THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
In the Court of Common Pleas for the Fourth Judicial Circuit

The Honorable Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2019-001972

Everett J. Samuels, Jr. ..... Respondent

v.

Schumacher Homes of South Carolina, Heather McCarley, and Dave Boldman ..... Appellants

# INITIAL BRIEF OF APPELLANTS



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## STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in considering the question of whether Appellants waived the right to arbitration by their conduct in this litigation, where the parties' agreement expressly provides that the arbitrator is to decide all issues of arbitrability?**

SUGGESTED ANSWER: *Yes.*

II. **Did the trial court err in refusing to compel arbitration in this matter based on Defendants' conduct in this litigation, where Defendants merely participated in mutual discovery (that would have likely been permissible in arbitration) and mediation, but did not seek and obtain any substantive rulings on the merits?**

SUGGESTED ANSWER: *Yes.*

## STATEMENT OF THE CASE

Plaintiff Everett Samuels, Jr. ("Plaintiff") commenced this action in the Court of Common Pleas of Darlington County on July 10, 2017. (*See* July 10, 2017 Complaint). He commenced this action against Schumacher Homes of South Carolina ("Schumacher"), as well as two of its employees, Heather McCarley ("McCarley") and Dave Boldman ("Boldman") (Schumacher, McCarley and Boldman are collectively referred to herein as "Defendants"). (*See id.* ¶¶ 2-3). Plaintiff alleges that he entered into a contract with Schumacher ("Agreement") to design and build a residential home ("Home") on his property in Darlington County, South Carolina. (*See id.* ¶ 6). Plaintiff further alleged that he paid Schumacher approximately $359,000 for the design, manufacture, and construction of the Home. (*See id.* ¶ 7).

Plaintiff alleged further that he expended thousands of dollars in an attempt to repair the Home since flooding occurred due to Defendants' negligence, misrepresentation, and breach of contract. (*See id.* ¶ 8). Specifically, Plaintiff alleged that Defendants:

> improperly designed, built, and manufactured the home, causing the home to flood and retain water and becoming structurally unsound. Among other deficiencies, the design, manufacture, and building fell well below the standards in the profession and industry and fell below the standards specifically represented and promised to the Plaintiff as part of the sale agreement and advertising of Defendant. Defendants negligently and intentionally misrepresented multiple matters to Plaintiff relating to the design of the home and the features of the home being built, including costs, pricing, workmanship, and lowering the first floor elevation by over two feet and misrepresenting such to the Plaintiff.

(*See id.* ¶ 9). Plaintiff claims that this negligent and reckless conduct damaged him, including flooding of the Home. (*See id.* ¶ 10). He claims that the Home is uninhabitable. (*See id.*). Additionally, he asserts that Schumacher and its agents failed to follow proper design, manufacturing, building, and installation standards and failed to perform work in a proper manner. (*See id.* ¶ 11). Plaintiff's claims in this matter sound in: (a) negligence, gross negligence and recklessness; (b) breach of contract; (c) breach of express warranties; (d) breach of implied warranties; (e) negligent and reckless misrepresentation; and (f) fraud and fraudulent inducement.

Defendants filed their Answer to Plaintiff's Complaint on August 28, 2017, denying

liability to Plaintiff. (*See* August 28, 2017 Answer of Defendants).

On August 20, 2019, Defendants filed their Notice of Motion and Motion to Dismiss and Refer to Arbitration ("Arbitration Motion"). (*See* August 20, 2019 Defendants' Notice of Motion and Motion to Dismiss and Refer to Arbitration). Defendants' Arbitration Motion asserts that:

> The parties entered into a contract whereby Defendant Schumacher Homes of South Carolina was to construct a home for the Plaintiff. The parties' written contract contained a waiver of jury trial and arbitration provision. The relevant portion of the contract is filed herewith.
>
> Schumacher Homes of South Carolina is an Ohio corporation. At the time the parties entered into the contract, the Plaintiff was a citizen and resident of Pennsylvania. He is now a resident of South Carolina. Given these and other connections to interstate commerce, the Federal Arbitration Act applies to the parties' contract. Therefore, this action should be immediately dismissed so that the parties may resolve their dispute before an arbitrator, per the terms of their agreement.

(*See id.*, at 1).

