, contending that the arbitration provision is unconscionable (a provision that Attorney Leeke, as a lawyer, should have been able to fully comprehend and challenge prior to having the contract executed on her behalf), that Article 12.6 prevents arbitration because all "necessary" parties cannot participate in a single proceeding, that Mashburn waived arbitration through its alleged pre-suit conduct, and that certain pre-arbitration procedures have not yet been met. However, such an appeal is not immediately appealable and should be dismissed. Alternatively, should this Court reach the merits, the circuit court correctly enforced the parties' agreement to arbitrate.

FACTS

Appellant Shelly Leeke Law Firm is an established law firm with multiple locations throughout the State. Compl. ¶ 14 (R. p. __). Shelly Leeke, Esquire is the owner and managing member of Shelly Leeke Law Firm, LLC and is an experienced litigation attorney practicing in South Carolina. Deft.'s Memo. in Support. Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, p. 8 (R. p. __). Before entering private practice, Leeke served as a state supreme court judicial law clerk in Louisiana, and her litigation experience includes representing both plaintiffs and defendants, including in construction litigation. *Id*. On or around March 4, 2021, Shelly Leeke Law Firm, LLC and A Site on Rivers, LLC (collectively, "Appellants") entered into a ConsensusDocs 415 Standard Design-Build Agreement ("Agreement") with Mashburn Construction Company, Inc. ("Respondent" or "Mashburn") to construct and renovate commercial property on Rivers Avenue in North Charleston, South Carolina, for use as the headquarters of Shelly Leeke Law Firm. (the "Project"). Order dated January 8, 2026, p. 2 (R. p. ____); Compl. ¶ 14 (R. p. ____); Kinard Aff. ¶ 4 (R. p. ____). Thus, at the time of the Project, Leeke had substantial professional experience with litigation and dispute resolution. Thus, she had knowledge, experience and understanding as a lawyer to know the distinction between state court litigation and arbitration. No challenge was made to the Agreement containing an arbitration provision. The Agreement was executed on Appellants' behalf by Todd Swanson, their Chief Financial Officer. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 32 (R. p. ____); Kinard Aff. ¶ 6 (R. pp. ____).

Prior to execution of the Agreement, the parties initially considered an American Institute of Architects ("AIA") form agreement that likewise contained an arbitration provision before ultimately proceeding with the ConsensusDocs agreement. Transcript, 7:1-22 (R. p. __); R. pp. ___ (Dec. 2, 2020 email provided to the circuit court). Although owners commonly provide the form of agreement for Mashburn's projects, Appellants requested that Mashburn provide the agreement for this Project. Kinard Aff. ¶ 9 (R. p. __). After having considered the AIA form agreement, Mashburn thereafter provided the proposed ConsensusDocs agreement, a form commonly used in the construction industry (Deft.'s Memo. in Support of Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, p. 3 (R. p. __)), to Ms. Leeke and Mr. Swanson via email on February 5, 2021, for their review. Transcript, 7:17-22, 8:10-13 (R. pp. __); R. p. ____ (Feb. 5, 2021 email provided to the circuit court). The Agreement was finalized and executed four weeks later. *See* Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A. Appellants therefore received the Agreement before execution and had an opportunity to review its terms, propose revisions, or object to arbitration. Notably, the first page of the proposed Agreement prominently contained the statutorily required notice that the contract was subject to arbitration. *Id.*, Exhibit A, at 1 (R. p. __). Critically, the Agreement was not presented to Appellants on a "take-it-or-leave-it" basis. According to the affidavit of Mashburn Vice President Richard Kinard, Mashburn had previously entered contracts with owners who did not wish to arbitrate, and the dispute-resolution provisions could have been discussed or modified in Appellants' situation. Kinard Aff. ¶ 8 (R. p. __). In fact, the record reflects that negotiations with Appellants concerning the terms of the Agreement did take place and occurred through email, telephone calls, and remote video conferences. *Id.* at ¶ 9 (R. p. __).

Article 12 of the executed Agreement establishes a procedure for resolving disputes arising from the Project. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 29-31 (R. pp. __). The procedure, as set forth in the Agreement, begins with direct discussions between the parties' representatives and proceeds through additional dispute-resolution procedures and mediation before culminating in binding arbitration if the dispute remains unresolved. *Id.* Article 12.6, entitled "Multiparty Proceeding," further provides that "all Parties necessary to resolve a matter shall be Parties to the same dispute resolution procedure" and that "[a]ppropriate provisions shall be included in all other contracts relating to the Work to provide for the joinder or consolidation of such dispute resolution proceedings." *Id.* at p. 31 (R. p. __). Consistent with Article 12.6, Mashburn's subcontracts contain dispute-resolution provisions applicable to disputes arising from the subcontractors' work. Transcript, at 11:15-12:8, 22:12-17 (R. pp. ____); *see also*, R. p. ___ (excerpts from Mashburn subcontract agreements). At the hearing on Mashburn's Motion to Compel Arbitration, Mashburn presented eight subcontract agreements for the subcontractors then sued by Appellants and advised the circuit court that those agreements contained arbitration requirements. *Id.* Mashburn further explained that the subcontract provisions require subcontractors whose work is implicated by an owner's dispute to participate in the arbitration and that, upon arbitration of Appellants' claims, Mashburn would bring the appropriate subcontractors into that proceeding. Transcript, at 12:9-12 (R. p. __).

Disputes ultimately arose concerning construction of the Project. Appellants alleged defects involving, among other things, the roof, windows and doors, plumbing and sewage systems, HVAC system, framing, exterior and interior finishes, landscaping, irrigation, and grading, and in January 2024, Appellants provided Mashburn with written notice of the alleged defects. Pls,' Memo. in Opp. to Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A (R. p. __). Mashburn responded the following month, addressing the issues identified by Appellants. Memo. in Opp. to Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit B (R. p. __).

