THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 29 2022

S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Opinion No. 5900 (S.C. App. March 16, 2022)

Donald and Carlee Simmons, ... Respondents,

v.

Benson Hyundai, LLC, ... Petitioner.

PETITIONER'S REPLY TO RESPONDENTS' RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)
ATTORNEYS FOR PETITIONER

Other Counsel of Record:
Warren Moise, Esq.
Grimball and Cabaniss, LLC
1180 Sam Rittenburg Boulevard
Suite 120
Post Office Box 31358
843.722.0311
Charleston, SC 29417
ATTORNEY FOR RESPONDENTS

INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

There are two critical errors made in Respondents' Return. First, Respondents fill the Statement of the Case with derogatory facts that are not in the Record on Appeal and were not before the lower court. Second, Respondents do not even address the main issue: that Respondents never raised the grounds upon which the Court of Appeals decided the matter. What follows is Petitioner's Reply to each section of Respondents' Return.

STATEMENT OF THE CASE

Rule 242(f), SCACR allows Respondents to file a Return to a Petition. Rule 242(i), SCACR requires the Return to comply with the requirements of Rule 208(b), SCAR. Rule 208(b)(1)(C), SCACR makes it clear that the Statement of the Case shall not contain contested matters. Rule 210(c) also provides that the Record shall not include matter which was not presented to the lower court or tribunal. The Statement of the Case is riddled with derogatory and contested matters which violate all of these Rules.[1] Many examples follow.

First, this is not an "auto-fraud" case: Respondents sued alleging six causes of action and none rely upon a theory of fraud (R. 23-44). Next, the only thing submitted to the lower court was an Affidavit of Professor Simmons (that was once supplemented to add only a last paragraph) that did not include the facts that "they planned to have a baby," or that "they needed a reliable car at an affordable price." (R. 270-272; 285-287). The car involved was a small, turbo charged sports car for Professor Simmons, not appropriate for a baby. (R. 73; 286 ¶7).

[1] *See Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E. 2d 127, 129 (1991). ("Mr. Bowers offered neither affidavits nor other proof. Mr. Bowers, however, relies on the allegations contained in his unverified counterclaim and the arguments made by his attorney during the hearing on his motion. Mere allegations, denied by the other party, are not evidence. [citations omitted]. Arguments of counsel are also not evidence. . .")

No evidence was presented that they "spoke to salesman Robert Wincoff," that Mrs. Simmons' credit score was 833, or that Professor Simmons disclosed his bankruptcy prior to purchase (R. 280, ¶5); certainly his credit score was not "designated as good." His loan application was rejected six separate times by Hyundai Finance and never approved. (R. 76-81).

The Record also reflects that the only evidence of the "Manufacturers Suggested Retail Price" of the car was $27,920.00 (R. 280, ¶2), not $19,600.00, as Respondents allege on page 3 of their Brief. Bank check payments made out to Honda Motor Finance were sent directly to Benson, (R. 281 ¶6), even though no loan was ever approved. (R. 76-83).

There is nothing in the Record about Respondents being contacted by the dealership the next morning and told to tear up the contracts. (R.285-287). There is nothing in the Record that foul language was used by the "repo man," or that he confronted Mrs. Simmons while she was alone in her office at work. *Id.* Of course, Petitioner strongly disputes these derogatory and unsupported facts.

Finally, there is nothing in the Record that Respondents were texted or emailed a "cropped" version of the document entitled "Worksheet." (R. 285-287). What was sent was the first Retail Buyer's Order signed by Mrs. Simmons that showed she consented to the correct purchase price of $26,691.00 (R. 72, 280 ¶2). An honest mistake was made in the final paperwork, and Benson agreed to take a $7,000 loss once Respondents refused to acknowledge it. (R. 280 ¶2). Now, after five years, Respondents continue to refuse to return the car they never paid for.