On September 24, 2019, Plaintiff filed his Memorandum in Opposition to Defendants' Motion to Dismiss and Compel Arbitration ("Opposition to Arbitration Motion"). (*See* September 24, 2019 Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss and Compel Arbitration). In his Opposition to Arbitration Motion, Plaintiff argued only that Defendants waived the right to seek arbitration because of the delay in filing the Arbitration Motion:

> Defendants could not have feasibly delayed their request for arbitration any longer without actually trying the case to a jury verdict. There is ample prejudice to the Plaintiff as a result of this delay and the Defendants can provide no reasonable explanation why they waited over two years to assert their right to arbitration.

(*See id.*, at 5). Notably, Plaintiff did *not* argue: (a) that the arbitration agreement was unenforceable, void or invalid; (b) that the instant case is not within the scope of the arbitration agreement; or (c) that the Defendants were unable to enforce the arbitration agreement (for any reason other than waiver or delay).

On September 25, 2019, Defendants filed their Memorandum in Support of Motion to Dismiss and Refer to Arbitration. (*See* September 25, 2019 Memorandum in Support of Motion

to Dismiss and Refer to Arbitration).

On October 7, 2019, the Honorable Roger E. Henderson entered Plaintiff's proposed Order Denying Defendants' Motion to Dismiss and Compel Arbitration ("Order"). (*See* October 7, 2019 Order Denying Defendants' Motion to Dismiss and Compel Arbitration). In the Order, Judge Henderson denied the Arbitration Motion only on the ground that "Defendants waived any contractual right to arbitration through its delayed demand for arbitration." (*See id.*, at 2).

On October 16, 2019, Defendants filed their Notice of Motion and Motion to Reconsideration (sic) and Alter or Amend Judgment ("Motion for Reconsideration"), stating (in relevant part):

> Plaintiff has not demonstrated that he would be prejudiced if this matter were referred to arbitration. The fact that the parties have taken several depositions in the case to date would only expedite the arbitration process. Additionally, the case law cited by Defendants in their supporting memorandum clearly holds that the question of whether a party has waived their right to invoke an arbitration clause in a contract is a fact question to be determined by the arbitrator rather than the Court. As such, Defendants respectfully request that the Court reconsider its denial of Defendants' motion to compel arbitration and amend its judgment accordingly.

(*See* October 16, 2019 Defendants' Notice of Motion and Motion to Reconsideration (sic) and Alter or Amend Judgment, at 1). On November 21, 2019, the trial court entered an Order denying Defendants' Motion for Reconsideration. (*See* November 21, 2019 Order).

In November 25, 2019, Defendants timely filed their timely Notice of Appeal from " the order of the Honorable Roger E. Henderson dated October 7, 2019, and Judge Henderson's subsequent order denying Schumacher Homes, et al.'s Rule 59(e) Motion for Reconsideration dated November 21, 2019." (*See* November 25, 2019 Notice of Appeal).

## ARGUMENT

### A. Standard of Review

"The determination of whether a claim is subject to arbitration is subject to *de novo* review." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 171, 644 S.E.2d 718, 720 (2007). "[D]etermining whether a party waived its right to arbitrate is a legal conclusion subject to de novo review; nevertheless, the circuit judge's factual findings underlying that conclusion will not be overruled if there is any evidence reasonably supporting them." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664–65, 521 S.E.2d 749, 753 (Ct. App. 1999); *accord Rich v. Walsh*, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003) ("The denial of a motion to compel arbitration, based on a finding of waiver, is reviewed on appeal de novo."); *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) ("The denial of a motion to compel arbitration, based on a finding of waiver, is reviewed de novo.").

### B. The Trial Court Erred in Declining to Dismiss This Action or Compel Arbitration

Under the parties' July 31, 2014 Agreement, Defendant Schumacher agreed to construct the Home for Plaintiff. The Agreement contained the following plain and unambiguous waiver of jury trial and arbitration provision:

> The Parties agree that any claim, dispute or cause of action, of any nature, including but not limited to, those arising under tort, contract, consumer protection or other statute, equity, law, fraud, intentional tort, breach of statute, ordinance, regulation, code, or other law, or by gross or reckless negligence, arising out of or related to, the negotiations of the Contract Documents, the Home, the Property, materials or services provided to the Home or Property, the performance or non-performance of the Contract Documents or interaction of Homeowner(s) and Schumacher or its employees, agents, or subcontractors, *shall be subject to final and binding arbitration* by an arbitrator appointed by the American Arbitration Association in accordance with the Construction Industry Rules of the American Arbitration Association, and judgment may be entered on the award in a court of appropriate venue. . . .
>
> THE PARTIES UNDERSTAND THAT BY AGREEING TO BINDING ARBITRATION THEY ARE AGREEING TO ARBITRATE AND NOT LITIGATE THEIR DISPUTES AND ARE GIVING UP THEIR RIGHT TO A TRIAL BY JURY OR TO A JUDGE AND THE RIGHTS TO APPEAL THE

> ARBITRATOR'S DECISION IN A COURT OF LAW AND TO SEEK REMEDIES FROM A COURT ARE LIMITED.

