

ORIGINAL

**IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

v.

**SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a
CENTURY BMW**

Appellant.

RECORD ON APPEAL

VOLUME III

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The South Carolina Supreme Court denied the petition. App., *infra*, 24a-26a. The court rejected petitioner's preemption argument on the merits, reasoning that *Stolt-Nielsen* was "distinguishable on the law and the facts." *Id.* at 26a. The court reiterated that "[its] opinion affirming the trial court's denial of the motion to compel arbitration [was] wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer[s] Act and the public policy of this State." *Ibid.*

5. While the petition for rehearing was pending, this Court granted the petition for certiorari in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which presented the question whether the FAA preempted a state-law rule that conditioned the enforceability of an arbitration agreement on the availability of class arbitration.

After the South Carolina Supreme Court denied rehearing, petitioner filed a petition for certiorari in this Court, contending that this case presented a materially identical question to the one then pending in *AT&T Mobility*. See 10-315 Pet. 6-9. After issuing its decision in *AT&T Mobility*—which held that the FAA preempted the state-law rule at issue there—the Court granted the petition, vacated the judgment below, and remanded for further consideration. See 131 S. Ct. 2872 (2011).

6. On remand, the South Carolina Supreme Court reinstated its original opinion. App., *infra*, 1a-11a.

Although the South Carolina Supreme Court had seemingly rejected petitioner's preemption argument on the merits in denying the earlier petition for rehearing, the court now determined that petitioner had forfeited that argument by failing to raise it earlier. App., *infra*, 2a-3a. Although the court acknowledged that petitioner had previously raised its preemption argument, the court reasoned that "such an attempt was untimely and im-

proper as a party may not raise an issue for the first time in a petition for rehearing”—even though the particular state-law rule that was the object of petitioner’s preemption argument was not advanced by Ms. Watts and was not adopted until the opinion from which rehearing was sought. *Id.* at 9a.

Based on its determination that petitioner had failed adequately to preserve its preemption argument, the South Carolina Supreme Court held that “further consideration in light of *AT&T Mobility* * * * is unwarranted.” App., *infra*, 11a. In conclusion, the court stated, “[w]e reinstate our original opinion and decline to revisit it.” *Ibid.*

REASONS FOR GRANTING THE PETITION

This case is a compelling candidate for summary reversal. Twice in the last two years, this Court has rejected efforts to coerce unwilling parties into class arbitration (or to condition the enforceability of arbitration agreements on the availability of class arbitration). See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Some lower courts, however, have reacted to those decisions with almost open defiance, evincing the same hostility to arbitration that led Congress to enact the Federal Arbitration Act in the first place. Just last month, the Court summarily reversed a lower-court decision on the ground that it was inconsistent with the “clear instruction” provided in *AT&T Mobility*. See *Marmet Health Care Center, Inc. v. Brown*, Nos. 11-391 & 11-394, slip op. 2-4 (Feb. 21, 2012) (per curiam).

The South Carolina Supreme Court’s decision in this case is cut from the same cloth as the West Virginia Supreme Court’s decision in *Marmet*. In its original opi-

nion, the South Carolina Supreme Court held that, notwithstanding the FAA, state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. In the period between *Stolt-Nielsen* and *AT&T Mobility*, the court considered and rejected on the merits petitioner's contention that the FAA preempted its newly minted state-law rule. In the wake of this Court's decision in *AT&T Mobility*, the South Carolina Supreme Court's rejection of petitioner's preemption argument became entirely untenable. But in the face of an order from this Court vacating its original opinion and remanding the case for further consideration in light of *AT&T Mobility*, the South Carolina Supreme Court *reinstated* its original opinion, holding that the preemption argument it had previously rejected on the merits had actually been forfeited because petitioner had not made the argument earlier in the litigation.

The South Carolina Supreme Court's efforts to insulate its decision to invalidate the waiver of class arbitration from this Court's review cannot stand. It would be nonsensical to suggest that a party has forfeited an argument when it raises it at the first available opportunity. But that is precisely the upshot of the South Carolina Supreme Court's most recent order, in which it determined that petitioner had forfeited its preemption argument by failing to raise it before its petition for rehearing—even though the state-law rule was adopted *sua sponte* in the opinion from which rehearing was sought. That determination, moreover, is fundamentally inconsistent with the court's earlier order denying the petition for rehearing, which addressed the preemption argument on the merits—the same argument that the court now asserts is forfeited. It is hard to imagine a flimsier rationale for refusing to apply squarely controlling federal law. This Court's intervention is necessary in order

to vindicate petitioner's right to arbitration and to make clear that judicial hostility to arbitration cannot be tolerated. The petition for certiorari should be granted, and the judgment of the South Carolina Supreme Court summarily reversed.

A. The South Carolina Supreme Court's Decision To Invalidate A Waiver Of Class Arbitration Conflicts With *AT&T Mobility*

1. In the wake of this Court's decision in *AT&T Mobility*, it is now clear that the FAA preempts the state-law rule that the South Carolina Supreme Court adopted in its original opinion. In that opinion, the South Carolina Supreme Court determined that "the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act"—and, for that reason, it concluded that "any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." App., *infra*, 21a. In *AT&T Mobility*, however, this Court held that a state-law rule that conditioned the enforceability of an arbitration agreement on the availability of class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

a. The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case. Like the rule in *AT&T Mobility*, the rule at issue here was grounded in public policy: specifically, the perceived concern that it would be impractical to resolve claims involving relatively small amounts in bilateral arbitration. Compare *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (noting, in adopting the rule at issue in *AT&T Mobility*, that the claims at issue "predict-

ably involve small amounts of damages”), with App., *infra*, 20a (noting that “[d]amages are typically small” in Dealers Act cases). Significantly, in *AT&T Mobility*, the Court deemed that public-policy concern insufficient to avoid preemption, reasoning that “States cannot require a procedure that is inconsistent with the FAA[] even if it is desirable for unrelated reasons.” 131 S. Ct. at 1753.

Also like the rule in *AT&T Mobility*, the state-law rule at issue here “does not *require* classwide arbitration.” 131 S. Ct. at 1750. But both rules offend the FAA in the same way: namely, by forcing a defendant that is a party to an arbitration agreement to make the Hobson’s choice between acquiescing to class arbitration and losing the benefits of the arbitration agreement altogether. Put differently, both rules have the practical effect of conditioning a defendant’s ability to arbitrate on its willingness to agree to class arbitration. As a result, both rules contravene Congress’s “overarching purpose” in the FAA: *viz.*, “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Id.* at 1748.

b. On remand, respondents sought to distinguish the state-law rule at issue here from the state-law rule in *AT&T Mobility* on the ground that the former rule “involves narrow restrictions not against arbitration for all consumer cases, but in favor of a specific protection for a certain type of litigant; in this case, car-buying consumers.” Resp. S.C. S. Ct. Remand Br. 11. In *AT&T Mobility* itself, however, the Court made clear that the FAA preempts a state-law rule whenever it “prohibits outright the arbitration of a particular type of claim.” 131 S. Ct. at 1747.

The Court’s recent opinion in *Marmet* confirms that the FAA preempts not just state-law rules of general applicability, but also rules that apply only to claims in-

volving a particular subject. In *Marmet*, the West Virginia Supreme Court had held that, as a matter of state law, “an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death[] shall not be enforced to compel arbitration of a dispute concerning the negligence.” *Brown v. Genesis Healthcare Corp.*, Nos. 35494, 35546 & 35635, ___ S.E.2d ___, 2011 WL 2611327, at *29 (June 29, 2011). Although the state-law rule appeared to be confined to the context of claims involving negligence at nursing homes, the Court characterized the rule as a “categorical rule prohibiting arbitration of a particular type of claim,” and held that it was preempted under the reasoning of *AT&T Mobility*. See *Marmet*, slip op. 4.

So too here. Although the state-law rule at issue is by its terms limited to claims arising under the Dealers Act—and although it “does not *require* classwide arbitration,” *AT&T Mobility*, 131 S. Ct. at 1750—it is still preempted because it offends the FAA’s overriding purpose of “enforc[ing] arbitration agreements as written.” *Id.* at 1754. There can be no serious dispute that, if the South Carolina Supreme Court had faithfully reconsidered its decision in light of *AT&T Mobility*, it would have reversed course and compelled arbitration of Ms. Watts’s claims.

2. The South Carolina Supreme Court’s decision on remand contrasts with the decisions of lower courts in other cases remanded by this Court for further consideration in light of *AT&T Mobility*. In one such case, the Third Circuit had invalidated an arbitration provision in a cellular-telephone service agreement because it violated a New Jersey rule grounded in the public-policy concern that it would be impractical to resolve consumer claims involving small amounts in bilateral arbitration.

See *Litman v. Cellco Partnership*, 381 Fed. Appx. 140, 141 (3d Cir. 2010), vacated and remanded, 131 S. Ct. 2872, 131 S. Ct. 2873 (2011). On remand, the Third Circuit held that the state-law rule it had previously recognized was preempted by the FAA. See *Litman v. Cellco Partnership*, 655 F.3d 225, 231 (3d Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012).

In other cases that were remanded in the wake of *AT&T Mobility*, lower courts have reached similar conclusions. See *Fensterstock v. Education Finance Partners*, 426 Fed. Appx. 14, 15 (2d Cir. 2011) (concluding that “the *Discover Bank* rationale is no longer viable” in the wake of *AT&T Mobility*); *Gordon v. Branch Banking & Trust*, No. 09-15399, 2012 WL 265938, at *1 (11th Cir. Jan. 31, 2012) (per curiam) (remanding to the district court for further consideration in light of *AT&T Mobility* and intervening Eleventh Circuit decisions).³ The decisions of those courts, in turn, reflect the broader consensus since *AT&T Mobility* that “[S]tates cannot refuse to enforce arbitration agreements based on public policy.” *Arellano v. T-Mobile USA, Inc.*, Civ. No. 10-5663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011).⁴

³ But cf. *Brewer v. Missouri Title Loans, Inc.*, ___ S.W.3d ___, No. 90647, 2012 WL 716878, at *5 (Mo. Mar. 6, 2012) (holding a waiver of class arbitration invalid on the ground that unconscionability determinations must be made on a case-by-case basis). In another remanded case, the California Supreme Court has yet to issue an opinion. See *Sonic Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

⁴ See, e.g., *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011); *D’Antuono v. Service Road Corp.*, 789 F. Supp. 2d 308, 331 (D. Conn. 2011); *Zarandi v. Alliance Data Systems Corp.*, Civ. No. 10-8309, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011); *Day v. Persels & Assocs.*, Civ. No. 10-2463, 2011 WL 1770300, at *5 (M.D. Fla. May 9, 2011); *Bellows v. Midland Credit Mgmt., Inc.*, Civ. No. 09-1951, 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011).

The South Carolina Supreme Court therefore stands out for its unwillingness to revisit its previously articulated state-law rule limiting the availability of arbitration.

B. There Is No Adequate State-Law Ground To Insulate The South Carolina Supreme Court's Decision From Further Review

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited its preemption argument by failing to raise it earlier in the litigation. That is an untenable basis for refusing to consider petitioner's argument, and it therefore presents no obstacle to this Court's review.

1. In its original opinion, the South Carolina Supreme Court held that the waiver of class arbitration in the arbitration agreement was not unconscionable, but was nevertheless inconsistent with South Carolina public policy as embodied in the Dealers Act. App., *infra*, 20a-21a. Notably, Ms. Watts had never advanced that discrete ground for invalidating the waiver of class arbitration, nor had the trial court addressed it; instead, the South Carolina Supreme Court adopted it *sua sponte*. Naturally, therefore, petitioner did not specifically argue that the FAA preempted the *Dealers Act* until its petition for rehearing. See S.C. S. Ct. Pet. for Reh'g 3-7.

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier. App., *infra*, 2a-3a. In doing so, however, the court completely ignored the fact that the state-law rule that was the object of petitioner's preemption argument was only adopted in the opinion from which rehearing was sought—and that petitioner therefore raised the preemption argument at the first opportunity it had to do so.

2. In order to be an adequate state-law ground, the state-law ground “must * * * be a tenable one.” Ro-

bert L. Stern et al., *Supreme Court Practice* § 3.26, at 222 (9th ed. 2007). A state court cannot evade this Court's review by relying on a state-law ground that is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). And before a state procedural rule can be "permitted to bar vindication of important federal rights," a state court's application of that rule must be shown to "serve[] a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447-448 (1965).

The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation of arguments. To the contrary, in South Carolina as elsewhere, a party adequately preserves an argument by making it at the first available opportunity. See, e.g., *Stone v. Roadway Express*, 627 S.E.2d 695, 699 (S.C. 2006) (holding that an employer timely raised a defense to a workers' compensation claim based on the employee's death when it did so for the first time before an appellate panel, on the ground that the employer raised it "at the first available opportunity"); *Mortgage Electronic Systems, Inc. v. White*, 682 S.E.2d 498, 501 (S.C. Ct. App. 2009) (holding that the defendants timely challenged the denial of their demand for a jury trial when the special referee did not rule on the demand until the day of the hearing and the defendants did not appeal until after the hearing, on the ground that the appeal was taken "at the first available opportunity").

Consistent with that general principle, this Court has long recognized that a party adequately preserves a federal argument in a petition for rehearing to a state court of last resort where "the ruling of the state court could

not have been anticipated and a petition for rehearing presented the first opportunity for raising it.” *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935); see, e.g., *Prune-Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980); *Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). That principle squarely applies here, because petitioner could not have anticipated the South Carolina Supreme Court’s adoption of its novel state-law rule.

There is no conceivable state interest in applying a forfeiture rule that would demand clairvoyance, by requiring a party to make a responsive argument before the argument to which it responds has itself been made (or could even have been anticipated). And even if South Carolina courts had consistently applied such a rule, it would be inadequate for an additional reason, because it would deprive a party of a “reasonable opportunity” to assert its federal rights. *Lee v. Kemna*, 534 U.S. 362, 392 (2002) (Kennedy, J., dissenting) (quoting 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4027, at 392 (2d ed. 1996)).

3. Perhaps the best evidence that South Carolina courts do not ordinarily apply such a rule comes from the South Carolina Supreme Court’s earlier ruling *in this case*. In response to petitioner’s petition for rehearing, in which petitioner first made the specific argument that the FAA preempted the Dealers Act, the South Carolina Supreme Court did not determine that the petitioner had forfeited the argument by failing to raise it earlier. Instead, the South Carolina Supreme Court considered and rejected that argument on the merits, reasoning that this Court’s decision in *Stolt-Nielsen* (on which petitioner

had heavily relied) was “distinguishable on the law and the facts.” App., *infra*, 26a. It was only after this Court decided *AT&T Mobility*—confirming that petitioner’s preemption argument was in fact correct—that the South Carolina Supreme Court suddenly determined that the argument had been forfeited. That sequence of events strongly suggests that the South Carolina Supreme Court relied upon forfeiture in order to “thwart review in this Court” by a party seeking vindication of a federal right. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958).

The South Carolina Supreme Court’s forfeiture determination is particularly problematic because, even before the South Carolina Supreme Court’s unexpected reliance on the Dealers Act, petitioner consistently took the position that it would violate the strong federal policy embodied in the FAA not to enforce the waiver of class arbitration. In moving to compel arbitration in the first place, petitioner contended that “[t]he FAA embodies the strong federal policy in favor of enforcing arbitration agreements,” Mem. in Support of Mot. to Compel Arb. 4 (internal quotation marks and citation omitted), and that “South Carolina courts give due regard * * * to the federal policy favoring arbitration,” Reply Mem. in Support of Mot. to Compel Arb. 1 n.1 (internal quotation marks and citation omitted).

In addition, in its brief before the South Carolina Supreme Court, petitioner contended that the trial court’s order holding that the waiver of class arbitration was unconscionable under state law “violated the federal policy favoring arbitration” and should be “reverse[d] * * * as inconsistent with federal law.” Pet. S.C. C.A. Br. 11; see *id.* at 1 (contending, in first question presented, that the trial court “violated the federal and South Carolina policies favoring arbitration”). Although the South Caro-

lina Supreme Court faulted petitioner for failing to make a “specifically articulated preemption argument” until its petition for rehearing, App., *infra*, 8a, petitioner’s failure to do so was entirely unsurprising because, until the South Carolina Supreme Court’s original opinion, petitioner had no occasion to frame its argument as seeking preemption of that court’s novel state-law rule.

By any standard, therefore, petitioner adequately preserved its preemption argument. And this Court should not countenance the South Carolina Supreme Court’s subsequent efforts to shield that anti-arbitration rule from further review. The South Carolina Supreme Court’s rejection of petitioner’s preemption argument constitutes a “demonstrably erroneous application of federal law.” *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (per curiam). Summary reversal is warranted to correct that error—and to make clear to lower courts that they are not free to flout the FAA and this Court’s jurisprudence interpreting it.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the South Carolina Supreme Court summarily reversed.

Respectfully submitted.

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APPENDIX

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APPENDIX A
SUPREME COURT OF SOUTH CAROLINA

No. 26805

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHO PAID
“ADMINISTRATIVE FEES” AS DESCRIBED BE-
LOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE;
DICK DYER & ASSOCIATES, INC.; GALEANA
CHRYSLER PLYMOUTH, INC., A/K/A GALEANA
CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP
A/K/A HENDRICK HONDA; OVERLAND, INC.,
D/B/A LAND ROVER OF COLUMBIA; TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS; AND
TOYOTA OF GREENVILLE, INC. ET AL., Defen-
dants,
of whom CENTURY BMW A/K/A SONIC AUTOMO-
TIVE, Appellant.

ON REMAND FROM THE UNITED STATES
SUPREME COURT

(1a)

Reheard Nov. 1, 2011
Refiled Dec. 19, 2011

Before TOAL, Chief Judge, BEATTY and HEARN,
Justices, and MOORE, Acting Justice.

KITTREDGE, Justice.

This case returns to us on remand from the United States Supreme Court to reconsider our opinion in *Herron v. Century BMW*¹ in light of its decision in *AT&T Mobility, LLC v. Concepcion*.² Because the issue of preemption was not preserved for review in the South Carolina proceedings, we reinstate our initial opinion.

I.

The underlying action originally came before this Court on appeal of the trial court's denial of Appellant Century BMW's motion to compel arbitration. We affirmed in result the trial court's denial of the motion to compel.³

Following our decision, Appellant filed a petition for rehearing, contending this Court's opinion was "inconsistent with the United States Supreme Court's recent decision in *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*"⁴ Appellant stated that pursuant to *Stolt-Nielsen*,

¹ 387 S.C. 525, 693 S.E.2d 394 (2010).

² 131 S.Ct. 1740 (2011).

³ A detailed summary of the underlying facts and the Court's reasoning for that decision can be found in our original opinion.

⁴ 130 S.Ct. 1758 (2010).

“[t]he [Federal Arbitration Act] clearly preempts South Carolina law, as this Court construed it” and “[i]f a party cannot be compelled to class arbitration absent an agreement to arbitrate as a class, a fortiori the FAA preempts any public policy requiring class arbitration even where the parties agreed not to arbitrate as a class.” In our order denying rehearing, we emphasized that our opinion was “wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealers Act⁵ and the public policy of this State.” We further admonished Appellant for attempting to reframe the issues and miscast our holding as “disingenuous to the opinion and a holding we never made.”

Thereafter, Appellant petitioned the United States Supreme Court for a writ of certiorari. Although the issue was not raised to the trial court or this Court, Appellant presented the following question in its certiorari petition:

Whether the Federal Arbitration Act preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement.

This Court’s opinion was vacated by the United States Supreme Court and remanded for consideration in light of its decision in *AT&T Mobility, LLC v. Concepcion*. Respondents argue that the matter of preemption was not preserved in the South Carolina proceedings. We agree and therefore adhere to our initial opinion.

⁵ The full title of the Act is the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann § 56-15-10 *et seq* (2007).

II.

A.

Appellant contends that the issue of whether the FAA preempted state law, which it raised to the United States Supreme Court, was sufficiently preserved in the state court proceedings because Appellant referenced the state and federal policies favoring arbitration in its filings.⁶ We disagree.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* Imposing such a requirement on the appellant “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

⁶ At oral argument on rehearing, counsel for Appellant went beyond its brief and claimed it had made the argument to the effect that “federal law controls,” and that such argument was sufficient to preserve the preemption argument. We would agree that the argument was preserved if Appellant had ever made that argument in any manner related to the issue of preemption, but it did not. Just as the word “preemption” appears nowhere in the briefs filed with this Court, neither does the argument that the “federal law controls.” In short, Appellant presented no argument (prior to its rehearing petition) that could reasonably be construed to embrace the matter of preemption.

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. *Glover v. County of Charleston*, 361 S.C. 634, 606 S.E.2d 773 (2004) *overruled on other grounds by* *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005); *see also* *Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved); *Merriman v. Minter*, 298 S.C. 110, 378 S.E.2d 441 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised to the trial court).

Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. *See State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words “corpus delicti” in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *see also* *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue).

Our appellate rules also offer guidance. “Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal.” Rule 208(b)(1)(B), SCACR. When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant’s arguments. *See Eubank v. Eubank*, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) (find-

ing the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court). However, “[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to ‘grope in the dark’ to ascertain the precise point at issue.” *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (internal citation omitted). Similarly, a petition for rehearing must “state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR. “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999)).

B.

South Carolina is not alone in its issue preservation requirements. The United States Supreme Court has “consistently refused to decide federal constitutional issues raised [to it] for the first time on review of state court decisions.” *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also Webb v. Webb*, 451 U.S. 493 (1981) (holding where the Georgia Supreme Court failed to rule on federal issue, the United States Supreme Court was without jurisdiction in the case); *Hill v. California*, 401 U.S. 797 (1971) (refusing to reach a Fifth Amendment question when the issue was not raised, briefed, or argued at any level of state court).⁷

⁷ Appellant contends that because the United States Supreme Court granted certiorari, Respondents are precluded from arguing that the preemption issue is not preserved. We disagree. The Su-

Moreover, the Supreme Court has stated “[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.” *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (internal citations omitted).⁸ The Supreme Court has explained its reasoning for such policies:

preme Court has previously granted certiorari based on assertions in petitions and later refused to rule on the issue because it realized the issue was never raised to the state court. *See Cardinale*, 394 U.S. at 438 (stating that “[a]lthough certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below”); *see also Webb*, 451 U.S. at 494-95 (stating that because the Court disfavors the filing of the state court record, “[the Court] [is] largely dependent on assertions made by the parties as to what that record will demonstrate concerning the manner in which a federal question was raised below”).

⁸ The Rules of the Supreme Court also require a party to demonstrate the state court addressed the issue presented to it. Rule 14 states in relevant part.

If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court’s charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari

[I]n a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, they should be given the first opportunity to consider them.

Cardinale, 394 U.S. at 439.

C.

We have carefully re-examined the record. In all of the submissions, memoranda, and hearings before the trial court, not once was there a single mention of federal preemption as it relates to the issue before us. Certainly, Appellant cites to both the federal and state policy favoring arbitration, and no party or court has ever disputed the obvious—both the federal and state policies do favor arbitration. However, a general acknowledgment of a policy favoring arbitration is a far cry from a specifically articulated preemption argument.⁹

Tellingly, the trial court's order denying Appellant's motion to compel states "[t]he Plaintiff and Defendant agree that *Simpson v. MSA of Myrtle Beach, Inc.*, 373

Sup.Ct. R 14(1)(g)(i).

⁹ We also note that Appellant cites a provision of the FAA, 9 U.S.C. § 2 (2006), in its trial court motions for the proposition that the FAA applies to the arbitration agreement at hand. Both the trial court and this Court agreed with Appellant. Yet Appellant never cited section 2 of the FAA in any fashion that can be construed as anything akin to the preemption argument it presented to the United States Supreme Court.

S.C. 14, 644 S.E.2d 663 (2007)¹⁰ is the *controlling authority* of this motion.” (emphasis added). In our opinion, this opening sentence to the legal analysis section of the trial court’s order demonstrates Appellant and Respondents’ mutual agreement that the case was to be decided by reference to state law. That finding was never challenged until the petition for rehearing.

Moreover, it is clear preemption was neither a novel nor an unknown argument to Appellant. Significantly, Appellant did raise the issue of preemption to the trial court, albeit in a different context. Respondents initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated that state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to *any* claim of preemption, until the petition for rehearing filed with this Court.

Simply stated, the question Appellant presented to the United States Supreme Court, namely whether the FAA preempted our state’s legislative policy as set forth in the Dealers Act, was raised neither to the trial court nor to our Court. And although the issue of preemption was raised in Appellant’s rehearing petition, such an attempt was untimely and improper as a party may not raise an issue for the first time in a petition for rehear-

¹⁰ In *Simpson*, this Court denied a motion to compel arbitration, finding an arbitration clause in a vehicle trade-in contract was unconscionable and, therefore, unenforceable due to a multitude of one-sided terms. Notably, the *Simpson* decision, however, in no way dealt with federal preemption. The word “preemption” appears in the *Simpson* opinion, only to note that preemption was not involved.

ing. See *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.”). Unquestionably, our opinion in *Herron* did not address federal preemption. Rather, it quite naturally resolved the matter solely on the basis of state law, just as the parties presented it to us. See *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) (“[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.”). However, the absence of a preemption discussion is not attributable to this Court’s failure to recognize or understand the arguments presented. Rather, Appellants failed to present the issue to us, as evidenced by our detailed order denying Appellant’s petition for rehearing which rejected Appellant’s attempt to recast the issues that were presented to us.

We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. As this Court observed, 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.” *I’On*, 338 S.C. at 406, 526 S.E.2d at 724. Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under even the most liberal approach to issue preservation prin-

ciples, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law.

Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted. We reinstate our original opinion and decline to revisit it.

ORIGINAL OPINION REINSTATED.

APPENDIX B
SUPREME COURT OF SOUTH CAROLINA

No. 26805

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHO PAID
“ADMINISTRATIVE FEES” AS DESCRIBED BE-
LOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE;
DICK DYER & ASSOCIATES, INC.; GALEANA
CHRYSLER PLYMOUTH, INC., A/K/A GALEANA
CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP
A/K/A HENDRICK HONDA; OVERLAND, INC.,
D/B/A LAND ROVER OF COLUMBIA; TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS; AND
TOYOTA OF GREENVILLE, INC. ET AL., Defen-
dants,
of whom CENTURY BMW A/K/A SONIC AUTOMO-
TIVE, Appellant.

Heard Jan. 20, 2010
Decided April 19, 2010
Rehearing Denied June 9, 2010

Before TOAL, Chief Judge, BEATTY, and HEARN, Justices, and MOORE, Acting Justice.

KITTREDGE, Justice.

This case concerns the enforceability of an arbitration agreement. Respondents Christine and Michael Watts entered into a contract with Appellant Century BMW (Century) for the purchase of a car. The transaction included the execution of an arbitration agreement. Subsequently, the Wattses filed a class action suit against Century alleging the dealership had charged illegal administrative fees. Century moved to compel arbitration. The trial court found the arbitration agreement was unconscionable and unenforceable and denied the motion to compel. Century appealed, and we granted certification pursuant to Rule 204, SCACR.

We hold the arbitration agreement, although an adhesion contract, is not unconscionable. Yet the arbitration provision prohibiting class actions is against public policy, which would ordinarily be severed pursuant to the agreement's severance clause. Century has insisted, however, that if the class action prohibition provision is unenforceable, it will abandon the balance of its rights under the arbitration agreement and consent to the action proceeding in the trial court. Although the arbitration agreement is otherwise enforceable, in accordance with Century's request, we affirm in result the trial court's order denying the motion to compel arbitration.

I.

In 2005, Michael Watts began looking for a car to purchase for his daughter, Christine Watts, as a graduation present. He negotiated with Century for the sale of a 2004 BMW Z4 convertible. Michael gave Century a bottom line price of \$32,000, which Century initially re-

jected, but ultimately accepted. On the day of sale, Century presented a packet of documents Michael and Christine were to sign. Within the packet was a document titled “**ARBITRATION AGREEMENT.**” The arbitration agreement provided that any dispute between the parties would be subject to arbitration¹ and that the agreement was governed by the Federal Arbitration Act (FAA). The agreement further provided that the parties were waiving their right to bring or participate in a class action suit.

The Wattses brought a class action suit against Century and numerous other car dealerships in South Carolina, alleging the dealers charged an illegal administrative fee in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (“Dealers Act”). S.C.Code Ann. § 56-15-10 *et seq.* (2005). Century filed a motion to compel arbitration pursuant to the terms of the agreement. Relying heavily on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the trial court found the arbitration agreement was unconscionable because there was an absence of a meaningful choice and the agreement contained oppressive and one-sided terms. Accordingly, the trial court found the arbitration agreement was unenforceable and denied Century’s motion to compel.

II.

A.

Arbitration

The question of arbitrability of a claim is an issue for the courts. *Partain v. Upstate Automotive Group*, 386

¹ The Wattses have never contended that this dispute is not within the scope of the arbitration agreement.

S.C. 488, 689 S.E.2d 602 (2010) (Shearouse Adv. Sh. No. 6 at 28). The determination of whether a claim is subject to arbitration is subject to de novo review, but a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

At the outset, we recognize that there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). At the same time, general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996)). To this end, if a court as a matter of law finds any clause of a contract involving the sale of goods to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

B.

Adhesion Contract

The Wattses and Century dispute whether this contract is an adhesion contract. Century argues the transaction was thoroughly negotiated and the sale was not conditioned upon the Wattses agreeing to sign the arbitration agreement. The Wattses, on the other hand, argue there is evidence to support the trial court's finding that this was an adhesion contract, including the fact that this was a standard form contract. It appears that one customer (and certainly no more than a few customers) out of approximately six thousand failed to sign the arbitration agreement.

We agree with the trial court that this is an adhesion contract. This was a contract on a standard form, presented on a take-it-or-leave-it basis. The Wattses did not contribute to the drafting of the contract or possess the bargaining power to negotiate the terms of the contract.² See *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, although this Court has approached adhesion contracts between a consumer and automobile retailer with “considerable skepticism,” adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. Finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902.

C.

Unconscionability

In South Carolina, unconscionability is defined 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. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

1. *Absence of Meaningful Choice*

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *Id.* at 25, 644

² Although the Wattses negotiated the *price of the car*, they did not have the power to negotiate the *terms of the contract*

S.E.2d at 669. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

We are firmly convinced and find the Wattses had a meaningful choice in signing the contract. We recognize that this was a contract for the sale of a vehicle Christine Watts planned to use as her primary means of transportation, "which is critically important in modern day society." *Id.* at 27, 644 S.E.2d at 670. We also recognize that there was an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and a commercial entity.³ However, the arbitration agreement is a separate, one-page document which both Michael and Christine Watts signed. It is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font. The important terms and provisions of the agreement appear in the body of the contract and again in capital letters just above the signature line.

The Wattses both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions. Our jurisprudence forbids us to allow the Wattses to invalidate the enforceability of the arbitration agreement by claim-

³ Contrary to Century's assertion, we find no significance in the fact that this was a luxury vehicle or that Christine Watts was "highly-educated." These factors do not change the "consumer/business nature" of the transaction.

ing they did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)) (“A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.”).

This arbitration agreement and the actions of Century surrounding the transaction are markedly different from the actual agreement as well as surrounding circumstances in *Simpson*. The *Simpson* arbitration agreement was inconspicuously buried in the sales contract, on the opposite page from the customer’s signature, in paragraph “10” of sixteen other paragraphs. Additionally, the *Simpson* customer alleged the contract was “hastily” presented for her signature.

The significant features that impacted the unconscionability determination in *Simpson* are not present here. We hold the Wattses had a meaningful choice in making the decision to enter into this contract with Century.

2. *Oppressive One-Sided Terms*

First, we will address the provisions in the arbitration agreement, save for the provision prohibiting a customer from bringing a class action suit against Century.

Under the agreement, all claims must be brought within the applicable statute of limitations, the arbitrator shall be an attorney or retired judge, and each party is responsible for his or her own attorney’s fees. Additional terms include: no arbitration is required if the claim is brought in small claims court; the arbitration shall be conducted, at the customer’s option, in the federal district in which the customer resides or in which the vehicle was purchased; the arbitrator shall apply governing local, state or federal laws and award damages or other relief allowed by such governing laws; if the customer

initiates a claim, Century will pay the portion of the filing fee which exceeds the court filing fee; if Century initiates the claim, it will pay the entire filing fee; Century will pay up to \$1,500 of the arbitrator's fees; and parties shall equally share fees in excess of \$1,500.

In our view, these terms are neither oppressive nor one-sided. Moreover, nothing in the agreement prevents the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the agreement limit any available statutory remedies. Several provisions favor the customer, such as allowing the customer a choice of venue and Century's obligation to pay certain fees. Moreover, both the customer and Century are subject to the same terms in the arbitration agreement, thus there is no lack of mutuality of remedy. *See Simpson*, 373 S.C. at 32, 644 S.E.2d at 672 (adhering to previous holdings in that lack of mutuality of remedy will not invalidate an arbitration agreement, but finding the provision dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies was one-sided and oppressive).

These terms stand in sharp contrast to the terms present in *Simpson*. In *Simpson*, the arbitration provision required the customer to waive her right to mandatory statutory remedies, including the right to punitive damages and double and treble compensatory damages. There was a lack of mutuality of remedies, as the customer was forced to arbitrate all claims she may have had against the dealer, while the dealer reserved its right to judicial remedies in certain circumstances. Further, the scope of the arbitration agreement in *Simpson* was so broad it included non-arbitratable disputes.⁴

⁴ The Court found the scope of the arbitration agreement was broad enough to implicate claims arising under the Magnuson-Moss

3. *Ban on Class Actions*

Finding the terms in the arbitration agreement not to be oppressive or one-sided, we next turn to the provision banning class action suits. This provision provides: “By entering into this Agreement the Parties are waiving their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration.” The Wattses argue this provision is unenforceable because it is oppressive in that it takes away statutory rights, and it is one-sided in that Century would not bring a class action suit against its customers. While we agree with the Wattses that the provision is unenforceable, we hold the ban on class actions is unenforceable on public policy grounds.

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Warranty Act (MMWA), a federal statute that governs warranties on consumer products. The Court noted that federal regulations state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703.5(j) (2006). Accordingly, the Court held “the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy.” *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673.

Section 56-15-110(2). The Dealers Act further provides: “Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.” Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State’s public policy and is void and unenforceable. We note that courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit. *See Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007) (highlighting the split in authority with a list of nationwide cases finding class action waivers enforceable and unenforceable). We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

4. Severance

Finding this provision unenforceable would normally not end the inquiry on the enforceability of the remainder of the contract, as courts will attempt to sever an illegal provision in an otherwise valid contract and enforce

the remaining terms.⁵ The parties' arbitration agreement provides that "[i]f any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable."

Nevertheless, counsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Century unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole. Obviously, the Wattses seek to avoid the arbitration agreement and proceed in court. We will not provide a remedy that neither party seeks. We treat the issue of severability as abandoned. Therefore, we decline to enforce the arbitration agreement and affirm in result the trial court's denial of Century's motion to compel arbitration.

III.

We hold, except for the provision prohibiting customers from bringing class actions, the arbitration agreement is not unconscionable, for the Wattses had a meaningful choice in entering this agreement and the agreement does not contain oppressive or one-sided terms. The arbitration agreement is enforceable except for the ban on class actions, which, under ordinary circumstances, would be severed. However, Century has abandoned its right to severance and seeks to litigate this matter in court if the ban on class actions is unenfor-

⁵ A severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent. *Columbia Architectural Group, Inc v Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980). Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co v. Twillman, Ltd*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002).

ceable. Accordingly, we affirm in result the trial court's order denying the motion to compel arbitration.

AFFIRMED IN RESULT.

APPENDIX C

SUPREME COURT OF SOUTH CAROLINA

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHO PAID
“ADMINISTRATIVE FEES” AS DESCRIBED BE-
LOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE;
DICK DYER & ASSOCIATES, INC.; GALEANA
CHRYSLER PLYMOUTH, INC., A/K/A GALEANA
CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP
A/K/A HENDRICK HONDA; OVERLAND, INC.,
D/B/A LAND ROVER OF COLUMBIA; TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS, AND
TOYOTA OF GREENVILLE, INC. ET AL., Defen-
dants,
of whom CENTURY BMW A/K/A SONIC AUTOMO-
TIVE, Appellant.

June 9, 2010

ORDER

Before TOAL, Chief Justice; BEATTY, HEARN,
and KITTREDGE, Justices; and MOORE, Acting Jus-
tice.

On April 19, 2010, we issued our opinion in *Herron v. Century BMW*, Shearouse Adv. Sh. No. 15 at 14 (April 19, 2010), in which we affirmed the trial court's denial of Century's motion to compel arbitration. Although we found the arbitration agreement was not unconscionable, we held the provision banning class actions was invalid on state law grounds.

Specifically, we held:

[T]he Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.

Although the arbitration agreement contained a severance clause, at oral argument, counsel for Century adamantly insisted it was their position that the severance clause not be invoked to sever the provision and repeatedly requested the Court to consider the arbitration as a whole. In honoring Century's position and request, we held the inclusion of the provision banning class action suits rendered the arbitration agreement unenforceable.

Eight days after we issued our opinion, the United States Supreme Court issued *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), in which the Supreme Court held a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Century has now filed a petition for rehearing. Century asserts "[t]his Court held that Century BMW could not arbitrate unless it did so as part of a class arbitration," and

argues such a holding is contrary to the holding in *Stolt-Nielsen*.