During the parties' dispute, but prior to Appellants filing its lawsuit, Mashburn also preserved its statutory lien rights by filing a mechanic's lien for approximately $21,000 it claimed remained due for its work. Pls.' Memo. in Opp. to Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit E (R. p. __). Mashburn did not institute an action to foreclose the lien and instead allowed it to lapse. Deft.'s Memo. in Support. of Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, p. 6 (R. p. __). The parties did not thereafter proceed through the executive meeting and mediation contemplated by Article 12. Instead, Appellants ultimately commenced this action in the Charleston County Court of Common Pleas in March 2025. *See generally*, Compl. (R. p. __). After Appellants filed suit, Mashburn moved to dismiss or, alternatively, to stay the claims against it and compel arbitration pursuant to the Agreement. *See* Deft's. Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration (R. p. __). In response, Appellants argued that the arbitration provision was unconscionable, that the contractual dispute-resolution procedures had not been completed, that Mashburn waived arbitration by filing its mechanic's lien, and that Appellants' lack of arbitration agreements with the subcontractors precluded enforcement of the arbitration agreement between Appellants and Mashburn. *See* Pls.' Memo. in Opp. to Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration (R. p. __).

The circuit court rejected Appellants' arguments and enforced the parties' agreement to arbitrate. On December 11, 2025, the circuit court granted Mashburn's Motion to Compel Arbitration and directed Mashburn to submit a formal order. Order dated Dec. 11, 2025 (R. p. __). The court thereafter entered its formal Order granting Mashburn's Motion to Compel Arbitration on January 8, 2026, staying Appellants' claims against Mashburn and compelling those claims to arbitration. Order dated Jan. 8, 2026 (R. p. __). Appellants filed a Motion to Reconsider after the December 11, 2025, Form 4 Order and again after the formal January 8, 2026, Order, both which were ultimately denied. Pls.' Notice of Mot. and Mot. to Reconsider dated Dec. 22, 2025; Pls.' Notice of Mot. and Mot. to Reconsider dated Jan. 19, 2026; Order dated Jan. 9, 2026; Order dated March 11, 2026 (R. p. __).

<u>ARGUMENTS</u>

I. STANDARD OF REVIEW ON APPEAL

Arbitrability determinations by the circuit court are subject to *de novo* review on appeal. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). "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); *see also Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002). Issues of law, however, are reviewed without any particular deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). "[C]ourts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions." *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021); *see also Morgan v. Sundance, Inc.*, 596 U.S. 411, 417-19, 142 S. Ct. 1708, 1712-14, 212 L. Ed. 2d 753, 759-60 (2022). The litigant opposing arbitration bears the burden of demonstrating a valid defense to arbitration. *Johnson v. Heritage Healthcare of Estill, LLC*, 416 S.C. 508, 512, 788 S.E.2d 216, 218 (2016).

II. THE COURT SHOULD DISMISS THE APPEAL BECAUSE THE ORDER STAYING APPELLANTS' CLAIMS AND COMPELLING ARBITRATION IS NOT IMMEDIATELY APPEALABLE.

South Carolina law provides that an order granting a motion to compel arbitration and staying the underlying claims is not immediately appealable. Specifically, S.C. Code Ann. § 15-48-200(a) identifies specific orders concerning arbitration from which an appeal may be taken, such as an order *denying* an application to compel arbitration and an order granting an application to *stay arbitration*. Notably, the statute does not include an order granting a motion to compel arbitration or an order staying judicial proceedings pending arbitration. Our state's common law supports this as well and has held that an order compelling arbitration and staying claims is not immediately appealable. *See Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 558, 606 S.E.2d 752, 759 (2004) (reasoning that "Section 15–48–200 does not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration.").

Contrarily, an order compelling arbitration may, however, be immediately appealable when the circuit court *dismisses* the underlying action, thereby finally determining the parties' rights. *See Widener v. Fort Mill Ford*, 381 S.C. 522, 524, 674 S.E.2d 172, 174 (Ct. App. 2009). In

Widener, the circuit court dismissed the plaintiff's action without prejudice and directed the parties to pursue arbitration. *Id.* at 523, 674 S.E.2d at 173. The Court of Appeals held that the order was immediately appealable because, "[b]y dismissing Widener's action, the court finally determined the rights of the parties," thereby conferring appellate jurisdiction under S.C. Code Ann. § 14-3-330; *Widener,* at 524, 674 S.E.2d at 174.

Critically, *Widener* distinguished dismissal from a stay pending arbitration. Relying on *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), the Court observed that had the action been stayed rather than dismissed, "that order would not be appealable." *Widener*, at 524, 674 S.E.2d at 174. The Court likewise distinguished *Carolina Care Plan* because that case involved "an order compelling arbitration and staying the remaining claims," whereas the circuit court in *Widener* had dismissed the action. *Id.* The Court ultimately reversed the dismissal and remanded with instructions to stay the action pending arbitration. *Id.* at 526, 674 S.E.2d at 175; *see also Weldon v. Dominion Clemson, LLC*, No. 2023-000033, 2025 WL 1328815, at *3 (S.C. Ct. App. May 7, 2025) (reversing and remanding for the circuit court to stay the action pending arbitration). Thus, *Widener* confirms that it is the finality created by *dismissal*, not the mere fact that arbitration has been compelled and the claims stayed, that permits an immediate appeal.