PETITIONER'S REPLY TO RESPONDENTS' COUNTER ARGUMENTS

I. THE COURT OF APPEALS IMPROPERLY DECIDED THE MATTER BY UNILATERALLY REQUIRING A CONDITION PRECEDENT TO A STAND-ALONE AGREEMENT

A. Respondents Never Raised the Issue of a Condition Precedent

South Carolina is crystal clear that the Appellate Courts cannot make decisions on bases that have not been raised by Respondents, either before the lower court or as an additional sustaining ground. A statement of this premise was made by then Chief Judge of the Court of Appeals Alex Sanders in the case of *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d, 550, 561 (1984) *rev'd on other grounds,* 286 S.C. 85, 332 S.E.2d 550 (1985):

> South Carolina is an "exception state." This means the South Carolina Supreme Court and this court are "confined to a disposition of appeals upon the exceptions taken...." *Mishoe v. Atlantic Coast Line R. Co.*, 186 S.C. 402, 197 S.E. 97, 106 (1938); *Evans v. Bruce*, 245 S.C. 42, 138 S.E.2d 643 (1964); *Bartles v. Livingston*, S.C., 319 S.E.2d 707 (S.C.App.1984); *Ellison v. Heritage Dodge, Inc.*, S.C., 320 S.E.2d 716 (S.C.App.1984). More simply put, appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.

This holding has been affirmed in several Supreme Court cases since Judge Sanders' Opinion: *State v. Harrison*, 432 S.C. 448, 464, 854 S.E.2d 468, 475 (2021), Kittredge, J. ("Courts do not give advisory opinions or answer questions that are not asked."); *Rutland v. SCDOT*, 400 S.C. 209, 216, fn. 4, 734 S.E. 2d 142, 145, fn. 4 (2012) Hearn, J. (Supreme Court refused to entertain an argument to overrule precedent not presented by Rutland, citing *Langley*); *Atlantic Coast Builders and Cont. v. Lewis* 398 S.C. 323, 730 S.E. 2d 282 (2012) Hearn, J. (Supreme Court declined to declare a lease illegal when the issue was not raised to the trial court or the Court of Appeals, citing *Langley*); *Oblachinski v. Reynolds*, 391 S.C. 557, 706 S.E. 2d 844 (2011) Hearn, J. (issue of recklessness never raised before the lower court, at the post trial motion stage, or in

briefs or oral argument; therefore, the Supreme Court declined to address it, citing *Langley*).[2] It is clear error for the Court of Appeals to select a novel issue that was never raised before the lower court, at the post-trial motion stage, or in briefs, as an additional sustaining ground, or oral argument. Nevertheless, there was no condition precedent of credit approval to Benson's stand-alone Arbitration Agreement.

The Court of Appeals cites Rule 220(c), SCACR, for its authority to make this novel ruling. (Opinion, p.1). However, Rule 220(c) still requires the Respondents to raise an issue as an additional sustaining ground. Here, they did not. In *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court took the opportunity to review and clarify the law regarding additional sustaining grounds. The Court held:

> Under the present rules, a respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling. . .
>
> The basis for respondent's additional sustaining grounds must appear in the record on appeal . . . Of course, a respondent may abandon an additional sustaining ground under the present rules—just as a respondent could under the former rules—by failing to raise it in the appellate brief.
> *Id.* 338 S.C. at 419-420 [citations omitted].

Respondents did not raise, as an additional sustaining ground, that the wording of the Special Delivery Agreement applied to the stand-alone Arbitration Agreement. Therefore, Petitioner's Petition should be granted.[3]

---

[2] Respondents cite *S.C. Dept. of Transp. v. M&T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 667 S.E. 2d 7 (Ct. App. 2008) for the proposition that an appellate court may affirm for any reason in the Record. However, this was a 2 to 1 lower appellate court decision with future Supreme Court Justice Hearn dissenting because "[n]o argument was advanced to the master or before us on appeal that a different method of valuation should be applied where the take is partial." She then favorably cited *Langley. Id.* 667 S.E.2d at 22.

[3] *See also State v. Key*, 431 S.C. 336, 848 S.E.2d 315 (2020), *James J.* (holding an argument was preserved because it was raised as an additional sustaining ground).