We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State. Although we would have looked to the severance clause of the agreement to sever this invalid provision, Century unequivocally insisted we consider the arbitration agreement as a whole, which we did. Century's attempt to depict our opinion as holding "that Century BMW could not arbitrate unless it did so as part of a class arbitration" is disingenuous to the opinion and a holding we never made. We did not condition the enforcement of the arbitration agreement on the availability of class arbitration or otherwise indicate the plaintiffs could proceed as a class in arbitration. This case is not controlled by *Stolt-Nielsen*, for is distinguishable on the law and the facts.

For these reasons, we deny Century's petition for rehearing.

IT IS SO ORDERED.

APPENDIX D

**IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN**

No. 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG,
MICHAEL RITZ, JULIE FREEMAN, CHRISTINE
WATTS, ALISON DANNERT, MICHAEL BLEASE,
MICHAEL WATTS, INDIVIDUALLY AND FOR
THE BENEFIT OF ALL CAR BUYERS WHOM
PAID "ADMINISTRATIVE FEES" AS DESCRIBED
BELOW TO DEFENDANTS, Plaintiffs,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE;
DICK DYER & ASSOCIATES, INC.; GALEANA
CHRYSLER PLYMOUTH, INC. A/K/A GAJEANA
CHRYSLER JEEP, INC.; T.L.H. INVESTMENTS,
LP A/K/A HENDRICKS HONDA; OVERLAND, INC.
D/B/A LAND ROVER OF COLUMBIA; TAYLOR
TOYOTA A/K/A TAYLOR INVESTMENTS; AND
TOYOTA OF GREENVILLE, INC., ET. AL., Defen-
dants.

March 10, 2008

ORDER DENYING MOTION TO COMPEL ARBITRATION

EARLY, Circuit Court Judge.

This matter comes before the Court by way of Century BMW a/k/a Sonic Automotive's ("Century BMW's") Motion to Compel Arbitration. This motion was argued before me on November 30, 2007. After considering the parties' filings, as well as the memoranda and legal arguments of counsel, I have determined that the Motion to Compel Arbitration should be denied.

FACTUAL BACKGROUND

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old college student, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW. The vehicle was a graduation present for Ms. Watts. The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work.

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms. Watts and her father into a cubicle to sign paperwork. Christine Watts in her affidavit stated that the documents were "hastily presented." Century BMW refers to this process as "rolling out the paper."

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign. Century BMW's General Manager testified that it was the F&I manager's custom to place his finger on the individual documents pointing to the place on the documents that needed to be signed and say "sign here."

The Wattses signed multiple documents. Some of the documents were required to be signed by law.

The arbitration agreement at issue was one of the documents included in the packet. This arbitration

agreement is a form contract drafted by Century BMW. The arbitration agreement uses a small font.

The Wattses say there was no discussion with the F&I manager about the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." The Wattses also testified that believed that they were required to sign all of the documents in order to get the car.

On October 31, 2006, Plaintiff Watts initiated the current action against Defendant Century BMW. In the Amended Complaint, Plaintiff Watts alleged causes of action for a declaratory judgment, civil conspiracy, and violation of the Motor Vehicle Dealers Act. On December 29, 2006, Defendant Century BMW filed a motion to compel arbitration.

ANALYSIS

The Plaintiff and Defendant agree that *Simpson v. MSA of Myrtle Beach Inc.*, 644 S.E.2d 663 (S.C. 2007) is the controlling authority for this motion. The *Simpson* Court held that a car dealer's attempt in a form contract to prevent a consumer from prosecuting statutory rights in arbitration was unconscionable and unenforceable. *Simpson*, 644 S.E.2d at 668-671. Application of the *Simpson* test here shows that the Century BMW arbitration agreement is also unconscionable and unenforceable.

A. The Century BMW Arbitration is an Adhesion Contract.

The Century BMW arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 644 S.E.2d at

669. Adhesion contracts "are standard in the automobile retail industry." *Id.*

The arbitration agreement here is a standard form contract drafted by Century BMW. The contract has only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership. Plaintiff Watts did not participate in the drafting of the agreement and had no voice in the formulation of its terms.

Century BMW presents the arbitration agreement on a take-it-or-leave-it basis. Century BMW's procedures and method of presentation lead to the conclusion that the arbitration agreement must be signed to purchase the car. Century BMW's General Manager stated that the F&I Manager's "practice" was to present the individual documents and point to on the paper to where the customer was supposed to sign and say "sign here." Century BMW had no standard statements to tell purchasers. This practice indicates that signing the document is required in order to purchase a car. This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who ever bought a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer in this case.

The agreement is a standard form contract. Century BMW's procedures and the Watts's testimony¹ show that

¹ The Wattses' testimony is the only testimony about the events surrounding the execution of the agreement. The Wattses testified they believed they were required to sign the agreement in order to get the car. Century BMW was unable to produce any witness whom remembered the transaction

the terms of the arbitration agreement were not negotiable. Accordingly, I find that the arbitration agreement is an adhesion contract. Because the Century BMW arbitration agreement is an adhesion contract, the Century BMW arbitration agreement should be viewed with “considerable skepticism.” *Simpson*, 644 S.E.2d at 670 (adopting rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating “We . . . proceed to analyze this contract between a consumer and automobile retailer with ‘considerable skepticism’.”).

B. Absence of Meaningful Choice.

I also find that there was an absence of meaningful choice in agreeing to arbitrate and waive the statutory right to participate in a multi-plaintiff action. The *Simpson* case describes absence of meaningful choice as follows:

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was “tainted by an absence of meaningful choice,” courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties’ bargaining power; the parties’ relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach Inc., 644 S.E.2d 663 (internal citation omitted).

Because an automobile is a “necessity” in everyday life, the *Simpson* Court found this factor should be con-

sidered in determining “whether a consumer had a meaningful choice in negotiating the arbitration agreement.” *Simpson*, 644 S.E.2d at 669.

Applying this analysis, the *Simpson* Court provided as follow:

[T]he contract between Simpson and Addy involved a vehicle intended for use as Simpson’s primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson’s claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party’s status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note that Simpson’s allegation that the contract was “hastily” presented for her signature.

Simpson, 644 S.E.2d at 670. The facts here support a finding of an absence of meaningful choice by the Plaintiffs.

There was a clear disparity in the parties’ bargaining power and the relative sophistication between the parties. Century BMW argues that Ms. Watts is sophisticated because in 2008 she works as an auditor. However, in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston. Michael Watts sold garage doors. The Wattses did not have any attorney present when they signed the agreement. The Plain-

tiffs were not sophisticated and obviously not substantial business concerns.

Century BMW, on the other hand, is owned by Sonic Automotive, Inc., a large corporation that owns dozens of cars dealerships. Sonic Automotive, Inc. drafted the arbitration agreement and had engaged in thousands of transactions where arbitration clauses were used. Sonic was a sophisticated car dealer with years of arbitration clause use. I find that there was a disparity of bargaining power between the parties.

Additionally, there was unfairness in the bargaining process. Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I Manager point on each document (whether required to be signed by law or not) and say sign here. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law was not mandatory. This procedure indicates that signing all of the documents is mandatory and is indicative of unfairness in the bargaining process. *Simpson*, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

The Watts stated that there was no discussion of the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." This statement, if given by Century BMW, is sorely lacking because the arbitration agreement in actuality takes away remedies and statutory rights. The lack of a Cen-

tury BMW full explanation is further evidence showing the fundamental unfairness of the bargaining process.

There was also an element of surprise involved in the inclusion of the arbitration agreement because none of the signatories of the arbitration agreement (the Wattses nor the F&I manager) understood what they were signing. Neither of the Wattses had ever participated in an arbitration nor had any understanding of arbitration. Similarly, Century BMW's General Manager and F&I manager did not have much understanding of the arbitration agreement nor how it worked.

Century BMW's argument that the bargaining process was fair because the Wattses could have read the arbitration agreement is non-availing. The Plaintiff in *Simpson* also could have read the arbitration agreement at issue in that case. Additionally, even if the Wattses had read the arbitration agreement, the bargaining process was unfair because the arbitration agreement was not easily understandable.

Century BMW's Rule 30(b)(6) representative as the person most knowledgeable on the arbitration agreement testified that he did not have much understanding of how the arbitration agreement worked. Century BMW's General Manager has thirty-two years worth of experience in the car industry, has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not have much understanding of the agreement. It is unfair to expect the Wattses to understand the agreement, when in a little cubicle with the F&I Manager with his finger on the document pointing to the place to sign.

I also find that use of the car was a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary

source of transportation and was purchased so that she could get back and forth from work. Century BMW argues that the vehicle was not necessity because Christine Watts previously owned a Mitsubishi Montero. The fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. The plaintiff in *Simpson*, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. *Simpson*, 644 S.E.2d at 663. The car purchased by Ms. Watts, like the car purchased in *Simpson*, was purchased to be her primary source of transportation. As such, I find that the use of the car was a necessity.

In the end, I find that the facts in this case are similar to those in *Simpson*. These facts, just as they did in *Simpson*, warrant a finding that Plaintiff Watts had an absence of meaningful choice when she entered into the arbitration agreement.²

C. One-Sided and Oppressive Terms.

The Century BMW arbitration agreement contains oppressive and one-sided terms. In analyzing this factor, the *Simpson* Court stated:

The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 631 S.C. at 555, 606 S.E.2d at

² In addition to *Simpson*, the North Carolina Supreme Court's decision in *Tillman v Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) also supports a finding that the arbitration agreement here is unenforceable.

758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 644 S.E.2d at 671 (citing the “strong public policy notions behind the enactment of the . . . Dealers Act.”). The *Simpson* case reasoning is equally applicable here.

One-Sided Terms

The prohibition of multi-plaintiff and class action in the Century BMW arbitration agreement is one-sided. Although styled as a mutual prohibition on representative class actions, it is difficult to envision the circumstances on which the provision might negatively impact Century BMW, because car dealers typically do not sue their customers in class action lawsuits. Such a one-sided contract is unconscionable. See *Kinkel v. Cingular Wireless, LLC*, 828 N.E.2d 812, 820-821 (Ill. App. 5 Dist. 2005) (“cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular’s provision barring class arbitration is a one-sided limitation on its customers’ ability to seek relief . . . such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconsciona-

ble.”). *See also Szetela v. Discover Bank*, 97 Cal.App. 4th 1094 (2002)(Holding a similar clause unconscionable and one-sided because “credit card companies typically do not sue their customers in class action lawsuits.”). Clearly, the Century BMW arbitration agreement contains one-sided terms.

Oppressive Terms

The arbitration agreement contains oppressive terms that violate public policy and statutory law. The Century BMW arbitration agreement here, like the arbitration agreement in *Simpson*, attempts to take away Plaintiff Watts’s statutory rights. The Dealers Act provides substantive rights to those harmed by violations. S.C. Code Ann. §56-15-110(2) provides:

- (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole. Including actions for injunctive relief.

S.C. Code Ann. §56-15-110(2) provides statutory rights to plaintiffs including the right to bring a claim on behalf of a group and injunctive relief on behalf of a group. The statute was “[o]bviously enacted . . . because consumers’ remedies at common law were deemed inadequate.” *See Kucharski v. Rick Hendrick Chevrolet, LP*, 2002 WL 313860990 (S.C. Ct. App. 2002). As stated by the Supreme Court in *Simpson*, the purpose behind the Dealers Act is to “punish[] acts that adversely affect the public interest.” *Simpson*, 644 S.E.2d at 671.

The Century BMW arbitration agreement’s attempted prohibition of group suits prevents Plaintiff Christine Watts from effectively vindicating her statuto-

ry rights in arbitration. The right to bring a claim on behalf of a group under S.C. Code Ann. §56-15-110(2) is significant. This protection is necessary because otherwise parties with nominal individual claims, but significant collective claims, would be left with limited avenues for relief and a wrongdoer car dealer with little checks on its abuses of law. S.C. Code Ann. §56-15-110 makes it economical for a car purchaser who has been harmed by violation of the statute to bring claims against a car dealer. Century BMW's attempt to take this right away is violative public policy.

Similarly, Plaintiff Christine Watts's statutory right, as one harmed Plaintiff, to seek *group injunctive relief*, when an action is of common or general interest to many persons, cannot be effectively vindicated under the Century BMW arbitration Agreement. S.C. Code Ann. §56-15-110(2) is designed so that one person can stop a car dealers from perpetrating wrongdoing against many car purchasers. This right to group injunctive relief was given by the General Assembly to prevent car dealerships from perpetrating mass wrongdoing on the public. This is a significant right that cannot be vindicated in the Century BMW arbitration agreement.

Courts in other jurisdictions have found similar provisions unconscionable and unenforceable. *See Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008); *Cooper v. OC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1290 (D. Ariz. 2007); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. 2004) (concluding provision preventing right to proceed through a class action or as a private attorney general were both against public policy and the underlying purpose of the Consumer Sales Practices Act and thus were unenforceable). *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000) (arbitration clause in-

volving the sale of automobiles providing for waiver by buyer's or right to proceed by way of a class action was substantially unreasonable and unconscionable); *State Ex Rel. Dunlap v. Berger*, 567 S.E.2d 570, 576 (Fla. Dist. Ct. App. 1998).

The South Carolina Supreme Court has stated that it will not enforce this type of arbitration clause. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract." *Bazzle v. Green Tree Financial Com.*, 569 S.E.2d 349, 361 (S.C. 2002) (*rev'd on other grounds*). Such clauses are unconscionable because they insulate Defendants from significant exposure brought about when otherwise small claims are grouped together.

The class action and representative capacity suit prohibitions in the Century BMW arbitration agreement are contrary to the "strong public policy reasons" behind the enactment of the Dealers Act and contrary to the Dealers Act's purpose of "punishing acts that adversely affect the public's interest." *Simpson*, 644 S.E.2d at 671. I, therefore, find that the terms of the arbitration agreement are oppressive and violative of public policy and statutory law.

CONCLUSION

Like the arbitration agreement at issue in *Simpson*, there was an absence of meaningful choice by the Wattses in entering into the Century BMW arbitration agreement. Additionally, the Century BMW arbitration agreement's attempt to take away statutory rights under the Motor Vehicle Dealers Act are one-sided and violative of statutory law. I therefore find that the Century BMW arbitration agreement is unconscionable and unenforceable.

Based upon the foregoing, the Motion to Compel Arbitration filed by Century BMW is denied.
AND IT IS SO ORDERED.

IN THE
Supreme Court of the United States

SONIC AUTOMOTIVE, INC., 2752 LAURENS RD.,
GREENVILLE, D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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IN THE
Supreme Court of the United States

No. 11-1151

SONIC AUTOMOTIVE, INC., 2752 LAURENS RD.,
GREENVILLE, D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.,
Respondent.

**On Petition for a Writ of Certiorari to the
Supreme Court of South Carolina**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

Respondent respectfully submits that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in this case should be denied.

OPINIONS BELOW

The opinions below are as set forth by Petitioner.

JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a) and *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) as contended by Petitioner because:

1. The South Carolina Supreme Court found that the issue of preemption was barred as it was not preserved under state law;
2. Even if the issue of preemption is preserved, the holding in *AT&T Mobility LLC v. Concepcion* does not extend to a substantive, unwaivable right expressly provided for by state statute.

STATUTORY PROVISIONS INVOLVED

In addition to 9 U.S.C. § 2 cited by Petitioner, also involved are the following:

S.C. Code Ann. § 56-15-40. Specific acts deemed unfair methods of competition and unfair or deceptive acts or practices; Office of Administrator; appointment of personnel; enforcement.

(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

S.C. Code Ann. § 56-15-110. Suits for damages.

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common please and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

(3) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damages not to exceed three times the actual damages.

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C. § 16)

S.C. Code Ann. § 56-15-130. Contracts in violation of chapter shall be void.

Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.

S.C. Code Ann. § 37-2-307. Notice of closing fees on motor vehicle sales contract; registration fees.

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on

the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

STATEMENT

This action was initiated on August 29, 2006. Respondent alleges that Petitioner was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et seq.* and did engage in one or more of the following illegal acts:

- a. failed to register with the Department of Consumer Affairs;
- b. failed to individually register annually with the Department of Consumer Affairs;
- c. charged illegal “administrative fees” in excess of the amount for which it registered;
- d. failed to disclose the illegal “administrative fees” on sales contracts;
- e. charged illegal “administrative fees” in excess of their costs;
- f. failed to display the charging of illegal “administrative fees” in a conspicuous location in the dealership;
- g. advertised deceptively and illegally by failing to include the “administrative fees” in the advertised price; and
- h. created a closing procedure to illegally add “administrative fees.”

Respondent contends that the conduct of the Petitioner violates the South Carolina Dealer’s Act. (S.C. Code Ann. § 56-15-10).

Petitioner filed a motion to compel arbitration, claiming arbitration was required by an agreement under which the Respondent waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. This motion was denied by the trial court in an order dated March 10, 2008. (Pet. 27a). The order properly concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was “the controlling authority” for the motion. (Pet. 29a). Further, as reflected in the order, the motion was decided wholly on state law grounds.

On March 12, 2008, the Petitioner filed a notice of appeal to the South Carolina Court of Appeals. Once again the issues were primarily state issues. Petitioner’s only mention of the Federal Arbitration Act was in passing when Petitioner asserted that the trial court violated federal policy favoring arbitration by resolving doubt against arbitration, Pet. S.C. C.A. Brief. 11. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued its decision wherein it specifically recognized the federal policy in favor of arbitration (Pet. 4a). Of significance, the issue of federal preemption of South Carolina law was never raised by the Petitioner. The South Carolina Supreme Court held, wholly on state law grounds,¹ that the provision of the arbitration agreement relied upon by Petitioner was invalid, unenforceable, and in violation of the public policy of South Carolina,

¹ The order denying the Petition for Rehearing confirms that the South Carolina Supreme Court opinion was “wholly based on state law grounds.” (Pet. 26a)

specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act further provides: “Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.” Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our State’s public policy and is void and unenforceable. . . . We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. See *Carolina Care Plan, Inc. v. United HealthCare*

Servs., Inc., 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

(Pet. 20a-21a).

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement at issue, Petitioner filed a Petition for Rehearing pursuant to South Carolina Appellate Court Rule 221. Specifically, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. Instead, in the Petition for Rehearing, the Petitioner raised new matters including: 1) *Stolt-Nielson S.A. v. Animal Feeds Int'l*² held that the FAA precludes class arbitration; 2) The South Carolina Legislature did not intend to create a nonwaivable right to bring a class action under the Dealers Act; and 3) The causes of action for civil conspiracy and declaratory judgment did not arise under the Dealers Act and should be compelled to arbitration. By order dated June 9, 2010, the South Carolina Supreme Court denied the petition for rehearing stating:

We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State.

(Pet. 26a).

² 130 S.Ct. 1758 (2010)

On August 31, 2010, Appellant petitioned this Court for a writ of certiorari. While that petition was pending, this Court issued its decision in *AT&T Mobility, LLC v. Concepcion*, No. 09-893 593 U.S. ___, 131 S.Ct. 1740 (April 27, 2011). This Court then remanded this case to the South Carolina Supreme Court for further consideration in light of *AT&T*.

After supplemental briefing and oral argument centering on preemption, the South Carolina Supreme Court issued its opinion, dated December 19, 2011 (Pet. 1a). In its opinion, the South Carolina Supreme Court found that, as a matter of state law, preemption was not preserved in the South Carolina proceeding:

Because preemption was not raised and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as a matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted. We reinstate our original opinion and decline to revisit it.

(Pet. 11a).

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Petitioner Century BMW's Petition for Writ of Certiorari to this Court should be denied for the following reasons: 1) The issue of preemption was procedurally barred by the South Carolina Supreme Court as it was not preserved under state appellate procedure; 2) The holding in *AT&T Mobility* does not extend to a substantive, unwaivable right expressly provided for by state statute.

A. The South Carolina Supreme Court's decision, based on state law, that Petitioner's preemption argument was procedurally barred, eliminates any basis for review by this Court.

Petitioner overlooks the preemption issue and tries to argue on the merits that *AT&T* conflicts with the South Carolina Supreme Court decision. *AT&T* did not consider issue preservation in a state appeal. That case cannot save Petitioner from its failure to meet the preservation requirements in a state court appeal.

After this Court remanded the case, the South Carolina Supreme Court carefully considered whether the preemption argument had been preserved under South Carolina law and found that the issue

. . . was raised neither to the trial court nor our Court. And though the issue of preemption was raised in Appellant's rehearing petition, such an attempt was untimely and improper as a party may not raise an issue for the first time on a petition for rehearing.

(Pet. 9a). The South Carolina Supreme Court noted that they were:

mindful of the needs to approach issue preservation rules with a practical eye and not in a rigid, hyper technical manner. Yet because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules would render them meaningless.

(Pet. 10a).

Under South Carolina state law, issue preservation requires, at a minimum, that an issue be raised to

and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 497 S.E.2d 731, 733 (1998). It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* Imposing such a requirement on the appellant “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 724 (2000).

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. *Glover v. County of Charleston*, 606 S.E.2d 773 (2004) *overruled on other grounds by* *Byrd v. City of Hartsville*, 620 S.E.2d 76 (2005); *see also* *Grant v. S.C. Coastal Council*, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved); *Merriman v. Minter*, 378 S.E.2d 441 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised to the trial court).

The State of South Carolina is not alone in its issue preservation requirements. This Court has “consistently refused to decide federal constitutional issues raised [to it] for the first time on review of state court decisions.” *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *see also* *Webb v. Webb*, 451 U.S. 493 (1981) (holding where the Georgia Supreme Court failed to rule on federal issue, the United States Supreme Court was without jurisdiction in the case); *Hill v. California*, 401 U.S. 797 (1971) (refusing to reach a Fifth Amendment question when the issue was not raised, briefed, or argued at any level of state court).³

³ The fact that this Court granted certiorari in 2011 does not preclude Respondent from arguing that preemption issue is not

Moreover, this Court has stated “[w]hen the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question that is sought to be presented here.” *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (internal citations omitted).

As the South Carolina Supreme Court correctly found, “[i]n all of the submissions, memoranda, and hearings before the trial court not once was there a single mention of federal preemption as it relates to the issue before us.” (Pet. 8a). Similarly, no preemption argument was presented to the South Carolina Supreme Court until the request for rehearing: “[T]he voluminous record is [] silent as to *any* claim of preemption, until the petition for rehearing filed with this Court.” (Pet. 9a) (emphasis in original).

Petitioner apparently concedes that it did not raise the issue before the petition for rehearing but argues it raised the issue at the first possible opportunity. Petitioner argues that it could not have raised the issue until after the South Carolina Supreme Court’s April 19, 2010 opinion that the Dealers Act gave Respondent the right to a group action. (Pet. 13a). Petitioner claims that Respondent had never ad-

preserved This Court has granted certiorari based on assertions in petitions and later refused to rule on the issue because the issue had not been raised to the state court *See, e.g.,* *Cardinale v. Louisiana*, 394 U.S. 437 (1969) (Writ of certiorari granted to consider question of constitutionality of Louisiana statute requiring that confessions be admitted in their entirety was dismissed for want of jurisdiction in view of petitioner’s admitted failure to raise issue below)

vanced that argument to invalidate the arbitration waiver and that no court had made such a finding. However, the proceedings in the trial court and the South Carolina Supreme Court prove otherwise, and in fact show that rights under the Dealers Act were the focus of the case.

At the trial court level, Petitioner agreed that state authority – specifically, *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 671 (S.C. 2007) – controlled. In *Simpson*, the court stated:

The general rule is that courts will not enforce a contract which is violative of public policy, **statutory law**, or provisions of the Constitution.

Simpson at 671 (emphasis added). The *Simpson* court then held that the arbitration clause at issue:

violates statutory law because it prevents Simpson from receiving the **mandatory statutory remedies** to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.

Simpson at 671 (emphasis added). The trial court in the case at bar held that the arbitration agreement in this case, as in *Simpson*, “attempt[ed] to take away statutory rights” of Respondent Christine Watts. (Pet. 39a).

In Respondent’s brief to the South Carolina Supreme Court, in the original appeal, Respondent argued that a contract that prevented a consumer “from prosecuting statutory rights” was unenforceable. S.C.Sup.Ct.

Resp. Brief, p. 11. Respondent again cited to *Simpson*, for the proposition that the arbitration clause in that case (as in this one) prevented her from receiving her “**mandatory statutory remedies**.” S.C.Sup.Ct. Resp. Brief, p. 19 (emphasis added). Respondent expanded on that argument on pages 21-22 of her brief to the South Carolina Supreme Court, arguing that the Dealers Act provided a substantive right to bring a group action and that Petitioner’s arbitration agreement would prevent the plaintiff from exercising her substantive, statutory rights. Petitioner cannot now claim that the state law rule that the Dealers Act provided substantive rights was not argued by Respondent or expressed by a court until the South Carolina Supreme Court’s opinion of April 19, 2010. The record of the lower court proceedings as well as the appeal before the South Carolina Supreme Court clearly shows that one of the primary issues was whether the arbitration agreement could force a plaintiff to waive a substantive statutory right under the Dealers Act. Petitioner could have argued that the FAA preempted the provisions of the Dealers Act at that time, but failed to do so.

Furthermore, it is clear preemption was neither a novel nor an unknown argument to Petitioner. Petitioner cited to the FAA, 9 U.S.C. § 2, in its trial court motions for the proposition that the FAA applied to the arbitration agreement at hand. However, the Petitioner never cited section 2 of the FAA “in any fashion that can be construed as anything akin to the preemption argument” it now attempts to present. (Pet. 8a). Furthermore, Petitioner agreed, at the trial court level, that the controlling authority was one of state law – *Simpson v. MSA of Myrtle Beach, Inc*, 373 S.C. 14, 644 S.E.2d 663 (2007). The South Carolina

Supreme Court's decision resolved the matter solely on state law, just as the parties presented it.

After failing to preserve the issue of preemption, Petitioner has twice attempted to revive it before the South Carolina Supreme Court. However, as that Court held: "even under the most liberal preservation principles, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law." (Pet. 10a). Because the issue of preemption was not preserved in the state courts, there is no basis for review by this Court.

B. The South Carolina Supreme Court's decision is based on state contract and statutory law and does not conflict with this Court's holding in *AT&T Mobility*.

South Carolina applies state law to determine the interpretation of a contract formed in the State of South Carolina. *Unisun Ins. Co. v. Hertz Rental Corp.*, 436 S.E.2d 182, 184 (Ct.App.1993) ("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made.").⁴ Under state law principles, a "contract is void *ab initio* and unenforceable [if] it violates statutory law and public policy" and will not be enforced. *Berkebile v. Outen*, 426 S.E.2d 760, 762 n. 2 (1993) (recognizing that an illegal contract has always been unenforceable and that South Carolina

⁴ Even if the FAA is involved, state law governs contract formation. See, *Hill v Peoplesoft USA, Inc*, 412 F.3d 540 (4th Cir. 2005) (noting that the FAA requires and this Court directs the use of "ordinary state-law principles that govern the formation of contracts"), *Adams v Suozzi*, 433 F.3d 220, 227 (2d Cir. 2005)) "[w]hen contract formation is at issue in an FAA case, we generally apply state-law principles")

courts will not enforce a contract which is violative of public policy, statutory law or provisions of the constitution). Where a statute is enacted to protect the public, the statutory provisions become part of any contract, and override any conflicting contractual provisions. *See, e.g., Sloan Const. Co., Inc. v. Southco Grassing, Inc.*, 659 S.E.2d 158, 165 (2008) (Court recognized that the underlying goals of the Procurement Code served important public interests and held that contracts formed pursuant to the Procurement Code were deemed to incorporate the applicable statutory provisions, with the statutory provision prevailing over conflicting contract provisions); *Kay v. State Farm Mut. Auto. Ins. Co.*, 562 S.E.2d 676, 678 Ct.App.2002) (holding that uninsured motorist insurance coverage was controlled by statute and any policy “inconsistent therewith [is] void, and the relevant statutory provisions prevail as if embodied in the policy.”).

The state-law rule that this Court found to be preempted in *AT&T* is distinguishable from the substantive state law protection in this case. *AT&T* concerns the preemption of unconscionability determinations for class action waivers but did not purport to deal with the validity of a contract that conflicts with a state statutory right such as the group action in the Dealers Act. *AT&T* specifically deals with the rule in *Discover Bank v. Superior Court*, 36 Cal 4th 148, 113 P.3d 1100 (2005) and addresses whether the Federal Arbitration Act (FAA) preempted the *Discover Bank* rule “classifying most collective-arbitration waivers in consumer contracts as unconscionable.” *AT&T*, 131 S.Ct. at 1746. The *AT&T* case was about unconscionability, while this case is about the effect of a purported contractual waiver of an unwaivable right to a group action under state

law, regardless of unconscionability, which renders the contract void *ab initio* under South Carolina law.

Before the decision in *AT&T*, the court in *Discover Bank* considered a California law that instructed courts to refuse to enforce any contract found to have been unconscionable at the time it was made or to limit the application of any unconscionable clause. See Cal. Civ.Code § 1670.5(a). In *Discover Bank*, the California Supreme Court applied that statute to class-action waivers in arbitration agreements and held that a class-action waiver in an arbitration agreement constituted a deliberate scheme to cheat large numbers of consumers from relatively small amounts of money and to protect businesses from responsibility for their own fraud. Thus, the court created the *Discover Bank* rule, which held that class action waivers in consumer contracts of adhesion were unenforceable, and found that the FAA did not preempt that rule.

In *AT&T*, the holding was limited and found that, generally, states may not adopt rules of contract interpretation that undermine the “overarching purpose” of the FAA, which is to ensure enforcement of arbitration agreements. *AT&T* at 1748. In other words, the court in *AT&T* rejected the judicially created rule that class-action waivers in all consumer arbitration agreements were unconscionable. However, the court in *AT&T* did not address a representative action expressly provided for by statute, which is at the heart of this matter. Individual actions of “one plaintiff, one dealer” (as Petitioner would try to impose) would eviscerate the protections provided by the Dealers Act, which was enacted to safeguard the public as the South Carolina Supreme Court previously recognized:

. . . unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary **to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.**

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (2007) (emphasis added).

The South Carolina Supreme Court adopted the reasoning in *Simpson, supra*, and found that the arbitration agreement violated “statutory law” because it prevents Respondent from “receiving the mandatory statutory rights” provided by the South Carolina Dealers Act. (Pet. 36a). In other words, the formation of the contract was defective from its inception because it was in conflict with South Carolina statutory law. This conflict rendered the arbitration void *ab initio*. As Justice Thomas recognized in *AT&T*, an agreement to arbitration should not be enforced if a “party successfully challenges the formation of the agreement.” *AT&T*, J. Thomas concurring, 131 S.Ct. at 1753. The South Carolina Supreme Court’s ruling is based on state contract law and a substantive state statute and does not conflict with *AT&T*; thus, there is no basis for review by this Court.

Petitioner asserts that other cases decided after *AT&T* have reached similar conclusions as to the preemption.⁵ However, those cases are distinguishable from the case at bar because those cases do not

⁵ Specifically, *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. __ (2012), *Litman v. Cellco Partnership*, 655 F.3d 225 (3rd Cir. 2011), and *Fenterstock v. Education Finance Partners*, 426 Fed. Appx. 14 (2nd Cir. 2011).

involve a substantive, unwaivable right granted by a state statute. For example, in *Marmet*, the issue was whether a court-created policy that an arbitration clause in a nursing home admission agreement would not be enforced in personal injury or wrongful death cases. While that court-created policy was invalidated, that case did not address a state statutory scheme enacted to protect the public from unscrupulous car dealers.

In addition, Petitioner ignores a case almost on point with the case here. In *Brown v. Ralphs Grocery Co.*, 197 Cal.App. 4th 489 (Cal. App. 2011) *review denied*, October 19, 2011, the court held:

We also hold that the recent decision of the United States Supreme Court in *AT & T Mobility LLC v. Concepcion et ux.* (2011) __ U.S. __, 131 S.Ct. 1740 (*AT & T*), holding that California decisional law invalidating class action waivers in consumer arbitration agreements is preempted by the Federal Arbitration Act (9 U.S.C. 1 et seq. (FAA)), **does not apply to representative actions under the [Private Attorney General Act], and thus the trial court correctly ruled that the waiver of plaintiff's right to pursue a representative action under the PAGA was not enforceable under California law.**

Brown at 494. (emphasis added). In that case, the plaintiff brought both a class action and a representative action under the Private Attorney General Act, against her employers for labor violations.⁶ The court

⁶ While the court in *Brown* also found that the trial court erred in holding the class action waiver was not enforceable, the court's decision was not based on *AT&T*. Instead, the court

in that case also noted that previous case law had determined that class actions were distinct from representative PAGA actions because “class action requirements do not apply to representative actions brought under the PAGA.” *Id.* at 499.

The court in *Brown* noted that *AT&T* did not purport to deal with the possible preemption of contractual efforts to eliminate a statutory right to a representative action: “*AT&T* does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law.” *Id.* at 500. Furthermore, as the court in *Brown* recognized:

. . . a representative action has “significant institutional advantages” over a single claimant arbitration. The representative action is a means for public enforcement of the labor laws. Thus, assuming it is authorized, a single claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.

Id. at 502. The court also noted “that plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA. . . . In short, representative actions under the PAGA do not conflict with the purposes of the FAA.” *Id.* at 502. Because the *AT&T* case did not involve waivers of “statutory representative actions,” the *Brown* court

found that the plaintiff had failed to make the necessary showing (in opposing the petition to compel arbitration), as required by *Gentry v Superior Court*, 165 P.3d 556 (Cal 2007)

concluded that the FAA did not preempt state law regarding the unenforceability of a contractual waiver of the right to pursue a representative action. *Id.*

Here, the South Carolina Dealers Act, S.C. Code Anno. § 56-15-110 provides that “one or more [persons] may sue for the benefit of the whole, **including actions for injunctive relief.**” (emphasis added). This section is an extension of S.C. Code Anno. § 56-15-40 (5), which creates the Office of Administrator, within the Attorney General’s office, for the purpose of regulating the Dealers Act and grants the Administrator the power “to investigate, issue cease and desist orders **and injunctive relief. . . .**” (emphasis added). In other words, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public. Respondents brought an action on behalf of the whole, which seeks injunctive relief preventing car dealers from advertising/charging future customers with administrative fees in a manner which violates S.C. Code Ann. § 56-15-10 and S.C. Code Ann. § 37-2-307.

Because Respondents seek injunctive relief on behalf of the whole as expressly permitted under statute, they are acting as private attorneys general. In *Brown*, the court found that AT&T did not apply to a private attorney general action, which is designed to protect the public and penalize the wrongdoer. *Brown* at 502.

The South Carolina state court has already recognized that this case is being pursued as a private attorney general action:

This case is being prosecuted pursuant to a “private attorneys general” provision under the

Dealers Act. A “private attorney general suit” is a term used by courts when statutes authorize both the Attorney General’s office and private citizens, through civil actions, to enforce regulations. In this case, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public. Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Plaintiffs’ counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices.

Herron v. Century BMW, Order of Motion to Dismiss and Substitute as to Toyota of Greenville, Inc., October 12, 2009 (internal citations omitted).⁶ The lower court also recognized that an action under the Dealers Act is not the same a class action: “Class

⁶ See also, *Maracich v Spears*, __ F.3d __, 2012 WL 1111590 (4th Cir. April 4, 2012) “Despite its rejection of the argument when it was raised in the earlier motion to dismiss, the [district] court also ruled that the Lawyers’ conduct was lawful under the state action exception because their role in *Herron* was adequately analogous to that of a state attorney general.” In that case the plaintiff sued undersigned attorneys alleging violations of the Driver’s Privacy Protection Act (“DPPA”), 18 U.S.C. § 2721, in obtaining personal information pursuant to the Freedom of Information Act (“FOIA”) for use in this case. The attorneys argued that the information was also obtained for the permissible use set forth in § 2721(b)(1), the state action exception, because they were acting on behalf of the State as private attorneys general in prosecuting the *Herron* case for the benefit of the whole. The district court agreed and granted the attorneys’ motion for summary judgment, which the Fourth Circuit upheld.

certification is not a prerequisite to action to a private attorneys general suit.”⁷ *Herron* Order, p. 6. Since this case is a private attorney general action, and not a class action, *AT&T* does not apply.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 20, 2012

⁷ In *Brown*, the Court also noted that the PAGA contained no specific class certification requirements and that act did not “have the attributes of a class action that the AT&T case said conflicted with arbitration, such as class certification, notices, and opt-outs ” *Brown*, 128 Cal Rptr 3d at 863

No. 11-1151

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE,
INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

REPLY BRIEF FOR THE PETITIONER

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*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

REPLY BRIEF FOR THE PETITIONER

Nothing respondents say in their brief in opposition undermines the case for summary reversal. In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration. For the reasons stated in the petition, that determination is wholly untenable and presents no obstacle to this Court's review.

In their brief in opposition, respondents make two primary contentions: first, that the South Carolina Supreme Court's forfeiture determination was correct because respondents had previously advocated the state-law rule that the court adopted in its original opinion,

(1)

and second, that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), does not control the analysis in this case because of the allegedly distinctive nature of the state-law rule. As we will now explain, respondents are simply wrong in each particular. By belatedly invoking forfeiture in response to the remand for further consideration in light of *AT&T Mobility*, the South Carolina Supreme Court has thumbed its nose at this Court. The Court should grant the petition and summarily reverse the judgment below.

