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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

Reply in Support of Petition for Rehearing

The Return to Sanders' Petition for Rehearing does not deny that what Petitioners told this Court differed from what they told the Circuit Court. Nor does

it deny that, based on what they told the Trial Court, Conseco supports denial of their motion to compel arbitration.[1]

Instead, Petitioners attempt to distinguish what they told this Court from what they told the Trial Court on grounds that this Court asked a question, and they complain that Sanders' Petition took out of context their statement to the trial court that the contract was fully assigned. Their arguments fail.

I. Petitioners attempt to distinguish the information they provided to this Court from the information they provided to the Circuit Court on grounds that this Court asked a question. (Return, p. 2, arguing that they brought up the survival clause to this Court only "in response to a question" asked at oral argument). Their argument fails because the Trial Court asked a similar question and received a very different answer.

The Circuit Court asked, "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?" Petitioners responded, "It is fully assigned once it goes to the lending institution." (App. p. 143, lines 17-21) (emphasis added), (Br. of Respondent, pp. 2, 7), (Pet. Reh'g, p. 2).

At oral argument before this Court, the exchange was,

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[11] (See Pet. pp. 3-4) (discussing Large v. Conseco Finance Servicing Corp., 292 F.3d 49 (1st Cir. 2002)).

Justice Few:	[M]y question really is this: If you have a contract, such as this, where there is no reservation of what is assigned, why is the answer to who should decide arbitrability – isn't it going to be the same in every case like this?
Mr. Lay:	Well, if there's an assumption that there is no retention. We haven't gotten to that issue yet. We have language in the arbitration agreement and it says you don't give up arbitration rights if there's a transfer of the contract.
. . . .[2]	
Justice James:	All right. What's it say?
Mr. Lay:	[reading aloud] This arbitration clause shall survive any termination, payoff, or transfer of this contract.

https://media.sccourts.org/videos/2021-000137.mp4, beginning at 5:21.

[2] The portion of the recording represented by the ellipse above is,

Justice James:	Where does it say that?
Mr. Lay:	It says it in –
Justice James:	Give me a page of the Appendix.
Mr. Lay:	It says it in the opinion? Or in the Appendix?
Justice James:	In the Appendix.
Mr. Lay:	It is in the actual arbitration—the finance agreement.
Justice James:	OK, what page is that on?
Mr. Lay:	It is appellate 237.

Petitioners' answer to this Court—denying there was no reservation of what is assigned, and instead asserting there was a reservation of rights—was very, very different from their answer to the Trial Court. A party may not take one position at trial and another position on appeal. E.g., Dunes W. Golf Club, L.L.C. v. Town of Mount Pleasant, 401 S.C. 280, 303 n.11, 737 S.E.2d 601, 613 n.11 (2013).

Moreover, Petitioners called Justice Few's statement that "there is no retention" an "assumption" that needed correction by Petitioners' counsel. (Oral argument beginning at 5:21). But Justice Few's statement follows directly from Petitioners' answer to the Circuit Court. It was not an "assumption." It was the Record.

"An issue conceded in a lower court may not be argued on appeal." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 46, 691 S.E.2d 135, 147 (2010) (quoting TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998)).

This has been the law for a long time. "[T]he trial judge was justified in concluding that counsel conceded [the question], and the question cannot now be

raised in this court." S. Ry. Co. v. Routh, 161 S.C. 328, 159 S.E. 640, 642 (1931). See also Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (similar).[3]

So too here. As the Circuit Court wrote (App. 211),

> Rick Hendrick purported to assign all of its interests in the retail installment sales contract to Santander. . . . It also does not appear that Defendant retained any rights under the retail installment sales contract or the arbitration clause, specifically.

Here, the circuit judge was justified in concluding that counsel conceded there was no reservation of rights. Justice Few was therefore amply correct in so concluding.

Petitioners had a binary choice. Either they could tell the Circuit Court that the contract was fully assigned—and therefore they have no rights remaining under

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[3] In Ex parte McMillan, the Court wrote,

> Appellants contend that the complaint in this case is not under the Tort Claims Act; therefore, the court had no authority to award sanctions pursuant to the Act. We disagree.
>
> Attorney failed to raise this argument to the trial court. In fact, he expressly conceded at trial that the complaint was, in part, under the Tort Claims Act:
>
> > The Court: But you were bringing these things under the state Tort Claims Act . . .
> >
> > Attorney: Yes, Sir, but we also brought it against the individuals under common law, your Honor, in the event that the state Tort Claims protected the agency, okay.
>
> Accordingly, this issue is procedurally barred. Southern Ry. Co. v. Routh, 161 S.C. 328, 159 S.E. 640 (1930) (issue conceded in trial court cannot be argued on appeal).

Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (emphasis added).

the agreement—or not. If Petitioners chose not to say it was fully assigned, they could have said any number of things: such as, "We maintain there is a colorable claim that the contract reserved some rights after assignment, and that is what we want the arbitrator to assign."

If Petitioners thought the Circuit Court's order had mischaracterized/misunderstood/misstated/ignored their position in stating, "Rick Hendrick purported to assign all of its interests in the retail installment sales contract" and that Petitioners did not "retain[] any rights," they should have filed a Rule 59 motion. They did not file one.

If Petitioners thought the Circuit Court had mischaracterized their position, they should have argued that to the Court of Appeals. They did not.

Even now, Petitioners do not argue that the Circuit Court misunderstood their position. They simply argue that now, they have a new and better position.

II. Petitioners' assertion that Sanders took their statement to the Circuit Court that the contract was "fully assigned" out of context is backwards. Sanders' Petition placed that statement in its context as the answer to the question, "does the contract reserve a right for you to enforce arbitration once you've assigned it all to

the lending institution?" In that context, the answer is effectively "No."[4] (See Pet. Reh. p. 2).

It is Petitioners who seek to remove their statement from its context.

Finally, Petitioners' remaining arguments—that the existence of the "survival clause" was not important to this Court's decision, that it is "inexplicabl[e]" that Sanders discusses their statement to the lower court that the contract is "fully assigned once it goes to the lending institution," that Sanders was somehow playing "gotcha!," and that Sanders' discussion of error preservation includes a "beyond the pale" "ad hominem attack"—err, because,

- the survival clause was important to the decision (the opinion holds that whether Petitioners "retained the right to arbitration . . . because of a

[4] As presented in the Petition for Rehearing, p. 2 (citing App. p. 143, lines 17-21) (emphasis added); (Br. of Respondent, pp. 2, 7),

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.

'survival clause'" is "for the arbitrator to resolve"[5]),

- the statement that "the contract is fully assigned" is important as the answer to the question as to whether there could possibly be any reserved rights,
- it is not "gotcha" to point out that the opposing party's position at trial differed from its position on appeal—the whole point is to prevent a litigant from playing "gotcha" by withholding information from the lower court, and
- there was no ad hominem attack (let alone one "beyond the pale") as Sanders did not—and under this Court's precedents, did not need to—claim that Petitioners intentionally hid the survival clause from the Circuit Court, Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 481, 629 S.E.2d 653, 673 (2006) (emphasis added) (quoting I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716,

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[5] More fully, the Court wrote (Opinion p. 5 & n.5) (underscoring in original) (italics added),

> While Petitioners assert—in their brief and during oral argument—their right to arbitration was not extinguished by the assignment,[5] . . .
>
> 5 Petitioners claim the assignment of a contract containing an arbitration provision does not always extinguish the assignor's right to arbitration. *Specifically, Petitioners contend they retained the right to arbitration after assignment because of a "survival clause"* in the arbitration provision. These arguments are *for the arbitrator* to resolve.

724 (2000)) (issue preservation rules prevent "a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.").

Conclusion

It is enough that Petitioners kept the survival clause up their sleeve when the Trial Court asked point-blank, "does the contract reserve a right?" As stated in Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004) (emphasis added), "a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity" of "prevent[ing] a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id. at 24 n.4, 602 S.E.2d at 780 n. 4.

Petitioners here took a position on appeal to this Court different from their position at trial, contrary to the holdings of Dunes W. Golf Club, L.L.C. v. Town of Mount Pleasant, 401 S.C. 280, 303 n.11, 737 S.E.2d 601, 613 n.11 (2013), McLeod v. Starnes, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012), Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), and many, many other cases; kept a card up their sleeve, contrary to Elam, I'On, Erickson, and other cases; and argued

on appeal a factual point they had conceded does not exist, contrary to Austin, TNS Mills, Inc., Ex parte McMillan, S. Ry. Co. v. Routh, and other cases.

The Court should affirm the courts below.

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