Here, the circuit court did not dismiss Appellants' claims against Mashburn and instead stayed them pending arbitration. Order dated Jan. 8, 2026, p. 9 ("Plaintiffs' claims against Mashburn are hereby stayed and the parties are compelled to arbitration."). (R. pp. ___). Thus, unlike the order in *Widener*, the Order did not dismiss Appellants' claims against Mashburn or otherwise finally dispose of the action between those parties. Instead, the circuit court retained the action while staying Appellants' claims against Mashburn pending arbitration. This case therefore falls squarely within *Carolina Care Plan* rather than *Widener*.

Finally, there is no basis for this Court to reach the merits notwithstanding the interlocutory nature of the Order. The issues raised by Appellants are not novel questions requiring resolution despite the interlocutory posture of this appeal as the South Carolina Court of Appeals has already addressed the governing principles. *See, e.g. Weldon*, 2025 WL 1328815, at *2 (declining to reach the merits of an appeal from an order compelling arbitration where the issues were not capable of repetition and did not need to be addressed in light of existing authority). Accordingly, because the circuit court stayed Appellants' claims against Mashburn pending arbitration rather than dismissing them, the Order did not finally determine the parties' rights and is not subject to immediate appellate review. The Court should therefore dismiss this appeal.

III. THE CIRCUIT COURT CORRECTLY DETERMINED THAT THE ARBTRATION PROVISION IS NOT UNCONSCIONABLE.

The arbitration provision in the Agreement is not unconscionable. "Unconscionability has been recognized as 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." *Carolina Care Plan, Inc.,* at 554, 606 S.E.2d at 757 (quoting *Fanning v. Fritz's Pontiac–Cadillac–Buick, Inc.,* 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996)); 17A Am. Jur. 2d *Contracts* § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); *see also id.* § 271 ("Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices[.]"). Thus, "[a]n arbitration agreement is unconscionable if there is (1) an absence of meaningful choice in entering the agreement and (2) oppressive and one-sided terms." *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 531, 908 S.E.2d 892, 897 (Ct. App. 2024), *reh'g denied* (Nov. 13, 2024), *cert. granted* (June 25, 2025), *aff'd as modified*, 448 S.C. 149, 932 S.E.2d 335 (2026), *reh'g denied* (July 24, 2026 (citing *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016)). Lastly, "[a] determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." *Holler v. Holler,* 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) (quoting 17A Am.Jur.2d *Contracts* § 279 (2004)).

a. The Arbitration Agreement Is Not Procedurally Unconscionable Because Appellants are Sophisticated Commercial Parties That Had a Meaningful Opportunity to Review, Negotiate, and Modify Its Terms.

"In determining whether a contract was 'tainted by an absence of meaningful choice,' courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson,* at 25, 644 S.E.2d at 669 (internal citations omitted; citing *Carlson v. General Motors Corp.,* 883 F.2d 287, 295 (4th Cir.1989)).

"[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are *not* negotiable." *Simpson*, at 26–27, 644 S.E.2d at 669 (emphasis added; citing *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). "Because contracts of adhesion are non-negotiable, '[a]n offeree faced with such a contract has two choices: complete adherence or outright rejection."*' Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 613, 879 S.E.2d 746, 756 (2022) (quoting *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998)). "Adhesion contracts, however, are not per se unconscionable. Therefore, finding an adhesion contract is merely the beginning point of the analysis." *Simpson*, at 26-27, 644 S.E.2d at 669 (citing *Lackey,* at 395, 498 S.E.2d at 902). "The distinction between a contract of adhesion and unconscionability is worth emphasizing: *adhesive contracts are not unconscionable in and of themselves **so long as the terms are even-handed***." *Damico,* at 614, 879 S.E.2d at 756 (emphasis in original). "Thus, an adhesion contract with fair terms is certainly not unconscionable, and the mere fact a contract is one of adhesion does not doom the contract-drafter's case." *Id.*

Further, one cannot argue that an arbitration agreement was not disclosed by the other party to the contract. This is because "the law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 39-40, 524 S.E.2d 839, 845 (Ct. App. 1999) (stating that one cannot legitimately claim the other failed to provide actual notice of arbitration agreement) (citing *Citizens and Southern Nat'l Bank v. Lanford,* 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994)). Critically, "every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it." *Burwell v. South Carolina Nat'l Bank,* 288 S.C. 34, 39, 340 S.E.2d 786, 789 (1986); *see also First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.,* 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) (holding that "in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'"). Thus, a person who can read is bound to read an agreement before signing it. *Hood v. Life & Cas. Ins. Co. of Tennessee,* 173 S.C. 139, 175 S.E. 76 (1934).

Simpson, which Appellants cite in their brief, further demonstrates why Appellants cannot establish an absence of meaningful choice. In applying the factors set forth above in determining whether there was meaningful choice, the *Simpson* Court concluded that a consumer purchasing her primary vehicle lacked meaningful choice where the agreement was undisputedly a take-it-or-leave-it adhesion contract, the consumer lacked business sophistication and legal assistance, the contract was "hastily" presented for signature, and the arbitration provision was inconspicuously embedded in small print among sixteen paragraphs of additional terms. *Simpson,* at 26-28, 644 S.E.2d at 670; *compare Carolina Care Plan, Inc*, 361 S.C. 544, 606 S.E.2d 752 (rejecting unconscionability challenge to arbitration provision in an administrative-services agreement between sophisticated commercial entities in the managed-healthcare industry).