B. Benson's Arbitration Policies and Procedures Require No Condition Precedent

Benson's Arbitration Agreement[4] is a stand-alone document in which there has been a proper offer, acceptance, and consideration. There is no requirement for credit to be approved. (R. 57-62). The contract itself provides for a way for it to be modified, which must be in writing signed by all parties:

> 24. . . . ENTIRE AGREEMENT. . . The parties' Agreement and these Rules constitutes the full agreement of the parties and can be changed only in writing signed by the individual and an executive officer of Benson.
> (Agreement ¶24, R. 62)

The Record is absent of any such modification that would require the condition precedent of credit approval to be applied. (R. 57-62). The Special Delivery Agreement nor the Retail Installment Sales Contract (RISC) were never signed by an officer of Benson. (R. 75). This is clear error.

Respondents cite *Ex parte Horton Family Housing, Inc.*, 882 S.2d 838, (Ala. 2003). However, that case only involved a discovery dispute regarding arbitration, and whether the condition precedent applied was consented to by Horton. *Id.* at 841. It also only dealt with Alabama state law. Unlike Horton, Benson never consented to the condition precedent.

Respondents also cite *Ex parte Cobb*, 781 So.2d 208 (Ala. 2000). Unlike the facts here, the arbitration clause was not in a stand-alone agreement, but was included in the Lease Agreement that explicitly stated it was conditioned upon credit approval. *Id.* at 209.

Finally, Respondents' cited the case of *Ex parte Payne*, 741 So.2d 398 (Ala. 1999) which is distinguishable. In that case, the arbitration clause was contained in the Retail Purchase Order that included the condition precedent of credit approval. There was no stand-alone arbitration agreement.

---

[4] The Court of Appeals referred to this stand-alone agreement as the BAPP.

II. THE COURT OF APPEALS ERRONEOUSLY OVERLOOKED THE ISSUE OF CONTRACT MODIFICATION

Respondents claim that the Court of Appeals considered the issue of contract modification, but provide no evidence of where in that Opinion it did so.[5] Instead, the Court of Appeals went outside of the Record, outside the Briefs (with no additional sustaining ground presented), outside of Oral Argument, and applied a condition precedent of loan approval from the Special Delivery Agreement to the stand-alone Arbitration Agreement. The Special Delivery Agreement provides it is incorporated into the Retail Installment Sales Contract ("RISC"), but not the Arbitration Agreement. (R. 75). The RISC expressly stated it could be modified in writing signed by both parties:

> **HOW THIS CONTRACT CAN BE CHANGED: . . .**
>
> Any change to this contract must be in writing and we must sign it. No oral changes are binding.
> (R. 222)

Both parties signed the Arbitration Agreement, and no change was signed by Benson. Therefore, the language of the Arbitration Agreement controls, and is not obviated by the condition precedent of loan approval.

III. THE COURT OF APPEALS DECISION OVERLOOKS THAT THE ARBITRATION AGREEMENT MUST BE READ TO GIVE MEANING TO ALL OF ITS TERMS AND TO THE PARTIES' INTENT

Respondents' Return provides no analysis of this issue. The clear intent of the parties was that all documents other than the agreement to arbitrate were conditioned upon approval of financing. The Special Delivery Agreement was incorporated only into the RISC, not the

[5] Respondents claim that the Court of Appeals addressed contract modification at p. 3 of its Opinion on page 8 of their Brief. However, Petitioner cannot find such consideration on p. 3.

Arbitration Agreement. It is clear that without financing approval there was no consideration for the purchase of the car or any related products.

In contrast, the consideration for the Arbitration Agreement was to forbear the right to a jury trial.[6] The parties agreed all subsequent disputes regarding financing were subject to arbitration:

> 2. *DISPUTES SUBJECT TO ARBITRATION . . . are any claim or dispute... which arise out of or relate to Customers' credit application . . . or financing contract or any resulting transaction or relationship.* (R. 57).