(*See* August 20, 2019 Exhibit to Defendants' Notice of Motion and Motion to Dismiss and Refer to Arbitration Ex. A ¶ 44 (emphasis added)). The Agreement further provides that "[t]he arbitrator(s) shall determine all issues regarding the arbitrability of the dispute." (*See id.*).

The Agreement additionally provides that it is to be construed in accordance with South Carolina law:

> The Contract Documents shall be governed by and construed in accordance with the laws of the state in which the home is to be constructed[, *i.e.,* South Carolina]. The Parties agree that any and all arbitration proceeding, and any claims, cause of actions or disputes not otherwise subject to arbitration, regardless of the nature or kind, shall be venued in the county and state of Schumacher's office where Schumacher signed this Agreement [(Columbia, according to Schumacher's signature line)].

(*See id.* ¶ 37). Plaintiff alleges that the Agreement "was consummated in Darlington County, South Carolina." (*See* July 10, 2017 Complaint ¶ 6).

Plaintiff has not disputed that the Federal Arbitration Act applies to the arbitration provisions of the Agreement.[1] The Federal Arbitration Act mandates that arbitration agreements in contracts "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA "is a congressional declaration of a *liberal federal policy favoring arbitration agreements.*" *See Drews Distrib. v. Sillicon Gaming, Inc.*, 245 F.3d 347, 349 (4th Cir. 2001) (emphasis added). The "central" purpose of the FAA is to "ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (citation omitted).

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[1] The Federal Arbitration Act "applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *See Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001). Plaintiffs cannot seriously dispute that this case involves interstate commerce, as the contract was between citizens of different states and would have involved interstate commerce in connection with the construction of the Home.

The trial court and Plaintiff did not challenge whether this dispute is within the substantive scope of the arbitration provisions of the Agreement. Plaintiff did not contest the enforceability of the arbitration provision. As a result, there is no dispute that this action should be arbitrated. Plaintiff *only* argued that Defendants had waived their right to demand arbitration under the Agreement by not requesting arbitration sooner and by actively participating in this lawsuit. It was upon this basis that the trial court denied Defendants' Motion at issue in this appeal. For the reasons that follow, the trial judge erred in holding that Defendants waived the right to arbitrate this dispute. Therefore, this Court should reverse this action and remand this case with instructions to the trial court to enter an order dismissing this action and/or compelling arbitration.

### 1. The Trial Court Was Not Permitted to Determine the Threshold Issue of Whether Defendants Waived the Right to Arbitrate by Their Litigation Conduct

The trial court erred in denying Defendants' motion because it was not permitted to determine the threshold issue of whether this dispute should be submitted to arbitration in the first instance. To the contrary, this determination was reserved (under the Agreement and the law) to *the arbitrators*. Therefore, the Court should reverse the trial judge's refusal to dismiss this case and instruct the trial judge to compel arbitration under the plain language of the parties' Agreement.

The Agreement provides in relevant part that "[t]he arbitrator(s) shall determine *all issues* regarding the arbitrability of the dispute." (*See* August 20, 2019 Exhibit to Defendants' Notice of Motion and Motion to Dismiss and Refer to Arbitration Ex. A ¶ 44 (emphasis added)). Additionally, such arbitration is to be "in accordance with the Construction Industry Rules of the American Arbitration Association." (*See id.*). Consistent with the parties' agreement, Rule R-9 of the American Arbitration Association's Construction Industry Arbitration Rules and Mediation Procedures provides that (emphasis added): "[t]he arbitrator *shall have the power to rule on his or her own jurisdiction*, including any objections with respect to the existence, scope, or validity of the arbitration agreement."

The Federal Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). As such, courts "are to resolve any doubts concerning the scope of arbitrable issues in favor of arbitration with a healthy regard for the federal policy favoring arbitration." *Cherry v. Wertheim Schroder and Co.*, 868 F. Supp. 830, 834 (D.S.C.1994).