The circumstances here are in stark contrast to *Simpson*. This case involves sophisticated commercial parties entering a commercial construction contract using a ConsensusDocs form commonly utilized in the construction industry. Deft.'s Memo. Supp. Mot. to Dismiss, or in the Alt., Stay & Compel Arbitration, pp. 3, 8 (R. p. ___). Shelly Leeke Law Firm is itself a law firm, and Ms. Leeke is an experienced South Carolina litigation attorney who previously served as a state supreme court judicial law clerk in Louisiana and has practiced on both the plaintiff and defense sides of litigation, including in construction-related matters. Deft.'s Memo. Supp. Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, 8 (R. pp. ___). The circuit court accordingly found that "Shelly Leeke Law Firm, LLC is a law firm that was not at a disadvantage in negotiating the Design-Build Agreement with Defendant" and that Appellants, "being sophisticated parties, did have a meaningful choice in entering the arbitration agreement and chose to submit the controversy to arbitration." Order dated Jan. 8, 2026, at 8 (R. p. ___).

Additionally, Appellants received the proposed Design-Build Agreement approximately four weeks before execution and had the opportunity to review and propose revisions to its terms. Kinard Aff. ¶ 9 (R. p. ___); Transcript, 7:17–22, 8:10–13 (R. p. ___). Indeed, the circuit court found that multiple iterations and markups of the Agreement were exchanged before execution and that Appellants had an opportunity to review and revise the proposed Agreement. Order dated Jan. 8, 2026, at 7-8 (R. pp. ___); *see also* Kinard Aff. ¶ 9 (R. p. ___).

Notably, the arbitration agreement was not hidden from Appellants. Before the ConsensusDocs Agreement was transmitted, Mashburn provided Ms. Leeke and Mr. Swanson with an AIA form agreement that likewise provided for arbitration. Transcript, 7:1-22 (R. p. ___); *see also* Dec. 2, 2020, Email (R. p. ___) (provided to the circuit court during November 5, 2025 hearing as reflected at Transcript, 7:1-22 (R. p. ___)). Mashburn thereafter transmitted the ConsensusDocs Agreement to both Ms. Leeke and Mr. Swanson approximately four weeks before its execution. Transcript 7:17–22, 8:10–13 (R. p. ___); *see also* Feb. 5, 2021, Email (R. p. ____) (provided to the circuit court during November 5, 2025, hearing as reflected at Transcript, 7:1-22 (R. p. ___)). As Mashburn emphasized at the hearing, Ms. Leeke was copied on both contract-transmittal emails provided to the circuit court. Transcript, 19:1–10 (R. p. ___); see also Dec. 2, 2020, Email (R. p. ___) (provided to the circuit court during November 5, 2025, hearing as reflected at Transcript, 7:1-22 (R. p. ___)); Feb. 5, 2021, Email (R. pp. ____) (provided to the circuit court during November 5, 2025, hearing as reflected at Transcript, 7:1-22 (R. p. ___)). Critically, unlike the inconspicuous provision in *Simpson*, the very first page of the Design-Build Agreement prominently notified the parties that the Agreement was subject to arbitration. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 1 (R. p. ___). Thus, Appellants' attempt to argue they did not know there was an arbitration agreement through the affidavits of Shelly Leeke, Esquire and Todd Swanson are entirely baseless. *See* Leeke Aff. ¶ 12 (R. p. ___); Swanson Aff. ¶ 11 (R. p. ____); *see also Burwell*, at 39, 340 S.E.2d at 789 ("[T]he law does not impose a duty to explain a document's contents to an individual when the individual can learn the contents from simply reading the document."); *First Baptist Church of Timmonsville*, at 599, 281 S.E.2d at 123 (holding that "in the absence of a showing of fraud, mistake, unfair dealing or the like, a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'"); *Hood,* 173 S.C. 139, 175 S.E. 76 ("a person who can read is bound to read [an agreement] before signing it."). Likewise, to the extent Appellants rely on Mr. Swanson's statement that he did not "authorize anyone to negotiate or agree to arbitration," the relevant agreement to arbitrate is contained in the contract Mr. Swanson himself executed on Appellants' behalf. Swanson Aff. ¶ ___ (R. p. ___); Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 32 (R. p. ___).

The record likewise refutes Appellants' characterization of the Agreement as nonnegotiable merely because they did not request changes to Article 12. Mr. Kinard attested that the Agreement was not presented on a take-it-or-leave-it basis, that Appellants were afforded an opportunity to propose revisions, and that Mashburn had previously entered contracts without arbitration when an owner preferred another method of dispute resolution. Kinard Aff. ¶¶ 8–9 (R. pp. ___). Appellants' failure to request a change to Article 12 does not establish that the provision *could not* be changed. The relevant inquiry is whether Appellants lacked a meaningful choice, not whether they ultimately exercised that choice by proposing a revision to the arbitration provision. The fact Appellants made revisions to other portions of the Agreement further supports the fact they could have made revisions to the arbitration agreement itself but chose not to.

Thus, Appellants failed to establish that they lacked a meaningful choice in agreeing to arbitration, and the Record contains no evidence demonstrating otherwise. Appellants had weeks to review the Agreement, received advance notice of arbitration, had the opportunity to propose revisions, and were sophisticated commercial parties capable of evaluating the Agreement's terms.

The circuit court therefore correctly determined that Appellants had a meaningful choice and that the arbitration provision was not procedurally unconscionable.

b. The Arbitration Agreement Is Not Substantively Unconscionable Because Article 12.6 Facilitates the Participation of Necessary Parties and Does Not Create the One-Sided Procedural Scheme Condemned in *Damico*.

