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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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT.....	1
I. RESPONDENT’S REQUEST TO DISMISS THIS APPEAL SHOULD BE DENIED AND THE COURT SHOULD REACH THE MERITS OF THE ISSUES PRESENTED.	1
II. THE ARBITRATION PROVISION IS PROCEDURALLY UNCONSCIONABLE AND RESPONDENT’S RELIANCE ON APPELLANTS’ SOPHISTICATION DOES NOT RESOLVE THE UNCONSCIONABILITY INQUIRY.	3
III. RESPONDENT’S ATTEMPT TO DISTINGUISH <i>DAMICO</i> DOES NOT ELIMINATE THE EMPTY-CHAIR PROBLEM CREATED BY COMPELLING ARBITRATION.	6
IV. RESPONDENT’S INTERPRETATION OF ARTICLE 12.6 CANNOT BE RECONCILED WITH ITS PLAIN LANGUAGE.....	8
V. RESPONDENT INCORRECTLY ARGUES THAT APPELLANTS ALONE WERE RESPONSIBLE FOR INITIATING THE CONTRACTUAL DISPUTE RESOLUTION PROCEDURES.	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.</i> , 361 S.C. 544, 606 S.E.2d 752 (2004).	3
<i>Damico v. Lennar Carolinas, LLC</i> , 437 S.C. 596, 879 S.E.2d 746 (2022).	2, 5, 6
<i>Huskins v. Mungo Homes, LLC</i> , 439 S.C. 356, 887 S.E.2d 534 (Ct. App. 2023)	2
<i>Hyload, Inc. v. Pre-Engineered Products, Inc.</i> , 308 S.C. 277, 417 S.E.2d 622 (Ct. App. 1992).	10
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007).	3, 4
<i>Taylor v. Sturgell</i> , 553 U.S. 880, 128 S. Ct. 2161 (2008).	7
<i>Toler’s Cove Homeowners Ass’n, Inc. v. Trident Construction Co.</i> , 355 S.C. 605, 586 S.E.2d 581 (2003).	1
<i>Weldon v. Dominion Clemson, LLC</i> , No. 2025-UP-157, 2025 S.C. App. Unpub. LEXIS 150 (Ct. App. May 7, 2025).	2

Statutes

S.C. Code Ann. § 15-48-220.	2, 9
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Rules

Rule 268(d)(2), SCACR.	2
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INTRODUCTION

Appellants A Site on Rivers, LLC and Shelly Leeke Law Firm, LLC (collectively, “Appellants”) submit this Reply Brief in response to the Initial Brief of Respondent Mashburn Construction Company, Inc. (“Mashburn” or “Respondent”). For the reasons set forth below and in the Initial Brief of Appellants, Respondent’s request for dismissal should be denied, and the order compelling arbitration should be reversed.

ARGUMENT

I. RESPONDENT’S REQUEST TO DISMISS THIS APPEAL SHOULD BE DENIED AND THE COURT SHOULD REACH THE MERITS OF THE ISSUES PRESENTED.

Respondent contends that this appeal should be dismissed because an order compelling arbitration and staying the underlying claims is not immediately appealable. (cite?). Appellants acknowledge that South Carolina courts generally treat an order compelling arbitration and staying the underlying claims differently from an order compelling arbitration and dismissing the action. That acknowledgement, however, does not end the inquiry under the circumstances presented here. Respondent’s own authority establishes that South Carolina appellate courts will review the merits of an order compelling arbitration where the issues raised are capable of repetition and need to be addressed. *See Toler’s Cove Homeowners Ass’n, Inc. v. Trident Construction Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003).

In *Toler’s Cove*, our Supreme Court held that an order compelling arbitration and staying the underlying claims was not immediately appealable and, in the very next sentence, proceeded to decide the appellant’s waiver and unconscionability challenges “because appellant’s issues are capable of repetition and need to be addressed.” *Id.* at 611, 586 S.E.2d at 584-85. Remarkably, Respondent relies on *Toler’s Cove* in its waiver argument but never mentions that *Toler’s Cove*

reached the merits of precisely the type of appeal Respondent now asks this Court to dismiss. This Court followed the same course in *Huskins v. Mungo Homes, LLC*, 439 S.C. 356, 365, 887 S.E.2d 534, 539 (Ct. App. 2023) (considering the merits of issues raised on appeal from an order compelling arbitration because those issues were capable of repetition).

