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July 17, 2023

VIA EMAIL ONLY TO:
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RECEIVED
Jul 17 2023
SC Court of Appeals

Jason Imhoff
Kenison Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601

Re: ***Penland Automotive, LLC and Charles W. Penland, Jr. v. Dealer Financial Holdings, LLC, Steve Lanzl, and Daniel B. Haight***
Case No. 2023-001053

Dear Jason:

Enclosed please find the Transcript for the Motion hearing held before Judge J. Derham Cole, on January 4, 2023, in the above-referenced matter. This transcript was received on Friday, July 14, 2023.

Should you have any questions or require any additional information, please let us know.
Thank you

Sincerely,

A handwritten signature in blue ink that reads 'Emily I. Bridges'.

Emily I. Bridges

EIB
Enclosure

cc: Clerk, Court of Appeals, ctappfilings@sccourts.org

PPAB 9667680v1

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
) 2021-CP-23-00244
COUNTY OF GREENVILLE)
)
)
)
)
PENLAND AUTOMOTIVE, LLC, ET)
AL,)
)
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)
)
vs.) TRANSCRIPT OF RECORD
)
)
DEALER FINANCIAL HOLDINGS,)
LLC, ET AL,)
)
)
DEFENDANTS.)
)
_____)

January 4, 2023
Greenville, South Carolina

B E F O R E:

THE HONORABLE J. DERHAM COLE, JUDGE

A P P E A R A N C E S:

JASON MICHAEL IMHOFF, ESQ
Attorney for the Plaintiffs

ROBERT HOPE JORDAN, ESQ.
EMILY IRENE BRIDGES, ESQ.
Attorney for the Defendant

CHERYL A. SMITH
Circuit Court Reporter

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INDEX

(SW) - Denotes State's Witness
(DW) - Denotes Defense Witness
(IC) - Denotes In Camera

PAGE

There were no witnesses called.

EXHIBITS

| <u>NO</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EVD</u> |
|-----------|--------------------|-----------|------------|
|-----------|--------------------|-----------|------------|

There were no exhibits introduced.

P R O C E E D I N G S

(WHEREUPON, proceedings commenced at 11:18 AM.)

THE COURT: All right. It appears there are two motions pending. First is the defendant's motion to strike, and the second is the plaintiff's motion to compel.

Motion to strike.

MR. JORDAN: Yes, Your Honor. May it please the Court. Robert Jordan along with my colleague Emily Bridges. We represent the defendants Dealer Financial, Dan Haight, Steve Lanzel in this action. We're here on a motion to strike a jury demand pursuant to a jury waiver in a contract between the parties.

Judge, by way of just a short background, and I will go ahead and let the Court know we filed a memo in support, so we'd like to incorporate that memo for the record.

THE COURT: Well, why are you incorporating it? You've got a hard copy so I can incorporate it with my stuff?

MR. JORDAN: Sure can, Your Honor. May I approach?

THE COURT: Sure. Thank you.

MR. JORDAN: So, Your Honor, just by way of brief background, and this is set forth in the memo, this dispute involves a lending relationship between the

1 parties. My client is the lender. The plaintiff and the
2 individual plaintiff run a preowned car dealership. My
3 client provides what's typically called floor financing to
4 car dealerships. You're probably familiar with that
5 arrangement. Money's advanced, cars are bought, they're
6 paid back with fees and interest. And that's the way the
7 used-car lots are able to finance the purchase of
8 inventory.

9 In 2016 the parties entered into a contractual
10 arrangement, which I call the loan documents, to set up a
11 relationship for my client to lend money for floor
12 financing. That contract contains a jury waiver. We
13 cited that jury waiver in our motion and in the memo on
14 page 3. I think this entire motion is about that clause
15 and the Court's interpretation of the clause and whether
16 it covers the claims that we're now litigating in this
17 case or not. We submit, of course, that the waiver does
18 cover the claims.

19 Judge, the parties did business for three years.
20 That's undisputed. Money was advanced, cars were bought,
21 payments were made back on the loans. In the summer of
22 2020, the -- well, actually, in 2019 the parties stopped
23 doing business. There's a debate between the parties
24 about the circumstances involving that stoppage of loan to
25 client. In 2020, though, it's undisputed they resumed

1 doing business. My client loaned money. The plaintiff
2 took the money, bought cars. And then another dispute
3 arose between the parties which forms the basis of the
4 lawsuit.

5 Judge, what's at issue is the plaintiff contends that
6 the contract was terminated in 2019. We contend whether
7 the contract was terminated in 2019 or not, the jury
8 waiver survives any termination or any interpretation of
9 what parts of the contract survive and what parts don't.