Under South Carolina law, substantive unconscionability concerns contractual "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, at 25, 644 S.E.2d at 668; *see also Damico*, at 879 S.E.2d at 755. Thus, "[s]ubstantive unconscionability attacks are challenges to the terms of a contract." *Finch v. Lowe's Home Ctrs., LLC*, 2021 WL 2982863, at *8 (D.S.C. July 15, 2021). Mutuality is a paramount consideration when assessing the substantive unconscionability of a contract term. *Damico*, at 879 S.E.2d at 757 (citing 17A Am. Jur. 2d *Contracts* § 272 (2016)).

Appellants' substantive unconscionability argument rests solely on *Damico*, contending that arbitration of their claims against Mashburn while claims against subcontractors remain in circuit court creates the same "empty-chair" problem identified in that case. However, *Damico* did not hold that the mere possibility of parallel proceedings, absent parties, or incomplete recovery renders an arbitration agreement substantively unconscionable. Rather, its holding turned on materially different contractual provisions that gave the builder unilateral control over which parties would participate in arbitration and, in doing so, created an unreasonable and oppressive procedural advantage. Specifically, the agreement in *Damico* gave the builder the "sole election" to determine which subcontractors would participate in arbitration. *Damico*, at 615, 879 S.E.2d at 757. A separate provision provided that factual and legal findings in arbitration would not bind another proceeding absent mutuality of parties. *Id.* at 616, 879 S.E.2d at 757. Read together, the Court found those provisions permitted the builder to exclude subcontractors from arbitration and then prevented findings made in one proceeding from carrying over to another. *Id*. As a result, the defendants in each forum could therefore attribute responsibility to parties absent from that proceeding, potentially leaving the homeowners without recovery because each factfinder concluded an absent defendant was responsible. *Id.* Critically, the homeowners had no control over that result because the builder possessed the contractual authority to determine who participated in arbitration. *Id.* Our Supreme Court therefore characterized the arrangement as creating an unreasonable and oppressive "procedural defense to liability" for the builder. *Id.* at 615-16, 879 S.E.2d at 757. Additionally, a significant number of the subcontractors in *Damico* could not be required to arbitrate because their contracts contained no arbitration provision, were executed only after suit was filed and their work completed, or did not exist at all. *Id.* at 616, 879 S.E.2d at 757. Thus, it was the combination of the builder's unilateral contractual control over participation, the prohibition against giving findings effect across proceedings, and the actual inability to compel numerous subcontractors to arbitrate that made the prospect of inconsistent findings probable and inherently unfair. *Id.*

No comparable contractual scheme exists here. The Agreement does not give Mashburn unilateral discretion to decide which subcontractors will participate in arbitration. To the contrary, Article 12.6 provides that "all Parties necessary to resolve a matter shall be Parties to the same dispute resolution procedure" and requires "[a]ppropriate provisions" in other contracts relating to the Work to provide for joinder or consolidation. Def.'s Mot. to Dismiss, or in the Alt., Stay & Compel Arbitration, Exhibit A, at 31 (R. p. ___). The record further demonstrates that Mashburn included provisions in its Project subcontracts designed to implement that requirement. Transcript, 11:15-12:8, 22:12-17 (R. pp. ___); *see also* R. pp. ___ (excerpts from Mashburn subcontract agreements provided to the circuit court at the November 5, 2025, hearing). Specifically, each of the subcontracts require claims arising from or relating to the subcontract to proceed to arbitration if unresolved through the preceding dispute-resolution procedures. R. pp. ___. More importantly, it provides that "all parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding" and that, when a dispute between Mashburn and a subcontractor involves a dispute between the subcontractor and the Owner, the disputes "shall be decided by the same tribunal and in the same forum." *Id.* at ___.

The distinction from *Damico* is therefore substantial. There, the contract empowered the builder to exclude subcontractors from arbitration at its "sole election," thereby allowing the builder itself to create the very "empty chair" from which it could benefit. Here, the contractual framework does the opposite: Article 12.6 and Mashburn's subcontract provisions seek to include necessary parties and coordinate overlapping Owner, Contractor, and Subcontractor disputes in the same proceeding. Nothing gives Mashburn the unilateral authority condemned in *Damico*, nor have Appellants identified any provision comparable to *Damico*'s prohibition against giving findings effect in another proceeding. Additionally, Article 12.5.4 of the Agreement provides that "[a]n award entered in an arbitration proceeding pursuant to [the] Agreement shall be final and binding upon the Parties, adjudgment may be entered upon an award in any court having jurisdiction[,]" thereby giving final and binding effect to the arbitration award rather than contractually insulating arbitral findings from effect in other proceedings, as was the case in *Damico*. *See* Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 30 (R. p. ____).

Appellants' lack of direct arbitration agreements with Mashburn's subcontractors does not render the arbitration provision between Appellants and Mashburn oppressive or one-sided. Appellants agreed to arbitrate disputes with Mashburn, while Article 12.6 contemplated that the mechanisms facilitating subcontractor participation would appear in the "other contracts relating to the Work." *Id*. at Exhibit A, p. 31 (R. p. ___). Mashburn, in turn, separately contracted with its subcontractors concerning their participation in disputes arising from their work. Any alleged difficulty concerning a particular subcontractor or lower-tier subcontractor therefore does not establish that the arbitration agreement itself contains the oppressive, unilateral contractual terms at issue in *Damico*.

Critically, Appellants' argument of substantive unconscionability of the arbitration provision cannot turn on whether an arbitration agreement exists at every successive tier of contracting on the Project. Appellants' theory would permit the enforceability of their agreement with Mashburn to depend not only on Mashburn's contracts with its subcontractors, but also on each subcontractor's agreements with its sub-subcontractors, those entities' agreements with any lower-tier contractors, and so on. Nothing in Article 12 conditions Appellants' obligation to arbitrate with Mashburn upon the existence of an uninterrupted chain of arbitration agreements extending through every tier of Project participants. Such an interpretation would effectively permit the contractual arrangements of a remote lower-tier entity, over which Mashburn may have no contractual control, to invalidate the arbitration agreement knowingly entered between Appellants and Mashburn. Accordingly, the circuit court correctly concluded that the arbitration provision was not substantively unconscionable.