Respondent's reliance on *Weldon v. Dominion Clemson, LLC* does not alter the analysis, for two reasons. First, *Weldon* is an unpublished opinion, No. 2025-UP-157, 2025 S.C. App. Unpub. LEXIS 150 (Ct. App. May 7, 2025), and thus has no precedential value. Rule 268(d)(2), SCACR. Second, *Weldon* confirms, rather than undermines, the rule Appellants invoke. The court in *Weldon* declined to reach the merits of the issues on appeal only after cataloguing existing appellate precedent on each issue presented, from waiver through litigation conduct to the authority of an agent under a power of attorney, and concluding that, "unlike the issues in *Huskins* and *Toler's Cove*," those issues had already been resolved. *Weldon*, 2025 S.C. App. Unpub. LEXIS at *7-8. Thus, the controlling question under Respondent's own authority is whether the issues in this appeal have already been settled by precedent. They have not.

South Carolina appellate courts have never addressed (1) whether the reasoning of *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022), applies where a general contractor contends its own subcontracts supply the necessary joinder, but the owner has no arbitration agreement with any subcontractor and the lower-tier subcontractors have no arbitration agreement with anyone; (2) the effect of the "Multiparty Proceeding" clause in the ConsensusDocs 415 Standard Design-Build Agreement, an industry form used on commercial projects throughout this State, when the parties necessary to resolve a dispute cannot be joined in the same procedure; or (3) whether a contractor waives arbitration through pre-suit conduct, including electing its own lien remedy while declining the contractual dispute-resolution process, and whether S.C. Code

Ann. § 15-48-220 speaks to waiver at all. These questions arise in virtually every multi-party construction defect action involving standard form owner-contractor and design-build agreements, and they will continue to arise.

Critically, the injury Appellants challenge cannot be remedied after the fact. The prejudice condemned in *Damico* is being forced to litigate the same defects in two different forums before two different fact finders while each set of defendants blames the parties absent from that forum. If review is deferred until after an arbitration award, that injury will already be complete. As in *Toler's Cove*, the issues here are capable of repetition and need to be addressed, and the Court should decline Respondent's request to dismiss the appeal.

II. THE ARBITRATION PROVISION IS PROCEDURALLY UNCONSCIONABLE AND RESPONDENT'S RELIANCE ON APPELLANTS' SOPHISTICATION DOES NOT RESOLVE THE UNCONSCIONABILITY INQUIRY.

Respondent devotes substantial attention to Ms. Leeke's profession and the fact that Appellants made "revisions to other portions of the Agreement." (Resp't's Br. 16). Neither of those resolve the questions presented. Every affiant, including Mashburn's own executive, agrees that no one negotiated Article 12. (R. p. ____ (Leeke Aff. ¶¶ 5-13); R. p. ____ (Swanson Aff. ¶¶ 6-13); R. p. ____ (Kinard Aff. ¶ 10)). Procedural unconscionability is determined by the totality of the circumstances where sophistication is a factor, not a dispositive rule. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Respondent's argument, however, places dispositive weight on one consideration while disregarding the circumstances surrounding the formation of the arbitration agreement. South Carolina law requires a broader, fact-specific inquiry into whether Appellants had a meaningful choice in agreeing to the challenged provision.

Critically, the meaningful-choice inquiry is directed at the arbitration clause specifically, not the contract as a whole. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C.

544, 555, 606 S.E.2d 752, 758 (2004). There is no evidence in the record to support a finding that Appellants ever revised or negotiated the arbitration provision. The fact that the parties discussed or modified unrelated contractual provisions does not establish that they negotiated the arbitration provision itself. Respondent's argument rests on the assertion of its Vice President, Richard Kinard, that the dispute-resolution provisions "could have been discussed or modified" and that Mashburn had previously contracted without arbitration with other owners. (R. p. ____ (Kinard Aff. ¶ 8.)). However, the record contains no evidence that Mashburn ever told Appellants any of this, and an option to negotiate that is never disclosed to the other party does not constitute meaningful choice.