1. In its original opinion, the South Carolina Supreme Court held that the waiver of class arbitration in the arbitration agreement was inconsistent with South Carolina public policy as embodied in the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). Pet. App. 20a-21a. Respondents seemingly concede that, if petitioner is correct that the South Carolina Supreme Court adopted that state-law rule *sua sponte*, petitioner would adequately have preserved its argument that the rule was preempted by raising the argument for the first time in its petition for rehearing.

Respondents instead contend that, in her brief before the South Carolina Supreme Court, Christine Watts *did* advocate the state-law rule that the waiver of class arbitration was inconsistent with the Dealers Act—with the implication that, because petitioner did not argue preemption in reply, the argument was properly held to be forfeited. See Br. in Opp. 12-13 (citing Resp. S.C. S. Ct. Br. 11, 19, 21-22). But to the extent Ms. Watts cited the Dealers Act in her brief, she did so not in support of any argument that the Dealers Act itself invalidated the waiver of class arbitration, but instead merely in aid of the discrete (and more ambitious) argument that the arbitration agreement *as a whole* was unconscionable as a

matter of state law. See, *e.g.*, Resp. S.C. S. Ct. Br. 19-25 (section headed “[Petitioner’s] Arbitration Agreement Contains One-Sided and Oppressive Terms”).¹ Critically, in rejecting the unconscionability argument but then adopting the Dealers Act argument, the South Carolina Supreme Court itself acknowledged that the latter argument was one that Ms. Watts had not made. See Pet. App. 20a.

In their brief in opposition, respondents explicitly concede that the two arguments are discrete. See, *e.g.*, Br. in Opp. 15-16 (contending, in arguing that *AT&T Mobility* is not controlling, that “[t]he *AT&T* case was about unconscionability, while this case is about the effect of a purported contractual waiver of an unwaivable right to a group action under state law, *regardless of unconscionability*” (emphasis added)). And they implicitly concede that this case had been litigated solely on the issue of unconscionability when they repeatedly cite the trial court’s observation that the parties had agreed that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C.), cert. denied, 552 U.S. 990 (2007), was the “controlling authority” on petitioner’s motion to compel arbitration. See, *e.g.*, Br. in Opp. 5, 12, 13 (citing Pet. App. 29a). Although that case (like this one) involved Dealers Act claims, the South Carolina Supreme Court’s decision in *Simpson* addressed only the question of unconscionability. See, *e.g.*, 644 S.E.2d at 669 (noting that “we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive,

¹ Should the Court have any lingering doubt as to whether Ms. Watts advanced the argument that the Dealers Act itself invalidated the waiver of class arbitration, it should call for the record and examine the pleadings itself.

one-sided terms”).² The trial court in this case agreed with Ms. Watts that the arbitration agreement as a whole was unconscionable on the grounds cited in *Simpson*, see Pet. App. 27a-40a, and Ms. Watts’s brief to the South Carolina Supreme Court was devoted to a defense of the trial court’s reasoning, see Resp. S.C. S. Ct. Br. 11-30. There can therefore be no doubt that Ms. Watts did not advance the discrete argument that the Dealers Act invalidated the waiver of class arbitration.

Respondents do not dispute that petitioner vigorously argued in its petition for rehearing that the South Carolina Supreme Court’s novel state-law rule was preempted. See, e.g., S.C. S. Ct. Pet. for Reh’g 3 (arguing that “[t]he FAA clearly preempts South Carolina law, as this Court construed it”).³ Nor do respondents offer any explanation for the fact that, in response to the petition for rehearing, the South Carolina Supreme Court considered and rejected petitioner’s preemption argument on the merits—a telling sign that the court’s subsequent determination that the argument was for-

² To be sure, in determining whether the arbitration clause at issue contained “oppressive, one-sided terms,” the South Carolina Supreme Court took into consideration whether the clause limited the remedies available on the underlying claims. See *Simpson*, 644 S.E.2d at 670-671. It was in that context that the court stated that the clause, which barred an arbitrator from awarding punitive damages, “violates statutory law because it prevents [the plaintiff] from receiving the mandatory statutory remedies to which she may be entitled in her underlying * * * Dealers Act claims.” *Id.* at 671. That is a far cry, however, from suggesting that the Dealers Act *itself* invalidates a waiver of class arbitration.

³ Throughout the litigation, moreover, petitioner repeatedly made the more generalized argument that it would violate the strong federal policy embodied in the FAA to invalidate provisions of the arbitration agreement on *any* ground. See Pet. 16-17

feited was nothing more than a thinly disguised effort to “thwart review in this Court.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958). Because petitioner raised its preemption argument at the first available opportunity, there is no valid justification for the South Carolina Supreme Court’s subsequent forfeiture determination—a determination that unjustly deprived petitioner of a “reasonable opportunity” to assert its federal rights. *Lee v. Kemna*, 534 U.S. 362, 392 (2002) (Kennedy, J., dissenting) (quoting 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4027, at 392 (2d ed. 1996)).

2. Once the South Carolina Supreme Court’s forfeiture determination is set aside, it is clear that the FAA preempts the state-law rule that the court adopted in its original opinion. In *AT&T Mobility*, this Court held that a state-law rule that conditioned the enforcement of an arbitration agreement on the availability of class arbitration “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” 131 S. Ct. at 1748.

The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case. To be sure, the rule at issue here, unlike the rule in *AT&T Mobility*, applies only to claims involving a particular subject: *i.e.*, claims brought under the Dealers Act. In *AT&T Mobility* itself, however, the Court stressed that the FAA preempts a state-law rule whenever it “prohibits outright the arbitration of a particular type of claim.” 131 S. Ct. at 1747. And in its recent decision ordering summary reversal in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the Court applied that principle and held that a state-law rule that was seemingly applicable only to claims involving negli-

gence at nursing homes was preempted under the reasoning of *AT&T Mobility*. See *id.* at 1203-1204.

Respondents suggest two additional ways of distinguishing *AT&T Mobility*, but neither is persuasive. Respondents first note that the state-law rule invalidated in *AT&T Mobility* was a “judicially created rule,” whereas the state-law rule at issue here is rooted in the Dealers Act, a “substantive state statute.” See Br. in Opp. 14-17. But that is the epitome of a distinction without a difference, because the holding of *AT&T Mobility* was no more limited to common-law rules than it was to cellular-telephone contracts. The Court has repeatedly held that, consistent with ordinary preemption principles, the FAA preempts state statutes as well as common-law rules; in so doing, the Court has made clear that the FAA’s policy favoring arbitration overrides “state legislative attempts to undercut the enforceability of arbitration agreements.” *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); see, e.g., *Preston v. Ferrer*, 552 U.S. 346, 363 (2008); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

In the alternative, respondents contend that *AT&T Mobility* is distinguishable because this case is a “private attorney general action” rather than a class action. See Br. in Opp. 17-22. As a preliminary matter, this case is a garden-variety class action in which respondents are seeking the usual litany of remedies that would flow to class members, including actual, compensatory, and punitive damages and disgorgement of the “administrative fees” being challenged. See S.C. C.A. App. 146. Accordingly, in its original opinion, the South Carolina Su-

preme Court accurately described this case as “a class action suit against [petitioner].” Pet. App. 13a.⁴

Even if respondents were correct to label this case a “private attorney general action,” however, the outcome of the preemption analysis under *AT&T Mobility* would be the same. *AT&T Mobility* stands for the proposition that, whatever the public-policy justification for a state-law rule invalidating waivers of class arbitration, such a rule “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” 131 S. Ct. at 1748. Even if South Carolina had expressly denominated all or some actions under the Dealers Act as “private attorney general actions,” therefore, it would be unable to escape preemption under the *AT&T Mobility* principle.

Finally, although it is ultimately irrelevant to the preemption analysis, it bears emphasizing that this is not a situation in which a State has specifically provided that the right to proceed on a classwide basis on a particular type of claim is non-waivable. In the relevant provision of the Dealers Act, South Carolina merely authorized Dealers Act claims to be brought as class actions. See

⁴ Because respondents are seeking the full panoply of class-action remedies under the Dealers Act, their claims critically differ from claims brought under the California Private Attorneys General Act—the statute at issue in *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), cert. denied, No. 11-880 (Apr. 16, 2012). The purpose of the California statute is “not to recover damages or restitution”; to the extent the statute provides for civil penalties, most of those penalties flow to the State. See *id.* at 862. Notably, since the intermediate-state-court decision in *Brown*, the Ninth Circuit has held that, in light of *AT&T Mobility*, “[t]he FAA preempts California’s * * * rule that claims for public injunctive relief cannot be arbitrated.” *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 965 (9th Cir. 2012).

S.C. Code Ann. § 56-15-110(2) (2006). The South Carolina Supreme Court nevertheless cited that run-of-the-mill provision in concluding that, as a matter of “public policy,” plaintiffs have a *non-waivable* right to proceed on a classwide basis on Dealers Act claims. See Pet. App. 21a.

If the South Carolina Supreme Court’s decision adopting that state-law rule is allowed to stand, it will serve as a template for lower courts that wish to evade the rule of *AT&T Mobility*. And if the South Carolina Supreme Court’s subsequent decision on remand is left undisturbed, it will signal to lower courts that this Court will permit such evasion to go uncorrected. This is therefore the rare case in which summary reversal is warranted.

* * * * *

The petition for a writ of certiorari should be granted and the judgment of the South Carolina Supreme Court summarily reversed.

Respectfully submitted.

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APRIL 2012

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Heather Herron et al

☐ Plaintiff

v.

Dick Dyer & Associates Et Al - In Re Century BMW

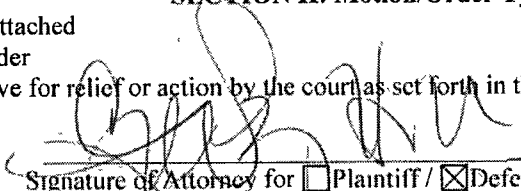
☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO

2006-CP-02-1230

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: _____, Bar No. Address: phone: _____ fax: _____ e-mail: _____ other: _____	Defendant's Attorney: Steven W. Hamm /C Joanne Wessinger Hill, Bar No. 2634/15,025 Address: PO Drawer 7788, Columbia, SC 29202 phone: 803 771 4400 fax: 803 779 0016 e-mail: shamm@rprclaw.com/jwessingerhill @rprclaw.com other: _____
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information Nature of Motion. CENTURY BMW'S MOTION FOR JUDGMENT ON THE PLEADINGS FOR FAILURE TO JOIN AN INDISPENSABLE PARTY OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION AND SUPPORTING MEMORANDUM Estimated Time Needed. 60 minutes Court Reporter Needed: ☒ YES / ☐ NO	
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☒ Defendant May 14, 2012 Date submitted	
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ EXEMPT (check reason): ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter _____ ☐ Other: _____	
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other.	JUDGE _____ CODE _____ Date: _____
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____	

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE. _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	C.A. No.: 06 CP 02-1230
Heather Herron, et al.,	)	
	)	CENTURY BMW'S MOTION FOR
Plaintiffs,	)	JUDGMENT ON THE PLEADINGS
	)	FOR FAILURE TO JOIN AN
vs.	)	INDISPENSABLE PARTY
	)	OR, IN THE ALTERNATIVE, TO
Dick Dyer & Associates, Inc., et al.,	)	COMPEL ARBITRATION
	)	
Defendants.	)	
	)	

PLEASE TAKE NOTICE that Defendant Sonic Automotive 2752 Laurens Rd., Greenville, Inc. ("Century BMW") will move before the presiding judge of the Court of Common Pleas for the Second Judicial Circuit within ten (10) days from the service of this motion, or as soon thereafter as counsel may be heard, for judgment on the pleadings and to compel arbitration, pursuant to Rules 12(b)(7), 12(c), 12(h), and 19, SCRCF; the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq.; and the South Carolina Uniform Arbitration Act, S.C. Code Ann § 15-48-10, *et seq.*

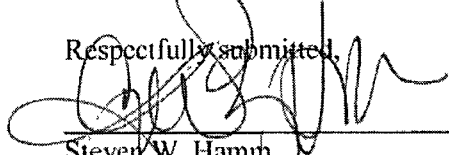
Century BMW hereby moves as follows:

1. Pursuant to Rules 12(b)(7), 12(c), 12(h), and 19, SCRCF, Century BMW moves for judgment on the pleadings as to Christine Watts' claims because she has failed to join Michael Watts, her father, who co-purchased the car and is a necessary and indispensable party. The Court dismissed Mr. Watts from this lawsuit because he did not want to be a plaintiff. Century BMW thus requests that the Court also dismiss Ms. Watts' claims.

2. In the alternative, Century BMW moves to compel arbitration of Christine Watts' claims pursuant to Federal Arbitration Act, 9 U.S.C.A. § 1 et seq., the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10, *et seq.*, and the Arbitration Agreement Plaintiff

Christine Watts and Michael Watts signed. Century BMW renews its motion to compel arbitration based on the Supreme Court of the United States's decision in *AT&T Mobility LLC v Concepcion*, 131 S. Ct. 1740 (2011), controlling precedent that the Court decided after this Court ruled on Century BMW's initial motion to compel arbitration.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT CENTURY BMW
D/B/A SONIC AUTOMOTIVE, WHOSE TRUE NAME IS
SONIC AUTOMOTIVE 2752 LAURENS RD.,
GREENVILLE, INC. D/B/A CENTURY BMW

May 11, 2012
Aiken, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	
	)	C.A. No.: 06 CP 02-1230
Heather Herron, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs	)	
	)	
Dick Dyer & Associates, Inc., et al.,	)	
	)	
Defendants.	)	
	)	

**CENTURY BMW'S MEMORANDUM IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS FOR
FAILURE TO JOIN AN INDISPENSABLE PARTY
OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION**

Century BMW moves for two alternate forms of relief as to Plaintiff Christine Watts' claims

First, Century BMW moves to dismiss Ms. Watts' claims because Michael Watts, the co-purchaser of her car, is an indispensable party who refuses to be a plaintiff. Michael Watts, Christine Watts' father, purchased the BMW for Ms. Watts as a graduation gift. Both Michael and Christine Watts signed the purchase agreement and thus both have an interest in any claims arising out of that sale. The Court cannot justly adjudicate the claims without both as parties. Mr. Watts has withdrawn as a plaintiff from this lawsuit. Accordingly, because Mr. Watts is an indispensable party who has been dismissed with prejudice, Century BMW respectfully requests that the Court dismiss Christine Watts' claims, pursuant to Rule 19, SCRCP.¹

¹ By letter dated March 2, 2012, counsel for Century BMW inquired of Plaintiffs' counsel whether Plaintiffs wanted to discuss voluntarily substituting another party for Ms. Watts. After requesting a lengthy delay to consider the suggestion, on April 30, 2012, Plaintiffs' counsel declined

Second, in the alternative, the Court should compel arbitration of Ms. Watts' claims on an individual basis. The Supreme Court of the United States and the South Carolina Supreme Court have now made clear that the arbitration agreement between Century BMW and Christine and Michael Watts, including its provision waiving class actions in arbitration, is valid and enforceable. The South Carolina Supreme Court did not require arbitration on an individual basis only because it held that Century BMW did not raise the issue of federal preemption before this Court in its initial motion to compel arbitration and, therefore, failed to preserve the issue for appellate review. Accordingly, Century BMW now renews its motion to compel arbitration, relying on controlling federal preemption precedent that was not available at the time of its initial motion and this Court's initial order. The Court should apply this precedent and compel arbitration of Christine Watts' claims.²

ARGUMENT

I. The Court Should Dismiss Christine Watts' Claims Because Michael Watts is an Indispensable Party Who Has Been Dismissed With Prejudice.

"A motion under Rule 12(b)(7) is proper where a necessary party under Rule 19 should be joined for a just adjudication of the issues, and 'may be made . . . by motion for judgment on the pleadings . . .'" *BancOhio Nat Bank v Neville*, 310 S.C. 323, 326 (1993) (quoting Rule 12(h)(2), SCRCF). Rule 19(a) provides, in part, that "[a] person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability

² In filing this motion, Century BMW does not waive and expressly reserves its pending motion to dismiss based on improper venue and improper joinder. *See* Order on Plaintiffs' Rule 41(a) Motion to Voluntarily Dismiss Certain Defendants and Defendants' Rule 59(e) Motion to Reconsider the Denial of Their Motions to Dismiss on Certain Grounds (February 5, 2008) at 12.

to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.” Rule 19(a), SCRCP. In other words, “[a] necessary party is one whose rights must be ascertained and settled before the rights of the parties to the action can be determined.” *Slatton v Slatton*, 289 S.C. 128, 130 (1986).

If joinder of a necessary party is not feasible, a court must decide whether “the action should proceed among the parties before it, or should be dismissed” because the absent party is “indispensable.” Rule 19(b), SCRCP. To make this determination, a court should consider:

first, to what extent a judgment rendered in the person’s absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person’s absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. These factors are not exhaustive, however, and the decision “must be made pragmatically, in the context of the substance of each case, rather than by procedural formula.” *Owens-Illinois, Inc v Meade*, 186 F.3d 435, 441 (4th Cir. 1999); *see also Republic of Philippines v Pimentel*, 553 U.S. 851, 862-863 (2008). In sum, “[t]he proper course for the trial court is to determine the necessity of adding a new party under Rule 19 to insure a full adjudication of the controversy.” *BancOhio Nat Bank*, 310 S.C. at 328.

Michael Watts is a necessary party because he was a co-purchaser of the car. Michael and Christine Watts co-signed the contract with Century BMW to purchase the 2004 BMW convertible. Deposition of Michael Watts (Jan. 29, 2008) at 39:6-9 (excerpts attached as Ex. 1); *see also Herron v Century BMW*, 387 S.C. 525, 529-30, 693 S.E.2d 394, 396 (2010) (“*Herron I*”). The car was a graduation gift for Ms. Watts, and Mr. Watts alone negotiated the purchase price. Michael Watts Dep. at 33:18-36:7, 37:5-38:5; Deposition of Christine Watts (Jan. 29,

2008) at 20:22-24; 30:25-31:2 (excerpts attached as Ex. 2). Mr. Watts obtained financing from his credit union to purchase the car Michael Watts Dep. at 31:20-32:17; 38:6-23. Accordingly, any claim against Century BMW for allegedly illegal administrative fees would inure predominantly, perhaps exclusively, to Michael Watts because he provided the funds for the purchase.

As a result, without Mr. Watts as a party, the Court cannot achieve complete relief among the existing parties. *See* Rule 19(a), SCRCP. Mr. Watts could not collect on any judgment to Ms. Watts (who would appear to lack standing to bring a claim without Mr. Watts joined³). If Ms. Watts loses her claim, Mr. Watts may argue that this does not extinguish his claim. Thus, the disposition of Ms. Watts' claims would create the risk that Century BMW would be subject to multiple, and perhaps inconsistent, claims on this same transaction. *See id* Avoiding such piecemeal litigation is the core purpose of Rule 19, which is designed "to insure a full adjudication of the controversy." *BancOhio Nat Bank*, 310 S C at 328 (finding the State to be a necessary and indispensable party in a road closure dispute because its interests "would not be discharged by this case because any court order would not be binding on the State"). Thus, Michael Watts is a necessary party.

Joinder of Michael Watts is not feasible because he has refused to join, and the Court has already approved his dismissal. Mr. Watts was originally a plaintiff, although he asserted no claim against Century BMW; his claims concerned a purchase from Toyota of Greenville. Am. Compl. ¶ 388 On June 22, 2009, Mr. Watts moved to withdraw as a named plaintiff because he had recently started a business and did not have time to be involved in the lawsuit. Notice of

³ Century BMW reserves the right to bring a subsequent motion contending that Ms. Watts is not the real party in interest after further discovery should the case not be dismissed or sent to arbitration.

Motion and Motion Dismiss and Substitute Plaintiff (June 23, 2009) and Exhibit A thereto (Affidavit of Michael Watts). He also stated that he did not want to jeopardize his wife's ability to find employment at a law firm in Greenville. *Id* The Court granted Mr. Watts' motion and dismissed his claims with prejudice. Order on Motion to Dismiss and Substitute as to Toyota of Greenville, Inc (Oct. 12, 2009). Thus, it is not feasible to join Mr. Watts because the Court has already dismissed him from the case with prejudice at his request.

Courts have recognized that "a contracting party is the paradigm of an indispensable party." *Travelers Indem Co v Household Int'l, Inc* , 775 F. Supp. 518, 527 (D. Conn. 1991); *see also Ward v Deavers*, 203 F.2d 72, 75 (D C. Cir. 1953) ("[T]here is a general rule that where rights sued upon arise from a contract all parties to it must be joined."); *Japan Petroleum Co (Nigeria) Ltd. v Ashland Oil, Inc* , 456 F. Supp. 831, 836 (D. Del 1978) ("In general, where rights sued upon arise from a contract, all parties to the contract must be joined."). In particular, "[i]t has often been held that joint obligees are indispensable parties when suing an obligor." *Bry-Man's, Inc v Stute*, 312 F.2d 585, 587 (5th Cir. 1963); *see also Lagrimas v Gossel*, 24 Fed. R. Serv. 3d 1373, 1993 WL 18951 (D. Md. 1993) ("Joint obligees . . . have usually been held indispensable parties and their nonjoinder has led to a dismissal of the action."); *see also Shields v Barrow*, 58 U.S. 129, 139 (1855) (obligees to contract should have been joined as plaintiffs because they all had an interest and no decree could be made without all of them); *Cf R-Delight Holding LLC v Anders*, 246 F.R.D. 496, 500 (D. Md. 2007) (holding that son was indispensable party in lawsuit against mother because son had attended the auction for the property, negotiated the agreement, and signed the contract). "Obligors have a right to stand upon their contract and insist that they shall not be harassed with different actions or suits to recover parts of one single demand." *Bry-Man's, Inc* , 312 F 2d at 587 (internal quotations omitted)

In *Bry-Man*'s, two insurance brokers worked together to secure a loan for the defendant corporation. 312 F. 2d at 586 One of the brokers sued to collect a commission allegedly owed to him. *Id* The court held that the absent broker was an indispensable party because if the two brokers "are entitled to any commission at all, [they] are entitled to it jointly, and severally, for their services rendered." *Id* (reversing judgment). Likewise, because Christine and Michael Watts jointly purchased the car from Century BMW, any interest they have in recovering the closing fee from this purchase is held by both of them jointly.

Thus, under the case law Mr. Watts is an indispensable party under Rule 19(b) because the dispute regarding this car sale cannot be fully adjudicated without him. First, a judgment in his absence would prejudice Century BMW because it might subject it to a subsequent duplicative claim by Mr. Watts arising out of the same transaction. Second, a judgment in Ms Watts' case cannot prevent this prejudice because it cannot bind Mr. Watts as a non-party. *See BancOhio Nat Bank*, 310 S.C. at 328. Third, a judgment rendered in Mr. Watts' absence would not be adequate because it would not resolve the whole dispute. "[A]dequacy refers to the public stake in settling disputes by wholes, whenever possible," and "[t]his social interest in the efficient administration of justice and the avoidance of multiple litigation . . . has traditionally been thought to support compulsory joinder of absent and potentially adverse claimants." *Pimentel*, 553 U.S. at 862-863 (internal citations and quotations omitted). "Going forward with the action without the [absent parties] would not further the public interest in settling the dispute as a whole because [they] would not be bound by the judgment in an action where they were not parties." *Id* Fourth, Christine Watts will have an adequate remedy if her claim is dismissed because she and Mr. Watts can pursue their claims in arbitration, as they agreed to do when they purchased the car.

Thus, because Michael and Christine Watts were co-parties to the contract, they both must be joined as plaintiffs in a case arising out of that contract. Michael Watts is a necessary and indispensable party. Because the Court has already dismissed Mr. Watts as a plaintiff based on his refusal to participate in the lawsuit, the Court should dismiss Christine Watts' claims for failure to join an indispensable party.

II. THE COURT SHOULD COMPEL ARBITRATION OF CHRISTINE WATTS' CLAIMS.

In the alternative, Century BMW respectfully renews its motion to compel arbitration. Although the law was unsettled at the time Century BMW first filed its motion to compel arbitration, the decisions of the Supreme Court of the United States and South Carolina Supreme Court now make it clear that the arbitration agreement between Century BMW and the Wattses is valid and enforceable, including its class action waiver provision. Century BMW therefore moves to compel arbitration of Ms. Watt's claims on an individual basis under this controlling precedent.

A. Procedural History.

At the time of the Watts' purchase in 2005, the parties executed a free-standing Arbitration Agreement providing that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., governed, and that the parties would arbitrate any and all disputes relating to the transaction. Attached as Ex 3. The Arbitration Agreement further provided that the parties "waiv[ed] their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." *Id* (referred to herein as the "class action waiver" provision).

On October 31, 2006, Ms. Watts, along with other plaintiffs, brought this putative class action against Century BMW and other South Carolina car dealerships alleging, among other things, that the dealerships impermissibly charged "administrative fees" in connection with

vehicle sales in alleged violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (“Dealers Act”), S.C Code Ann. §56-15-10 to -130 (2009). *See* Am. Compl. ¶¶ 384-85.

On December 29, 2006, Century BMW moved to compel arbitration of the Watts’ claims based on the Arbitration Agreement.

On March 10, 2008, this Court denied Century BMW’s motion to compel arbitration on the basis that the Arbitration Agreement was unconscionable and unenforceable.

On April 19, 2010, the South Carolina Supreme Court disagreed with this Court, holding that the Arbitration Agreement was not unconscionable and was “enforceable, except for the ban on class actions.” *Herron I*, 387 S.C. at 537, 693 S.E.2d at 400. It held that the class action waiver violated South Carolina public policy *Id* at 535-36, 693 at 399-400. Because Century BMW elected not to sever the class action waiver from the rest of the Arbitration Agreement, the South Carolina Supreme Court affirmed in result this Court’s order denying the motion to compel arbitration. *Id*⁴

Six weeks later, the Supreme Court of the United States granted certiorari in *AT&T Mobility*, 2010 WL 303962 (May 24, 2010), to address whether the FAA preempts state-law rules that invalidate class action waivers in arbitration agreements. In light of the Supreme Court’s grant of certiorari in *AT&T Mobility*, Century BMW filed a petition for writ of certiorari

⁴ Eight days later, the Supreme Court of the United States decided *Stolt-Nielsen, SA v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), which held that the FAA does not permit class arbitration to be imposed on parties who had not agreed to it. Century BMW filed a petition for rehearing contending, *inter alia*, that *Stolt-Nielsen* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration. The South Carolina Supreme Court denied the petition on June 9, 2010.

in the Supreme Court of the United States, asking the Court to hold the petition until the Court decided *AT&T Mobility*, and then to dispose of it accordingly.

On April 27, 2011, the United States Supreme Court held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) that the FAA preempts state-law rules that invalidate class action waivers in arbitration agreements. Five days later, on May 2, 2011, the Supreme Court of the United States granted Century BMW's petition for a writ of certiorari, vacated the South Carolina Supreme Court's judgment, and remanded the case for further consideration in light of *AT&T Mobility. Sonic Automotive, Inc. v. Watts*, 131 S. Ct. 2872.

On remand, the South Carolina Supreme Court did not address the application of *AT&T Mobility* on the merits, but rather reinstated its opinion on the basis that Century BMW did not raise the issue of federal preemption before this Court when it moved to compel arbitration and, therefore, had not preserved the issue for appellate review. *Herron v Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) ("*Herron II*").

B. The Court Should Compel Arbitration Based on New, Controlling Federal Preemption Precedent.

The combination of the *AT&T Mobility* decision and *Herron I* require the enforcement of the arbitration agreement between Century BMW and the Wattses on an individual basis.

The South Carolina Supreme Court held that the Arbitration Agreement was valid and enforceable under South Carolina law, except for the class action waiver, which it held violated South Carolina public policy. *Herron I*, 387 S.C. at 536-37, 693 at 399-400. But *AT&T Mobility* now makes clear that the class action waiver is also valid and enforceable. 131 S. Ct. at 1740. *AT&T Mobility* held that the FAA pre-empts state-law rules—including rules based on state public policy—that invalidate class action waivers in arbitration agreements. *AT&T Mobility*, 131 S. Ct. at 1747. As a result, the FAA pre-empts the South Carolina policy that

Herron I held invalidated the class action waiver. *AT&T Mobility* is materially indistinguishable from this case and requires the enforcement of the Arbitration Agreement.

Courts since *AT&T Mobility* have consistently enforced class action waivers in arbitration agreements. See, e.g., *Wallace v. Ganley Auto Group*, 2011 WL 2434093 (Ohio App. June 16, 2011) (*AT&T Mobility* “makes clear that enforcement of arbitration clauses cannot be conditioned upon the availability of classwide arbitration”); *Arellano v T-Mobile USA, Inc.*, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (*AT&T Mobility* “decided that states cannot refuse to enforce arbitration agreements based on public policy”); *D'Antuono v Service Road Corp.*, 789 F.Supp.2d 308 (D. Conn. May 25, 2011); *Zarandi v Alliance Data Systems Corp.*, 2011 WL 1827228, (C.D. Cal. May 09, 2011); *Day v Persels & Associates*, 2011 WL 1770300 (M.D. Fla. May 09, 2011); *Bellows v Midland Credit Management, Inc.*, 2011 WL 1691323, (S.D. Cal. May 04, 2011); *Bernal v Burnett*, 793 F.Supp.2d 1280 (D. Colo. Jun 06, 2011).

C. There Has Been No Waiver In This Court.

In 2006, when Century BMW first timely moved to compel arbitration, the Supreme Court of the United States had not yet ruled that the FAA preempts state court rules invalidating class action waivers in arbitration agreements. Indeed, the South Carolina Supreme Court specifically noted in *Herron I* that “courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit.” 387 S.C. at 536. *AT&T Mobility* conclusively resolved the issue

Nothing in *Herron II* prohibits Century BMW from renewing its motion to compel arbitration in this Court based on *AT&T Mobility*. The South Carolina Supreme Court reinstated its decision only because it held that, as a matter of appellate procedure, Century BMW did not preserve the issue of federal preemption for appellate review because it had not first raised the issue in this Court. *Herron II*, 395 S.C. at 461, 719 S.E.2d at 640. The court explained that

“[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Id.* (internal citations omitted). “Imposing such a requirement on the appellant ‘is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.’” *Id.* (quoting *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422 (2000)). Thus, the South Carolina Supreme Court did not hold that Century BMW was permanently barred from raising the issue of federal preemption with this Court; rather, it held that Century BMW could not raise the issue *in that appeal* because it had not allowed this Court an opportunity to rule on the issue first. Accordingly, Century BMW now raises this issue so that this Court can rule on it.⁵

Nor does the law of the case doctrine prevent Century BMW from moving to compel arbitration based on new legal precedent. First, the law of the case doctrine does not apply because the preemption issue raised has not yet been decided. “The doctrine of the law of the case prohibits issues *which have been decided in a prior appeal* from being relitigated in the trial court in the same case.” *Ross v. Med Univ of S Carolina*, 328 S.C. 51, 62 (1997) (emphasis added). Neither the South Carolina Supreme Court nor this Court has ever ruled on the issue of whether the FAA preempts any South Carolina policy that invalidates the class action waiver. Indeed, the South Carolina Supreme Court’s ruling in *Herron II* was expressly based on its finding that this Court had not yet ruled on the preemption issue. 395 S.C. at 461. And this Court recently stated in the *Ritz v. Taylor Toyota* pre-trial hearing that the South Carolina Supreme Court’s decision “was on a preemption situation that never was before me.” Pre-Trial

⁵ Century BMW believes that it did adequately raise the preemption issue in the first motion to compel arbitration, but that is of no consequence to this motion because the South Carolina Supreme Court said otherwise.

Hearing Tr. at 81:78 (Apr. 10, 2012) (excerpt attached as Ex. 4). Thus, there is no law of the case because the relevant issue has not been decided.

Second, the law of the case doctrine does not apply because *ATT Mobility* was an intervening change in controlling law. There is an exception to the law of the case doctrine if “controlling authority has since made a contrary decision of law applicable to the issue.” *Sejman v Warner-Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988). In *Sejman*—a case strikingly similar to this one—employees sued their employer under South Carolina contract law for severance benefits. *Id.* at 67-68. The employer moved for summary judgment on the basis that the federal Employee Retirement Income Security Act of 1974 (“ERISA”) preempted South Carolina contract law. *Id.* The trial court denied summary judgment, holding that because the employer had failed to raise the issue of preemption before an earlier appeal, it could not now raise the issue based on the law of the case. *Id.* The Fourth Circuit reversed, holding that the employer’s “failure to assert federal preemption” did not “render[] that default part of the law of the case.” *Id.* at 69. The court explained that “an omission may become part of the law of the case only if its subsequent assertion is an attempt to relitigate the ultimate issue previously decided.” *Id.* Because the only issue raised previously was under state contract law, the court held that the employer’s “claim of preemption does not challenge this Court’s previous analysis,” but rather “contends only that the rights of the plaintiffs must now be weighed in light of a hitherto unexamined legal doctrine.” *Id.* Similarly, the law of the case doctrine does not prohibit this Court from considering the “unexamined” question of whether *AT&T Mobility*—controlling new legal authority—requires enforcement of the Arbitration Agreement. *See also Binkley v Burry*, 352 S.C. 286, 294 (Ct. App. 2002) (law of the case did not apply because question of

notice regarding the existence of an easement is distinct from the question of notice as it relates to the scope and enforceability of the easement.).

Third, even if the law of the case doctrine did apply, under the Supremacy Clause it must yield to the Supreme Court's interpretation of the Federal Arbitration Act in *AT&T Mobility*. As the court in *Sejman* explained:

A judicially created procedural doctrine cannot defeat the intent of Congress. When Congress preempts state law, it gives concrete expression to the constitutional authority granted by the Supremacy Clause of Article VI. The effect of a preemptive statute is, therefore, quasi-judicial. A state court confronted with a dispute governed by a preemptive federal statute would have no authority to adjudicate the matter other than in accordance with the statute.

Id

Accordingly, Century BMW requests that the Court compel arbitration based on the now-established law that the Arbitration Agreement is valid and enforceable, and the FAA preempts any attempt to void its class action waiver.

CONCLUSION

For the reasons stated above, Century BMW respectfully requests that the Court (i) dismiss Christine Watts' claims for failure to join an indispensable party; or (ii) in the alternative, compel arbitration of her claims.

Respectfully submitted,



Steven W. Hamm

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ATTORNEYS FOR DEFENDANT CENTURY BMW

D/B/A SONIC AUTOMOTIVE, WHOSE TRUE NAME IS

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GREENVILLE, INC. D/B/A CENTURY BMW

May 11, 2012
Aiken, South Carolina

EXHIBIT NO. 1

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF AIKEN

HERRON, et al.,

Plaintiffs,

Case No.

2006-CP-02-1230

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: MICHAEL WATTS

DATE: January 29, 2008

TIME: 9:08 a.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

Computer-Aided Transcription By:

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1 Q. And did the salesperson accompany you?

2 A. I think she -- if I -- I think she
3 accompanied my daughter, and I think my daughter and
4 I drove it.

5 Q. After test driving the vehicle, did you
6 determine you wanted to buy it?

7 A. I let my daughter make the decision.

8 Q. Okay. Did she express an interest in
9 purchasing the car?

10 A. Yes, sir.

11 Q. Okay. Did she like the car?

12 A. Yes, sir.

13 Q. And at that point, did you engage in any
14 price negotiations with anyone at the dealership?

15 A. Not right then. We went back and talked
16 about it.

17 Q. Okay. So you test drove the car and
18 decided you liked it, and left.

19 A. Correct.

20 Q. Okay. And why did you leave rather than
21 stick around and negotiate the purchase right then?

22 A. We wanted to think about it, talk about it,
23 and I wanted to call the credit union and check on
24 financing.

25 Q. And how long after you test drove the car

1 was it before you returned to negotiate the deal?

2 A. Probably -- I think -- I can't remember.

3 It was within a day.

4 Q. Were you aware that the dealership would
5 likely offer you financing on the vehicle?

6 A. Yes, sir.

7 Q. But you preferred to finance it elsewhere?

8 A. Yes, sir.

9 Q. So I take it you understood you didn't have
10 to enter into a financing agreement with the car
11 dealership in order to purchase the car.

12 A. Yes, sir.

13 Q. Is it your general practice to finance car
14 purchases through your own credit union --

15 A. Yes, sir.

16 Q. -- rather than the dealership?

17 A. Yes, sir.

18 Q. Have you ever financed the terms of a --
19 have you ever financed a car through the car
20 dealership?

21 A. Yes, sir.

22 Q. And did you engage in negotiations on the
23 terms of the financing?

24 A. No, sir.

25 Q. You realized you were free to ask for a

1 lower interest rate than what they offered you, I
2 take it.

3 A. I figured they would offer me the lowest.
4 I didn't know that their finance rate would be
5 negotiable.

6 Q. But in any event, you determined you were
7 going to get financing away from Century BMW for
8 this transaction.

9 A. Right.

10 Q. When you came back to the dealership to
11 negotiate the purchase, who did you meet with?

12 A. The saleslady.

13 Q. And was it the same saleslady you dealt
14 with previously?

15 A. Yes, sir.

16 Q. And when you came back, did you come back
17 alone or with your daughter?

18 A. We negotiated via telephone.

19 Q. Okay. So you didn't come into the
20 dealership?

21 A. I did not come -- I called, and we
22 negotiated over the telephone.

23 Q. Okay.

24 A. And then once the price was agreed upon, we
25 went from there.

1 Q. And is the reason you dealt with them by
2 phone, was it because you felt more comfortable
3 being at home rather than being at the dealership
4 with the employees?