10 So I'll direct the Court's attention to the clause.
11 It's on page 3 of our brief. I think we put it in bold.
12 And it says in operative -- the operative language is,
13 quote, in any and all causes of action in any way relating
14 to any matter between them whether arising from or
15 relating to this agreement or any related agreement, or
16 arising from alleged extracontractual facts prior to,
17 during or subsequent to this agreement. So it's
18 undisputed that this language was agreed to in 2016.

19 And for the Court's benefit and for our argument,
20 what I would highlight is the waiver says "relating to any
21 matter between them." It's broader than just a contract.
22 It also says "relating to any alleged extracontractual
23 facts prior to, during or subsequent to this agreement."
24 So it essentially says if we're going to do business
25 together, we're going to have a relationship, whether it's

1 under this agreement or in the future, you agree to a jury
2 waiver. And so we're asking the Court to enforce this
3 waiver.

4 As set forth in our brief, Judge, and I think the
5 Court knows this, whether a party is entitled to a jury
6 trial is a question of law for the Court. It's not a
7 question of fact for the jury. I would cite Mims
8 Amusement Company, which is 266 SC 141, South Carolina
9 Supreme Court 2005.

10 I would also cite for the Court that in South
11 Carolina it's well-settled that a right to a jury trial
12 may be waived by contract. So the Court gets to determine
13 as a matter of law whether or not a waiver is enforceable,
14 and South Carolina law establishes that a contract term
15 can constitute a waiver if the parties agree to it.

16 Judge, I think what we're going to hear and you will
17 hear and I'll go ahead and address it and address it on
18 rebuttal if the Court wants to hear from me is that the
19 contract was terminated in 2019, and therefore, the waiver
20 was terminated. So as I cite at the outset of the
21 argument, if you look at this language, it's broader than
22 just the 2016 contract. It governs any relationship or
23 any business between the parties. And it's undisputed
24 that what this lawsuit is now about is about a lineal
25 relationship between the parties and a dispute over the

1 rights and obligations of the parties. I don't think
2 there's anything the plaintiff can present factually that
3 takes them outside of this clause. For those reasons, we
4 would ask the Court enforce the clause and strike the jury
5 demand.

6 We'd be happy to answer any questions the Court may
7 have.

8 THE COURT: Mr. Imhoff?

9 MR. IMHOFF: Yes, Your Honor. Jason Imhoff on behalf
10 of the plaintiffs Penland Automotive and Charles W.
11 Penland. And I say that intentionally. There's a couple
12 plaintiffs in this, Your Honor.

13 And I have the loan security agreement. May I
14 approach and also hand our brief to the Court, Your Honor?

15 THE COURT: Sure.

16 MR. IMHOFF: Your Honor, I thank you for coming over
17 here to hear us from Spartanburg. I'm not sure if you
18 have access to this entire file or not.

19 THE COURT: I don't at this moment.

20 MR. IMHOFF: It is well-motioned, well-briefed, huge
21 briefs with lots of exhibits, multiple depositions. Your
22 Honor, this has been going on for years. We've been
23 before this court multiple times.

24 As you see from the defendant's motion, this is
25 either their second or third attempt to have the Court

1 grant this motion. It has already been denied previously,
2 Your Honor.

3 The issue in this case is much larger than just that
4 agreement. But let me give you a thumbnail sketch of what
5 the plaintiff has argued and the evidence that's in the
6 file and in the briefs in this case already.

7 These folks had an agreement in 2016. It's -- in our
8 opinion it is a security agreement which needs to be in
9 writing which is what the document I just handed you is.
10 It has multiple, multiple pages. It also required
11 multiple signatures.

12 My client, Charles Penland, as you can imagine, is an
13 individual. There's a personal guarantee in that
14 agreement that he had to sign in 2016 to get the loan. He
15 also had to sign a different place on behalf of his
16 automobile dealership, Penland Automotive. He had to sign
17 in a third place for Penland Properties too for a mortgage
18 and collateral on property that was owned by a separate
19 company.

20 There's no dispute that in 2019 these parties ended
21 their relationship. Not only did they end their
22 relationship, the reserve money that the loan company had
23 was sent back to my client and they went their separate
24 ways except for one thing. There's a UCC1 filing which
25 tells any other lender out there we still have first

1 priority over the collateral on that car lot that Dealer
2 Financial did not remove.