"The construction of a clear and unambiguous contract is a question of law for the court." *B.L.G. Enterprises, Inc. v. First Fin. Ins. Co.*, 328 S.C. 374, 377, 491 S.E.2d 695, 697 (Ct. App. 1997), aff'd, 334 S.C. 529, 514 S.E.2d 327 (1999). "When [a] contract's language is unambiguous it must be given its plain and ordinary meaning and the court may not look to extrinsic evidence to interpret its provisions." *56 Leinbach Inv'rs, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 472, 769 S.E.2d 242, 246 (Ct. App. 2014); *accord Stevens Aviation, Inc. v. DynCorp Int'l, L.L.C.*, 394 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct.App.2011). The court's duty is "limited to the interpretation of the contract made by the parties themselves 'regardless of its wisdom or folly, apparent unreasonableness, or failure [of the parties] to guard their interests carefully.'" *See C.A.N. Enterprises, Inc. v. S.C. Health & Human Services Finance Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citation omitted).

The Agreement at issue in this case is crystal clear and unambiguous. It provides that the arbitrator, not the court, must decide "**all issues**" regarding arbitrability. This provision is completely unqualified and without *any* condition. The parties plainly intended that the arbitrator decide *all* arbitrability issues, including waiver or any other issues relating to whether a dispute is arbitrable. The United States Supreme Court has held that the Federal Arbitration Act "*allows parties to agree by contract* that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes." *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527, 202 L. Ed. 2d 480 (2019) (emphasis added). Therefore, because only the arbitrator can determine waiver, the trial judge erred in ruling upon the question. To rectify this error, the Court should reverse

and remand, with instructions to the trial court to compel arbitration for determination of the threshold arbitrability/waiver issue.

This result is consistent with Federal Arbitration Act jurisprudence, which permits parties to delegate authority to determine arbitrability to the arbitrator(s):

> Courts should enforce valid delegation provisions as long as there is "clear and unmistakable" evidence that the parties manifested their intent to arbitrate a gateway question. [Citation omitted.]
>
> The terms of the delegation provision in this case provide clear and unmistakable evidence that M&T Bank and Given manifested their intent to arbitrate whether Given's claims are within the scope of the arbitration agreement. As we have mentioned, the delegation provision provides: "Any issue regarding whether a particular dispute or controversy is ... subject to arbitration will be decided by the arbitrator." Given's claims for relief are "a particular dispute or controversy," and whether her claims are within the scope of the arbitration agreement is an "issue regarding whether a particular dispute or controversy is subject to arbitration." Because the delegation provision encompasses *any* issue, it encompasses Given's claims for relief.

*In re Checking Account Overdraft Litig. MDL No. 2036*, 674 F.3d 1252, 1255 (11th Cir. 2012) (emphasis in original); *accord Anders v. Hometown Mortg. Servs., Inc.*, 346 F.3d 1024, 1028 (11th Cir.2003) ("The agreement could not have been broader. *Any disputes means all disputes*, because 'any' means all.") (emphasis added) (quotation marks omitted). One recent court has held that the incorporation of American Arbitration Rules sufficiently delegate to the arbitrator(s) the question of waiver by litigation conduct:

> As an initial matter, it appears that whether or not Mithril has waived its right to arbitrate has, like other gateway questions of arbitrability, been delegated to the arbitrator. True, "courts generally decide whether a party has waived his right to arbitration by litigation conduct." *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016). But that is because waiver is a "question of arbitrability" which is presumptively for a court to determine, "unless the parties clearly and unmistakably provide otherwise." *Id.* at 1123 (*citing Howsam*, 537 U.S. at 83). As discussed above, incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent to delegate this category of questions to the arbitrator, [citation omitted] so it would appear that that the waiver question, like other questions of arbitrability, is on for the arbitrator.

*McKellar v. Mithril Capital Mgmt. LLC*, No. 19-CV-07314-CRB, 2020 WL 1233855, at *5 (N.D. Cal. Mar. 13, 2020).

Even in the absence of such language, the United States Supreme Court has stated that, the FAA presumes that procedural matters relating to arbitration — *such as waiver* — are for the arbitrators to determine:

> [C]ourts presume that the parties intend *arbitrators, not courts*, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. *See* [*Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002)] (courts assume parties "normally expect a forum-based decisionmaker to decide forum-specific *procedural* gateway matters" (emphasis added)). These procedural matters include claims of "waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25, 103 S. Ct. 927, 74 L.Ed.2d 765 (1983). And they include the satisfaction of "'prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'" *Howsam, supra*, at 85, 123 S. Ct. 588 (*quoting* the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp.2002); emphasis deleted). *See also* § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"); § 6, Comment 2 (explaining that this rule reflects "the holdings of the vast majority of state courts" and collecting cases).

*BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34–35, 134 S. Ct. 1198, 1207, 188 L. Ed. 2d 220 (2014) (emphasis added).

As a South Carolina District Court — construing the Federal Arbitration Act — has held, arbitrators are to decide the question of whether litigation participation and delay constitutes a waiver of the right to arbitrate:

> Plaintiffs also argue that Defendant has waived its alleged right to compel arbitration "[b]y waiting approximately seven months prior to filing its original Motion to Compel Arbitration, by *engaging in extensive pretrial discovery on the merits of the claims and defenses, by filing a dispositive motion on the merits of the case, by mediating the case, and by requesting extensions and otherwise manifesting assent to pre-trial scheduling orders*. (ECF No. 74, p. 11.) The court declines to address this issue finding that it is in the category of threshold issues *for the arbitrator*.

*See Fleetwood Transp. Corp. v. Packaging Corp. of Am.*, No. CIV.A. 6:10-01219, 2012 WL 761737, at *4 (D.S.C. Mar. 8, 2012) (emphasis added). "[Q]uestions of mere delay, laches, statute of limitations, and untimeliness raised to defeat the compelled arbitration are issues of procedural

arbitrability *exclusively reserved for resolution by the arbitrator.*" *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 456 (4th Cir. 1997) (emphasis added); *Joe v. Security Fin. Corp. of S.C.*, No. CA 0:14-159-CMC-SVH, 2014 WL 2094978, at *3 (D.S.C. May 20, 2014) ("These procedural questions, however, are not for the court to decide. As explained above, these are issues for the arbitrator.").[2]

Therefore, under the Agreement, the AAA rules, the Federal Arbitration Act and relevant case law, the preliminary, threshold question of whether Defendants waived the right to arbitrate this dispute by participating is an issue for the arbitrators, *not the trial court*. As a result, this Court should reverse the trial court's denial of Defendants' Motion and remand to the trial court with instructions to dismiss this action and/or compel the parties to arbitrate all issues raised in this case (including the issue of waiver of the ability to request arbitration).

### 2. Even If the Trial Court Properly Considered the Issue of Arbitrability, It Erred in Holding That Defendants Waived the Right to Arbitrate

In any event, even if the issue of waiver of the right to arbitrate was proper for the trial court's determination, that court erred in finding that Defendants waived their right to arbitrate.[3] To the contrary, notwithstanding any actions taken by Defendants in the litigation of this matter, Plaintiff did not present any evidence sufficient to show a waiver of the favored right to demand arbitration

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[2] It is anticipated that Plaintiff will argue that only *certain types* of waiver issues should be determined by the arbitrator. Specifically, Plaintiff may contend that question of whether *litigation conduct* (as opposed to mere delay) constitutes a waiver "is a question solely for the court itself to resolve." *In re Mercury Const. Corp.*, 656 F.2d 933, 940 (4th Cir. 1981), *aff'd sub nom. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983). However, as discussed above, the parties expressly agreed that the arbitrator would determine "all issues" of arbitration; giving the parties' chosen language its plain meaning, the parties have expressed a desire for this issue to be decided, not in court, but in arbitration. Notwithstanding *In re Mercury Construction*, the parties' agreement is enforceable and controls under the Federal Arbitration Act. Moreover, in a case decided after *Mercury Construction*, the Fourth Circuit plainly stated that "questions of mere delay, laches, statute of limitations, and untimeliness raised to defeat the compelled arbitration are issues of procedural arbitrability exclusively reserved for resolution by the arbitrator." *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 456 (4th Cir. 1997).

[3] Initially, Defendants note that Rule R-54 of the AAA's Construction Industry Rules expressly states that "[n]o judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate." Consequently, the parties' chosen governing rules reject the premise of Plaintiff's waiver argument.

The Federal Arbitration Act "declares a liberal policy favoring arbitration." *See Soil Remediation Co. v. Nu-Way Envtl., Inc.*, 323 S.C. 454, 458, 476 S.E.2d 149, 151 (1996). "Pursuant to the liberal policy [of the Federal Arbitration Act], any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself *or an allegation of waiver, delay, or a like defense to arbitrability.*" *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (emphasis added). The Act "recognizes that arbitration is an expeditious way to resolve disputes and conserve judicial resources." *Degidio v. Crazy Horse Saloon & Rest. Inc.*, 880 F.3d 135, 140 (4th Cir.), *cert. denied sub nom. Crazy Horse Saloon & Rest., Inc. v. Degidio*, 138 S. Ct. 2666, 201 L. Ed. 2d 1053 (2018). Under the Act, a court "has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *See Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002).