Respondent's arguments concerning an individual's duty to read the contract likewise is misplaced. The authorities cited by Respondent hold that a signatory cannot escape a contract merely by claiming that they did not read it. Appellants make no such argument, and the doctrine of unconscionability presupposes a signed contract. If the duty to read ended the inquiry, no signed contract could ever be found procedurally unconscionable, and *Simpson* and *Damico*, both of which involved signed agreements, would have been decided differently. The very factors Respondent quotes from *Simpson*, including "whether there is an element of surprise in the inclusion of the challenged clause" and "the conspicuousness of the clause," have meaning only because the duty to read does not foreclose the analysis. 373 S.C. at 25, 644 S.E.2d at 669.

Finally, Respondent's repeated emphasis on Ms. Leeke's professional credentials, including its assertion that she "should have been able to fully comprehend and challenge" the provision, conflates legal literacy with bargaining power. The contracting parties are two limited liability companies, and the Design-Build Agreement was executed on their behalf not by Ms. Leeke, but by Todd Swanson, their Chief Financial Officer. Ms. Leeke confirmed in her affidavit

that she did not participate in any negotiations, agree to any revisions to the language of the contract, nor have any knowledge of an arbitration provision contained therein. (R. p. ____ (Leeke Aff. ¶¶ 8-12.)). Thus, Ms. Leeke’s profession has no bearing on the unconscionability analysis and Respondent cannot rely on her sophistication as evidence of alleged bargaining power.

Moreover, the Court in *Damico* measured the parties’ relative sophistication by reference to the transaction at issue, finding the builder “significantly more sophisticated than Petitioners in home buying transactions.” 437 S.C. at 614, 879 S.E.2d at 756. Here, Mashburn is a design-builder that uses industry form construction contracts in the ordinary course of its business, while Appellants are a law firm and its affiliated property holding company undertaking a single office renovation project. Respondent, however, relies on *Carolina Care Plan*, which involved two managed-care entities negotiating an administrative services agreement within their own industry, a circumstance bearing no resemblance to this one.

Importantly, the procedural and substantive prongs are not evaluated in isolation. As *Damico* explained, “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required.” 437 S.C. at 612, 879 S.E.2d at 755 (quoting 17A Am. Jur. 2d Contracts § 272). The relevant question is whether the bargaining circumstances, considered together with the consequences of compelling Appellants to proceed against Mashburn separately from the subcontractors who actually performed the defective work, render an arbitration agreement unconscionable. Respondent’s focus on sophistication does not answer that question.

III. RESPONDENT’S ATTEMPT TO DISTINGUISH *DAMICO* DOES NOT ELIMINATE THE EMPTY-CHAIR PROBLEM CREATED BY COMPELLING ARBITRATION.

Respondent argues that *Damico* is distinguishable because the contract there gave the builder the “sole election” to determine which subcontractors participated in arbitration, along with a clause denying arbitral findings preclusive effect absent mutuality of parties. *Damico*’s reasoning, however, is not so narrow, and each of those features Respondent identifies is present here in substance.

First, *Damico* did not limit its concern to a builder that chose to exclude subcontractors. Rather, the Supreme Court focused on the practical prejudice created when homeowners must pursue the same construction defect claims in separate forums, allowing defendants in each proceeding to attribute responsibility to parties who are absent from that proceeding. *Damico*, 437 S.C. at 615-17, 879 S.E.2d at 757. The Court then found that risk “probable, rather than merely theoretically possible,” because a significant number of subcontractors either had no arbitration provision in their contracts or had no contract with the builder at all. *Id.* That precise danger exists here regardless of why the necessary parties are absent.