IV. ARTICLE 12.6 DOES NOT MAKE JOINDER OF EVERY PROJECT PARTICIPANT A CONDITION PRECEDENT TO ARBITRATION, AND MASHBURN'S SUBCONTRACTS CONTAIN THE MULTIPARTY PROVISIONS CONTEMPLATED BY THE AGREEMENT.

Appellants contend that the circuit court erred in compelling arbitration because Article 12.6 allegedly conditions arbitration on the joinder of all necessary parties in a single proceeding. Their argument misconstrues Article 12.6 and would transform a provision designed to facilitate multiparty dispute resolution into a mechanism for nullifying the parties' express agreement to arbitrate.

Article 12.6, entitled "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." Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 31 (R. p. ___). Article 12.5 separately provides for arbitration as the parties' binding dispute-resolution procedure. *Id.* at p. 30 (R. p. ___). Read together, Article 12.5 establishes the parties' obligation to arbitrate, while Article 12.6 provides a mechanism for accommodating multiparty disputes. Nothing in Article 12.6 states that arbitration is conditioned upon successful joinder of every necessary party or becomes unavailable if a third party cannot participate. Appellants' contrary interpretation would add a consequence the parties did not include. Under their construction, the inability to join any necessary third party would cause Appellants' and Mashburn's arbitration agreement to disappear altogether. Had the parties intended successful joinder to be a condition precedent to arbitration, they could have said so. They did not. The circuit court therefore correctly concluded that the potential severance of claims against subcontractors "does not defeat the fact there is a valid and enforceable arbitration agreement that would require the claims between Plaintiffs and Defendant in this matter to be subject to arbitration." Order dated Jan. 8, 2026, p. 6 (R. p. ___).

Appellants and Mashburn indisputably consented to arbitration under Article 12. Whether a nonsignatory may also be compelled to arbitrate is a separate question from whether the agreement between Appellants and Mashburn remains enforceable. Moreover, even if Article 12.6 imposed the condition Appellants claim, the factual premise of their argument is undermined by the record. At the November 5, 2025, hearing, Mashburn submitted its Project subcontracts for the subcontractors Appellants sued in this action, and those agreements contain arbitration and multiparty dispute-resolution provisions. Transcript, 11:15–12:8, 22:12–17 (R. pp. ___); *see also* R. pp. ___ (excerpts from Mashburn subcontract agreements). The circuit court relied on this evidence in finding that Mashburn's subcontract agreements contain arbitration provisions requiring subcontractors to participate in the dispute-resolution process. Order dated Jan. 8, 2026, p. 5 (R. p. ___).

Specifically, the subcontracts provide that "[a]ny Claim arising from or related in any way to" the subcontract that remains unresolved after direct discussions or mediation "shall be subject to arbitration." R. pp. ___. More importantly, Article 12.13 provides that "all parties necessary to resolve a claim shall be parties to the same dispute resolution proceeding" and requires disputes involving both the subcontractor and Owner to "be decided by the same tribunal and in the same forum as disputes between the Contractor and the Owner." *Id.* Those provisions directly implement Article 12.6's requirement in the Agreement that "[a]ppropriate provisions" be included in other Project contracts to provide for joinder or consolidation.

Appellants emphasize that they did not enter separate arbitration agreements directly with Mashburn's subcontractors, but Article 12.6 requires no such agreements. Instead, it expressly contemplates that the mechanisms facilitating joinder or consolidation will appear in the "other contracts relating to the Work." Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 31 (R. p. ___). Mashburn's subcontracts do precisely that by accounting for disputes involving the Owner and directing overlapping Owner, Contractor, and Subcontractor disputes to the same tribunal and forum. Thus, Appellants' lack of direct contractual privity with the subcontractors does not establish that those subcontractors cannot participate in the same dispute-resolution proceeding.

Additionally, alleged differences in the administrative provisions of particular subcontracts do not establish that Mashburn failed to satisfy Article 12.6's multiparty dispute-resolution requirements. Although Appellants emphasize that the Plumbing Authority subcontract references arbitration under the Construction Industry Arbitration Rules of the American Arbitration Association, Article 12.6 does not require identical arbitration language in every Project contract. It requires "appropriate provisions" facilitating joinder or consolidation in the same dispute-resolution procedure. The subcontracts satisfy that requirement by expressly directing overlapping disputes involving the Owner to the same tribunal and forum as the Owner-Contractor dispute. R. pp. ___. Differences in default administrative procedures therefore do not establish that coordinated arbitration is contractually impossible.

Additionally, Appellants' reliance on several "lower-tier subcontractors" does not change the analysis. They identify Global Installation Contracting, LLC, Capital Dry Wall, LLC, Air Diagnostics, Inc., and Thermatech Services, LLC and contend that those entities lack arbitration agreements with Appellants or Mashburn. However, Article 12.6 does not condition Appellants' obligation to arbitrate on the existence of an arbitration agreement at every successive tier of contracting. Appellants' interpretation would make the enforceability of the Agreement dependent not only on Mashburn's contracts with its subcontractors, but also on each subcontractor's agreements with its sub-subcontractors and potentially the agreements of increasingly remote downstream entities. A single lower-tier contractor lacking an arbitration provision could thereby nullify the agreement between Appellants and Mashburn, despite nothing in Article 12.6 conditioning arbitration on such a circumstance.