"'A litigant may waive its right to invoke the Federal Arbitration Act by so substantially utilizing the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay.'" *Degidio*, 880 F.3d at 140 (*quoting Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987) (citation omitted)). However, "[e]ven if the party seeking to compel arbitration has engaged in litigation to some degree, the crucial question is whether the party opposing arbitration has suffered actual prejudice." *See Gadberry v. Rental Serv. Corp.*, 2011 WL 767034, at *3 (D.S.C. Jan. 21, 2011). The Fourth Circuit has held that a party asserting a waiver of the right to arbitrate bears a heavy burden of proving prejudice:

> Such default or waiver arises when the party seeking arbitration "so substantially utiliz[ed] the litigation machinery that to subsequently permit arbitration would prejudice the party opposing the stay." *Maxum Founds., Inc. v. Salus Corp.*, 779 F.2d 974, 981 (4th Cir. 1985). However, in concert with other circuits, we have consistently held that because of the strong federal policy favoring arbitration "**we will not lightly infer the circumstances constituting waiver.**" *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir.1996). **The party opposing arbitration on the basis of waiver thus bears a "heavy burden."** [*MicroStrategy, Inc. v. Lauricia*, 268 F.3d 244, 251 (4th Cir.2001)] (internal quotations omitted); *Am. Recovery Corp.*, 96 F.3d at 95.

*See Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004) (emphasis added) (reversing denial of motion to compel arbitration); *accord American Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 96 F.3d 88, 95 (4th Cir. 1996) (noting that party opposing arbitration "bears the heavy burden of proving waiver."). In determining whether a waiver exists, the Court should not "include activity that the moving party did not initiate." *See Patten*, 380 F.3d at 206.

Plaintiff argued in the trial court — without presenting any extrinsic evidence — that Defendants waived the right to arbitrate because in the two years that this lawsuit has been pending: (a) the parties engaged in discovery (including written discovery, document subpoenas, and depositions); (b) the parties entered into scheduling orders; (c) Plaintiff permitted Defendants access to his home; and (d) the parties took part in mediation. For the reasons that follow, none of these claims are sufficient to establish waiver, insofar as Plaintiff has not been prejudiced.

There is certainly no prejudice from the reasonable *mutual* discovery conducted to date in this matter. The discovery taken to date (including two days of depositions occurring at the office of Plaintiff's counsel) would likely have occurred, even if the case had been submitted to arbitration at the time this lawsuit was filed. Additionally, the written discovery conducted here would most probably have been available in arbitration in any event. *See* Constr. Indus. Rules R-24 (permitting arbitrator to allow discovery in regular-track case). Plaintiff did not present any evidence to the trial court showing that the discovery taken in this case would not have been permitted in arbitration or was in any way excessive; to the contrary, this discovery would also aid Plaintiff in an eventual arbitration. *See Maxum Foundations, Inc. v. Salus Corp.*, 779 F.2d 974, 982 (4th Cir. 1985) ("Maxum might have chosen not to conduct its discovery had it been placed on earlier notice of the possibility of arbitration, but Maxum has not disputed on appeal that the availability of discovery would aid, rather than impede, its claims in arbitration."). In any event, Plaintiff has not presented any evidence showing prejudice from the conduct of discovery in this lawsuit. The parties' mutual discovery in this case would not be wasted if this case proceeds in arbitration, as it could be used in such a proceeding.

Aside from that discovery, there were few litigation activities conducted in the trial court. Defendants did not file any substantive or dispositive motions in this matter. Defendants have not sought to use the trial court to obtain any substantive ruling on the merits. In fact, the only discovery motion (before the trial court heard the Arbitration Motion) was resolved without a hearing. The *only* real involvement of the trial court in the lawsuit was to enter two short consent scheduling orders. Plaintiff has not been prejudiced in any way from any filings that Defendants made in the trial court in this matter. Plaintiff has not presented any evidence to support or suggest that Defendants utilized this litigation to such an extent that they waived their right to enforce the arbitration agreement. There would have been similar limited pleadings and scheduling filings had this case been initiated in arbitration in the first place (as Plaintiff agreed to do). Plaintiff cannot reasonably argue any prejudice from filings with the trial court.