5 A. You know, I don't know why we did it from
6 the house.

7 Q. Who was on the phone when you were
8 negotiating the price?

9 A. The saleslady and I.

10 Q. Okay. Was Christine on an extension, or
11 was it just you and the salesperson?

12 A. It was just me and the salesperson.

13 Q. Okay. Who called --

14 A. Christine was in the room.

15 Q. Okay. So she may have overheard -- I take
16 it the salesperson wasn't on a speakerphone in your
17 house.

18 A. No, sir.

19 Q. Okay. So Christine may have overheard your
20 side of the conversation, but she wouldn't have
21 heard the other side?

22 A. Correct.

23 Q. Okay. Who initiated the phone call?

24 A. I did.

25 Q. Okay. And did you ask to speak to the

1 saleslady?

2 A. Yes, sir.

3 Q. And did -- when you called, did you tell
4 her you were interested in getting the Z4?

5 A. Yes, sir.

6 Q. And did you make an offer on the vehicle?

7 A. Yes, sir.

8 Q. Had there been a -- any sort of price on
9 the car?

10 A. Yes, sir. I don't remember what it was.

11 Q. Okay. Do you remember how it was posted on
12 the car? Was it written in shoe polish, or was it
13 on some sort of sticker?

14 A. I don't remember.

15 Q. Okay. And had you discussed that price at
16 all with the salesperson when you were back at the
17 dealership?

18 A. No, sir.

19 Q. So you called -- I think her name is
20 Elizabeth Courtney; does that ring a bell?

21 A. Sounds familiar.

22 Q. Well, whoever it was, you called --

23 A. Yes.

24 Q. -- the salesperson, and you made an initial
25 offer.

1 A. Correct.

2 Q. And what did she say? Do you remember what
3 your initial offer was?

4 A. No, sir.

5 Q. Was it, I take it, less than you ended up
6 paying?

7 A. More than likely.

8 Q. But you don't recall?

9 A. I do not remember.

10 Q. Okay. And did you have -- when you made
11 the call, did you have a bottom-line figure in mind
12 that you wouldn't pay more than?

13 A. Yes, sir.

14 Q. Do you remember what that was?

15 A. I'm feeling my brain. 30 -- it was 31, 32,
16 somewhere right in there.

17 Q. Okay.

18 A. I do not remember exactly.

19 Q. And you knew -- you knew that if the
20 dealership, for whatever reason, didn't offer terms
21 that you were comfortable with, you could hang up
22 the phone, and you weren't under any obligation to
23 purchase the vehicle from them; is that fair?

24 A. That's fair.

25 Q. Okay. And that would include terms other

1 than the price, such as if they refused to offer you
2 a warranty on the car, you could hang up the phone
3 and not have to deal with them; is that fair?

4 A. Yes, sir.

5 Q. Okay. Do you recall what Ms. Courtney's
6 response was to your offer?

7 A. There was negotiation. I don't remember
8 the interaction.

9 Q. Was it all in one phone call or multiple
10 phone calls?

11 A. No, sir, there were multiple phone calls.

12 Q. Okay. After you made your offer, did she
13 say, I'll have to get back with you and call you
14 back?

15 A. All I remember is there were multiple phone
16 calls back and forth.

17 Q. Okay. And did all of this take place in
18 one day?

19 A. Yes, sir.

20 Q. Okay. Do you generally recall over what
21 time period, how many hours or --

22 A. It was late afternoon.

23 Q. Was it a weekend?

24 A. It was a Friday afternoon.

25 Q. And did you talk with anyone other than

1 Ms. Courtney?

2 A. No, sir.

3 Q. And eventually in this back and forth phone
4 calls, did you reach an agreement on price?

5 A. Yes, sir.

6 Q. And then did you come into the dealership
7 to finalize the paperwork?

8 A. After I did my credit ap and got my
9 financing in order.

10 Q. From the credit union?

11 A. Correct.

12 Q. So did you come into the dealership with a
13 cashier's check from the credit union?

14 A. I came in with some paperwork that they
15 needed to fill out, and the credit union verified
16 the funds would be sent to them.

17 Q. The credit union --

18 A. Verified the funds would be sent.

19 Q. So you didn't have a check?

20 A. I did not have a check.

21 Q. And I assume you signed a promissory note
22 or financing agreement with the credit union?

23 A. Yes, sir.

24 Q. Do you maintain -- still have a copy of
25 that?

1 A. Probably so.

2 Q. Are you still making payments on it?

3 A. She is, yes, sir.

4 Q. So your daughter is making the payments?

5 A. Yes, sir.

6 Q. Who was the -- were you the borrower on the
7 financing agreement, or were both of you, or how was
8 that arranged?

9 A. She co-signed with me.

10 Q. Okay. Do you recall whether -- did you
11 enter into any other agreements with the credit
12 union? Did they offer you any sort of service
13 agreement on the car or anything like that?

14 A. No, sir.

15 Q. Did the financing agreement that you signed
16 with the credit union contain any arbitration
17 clause?

18 A. I do not know.

19 Q. Did you check with the dealership as to
20 whether they could give you a better interest rate
21 than the credit union was giving you?

22 A. I like my credit union, and past
23 experience, their rates have always been very, very
24 competitive.

25 Q. When you came into the dealership with your

EXHIBIT NO. 2

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF AIKEN

HERRON, et al.,

Plaintiffs,

Case No.

2006-CP-02-1230

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: CHRISTINE WATTS

DATE: January 29, 2008

TIME: 5:15 p.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

Computer-Aided Transcription By:

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1 reason?

2 A. No.

3 Q. At the time you were in Century BMW buying
4 the Z-4, did you have an understanding what
5 arbitration is?

6 A. No.

7 Q. So I take it at the time, you didn't have a
8 view whether it was a good thing or a bad thing.

9 A. No.

10 Q. No, I'm -- no, I'm wrong, or no, you didn't
11 have a view?

12 A. No, I didn't have a view of -- I didn't
13 really know what it was, so no, I didn't have a view
14 of it.

15 Q. Okay. Up until today, have you ever
16 participated in arbitration in any capacity, as a
17 witness or a party or anything like that?

18 A. No.

19 Q. So I take it you've had no bad experiences
20 with arbitration.

21 A. No.

22 Q. As I understand it, the Z-4 was a
23 graduation present of sorts for you.

24 A. Yes.

25 Q. And you were the person that primarily did

1 Q. Did you personally have any discussions
2 with the credit union about the terms of financing,
3 or did your father do that?

4 A. That would be my father.

5 Q. And was that done by phone?

6 A. That is correct.

7 Q. Were you present?

8 A. No, I was not.

9 Q. Did you sign any paperwork with the credit
10 union before coming back to Century BMW?

11 A. I did not. No.

12 Q. Do you know if your father did?

13 A. I have no idea.

14 Q. Did you visit the credit union in person
15 before coming back to Century BMW?

16 A. No, I did not.

17 Q. Do you know if your father did?

18 A. I have no idea.

19 Q. Okay. Before you came back to Century BMW,
20 had you already agreed on a bottom-line price for
21 the vehicle with Century BMW?

22 A. Yes.

23 Q. And how did that occur?

24 A. Via telephone.

25 Q. Okay. And who was it that dealt with

1 Century BMW by telephone?

2 A. My father, Mike Watts.

3 Q. And who -- who initiated the telephone
4 calls; did your father call them first?

5 A. That is correct.

6 Q. And had you had a -- prior to your father
7 calling Century BMW, had you discussed with your
8 father what your goal was in terms of a price for
9 the vehicle?

10 A. Yes.

11 Q. And do you recall what your goal was?

12 A. 31,000.

13 Q. 31,000?

14 A. That's correct.

15 Q. And was that after all taxes and whatever
16 else, or was it --

17 A. That's correct.

18 Q. Had you discussed with your father what
19 your worst-case scenario was so far as the cost of
20 the vehicle?

21 A. Yes, I did.

22 Q. And was that different than what your goal
23 was?

24 A. That is correct.

25 Q. Okay. And what was -- do you recall what

EXHIBIT NO. 3

ARBITRATION AGREEMENT
(All States Except CA)

DATE: 6.25.05

VIN: 46687335546590759

In this Arbitration Agreement ("Agreement"), "you" and "your" refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and includes the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

The Parties waive the right to request arbitration for a Claim filed and maintained individually (as opposed to a class action) in your state's small claims court, if any. However, if such a Claim originally brought in small claims court is transferred or removed to a higher state or federal trial court, the Parties reserve their right to request arbitration under this Agreement.

The Parties agree that once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this Agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. Until a Party entitled to do so requests arbitration under this Agreement, any party to this Agreement may proceed with all other rights and remedies they may have. Neither you nor we waive our right to request arbitration under this Agreement, even after all Parties have elected to litigate a Claim in court, in the event new Claims are asserted after the initial filing of such litigation in court.

The arbitrator shall be an attorney or retired judge. The arbitrator shall apply and be bound by governing local, state or federal law when making an award, and shall award only those damages or other relief allowed by such governing law. Issues regarding whether a matter is arbitrable shall be made by the arbitrator. The arbitrator shall prepare a written decision stating reasoned findings of fact and conclusions of law. A party may seek entry of a judgment on the award in any court of competent jurisdiction.

If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside. If we initiate a Claim for arbitration we will pay the entire initial filing fee. We also agree to pay up to \$1500 of the arbitrator's fees, unless applicable law or the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of \$1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decides we must pay in accordance with applicable law for this Agreement to be enforceable. The arbitrator deciding the Claim(s) shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law. Unless otherwise ordered by the arbitrator in accordance with applicable law or provided otherwise by applicable law, the Parties shall be responsible for the payment of their own attorney's ("") fees.

This Agreement evidences a transaction involving interstate commerce. The Parties acknowledge and agree that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) ("FAA") shall govern any arbitration under this Agreement. The arbitrator's decision shall be final and binding, except for any right of appeal provided by the FAA or the rules of the AAA.

If any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable. In the event this Agreement is found void you and we waive our respective rights to a trial by jury, if such waiver is permitted by applicable law.

This Agreement shall survive the repayment of all amounts owed by you with respect to the Vehicle. This Agreement is incorporated into and made a part of all Contract(s) as defined in this Agreement. If there is a separate arbitration agreement in any other Contract, then to the extent this Agreement is inconsistent with any such arbitration agreement this Agreement shall supersede such other arbitration agreement with respect to Claims between you and us, unless otherwise provided by law.

- EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT.
- IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY.
- IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US, INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
- THE INFORMATION YOU AND WE MAY OBTAIN IN DISCOVERY FROM EACH OTHER IN ARBITRATION IS GENERALLY MORE LIMITED THAN IN A LAWSUIT.
- OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.
- YOUR AND OUR RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE VERY LIMITED.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT

Customer: [Signature]

Dealer: [Signature]

Customer: [Signature]

Its: _____

EXHIBIT NO. 4

State of South Carolina)
County of Aiken)

Court of Common Pleas
2006-CP-02-01230

Michael Ritz, et al)
Plaintiffs)
vs.)
Taylor Investments, f/d/b/a)
Taylor Toyota,)
Defendant)

Transcript of Record

April 10, 2012
Bamberg, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

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

Michael E. Spears, Esq.
A. Camden Lewis, Esq.
Attorneys for the Plaintiff

Robert L. Reibold, Esq.
H. Clayton Walker, Jr., Esq.
Attorneys for the Defendant

Lisa H. Davenport, RPR
Official Court Reporter

1 it is a South Carolina Supreme Court decision?

2 MR. SPEARS: The second South Carolina Supreme Court
3 reaffirmed the first South Carolina Supreme Court opinion
4 on the arbitration issue on behalf of the group.

5 MR. LEWIS: You got two wins, Your Honor.

6 THE COURT: Well, no, I really don't have two wins
7 because the second decision was on a preemption situation
8 that never was before me; so I don't know if that's a win
9 or what. I don't mean win or what, but y'all know what
10 I'm talking about. Go ahead.

11 MR. REIBOLD: I also want to address Fanning.
12 Fanning, obviously, was decided before the motor vehicle
13 closing fee statute was passed, and, therefore, it doesn't
14 speak at all to the effect that closing fee statute has on
15 subsequent remedies and because it was put in the Consumer
16 Protection Code the Consumer Protection Code's
17 displacement provision is applicable and the Consumer
18 Protection Code does create a remedy for this statute.
19 Again, I am going to quote you from the administrative
20 interpretation ---

21 THE COURT: Then why do we have the Dealer's Act? I
22 mean, the Dealer's Act, separate statute, 56-15, et al,
23 precludes the dealers from acting arbitrary, in bad faith,
24 and unconscionable which they allege by charging these
25 fees which go beyond the definition of closing costs gives

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No : 2006-CP-02-1230
	)	
Christine Watts	)	
	)	
	)	
	)	
	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
	)	
Sonic Automotive 2752 Laurens Road,	)	
Greenville, Inc.	)	
	)	
Defendants.	)	
	)	
	)	

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT CENTURY
BMW'S MOTION FOR JUDGMENT ON THE PLEADINGS FOR FAILURE TO JOIN
AN INDISPENSABLE PARTY OR, IN THE ALTERNATIVE, TO COMPEL
ARBITRATION**

Plaintiff Christine Watts hereby submits her memorandum in opposition to Century BMW's Memorandum in Support of Motion for Judgment on the Pleading's For Failure to Join an Indispensable Party Or, In the Alternative, to Compel Arbitration. Defendants' Motion should be denied because Plaintiff Christine Watts's father, Michael Watts, is not an indispensable party, under Rule 19, SCRPC, and Defendant's alternative motion to compel arbitration should be denied because the South Carolina Supreme Court has held that Defendant has forfeited this argument by knowingly failing to raise this argument five years ago in the initial motion to compel arbitration.

BACKGROUND

This action was initiated on August 29, 2006. Ms. Watts alleges that Century BMW was charging illegal closing fees in violation of S C. Code Ann. § 37-2-307 and § 56-15-10, *et seq* and did engage in one or more of the following illegal acts:

-
- a. failed to register with the Department of Consumer Affairs;
 - b. failed to individually register annually with the Department of Consumer Affairs,
 - c. charged illegal “administrative fees” in excess of the amount for which it registered,
 - d. failed to disclose the illegal “administrative fees” on sales contracts,
 - e. charged illegal “administrative fees” in excess of their costs;
 - f. failed to display the charging of illegal “administrative fees” in a conspicuous location in the dealership;
 - g. advertised deceptively and illegally by failing to include the “administrative fees” in the advertised price; and
 - h. created a closing procedure to illegally add “administrative fees ”

Ms. Watts contends that the conduct of Century BMW violates the South Carolina Dealer’s Act (S C Code Ann. § 56-15-10)

Century BMW filed a motion to compel arbitration, claiming arbitration was required by an agreement under which Ms. Watts waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. This motion was denied by this Court in an order dated March 10, 2008. The order properly concluded that Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663 (S.C. 2007) was “the controlling authority” for the motion.

On March 12, 2008, Century BMW filed a notice of appeal to the South Carolina Court of Appeals. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued an order holding that the provision of the arbitration agreement relied upon by Century BMW was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions

Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief

Section 56-15-110(2) The Dealers Act further provides “Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable” Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our State’s public policy and is void and unenforceable. We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. See Carolina Care Plan, Inc v United HealthCare Servs., Inc., 606 S.E 2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution)

Herron v. Century BMW, 387 S.C. 525, 535-536, 693 S.E 2d 394, 399-400 (S C 2010).

Following the South Carolina Supreme Court’s refusal to enforce the arbitration agreement at issue, Century BMW filed a Petition for Rehearing. By order dated June 9, 2010, the South Carolina Supreme Court denied the petition for rehearing.

On August 31, 2010, Century BMW petitioned the United States Supreme Court for a writ of certiorari. While that petition was pending, the Supreme Court issued its decision in AT&T Mobility, LLC v. Concepcion, 131 S Ct. 1740 (April 27, 2011). The Supreme Court then remanded this case to the South Carolina Supreme Court for further consideration in light of AT&T.

After supplemental briefing and oral argument centering on preemption, the South Carolina Supreme Court issued its opinion, dated December 19, 2011. In its opinion, the South Carolina Supreme Court found that, as a matter of state law, preemption was not timely raised

and “is procedurally barred as a matter of state law.” Herron v Century BMW, 395 S.C. 461, 469-470, 719 S.E 2d 640, 644-645 (2011) (“Herron II”).

Century BMW then filed a Petition for a Writ of Certiorari in the United States Supreme Court arguing that the South Carolina Supreme Court’s ruling that Century BMW had “forfeited” the preemption argument by failing to raise it to any prior court was unfair because it would “deprive [Century BMW] of a ‘reasonable opportunity’ to assert its federal rights ” *See* Exhibit 1, Petition for a Writ of Certiorari, p. 15.

On May 21, 2012, the United States Supreme Court denied certiorari. Thus, the controlling opinion in this case is the South Carolina Supreme Court holding that, in Century BMW’s words, Century BMW “forfeited its preemption argument.” This is the law of the case.

Now despite correctly admitting in previous briefing that the South Carolina Supreme Court determined that Century BMW “forfeited its preemption argument” by knowingly failing to raise the argument, Century BMW has now filed another motion to compel arbitration based on preemption. For the following reasons, this motion and the motion asserting that Michael Watts is indispensable party should be denied.

ARGUMENT

1. Century BMW Forfeited the Ability to Argue Preemption By Not Raising This Known Argument on the First Motion to Compel Arbitration.

Century BMW’s attempt to revisit the Order denying arbitration based on AT&T is improper and contrary to the South Carolina Supreme Court’s holding in Herron II. The South Carolina Supreme Court in Herron II held that Century BMW cannot continue to re-litigate the enforceability of the arbitration agreement by raising arguments it chose not to argue when the

motion to compel arbitration was first argued. The South Carolina Supreme Court opinion in

Herron II provides in part

Moreover, it is clear preemption was neither a novel nor an unknown argument to Appellant. Significantly, Appellant did raise the issue of preemption to the trial court, albeit in a different context. Respondents initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated that state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to any claim of preemption, until the petition for rehearing filed with this Court.

Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (S.C. 2011)(emphasis added)

As this Court observed, **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."** I'On, 338 S.C. at 406, 526 S.E.2d at 724. Here, intentionally or by chance, Appellant kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under **even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law.**

Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, **we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted.** We reinstate our original opinion and decline to revisit it.

Herron v. Century BMW, 719 S.E.2d 640, 645, 395 S.C. 461, 470 (S.C. 2011) (emphasis added).

Importantly, the Supreme Court held that the preemption argument was not “preserved in our courts as a matter of state law.” (emphasis added). Use of the word “courts” shows that the Supreme Court specifically meant all state courts and not just the South Carolina Supreme Court.

Additionally, the South Carolina Supreme Court held that “the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted.” If the Supreme Court had intended to rule that the issue was not proper on appeal but instead should be re-raised so that this Court could rule on the issue first, it could have remanded the case for further determination. It did not. Instead, the Supreme

Court reinstated its original opinion holding that the arbitration clause at issue was unenforceable. Respectfully, this Court should reject Century BMW's attempt to now raise the issue of preemption in light of AT&T Mobility because this issue is "procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." Herron v. Century BMW, 719 S.E.2d 640, 645, 395 S.C. 461, 470 (S.C. 2011). Quite simply, Century BMW forfeited the ability to make this argument by choosing not to play this card when they moved for arbitration.

Moreover, Century BMW has admitted in briefing to the United States Supreme Court that the South Carolina Supreme Court's ruling means that they forfeited the ability to raise preemption. Century BMW's brief provides in part

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier.

Exhibit 1, Petition for a Writ of Certiorari 13

The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation arguments.

Exhibit 1, p. 14.

[The forfeiture rule] is inequitable because it would deprive [Century BMW] of a "reasonable opportunity" to assert its federal rights."

Exhibit 1, p. 15.

Similarly, Century BMW's Reply Brief to the United States Supreme Court stated

In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration.

[T]here is no valid justification for the South Carolina Supreme Court's subsequent forfeiture determination—a determination that unjustly deprived [Century BMW] of a “reasonable opportunity” to assert its federal rights.

Exhibit 2, p. 2 Century BMW's counsel was correct in the above admissions, the South Carolina Supreme Court has ruled that Century BMW has forfeited the ability to now raise preemption.

Century BMW should be bound by the admissions above and not permitted to now argue the opposite position. See Quinn v. Sharon Corp., 343 S C. 411, 416, 540 S E 2d 474, 476 (S C Ct App 2000) (j. Anderson concurring) (“A court must be able to rely on the statements made by the parties because truth is the bedrock of justice Therefore, a litigant cannot “blow both hot and cold ”). Century BMW now argues that “the South Carolina Supreme Court did not hold that Century BMW was permanently barred from raising the issue of federal preemption with this Court; rather, it held that Century BMW could not raise the issue *in that appeal* because it had not allowed this Court an opportunity to rule on the issue first ” See Century BMW brief, page 11 This argument completely contradicts the prior admissions to the United States Supreme Court wherein Century BMW described the ruling as a “forfeiture determination” that would deprive Century BMW of a “reasonable opportunity” to assert its rights. Quite simply, if Century BMW believed, as it now argues, that Herron II permitted it to go back to the trial court and re-raise federal pre-emption it would not have argued that it had been denied a “reasonable opportunity” to assert its rights. In light of the prior arguments to the United States Supreme Court, Century BMW should be estopped from now arguing that the South Carolina Supreme Court's ruling is anything other than a finding that Century BMW has “forfeited” its ability to argue preemption in all South Carolina courts

Importantly, the South Carolina Supreme Court's ruling that Century BMW is "procedurally barred as a matter of state law" from arguing that the arbitration clause fails due to preemption and AT&T is just Century BMW knew that it had a preemption argument and chose not to raise it before this Court in the initial hearing on November 30, 2007. Century BMW lost the motion and then filed an appeal which effectively delayed further prosecution of the case until the United States Supreme Court denied certiorari on May 21, 2012. This is the second motion to compel arbitration which is now scheduled for November 28, 2012, almost five years after the first hearing. It would be inequitable to adopt a rule that a party can knowingly hold back arguments, test each individual argument on appeal, and effectively prevent a case from ever proceeding forward

Respectfully, this Court should follow the South Carolina Supreme Court and rule that "the issue of preemption is procedurally barred as matter of state law and further consideration in light of AT&T Mobility, LLC v. Concepcion is unwarranted." Herron v. Century BMW, 719 S.E 2d 640, 645, 395 S.C. 461, 470 (S.C. 2011).

2. The South Carolina Supreme Court's decision is based on state contract and statutory law and does not conflict with the Supreme Court's holding in AT&T Mobility.

Even if Century BMW's ability to raise preemption was not forfeited, which is denied, the Herron opinion holding that the arbitration clause at issue is not enforceable does not conflict with the United States Supreme Court's holding in AT&T

South Carolina applies state law to determine the interpretation of a contract formed in the State of South Carolina Unisun Ins. Co. v. Hertz Rental Corp., 436 S.E 2d 182, 184 (Ct.App.1993) ("Unless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was

made”).¹ Under state law principles, a “contract is void *ab initio* and unenforceable [if] it violates statutory law and public policy” and will not be enforced. Berkebile v Outen, 426 S.E 2d 760, 762 n. 2 (1993) (recognizing that an illegal contract has always been unenforceable and that South Carolina courts will not enforce a contract which is violative of public policy, statutory law or provisions of the constitution) Where a statute is enacted to protect the public, the statutory provisions become part of any contract, and override any conflicting contractual provisions. *See, e g*, Sloan Const. Co., Inc v Southco Grassing, Inc., 659 S.E 2d 158, 165 (2008) (Court recognized that the underlying goals of the Procurement Code served important public interests and held that contracts formed pursuant to the Procurement Code were deemed to incorporate the applicable statutory provisions, with the statutory provision prevailing over conflicting contract provisions); Kay v. State Farm Mut. Auto Ins. Co., 562 S.E.2d 676, 678 Ct.App.2002) (holding that uninsured motorist insurance coverage was controlled by statute and any policy “inconsistent therewith [is] void, and the relevant statutory provisions prevail as if embodied in the policy.”).

The state-law rule that the Supreme Court found to be preempted in AT&T is distinguishable from the substantive state law protection in this case AT&T concerns the preemption of unconscionability determinations for class action waivers but did not purport to deal with the validity of a contract that conflicts with a state statutory right such as the group action in the Dealers Act. AT&T specifically deals with the rule in Discover Bank v. Superior Court, 36 Cal 4th 148, 113 P 3d 1100 (2005) and addresses whether the Federal Arbitration Act

¹ Even if the FAA is involved, state law governs contract formation. *See, Hill v Peoplesoft USA, Inc.*, 412 F.3d 540 (4th Cir 2005) (noting that the FAA requires and this Court directs the use of “ordinary state-law principles that govern the formation of contracts.”), Adams v Suozzi, 433 F 3d 220, 227 (2d Cir 2005)) “[w]hen contract formation is at issue in an FAA case, we generally apply state-law principles.”)

(FAA) preempted the Discover Bank rule “classifying most collective-arbitration waivers in consumer contracts as unconscionable.” AT&T, 131 S Ct at 1746 The AT&T case was about unconscionability, while this case is about the effect of a purported contractual waiver of an unwaivable right to a group action under state law, regardless of unconscionability, which renders the contract void *ab initio* under South Carolina law

Before the decision in AT&T, the court in Discover Bank considered a California law that instructed courts to refuse to enforce any contract found to have been unconscionable at the time it was made or to limit the application of any unconscionable clause. *See* Cal. Civ Code § 1670.5(a) In Discover Bank, the California Supreme Court applied that statute to class action waivers in arbitration agreements and held that a class action waiver in an arbitration agreement constituted a deliberate scheme to cheat large numbers of consumers from relatively small amounts of money and to protect businesses from responsibility for their own fraud. Thus, the court created the Discover Bank rule, which held that class action waivers in consumer contracts of adhesion were unenforceable, and found that the FAA did not preempt that rule

In AT&T, the holding was limited and found that, generally, states may not adopt rules of contract interpretation that undermine the “overarching purpose” of the FAA, which is to ensure enforcement of arbitration agreements. AT&T at 1748. In other words, the court in AT&T rejected the judicially created rule that class action waivers in all consumer arbitration agreements were unconscionable. However, the court in AT&T did not address a representative action expressly provided for by statute, which is at the heart of this matter. Individual actions of “one plaintiff, one dealer” (as Century BMW would try to impose) would eviscerate the protections provided by the Dealers Act, which was enacted to safeguard the public as the South Carolina Supreme Court previously recognized:

. unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C 14, 30, 644 S E.2d 663, 671 (2007) (emphasis added)

In Herron I, the South Carolina Supreme Court adopted the reasoning in Simpson, *supra*, and found that the arbitration agreement violated “statutory law” because it prevents Christine Watts from “receiving the mandatory statutory rights” provided by the South Carolina Dealers Act. In other words, the formation of the contract was defective from its inception because it was in conflict with South Carolina statutory law. This conflict rendered the arbitration void *ab initio*. As Justice Thomas recognized in AT&T, an agreement to arbitrate should not be enforced if a “party successfully challenges the formation of the agreement.” AT&T, J. Thomas concurring, 131 S Ct. at 1753. The South Carolina Supreme Court’s ruling is based on state contract law and a substantive state statute and does not conflict with AT&T, thus, there is no basis for this Court to overturn the Order denying the motion to compel arbitration due to AT&T.

Century BMW asserts that other cases decided after AT&T have reached similar conclusions as to pre-emption². However, those cases are distinguishable from the case at bar because those cases do not involve a substantive, unwaivable right granted by a state statute. For example, in Marmet, the issue was whether a court created policy that an arbitration clause in a nursing home admission agreement would not be enforced in personal injury or wrongful death

² Specifically, Marmet Health Care Center, Inc. v. Brown, 565 U S ____ (2012), Litman v Cellico Partnership, 655 F.3d 225 (3rd Cir. 2011); and Fenterstock v Education Finance Partners, 426 Fed Appx. 14 (2nd Cir. 2011).

cases. While that court created policy was invalidated, that case did not address a state statutory scheme enacted to protect the public from unscrupulous car dealers.

In addition, Century BMW ignores a case almost on point with the case here. In Brown v. Ralphs Grocery Co., 197 Cal.App. 4th 489 (Cal. App. 2011) *review denied*, October 19, 2011, the court held:

We also hold that the recent decision of the United States Supreme Court in *AT & T Mobility LLC v. Concepcion et ux* (2011) __ U.S. __, 131 S.Ct. 1740 (*AT & T*), holding that California decisional law invalidating class action waivers in consumer arbitration agreements is pre-empted by the Federal Arbitration Act (9 U.S.C. 1 et seq. (FAA)), **does not apply to representative actions under the [Private Attorney General Act], and thus the trial court correctly ruled that the waiver of plaintiff's right to pursue a representative action under the PAGA was not enforceable under California law.**

Brown at 494. (emphasis added). In that case, the plaintiff brought both a class action and a representative action under the Private Attorney General Act, against her employers for labor violations.³ The court in that case also noted that previous case law had determined that class actions were distinct from representative PAGA actions because “class action requirements do not apply to representative actions brought under the PAGA.” Id. at 499.

The court in Brown noted that AT&T did not purport to deal with the possible preemption of contractual efforts to eliminate a statutory right to a representative action. “AT&T does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law.” Id. at 500. Furthermore, as the court in Brown recognized:

. . . a representative action has “significant institutional advantages” over a single claimant arbitration. The representative action is a means for public enforcement of the

³ While the court in Brown also found that the trial court erred in holding the class action waiver was not enforceable, the court’s decision was not based on AT&T. Instead, the court found that the plaintiff had failed to make the necessary showing (in opposing the petition to compel arbitration), as required by Gentry v. Superior Court, 165 P.3d 556 (Cal. 2007).

labor laws. Thus, assuming it is authorized, a single claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.

Id at 502 The court also noted “that plaintiff and other employees might be able to bring individual claims for Labor Code violations in separate arbitrations does not serve the purpose of the PAGA . . . In short, representative actions under the PAGA do not conflict with the purposes of the FAA ” Id at 502 Because the AT&T case did not involve waivers of “statutory representative actions,” the Brown court concluded that the FAA did not preempt state law regarding the unenforceability of a contractual waiver of the right to pursue a representative action. Id

Here, the South Carolina Dealers Act, S.C. Code Anno. § 56-15-110 provides that “one or more [persons] may sue for the benefit of the whole, **including actions for injunctive relief.**” (emphasis added) This section is an extension of S.C. Code Anno § 56-15-40 (5), which creates the Office of Administrator, within the Attorney General’s office, for the purpose of regulating the Dealers Act and grants the Administrator the power “to investigate, issue cease and desist orders **and injunctive relief** . . .” (emphasis added). In other words, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public. Here, Christine Watts brought an action on behalf of the whole, which seeks injunctive relief preventing car dealers from advertising/charging future customers with administrative fees in a manner which violates S.C. Code Ann § 56-15-10 and S.C. Code Ann § 37-2-307.

Because Christine Watts seeks injunctive relief on behalf of the whole as expressly permitted under statute, she is acting as private attorney general. In Brown, the court found that

AT&T did not apply to a private attorney general action, which is designed to protect the public and penalize the wrongdoer Brown at 502

This Court has already recognized that this case is being pursued as a private attorney general action

This case is being prosecuted pursuant to a “private attorneys general” provision under the Dealers Act. A “private attorney general suit” is a term used by courts when statutes authorize both the Attorney General’s office and private citizens, through civil actions, to enforce regulations. In this case, the Dealers Act empowers both the State Attorney General and private citizens to seek injunctive relief on behalf of the public. Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Plaintiffs’ counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices

Exhibit 3, Order of Motion to Dismiss and Substitute as to Toyota of Greenville, Inc , October 12, 2009 (internal citations omitted). The Court also recognized that an action under the Dealers Act is not the same as a class action: “Class certification is not a prerequisite to action to a private attorneys general suit.” Id., p. 6 Since this case is a private attorney general action, and not a class action, AT&T does not apply and this Court should not compel arbitration on that basis

3. Christine Watts’s father, Michael Watts, is not an indispensable party.

Defendant’s motion for judgment on the pleadings pursuant to Rules 12 (b)(7) (“failure to join a party under Rule 19”), 12 (c), and 12(h) SCRCF should be denied Defendant wrongly argues that Plaintiff’s father, Michael Watts, is an indispensable party, “because a judgment in his absence would prejudice Century BMW because it might subject it to a subsequent duplicative claim by Mr. Watts arising out of the same transaction.” See Century BMW’s brief, page 6 This motion is governed by Rule 19, SCRCF which provides

RULE 19
JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff⁴

(b) Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.⁵

⁴ The Official Note accompanying Rule 19 (a) provides: "This Rule 19(a) is the same as the Federal Rule. The principle behind this Rule is that whenever possible persons materially interested in the action should be joined so that they may be heard and a complete determination had. When this joinder is not possible, the case should be examined pragmatically and a choice made between proceeding without the particular interested party or dismissing the action. Dean Lightsey, in Code Pleading, notes that the number of cases in which there is truly an "indispensable party" in whose absence the court should not proceed are very rare. Id. at 109-110. The Rule provides for joining such a party as a defendant or involuntary plaintiff similar to Code § 15-5-40. Case law interpreting the Federal Rule makes it clear that the absence of a party does not automatically deprive the court of jurisdiction to resolve the interests of the parties before it. This changes some older state precedents which have held that such defects were jurisdictional. See Green v. Niver, 43 S. C. 359, 21 S. E. 263 (1894); Gooch v. Elliott, 120 S. C. 245, 113 S. E. 72 (1922)."

⁵ The Official Note accompanying Rule 19(b) provides: "When a party described in Rule 19(a) cannot be joined, the court must decide whether to proceed with the case in that party's absence. This Rule 19(b) provides the practical factors for the court to consider in reaching its determination, and are not meant to be exclusive. Only if pragmatic considerations strongly indicate that it would be preferable to dismiss the action rather than proceed with the parties

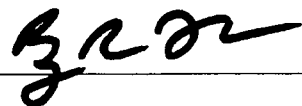
Michael Watts is not an indispensable party because a judgment rendered in Michael Watts's absence would not be prejudicial to him or those already parties. Importantly, Michael Watts has executed an assignment of any rights related to the transaction at issue, passing those rights to his daughter, Plaintiff Christine Watts. See Exhibit 4, Assignment. Thus, Mr. Watts does not have any rights related to the transaction at issue and will not be prejudiced by a ruling adverse to his daughter. Furthermore, there is no prejudice to Century BMW because the only parties who could prosecute the claims at issue are already parties to this case. There is no risk of a subsequent duplicative claim by Mr. Watts arising out of the same transaction because Mr. Watts has no rights related to the transaction. See Century BMW's brief, page 6. Moreover, this Court under Rule 19(b), SCRPC can include protective provisions in the judgment prohibiting Ms. Watts from prosecuting a second action in her father's name. This, quite simply, is not the "the very rare" case where a person's absence warrants dismissal of the entire case. See fn. 2 setting forth the Official Note to Rule 19 (a) which states in part: "the number of cases in which there is truly an "indispensable party" in whose absence the court should not proceed are very rare."

CONCLUSION

For the foregoing reasons, Defendant's motion should be denied.

before it, should the court conclude that the absent party is truly "indispensable." Under Rule 12(h)(1) the lack of an "indispensable" party in this sense can be raised as late as the trial on the merits. However, if the purpose of the motion is to protect the movant from an apparently unfavorable situation, rather than to protect the absent party, the court may properly consider delay in making the motion as a reason against dismissing the action.

Respectfully submitted,

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ATTORNEYS FOR THE PLAINTIFF

November 15, 2012

Barnwell, South Carolina

Exhibit 1

No.

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE,
INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Federal Arbitration Act preempts a state-law rule that invalidates a provision of an arbitration agreement precluding the availability of class arbitration.

(I)

**PARTIES TO THE PROCEEDING
AND CORPORATE DISCLOSURE STATEMENT**

Petitioner is Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW. Petitioner is wholly owned by Sonic Automotive, Inc., a publicly held company. Sonic Automotive, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Christine Watts, Natalie Armstrong, Michael Blease, Alison Dannert, Julie Freeman, Heather Herron, Michael Ritz, and Michael Watts.

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In the Supreme Court of the United States

No.

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE,
INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

PETITION FOR A WRIT OF CERTIORARI

Sonic Automotive, 2752 Laurens Rd., Greenville, Inc.,
doing business as Century BMW, respectfully petitions
for a writ of certiorari to review the judgment of the Su-
preme Court of South Carolina in this case.