Accordingly, Article 12.6 neither conditions arbitration on successful joinder of every Project participant nor permits the contractual arrangements of downstream entities to nullify Appellants' agreement with Mashburn. Regardless, the record demonstrates that Mashburn included in its Project subcontracts the very multiparty provisions Article 12.6 contemplates. The circuit court therefore correctly rejected Appellants' interpretation and compelled arbitration of their claims against Mashburn.

V. THE CIRCUIT COURT CORRECTLY DETERMINED THAT MASHBURN DID NOT WAIVE ITS CONTRACTUAL RIGHT TO ARBITRATION THROUGH ITS PRE-SUIT CONDUCT.

"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." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007) (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). In determining whether waiver has occurred, South Carolina courts generally consider: "(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration." *Rhodes*, at 126, 647 S.E.2d at 251. These considerations are interrelated, and no one factor is dispositive. *Id.* What constitutes a substantial delay depends upon the extent to which the party seeking arbitration has utilized the judicial process and the resulting prejudice, if any, to the party opposing arbitration. *Id.* The party seeking to establish waiver has the burden of showing prejudice. *Id.*; *see also Rich v. Walsh*, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003) (citing *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985)). South Carolina courts have further emphasized that prejudice, not mere inconvenience, is central to the waiver inquiry. *See Rich*, at 71, 590 S.E.2d at 510; *Rhodes*, at 127, 647 S.E.2d at 251. Rather, courts examine whether the party demanding arbitration first took advantage of the judicial system, particularly through substantial discovery or other litigation activity, before seeking arbitration. *Rhodes,* at 127, 647 S.E.2d at 251.

These principles foreclose Appellants' waiver argument. Mashburn did not substantially invoke the judicial process and then belatedly demand arbitration. Appellants are the ones who commenced this action on March 14, 2025. *See generally*, Compl. (R. pp. ____). Mashburn did not answer the merits of Appellants' claims, engage in extensive discovery, take depositions, seek dispositive relief on the merits, or otherwise avail itself of the judicial process before invoking arbitration. Instead, on May 15, 2025, approximately two months after suit was filed, Mashburn's first responsive filing was its Motion to Dismiss, or in the Alt., Stay and Compel Arbitration. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration (R. pp. ____). The circuit court expressly recognized this circumstance, finding that Mashburn's responsive pleading to the Complaint was the very motion seeking to enforce its arbitration rights and that Mashburn "at all times relevant hereto, has sought its right to arbitrate under the Contract." Order dated Jan. 8, 2026, p. 7 (R. pp. ___).

That conduct bears no resemblance to the circumstances in which South Carolina courts have found waiver. *Compare Rhodes* at 127-28, 647 S.E.2d at 251-52 (finding waiver where virtually all discovery had occurred before arbitration was demanded, including written discovery and five depositions, and the case was approaching trial); *Liberty Builders, Inc.,* 336 S.C. 658, 521 S.E.2d 749 (finding waiver where contractor that pursued litigation for approximately two and one-half years before seeking arbitration). Mashburn specifically distinguished *Liberty Builders* cited by Appellants to the circuit court on that basis, arguing that waiver there resulted from extensive participation in litigation, not merely the filing or perfection of a mechanic's lien. Deft.'s Memo. in Support of Mot. to Dismiss, or in the Alt., Saty and Compel Arbitration, pp. 6-7. (R. pp. ___). Conversely, South Carolina courts have declined to find waiver even after considerably longer delays where the party seeking arbitration had not meaningfully availed itself of the judicial system. *See Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding no waiver after thirteen months where discovery was "very limited," no depositions had been taken, and the party seeking arbitration had not availed itself of the court's assistance); *Rich*, 357 S.C. at 66, 590 S.E.2d at 507 (finding no waiver despite a thirteen-month period and limited discovery). Here, Mashburn sought arbitration approximately two months after Appellants filed suit and before engaging in the type of litigation conduct that South Carolina courts have found inconsistent with the right to arbitrate.

Notably, Appellants have not demonstrated prejudice of the kind necessary to support waiver. Instead, their appellate theory centers primarily on Mashburn's pre-suit conduct, i.e., the parties' dispute-resolution communications and Mashburn's filing of a mechanic's lien, not on any litigation advantage Mashburn obtained before seeking arbitration. Appellants therefore attempt to establish waiver based on two distinct theories: first, that Mashburn waived arbitration by filing and perfecting its mechanic's lien, and second, that Mashburn waived arbitration by allegedly failing to initiate the pre-arbitration procedures set forth in Article 12. Neither theory supports reversal.

a. Mashburn Did Not Waive Arbitration by Preserving Its Mechanic's Lien Rights.

Appellants nevertheless contend Mashburn waived arbitration by recording a mechanic's lien before Appellants filed suit. That argument improperly equates the preservation of a statutory lien right with the substantial invocation of the judicial process necessary to establish waiver.

Mashburn filed a Notice and Certificate of Mechanic's Lien on May 24, 2024, but it never filed an action to foreclose the lien and never prosecuted a lien claim through the courts. Deft.'s Memo. in Support. of Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, p. 6 (R. pp. __). Instead, Mashburn ultimately allowed the approximately $21,000 lien to lapse. *Id*. The circuit court thus expressly found that Mashburn "never filed suit to foreclose on its mechanic's lien and therefore never initiated any proceeding through the judicial system for action on its mechanic's lien." Order dated January 8, 2026, p. 6. (R. pp. ___).