The mediation of this lawsuit also did not prejudice Plaintiff in any imaginable way. Under the Construction Industry Rules governing the parties' arbitration, they would have been required to mediate this case even if Defendants had sought to enforce the arbitration agreement earlier. (*See* Const. Indus. Rules R-10 ("In all cases where a claim or counterclaim exceeds $100,000 . . . the parties shall mediate their dispute."). In any event, Plaintiff has not shown any undue prejudice from the parties' efforts to resolve this dispute. There is no reasonable basis for this Court to use the common alternative dispute resolution exercise of mediation to suggest that Plaintiff was somehow prejudiced.

Finally, Plaintiff was not prejudiced by allowing Defendants access to his home. Plaintiff granted this access without a formal request or court order. Consequently, Plaintiff could not show that this access had *anything* to do with Defendants' litigation activities in this case. In reality, this access occurred in connection with the parties' settlement negotiations. In any event, Plaintiff granting access to his home would most certainly have been requested irrespective of whether this case was litigated in this Court or in arbitration. Plaintiff has made no showing that Defendants would not have been permitted to access his home had this case been originally brought in

arbitration. As a result, Plaintiff cannot rely upon his granting access to his house as a basis for his waiver argument.

In light of the foregoing, Plaintiff has not carried his heavy burden of showing that he would *actually* be prejudiced, in any way, by the dismissal of this action and reference to arbitration. The only prejudice claimed is from the delay in seeking arbitration, which (standing alone) is not a proper basis for a finding of prejudice. To the contrary, most of Defendants' alleged "waivers" actually would have occurred even if this case was initially commenced in arbitration. In any event, "'[m]ere inconvenience to an opposing party is not sufficient to establish prejudice, and thus invoke the waiver of right to arbitrate.'" See *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 510 (Ct. App. 2003) (*quoting Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76-77 (Ct. App. 2003)).

Even starting now, arbitration would be a more efficient dispute-resolution vehicle for the parties and the court, as it is the method the parties selected and is favored as a matter of federal law. Plaintiff has not presented sufficient evidence to carry his heavy burden of showing that Defendants used the litigation process to such an extent that they should be denied their contractual right to arbitrate this dispute.

In the *Degidio* case, *supra*, the Fourth Circuit premised its finding of litigation-based waiver on a parties' efforts to actually *obtain a substantive judgment* in its favor:

> Crazy Horse employed judicial proceedings to pursue a litigation strategy for over three years, and it did so to the detriment of plaintiffs in this case. Instead of filing a motion to compel arbitration at an early stage in the litigation process, Crazy Horse filed multiple motions for summary judgment, served discovery, and twice asked the district court to certify questions of state law to the South Carolina Supreme Court. This was litigation activity aimed at obtaining a favorable ruling on the merits of the case. In fact, Crazy Horse had already obtained favorable rulings from the district court to the effect that Degidio's claims for minimum wages and overtime under the SCPWA were preempted.
>
> In pursuing this merits-based strategy for three years, Crazy Horse *actively sought to obtain a favorable legal judgment*. In doing so, it forced plaintiffs and the district court to spend unnecessary time and resources on issues that might have had to be

> reargued before an arbitrator. This conduct could not be more at odds with the FAA's goal of facilitating the expeditious settlement of disputes.

*See Degidio,* 880 F.3d at 141 (emphasis added). In this case, however, Plaintiff presents no evidence that Defendants did anything to obtain a substantive ruling in the trial court. To the contrary, the only substantive motion that Defendants filed was to seek arbitration. Defendants did not move for summary judgment or seek any interim injunctive or equitable relief. Therefore, Defendants' litigation conduct was insufficient to constitute a waiver.

## CONCLUSION

Therefore, for the foregoing reasons, this Court should reverse and vacate the trial court's denial of Appellants' Notice of Motion and Motion to Dismiss and Refer to Arbitration. The court should remand this action with instructions to dismiss this action and/or to compel the parties to honor their contractual promises to each other.

March 27, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
In the Court of Common Pleas for the Fourth Judicial Circuit



The Honorable Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2019-001972

Everett J. Samuels, Jr. ..... Respondent

v.

Schumacher Homes of South Carolina, Heather McCarley, and Dave Boldman ..... Appellants

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2020, addressed to his attorneys of record:

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APPEAL FROM DARLINGTON COUNTY
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Appellate Case No. 2019-001972

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v.