The Agreement made it clear that there was no condition precedent for it to be binding. Both Professor and Mrs. Simmons signed the Agreement under the following capitalized words:

I AGREE TO ARBITRATE ANY DISPUTES AND UNDERSTAND THAT I AM GIVING UP MY RIGHT TO A JURY AND TO PARTICIPATE IN A CLASS OR GROUP ACTION.

07/26/16 — Date — Buyer

07/26/16 — Date — Co-Buyer

07/26/16 — Date — Dealer Rep

I AGREE THAT THE FOLLOWING RULES GOVERN ANY ARBITRATION BETWEEN THE PARTIES.

07/26/16 — Date — Buyer

07/26/16 — Date — Co-Buyer

07/26/16 — Date — Dealer: Buyer

(R. 57).

[6] "Valuable consideration for a contract may consist of some forbearance given." *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1995).

If and only if a document attempting to change this contract was signed (in writing) by all would any condition precedent apply. The Agreement provides

> 24 . . . ENTIRE AGREEMENT . . . these Rules constitute the full agreement of the parties and can be changed only in writing signed by the individual and an executive officer of Benson.
>
> (R. 62).

If the contract is read to give meaning to all its terms, then clearly arbitration applies. The Arbitration Agreement was never modified, and never contained a condition precedent.

IV. THE GRAMMATICAL CONSTRUCTION ARGUMENT WAS NEVER RAISED BELOW BECAUSE THE COURT OF APPEALS ISSUED ITS UNEXPECTED NOVEL OPINION

A reason why Appellate Courts are not allowed to adopt novel decisions is because the parties to the appeal have no opportunity to brief or argue against such a decision.[7] This is exactly why the grammatical construction argument was not raised before the trial judge or the Court of Appeals. Therefore, certainly it is not barred.

V. THE COURT OF APPEALS' DECISION UNDERMINES THE GOALS AND POLICIES OF THE FAA

A. The Court of Appeals Decision Clearly Overlooks the Fact That Arbitration Survives Termination of the Contract in Violation of the Policies of the FAA

The only way the Court of Appeals could overlook the fact that the Arbitration Agreement survives termination of the contract is to rule, novelly, that the contract was never formed. Petitioner's previous arguments show this decision is incorrect. Not only was the reason the Court

[7] "In such cases [where a party fails to raise an issue], the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal." *I'On, supra*, 338 S.C. at 421.

of Appeals found the contract invalid not argued, briefed, or raised as an additional sustaining ground, it is not what the actual language of the Arbitration Agreement says. For the Court of Appeals to look for a reason to vitiate the Arbitration Agreement is contrary to the purpose of the Federal Arbitration Act.

B. The Decision Overlooks the Fact That Whether a Condition Precedent has been Met is an Issue for the Arbitrator

The clear language of the Arbitration Agreement illustrates that the parties intended 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). This includes the satisfaction of ". . . prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate. . ." *Id.* at 85, quoting the Revised Uniform Arbitration Act of 2000 §6, comment 2, 7 U.L.A. 12-13 (Supp. 2002). *See also* 9 U.S.C. 36(c). "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled." The issue of a condition precedent is, therefore, an issue for the arbitrator under the FAA. Respondents failed to address this issue and therefore it should be considered inapplicable. Respondents' Return relies on the improper application of the condition precedent from the Special Delivery Agreement to the Arbitration Agreement.

CONCLUSION

The Return is filled with pejorative factual statements not in the Record which is totally inappropriate. The Court of Appeals has no authority, on its own, to seize upon a novel issue to decide a case that was neither briefed nor argued. The Federal Arbitration Act clearly and unequivocally favors arbitration and is a shield to state courts in their attempt to obviate such agreements.

Professor Simmons and his sophisticated spouse certainly can understand the meaning of the words "ARBITRATE" and "GIVING UP MY RIGHT TO A JURY." No lawyer is needed to define the word "ARBITRATE" or to define the words "GIVING UP." Petitioner respectfully requests this Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

June 29, 2022

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)
ATTORNEYS FOR PETITIONER
BENSON HYUNDAI, LLC