OPINIONS BELOW

The order of the South Carolina Supreme Court
reinstating its original opinion (App., *infra*, 1a-11a) is
reported at 719 S.E.2d 640. The original opinion of the
South Carolina Supreme Court (App., *infra*, 12a-23a) is
reported at 693 S.E.2d 394. The South Carolina Su-
preme Court's order denying rehearing (App., *infra*,
24a-26a) and the trial court's order denying petitioner's
motion to compel arbitration (App., *infra*, 27a-40a) are
unreported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on December 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in relevant part:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

Respondents filed a class action in South Carolina state court against petitioner and others. Pursuant to the terms of an arbitration agreement governed by the Federal Arbitration Act (FAA), petitioner moved to compel arbitration of respondent Christine Watts's claim. The trial court denied the motion. App., *infra*, 27a-40a. The South Carolina Supreme Court affirmed, holding *sua sponte* that a provision of the arbitration agreement precluding the availability of class arbitration was invalid under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the Dealers Act). *Id.* at 12a-23a. Petitioner filed a petition for rehearing, contending that the FAA preempted the Dealers Act to the extent it invalidated such a provision.

After rejecting petitioner's preemption argument on the merits, the South Carolina Supreme Court denied the petition. *Id.* at 24a-26a.

Petitioner then filed a petition for certiorari in this Court, contending that this case presented a materially identical question to the one then pending in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). After issuing its decision in *AT&T Mobility*, the Court granted the petition, vacated the judgment below, and remanded. See 131 S. Ct. 2872 (2011). On remand, however, the South Carolina Supreme Court refused to reconsider its original opinion, determining that petitioner had failed adequately to preserve its preemption argument—even though petitioner had raised that argument in its earlier petition for rehearing and the court had then considered it on the merits. App., *infra*, 1a-11a.

1. Petitioner is an automobile dealer in Greenville, South Carolina. In 2005, respondent Michael Watts purchased a 2004 BMW Z4 convertible from petitioner as a graduation present for his daughter, respondent Christine Watts. In the course of doing so, Mr. Watts and Ms. Watts executed an arbitration agreement. Under the terms of that agreement, which was expressly governed by the FAA, any dispute between the parties would be subject to arbitration. Of critical relevance here, the arbitration agreement provided that the parties "waiv[ed] their right to * * * bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." App., *infra*, 20a; S.C. C.A. App. 94, 136, 1106; Pet. S.C. C.A. Br. 1-7.

2. On October 31, 2006, respondents filed a class action in South Carolina state court against petitioner and more than 300 other automobile dealers. S.C. C.A. App. 68-147. They contended, *inter alia*, that the dealers had improperly charged "administrative fees" in connection

with the sale of vehicles, in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2006).¹

Pursuant to the terms of the arbitration agreement, petitioner moved to compel arbitration of Ms. Watts's claim; Ms. Watts opposed the motion on the ground that the arbitration agreement was unconscionable under South Carolina law. The trial court denied the motion. App., *infra*, 27a-40a. The court agreed with Ms. Watts that the arbitration agreement was "unconscionable and unenforceable" on the grounds that Ms. Watts "had an absence of meaningful choice when she entered into the arbitration agreement," *id.* at 29a, and that "[t]he Century BMW arbitration agreement contains oppressive and one-sided terms," *id.* at 35a.

3. Petitioner appealed to the South Carolina Court of Appeals. The South Carolina Supreme Court *sua sponte* certified the appeal for its own review and then affirmed in result. App., *infra*, 12a-33a.

The South Carolina Supreme Court first agreed with petitioner that the trial court had erred in holding that the arbitration agreement as a whole was unconscionable. App., *infra*, 16a-19a. The court determined that Ms. Watts "had a meaningful choice in signing the [arbitration agreement]," *id.* at 17a, and that "the[] terms [of the agreement] are neither oppressive nor one-sided," *id.* at 19a.

The South Carolina Supreme Court nevertheless held that the provision of the arbitration agreement precluding the availability of class arbitration was

¹ Because the other respondents besides Ms. Watts all purchased vehicles from dealers other than petitioner, they were nominal parties below and remain so here. See S.C. C.A. App. 135-136.

invalid. App., *infra*, 20a-21a. Critically for present purposes, it did so on a discrete ground that was neither advanced by Ms. Watts nor adopted by the trial court: *viz.*, that, wholly apart from whether the arbitration agreement as a whole was unconscionable under South Carolina law, the agreement's waiver of class arbitration was inconsistent with a provision of the Dealers Act allowing claims under that act to be brought as class actions. *Ibid.* (citing S.C. Code Ann. § 56-15-110(2) (2006)).² Although the provision at issue merely authorized class actions and did not state that the right to file a class action was non-waivable, the court determined that "the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act"—and, for that reason, it concluded that "any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." *Id.* at 21a.

4. In response to the South Carolina Supreme Court's unexpected reliance on the Dealers Act, petitioner filed a petition for rehearing, in which it primarily argued that "[t]he FAA clearly preempts South Carolina law, as this Court construed it." S.C. S. Ct. Pet. for Reh'g 3. In so arguing, petitioner heavily relied on *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). In that case—decided shortly after the South Carolina Supreme Court issued its decision—this Court held that it violated the FAA to impose class arbitration on a party that had agreed only to bilateral arbitration. *Id.* at 1775.

² Indeed, the court explicitly acknowledged that the argument was one that Ms. Watts had not made. See App., *infra*, 20a.

The South Carolina Supreme Court denied the petition. App., *infra*, 24a-26a. The court rejected petitioner's preemption argument on the merits, reasoning that *Stolt-Nielsen* was "distinguishable on the law and the facts." *Id.* at 26a. The court reiterated that "[its] opinion affirming the trial court's denial of the motion to compel arbitration [was] wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer[s] Act and the public policy of this State." *Ibid.*

5. While the petition for rehearing was pending, this Court granted the petition for certiorari in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which presented the question whether the FAA preempted a state-law rule that conditioned the enforceability of an arbitration agreement on the availability of class arbitration.

After the South Carolina Supreme Court denied rehearing, petitioner filed a petition for certiorari in this Court, contending that this case presented a materially identical question to the one then pending in *AT&T Mobility*. See 10-315 Pet. 6-9. After issuing its decision in *AT&T Mobility*—which held that the FAA preempted the state-law rule at issue there—the Court granted the petition, vacated the judgment below, and remanded for further consideration. See 131 S. Ct. 2872 (2011).

6. On remand, the South Carolina Supreme Court reinstated its original opinion. App., *infra*, 1a-11a.

Although the South Carolina Supreme Court had seemingly rejected petitioner's preemption argument on the merits in denying the earlier petition for rehearing, the court now determined that petitioner had forfeited that argument by failing to raise it earlier. App., *infra*, 2a-3a. Although the court acknowledged that petitioner had previously raised its preemption argument, the court reasoned that "such an attempt was untimely and im-

proper as a party may not raise an issue for the first time in a petition for rehearing"—even though the particular state-law rule that was the object of petitioner's preemption argument was not advanced by Ms. Watts and was not adopted until the opinion from which rehearing was sought. *Id.* at 9a.

Based on its determination that petitioner had failed adequately to preserve its preemption argument, the South Carolina Supreme Court held that "further consideration in light of *AT&T Mobility* * * * is unwarranted." App., *infra*, 11a. In conclusion, the court stated, "[w]e reinstate our original opinion and decline to revisit it." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case is a compelling candidate for summary reversal. Twice in the last two years, this Court has rejected efforts to coerce unwilling parties into class arbitration (or to condition the enforceability of arbitration agreements on the availability of class arbitration). See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). Some lower courts, however, have reacted to those decisions with almost open defiance, evincing the same hostility to arbitration that led Congress to enact the Federal Arbitration Act in the first place. Just last month, the Court summarily reversed a lower-court decision on the ground that it was inconsistent with the "clear instruction" provided in *AT&T Mobility*. See *Marmet Health Care Center, Inc. v. Brown*, Nos. 11-391 & 11-394, slip op. 2-4 (Feb. 21, 2012) (per curiam).

The South Carolina Supreme Court's decision in this case is cut from the same cloth as the West Virginia Supreme Court's decision in *Marmet*. In its original opi-

nion, the South Carolina Supreme Court held that, notwithstanding the FAA, state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. In the period between *Stolt-Nielsen* and *AT&T Mobility*, the court considered and rejected on the merits petitioner's contention that the FAA preempted its newly minted state-law rule. In the wake of this Court's decision in *AT&T Mobility*, the South Carolina Supreme Court's rejection of petitioner's preemption argument became entirely untenable. But in the face of an order from this Court vacating its original opinion and remanding the case for further consideration in light of *AT&T Mobility*, the South Carolina Supreme Court *reinstated* its original opinion, holding that the preemption argument it had previously rejected on the merits had actually been forfeited because petitioner had not made the argument earlier in the litigation.

The South Carolina Supreme Court's efforts to insulate its decision to invalidate the waiver of class arbitration from this Court's review cannot stand. It would be nonsensical to suggest that a party has forfeited an argument when it raises it at the first available opportunity. But that is precisely the upshot of the South Carolina Supreme Court's most recent order, in which it determined that petitioner had forfeited its preemption argument by failing to raise it before its petition for rehearing—even though the state-law rule was adopted *sua sponte* in the opinion from which rehearing was sought. That determination, moreover, is fundamentally inconsistent with the court's earlier order denying the petition for rehearing, which addressed the preemption argument on the merits—the same argument that the court now asserts is forfeited. It is hard to imagine a flimsier rationale for refusing to apply squarely controlling federal law. This Court's intervention is necessary in order

to vindicate petitioner's right to arbitration and to make clear that judicial hostility to arbitration cannot be tolerated. The petition for certiorari should be granted, and the judgment of the South Carolina Supreme Court summarily reversed.

A. The South Carolina Supreme Court's Decision To Invalidate A Waiver Of Class Arbitration Conflicts With *AT&T Mobility*

1. In the wake of this Court's decision in *AT&T Mobility*, it is now clear that the FAA preempts the state-law rule that the South Carolina Supreme Court adopted in its original opinion. In that opinion, the South Carolina Supreme Court determined that "the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act"—and, for that reason, it concluded that "any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." App., *infra*, 21a. In *AT&T Mobility*, however, this Court held that a state-law rule that conditioned the enforceability of an arbitration agreement on the availability of class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

a. The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case. Like the rule in *AT&T Mobility*, the rule at issue here was grounded in public policy: specifically, the perceived concern that it would be impractical to resolve claims involving relatively small amounts in bilateral arbitration. Compare *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005) (noting, in adopting the rule at issue in *AT&T Mobility*, that the claims at issue "predict-

ably involve small amounts of damages”), with App., *infra*, 20a (noting that “[d]amages are typically small” in Dealers Act cases). Significantly, in *AT&T Mobility*, the Court deemed that public-policy concern insufficient to avoid preemption, reasoning that “States cannot require a procedure that is inconsistent with the FAA[] even if it is desirable for unrelated reasons.” 131 S. Ct. at 1753.

Also like the rule in *AT&T Mobility*, the state-law rule at issue here “does not *require* classwide arbitration.” 131 S. Ct. at 1750. But both rules offend the FAA in the same way: namely, by forcing a defendant that is a party to an arbitration agreement to make the Hobson’s choice between acquiescing to class arbitration and losing the benefits of the arbitration agreement altogether. Put differently, both rules have the practical effect of conditioning a defendant’s ability to arbitrate on its willingness to agree to class arbitration. As a result, both rules contravene Congress’s “overarching purpose” in the FAA: *viz.*, “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” *Id.* at 1748.

b. On remand, respondents sought to distinguish the state-law rule at issue here from the state-law rule in *AT&T Mobility* on the ground that the former rule “involves narrow restrictions not against arbitration for all consumer cases, but in favor of a specific protection for a certain type of litigant; in this case, car-buying consumers.” Resp. S.C. S. Ct. Remand Br. 11. In *AT&T Mobility* itself, however, the Court made clear that the FAA preempts a state-law rule whenever it “prohibits outright the arbitration of a particular type of claim.” 131 S. Ct. at 1747.

The Court’s recent opinion in *Marmet* confirms that the FAA preempts not just state-law rules of general applicability, but also rules that apply only to claims in-

volving a particular subject. In *Marmet*, the West Virginia Supreme Court had held that, as a matter of state law, “an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death[] shall not be enforced to compel arbitration of a dispute concerning the negligence.” *Brown v. Genesis Healthcare Corp.*, Nos. 35494, 35546 & 35635, ___ S.E.2d ___, 2011 WL 2611327, at *29 (June 29, 2011). Although the state-law rule appeared to be confined to the context of claims involving negligence at nursing homes, the Court characterized the rule as a “categorical rule prohibiting arbitration of a particular type of claim,” and held that it was preempted under the reasoning of *AT&T Mobility*. See *Marmet*, slip op. 4.

So too here. Although the state-law rule at issue is by its terms limited to claims arising under the Dealers Act—and although it “does not *require* classwide arbitration,” *AT&T Mobility*, 131 S. Ct. at 1750—it is still preempted because it offends the FAA’s overriding purpose of “enforc[ing] arbitration agreements as written.” *Id.* at 1754. There can be no serious dispute that, if the South Carolina Supreme Court had faithfully reconsidered its decision in light of *AT&T Mobility*, it would have reversed course and compelled arbitration of Ms. Watts’s claims.

2. The South Carolina Supreme Court’s decision on remand contrasts with the decisions of lower courts in other cases remanded by this Court for further consideration in light of *AT&T Mobility*. In one such case, the Third Circuit had invalidated an arbitration provision in a cellular-telephone service agreement because it violated a New Jersey rule grounded in the public-policy concern that it would be impractical to resolve consumer claims involving small amounts in bilateral arbitration.

See *Litman v. Celco Partnership*, 381 Fed. Appx. 140, 141 (3d Cir. 2010), vacated and remanded, 131 S. Ct. 2872, 131 S. Ct. 2873 (2011). On remand, the Third Circuit held that the state-law rule it had previously recognized was preempted by the FAA. See *Litman v. Celco Partnership*, 655 F.3d 225, 231 (3d Cir. 2011), cert. denied, 132 S. Ct. 1046 (2012).

In other cases that were remanded in the wake of *AT&T Mobility*, lower courts have reached similar conclusions. See *Fensterstock v. Education Finance Partners*, 426 Fed. Appx. 14, 15 (2d Cir. 2011) (concluding that “the *Discover Bank* rationale is no longer viable” in the wake of *AT&T Mobility*); *Gordon v. Branch Banking & Trust*, No. 09-15399, 2012 WL 265938, at *1 (11th Cir. Jan. 31, 2012) (per curiam) (remanding to the district court for further consideration in light of *AT&T Mobility* and intervening Eleventh Circuit decisions).³ The decisions of those courts, in turn, reflect the broader consensus since *AT&T Mobility* that “[S]tates cannot refuse to enforce arbitration agreements based on public policy.” *Arellano v. T-Mobile USA, Inc.*, Civ. No. 10-5663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011).⁴

³ But cf. *Brewer v. Missouri Title Loans, Inc.*, ___ S.W.3d ___, No. 90647, 2012 WL 716878, at *5 (Mo. Mar. 6, 2012) (holding a waiver of class arbitration invalid on the ground that unconscionability determinations must be made on a case-by-case basis). In another remanded case, the California Supreme Court has yet to issue an opinion. See *Sonic Calabazas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

⁴ See, e.g., *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011); *D’Antuono v. Service Road Corp.*, 789 F. Supp. 2d 308, 331 (D. Conn. 2011); *Zarandi v. Alliance Data Systems Corp.*, Civ. No. 10-8309, 2011 WL 1827228, at *2 (C.D. Cal. May 9, 2011); *Day v. Persels & Assocs.*, Civ. No. 10-2463, 2011 WL 1770300, at *5 (M.D. Fla. May 9, 2011); *Bellows v. Midland Credit Mgmt., Inc.*, Civ. No. 09-1951, 2011 WL 1691323, at *3 (S.D. Cal. May 4, 2011).

The South Carolina Supreme Court therefore stands out for its unwillingness to revisit its previously articulated state-law rule limiting the availability of arbitration.

B. There Is No Adequate State-Law Ground To Insulate The South Carolina Supreme Court’s Decision From Further Review

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited its preemption argument by failing to raise it earlier in the litigation. That is an untenable basis for refusing to consider petitioner’s argument, and it therefore presents no obstacle to this Court’s review.

1. In its original opinion, the South Carolina Supreme Court held that the waiver of class arbitration in the arbitration agreement was not unconscionable, but was nevertheless inconsistent with South Carolina public policy as embodied in the Dealers Act. App., *infra*, 20a-21a. Notably, Ms. Watts had never advanced that discrete ground for invalidating the waiver of class arbitration, nor had the trial court addressed it; instead, the South Carolina Supreme Court adopted it *sua sponte*. Naturally, therefore, petitioner did not specifically argue that the FAA preempted the *Dealers Act* until its petition for rehearing. See S.C. S. Ct. Pet. for Reh’g 3-7.

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier. App., *infra*, 2a-3a. In doing so, however, the court completely ignored the fact that the state-law rule that was the object of petitioner’s preemption argument was only adopted in the opinion from which rehearing was sought—and that petitioner therefore raised the preemption argument at the first opportunity it had to do so.

2. In order to be an adequate state-law ground, the state-law ground “must * * * be a tenable one.” Ro-

bert L. Stern et al., *Supreme Court Practice* § 3.26, at 222 (9th ed. 2007). A state court cannot evade this Court's review by relying on a state-law ground that is "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." *Enterprise Irrigation Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917). And before a state procedural rule can be "permitted to bar vindication of important federal rights," a state court's application of that rule must be shown to "serve[] a legitimate state interest." *Henry v. Mississippi*, 379 U.S. 443, 447-448 (1965).

The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation of arguments. To the contrary, in South Carolina as elsewhere, a party adequately preserves an argument by making it at the first available opportunity. See, e.g., *Stone v. Roadway Express*, 627 S.E.2d 695, 699 (S.C. 2006) (holding that an employer timely raised a defense to a workers' compensation claim based on the employee's death when it did so for the first time before an appellate panel, on the ground that the employer raised it "at the first available opportunity"); *Mortgage Electronic Systems, Inc. v. White*, 682 S.E.2d 498, 501 (S.C. Ct. App. 2009) (holding that the defendants timely challenged the denial of their demand for a jury trial when the special referee did not rule on the demand until the day of the hearing and the defendants did not appeal until after the hearing, on the ground that the appeal was taken "at the first available opportunity").

Consistent with that general principle, this Court has long recognized that a party adequately preserves a federal argument in a petition for rehearing to a state court of last resort where "the ruling of the state court could

not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935); see, e.g., *Prune-Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980); *Terminiello v. City of Chicago*, 337 U.S. 1, 5-6 (1949); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678 (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313, 320 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). That principle squarely applies here, because petitioner could not have anticipated the South Carolina Supreme Court's adoption of its novel state-law rule.

There is no conceivable state interest in applying a forfeiture rule that would demand clairvoyance, by requiring a party to make a responsive argument before the argument to which it responds has itself been made (or could even have been anticipated). And even if South Carolina courts had consistently applied such a rule, it would be inadequate for an additional reason, because it would deprive a party of a "reasonable opportunity" to assert its federal rights. *Lee v. Kemna*, 534 U.S. 362, 392 (2002) (Kennedy, J., dissenting) (quoting 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4027, at 392 (2d ed. 1996)).

3. Perhaps the best evidence that South Carolina courts do not ordinarily apply such a rule comes from the South Carolina Supreme Court's earlier ruling *in this case*. In response to petitioner's petition for rehearing, in which petitioner first made the specific argument that the FAA preempted the Dealers Act, the South Carolina Supreme Court did not determine that the petitioner had forfeited the argument by failing to raise it earlier. Instead, the South Carolina Supreme Court considered and rejected that argument on the merits, reasoning that this Court's decision in *Stolt-Nielsen* (on which petitioner

had heavily relied) was “distinguishable on the law and the facts.” App., *infra*, 26a. It was only after this Court decided *AT&T Mobility*—confirming that petitioner’s preemption argument was in fact correct—that the South Carolina Supreme Court suddenly determined that the argument had been forfeited. That sequence of events strongly suggests that the South Carolina Supreme Court relied upon forfeiture in order to “thwart review in this Court” by a party seeking vindication of a federal right. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958).

The South Carolina Supreme Court’s forfeiture determination is particularly problematic because, even before the South Carolina Supreme Court’s unexpected reliance on the Dealers Act, petitioner consistently took the position that it would violate the strong federal policy embodied in the FAA not to enforce the waiver of class arbitration. In moving to compel arbitration in the first place, petitioner contended that “[t]he FAA embodies the strong federal policy in favor of enforcing arbitration agreements,” Mem. in Support of Mot. to Compel Arb. 4 (internal quotation marks and citation omitted), and that “South Carolina courts give due regard * * * to the federal policy favoring arbitration,” Reply Mem. in Support of Mot. to Compel Arb. 1 n.1 (internal quotation marks and citation omitted).

In addition, in its brief before the South Carolina Supreme Court, petitioner contended that the trial court’s order holding that the waiver of class arbitration was unconscionable under state law “violated the federal policy favoring arbitration” and should be “reverse[d] * * * as inconsistent with federal law.” Pet. S.C. C.A. Br. 11; see *id.* at 1 (contending, in first question presented, that the trial court “violated the federal and South Carolina policies favoring arbitration”). Although the South Caro-

lina Supreme Court faulted petitioner for failing to make a “specifically articulated preemption argument” until its petition for rehearing, App., *infra*, 8a, petitioner’s failure to do so was entirely unsurprising because, until the South Carolina Supreme Court’s original opinion, petitioner had no occasion to frame its argument as seeking preemption of that court’s novel state-law rule.

By any standard, therefore, petitioner adequately preserved its preemption argument. And this Court should not countenance the South Carolina Supreme Court’s subsequent efforts to shield that anti-arbitration rule from further review. The South Carolina Supreme Court’s rejection of petitioner’s preemption argument constitutes a “demonstrably erroneous application of federal law.” *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (per curiam). Summary reversal is warranted to correct that error—and to make clear to lower courts that they are not free to flout the FAA and this Court’s jurisprudence interpreting it.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the South Carolina Supreme Court summarily reversed.

Respectfully submitted.

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MARCH 2012

Exhibit 2

2012 WL 1514400 (U S) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

SONIC AUTOMOTIVE, 2752 Lauens Rd , Greenville, Inc , d/b/a Century BMW, Petitioner,

v
Christine WATTS, et al

No 11-1151.
April 30, 2012

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

Reply Brief for the Petitioner

Steven W Hamm, C Jo Anne Wessinger Hill, Richardson Plowden, & Robinson, P A , P O Box 7788, Columbia, SC 29202.

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TABLE OF AUTHORITIES

Cases	
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S. Ct. 1740 (2011)	<i>passim</i>
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S.C. Code Ann. § 56-15-110(2) (2006)	8
Miscellaneous:	
Charles Alan Wright et al., <i>Federal Practice and Procedure</i> (2d ed. 1996)	5

*1 Nothing respondents say in their brief in opposition undermines the case for summary reversal. In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration. For the reasons stated in the petition, that determination is wholly untenable and presents no obstacle to this Court's review.

In their brief in opposition, respondents make two primary contentions: first, that the South Carolina Supreme Court's forfeiture determination was correct because respondents had previously advocated the state-law rule that the court adopted in its original opinion, *2 and second, that *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), does not control the analysis in this case because of the allegedly distinctive nature of the state-law rule. As we will now explain, respondents are simply wrong in each particular. By belatedly invoking forfeiture in response to the remand for further consideration in light of *AT&T Mobility*,

the South Carolina Supreme Court has thumbed its nose at this Court. The Court should grant the petition and summarily reverse the judgment below.

1 In its original opinion, the South Carolina Supreme Court held that the waiver of class arbitration in the arbitration agreement was inconsistent with South Carolina public policy as embodied in the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act). Pet. App. 20a-21a. Respondents seemingly concede that, if petitioner is correct that the South Carolina Supreme Court adopted that state-law rule *sua sponte*, petitioner would adequately have preserved its argument that the rule was preempted by raising the argument for the first time in its petition for rehearing.

Respondents instead contend that, in her brief before the South Carolina Supreme Court, Christine Watts *did* advocate the state-law rule that the waiver of class arbitration was inconsistent with the Dealers Act - with the implication that, because petitioner did not argue pre-emption in reply, the argument was properly held to be forfeited. See Br. in Opp. 12-13 (citing Resp. S.C.S.Ct. Br. 11, 19, 21-22). But to the extent Ms. Watts cited the Dealers Act in her brief, she did so not in support of any argument that the Dealers Act itself invalidated the waiver of class arbitration, but instead merely in aid of the discrete (and more ambitious) argument that the arbitration agreement as a whole was unconscionable as a matter of state law. See, e.g., Resp. S.C.S.Ct. Br. 19-25 (section headed "[Petitioner's] Arbitration Agreement Contains One-Sided and Oppressive Terms").¹ Critically, in rejecting the unconscionability argument but then adopting the Dealers Act argument, the South Carolina Supreme Court itself acknowledged that the latter argument was one that Ms. Watts had not made. See Pet. App. 20a.

In their brief in opposition, respondents explicitly concede that the two arguments are discrete. See, e.g., Br. in Opp. 15-16 (contending, in arguing that *AT&T Mobility* is not controlling, that "[t]he *AT&T* case was about unconscionability, while this case is about the effect of a purported contractual waiver of an unwaivable right to a group action under state law, *regardless of unconscionability*" (emphasis added)). And they implicitly concede that this case had been litigated solely on the issue of unconscionability when they repeatedly cite the trial court's observation that the parties had agreed that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C.), cert. denied, 552 U.S. 990 (2007), was the "controlling authority" on petitioner's motion to compel arbitration. See, e.g., Br. in Opp. 5, 12, 13 (citing Pet. App. 29a). Although that case (like this one) involved Dealers Act claims, the South Carolina Supreme Court's decision in *Simpson* addressed only the question of unconscionability. See, e.g., 644 S.E.2d at 669 (noting that "we determine whether a contract provision is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms").² The trial court in this case agreed with Ms. Watts that the arbitration agreement as a whole was unconscionable on the grounds cited in *Simpson*, see Pet. App. 27a-40a, and Ms. Watts's brief to the South Carolina Supreme Court was devoted to a defense of the trial court's reasoning, see Resp. S.C.S.Ct. Br. 11-30. There can therefore be no doubt that Ms. Watts did not advance the discrete argument that the Dealers Act invalidated the waiver of class arbitration.

Respondents do not dispute that petitioner vigorously argued in its petition for rehearing that the South Carolina Supreme Court's novel state-law rule was preempted. See, e.g., S.C.S.Ct. Pet. for Reh'g 3 (arguing that "[t]he FAA clearly preempts South Carolina law, as this Court construed it").³ Nor do respondents offer any explanation for the fact that, in response to the petition for rehearing, the South Carolina Supreme Court considered and rejected petitioner's preemption argument on the merits - a telling sign that the court's subsequent determination that the argument was forfeited⁴ was nothing more than a thinly disguised effort to "thwart review in this Court." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958). Because petitioner raised its preemption argument at the first available opportunity, there is no valid justification for the South Carolina Supreme Court's subsequent forfeiture determination - a determination that unjustly deprived petitioner of a "reasonable opportunity" to assert its federal rights. *Lee v. Weems*, 334 U.S. 362, 392 (2002) (Kennedy, J., dissenting) (quoting 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4027, at 392 (2d ed. 1996)).

2. Once the South Carolina Supreme Court's forfeiture determination is set aside, it is clear that the FAA preempts the state-law rule that the court adopted in its original opinion. In *AT&T Mobility*, this Court held that a state-law rule that conditioned the enforcement of an arbitration agreement on the availability of class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S.Ct. at 1748.

The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case. To be sure, the rule at issue here, unlike the rule in *AT&T Mobility*, applies only to claims involving a particular subject *ie*, claims brought under the Dealers Act. In *AT&T Mobility* itself, however, the Court stressed that the FAA preempts a state-law rule whenever it “prohibits outright the arbitration of a particular type of claim.” 131 S. Ct. at 1747. And in its recent decision ordering summary reversal in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the Court applied that principle and held that a state-law rule that was seemingly applicable only to claims involving negligence *6 at nursing homes was preempted under the reasoning of *AT&T Mobility*. See *id.* at 1203-1204.

Respondents suggest two additional ways of distinguishing *AT&T Mobility*, but neither is persuasive. Respondents first note that the state-law rule invalidated in *AT&T Mobility* was a “judicially created rule,” whereas the state-law rule at issue here is rooted in the Dealers Act, a “substantive state statute.” See Br. in Opp. 14-17. But that is the epitome of a distinction without a difference, because the holding of *AT&T Mobility* was no more limited to common-law rules than it was to cellular-telephone contracts. The Court has repeatedly held that, consistent with ordinary preemption principles, the FAA preempts state statutes as well as common-law rules, in so doing, the Court has made clear that the FAA’s policy favoring arbitration overrides “state legislative attempts to undercut the enforceability of arbitration agreements.” *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984), see, e.g., *Preston v. Ferrer*, 552 U.S. 346, 363 (2008), *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 683 (1996).

In the alternative, respondents contend that *AT&T Mobility* is distinguishable because this case is a “private attorney general action” rather than a class action. See Br. in Opp. 17-22. As a preliminary matter, this case is a garden-variety class action in which respondents are seeking the usual litany of remedies that would flow to class members, including actual, compensatory, and punitive damages and disgorgement of the “administrative fees” being challenged. See S.C.C.A. App. 146. Accordingly, in its original opinion, the South Carolina Supreme *7 Court accurately described this case as “a class action suit against [petitioner].” Pet. App. 13a.⁴

Even if respondents were correct to label this case a “private attorney general action,” however, the outcome of the preemption analysis under *AT&T Mobility* would be the same. *AT&T Mobility* stands for the proposition that, whatever the public-policy justification for a state-law rule invalidating waivers of class arbitration, such a rule “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” 131 S. Ct. at 1748. Even if South Carolina had expressly denominated all or some actions under the Dealers Act as “private attorney general actions,” therefore, it would be unable to escape preemption under the *AT&T Mobility* principle.

Finally, although it is ultimately irrelevant to the preemption analysis, it bears emphasizing that this is not a situation in which a State has specifically provided that the right to proceed on a classwide basis on a particular type of claim is non-waivable. In the relevant provision of the Dealers Act, South Carolina merely authorized Dealers Act claims to be brought as class actions. See *8 S.C. Code Ann. § 56-15-110(2) (2006). The South Carolina Supreme Court nevertheless cited that run-of-the-mill provision in concluding that, as a matter of “public policy,” plaintiffs have a *non-waivable* right to proceed on a classwide basis on Dealers Act claims. See Pet. App. 21a.

If the South Carolina Supreme Court’s decision adopting that state-law rule is allowed to stand, it will serve as a template for lower courts that wish to evade the rule of *AT&T Mobility*. And if the South Carolina Supreme Court’s subsequent decision on remand is left undisturbed, it will signal to lower courts that this Court will permit such evasion to go uncorrected. This is therefore the rare case in which summary reversal is warranted.

The petition for a writ of certiorari should be granted and the judgment of the South Carolina Supreme Court summarily reversed.

Footnotes

- 1 Should the Court have any lingering doubt as to whether Ms. Watts advanced the argument that the Dealers Act itself invalidated the waiver of class arbitration, it should call for the record and examine the pleadings itself.
- 2 To be sure, in determining whether the arbitration clause at issue contained "oppressive, one-sided terms," the South Carolina Supreme Court took into consideration whether the clause limited the remedies available on the underlying claims. See *Simpson*, 644 S.E.2d at 670-671. It was in that context that the court stated that the clause, which barred an arbitrator from awarding punitive damages, "violates statutory law because it prevents [the plaintiff] from receiving the mandatory statutory remedies to which she may be entitled in her underlying *** Dealers Act claims." *Id.* at 671. That is a far cry, however, from suggesting that the Dealers Act itself invalidates a waiver of class arbitration.
- 3 Throughout the litigation, moreover, petitioner repeatedly made the more generalized argument that it would violate the strong federal policy embodied in the FAA to invalidate provisions of the arbitration agreement on *any* ground. See Pet. 16-17.
- 4 Because respondents are seeking the full panoply of class-action remedies under the Dealers Act, their claims critically differ from claims brought under the California Private Attorneys General Act - the statute at issue in *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), cert. denied, No. 11-880 (Apr. 16, 2012). The purpose of the California statute is "not to recover damages or restitution", to the extent the statute provides for civil penalties, most of those penalties flow to the State. See *id.* at 862. Notably, since the intermediate-state-court decision in *Brown*, the Ninth Circuit has held that, in light of *AT&T Mobility*, "[t]he FAA preempts California's *** rule that claims for public injunctive relief cannot be arbitrated." *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 965 (9th Cir. 2012).

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Exhibit 3

STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease, Michael Watts, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described below to Defendants

Plaintiffs,

vs.

Century BMW a/k/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments, LP a/k/a Hendricks Honda; Overland, Inc. d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments; and Toyota of Greenville, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
CIRCUIT
I, Liz Godard, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original as filed with me on 10-12-09. Office this

CIVIL ACTION NO. 06-CP-02-1330

OCT 12 2009

Liz Godard
C.C.P. & U.S., Aiken County, S.C.
Anita Knoepfle
Deputy Clerk

ORDER ON MOTION TO DISMISS
AND SUBSTITUTE AS TO TOYOTA
OF GREENVILLE, INC.

FILED 10.12.09
Liz Godard
C.C.P. & U.S.
Anita Knoepfle / OSK
Deputy Clerk

This matter comes before the Court by way of Plaintiffs' Motion to Dismiss and Substitute as to Defendant Toyota of Greenville. This motion was argued before me on October 1, 2009. After considering the parties' filings, as well the legal arguments of counsel, I have determined the motion should be granted and that David Carroll is to replace Plaintiff Michael Watts as the named representative as to Defendant Toyota of Greenville, Inc. Plaintiff Watts's individual claims are dismissed with prejudice.

This a consumer protection action brought against the Defendants based on alleged violations of South Carolina laws, including but not limited to the South Carolina Manufacturers, Distributors, and Dealers Act ("Dealers Act"), codified at S.C. Code Ann. sections 56-15-10, et

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seq. The Dealers Act prohibits motor vehicle dealers from engaging "in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." S.C. Code Ann. § 56-15-40. In order to protect the public through enforcement of the Dealers Act, the Legislature created a private right of action for damages in section 56-15-110, and in order to further protect the public through private enforcement, added a separate provision enabling a private action to be brought in a representative capacity for "the benefit of the whole." S.C. Code § 56-15-110(2). The specific language of this section reads:

When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Id. This statute allows one aggrieved car purchaser to sue "for the benefit of the whole," including all persons hurt by the same Defendant's violations of the Dealers Act.

This case was filed on August 29, 2006. On October 31, 2006, Plaintiffs amended the Complaint. The October 31, 2006 amendment added Plaintiff Michael Watts as a named representative under the Dealers Act representing all persons who paid "administrative fees" to Defendant Toyota of Greenville, Inc. Plaintiffs' Amended Complaint defines "administrative fees" as including illegal fees "often referred to as an 'administrative fee,' a 'recording and processing fee,' 'closing fee,' 'dealer documentation and closing fee.'" Plaintiffs allege that Defendants are charging the "administrative fees" in violation of the Consumer Protection Code, S.C. Code Ann. §37-2-307, and the Dealers Act, §56-15-10 *et seq.*¹

¹The Consumer Protection Code, S.C. Code Ann. §37-2-307 uses the term "closing fees" as encompassing all of these fees.

In July 2007, this Court issued an Order confirming a substantive statutory right of the named Plaintiffs to proceed "for the benefit of the whole" under the Dealers Act against all Defendants without "a requirement that the plaintiff plead and prove the class certification requirements of S.C. R. P. Rule 23." This finding certifies that the named plaintiffs could proceed on behalf of the group of car purchasers who paid "administrative fees."

In January 2008, this Court ruled on certain Defendants' Rule 59(e) motions and then held that each named Plaintiff had standing to sue for himself and in a representative capacity for others against the Defendant that transacted business with that named Plaintiff. The January 2008 ruling confirmed that named Plaintiffs, including Plaintiff Watts, who, as alleged in the Amended Complaint, paid "administrative fees," represented a large group of people who had paid the same kind of fee.²

In May 2009, Plaintiff Watts decided that he no longer wished to participate in this case as the named representative plaintiff against Defendant Toyota of Greenville, Inc. Defendant Toyota of Greenville, Inc. refused to consent to Plaintiff Watts's request for a dismissal with prejudice of his claim.

In June 2009, David Carroll, a purchaser who like Plaintiff Watts alleges he paid "administrative fees" to Defendant Toyota of Greenville, Inc., came forward and sought to be substituted as a named representative in this case in order to protect the interests of the group of car purchasers that was represented by Plaintiff Watts. David Carroll has answered written

²As stated by Plaintiffs' counsel at the hearing and confirmed by Defendant Toyota of Greenville's Second Revised Answers to Plaintiffs' First Set of Interrogatories, this Court was correct that there are thousands of car purchases at issue. One purchaser who paid an "administrative fee" has the statutory right to proceed "for the benefit of the whole."

discovery promulgated by Defendant Toyota of Greenville, Inc. and has provided available dates for his deposition.

On June 23, 2009, Plaintiffs' counsel filed this motion seeking to dismiss Plaintiff Michael Watts and substitute David Carroll in this action. In support of the motion, Plaintiffs argue that in representative actions the unnamed group members have an interest that should be protected by allowing the replacement of the named representative. Plaintiffs cite to representative cases for the proposition that "[W]hen a class representative is unable or unwilling to continue as the class representative, the court should permit class members an opportunity to 'substitute themselves as the class representative. By doing so, the court protects the interests of the class, which has a separate and distinct legal status from that of the representative.'" *Citing Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331 (11th Cir. 2003); *Swan v. Stoneman*, 635 F.2d 97 (2nd Cir. 1980); *Griffith v. Bowen*, 678 F.Supp. 942 (D.Mass. 1988).