Second, Mashburn holds the functional equivalent of the “sole election” language condemned in *Damico*. At the hearing, Mashburn explained that, upon arbitration of Appellants’ claims, “Mashburn would bring the appropriate subcontractors into that proceeding.” (Resp’t’s Br. 7; Tr. 12:9-12). The joinder rights on which Respondent relies exist only in Mashburn’s subcontracts, to which Appellants are strangers and which Appellants have no right to invoke. Thus, it is Mashburn, and Mashburn alone, that will decide which subcontractors are “appropriate” to join. That is the functional equivalent of *Damico*’s “sole election” provision, regardless of the label attached to it, and it strips Appellants of their right, as masters of their own complaint, to

decide whom to pursue for their injuries. 437 S.C. at 615, 879 S.E.2d at 757. Nor does the fact that Mashburn's subcontracts contain provisions contemplating multiparty proceedings remedy the problem. Those provisions do not create an arbitration agreement between Appellants and the subcontractors, and they cannot bind the lower-tier subcontractors who never agreed to arbitrate.

Respondent argues, however, that enforceability cannot depend upon an "uninterrupted chain" of arbitration agreements through every contracting tier. (Resp't's Br. 20). But Appellants do not contend that every conceivable Project participant must arbitrate. Article 12.6 itself supplies the relevant category: "all Parties necessary to resolve a matter." If a lower-tier subcontractor is necessary to resolve the defects at issue, Article 12.6 says that party "shall" participate in the same dispute-resolution procedure. If that party cannot be compelled to participate, however, Respondent cannot simply disregard Article 12.6 and compel the fragmented proceeding that provision expressly sought to avoid.

Third, Article 12.5.4 does not remedy the empty chair danger created by the express mutuality clause in *Damico*. Respondent argues that danger is not present here because Article 12.5.4 makes an arbitration award "final and binding upon the Parties." (Resp't's Br. 19). Thus, the award binds "the Parties," that is, Appellants and Mashburn. It does not bind any subcontractor or lower-tier subcontractor absent from the arbitration, because a nonparty is generally not bound by the result of a proceeding in which it did not participate. *See Taylor v. Sturgell*, 553 U.S. 880, 892-93, 128 S. Ct. 2161, 2171 (2008). Thus, if the arbitrator attributes a defect to an absent lower-tier subcontractor, that finding cannot be used against the subcontractor in circuit court, and the subcontractor remains free there to blame Mashburn. The express mutuality clause in *Damico* merely stated the result that ordinary preclusion principles produce here by default, and the empty chair remains in both forums.

IV. RESPONDENT'S INTERPRETATION OF ARTICLE 12.6 CANNOT BE RECONCILED WITH ITS PLAIN LANGUAGE.

Respondent next argues that Article 12.6 merely “facilitate[s]” or “accomodat[es]” multiparty proceedings and does not make joinder a condition of arbitration. (Resp’t’s Br. 20-21). That characterization, however, ignores the language actually used in the contract.

Article 12.6 does not state that necessary parties *may* participate in the same procedure or that the parties should merely attempt joinder consolidation in one forum. It provides that “all Parties necessary to resolve a matter **shall be Parties to the same dispute resolution procedure.**” It then requires that “[a]ppropriate provisions **shall be included** in all other contracts relating to the Work to provide for joinder or consolidation.” Respondent’s interpretation, however, gives the first sentence no operative effect. According to its reading, Article 12.6 is satisfied merely because Mashburn inserted language concerning joinder into some subcontracts, even if necessary parties ultimately cannot be joined, and Appellants are forced to litigate the same dispute separately in two different forums. But the contractual promise is not merely that Mashburn will *attempt* to facilitate joinder. The contract unequivocally says the necessary parties “**shall be Parties to the same dispute resolution procedure.**”

Respondent further argues that differences between the arbitration procedures contained in the subcontracts are merely “administrative.” (Resp’t’s Br. 23). But Article 12.6 does not require merely similar proceedings, it requires the “**same dispute resolution procedure.**” Respondent cannot ask the Court to enforce Article 12.5 according to its terms while treating the immediately following Article 12.6 as aspirational.