Schumacher Homes of South Carolina, Heather McCarley, and Dave Boldman ..... Appellants

PROOF OF SERVICE

I certify that I have served Appellants' Designation of Matter for Inclusion in the Record on Appeal on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2020, addressed to his attorneys of record:

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March 27, 2020



3548.007
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Everett Samuels, Jr. v. Schumacher Homes, et al.
Appellate Case No. 2019-001972

Dear Ms. Kitchings:

Please find enclosed for filing Appellants Schumacher Homes of South Carolina, Heather McCarkley, and Dave Boldman's Initial Brief and Designation of Matter along with Proofs of Service of the same. Pursuant to the recent Order from the South Carolina Supreme Court, we are sending only one unbound original of each of these documents to the Court for filing.

As indicated in the enclosed Proofs of Service, we are also serving a copy of the Brief and DOM on counsel for the Respondent.

Very truly yours,

K. Michael Barfield
John W. Fletcher

/jas
Enclosures

cc: Greg B. Collins, Esq.
Vincent A. Sheheen, Esq.

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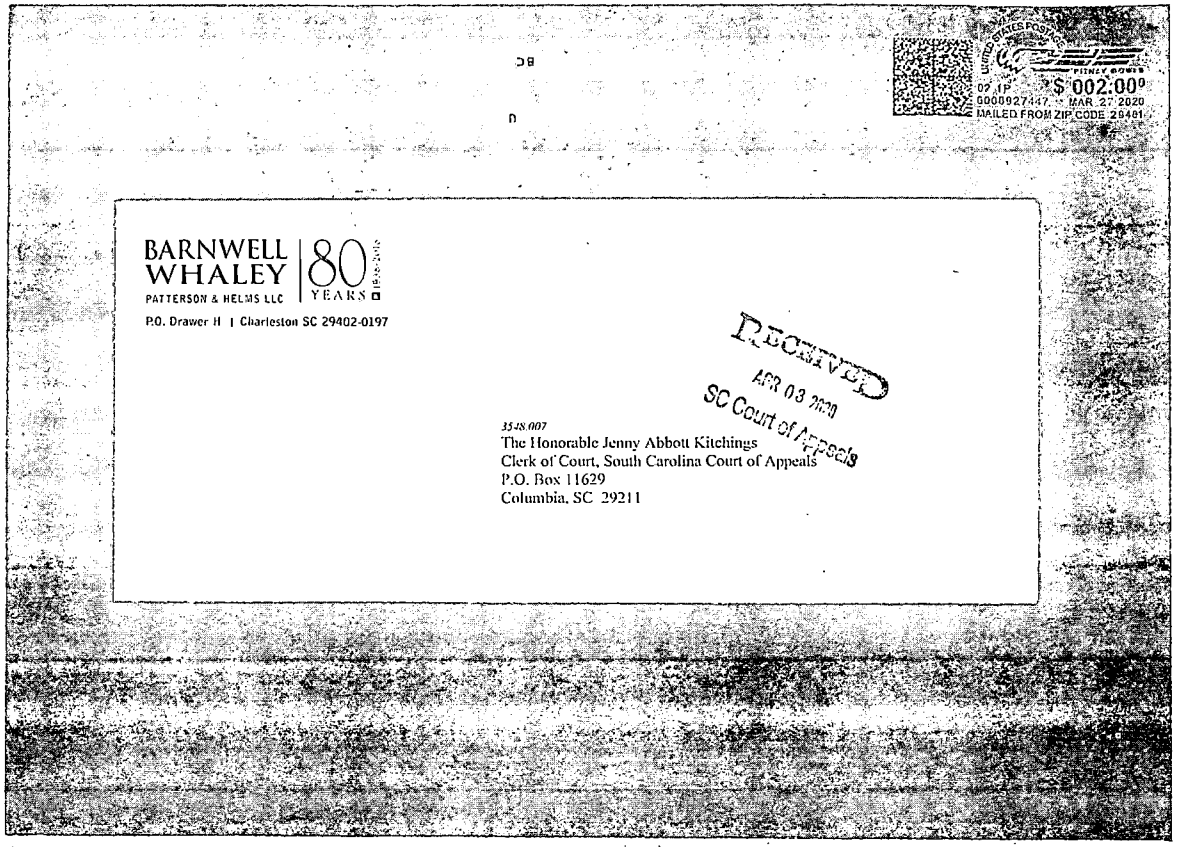

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