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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Cleo Sanders, Respondent,

v.

Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram; Santander Consumer USA Holdings, Inc.; Isiah S. White; Danny Anderson; and Patrick Bachrodt Jr., Defendants,

of which Savannah Highway Automotive Company, a General Partnership d/b/a Rick Hendrick Dodge Chrysler Jeep Ram, and Isiah S. White are the Petitioners.

Appellate Case No. 2021-000137

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Charleston County
J.C. Nicholson Jr., Circuit Court Judge

Opinion No. 28168
Heard April 28, 2022 – Filed July 26, 2023

Petition for Rehearing

Cleo Sanders, the Respondent in this action, respectfully asks the Court to reconsider its divided opinion. As an initial matter, the opinion may have

misapprehended Sander's argument, which was not whether a valid arbitration exists at all, but whether it exists between the parties. (E.g., Sanders' Brief p. 6).[1]

More importantly, as the majority makes clear, it directs the Circuit Court to send this case to arbitration, to determine whether Petitioners "retained the right to arbitration after assignment because of a 'survival clause' in the arbitration provision." (Opinion p. 5 n.5).

However, when the Circuit Court asked Petitioners whether they retained the right to arbitration after the assignment, their answer was at odds with the position they took before this Court.

> THE COURT: I understand the contract, but does the contract reserve a right for you to enforce arbitration once you've assigned it all to the lending institution?
>
> MR. LAY: It is fully assigned once it goes to the lending institution.

(App. p. 143, lines 17-21) (emphasis added); (Br. of Respondent, p. 2 (quoting the same portion of the Appendix), p. 7 (same)).

[1] "The question before the trial court and the Court of Appeals was whether there is a contract between the parties. Due to petitioners' assignment of the contract, the answer must be 'no.' . . . .Again, validity is not the issue. The existence of a written agreement between the Parties is." (Sanders' Brief p. 6) (emphasis added).

The "survival clause" was never argued to the Circuit Court. It was not even included in the contract excerpt Petitioners presented to the Circuit Court in their motion.[2]

It is axiomatic that a party may not take one position at trial and another position on appeal. E.g., Dunes W. Golf Club, LLC v. Town of Mount Pleasant, 401 S.C. 280, 303 n.11, 737 S.E.2d 601, 613 n.11 (2013) (citing McLeod v. Starnes, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012)). It is also axiomatic that a trial court does not err by ruling on what has been presented to him. See, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Nor does the Court of Appeals.

When asked whether the contract reserves a right for Rick Hendrick to enforce arbitration after an assignment, the Petitioners should have answered, "Yes." Or "We believe it does, and that's what we want the arbitrator to rule on." They should not have hidden from the trial judge the clause on which the decision now swings.[3]

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[2] That excerpt did not include any signatures—not of Mr. Sanders nor of anyone else. Even when Petitioners—allowed to present simply an "affidavit regarding the authenticity of the retail sales agreement" (Form 4 Order, App. 203)—improperly presented an entirely new memorandum (App. 249-63), Petitioners did not attempt to retract, withdraw, or otherwise explain their answer to Judge Nicholson.

[3] Seen in this light, the case on which the majority focuses cuts in favor of Sanders. In Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002), which the majority analyses on pages 10-12 of its opinion, the First Circuit addressed a statute that allowed for recission of a contract if a lender failed to make proper disclosures. Plaintiff there took the position that because Plaintiff considered the lender's disclosures improper, the contract was rescinded, and therefore there was nothing

Cont'd

The survival clause was not even mentioned below, nor was its importance argued. It was only to this Court that the fact of a survival clause and argument therefrom was presented.[4]

Rather than rest its decision on what it recognizes as the "muddy" (Op. p. 6) Prima Paint doctrine, with its "muddled" case law (id.), the Court should rest its decision on the well-established principles of South Carolina law, and hold that regardless of what the result might have been had Petitioners raised to the Circuit Court and/or the Court of Appeals the argument they make here, Petitioners did not do so, and a court does not err by deciding an issue on the "facts, law, and arguments"

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left to arbitrate. The First Circuit reasoned that plaintiff's mere assertion that the disclosures were improper did not automatically result in rescission. Plaintiff provided cases from other jurisdictions that appeared to support its position, but the First Circuit held most of those cases "are inapposite because the lender, unlike Conseco here, had conceded that there had been a violation of the TILA's disclosure rules." 292 F.3d at 55 (emphasis in original). Here, Petitioners conceded there had been an assignment. They described it as a "full" assignment, and made no mention of anything that had been retained. Under Conseco, the holding should be for Sanders.

Importantly, Conseco further held, "Neither the statute nor the regulation establishes that a borrower's mere assertion of the right of rescission has the automatic effect of voiding the contract." Id. at 54. Here, South Carolina law establishes that a full assignment has the automatic effect of transferring the right from the assignor to the assignee. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 213, 493 S.E.2d 826, 833 (1997); Donahue v. Multimedia, Inc., 362 S.C. 331, 338, 608 S.E.2d 162, 165–66 (Ct. App. 2005); (Sanders' April 27, 2022 letter to the Court) (citing Crestwood); (Br. of Respondent pp. 7-8) (citing Donahue).

[4] As the Court notes (Opinion p. 5 n.5), "Specifically, Petitioners contend they retained the right to arbitration after assignment because of a 'survival clause' in the arbitration provision."

presented to it, State v. Cope, 405 S.C. 317, 339, 748 S.E.2d 194, 205 (2013); Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (same); I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (same). The Court should rehear the matter and affirm the Court of Appeals.

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