Moreover, the parties' own Agreement expressly preserved Mashburn's lien remedies. Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 31 (R. pp. ___). Article 12.7 provides that nothing in the dispute-resolution provisions limits Mashburn's rights and remedies under applicable lien laws. *Id.* Additionally, South Carolina's Uniform Arbitration Act likewise expressly provides that "[n]othing in this chapter shall preclude the filing and perfecting of a mechanic's lien by any party." S.C. Code Ann. § 15-48-220. The circuit court relied on that statute in rejecting Appellants' waiver argument, concluding that the Act permits preservation of lien rights notwithstanding an agreement to arbitrate and further stated that Appellants provided no legal authority that the mere filing of a mechanic's lien waives a party's right to arbitrate. Order dated Jan. 8, 2026, p. 6 (R. pp. ____).

Appellants' reliance on *Liberty Builders* therefore misses the mark. Specifically, the contractor in *Liberty Builders* did not merely record a lien and preserve its statutory rights. Instead, it pursued litigation for approximately two and one-half years before seeking arbitration. *Liberty Builders, Inc*., at 667, 521 S.E.2d at 754. Thus, *Liberty Builders* addressed a contractor that remained in litigation for years before invoking arbitration, whereas Mashburn never foreclosed its lien and instead allowed it to lapse. The *Liberty Builders* Court made it clear that the correct process is to file the lien, foreclose on the lien, and then file a motion to stay its suit and compel it into arbitration. *Id.* The circuit court therefore correctly concluded that "the filing of a mechanic's lien alone does not waive arbitration rights, especially when done solely to preserve lien rights within statutory deadlines." Order dated Jan. 8, 2026, p. 7. (R. pp. ___).

b. Mashburn Did Not Waive Arbitration by Allegedly Failing to Initiate Article 12's Pre-Arbitration Procedures.

Appellants also contend that Mashburn waived arbitration by failing to initiate the direct discussions, mitigation procedures, and mediation contemplated by Article 12 after Appellants sent their January 2024 Notice and Opportunity to Cure letter. That argument likewise fails. Article 12 of the Agreement establishes the procedures that must occur before arbitration. Defts.' Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration, Exhibit A, p. 29-30 (R. pp. ___). Appellants, not Mashburn, are the parties asserting affirmative claims arising from the alleged construction defects. Mashburn has not filed any claims against Appellants. Yet, Appellants ultimately commenced its lawsuit without proceeding through mediation or completing the remaining contractual dispute-resolution steps. Thus, because Appellants were the parties asserting claims, they, not Mashburn, were responsible for satisfying the contractual conditions precedent before commencing proceedings. The circuit court agreed and found that Mashburn "is not the party asserting claims but is instead responding to claims initiated by Plaintiffs" and therefore could not, under the circumstances presented, be faulted for failing to satisfy conditions precedent applicable to the initiation of dispute resolution. Order dated Jan. 8, 2026, p. 5 (R. p. ____).

The record also refutes Appellants' characterization that Mashburn simply rejected the contractual process and remained silent until litigation was filed. In response to Appellants' January 2024 notice, Mashburn addressed the alleged deficiencies and proposed resolving the dispute. Memo. in Opp. to Deft.'s Mot. to Dismiss, or in the Alt., Stay and Compel Arbitration,

Exhibit B (R. pp. __). Notably, Mashburn's February 2024 letter expressly referenced the Agreement's dispute-resolution provisions and the contractual sequence of a meeting followed by mediation if the dispute remained unresolved. *Id.* (R. p. ___); Transcript, 20:4-21:9 (R. pp. ___). Mashburn further represented at the hearing that, had Appellants demanded mediation, Mashburn would have participated. Transcript, 21:7-9 (R. p. ___). Instead, Appellants filed suit.

Thus, the record does not demonstrate a waiver of Mashburn's right to arbitrate pursuant to the Agreement. Mashburn responded to the dispute, expressly referenced the contractual dispute-resolution procedure, did not institute litigation of its own, and promptly sought to compel arbitration once Appellants elected to file suit. Viewed under the circumstances South Carolina courts consider in determining waiver, Mashburn's conduct falls well short of relinquishing its contractual right to arbitrate. Mashburn did not substantially utilize the judicial process, did not obtain a litigation advantage before demanding arbitration, did not foreclose its mechanic's lien, and sought arbitration in its first response to Appellants' lawsuit. The circuit court therefore correctly determined that Mashburn did not waive its right to compel arbitration.

CONCLSUION

For the reasons discussed above, this Court should dismiss Appellants' appeal because the circuit court's Order compelling arbitration and staying Appellants' claims against Mashburn is not immediately appealable. Alternatively, should this Court reach the merits, the circuit court correctly enforced the parties' agreement to arbitrate. The arbitration provision is not unconscionable, Article 12.6 does not preclude arbitration of Appellants' claims against Mashburn, and Mashburn did not waive its contractual right to arbitration. Accordingly, if the appeal is not dismissed, Respondent respectfully requests that this Court affirm the circuit court's

Order granting Mashburn's Motion to Dismiss, or in the Alternative Stay and Compel Arbitration and grant Mashburn such other and further relief as the nature of its case may warrant.

REQUEST FOR ORAL ARGUMENT

Respondent respectfully requests oral argument.

August 26, 2026
Charleston, SC

/s/ *Taylor B. Ambrosius*
James A. Bruorton, IV (SC Bar # 71300)
Taylor B. Ambrosius (SC Bar # 105933)
ROSEN HAGOOD, LLC
40 Calhoun Street, Suite 450
Charleston, SC 29401
(843) 577-6726 telephone
cbruorton@rosenhagood.com
tambrosius@rosenhagood.com

ATTORNEYS FOR RESPONDENT