3 So in the summer of 2020 -- I think it was 2020 --
4 during COVID, my client had to go get another loan and had
5 another lender ready to give him a loan except for the
6 UCC1 filing which was still filed, which there's documents
7 in the file that have been argued to this court before,
8 briefed to this court before, that my client asked Dealer
9 Financial to remove that UCC filing multiple times.
10 Instead of removing the UCC1 filing, they made verbal
11 promises to the general manager of Penland Automotive
12 about what loan they were going to give and when they were
13 going to get new documents. That's all important to say,
14 Your Honor, at that time as they were negotiating a new
15 loan relationship, there was no meeting of the minds on
16 what the terms were, what the amount was, whether or not
17 Charles Penland was going to have to be another personal
18 guarantee, whether he was going to have to mortgage
19 property owned by another company. All of this has been
20 argued to this court and argued between us, depositions,
21 everything else, Your Honor.

22 But the key to this case is Dealer Financial came and
23 took all of the collateral cars off of my client's lot
24 without my client being in arrears at all, and then the
25 principal owners of Dealer Financial followed him to an

1 auction where they followed him around with a piece of
2 paper and demanded that he sign some document is the
3 testimony, Your Honor. So my client, Charles Penland, has
4 a defamation per se cause of action, has a fraud cause of
5 action, has a negligence misrepresentation, inducement of
6 a contract cause of action. All of those causes of action
7 occur because of the behavior in 2020.

8 And what defendants want you to do is go back and
9 enforce the agreement that is the central issue to this
10 case. Is Dealer Financial allowed to renew a 2016
11 security agreement that's got to be 50 pages long, Your
12 Honor, with three different entities and three different
13 people and enforce that when in 2020 they never sent
14 anything in writing to say what the terms or what the
15 agreement or anything else was? Again, this court has
16 heard this twice now, and both times -- I think it was
17 Judge Verdin both times -- has ruled that there's a
18 genuine issue of material fact as to whether or not that
19 2016 agreement can be renewed verbally. And if it is
20 renewed verbally, what are the terms to that agreement?
21 Because they're different from 2016 to 2020. Even
22 Mr. Haight and Dealer Financial admitted that. The terms
23 changed over the years and did in 2020 as well.

24 And so, Your Honor, I don't want to belabor it, but
25 the issue has already been sent to the Court. It's much,

1 much bigger than just, well, here's a document and they
2 started doing business again. Here's a document with
3 parties who never signed, and it can't be argued that a
4 general manager of an automobile -- used automobile shop
5 can personally guarantee an individual and bind a complete
6 different company and their property.

7 And so I would agree with this. I think there's an
8 issue of how we get this factual issue to a jury or to a
9 judge. But this isn't the way. A motion to strike would
10 essentially take away two parties' rights who didn't sign
11 anything in 2020 to agree to that 2016 agreement, Your
12 Honor. And also, we've made an argument which was denied
13 a motion for summary judgment that because it's not in
14 writing, it violates the security agreement provision of
15 the consumer code for the UCC, Your Honor, which requires
16 it to be in writing. All of that will be shared with the
17 jury, will be shared at trial.

18 But we've tried to narrow the case down over the last
19 couple years, Your Honor. And so far every judge that's
20 heard this has found that there's a material issue or
21 genuine issue of material fact, Your Honor.

22 So we would ask that the motion to strike be denied.
23 Because if you find that the motion to strike should be
24 granted, then you found that the 2016, which is the
25 agreement which is the entire dispute in this case, was

1 renewed in 2020 as an enforceable against my client who
2 never signed anything in 2020 including a personal
3 guarantee.

4 Your Honor, I don't want to belabor the whole thing.
5 I mean, we've argued this for hours in this courthouse.
6 But if there are other questions you have, I'm happy to
7 answer them. We've given you the brief. Again, this file
8 is enormous. I mean, there's so many exhibits and
9 depositions in this case. I would ask that the Court just
10 deny the motion to strike, Your Honor.

11 THE COURT: Mr. Jordan.

12 MR. JORDAN: Thank you, Your Honor. Just briefly.

13 Mr. Imhoff is arguing the merits of the case as
14 expected. He's arguing about the factual disputes. Both
15 parties did file cross-motions for summary judgment.
16 Those were both denied. Those are the merits of the case,
17 and the facts and disputes we have. And, of course, we
18 dispute many of the facts he just recited to the Court
19 about what happened in this case. But that's not before
20 the Court today. You don't have to decide the case today.