Defendant Toyota of Greenville, Inc. opposes the motion. Toyota of Greenville, Inc. argues that replacement of Mr. Watts is not proper because class certification has not occurred. At the hearing, Toyota of Greenville, Inc. conceded that if class certification had occurred in this case, Toyota of Greenville, Inc. would not oppose the requested replacement of Plaintiff Watts with Mr. Carroll.

Toyota Greenville, Inc.'s argument as to the necessity of a class certification order fails. This is not a Rule 23, SCRPC class action. This is a group representative action under the Dealers Act, S.C. Code Ann. Section 56-15-110(2). Nothing under the Dealers Act requires the Plaintiffs to move for class certification. Furthermore, I previously ruled "that a named Plaintiff has standing to pursue all three causes of action, on behalf of himself or others, against the Defendant from which that particular Plaintiff purchased a vehicle...." and that "[P]laintiffs are

not required to plead and prove the requirements pertaining to class actions contained in Rule 23 SCRCF during the liability or litigation phase of this case." January 31, 2008, Order, pp. 5 and 11. This Order confirmed that the named Plaintiffs were prosecuting these cases in a representative capacity on behalf of the group of purchasers who purchased vehicles from the same dealership and paid "administrative fees." No separate class certification order is required under the Dealers Act, as "group representation" has already been granted to the named Plaintiffs. Accordingly, Toyota of Greenville, Inc.'s argument that a class certification order is a prerequisite to allowing Mr. Carroll to replace Plaintiff Watts fails.³

Additionally, I find that the unnamed members of the group have an interest in the case that needs to be protected. See Birmingham Steel Corp. v. Tennessee Valley Authority, 353 F.3d 1331 (11th Cir. 2003); Swan v. Stoneman, 635 F.2d 97 (2nd Cir. 1980); Griffith v. Bowen, 678 F.Supp. 942 (D.Mass. 1988). As pointed out by several commentators, the interest of unnamed members in a representative suit is significant such that Plaintiffs' counsel has a duty when the unnamed members of the group stand to unknowingly lose their claims "to make reasonable efforts to recruit and identify a new representative." The Annotated Manual for Complex Litigation provides in part:

Later replacement of a class representative may become necessary if, for example the representative's individual claim has been mooted or otherwise significantly altered. Replacement also may be appropriate if a representative has engaged in conduct inconsistent with the interests of the class or is no longer pursuing the litigation. In such, circumstances, courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements.

Annotated Manual for Complex Litigation, (Fourth), §21.26. Based on the foregoing, I find that the unnamed group members here who paid administrative fees to Defendant Toyota of

³Notably, even in Rule 23 class actions, some courts have allowed the replacement of named plaintiffs prior to class certification. See Griffith v. Bowen, 678 F.Supp. 942 (D.C.Mass. 1988).

Greenville, Inc. have an interest from the inception of the suit that needs to be protected by the replacement of Plaintiff Watts with David Carroll.

Furthermore, this case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorneys general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to enforce regulation. See Hedgepath v. American Tel & Tel. Co., 348 S.C. 340, 359, 559 S.E.2d 327, 338 (Ct.App. 2001)(discussing Aurora National Bank v. Tri Star Marketing, 990 F.Supp. 1020 (N.D.Ill.1998) and the "private attorneys general" provision in the Resource Conservation and Recovery Act). In this case, the Dealers Act empowers both the state Attorney General and private citizens to seek injunctive relief on behalf of the public. See §56-15-40(5) (empowering the Attorney General to issue injunctive relief) and §56-15-110(2)(empowering private citizens to bring suit for the benefit of the public interest). Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Cf. Davis v. U.S. Bancorp, 383 F.3d 761 (8th Cir. 2004)(referring to Minn.Stat. §8.31, subd. 3a, as a private attorney general statute. Minn.Stat. §8.31, subd. 3a, like the Dealers Act allows individuals to enforce statutes regulating unfair business practices by bringing a civil cause of action). Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices. Class certification is not a prerequisite to action to a private attorneys general suit. Moreover, the public interest is protected by allowing the replacement of Plaintiff Watts by David Carroll. Because I find this case is being prosecuted as private attorneys general, this is an additional reason why Plaintiffs' motion should be granted.

Toyota of Greenville, Inc. also argues that Mr. Carroll should not be permitted to replace Plaintiff Watts in this case because there is no rule of civil procedure specifically dealing with this situation. Plaintiffs' counsel contends that Rule 7, SCRPC allows parties to apply for Orders from the Court when the rules do not provide specifically for a motion. *Citing Wright & Miller, Federal Practice and Procedure*, §1190 ("Finally, a party confronted by a situation in which the rules do not provide specifically for a motion, but who can show a need for an order from the court to prevent overreaching or injustice, may make what might be called an 'undifferentiated motion' stating his problem, the grounds for relief, and the remedy desired."). Plaintiffs also point out that replacing named representatives is permitted in other representative lawsuits even though it does not fall within the technical meaning of the terms "substitution" or "intervention" as used in the rules of civil procedure. *Citing Coffey v. Braddy*, 2009 WL 591280, n. 7 (M.D.Fla. 2009) ("[N]othing more is required than to permit the original representatives, who apparently have relinquished their duties, to be replaced. Although some of the cases reviewed use the terms 'intervention' and 'substitution,' it appears many courts use both those terms (sometimes interchangeably within the same sentence) to describe the replacement of class representatives, not necessarily meaning to ascribe to the terms the technical meaning under the Federal Rules of Civil Procedure."). Notably, again, at the hearing, Toyota of Greenville, Inc. conceded that if class certification had occurred in this case, Toyota of Greenville, Inc. would not oppose the requested replacement of Plaintiff Watts with Mr. Carroll.

I find Plaintiffs' arguments as to Rule 7, SCRPC and the Coffey case persuasive. This interpretation is in accord with Rule 1, SCRPC which states that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." In this case, if I were to deny the motion, Mr. Carroll may be forced to start over and file a separate

lawsuit on behalf of the group already represented in this action. This separate case would be the fourth case dealing with the same issues before the Court in this matter.⁴ The filing of a new lawsuit to replace this existing case is not speedy or inexpensive. Additionally, I find that the replacement of Plaintiff Watts with David Carroll avoids unfair prejudice to all parties and is therefore just. The substitution allows all parties to proceed towards a final determination on the merits after several years of litigation without starting anew. It would be unfair to all to sacrifice the time and expense of this litigation without the certainty of final ruling on the legality of the actions at issue.

I also find that an award of attorneys fees to Toyota of Greenville, Inc. is not warranted. None of the cases cited by Toyota of Greenville, Inc. are representative actions where absent group members needed to be protected. See Shipp v. Richardson Corporation of South Carolina, Inc., 285 S.C. 460, 330 S.E.2d 291 (1985); Mauro v. Clabaugh, 299 S.C. 184, 383 S.E.2d 244 (Ct.App. 1989); McEachern v. Wilson, 165 S.C. 485, 164 S.E.2d 133 (1932). This is a representative action under the Dealers Act and any prejudice to Toyota of Greenville, Inc. is mitigated by the substitution of Mr. Carroll. Mr. Carroll will replace Plaintiff Watts, as the named representative for the group of Toyota of Greenville, Inc. purchasers currently represented in this proceeding. This group will continue to be in the suit and any effort expounded by Toyota of Greenville, Inc. in defending against the group's claims will not be lost. Additionally, the cases cited by Toyota of Greenville, Inc. all involve dismissals without prejudice. By contrast, Plaintiff Watts seeks to dismiss his personal claims with prejudice. Toyota of

⁴In addition to this case the cases of Adams, et al v. Action Ford, et al., Civil Action Number: 07-CP-02-1232 and West-Cox, et al v. Cale Yarborough Honda, Inc., a/k/a Cale Yarborough Motors of SC, et al. Civil Action No.: 2007-CP-1154 also involve allegations of illegal "administrative fees."



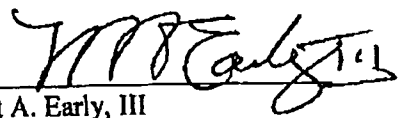
Greenville, Inc. would not automatically be entitled to attorneys fees if Plaintiff Watts's individual claim was lost with prejudice on summary judgment or at trial. Accordingly, it would be inequitable to force Mr. Watts to pay attorneys fees for dismissing only his individual claim with prejudice at this stage.

Based on the foregoing and after full consideration of the issues herein,

IT IS HEREBY ORDERED that the Motion to Dismiss Plaintiff Michael Watts and substitute David Carroll by and the same is hereby granted,

IT IS FURTHER ORDERED that the Defendant's Request for Attorneys fees be and the same is hereby denied.

AND IT IS SO ORDERED.


Doyet A. Early, III
Resident Circuit Court Judge
Second Judicial Circuit

 South Carolina
This 7th day of Oct., 2009.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

Heather Herron et al

CASE NO: 2006CP0201230

CARMAX AUTO SUPERSTORE, et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

This judgment was entered on the 12th day of October, 2009, and a copy mailed first class this 12th day of October, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Liz Godard by A Knapp
Liz Godard - Clerk of Court

Exhibit 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
	)	
Christine Watts, et al, Individually and for the	)	CIVIL ACTION NO 06-CP-02-
Benefit of All Car Buyers Who Paid	)	1230
"Administrative Fees" as Described below to	)	
Defendants	)	
	)	
Plaintiffs,	)	
	)	
vs	)	ASSIGNMENT
	)	
Century BMW a/k/a Sonic Automotive, et al	)	
	)	
Defendants	)	

THIS ASSIGNMENT is made this 1st day of May, 2012 by Michael Watts whose address is 210 Providence Sq Greenville SC, hereinafter referred to as "Assignor", to Christine Watts, whose address is 216 Providence Sq Greenville SC, (hereinafter referred to as "Assignee")

WITNESSETH:

WHEREAS, the Assignor is the purchaser of a car from Century BMW on June 25, 2005 and as such Assignor has an interest in the litigation known as *Christine Watts, et al vs Century BMW, et al* regarding that closing fees charged during the sales transaction, and

WHEREAS, the Assignor desires to assign to the Assignee all of his interest in that litigation,

NOW, THEREFORE, for valuable consideration. the receipt of which is hereby acknowledged, the Assignor hereby assigns to the Assignee all Assignor's interest in the litigation captioned *Christine Watts, et al vs Century BMW, et al*, including the right to direct the litigation and all moneys due or to become due to the Assignor thereunder as well as any other litigation as it relates to this purchase, and

IN WITNESS WHEREOF, the Assignor has executed this assignment the day and year first above written.

Signed, sealed and delivered in the presence of

Melanie B Thomas
Witness

Michael Watts
Assignor

Kathy A. Collins
Witness

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	C.A. No.: 2012-CP-23-07156
Christine Watts,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Sonic Automotive 2752 Laurens Rd.,	)	
Greenville, Inc., d/b/a/ Century BMW,	)	
	)	
Defendant	)	

**CENTURY BMW'S REPLY IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS FOR
FAILURE TO JOIN AN INDISPENSABLE PARTY
OR, IN THE ALTERNATIVE, TO COMPEL ARBITRATION**

Plaintiff's Opposition offers only one reason the Court should not dismiss Ms. Watts' claims for failure to join an indispensable party: that Mr. Watts assigned his claims to Ms. Watts. But Mr. Watts' purported assignment is invalid under controlling South Carolina law. Claims are not assignable unless they would survive the assignor's death, and the South Carolina Supreme Court has held that Dealers Act claims such as the Wattses' do *not* survive. Thus, Plaintiff's argument fails, and the Court should grant Century BMW's motion for judgment on the pleadings.

In the alternative, the Court should compel arbitration. Plaintiff's position that Century BMW waived its preemption argument defies logic and justice. Century BMW could not have argued in its initial motion to compel arbitration that federal law preempts the South Carolina rule prohibiting waivers of class arbitration because no such rule existed at that time. Plaintiff did not argue to this Court that such a rule existed. Instead, the South Carolina Supreme Court announced this rule *sua sponte* in the appeal of *this case*. Moreover, Century BMW could not

have cited the controlling United States Supreme Court precedent in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), in its initial motion because it had not yet been decided. Plaintiff cites no authority that prevents Century BMW from seeking to compel arbitration based on this controlling new legal precedent. This is the first opportunity that Century BMW has had to raise this issue before this Court, and it is seeking a ruling on the merits. And as to the merits, Plaintiff's attempts to distinguish *AT&T Mobility* are plainly off the mark and should be summarily rejected.

ARGUMENT

I. The Court Should Dismiss Christine Watts' Claims Because Michael Watts Is An Indispensable Party.

Plaintiff does not dispute that Mr. Michael Watts—as co-purchaser of the vehicle and signatory to the purchase agreement—has a legal interest in this dispute. Mr. Watts admits that he “is the purchaser of a car from Century BMW on June 25, 2005 and as such [he] has an interest in the litigation known as *Christine Watts, et al vs Century BMW, et al* regarding . . . closing fees charged during the sales transaction.” Assignment (May 1, 2012) (attached as Ex. 4 to Pl. Opp.). Nor does Plaintiff attempt to rebut Century's BMW's legal authority demonstrating that, because of this legal interest, Mr. Watts is an indispensable party. Def. Mem. at 3-7. Instead, Plaintiff's Opposition rests entirely on the argument that Mr. Watts has purportedly assigned his legal interest to Ms. Watts. Pl. Opp. at 16.

That argument fails, however, because Mr. Watts' assignment is invalid under South Carolina law. “It is the established law in South Carolina, and elsewhere as well, that a right of action is assignable if, and only if, the same action would survive to the assignor's personal representative in the event of the assignor's death.” *Schneider v Allstate Ins. Co.*, 487 F. Supp. 239, 241 (D.S.C. 1980) (Blatt. J.) (citing *Doremus v. Atl. Coast Line R.R.*, 242 S.C. 123, 142-

143, 130 S.E.2d 370, 379 (1963); *see also Doremus*, 242 S.C. at 142-43, 130 S.E.2d. at 379 (“[C]auses of action for tort which survive are assignable, while those which do not survive are not assignable.”); *Jolly v. Gen Accident Grp*, 382 F. Supp. 265, 267 (D.S.C. 1974) (same). Claims based on fraud and deceit do not survive *Ferguson v. Charleston Lincoln Mercury, Inc*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) (“South Carolina case law has continued to recognize a common law exception regarding causes of action for fraud or deceit.”).

The South Carolina Supreme Court has specifically held that Dealers Act claims such as the Watts’ are in essence for fraud and deceit and do not survive. *Ferguson* is on all fours with this case. There, as here, the plaintiff’s suit claimed that the charging of closing fees violated the Dealers Act. The Court explained that “[a]lthough [the plaintiff’s] cause of action arose directly under the Dealers Act, his action was based upon a theory of fraud and deceit.” 349 S.C. at 564-565, 564 S.E.2d at 97. Whether the plaintiff labeled the dealership’s “actions as unfair, misleading, or deceptive is irrelevant,” because the “core” of the “complaint was the allegation that [the dealership] misled him into paying more for the car than he should have paid.” *Id.* Similarly, Ms. Watts’ Dealers Act claims are expressly based on fraud and deceit, alleging that “Defendants have conspired together in a common scheme designed to *deceive* all car buyers” and that “[t]hese actions amount to concerted consumer *fraud*.” Am. Compl. 333; *see also id.* ¶338 (“Defendants’ advertising is *misleading* because it fails to include/adequately disclose the fact that Defendants will be charging “administrative fees” that are in addition to the advertised price of the car.”) (emphases added). The court held that “[a]llegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff’s death.” *Id.*

Thus, Mr. Watts cannot assign his causes of action under the Dealer’s Act to Ms. Watts because they would not survive his death. The Court therefore cannot fully adjudicate this case

because, as Mr. Watts acknowledges, he has a legal interest and has been dismissed with prejudice. *See* Def. Mem at 4-5. Accordingly, because Mr Watts is an indispensable party who cannot be joined, the Court should dismiss the case under Rule 19. *Id*

II. The Court Should Compel Arbitration of Christine Watts' Claims.

A. Century BMW Did Not Waive Its Right to Compel Arbitration.

Plaintiff's waiver argument is based on the mistaken premise that "Century BMW forfeited the ability to argue preemption by not raising this *known* argument on the first motion to compel." Pl. Opp. at 4 (emphasis added; capitalization omitted). But Century BMW's preemption argument was not "known" when it filed its motion to compel in this Court in 2007 for two reasons.

First, Century BMW could not have argued that federal law preempted the South Carolina rule prohibiting the waiver of class arbitration because that rule did not yet exist. Plaintiff did not argue that such a rule existed in response to Century BMW's motion to compel arbitration. Plaintiff argued that the arbitration agreement as a whole was unconscionable under South Carolina law, *not* that the agreement's class action waiver violated South Carolina public policy under the Dealers Act. It was not until the appeal of this Court's order denying Century BMW's motion to compel arbitration that the South Carolina Supreme Court adopted, *sua sponte*, the new rule that class action waivers violated South Carolina public policy under the Dealers Act. *Herron v Century BMW*, 387 S.C. 525, 529-30, 693 S.E.2d 394, 396 (2010) ("*Herron I*"). Indeed, the South Carolina Supreme Court acknowledged that Ms. Watts had not made this argument below or even on appeal. 387 S.C. at 535, 693 S.E.2d at 399. Thus, the *Herron I* opinion was the first time that Century BMW could have argued that federal law preempts the South Carolina state law ban on class arbitration because that was when that rule was announced. It is illogical and manifestly unjust to hold that Century BMW should have

clairvoyantly “known” to make a preemption argument in response to an argument that Plaintiff never made and that is based on a South Carolina rule of law first announced while the case was on appeal.

Plaintiff argues that the preemption argument was “known” to Century BMW because it argued federal preemption in another context in response to Plaintiff’s argument regarding the arbitration agreement’s formatting requirements. Pl. Opp. at 5. But that fact only further demonstrates Century BMW’s point. Century BMW *did* raise federal preemption when it was responsive to Plaintiff’s actual arguments. But it did not, and could not, raise preemption arguments in response to an argument that Plaintiff did not make, based on a state-law rule that the South Carolina Supreme Court first announced during the course of the appeal.

Second, Century BMW’s preemption argument based on the United States Supreme Court’s controlling precedent in *AT&T Mobility* was not “known” when Century BMW filed its initial motion to compel because *AT&T Mobility* had not yet been decided. The Supreme Court did not decide *AT&T Mobility* until 2011, after this Court had already ruled on Century BMW’s motion and after the case was on appeal. Thus, Century BMW is not raising an argument that was “known” to it earlier, but is seeking to enforce new, controlling Supreme Court precedent that was not available in 2007 when it first moved to compel arbitration.

Plaintiff cites no authority prohibiting Century BMW from now raising this preemption argument before this Court. Plaintiff mistakenly relies on *Herron v Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (“*Herron I*”), but nothing in that opinion precludes Century BMW’s motion. As is evident from the quotations cited in the Opposition, *Herron II* addressed “issue preservation rules.” Pl. Opp. at 5 (citing *Herron II*, 719 S.E.2d at 645, 395 S.C. at 470). But those rules of appellate procedure, which prevent a party from holding an “ace card up its

sleeve” in the trial court and then presenting it on appeal, are inapplicable here. Century BMW is not seeking to raise an issue on appeal that was not raised in the trial court. It is doing exactly the opposite—raising the issue in the trial court. In other words, in *Herron II* the South Carolina Supreme Court refused to consider Century BMW’s preemption argument on the basis that Century BMW had not first raised it before this Court. Century BMW is doing just that—raising the issue before this Court so that it can rule on the merits.¹

Herron II did not address the issue of whether there could be further review of the issue in *this Court* because that issue was not before it. As the court itself noted, “[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Herron II*, 395 S.C. at 469, 719 S.E.2d at 644 (internal quotation marks omitted). Yet Plaintiff attempts to extend *Herron II* beyond its limits by relying on snippets in the opinion, taken out of context. Plaintiff argues that *Herron II*’s statement that the preemption issue had not been preserved in “our courts” precludes further review of this issue by this Court. Pl. Opp. at 5. But that statement was in the context of the court’s discussion of “issue preservation principles” and means simply that the issue had not been preserved in the “courts” (trial or appellate courts) for purposes of *that appeal*. 395 S.C. at 469-70, 719 S.E.2d at 644-45. Likewise, there is no significance in the fact that the South Carolina Supreme Court reinstated its opinion, rather than remanding it for further consideration, because its task was to reconsider *its* opinion in light of *AT&T Mobility*, not to determine whether the issue could *ever* be raised again in this Court. Thus, *Herron II* addressed only the issues before it, which did *not* include whether

¹ Although they are inapplicable, Plaintiff’s argument also fails under appellate issue preservation rules. Century BMW was not dealt the ace card (*AT&T Mobility*) until *after* the case was already on appeal, so it could not have played it any earlier. And Century BMW could not have played any card on the issue of whether federal law preempts a state law rule invalidating class arbitration because Plaintiff did not make that argument in this Court.

Century BMW could raise the issue of arbitration in this Court based on new, controlling precedent from the United States Supreme Court.

Contrary to Plaintiff's argument, Century BMW did not admit in its petition to the United States Supreme Court that it had permanently waived its right to renew its request for arbitration in this Court. Again, Plaintiff misinterprets quotations from Century BMW's briefs by taking them out of context. Unlike here, Century BMW's petition to the United States Supreme Court challenged the South Carolina Supreme Court's ruling that it had not preserved the arbitration issue *in that appeal*. See Petition for a Writ of Certiorari at 14 ("The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law *on the preservation of arguments.*") (emphasis added) (attached as Ex. 1 to Pl. Opp.). Its statements regarding forfeiture relate to appellate issue preservation; they have nothing to do with the issue here—whether Century BMW can raise the issue *in this trial court*. Century BMW's petition to the United States Supreme Court exhausted its avenues of relief as to whether the issue had been preserved on appeal. But regardless of whether it was preserved on appeal, Century BMW filed this motion *while its petition to the United States Supreme Court was still pending* so it clearly was not taking the position that the South Carolina Supreme Court's holding forever foreclosed Century BMW from raising the issue here. Accordingly, contrary to Plaintiff's argument, Century BMW's petition to the United States Supreme Court is perfectly consistent with this motion and was a companion filing.

Finally, Plaintiff makes a passing comment that *Herron II* is the "law of the case," Pl. Opp. at 4, but makes no attempt to address, let alone distinguish, *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 69 (4th Cir. 1988), which squarely rejects that argument. Def. Mem. at 12-13. Thus, the law of the case doctrine has no applicability here.

B. *AT&T Mobility* Requires the Court to Compel Arbitration.

Once the issue of waiver is set aside, it is clear that the Federal Arbitration Act preempts the state-law rule that the South Carolina Supreme Court adopted in *Herron I*. In *Herron I*, the South Carolina Supreme Court determined that “the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act”—and, for that reason, it concluded that “any contract prohibiting a class action suit violates our State’s public policy and is void and unenforceable ” 387 S.C. at 536, 693 S.E.2d at 399. In *AT&T Mobility*, however, the United States Supreme Court held that a state-law rule that conditioned the enforceability of an arbitration agreement on the availability of class arbitration “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” 131 S. Ct. at 1748.

The state-law rule that the Supreme Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule adopted in *Herron I*. Like the rule in *AT&T Mobility*, the rule adopted in *Herron I* was grounded in public policy: specifically, the perceived concern that it would be impractical to resolve claims involving relatively small amounts in bilateral arbitration. Compare *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (noting, in adopting the rule considered in *AT&T Mobility*, that the claims at issue “predictably involve small amounts of damages”), with *Herron I*, 387 S.C. at 535, 693 S.E.2d at 399 (noting that “[d]amages are typically small” in Dealers Act cases). Significantly, in *AT&T Mobility*, the United States Supreme Court deemed that public-policy concern insufficient to avoid preemption, reasoning that “States cannot require a procedure that is inconsistent with the FAA[] even if it is desirable for unrelated reasons.” 131 S. Ct. at 1753.

Plaintiff suggests two ways of distinguishing *AT&T Mobility*, but neither is persuasive. First, Plaintiff argues that the state-law rule invalidated in *AT&T Mobility* was a “judicially

created rule that class action waivers in all consumer arbitration agreements were unconscionable,” whereas the state-law rule in *Herron I* is rooted in a “state statutory right” (i.e., the Dealers Act). Pl. Opp. at 10-11. But that is a distinction without a difference, because the holding of *AT&T Mobility* was no more limited to judicially-created common-law rules than it was to cellular-telephone contracts. The United States Supreme Court has repeatedly held that, consistent with ordinary preemption principles, the FAA preempts state statutes as well as common-law rules—and, in so doing, the Court has made clear that the FAA’s policy favoring arbitration overrides “state legislative attempts to undercut the enforceability of arbitration agreements.” *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984); *see, e.g., Preston v. Ferrer*, 552 U.S. 346, 353 (2008); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 684-87 (1996).

Indeed, the Supreme Court reiterated *today* that state statutes must yield to the FAA whenever there is a conflict. *Nitro-Lift Technologies, LLC v. Howard*, 568 U. S. __ (2012) (attached as Ex. 1). An Oklahoma state court had held that a noncompetition agreement containing an arbitration agreement was “void and unenforceable as against Oklahoma’s public policy,” as expressed in an Oklahoma statute. *Id.*, slip. op. at 3. The Supreme Court vacated the opinion, explaining that “where a specific state statute conflicts with a general federal statute”—specifically, the FAA—“the latter governs.” *Id.*, slip op., at 5.

Nor is it significant that the rule in *Herron I* applies only to claims involving a particular subject: *i.e.*, claims brought under the Dealers Act. In *AT&T Mobility*, the Supreme Court stressed that the FAA preempts a state-law rule whenever it “prohibits outright the arbitration of a particular type of claim.” 131 S. Ct. at 1747. And in its decision ordering summary reversal in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012), the Court applied that principle and held that a state-law rule that was seemingly applicable only to claims involving

negligence at nursing homes was preempted under the reasoning of *AT&T Mobility*. *See id* at 1203-04. The Supreme Court emphasized this point again today in *Nitro-Lift*, stating that “when state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Nitro-Lift Technologies, L.L.C.*, slip op., at 5 (internal alterations and quotations omitted).

Second, Plaintiff contends that *AT&T Mobility* is distinguishable because this case is a “private attorney general action” rather than a class action. *See* Pl. Opp. at 12-13. But the South Carolina Supreme Court has accurately described this case as “a class action suit against Century [BMW].” *Herron I*, 87 S.C. at 529, 693 S.E.2d at 396. In any event, labeling this case as a “private attorney general action” or “class action” does not change the preemption analysis under *AT&T Mobility*. *AT&T Mobility* stands for the proposition that, whatever the public-policy justification for a state-law rule invalidating waivers of class arbitration, such a rule “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” 131 S. Ct. at 1748. Thus, even if actions under the Dealers Act were “private attorney general actions,” they do not escape preemption under the *AT&T Mobility* principle.

Plaintiff relies on *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011), but Plaintiff’s claims critically differ from claims brought under the California Private Attorney General Act—the statute at issue in that case. Plaintiff is seeking a full panoply of remedies on behalf of herself and class members, including actual, compensatory, and punitive damages and disgorgement of the “administrative fees” being challenged. The purpose of the California statute, however, is “not to recover damages or restitution”; to the extent the statute provides for civil penalties, most of those penalties flow to the State. *See id* at 862.

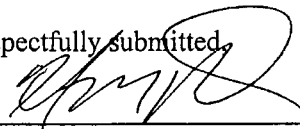
Moreover, courts have repeatedly rejected *Brown* as incorrectly decided. See *Grabowski v. C.H. Robinson Co*, 817 F. Supp. 2d 1159, 1180 (S.D. Cal. 2011) (“[The] Court finds that Plaintiff’s California Private Attorney General Act claim is arbitrable, and that the arbitration agreement’s provision barring him from bringing that claim on behalf of other employees is enforceable.”); *Quevedo v Macy’s, Inc.*, 798 F. Supp. 2d 1122 (C.D. Cal. 2011) (“[T]he Court concludes that Quevedo’s PAGA claim is arbitrable, and that the arbitration agreement’s provision barring him from bringing that claim on behalf of other employees is enforceable.”); *Nelson v AT & T Mobility, LLC*, No. C10-4802, 2011 WL 3651153, at *4 (N.D. Cal. Aug. 18, 2011) (same).

Thus, *AT&T Mobility* could not be more squarely on point. The Court should apply this controlling precedent from the United States Supreme Court and grant its motion to compel arbitration

CONCLUSION

For the reasons stated above, Century BMW respectfully requests that the Court (i) dismiss Christine Watts’ claims for failure to join an indispensable party; or (ii) in the alternative, compel arbitration of her claims.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT SONIC
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INC. D/B/A CENTURY BMW

November 26, 2012
Greenville, South Carolina

Exhibit 1

Per Curiam

SUPREME COURT OF THE UNITED STATES

**NITRO-LIFT TECHNOLOGIES, L. L. C. v. EDDIE LEE
HOWARD ET AL.**

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME
COURT OF OKLAHOMA

No 11–1377 Decided November 26, 2012

PER CURIAM.

State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), 9 U. S. C. §1 *et seq*, including the Act’s national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation. Here, the Oklahoma Supreme Court failed to do so. By declaring the noncompetition agreements in two employment contracts null and void, rather than leaving that determination to the arbitrator in the first instance, the state court ignored a basic tenet of the Act’s substantive arbitration law. The decision must be vacated.

* * *

This dispute arises from a contract between petitioner Nitro-Lift Technologies, L. L. C., and two of its former employees. Nitro-Lift contracts with operators of oil and gas wells to provide services that enhance production. Respondents Eddie Lee Howard and Shane D. Schneider entered a confidentiality and noncompetition agreement with Nitro-Lift that contained the following arbitration clause:

“Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the “Disputing Parties”) shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in

Per Curiam

Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association.” Pet. for Cert. 5.

After working for Nitro-Lift on wells in Oklahoma, Texas, and Arkansas, respondents quit and began working for one of Nitro-Lift’s competitors. Claiming that respondents had breached their noncompetition agreements, Nitro-Lift served them with a demand for arbitration. Respondents then filed suit in the District Court of Johnston County, Oklahoma, asking the court to declare the noncompetition agreements null and void and to enjoin their enforcement. The court dismissed the complaint, finding that the contracts contained valid arbitration clauses under which an arbitrator, and not the court, must settle the parties’ disagreement.

The Oklahoma Supreme Court retained respondents’ appeal and ordered the parties to show cause why the matter should not be resolved by application of Okla Stat, Tit. 15, §219A (West 2011), which limits the enforceability of noncompetition agreements. Nitro-Lift argued that any dispute as to the contracts’ enforceability was a question for the arbitrator. It relied for support—as it had done before the trial court—upon several of this Court’s cases interpreting the FAA, and noted that under *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U. S. 440, 446 (2006), “this arbitration law applies in both state and federal courts.” Record in No. 109,003 (Okla.), p. 273.

The Oklahoma Supreme Court was not persuaded. It held that despite the “[U. S.] Supreme Court cases on which the employers rely,” the “existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement.” 2011 OK 98, ¶15, n. 20, ¶16, 273 P. 3d 20, 26, n. 20, 27. For that proposition, the court relied on the “exhaustive overview of the United States Supreme Court decisions construing the Federal Arbitration Act” in *Bruner v. Timberlane Manor*

Per Curiam

Ltd. Partnership, 2006 OK 90, 155 P. 3d 16, which found Supreme Court jurisprudence “not to inhibit our review of the underlying contract’s validity.” 273 P. 3d, at 26. Finding the arbitration clauses no obstacle to its review, the court held that the noncompetition agreements were “void and unenforceable as against Oklahoma’s public policy,” expressed in Okla. Stat., Tit. 15, §219A. 273 P. 3d, at 27.

The Oklahoma Supreme Court declared that its decision rests on adequate and independent state grounds. *Id.*, at 23–24, n. 5. If that were so, we would have no jurisdiction over this case. See *Michigan v. Long*, 463 U.S. 1032, 1037–1044 (1983). It is not so, however, because the court’s reliance on Oklahoma law was not “independent”—it necessarily depended upon a rejection of the federal claim, which was both “properly presented to” and “addressed by” the state court. *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (*per curiam*) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*)). Nitro-Lift claimed that the arbitrator should decide the contract’s validity, and raised a federal-law basis for that claim by relying on Supreme Court cases construing the FAA. “[A] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds . . .” *Howell*, *supra*, at 444 (quoting *Baldwin v. Reese*, 541 U.S. 27, 32 (2004), emphasis added). The Oklahoma Supreme Court acknowledged the cases on which Nitro-Lift relied, as well as their relevant holdings, but chose to discount these controlling decisions. Its conclusion that, despite this Court’s jurisprudence, the underlying contract’s validity is purely a matter of state law for state-court determination is all the more reason for this Court to assert jurisdiction.

Per Curiam

The Oklahoma Supreme Court's decision disregards this Court's precedents on the FAA. That Act, which "declare[s] a national policy favoring arbitration," *Southland Corp. v. Keating*, 465 U. S. 1, 10 (1984), provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. It is well settled that "the substantive law the Act created [is] applicable in state and federal courts" *Southland Corp.*, *supra*, at 12, see also *Buckeye*, *supra*, at 446. And when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court." *Preston v Ferrer*, 552 U. S. 346, 349 (2008); see also *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967). For these purposes, an "arbitration provision is severable from the remainder of the contract," *Buckeye*, *supra*, at 445, and its validity is subject to initial court determination, but the validity of the remainder of the contract (if the arbitration provision is valid) is for the arbitrator to decide.

This principle requires that the decision below be vacated. The trial court found that the contract contained a valid arbitration clause, and the Oklahoma Supreme Court did not hold otherwise. It nonetheless assumed the arbitrator's role by declaring the noncompetition agreements null and void. The state court insisted that its "[own] jurisprudence controls this issue" and permits review of a "contract submitted to arbitration where one party assert[s] that the underlying agreement [is] void and unenforceable." 273 P. 3d, at 26. But the Oklahoma

Per Curiam

Supreme Court must abide by the FAA, which is “the supreme Law of the Land,” U. S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law. “It is this Court’s responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law.” *Rivers v. Roadway Express, Inc*, 511 U. S. 298, 312 (1994). Our cases hold that the FAA forecloses precisely this type of “judicial hostility towards arbitration.” *AT&T Mobility LLC v. Concepcion*, 563 U. S. ___, ___ (2011) (slip op., at 8).

The state court reasoned that Oklahoma’s statute “addressing the validity of covenants not to compete, must govern over the more general statute favoring arbitration” 273 P. 3d, at 26, n. 21. But the ancient interpretive principle that the specific governs the general (*generalia specialibus non derogant*) applies only to conflict between laws of equivalent dignity. Where a specific statute, for example, conflicts with a general constitutional provision, the latter governs. And the same is true where a specific state statute conflicts with a general federal statute. There is no general-specific exception to the Supremacy Clause, U. S. Const. Art. VI, cl. 2. “[W]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Marmet Health Care Center, Inc v Brown*, 565 U. S. ___, ___–___ (2012) (*per curiam*) (slip op., at 3–4) (quoting *AT&T Mobility LLC, supra*, at ___–___ (slip op., at 6–7)). Hence, it is for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law. See *Buckeye*, 546 U. S., at 445–446.

For the foregoing reasons, the petition for certiorari is granted. The judgment of the Supreme Court of Oklahoma is vacated, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE [X] COURT OF COMMON PLEAS
[] FAMILY COURT

Christine Watts ,

[] Plaintiff,

v

Century BMW, et al

[X] Defendant

C.A. No.: 2012-CP-23-07156

**MOTION INFORMATION FORM
AND COVER SHEET**

check box above indicating submitting party

Name, SC Bar No and Address of

Brady R Thomas

Richardson, Patrick, Westbrook & Brickman, LLC

PO Box 1368

Barnwell, SC 29812

Name, SC Bar No and Address of Defendant's Attorney

Kurt M Rozelsky

Smith Moore Leatherwood

PO Box 87

Greenville, SC 29602

(864) 24-2424

Kurt.rozelsky@smithmoorelaw.com

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion Motion to Reconsider

Estimated Time Needed 30 min/

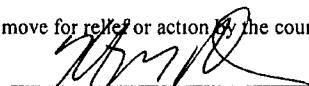
Court Reporter Needed Y

SECTION II: Motion Type

☐ Written motion attached

☒ Form Motion --

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for Century BMW

January 10, 2013

SECTION III: Motion Fee

X] PAID - AMOUNT

[]

(check reason)

[] Rule to Show Cause in Child or Spousal Support

[] Domestic Abuse or Abuse and Neglect

[] Indigent Status

[] State Agency v Indigent Party

[] Sexually Violent Predator Act

[] Post-Conviction Relief

[] Motion for Stay in Bankruptcy

[] Motion for Publication

[] Motion for Execution (Rule 69, SCRCP)

[] Proposed order submitted at request of the court, or

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

[] Other

JUDGE'S SECTION

[] Motion Fee to be paid upon filing of the attached order

[] Other

JUDGE _____

CODE _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by. _____

(print name)

[] MOTION FEE COLLECTED

[] CONTESTED - AMOUNT DUE: _____

SCCA/233 (1/20/03)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	C.A. No.: 2012-CP-23-07156
Christine Watts,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Sonic Automotive 2752 Laurens Rd.,	)	
Greenville, Inc., d/b/a/ Century BMW,	)	
	)	
Defendant.	)	

**CENTURY BMW'S MOTION TO RECONSIDER THE
DECEMBER 31, 2012 ORDER**

Defendant Sonic Automotive 2752 Laurens Rd , Greenville, Inc. ("Century BMW") moves, pursuant to Rule 59(e) SCRPC, to amend and reconsider the Order dated December 31, 2012, denying Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, in the Alternative, to Compel Arbitration. Attached as Exhibit 1.

