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**Jan 17 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Case No. 2021-CP-23-00244  
Appellate Case No. 2023-001053

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Dealer Financial Holdings, LLC, Steve Lanzl, and Daniel B. Haight,

Appellants,

v.

Penland Automotive, LLC and Charles W. Penland, Jr.,

Respondents.

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**APPELLANTS' FINAL REPLY BRIEF**

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## **SUMMARY OF ARGUMENT**

First, Respondents virtually ignore the issue on appeal and spend the majority of their Brief recounting the timeline and various factual disputes involving the merits of the case. While Appellants deny the facts as asserted by Respondents, factual disputes about the merits of the case have no bearing on the narrow issue before the Court. This appeal singularly focuses on whether the specific language of the jury trial waiver included in the Financing Agreement, which all parties acknowledged was agreed upon by all parties at the time it was signed, applies to the current causes of action. Regardless of whether the Financing Agreement was terminated or not, the only question before the Court is the enforceability of this language to the current claims, which Respondents barely acknowledge. In fact, the majority of Respondents' arguments, as cited by Respondents, arise from their Motion for Summary Judgment, which was denied by the lower court. This Order is not on appeal and is not before the Court, therefore these arguments are irrelevant and improper.

Second, the jury trial waiver is not one-sided or oppressive, therefore it is not unconscionable. The jury waiver arises from an arms-length transaction between two sophisticated businesses and it affects both parties equally. The waiver applies regardless of whether specific claims are brought by Appellants or Respondents. As such, the jury trial waiver is enforceable, and the lower court erred in denying Appellants' Renewed Motion to Strike.

### **RESPONDENTS' ARGUMENTS A-D ARE IRRELEVANT TO THE ISSUE ON APPEAL**

Respondents' first four arguments (A through D) are irrelevant and improper as they do not focus on the actual issue on appeal - the enforceability of the jury waiver. As evidence by its inclusion in the Designation of Matter to be Included in the Record on Appeal, Respondents' arguments all arise out of Respondents' Motion for Summary Judgment, which was denied by the lower court and is not on appeal. As stated in Appellants' Brief, the narrow issue on appeal is "whether the Circuit Court erred in denying the Renewed Motion to Strike Jury Demand based on

the language contained within the agreements.” Rather than address the jury waiver issue head on, Respondents devote the majority of their Brief arguing ongoing factual disputes among the parties, which are irrelevant to this appeal, seemingly in an attempt to confuse the issues. The sole question on appeal is whether the waiver of jury language included within the Financing Agreement is enforceable to the ongoing dispute, and Respondents’ Brief presents no compelling reason why the jury waiver should not be enforced.

As acknowledged by Appellants, enforceability of the jury waiver does not depend on what any factfinder ultimately concludes about whether the transactions or claims at issue are otherwise governed by the remaining terms of the Financing Agreement. In fact, Respondents agree and do not dispute that the Financing Agreement as executed in 2016 was a valid agreement, at least through any alleged pause or termination. All arguments related to the enforceability of other terms or other ongoing factual disputes are irrelevant. Once again, Respondents attempt to expand the issue beyond the narrow question of enforceability of the jury trial waiver to the entire merits of the case, which is improper, misleading, and simply not before this Court.

#### **THE WAIVER OF JURY TRIAL PROVISION IS NOT UNCONSCIONABLE**

The jury trial waiver is not one-side or oppressive, and is not unconscionable. The language of this provision applies equally to both Respondents and Appellants. As such, it is by definition not one sided as all parties are subject to its language. Moreover, as admitted by Respondents, the jury waiver in the Financing Agreement was agreed upon by all parties at the time it was signed, and there is no disclaimer of Appellants’ liability over Respondents’ as the terms apply equally to all signatories.

The cases cited by Respondents, *Smith v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007) and *Smith v. D.R. Horton, Inc.*, 403 S.C. 10, 742 S.E.2d 37 (Ct. App. 2013) in support of this argument are both in the context of a company seeking to enforce a jury waiver

against an individual consumer, not an arms-length transaction between two sophisticated business entities. “Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). This is not what occurred in this case. Both Appellants and Respondents were sophisticated business entities. Similar to *Carolina Care Plan*, this was a negotiated, arms-length transaction between business entities who knowingly signed the Financing Agreement. South Carolina courts consistently have held that jury trial waiver provisions are permitted and enforceable in such circumstances. *See Wachovia Bank, Nat. Ass’n v. Blackburn*, 407 S.C. 321, 333, 755 S.E.2d 437, 443 (2014); *N. Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc.*, 307 S.C. 533, 535, 416 S.E.2d 637, 638 (1992). The specific language of this waiver is not “so oppressive” such that it cannot be enforced as it applies equally to both parties and is part of a negotiated business arrangement.

The express language of the waiver clearly applies to all the causes of action included in the underlying pleadings. By its plain and ordinary meaning, it applies to all causes of action “in any way relating to any matter” involving the parties, and (3) all causes of action arising from or related to “extra-contractual facts ... subsequent to” the Financing Agreement. Respondents’ causes of action, including the defamation claim, clearly involve “extra-contractual facts” subsequent to the contract given that all allegations relate to the business dealings among the parties or “relate to” any matter involving the signatories to the Financing Agreement. It is undisputed that, but for the business relationship between the parties, there would not be a lawsuit. As such, it is plain that both Respondents’ and Appellants’ claims fall within the clear and express language of this provision.

## CONCLUSION

The vast majority of Respondents' Brief fails to address the actual issue on appeal - whether the language of the jury trial waiver is applicable and enforceable. Instead, Respondents seemingly attempt to re-argue their motion for summary judgment, which is simply not before the Court.

The jury trial waiver is not unconscionable as it was part of an arms-length negotiated transaction between sophisticated parties. Moreover, Respondents acknowledge the Financing Agreement was agreed upon by the parties in 2016, and both parties operated pursuant to its terms for a number of years. All of the causes of action asserted by Respondents either arise out of or are related to the identical lending relationship that has existed between the parties since 2016, regardless of whether any of the other commercial terms are applicable. As such, the jury trial waiver applies, and the Court erred in denying Appellants' Renewed Motion to Strike.

Accordingly, Respondents have no right to a jury trial on any issue in this case, and their demand for a jury trial should be struck and the case referred to the Greenville County Master-in-Equity in accordance with Rule 53(b), SCRPC.

*s/Emily I. Bridges*

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the Appellants' Final Reply Brief in the above-referenced matter complies with Rule 211(b), SCACR.

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