21 What you have to decide is is this clause, which was
22 signed by both parties -- and, again, these are
23 sophisticated business parties. Penland Automotive, the
24 evidence in the case, is running millions of dollars of
25 business through their dealership. Okay. This is a

1 sophisticated party. They don't get to argue we didn't
2 understand or we didn't know what we were signing. And as
3 I said in my argument, relating to any matter between
4 them, everything Mr. Imhoff just argued, even if we
5 disagree with the facts, is related to business dealings
6 between the parties as to contractual facts subsequent to
7 this agreement, exactly everything he talks about at the
8 auction and about the repossession of the cars, all is
9 extracontractual facts related to subsequent to the
10 agreement. So giving this language its plain and ordinary
11 meaning, which the Court is required to do under our rules
12 of construction, it should be enforced.

13 And so I'm happy to answer any questions, but I think
14 the issue is not today, Judge, please look at the huge
15 file and tell us who's right and wrong. Obviously, that's
16 for another day before a judge or a jury. Today the issue
17 before Your Honor is this clause and what does it mean,
18 and as a matter of law, is it enforceable. We obviously
19 contend it is.

20 THE COURT: Mr. Imhoff says that that clause has
21 already been addressed by one or two other judges. Do you
22 disagree or agree with that?

23 MR. JORDAN: Judge, I agree at the outset of the case
24 a motion to strike was filed. And I have the order. It
25 was argued in front of Judge Kinlaw. I'm happy to pass it

1 up.

2 THE COURT: Well, you might need to. But I'll just
3 ask you, what's changed?

4 MR. JORDAN: Yeah. It was denied without prejudice.
5 It's an order. He filed a motion for summary judgment.
6 We filed a motion to strike. Both motions were heard
7 simultaneously. Judge Kinlaw said you guys go do
8 discovery. I'm denying it without prejudice. You can
9 come back at another time. We've now, as Mr. Imhoff
10 indicated, litigated this case for a year and a half.
11 We're now in a position where no facts have come forward
12 which take him outside of the clause.

13 THE COURT: What was denied without prejudice? Your
14 right to refile a motion for summary judgment after
15 discovery or your right to have a jury trial or not?

16 MR. JORDAN: The right to have the jury trial was
17 denied without prejudice. I have the language right here,
18 Your Honor.

19 THE COURT: Well, let me just look at it. I can read
20 it myself.

21 Is this an extra copy?

22 MR. JORDAN: Yes. You can have that, Your Honor.

23 THE COURT: Okay. Anything else y'all need to tell
24 me?

25 MR. JORDAN: Nothing, Your Honor.

1 MR. IMHOFF: Yeah. Just one thing. And to make an
2 analogy, if you have a Chase credit card, you close your
3 Chase credit card and you call them on the phone and they
4 never send you -- and say, hey, I'd like to get -- it's
5 been a couple years, I'd like to reopen that Chase credit
6 card, what the defendants are arguing is that anything
7 that looks like this in that original signed credit card
8 agreement now controls any relationship you have with that
9 company going forward. And that's not the law. That's
10 not the facts of this case. My client has said absolutely
11 not, Your Honor. I didn't sign anything.

12 And, again, there are other parties that can't be
13 bound by someone who doesn't have the right to bind them.
14 A general manager of one company can't do the other one's.

15 Your Honor, what they're asking you to do is find a
16 closed, ended, rescinded contract now controls a
17 completely new relationship, and all of the conduct we're
18 talking about arises out of that new relationship and what
19 the terms of that new relationship are. There is no basis
20 in law to find an old closed contract controls everything
21 between parties for years and years on end going into the
22 future.

23 THE COURT: All right. What about your motion to
24 compel?

25 MR. IMHOFF: I'm sorry?

1 THE COURT: What about your motion to compel?

2 MR. IMHOFF: Your Honor, I'd prefer to continue it.
3 We're having some issues. Frankly, I've been out of the
4 state for a while and we're having some issues downloading
5 what was sent to use. May I continue it, Your Honor, and
6 we can either figure it out or I could refile it?

7 MS. BRIDGES: Yeah. I didn't realize, Your Honor,
8 opposing counsel was out of state. I tried calling last
9 week, with the holiday I assumed he was out with his
10 family, to try to figure out what was the problem. And I
11 recently learned there does seem to be a technology issue
12 which the downloading, which I'm happy to see if we can
13 work out.

14 THE COURT: All right. So you just want to withdraw
15 it?

16 MR. IMHOFF: I can withdraw it. I'd prefer to
17 continue it, but ---

18 THE COURT: Well, let's just withdraw it. That way
19 I've accomplished my task this week.

20 (WHEREUPON, proceedings concluded at 11:37 AM.)

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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, CHERYL A. SMITH, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 4th day of January, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 14, 2023

Cheryl A. Smith
Cheryl A. Smith, CVR-M
Court Reporter