On January 2, 2013, Plaintiff's counsel sent the Order by letter to the Greenville County Clerk of Court for filing. Counsel for Century BMW received the letter and attached Order on January 4, 2013.

Century BMW requests that the Court reconsider its rulings in the Order for the reasons stated in (i) Century BMW's Memorandum in Support of Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, in the Alternative, to Compel Arbitration, dated May 11, 2012 ("Opening Memorandum"); and (ii) Century BMW's Reply in Support of Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, in the Alternative, to Compel Arbitration, dated November 26, 2012 ("Reply").

In addition, Century BMW highlights two arguments that were not addressed by the Order.

First, the Order does not address the argument on pages 2-4 of the Reply that Mr. Watts's assignment of his claim is invalid under South Carolina law. The Order states that "Mr. Watts executed an assignment of any rights he may have had in this action to his daughter, Christine Watts, the named plaintiff." Order at 5. As explained in Century BMW's Reply, however, South Carolina law indisputably does not permit Mr. Watts to assign his Dealers Act claims to Ms. Watts. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002). Accordingly, Century BMW moves for reconsideration of the Court's Order on this basis.

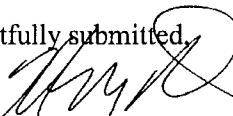
Second, the Court does not address Century BMW's argument on pages 12 and 13 of its Opening Memorandum that a state law procedural rule must yield to a preemptive federal statute under the Supremacy Clause. The Order states that "in light of the S.C. Supreme Court's holding in *Herron II*, this issue is 'procedurally barred as a matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted.'" Order at 4 (quoting *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E. 2d 640, 645 (S.C. 2011)). But a state procedural doctrine must yield to a preemptive federal statute:

A judicially created procedural doctrine cannot defeat the intent of Congress. When Congress preempts state law, it gives concrete expression to the constitutional authority granted by the Supremacy Clause of Article VI. The effect of a preemptive statute is, therefore, quasi-judicial. A state court confronted with a dispute governed by a preemptive federal statute would have no authority to adjudicate the matter other than in accordance with the statute.

Sejman v. Warner-Lambert Co., Inc., however, the 845 F.2d 66, 69 (4th Cir. 1988) Century BMW's motion to compel arbitration is based on the Federal Arbitration Act's preemption of

any state law rule invalidating class action waivers in arbitration agreements. Thus, the FAA, a preemptive federal statute, precludes a finding that Century BMW's is "procedurally barred as a matter of state law" from raising its argument. Century BMW moves for reconsideration of the Order on this basis as well.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANT SONIC
AUTOMOTIVE 2752 LAURENS RD., GREENVILLE,
INC. D/B/A CENTURY BMW

January 10, 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. ²⁰¹²2006 CP- 23-07151
DAE

Christine Watts

Sonic Automotive 2752 Laurens Road,

PLAINTIFF(S)

Greenville, Inc.
DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON).** ☐ Rule 12(b), SCRPC, ☐ Rule 41(a), SCRPC (Vol. Nonsuit), ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j), SCRPC, ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award, ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed, ☐ Reversed, ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

M. E. Early III
Circuit Court Judge
SCRPC Form 4C (12/2011)

0136
Judge Code

12/31/12
Date
Page 1

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

Case No 2012-CP-23-07156

Christine Watts)

Plaintiff,)

vs)

Order

Sonic Automotive 2752 Laurens Road,
Greenville, Inc)

Defendants)

The issue is whether Defendant Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, In the Alternative, to Compel Arbitration should be granted or denied. For reasons described herein, I hereby DENY Defendant Century BMW's motion

PROCEDURAL HISTORY

This action was initiated on August 29, 2006 Ms Watts alleges that Century BMW was charging illegal closing fees in violation of S C Code Ann § 37-2-307 and § 56-15-10, et seq and did engage in one or more of the following illegal acts:

- a Failed to register with the Dept. of Consumer Affairs;
- b. Failed to individually register annually with the Dept of Consumer Affairs,
- c Charged illegal "administrative fees" in excess of the amount for which it registered,
- d Failed to disclose the illegal "administrative fees" on sales contracts,
- e Charged illegal "administrative fees" in excess of their costs,
- f Failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;
- g Advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price, and
- h Created a closing procedure to illegally add "administrative fees"

Ms Watts contends that the conduct of Century BMW violates the South Carolina Dealer's Act (S C Code Ann § 56-15-10)

Century BMW filed a motion to compel arbitration, claiming arbitration was required by an agreement under which Ms Watts waived the right to bring or participate in any class action or multi-

plaintiff or claimant action in court or through arbitration. This motion was denied by this Court in an order dated March 10, 2008. The order concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was "the controlling authority" for the motion.

On March 12, 2008, Century BMW filed a notice of appeal to the South Carolina Court of Appeals. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued an order holding that the provision of the arbitration agreement relied upon by Century BMW was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions.

Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

When such action is one of common or general interest to many person or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against the public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violation of the Dealer Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable. . . . We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. See *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

Herron v. Century BMW, 387 S.C. 525, 535-536, 693 S.E.2d 394, 399-400 (S.C. 2010).



Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement, Century BMW filed a Petition for Rehearing. By order dated June 9, 2010, the South Carolina Supreme Court denied the same.

On August 31, 2010, Century BMW petitioned the United States Supreme Court for a writ of certiorari. While that petition was pending, the U.S. Supreme Court issued its decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (April 27, 2011). The Court then remanded this case to the South Carolina Supreme Court for further consideration, in light of *AT&T*.

After supplemental briefing and oral argument centering on preemption, the South Carolina Supreme Court issued its opinion, dated December 19, 2011. In its opinion, the South Carolina Supreme Court found, as a matter of state law, *preemption was not timely raised* and "is procedurally barred as a matter of state law." *Herron v. Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011) ("*Herron II*").

Century BMW then filed a petition for a Writ of Certiorari in the U.S. Supreme Court, arguing that the S.C. Supreme Court's ruling that Century BMW has "forfeited" the preemption argument by failing to raise it to any prior court was unfair because it would "deprive [Century BMW] of a 'reasonable opportunity' to assert its federal rights." See Petition for a Writ of Certiorari.

On May 21, 2012, the U.S. Supreme Court denied certiorari. Thus, the controlling opinion in this case is the S.C. Supreme Court holding that, in Century BMW's words, Century BMW "forfeited its preemption argument." This is the law of the case.

PREEMPTION

First, I DENY Defendant Century BMW's Motion (in the alternative) to Compel Arbitration. The S.C. Supreme Court's opinion in *Herron II* held, Century BMW could not continue to re-litigate the enforceability of the arbitration agreement by raising arguments it chose not to argue, when the motion to compel arbitration was first argued. The S.C. Supreme Court's opinion in *Herron II* provides in part

[I]t is clear preemption was neither a novel nor an unknown argument to [Century BMW]. Significantly, [Century BMW] did raise the issue of preemption to the trial court, albeit in a different context. [Plaintiff] initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated the state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to any claim of preemption, until the petition for rehearing filed with this Court.

Heron v Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (S.C. 2011)

As this Court observed, 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.” *l’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 406, 522 S.E.2d 716, 724 (S.C. 2000). Here, intentionally or by chance, [Century BMW] kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under even the most liberal approach to issue preservation principles, we could not treat [Century BMW’s] preemption argument as preserved in our *courts* as a matter of state law.

Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted. We reinstate our original opinion and decline to revisit it.

Heron v Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (S.C. 2011) (emphasis added).

It is significant that the S.C. Supreme Court used the word “courts”, plural, thereby signifying its opinion’s applicability to all state courts and not solely the South Carolina Supreme Court. Furthermore, in light of the S.C. Supreme Court’s holding in *Heron II*, this issue is “procedurally barred as a matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted.” *Heron v Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (S.C. 2011) (emphasis added).

Second, Century BMW admitted in its briefing to the United State Supreme Court that the South Carolina Supreme Court’s ruling means that Century BMW forfeited the ability to raise preemption. Defendant Century BMW’s brief provides as follows:

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier.



Petition for Writ of Certiorari 13

The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation arguments

Petition for Writ of Certiorari 14

[The forfeiture rule] is inequitable because it would deprive [Century BMW] of a "reasonable opportunity" to assert its federal rights

Petition for Writ of Certiorari 15

Similarly, Century BMW's Reply Brief to the United States Supreme Court said.

In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration

Petition for Writ of Certiorari 13

In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration.

Century BMW's Reply Brief to U S Supreme Court 1

[T]here is no valid justification for the South Carolina Supreme Court's subsequent forfeiture determination—a determination that unjustly deprived [Century BMW] of a "reasonable opportunity" to assert its federal rights

Century BMW's Reply Brief to U S Supreme Court 2

Century BMW was correct, the South Carolina Supreme Court ruled that the Century BMW forfeited the ability to raise preemption, a position echoed by this Court

INDISPENSABLE PARTY

Finally, I DENY Defendant's motion for judgment on the pleadings pursuant to Rules 12(b)(7) ("failure to join a party under Rule 19"), 12(c), and 12(h) SCRPC Michael Watts is not an indispensable party because judgment rendered in Michael Watts's absence would not prejudice him, nor those who are already parties Moreover, Mr Watts executed an assignment of any rights he may have had in this action, to his daughter, Christine Watts, the named plaintiff Therefore, he has no rights adverse to his daughter, nor will he be prejudiced by a ruling in this case For the same reason, there is no risk of a subsequent

duplicative claim by Mr. Watts. Furthermore, this is not "the very rare" case where a person's absence warrants dismissal of the entire case. See SCRCP 19(a) Note (Noting that "the number of cases in which there is truly an "indispensable party" in whose absence the court should not proceed are very rare.")

CONCLUSION

For the foregoing reasons, Defendant Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, In the Alternative, to Compel Arbitration is DENIED.

IT IS SO ORDERED.

Bombay, SC
Dec 31, 2012

The Honorable Doyet A. Early, III
Circuit Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No.. 2012-CP-23-07156
	)	
Christine Watts	)	
	)	
	)	
	)	PLAINTIFF'S MEMORANDUM IN
Plaintiff,	)	OPPOSITION TO DEFENDANT'S
	)	MOTION FOR
vs	)	RECONSIDERATION
	)	
Sonic Automotive 2752 Laurens Road,	)	
Greenville, Inc.	)	
	)	
Defendants.	)	
	)	

Defendant Century BMW's Motion for Reconsideration should be denied.

First, the Court was correct in ruling that that the South Carolina Supreme Court held, Century BMW, could not continue to re-litigate the enforceability of the arbitration agreement. The South Carolina Supreme Court stated "this issue is procedurally barred as a matter of state law and further consideration in light of *AT&T Mobility, LLC v Concepcion* is unwarranted." See Herron v. Century BWM, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011).

Second, the Court was correct in ruling that Michael Watts is not an indispensable party. To the extent there is any question about the enforceability of Mr. Watts's assignment, Century BMW's concerns can be addressed by modifying the following sentence:

Moreover, Mr. Watts executed an assignment of any rights he may have had in this action, to his daughter, Christine Watts, the named plaintiff.

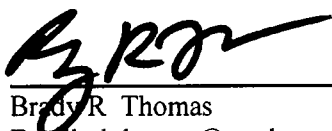
See page 5 of 6 of the Order. A copy of the Order is attached as Exhibit 1.

This sentence can be modified to read as follows:

Moreover, Mr. Watts previously dismissed all claims he had in this action with prejudice, including his claims against Century BMW, and Mr Watts has executed a disclaimer of any rights he may have related to the transaction.

The above change would moot all arguments by Century BMW as to the assignment. In any event, the Court's December 31, 2012 Order was correct in that "this is not the very rare case where a person's absence warrants a dismissal of the entire case "

Based on the foregoing, Plaintiff respectfully requests that the Court deny Century BMW's Motion to Reconsider the December 31, 2012 Order



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Exhibit)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	Case No 2012-CP-23-07156
Christine Watts	)	
	)	
Plaintiff,	)	
	)	Order
vs	)	
	)	
Sonic Automotive 2752 Laurens Road,	)	
Greenville, Inc	)	
Defendants	)	
-----	)	

The issue is whether Defendant Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, In the Alternative, to Compel Arbitration should be granted or denied For reasons described herein, I hereby DENY Defendant Century BMW's motion

PROCEDURAL HISTORY

This action was initiated on August 29, 2006 Ms. Watts alleges that Century BMW was charging illegal closing fees in violation of S C Code Ann § 37-2-307 and § 56-15-10, *et seq.* and did engage in one or more of the following illegal acts:

- a Failed to register with the Dept of Consumer Affairs;
- b Failed to individually register annually with the Dept. of Consumer Affairs;
- c Charged illegal "administrative fees" in excess of the amount for which it registered;
- d. Failed to disclose the illegal "administrative fees" on sales contracts,
- e Charged illegal "administrative fees" in excess of their costs,
- f. Failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership,
- g Advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price, and
- h Created a closing procedure to illegally add "administrative fees"

Ms Watts contends that the conduct of Century BMW violates the South Carolina Dealer's Act (S C Code Ann § 56-15-10)

Century BMW filed a motion to compel arbitration, claiming arbitration was required by an agreement under which Ms. Watts waived the right to bring or participate in any class action or multi-

plaintiff or claimant action in court or through arbitration. This motion was denied by this Court in an order dated March 10, 2008. The order concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was "the controlling authority" for the motion.

On March 12, 2008, Century BMW filed a notice of appeal to the South Carolina Court of Appeals. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued an order holding that the provision of the arbitration agreement relied upon by Century BMW was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions.

Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act.

When such action is one of common or general interest to many person or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against the public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violation of the Dealer Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable. We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. See *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

Herron v. Century BMW, 387 S.C. 525, 535-536, 693 S.E.2d 394, 399-400 (S.C. 2010).

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement, Century BMW filed a Petition for Rehearing. By order dated June 9, 2010, the South Carolina Supreme Court denied the same.

On August 31, 2010, Century BMW petitioned the United States Supreme Court for a writ of certiorari. While that petition was pending, the U.S. Supreme Court issued its decision in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (April 27, 2011). The Court then remanded this case to the South Carolina Supreme Court for further consideration, in light of *AT&T*.

After supplemental briefing and oral argument centering on preemption, the South Carolina Supreme Court issued its opinion, dated December 19, 2011. In its opinion, the South Carolina Supreme Court found, as a matter of state law, *preemption was not timely raised* and "is procedurally barred as a matter of state law." *Heron v. Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011) ("*Heron II*").

Century BMW then filed a petition for a Writ of Certiorari in the U.S. Supreme Court, arguing that the S.C. Supreme Court's ruling that Century BMW has "forfeited" the preemption argument by failing to raise it to any prior court was unfair because it would "deprive [Century BMW] of a 'reasonable opportunity' to assert its federal rights." See Petition for a Writ of Certiorari.

On May 21, 2012, the U.S. Supreme Court denied certiorari. Thus, the controlling opinion in this case is the S.C. Supreme Court holding that, in Century BMW's words, Century BMW "forfeited its preemption argument." This is the law of the case.

PREEMPTION

First, I DENY Defendant Century BMW's Motion (in the alternative) to Compel Arbitration. The S.C. Supreme Court's opinion in *Heron II* held, Century BMW could not continue to re-litigate the enforceability of the arbitration agreement by raising arguments it chose not to argue, when the motion to compel arbitration was first argued. The S.C. Supreme Court's opinion in *Heron II* provides in part:



[I]t is clear preemption was neither a novel nor an unknown argument to [Century BMW]. Significantly, [Century BMW] did raise the issue of preemption to the trial court, albeit in a different context. [Plaintiff] initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated the state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to any claim of preemption, until the petition for rehearing filed with this Court.

Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (S.C. 2011)

As this Court observed, 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.” *10n, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 406, 522 S.E.2d 716, 724 (S.C. 2000). Here, intentionally or by chance, [Century BMW] kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under even the most liberal approach to issue preservation principles, we could not treat [Century BMW’s] preemption argument as preserved in our *courts* as a matter of state law.

Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted. We reinstate our original opinion and decline to revisit it.

Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (S.C. 2011) (emphasis added)

It is significant that the S.C. Supreme Court used the word “courts”, plural, thereby signifying its opinion’s applicability to all state courts and not solely the South Carolina Supreme Court. Furthermore, in light of the S.C. Supreme Court’s holding in *Herron II*, this issue is “procedurally barred as a matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted.” *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (S.C. 2011) (emphasis added)

Second, Century BMW admitted in its briefing to the United State Supreme Court that the South Carolina Supreme Court’s ruling means that Century BMW forfeited the ability to raise preemption. Defendant Century BMW’s brief provides as follows:

In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier.



Petition for Writ of Certiorari 13

The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation arguments

Petition for Writ of Certiorari 14

[The forfeiture rule] is inequitable because it would deprive [Century BMW] of a "reasonable opportunity" to assert its federal rights

Petition for Writ of Certiorari 15

Similarly, Century BMW's Reply Brief to the United States Supreme Court said

In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration

Petition for Writ of Certiorari 13

In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration

Century BMW's Reply Brief to U S Supreme Court 1

[T]here is no valid justification for the South Carolina Supreme Court's subsequent forfeiture determination—a determination that unjustly deprived [Century BMW] of a "reasonable opportunity" to assert its federal rights

Century BMW's Reply Brief to U S Supreme Court 2.

Century BMW was correct, the South Carolina Supreme Court ruled that the Century BMW forfeited the ability to raise preemption, a position echoed by this Court

INDISPENSABLE PARTY

Finally, I DENY Defendant's motion for judgment on the pleadings pursuant to Rules 12(b)(7) ("failure to join a party under Rule 19"), 12(c), and 12(h) SCRPC. Michael Watts is not an indispensable party because judgment rendered in Michael Watts's absence would not prejudice him, nor those who are already parties. Moreover, Mr. Watts executed an assignment of any rights he may have had in this action, to his daughter, Christine Watts, the named plaintiff. Therefore, he has no rights adverse to his daughter, nor will he be prejudiced by a ruling in this case. For the same reason, there is no risk of a subsequent

duplicative claim by Mr Watts Furthermore, this is not "the very rare" case where a person's absence warrants dismissal of the entire case See SCRCP 19(a) Note (Noting that "the number of cases in which there is truly an "indispensable party" in whose absence the court should not proceed are very rare ")

CONCLUSION

For the foregoing reasons, Defendant Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, In the Alternative, to Compel Arbitration is DENIED

IT IS SO ORDERED'

Bombay, SC
Dec 31, 2012

The Honorable Doyet A. Early, III
Circuit Judge

1 PLAINTIFFS, AND IN CONNECTION WITH THE FOUR CORNERS OF THE
2 COMPLAINT ARGUMENT AND AS YOU CONSIDER A MOTION TO
3 DISMISS, THEY'VE GOT NO NAME PLAINTIFFS IN THIS CASE
4 AGAINST A SUBSTANTIAL NUMBER OF DEFENDANTS THAT ARE IN
5 HERE. THERE'S BEEN NO MOTION TO AMEND THAT I'VE HEARD
6 TODAY OR THAT I'VE RECEIVED TO ADD PARTY PLAINTIFFS. THIS
7 CASE IS GOING ON FIVE MONTHS OLD AT THIS STAGE. THERE HAS
8 BEEN NO MOTION FOR CLASS CERTIFICATION. Y'ALL BATTED THAT
9 AROUND IN THE DEBATES ALREADY TODAY.

10 THE COURT: WELL, THEY SAY THAT THIS IS NOT A CLASS
11 ACTION. SO, THEY HAVEN'T MOVED TO CERTIFY IT.

12 MR. NESS: RIGHT. SO, AND THERE'S BEEN NO CHALLENGE
13 TO AN ARBITRATION CLAUSE THAT, YOU KNOW, WE'VE SUBMITTED
14 AN AFFIDAVIT TO THE COURT --

15 THE COURT: WE'RE GOING TO DO ARBITRATION LATER.

16 MR. NESS: I UNDERSTAND THAT, YOUR HONOR, AND THIS IS
17 SOLELY AS TO OUR MOTION TO DISMISS, BUT THE POINT BEING
18 THAT IF THERE IS AN ARBITRATION CLAUSE OUT THERE AND
19 INVOLVES GENE READ OR ANY OTHER NUMBER OF DEFENDANTS, THIS
20 COURT IS GOING TO HAVE TO DISMISS THE CASE BECAUSE THEY
21 DON'T HAVE A PLAINTIFF UNDER 12B -- NOT NECESSARILY 12B6,
22 BUT A JURISDICTIONAL ISSUE BECAUSE THEY DON'T HAVE A NAMED
23 PLAINTIFF AGAINST THE DEFENDANT SUCH AS GENE READ, SUCH AS
24 ERVIN TOYOTA, AND SOME OTHERS BECAUSE OF AN ARBITRATION
25 ISSUE OUT THERE. I UNDERSTAND THE GATEWAY ISSUE OF THE

1 SIMPSON CASE HAS JUST COME UP, BUT WE'RE FIVE MONTHS INTO
2 THIS CASE. THERE ARE A NUMBER OF LAWYERS THAT ARE
3 DEFENDING ON BEHALF OF, BASICALLY, A PHANTOM ON BEHALF OF
4 THE DEFENDANTS FROM A PHANTOM PLAINTIFF IN THIS CASE.

5 THE COURT: WELL, THEY TAKE THE POSITION IT IS A
6 CONSPIRACY BETWEEN ALL OF THE CAR DEALERS AND THEY
7 CONSPIRED AGAINST THEIR NAMED PLAINTIFFS. SO, THEY DON'T
8 HAVE TO HAVE JACK EARLY BUYING A CAR FROM ZEIGLER'S
9 CHEVROLET. I AM SUING ALL OF THE DEALERS BECAUSE THERE IS
10 AN ALLEGED CONSPIRACY. ISN'T THAT CORRECT, MR. SPEARS?

11 MR. SPEARS: ABSOLUTELY.

12 MR. NESS: I UNDERSTAND THAT, YOUR HONOR, BUT THE
13 ISSUE GETS TO BE THAT IF THERE IS AN ARBITRATION AGREEMENT
14 OUT THERE AND I WANT TO DEAL WITH THAT, BUT IF THE COURT
15 DOESN'T WANT TO DEAL WITH THAT TODAY, THEN WHAT I WOULD
16 ASK THE COURT TO DO IS LET'S SET A DATE. WHOEVER HAS GOT
17 ARBITRATION AGREEMENTS --

18 THE COURT: WELL, MR. HAMM AND I HAD A CONVERSATION
19 YESTERDAY ALONG WITH MR. SPEARS ABOUT THE ARBITRATION THAT
20 WE WEREN'T GOING TO DEAL WITH THAT TODAY IN LIGHT OF THE
21 CASE THAT CAME OUT LAST WEEK AND WE WERE GOING TO ALLOW
22 Y'ALL TO DO SOME CONTINUED DISCOVERY AND THAT WOULD
23 CERTAINLY BE SOMETHING THAT WE'LL DEAL WITH DOWN THE ROAD.
24 YOU'RE NOT BEING PRECLUDED BECAUSE YOU'RE NOT ARGUING HERE
25 TODAY. IS THAT CORRECT?

1 MR. NESS: WE CERTAINLY WANT TO PRESERVE ALL OF OUR
2 RIGHTS.

3 MR. SPEARS: WE AGREE.

4 THE COURT: ARBITRATION IS STILL A MAJOR ISSUE IN THE
5 CASE.

6 MR. NESS: BUT, YOUR HONOR, ONE THING THAT I'D ASK
7 THE COURT TO DIRECT AND LET'S PUT SOME TIMEFRAMES ON IT OR
8 SOMETHING THAT IF THERE ARE SOME PLAINTIFFS OUT THERE
9 AGAINST GENE READ AND SOME OF THESE OTHER PEOPLE WHO DON'T
10 KNOW WHO A PLAINTIFF IS AGAINST THEM, THERE NEEDS TO BE A
11 TIME LIMIT. YES, THESE PEOPLE ARE GOING TO BE NAMED.
12 THERE HADN'T EVEN BEEN A MOTION TO AMEND, YOUR HONOR.

13 THE COURT: WELL, LET'S --

14 MR. SPEARS: YOUR HONOR, MAY WE HAVE 90 DAYS AND
15 WE'LL COMPLETE --

16 THE COURT: HERE'S WHAT I'M GOING TO DO. LET'S
17 FINISH THE 12B6 MOTION ON THE RECORD AND THEN I AM GOING
18 TO DO SOME HOUSEKEEPING MATTERS.

19 MR. SPEARS: THANK YOU, YOUR HONOR.

20 THE COURT: WE'LL ADDRESS ALL OF THAT. ANYBODY ELSE
21 ON THE 12B6? MR. SMITH?

22 MR. SMITH: MAY IT PLEASE THE COURT, YOUR HONOR. I
23 JUST WANTED THE RECORD TO REFLECT THAT PART OF OUR 12B
24 MOTION WAS AN ARBITRATION GROUNDS AND WE DO RESPECTFULLY
25 REQUEST THAT THAT BE SET AS SOON AS POSSIBLE BECAUSE IF

1 THE CLAIMS AREN'T SUPPOSED TO BE LITIGATED, THEN WE
2 SHOULDN'T BE DOING ANY DISCOVERY AND THE COURT NEEDS TO
3 GET INTO THE ISSUES.

4 THE COURT: WE'LL TALK ABOUT THAT.

5 MR. SMITH: I APPRECIATE THE FACT THAT THAT CASE CAME
6 OUT RECENTLY. I DON'T KNOW ABOUT THE CONVERSATION
7 YESTERDAY.

8 THE COURT: WELL, JUST FOR EVERYBODY'S -- MR. HAMM
9 WAS AT THE HEARING WHERE I HAD THE INITIAL HEARING ON THE
10 SETTLEMENT WITH CARMAX. MR. HAMM HAND-DELIVERED ME A
11 LETTER AND FAXED ME A LETTER SAYING THAT LET'S HOLD OFF ON
12 ARBITRATION UNTIL EVERYBODY CAN DIGEST AND ABSORB THE
13 LATEST CASE THAT CAME OUT. WE'LL DO IT IN A TIMELY
14 FASHION. IS THAT, BASICALLY, WHAT YOU SAID?

15 MR. HAMM: WELL, IT IS SLIGHTLY DIFFERENT THAN THAT.
16 WHAT I WAS SAYING IS SINCE WE HAD GENE READ, CENTURY
17 B.M.W., MR. SMITH'S CLIENT, THAT WE RECOGNIZE THAT THE
18 SUPREME COURT DECISION AND WE RECOGNIZE THAT YOU DIDN'T
19 WANT TO GET INTO THE BROAD GENERAL REASONS, BUT, IN FACT,
20 FOR EXAMPLE, CENTURY HAS A MOTION TO COMPEL ARBITRATION
21 BEFORE YOU, AND AS MR. NESS JUST SAID WE'VE GOT -- YOU CAN
22 APPRECIATE THAT WE HAVE CLIENTS THAT ARE SAYING WE'VE BEEN
23 IN THIS FOR FIVE MONTHS -- WHY ARE WE STILL HERE OR CAN'T
24 YOU GET THE COURT TO MAKE A DETERMINATION? THAT GOES BACK
25 TO WHAT MR. NESS WAS SAYING ABOUT LET'S GET TO THESE

1 ARBITRATION ISSUES IMMEDIATELY.

2 THE COURT: ALL RIGHT. WELL, LET'S FINISH THE 12B6
3 AND THEN I'LL DO SOME HOUSEKEEPING. I WILL ACCOMMODATE
4 THOSE WHO HAVE ARBITRATION A.S.A.P.

5 MR. HAMM: ALL RIGHT. THANK YOU.

6 THE COURT: ANYBODY ELSE WITH A 12B6? MS. CHAPMAN,
7 DO YOU HAVE ANYTHING THAT YOU WANT TO ADD? YOU SURE ARE
8 QUIET BACK THERE. SO UNLIKE YOU. ANYBODY ELSE? WE'LL GO
9 OFF THE RECORD NOW.

10 (WHEREUPON, THE HEARING WAS CONCLUDED AND A
11 DISCUSSION WAS HELD OFF THE RECORD.)

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STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

COURT OF COMMON PLEAS
06-CP-02-1230

HEATHER HERRON, ET AL.,)
PLAINTIFFS)
VS.)
CARMAX AUTO SUPERSTORES,)
INC., ET AL.,)
DEFENDANTS)

TRANSCRIPT OF RECORD

NOVEMBER 30, 2007
AIKEN, SOUTH CAROLINA

B E F O R E:

THE HONORABLE DOYET A. EARLY, III, JUDGE.

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

A. CAMDEN LEWIS, ESQ.
GEDNEY M. HOWE, III, ESQ.
RICHARD A. HARPOOTLIAN, ESQ.
BRADY R. THOMAS, ESQ.
ATTORNEYS FOR THE PLAINTIFF

JAMES Y. BECKER, ESQ.
STEVEN W. HAMM, ESQ.
RYAN L. VANGRACK, ESQ.
BRADFORD N. MARTIN, ESQ.
GREGORY STUDEMAYER, ESQ.
T. ALEXANDER BEARD, ESQ.
ATTORNEYS FOR THE DEFENDANTS

LISA H. HICKLIN
OFFICIAL COURT REPORTER

I N D E X O F W I T N E S S E S

STATEMENT BY MR. STUDEMAYER.....	3
STATEMENT BY MR. LEWIS.....	3,9,20,31,75,123
STATEMENT BY MR. MARTIN.....	4,5,11,27
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STATEMENT BY MR. GRIMBALL.....	80,102
STATEMENT BY MR. VANGRACK.....	101,130

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>

(NONE OFFERED)

1 (WHEREUPON, ON NOVEMBER 30, 2007 THE FOLLOWING
2 PROCEEDINGS WERE HELD:)

3 THE COURT: ALL RIGHT. GENTLEMEN AND LADIES, I'VE
4 HAD SEVERAL SUGGESTIONS ON HOW TO PROCEED THIS MORNING,
5 BUT IT LOOKS LIKE THE CONSENSUS IS TO HEAR THE PLAINTIFF'S
6 MOTION TO DISMISS WITH PREJUDICE THEIR NO-SALE DEFENDANTS
7 IN HERRON AND MOVE FORWARD AFTER THAT. ANYBODY HAVE ANY
8 REAL PROBLEM WITH THAT, LET ME KNOW.

9 MR. LEWIS, ET AL? I ASSUME THAT'S A NO?

10 MR. STUDEMEYER: YOUR HONOR --

11 THE COURT: HOLD ON. I HADN'T GOTTEN TO YOUR SIDE
12 YET, MR. STUDEMEYER.

13 MR. LEWIS: WE HAVE NO PROBLEM WITH THAT, YOUR HONOR.
14 WE THINK THAT'S VERY FAIR AND THE THING TO DO BECAUSE IT
15 DICTATES A WHOLE LOT OF OTHER THINGS.

16 THE COURT: IT CERTAINLY DOES, I THINK. ALL RIGHT.
17 I GOT A LETTER FROM MR. STUDEMEYER. MR. STUDEMEYER?

18 MR. STUDEMEYER: YES, YOUR HONOR. I WOULD ASK THAT
19 SINCE MY 12(B)(8) MOTION WAS FILED IN THE WEST-COX CASE
20 NEARLY A MONTH BEFORE THE MOTION FOR VOLUNTARY DISMISSAL
21 WAS FILED IN THE HERRON CASE THAT THAT MATTER BE FIRST --
22 NOT NECESSARILY FIRST, BUT BEFORE THIS VOLUNTARY DISPUTE.

23 THE COURT: WHAT IF I GRANT THEIR MOTION? THEN YOUR
24 GUY IS GONE, ISN'T HE?

25 MR. STUDEMEYER: NO.

1 THE COURT: ALL RIGHT. I'LL HAVE TO DECIDE THAT.
2 ANYBODY ELSE?

3 MR. MARTIN, I SAW YOU STANDING.

4 MR. MARTIN: I WOULD RESPECTFULLY ASK THAT THE
5 MOTIONS GO --

6 THE COURT: STAND UP, PLEASE.

7 MR. MARTIN: SORRY -- IN THE ORDER THAT JAMIE HAS
8 REQUESTED BECAUSE WE HAVE SOME SIGNIFICANT LEGAL ISSUES
9 THAT HAVE BEEN FULLY BRIEFED.

10 THE COURT: I SPENT ALL DAY YESTERDAY, I PROMISE YOU,
11 READING EVERYTHING -- EVERYBODY'S BRIEF.

12 MR. MARTIN: BUT WHATEVER SUITS YOU, YOUR HONOR.
13 JUST FOR THE RECORD WE WOULD REQUEST THIS ORDER.

14 THE COURT: ALL RIGHT. WELL, ANY WAY I DO IT YOU
15 WILL NOT BE PREJUDICED FROM MAKING ANY ARGUMENTS THAT
16 RELATE BACK AND FORTH. I'LL JUST DO IT LIKE THAT.

17 MR. HAMM, HOW ARE YOU DOING?

18 MR. HAMM: I HAVE BEEN ALL RIGHT, YOUR HONOR. I HAVE
19 LOST MY VOICE, BUT I HAD A GOOD REPORT WHEN I WENT TO
20 TEXAS.

21 THE COURT: GOOD. WELL, I HAVE SENT SEVERAL MESSAGES
22 BY SEVERAL PEOPLE.

23 MR. HAMM: AND I GOT THEM. THANK YOU.

24 THE COURT: THANK YOU. ALL RIGHT. LET ME HEAR
25 ANYBODY'S OPPOSITION AND MR. LEWIS' MOTION TO DISMISS IN

1 THE HERRON CASE. ANYBODY HAVE ANY OPPOSITION TO THAT?
2 PLEASE IDENTIFY YOURSELF. MR. BRAD MARTIN?

3 MR. MARTIN: MAY IT PLEASE THE COURT.

4 THE COURT: YES, SIR.

5 MR. MARTIN: I HAVE SUBMITTED A MEMORANDUM IN SUPPORT
6 OF MY OPPOSITION. I HAD 29 --

7 THE COURT: YOU HAD SOME THAT AGREED AND SOME THAT
8 DIDN'T AGREE.

9 MR. MARTIN: THAT'S RIGHT.

10 THE COURT: I UNDERSTAND.

11 MR. MARTIN: TWENTY-NINE THAT WANT IN AND --

12 THE COURT: WELL, Y'ALL HAVE BEEN ARGUING TO GET OUT.
13 NOW YOU WANT TO STAY IN.

14 MR. MARTIN: WELL, THAT IS AT FIRST BLUSH TRUE, BUT
15 IF YOU REALLY LOOK AT IT IT MAKES A LOT MORE SENSE TO HAVE
16 FINALITY. WHAT WE HAVE HERE IS A SITUATION WHERE THE CASE
17 STARTED WRONG FROM DAY ONE. IT WENT FROM 4 PLAINTIFFS AND
18 51 DEFENDANTS, 8 PLAINTIFFS TO 324 DEFENDANTS, AND THEN
19 THEY TRIED TO BRING IN 250 PLAINTIFFS. IT'S BEEN WRONG
20 FROM DAY ONE.

21 WE'VE BEEN AT THIS ALMOST A YEAR AND A HALF, AND THE
22 REASON WHY MY 29 CLIENTS WANT YOU TO DENY THIS MOTION IS
23 BECAUSE THEY NEED FINALITY. THEY NEED A DECISION HOW IT
24 AFFECTS THEM. THEY WILL BE SEVERELY PREJUDICED IF THEY DO
25 NOT HAVE AN OPPORTUNITY FOR YOU TO DECIDE THE RULE 59(E)

1 MOTION AND MAKE A FINAL DECISION IN THIS CASE. THE
2 CASELAW I HAVE HANDED UP -- YOU DID SAY YOU READ THE
3 BRIEFS. I HANDED UP A LITTLE ONE THAT'S IN A NICE LITTLE
4 FOLDER FOR YOU THIS MORNING.

5 THE COURT: I HAVE NOT READ THAT BECAUSE I JUST GOT
6 IT.

7 MR. MARTIN: OKAY. WELL, THAT WAS ACTUALLY FILED TWO
8 DAYS AGO. THIS IS JUST THE SAME THING IN A NICE LITTLE
9 PACKAGE JUST IN CASE YOU HADN'T SORTED MY OTHER ONE OUT.