Moreover, Respondent’s interpretation of Article 12.6 as being merely aspirational “mechanisms facilitating subcontractor participation” is in direct contradiction with its argument that the dangers present in *Damico* are not present here. (Resp’t’s Br. 20). Respondent cannot

assert that no danger of an empty chair in both forums exists here while simultaneously arguing that the mandatory joinder language in Article 12.6 is merely optional. If the joinder of necessary parties in arbitration is deemed optional, then Appellants can readily be subjected to the same fragmented proceedings the Court condemned in *Damico*.

Importantly, the two provisions can plainly be interpreted together without nullifying either. Article 12.5 identifies arbitration as the ultimate dispute-resolution mechanism, while Article 12.6 establishes that in arbitration of a multiparty dispute, all necessary parties are to participate in the same procedure. That plain language interpretation gives effect to both provisions. Respondent's interpretation, however, gives full effect to Article 12.5 while effectively nullifying the mandatory language of Article 12.6.

V. RESPONDENT INCORRECTLY ARGUES THAT APPELLANTS ALONE WERE RESPONSIBLE FOR INITIATING THE CONTRACTUAL DISPUTE RESOLUTION PROCEDURES.

Respondent argues that because Appellants ultimately asserted the construction defect claims, Appellants alone were responsible for initiating and completing Article 12's pre-arbitration procedures. (Resp't's Br. 28-29). Nothing in the quoted contractual language establishes that unilateral allocation of responsibility.

Article 12 establishes a contractual process between the parties. Respondent cannot rely on Appellants' alleged failure to complete that process while disregarding its own conduct after the dispute arose. As explained in Appellants' Initial Brief, Appellants notified Mashburn of the alleged defects and sought resolution. Mashburn did not demand the executive-level discussions, dispute mitigation, or mediation that it now contends were prerequisites to arbitration. Instead, Mashburn elected to protect its claimed right to payment through a mechanic's lien.

Appellants do not contend that the mere filing of a mechanic's lien automatically waives any right to arbitration. S.C. Code Ann. § 15-48-220 permits preservation of lien rights, and Appellants' Initial Brief expressly acknowledges the same. The relevant point is the totality of Mashburn's conduct: when the dispute arose, Mashburn did not insist upon the contractual dispute resolution procedure it now seeks to enforce. Rather, it pursued its own remedy and invoked arbitration only after Appellants filed suit.

Respondent's assertion that it would have participated in mediation had Appellants demanded it does not establish that Mashburn preserved its right to arbitration. Waiver turns on conduct, *see Hyload, Inc. v. Pre-Engineered Products, Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct. App. 1992), and a party cannot avoid the consequences of its actual conduct by asserting after litigation begins what it hypothetically would have done had the other party acted differently. Mashburn held the same contractual rights as Appellants, yet never demanded mediation itself in the fourteen months before suit. A party that holds a contractual right, declines to exercise it, pursues an alternative remedy, and invokes the right only after it is sued has acted inconsistently with that right. At a minimum, Respondent's attempt to place the entire burden for compliance with Article 12 upon Appellants finds no support in the language identified in its brief and does not answer Appellants' waiver argument.

CONCLUSION

Respondent's Initial Brief does not cure the fundamental defects in the order compelling arbitration. Respondent's characterization of Appellants as sophisticated parties does not establish meaningful choice concerning an arbitration provision that was never negotiated. Its effort to distinguish *Damico* does not eliminate the same empty chair prejudice that results when Mashburn proceeds in arbitration while the subcontractors and lower-tier subcontractors remain in circuit

court. Its interpretation of Article 12.6 disregards the mandatory requirement that all necessary parties participate in the same dispute resolution procedure. And its attempt to assign Appellants sole responsibility for the contractual dispute resolution procedure does not excuse Mashburn's own conduct.

For the reasons set forth above and in Appellants' Initial Brief, Appellants respectfully request that this Court deny Respondent's request to dismiss the appeal, reverse the order compelling arbitration and staying the action, and remand this matter to the circuit court for further proceedings.

Respectfully submitted,
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