10 THE COURT: OKAY.

11 MR. MARTIN: BUT, BASICALLY, THE CASELAW IN SOUTH
12 CAROLINA IS VERY CLEAR THAT IF YOU CAN SHOW LEGAL
13 PREJUDICE OR AN ISSUE OF -- IMPORTANT ISSUE OF PUBLIC
14 POLICY, A MOTION TO DISMISS IS NOT APPROPRIATE. WHAT WE
15 HAVE HERE IS AN ENTIRE INDUSTRY IN SOUTH CAROLINA HAS BEEN
16 PARALYZED BY THIS LAWSUIT. THEY DO NOT KNOW WHAT TO DO.
17 THEY'VE HAD THE LEGISLATURE SAYING YOU CAN CHARGE A
18 CLOSING FEE. THEY'VE HAD THE SUPREME COURT SAY IN FANNING
19 IN 1996 THAT IT'S NOT A VIOLATION OF THE CONSUMER
20 PROTECTION CODE, AND NOW WE HAVE THIS CLAIM THAT IT'S,
21 QUOTE, ILLEGAL AND ALL OF MY DEALERS HAVE HAD TO COME FROM
22 ALL COUNTIES HERE IN AIKEN BECAUSE OF THE WAY THIS CASE
23 HAS BEEN STYLED.

24 WE'VE BEEN AT THIS A YEAR AND A HALF BECAUSE OF THE
25 PROCEDURAL MISTAKES THAT HAVE BEEN MADE, AND WHAT WE HAVE

1 HERE IS NOT A PLAINTIFF SAYING I HAVE A VALID AND GOOD
2 REASON TO DISMISS THESE PEOPLE. WHAT WE HAVE IS A
3 PLAINTIFF SAYING, UH-OH, THE JUDGE IS MOVING. THE JUDGE
4 HAS GOT PROBLEMS WITH STANDING. SO, WE'RE GOING TO TRY TO
5 FIX IT EVERY WAY WE CAN DESPITE THE PREJUDICE THAT IT
6 COSTS TO THE PEOPLE ON THE OTHER SIDE.

7 WHAT I'M ASKING YOU TO DO -- AND IF YOU HAVEN'T READ
8 MY BRIEF I WANT YOU TO READ IT --

9 THE COURT: I HAVE READ THE BRIEF.

10 MR. MARTIN: -- IS TO MAKE A FINDING THAT THE LEGAL
11 ISSUES HAVE BEEN JOINED IN THIS CASE. MY CLIENTS HAVE
12 BEEN FORCED TO BRING ME HERE TIME AND TIME AGAIN. OVER A
13 QUARTER OF A MILLION DOLLARS HAS BEEN SPENT IN THIS YEAR
14 AND A HALF DEFENDING THIS SITUATION. ALL THE ISSUES ARE
15 RIPE. THE BRIEFS ARE DONE. ORAL ARGUMENT IS ABOUT TO
16 OCCUR. JAMIE IS GOING TO BE OUR LEAD ARGUER. WE WANT TO
17 HAVE A PLACE AT THE TABLE FOR YOU TO DECIDE THESE ISSUES
18 WITH FINALITY.

19 PUBLIC POLICY --

20 THE COURT: WILL YOU HAVE ANY CLIENTS LEFT IF I GRANT
21 MR. LEWIS' MOTION IN THE HERRON CASE?

22 MR. MARTIN: NO, I WILL NOT. I HAVE 29 THAT WANT TO
23 STAY IN --

24 THE COURT: OKAY.

25 MR. MARTIN: -- IF YOU LET ME. NOW, THE CASELAW SAYS

1 LEGAL PREJUDICE. I CITED THE CASE IN WHICH WE HAD THE
2 LIQUOR STORE AND ONE GUY SAID I OWN HALF OF THIS LIQUOR
3 WHOLESALE BUSINESS AND THIS MAN HAS GOT TO MAKE AN
4 ACCOUNTING FOR MY PROFITS AND IT COMPLETELY STYMIED THE
5 BUSINESS. JUSTICE LEWIS SAID THAT YOU CANNOT DISMISS IT.
6 YOU HAVE TO GO FORWARD. YOU HAVE TO HAVE A FINAL
7 DECISION.

8 I CITED MOORE'S FEDERAL PRACTICE. THERE ARE FIVE
9 REASONS WHY YOU NEED TO TAKE INTO CONSIDERATION IN
10 DETERMINING WHETHER DISMISSAL WITHOUT PREJUDICE WOULD
11 CAUSE HARM TO ME. NUMBER ONE IS DUPLICATIVE EXPENSE OF A
12 SECOND LITIGATION. WELL, WE KNOW A SECOND LITIGATION HAS
13 ALREADY BEEN FILED IN THE ADAMS CASE. MY PEOPLE HERE ARE
14 FACING EIGHT OR SEVEN PLAINTIFFS. IN ADAMS THEY'RE FACING
15 302 PLAINTIFFS. THINK OF THE DEPOSITIONS THAT MY PEOPLE
16 WILL HAVE TO FACE IN ADAMS COMPARED TO THIS CASE. THAT IS
17 A SIGNIFICANT PREJUDICE, AND IT'S NOT ETHERIAL BECAUSE THE
18 ADAMS CASE HAS ALREADY BEEN FILED. IT'S RIGHT IN THIS
19 COUNTY AGAIN.

20 THE COURT: WELL, EVERYONE IS SORT OF THE OPINION
21 THAT IF WE CAN GET THIS CASE UNDER CONTROL IT WILL STAY
22 ADAMS AND ALL OF THE LEGAL ISSUES CAN BE ADDRESSED.

23 MR. MARTIN: IF WE STAY ADAMS I'VE GOT ALL OF MY
24 CLIENTS NOT GETTING TO PARTICIPATE WONDERING WHAT'S GOING
25 TO HAPPEN WITH THIS HANGING --

1 THE COURT: WELL, YOU COMPLAINED THE LAST TIME ABOUT
2 HAVING TO PARTICIPATE.

3 MR. MARTIN: WE WANT YOU TO LET MY PEOPLE GO BUT FOR
4 THE LEGAL REASONS THAT WE'RE GOING TO ARGUE -- NOT JUST
5 WE'RE GOING TO FREEZE YOU SO YOU DON'T KNOW WHAT'S GOING
6 TO HAPPEN FOR ANOTHER YEAR OR TWO. WE'VE BEEN HERE A YEAR
7 AND A HALF TO GET FINALITY. PUBLIC POLICY ISSUES HAVE TO
8 BE DECIDED. TODAY IS THE DAY. WE'VE BEEN AT THIS A YEAR
9 AND A HALF. MY PEOPLE WANT A PLACE AT THE TABLE BECAUSE
10 THESE ARE IMPORTANT ISSUES OF PUBLIC POLICY.

11 CAN YOU CHARGE A CLOSING FEE IF THE LEGISLATURE SAYS
12 YOU CAN AND THE SUPREME COURT SAYS YOU CAN? DO OUR
13 BUSINESSES STILL HAVE TO WORRY ANOTHER YEAR AND A HALF TO
14 WHAT'S GOING TO HAPPEN TO THEM? IMPORTANT ISSUES OF
15 PUBLIC POLICY IS A REASON TO DENY THE MOTION TO DISMISS.
16 WE HAVE BEEN HERE FROM THE START. WE HAVE PAID HUNDREDS
17 OF THOUSANDS OF DOLLARS TO BE HERE AND PARTICIPATE. ALL
18 THAT GETS FLUSHED, YOUR HONOR, AND WE DON'T GET THE
19 BENEFIT OF ANY DECISION BECAUSE WE'LL BE OUT OF IT.

20 THE COURT: MR. LEWIS, DO YOU HAVE ANY PROBLEM WITH
21 THEM STAYING WITH US -- HIS 20-SOME-ODD CLIENTS?

22 MR. LEWIS: WELL, RIGHT NOW WE HAVE --

23 THE COURT: I MEAN, I CAN'T UNDERSTAND THE CIRCULAR
24 ARGUMENTS GOING ON.

25 MR. LEWIS: -- 78, YES, THEY WANT OUT WITH US THAT

1 AGREE WITH US, 40 THAT SAY, NO, AND 118 HAVE SAID NOTHING.
2 THE REASON IS -- AND I'VE HEARD THE ARGUMENTS JUST MADE
3 AND THERE IS NO SUCH RULE THAT ALLOWS A NON-DISMISSAL SO A
4 LAWYER CAN PARTICIPATE. THAT'S WHAT THEY'RE ASKING.

5 THE COURT: ALL RIGHT. I DIDN'T MEAN TO INTERRUPT.
6 I'LL GET BACK TO YOU, BUT YOU CONSENT TO HIM STAYING OR DO
7 YOU WANT --

8 MR. LEWIS: NO, I WANT HIM -- I THINK ALL THAT DOES
9 IS GO BACK TO THE CLUTTERED THING WE'VE TRIED VERY HARD AT
10 MR. MARTIN'S INSISTENCE --

11 THE COURT: TO UNCLUTTER.

12 MR. LEWIS: -- TO DISMISS THEM AND GET DOWN TO SEVEN
13 SO THAT WE CAN HAVE THE GUT ISSUES THAT HE NOW SAYS NEED
14 TO BE DETERMINED WHICH WE'VE SAID FOR A YEAR AND A HALF
15 NEED TO BE DETERMINED AND THEY FINALLY COME OVER TO OUR
16 SIDE AND SAID WE NEED THEM DETERMINED AND THE WAY TO GET
17 THEM DETERMINED IS IN THE SEVEN PEOPLE GOING FORWARD AS
18 QUICK AS WE CAN AND THEY WILL HAVE THE OPPORTUNITY TO TAKE
19 IT TO THE SUPREME COURT AND WE'LL GET THE GUT CORE ISSUES
20 DETERMINED, AND JUST BECAUSE MR. MARTIN IS NOT IN IT IS
21 NOT A REASON TO CLUTTER US UP WITH 29 NEW PLAINTIFFS.

22 THE COURT: ALL RIGHT. I UNDERSTAND YOUR POSITION.

23 I APOLOGIZE, MR. MARTIN. I WILL NOT INTERRUPT YOU
24 AGAIN. I THOUGHT WE COULD DO IT EASY, BUT, OBVIOUSLY, WE
25 CAN'T.

1 MR. MARTIN: WELL, THIS IS NOT FOR MY BENEFIT. THIS
2 IS FOR THE BENEFIT OF MY CLIENTS. THINK ABOUT RUNNING A
3 BUSINESS AND HAVING THIS HANGING OVER YOUR HEAD. IF I'VE
4 GOT TO PICK UP A PHONE AND CALL THEM AND SAY, FELLOWS,
5 THEY'VE STAYED YOUR CASE. YOU'RE OUT OF THIS CASE. WE
6 CAN'T TELL YOU WHAT YOU'RE GOING TO DO AND YOU DON'T HAVE
7 A SAY. WILLIAM BRADSHAW WAS THE PRESIDENT OF N.A.D.A.
8 WILLIAM BRADSHAW IS ONE OF THE BEST KNOWN CAR DEALERS IN
9 AMERICA. HE WAS NATIONAL PRESIDENT. HE WANTS FINALITY SO
10 HE CAN DO HIS BUSINESS.

11 ALL THE BRIEFS ARE DONE. WHAT WE HAVE HERE IS --

12 THE COURT: LET ME ASK YOU THIS. SAY THAT WE GO WITH
13 THE SEVEN AND WE GO TO THE SUPREME COURT AND MR. LEWIS'
14 THEORY AND MR. HARPOOTLIAN'S THEORY AND MR. HOWE'S THEORY
15 IS SHOT DOWN BY THE SUPREME COURT. DOES THAT NOT AFFECT
16 YOUR CLIENT? I MEAN, DON'T YOU BENEFIT FROM THAT?

17 MR. MARTIN: WELL, MR. LEWIS WILL NOT AGREE WITH
18 THAT.

19 THE COURT: WHAT --

20 MR. MARTIN: I PROMISE YOU HE WILL FIGHT IT FROM DAY
21 ONE.

22 MR. LEWIS: YOUR HONOR, I --

23 THE COURT: HOLD ON.

24 MR. MARTIN: WHAT WE HAVE HERE -- YOU KNOW, THE
25 PROBLEM WITH THIS CASE FROM DAY ONE --

1 THE COURT: I'LL GET TO YOU IN A MINUTE, MR. LEWIS.

2 MR. MARTIN: -- AND MY FRIEND IS A VERY GOOD AND
3 CAPABLE LAWYER AND I PROMISE I WILL NOT INTERRUPT HIS
4 ARGUMENT. I REALLY DO. I WILL NOT DO THAT.

5 THE COURT: I WILL ASK HIM TO SIT DOWN. BUT YOU'RE
6 TELLING ME THAT IF THE SUPREME COURT RULES THAT MR. LEWIS'
7 POSITION IS INCORRECT THAT YOU DON'T BENEFIT FROM THAT?

8 MR. MARTIN: WHO KNOWS? I MAY OR MAY NOT, BUT WHY
9 NOT -- WHY NOT BE A PARTY SO ALL ISSUES OF RES JUDICATA
10 ARE DECIDED? YOU HAVE CASELAW BEFORE YOU. I HAVE CITED
11 THE SOUTH CAROLINA SUPREME COURT CASES. IT SAYS VERY
12 CLEARLY IF THERE IS LEGAL PREJUDICE OR AN ISSUE OF PUBLIC
13 POLICY YOU CAN'T DISMISS A DEFENDANT WHO DOESN'T WANT TO
14 GO. THE LAW IS BLACK AND WHITE AND THERE'S BEEN NO LAW
15 CITED TO REFUTE IT.

16 MY PEOPLE -- 29 DEALERS -- ARE SAYING WE HAVE SPENT A
17 QUARTER OF A MILLION DOLLARS TO GET TO THIS POINT. WE
18 WANT A DECISION TODAY. WE WANT -- AND IF YOU'RE GOING TO
19 DECIDE IT HOWEVER YOU'RE GOING TO DECIDE IT, WHEN WE GO TO
20 THE SUPREME COURT THEY WANT TO BE A PART OF THAT DECISION
21 BECAUSE THEY WANT FINALITY AND IF THEY'RE PART OF THIS --
22 IF MR. LEWIS SIMPLY SUED SEVEN ON AUGUST OF 2006 AND WE
23 DIDN'T SPEND A QUARTER OF A MILLION DOLLARS TO GET HERE
24 TODAY, I WOULD HAVE NO OBJECTION, BUT THAT'S NOT WHAT HE
25 DID. HE WENT FROM 51 DEALERS TO 324 DEALERS AND THEN

1 TRIED TO BRING IN 250 PLAINTIFFS AND NOW HAS SUED FOR 300
2 PLAINTIFFS IN A CASE JUST SITTING BEHIND HERE A YEAR AND A
3 HALF LATER.

4 THAT'S NOT HOW YOU PLAY THE GAME. WE HAVE RULES. WE
5 HAVE PROCEDURES. THE RULES OF CIVIL PROCEDURE ARE CRYSTAL
6 CLEAR AS TO WHAT SHOULD HAPPEN. IF HE MADE A MISTAKE, IF
7 HE DID IT WRONG AND HE IS READING THE TEA LEAVES AND
8 SEEING YOUR TROUBLE WITH STANDING WHICH YOU HAVE MADE VERY
9 CLEAR FROM THE BEGINNING, HE CAN'T JUST PREJUDICE US INTO
10 TRYING TO FIX HIS PROBLEM.

11 THERE'S A LATIN PHRASE CALLED DEUS EX MACHINA.

12 THE COURT: IT IS WHAT?

13 MR. MARTIN: IT'S DEUS EX MACHINA.

14 THE COURT: I AM VERY FAMILIAR WITH THAT.

15 MR. MARTIN: IT IS A SITUATION WHERE YOU HAVE SOMEONE
16 WHO CREATES AN ABSOLUTE MESS AND THEY DON'T KNOW WHAT TO
17 DO. SO, A WRITER COMES IN AND HE JUST LIKE HAS GOD ON A
18 CRANE DROPPING IN OUT OF HEAVEN TO FIX THE PROBLEM.

19 THAT'S WHAT WE HAVE HERE. WE HAVE AN ABSOLUTE
20 UNMANAGEABLE, UNPRECEDENTED, AND UNFAIR SITUATION. MY
21 PEOPLE HAVE BEEN SEVERELY PREJUDICED BY THIS. IT IS AN
22 ISSUE OF PUBLIC POLICY SO THEY CAN GET ON WITH THEIR
23 BUSINESS. IF WE GET YOU TO DECIDE AND WE GO TO COLUMBIA
24 OR NOT GO TO COLUMBIA, WE'RE IN THE BALLGAME AND MY 29
25 DEALERS HAVE SOME FINALITY.

1 THAT IS THE CLEAR LAW IN SOUTH CAROLINA -- CLEAR AS A
2 BELL -- AND YOU CAN'T JUST SAY, OH, WELL, I AM GOING TO
3 SUE YOU FOR A YEAR AND A HALF. I AM GOING TO BRING YOU
4 FROM ALL OF THESE COUNTIES TO AIKEN AND TO BAMBERG AND
5 MAKE YOU SPEND ALL OF THESE THOUSANDS OF DOLLARS AND WE'RE
6 JUST GOING TO CHANGE OUR MIND AND JUST LET YOU GO. THE
7 REASON WHY YOU HAVE RULE 41 AND THE CASELAW IS BECAUSE
8 THAT'S NOT FAIR. LEGAL PREJUDICE OR PUBLIC POLICY ISSUES
9 MUST GO FORWARD. AND THEY --

10 THE COURT: WELL, WILL NOT THE PUBLIC POLICY ISSUE AT
11 LEAST GO FORWARD WITH THE SEVEN?

12 MR. MARTIN: BUT NOT FOR MY PEOPLE.

13 THE COURT: BUT FOR THE PUBLIC. YOU'RE PART OF THE
14 PUBLIC.

15 MR. MARTIN: I AM PART OF THE PUBLIC, BUT I HAVE BEEN
16 SUED.

17 THE COURT: OKAY.

18 MR. MARTIN: OKAY? IN ANALYZING THIS AND TO
19 DETERMINE WHETHER THE DISMISSAL WITHOUT PREJUDICE WOULD
20 CAUSE HARM TO ME YOU LOOK AT THE DUPLICATIVE EXPENSE IN
21 THE SECOND LITIGATION. I HAVE ALREADY TOLD YOU THE SECOND
22 LITIGATION HAS 300 PLAINTIFFS, NOT 7. NUMBER TWO, THE
23 EXTENT TO WHICH THE CURRENT SUIT HAS PROGRESSED. WE'VE
24 BEEN HERE A YEAR AND A HALF.

25 NUMBER THREE, THE ADEQUACY OF THE PLAINTIFF'S

1 EXPLANATION FOR THE NEED TO DISMISS. I HAVE NEVER READ A
2 CASE WHERE THE PLAINTIFF IS TRYING TO FIX A PROBLEM -- A
3 PROCEDURAL PROBLEM WHERE THEY DID SOMETHING WRONG BY DOING
4 IT THIS WAY. NORMALLY, WHEN THEY MAKE A MOTION TO DISMISS
5 THEY'VE GOT A SICK WITNESS OR THEIR EXPERT CAN'T COME OR
6 THEY REALIZE AT THE LAST SECOND THEY NEED AN EXPERT. WE
7 DON'T HAVE EVEN HAVE ANY OF THOSE REASONS. HE IS JUST
8 TRYING TO FIX -- HE DOESN'T WANT YOU TO DECIDE THE RULE
9 59(E) MOTION SAYING THESE PEOPLE DON'T HAVE STANDING AND
10 THAT'S WHY HE WANTS TO DO IT. THAT'S NOT KOSHER. THAT'S
11 NOT ALLOWED.

12 NUMBER FOUR, THE PLAINTIFF'S DILIGENCE IN BRINGING
13 THE MOTION TO DISMISS. THERE IS NOTHING DILIGENT ABOUT A
14 YEAR OR 15 MONTHS LATER AFTER CREATING THIS ABSOLUTE
15 HORROR THAT I'VE BEEN COMPLAINING ABOUT FROM DAY ONE AND
16 THEN SAY, OH, SORRY, FORGET IT. WE'LL JUST LET YOU GO.
17 THAT IS NOT DONE IN A TIMELY MANNER. WE HAVE BEEN
18 PREJUDICED BY THAT.

19 AND, NUMBER FIVE, ANY UNDUE VEXATIOUSNESS ON THE
20 PLAINTIFF'S PART. I WOULDN'T CALL MY FRIEND VEXATIOUS. I
21 CALL HIM INTERESTING, CREATIVE, AND QUICK ON HIS FEET, BUT
22 THIS IS NOT THE SOLUTION. THE CASELAW IS CLEAR. NOW, IF
23 YOU AGREE WITH ME AND WE HAVE A RIGHT TO STAY IN A FIGHT
24 THAT WE DIDN'T WANT TO BE IN HERE TO GET FINALITY FROM
25 YOU, THAT'S WHAT WE'RE ASKING. WE WANT TO BE A PART OF

1 JAMIE'S MOTION SO YOU CAN DECIDE WHETHER MY 29 DEALERS
2 INCLUDING THE FORMER PRESIDENT OF N.A.D.A. HAS A CHANCE TO
3 HAVE FINALITY IN THIS CASE SO THERE'S RES JUDICATA SO THE
4 MONEY WE SPENT DOESN'T GO DOWN THE DRAIN AND WE DON'T HAVE
5 TO SPEND IT AGAIN IN THE SECOND CASE BECAUSE YOU KNOW THAT
6 RULE 12(B)(8) WILL KNOCK US OUT OF THE SECOND CASE IF IT
7 KEEPS IN THE FIRST CASE.

8 IF YOU DECIDE TO ALLOW THEM TO DISMISS US, THE
9 CASELAW IS EQUALLY CLEAR THAT THEY HAVE TO PAY THE
10 FREIGHT. THEY HAVE ABSOLUTELY HAVE TO PAY THE COST AND
11 ATTORNEYS' FEES IN ORDER TO GET THERE, AND, AGAIN, I'VE
12 CITED THE CASES AGAIN. THERE'S NOT BEEN ONE CASE CITED IN
13 OPPOSITION TO IT. THE LAW IN SOUTH CAROLINA IS CLEAR IF
14 YOU MAKE A MESS YOU GOT TO CLEAN IT UP.

15 THE COURT: ISN'T THAT AN ARGUMENT FOR ANOTHER DAY?

16 MR. MARTIN: NO, IT'S FOR TODAY. UNDER RULE 41 YOU
17 HAVE TO DECIDE IF YOU'RE GOING TO DISMISS THE COST AND
18 EXPENSES. NOW, THE AMOUNT IS FOR ANOTHER DAY AS I SAID IN
19 MY BRIEF. WE'RE GOING TO SUBMIT OUR AFFIDAVITS AND PROVE
20 TO YOU HOW MUCH TIME, BUT TODAY IS THE DAY YOU HAVE TO
21 DECIDE -- AS A CONDITION OF DECIDING WHETHER THESE PEOPLE
22 WANT TO LET US GO YOU HAVE TO PUT IN YOUR ORDER AT THIS
23 TIME -- NOT WHEN THEY REFILE, BUT NOW -- THAT THEY HAVE TO
24 PAY THE COSTS IN ATTORNEYS' FEES.

25 IF THEY DO THAT, MY PEOPLE WILL HAVE SOME SOLUTION TO

1 THE PREJUDICE, BUT THE TRUTH IS THEY WANT TO GET ON WITH
2 THIS. THERE'S ABSOLUTELY NOTHING WRONG WITH CLOSING FEES.
3 WE WANT TO GET ON WITH IT, BUT WE'VE BEEN BROUGHT INTO
4 THIS MESS. WE WANT YOU TO DECIDE THE LAW AND THE
5 PROCEDURE UNDER SOUTH CAROLINA LAW THAT ALLOWS US TO BE IN
6 HERE. WE WANT A FINAL DECISION. OUR PEOPLE WANT TO
7 PARTICIPATE, AND, IF NOT, WE WANT ATTORNEYS' FEES AND
8 COSTS.

9 THE COURT: THANK YOU, MR. MARTIN. HOLD ON ONE
10 SECOND, MR. HAMM. YOU GOT SOME LAWYERS WAITING? LET THEM
11 IN.

12 MR. HAMM?

13 MR. HAMM: YOUR HONOR, I WANT TO RAISE ANOTHER ISSUE.
14 I HAVE 20 OF MY ALMOST 80 CLIENTS THAT HAVE DECLINED TO BE
15 DISMISSED. THE REMAINDER, BASICALLY, SAID THEY WOULD
16 LEAVE IT UP TO THE COURT. ONE ISSUE THAT MR. MARTIN DID
17 NOT RAISE, YOUR HONOR, AND I'LL GIVE YOU A SPECIFIC
18 EXAMPLE IS THE CHANGE IN THE STATUTE OF LIMITATIONS. I
19 HAVE A NUMBER OF DEALERS AT THE TIME THAT THEY WERE SUED
20 HAD BEEN IN BUSINESS FOR A VERY SHORT PERIOD OF TIME.
21 STATELINE CHRYSLER IN THE ROCK HILL AREA HAD BEEN IN
22 BUSINESS A MONTH WHEN THEY WERE SUED IN THE HERRON CASE.

23 SO, GETTING DISMISSED OUT OF THAT NOW ADDS,
24 BASICALLY, ANOTHER YEAR OF LIABILITY. IT'S CLEAR
25 PREJUDICE TO THAT CLIENT AND I HAVE SOME OTHERS THAT THEY

1 WERE NOT IN BUSINESS FOR ALL THE WAY BACK TO 2002. SO,
2 THAT CREATES THAT PROBLEM, AND I THINK THAT IS A SEVERE
3 PREJUDICE.

4 I WANT TO BE CLEAR BECAUSE I DON'T WANT TO BE SEEN AS
5 TRYING TO ARGUE OUT OF BOTH SIDES OF MY MOUTH BEFORE THE
6 COURT, AND I'M SENSITIVE TO THAT. I HAVE THE GREATEST
7 RESPECT FOR THE LAWYERS ON THE OTHER SIDE. THIS WILL BE A
8 HARD FOUGHT BUT WELL FOUGHT FIGHT ON BOTH SIDES, BUT THAT
9 PREJUDICE ISSUE IS REAL AND THERE IS PRACTICAL BUSINESS
10 CONSIDERATIONS, YOUR HONOR.

11 I HAVE SOME CLIENTS THE WAY THEIR INSURANCE COVERAGE
12 WORKS THEY HAVE SOME LIMITED COVERAGE IN HERRON, BUT THEIR
13 CARRIERS ARE TAKING THE POSITION THAT'S ALREADY ADDRESSED
14 IN THE HERRON CASE AND THEY'RE DISMISSED. THE COVERAGE IS
15 NOT GOING TO PICK UP IN THE ADAMS CASE. SO, SOME OF THEM
16 ARE GOING TO FIND THEMSELVES WITHOUT ANY COVERAGE IF
17 THEY'RE DISMISSED.

18 I WOULD -- I CAN -- VERY BRIEFLY WOULD LIKE TO
19 REFLECT THAT WE DIDN'T DECIDE AND I LOOKED AT THE
20 TRANSCRIPTS -- YOU HAVE BEEN REPEATEDLY TOLD IN PREVIOUS
21 HEARINGS THAT THEY COULD BRING THIS ENTIRE CASE WITH SEVEN
22 OR EIGHT PLAINTIFFS. YOU CERTAINLY HAVEN'T RULED, BUT YOU
23 CERTAINLY ASKED SOME COGENT QUESTIONS THAT SUGGESTED
24 PERHAPS SOME RESERVATIONS ABOUT THAT ARGUMENT. AS
25 MR. MARTIN HAS SAID WHAT THEY'RE ATTEMPTING TO DO IS TO

1 CLEAN UP A MESS THAT THEY CREATED, BUT IN DOING SO IT IS
2 GOING TO CREATE PREJUDICE WITH REGARD TO THE STATUTE OF
3 LIMITATIONS FOR SOME OF MY CLIENTS.

4 SO, I DID WANT YOU TO KNOW THAT IT WAS NOT LIGHTLY
5 THAT WE HAD THESE VARIOUS CLIENTS NOT AGREE TO DISMISS.
6 MOST OF THEM HAVE, BUT THERE WERE BUSINESS REASONS. I
7 THINK THERE'S PREJUDICE, AND TO THE EXTENT THAT THEY
8 REMAIN IN THE CASE AS MR. MARTIN ALSO SAID AND THEY'RE
9 NAMED AGAIN IN THE ADAMS CASE WE THINK THAT THERE IS A
10 12(B)(8) ISSUE WHICH IS NOT ON THE TABLE TODAY THAT WE'RE
11 NOT READY TO LET GO OF. SO, I RESPECTFULLY RAISE THAT
12 ISSUE TO YOU, YOUR HONOR.

13 THE COURT: THANK YOU. ANYONE ELSE WOULD LIKE TO
14 SPEAK?

15 MR. LEWIS, HOW ABOUT ADDRESS POTENTIAL COST ISSUES
16 AND EXPENSES, I.E., ATTORNEY FEES, PREJUDICE CONCERNING
17 THE STATUTE OF LIMITATIONS, PREJUDICE CONCERNING COVERAGE,
18 PUBLIC POLICY ARGUMENT MR. MARTIN HAS RAISED AND I WAS
19 HOPING WE COULD GET THIS THING DOWN TO A MANAGEABLE
20 NUMBER. SEVEN SEEMS TO BE A GOOD NUMBER, BUT MR. MARTIN
21 CERTAINLY -- GO AHEAD. FINISH YOUR CONVERSATION.

22 MR. MARTIN: I'M SORRY, YOUR HONOR.

23 THE COURT: GO AHEAD. FINISH. SAY WHAT YOU WANT TO
24 SAY.

25 MR. MARTIN CERTAINLY RAISES SOME VERY INTERESTING

1 ISSUES. THIS IS ABOUT AS COMPLEX AS I'VE HAD. SO, HELP
2 ME WITH YOUR POSITION.

3 MR. LEWIS: FIRST OF ALL, IF THE SUPREME COURT RULES
4 OR IF THE COURT OF APPEALS RULES I AGREE WE'LL BE BOUND BY
5 IT. SO, MR. MARTIN -- IF HE SAYS THIS ISN'T GOING TO
6 DECIDE ANYTHING, IS SIMPLY WRONG. THERE COULD BE APPEAL
7 OUT THERE RIGHT NOW THAT COULD COME DOWN WITH SOME KIND OF
8 RULING AND WE'D BE BOUND BY IT. WHEN THE SUPREME COURT
9 RULES, WE'RE BOUND BY IT.

10 NOW, IF MR. MARTIN WANTS TO PARTICIPATE WE'LL AGREE
11 RIGHT NOW THAT HE CAN BE AN AMICUS IN ANY KIND OF QUESTION
12 WE HAVE, BUT WHAT THEY'VE DONE, YOUR HONOR, THEY'VE COME
13 IN HERE AND THEY HAVE TOLD YOU THAT IT'S TOO BURDENSOME TO
14 HAVE ALL THESE PEOPLE.

15 THE COURT: AND I AM LISTENING.

16 MR. LEWIS: AND YOU AGREED WITH THEM.

17 THE COURT: I DID AGREE.

18 MR. LEWIS: AND, SO, THEN THEY STAND UP AND SAY IF WE
19 CAN JUST GO AHEAD WITH THE SEVEN THAT WOULD BE GOOD, AND
20 WE AGREED WITH THAT, AND WE MADE THE MOTION. NOW THEY
21 COME BACK AND THEY SAY, NO, WE DON'T WANT TO GO AHEAD WITH
22 THE SEVEN. WE WANT TO GO AHEAD WITH SOME 40 OR 50. NOW,
23 ON 40 OR 50 THAT'S GOING TO BE JUST AS BURDENSOME TO GET A
24 DEPOSITION SCHEDULED. THAT'S WHAT THEY'VE ARGUED.

25 SO, WHAT WE'RE TRYING TO DO IS GET IT DOWN TO AS

1 MR. MARTIN SAID THE -- A FINALITY ON THESE VERY, VERY
2 IMPORTANT ISSUES. WE AGREE. WE'VE BEEN TRYING. MY
3 GOODNESS, WE'VE HAD DISCOVERY OUT FOR OVER A YEAR. WE'VE
4 TRIED EVERYTHING WE CAN. WE'VE HIT EVERY BLOCK WE CAN.
5 THEY KEEP ARGUING AND WE KEEP TRYING TO FIX IT, AND THEN
6 WHEN WE FIX IT THEY GO BACK IN THE OTHER DIRECTION.

7 THE COURT: LET ME ASK YOU THIS. I ASSUME IF I RULED
8 FOR YOU AND ALLOWED YOU TO AMEND AND REDUCE IT TO SEVEN
9 AND I HEAR THE 59(E)'S TODAY AND I HEAR THE MOTIONS TO
10 DISMISS ON THE -- I CALL IT THE THREE-PLAINTIFF CASE,
11 THREE PLAINTIFFS, THREE DEFENDANTS. COX WHAT?

12 MR. MARTIN: WEST-COX.

13 THE COURT: I ASSUME FROM WHAT I'M LISTENING FROM THE
14 DEFENDANTS THEY'RE GOING -- EVEN THOUGH IT MAY BE
15 INTERLOCUTORY, THEY'RE GOING TO APPEAL THOSE ORDERS WHICH
16 IS FINE WITH ME, BUT IS THAT WHERE WE'RE GOING, MR. HAMM?

17 MR. HAMM: YES, SIR.

18 THE COURT: THAT'S FINE. AND THAT WAY WE'LL HAVE
19 SOME FINALITY --

20 MR. HAMM: YES, SIR.

21 THE COURT: -- WITH SOME --

22 MR. LEWIS: WE'LL HAVE SOME QUESTIONS ANSWERED. WE
23 WON'T HAVE ALL OF THEM ANSWERED BECAUSE SOME OF THEM
24 AREN'T UP BEFORE YOU YET.

25 THE COURT: I UNDERSTAND.

1 MR. LEWIS: LIKE, FOR EXAMPLE, WHEN IT SAYS YOU CAN'T
2 ADVERTISE WITHOUT PUTTING THIS FEE ON IT, WHAT DOES THAT
3 MEAN? THEY ADVERTISE WITHOUT IT. THERE IS ALL KINDS OF
4 QUESTIONS.

5 THE COURT: I UNDERSTAND, BUT THE STANDING QUESTION,
6 THE RULE 23 QUESTION, WHETHER OR NOT THE STATUTE GIVES YOU
7 A SUBSTANTIVE RIGHT -- ALL THOSE ISSUES WHICH Y'ALL HAVE
8 THROWN INTO MY PLATE WILL -- MY DECISION ON THOSE
9 DEPENDING ON HOW I RULE TODAY WILL BE REVIEWED BEFORE WE
10 MOVE FORWARD OR ATTEMPT WILL BE MADE TO HAVE IT REVIEWED
11 BEFORE WE MOVE FORWARD.

12 MR. LEWIS: THAT'S CORRECT, BUT LET'S SHOW YOU THE
13 ILLOGIC POSITION OF THEM.

14 THE COURT: NOW, WE'RE BACK TO THE MOTION TO AMEND.

15 MR. LEWIS: OKAY. LET'S JUST TAKE THE STANDING
16 ISSUES.

17 THE COURT: WELL, LET'S STAY WITH THE MOTION TO
18 AMEND.

19 MR. LEWIS: LET'S SUPPOSE YOU AGREE WITH THEM ON THE
20 STANDING ISSUE, AND WHAT IS THE SOLUTION? YOU DISMISS
21 THEM.

22 THE COURT: THAT'S RIGHT.

23 MR. LEWIS: AND WE'RE JUST RIGHT WHERE I AM NOW.

24 THE COURT: BACK TO SEVEN.

25 MR. LEWIS: THAT'S CORRECT. IF YOU AGREE WITH THE

1 STANDING ISSUE, WE'RE RIGHT BACK. SO, I MEAN, WHAT DOES
2 THAT MEAN? IT MEANS THAT OUR AMENDMENT TAKES CARE OF ALL
3 OF THESE ISSUES AND WE CAN GO UP ON WHATEVER OTHER ISSUES
4 THEY HAVE BECAUSE THE STANDING ISSUE, IF YOU DECIDE THAT,
5 IT'S OVER WITH, AND THEN WE JUST DISMISSED -- JUST LIKE WE
6 ASKED FOR IT TO BE DISMISSED. IT MAKES NO -- I JUST DON'T
7 UNDERSTAND IT. THERE ARE 196 SMART DEFENDANTS. THERE ARE
8 JUST THE 40 THAT HAVE NO'S. SO, I MEAN, TO ME IT MAKES NO
9 SENSE OTHER THAN TO JUST GRANT THE DISMISSAL AND WE GO
10 FORWARD WITH THE SEVEN AND THEN ON THE SEVEN --

11 THE COURT: THE EASIEST THING TO DO IS GRANT THEIR
12 59(E) ON STANDING SO THEY DON'T HAVE TO APPEAL AND THEN
13 YOU GOT SEVEN LEFT. YOU CAN MOVE QUICKLY WITHOUT AN
14 APPEAL.

15 MR. HAMM: YOU'RE EXACTLY RIGHT.

16 THE COURT: THAT'S ONE WAY.

17 MR. MARTIN: I VOTE FOR THAT, YOUR HONOR.

18 THE COURT: WELL, THE END RESULT IS GOING TO BE THE
19 SAME.

20 MR. LEWIS: THAT'S EXACTLY RIGHT. IT'S NOT WITH
21 PREJUDICE.

22 MR. MARTIN: THE END RESULT IS GOING TO BE THE SAME
23 IN THE NUMBER OF PEOPLE, BUT THE DAMAGE THAT HAS BEEN
24 CAUSED BY THE INCONSISTENCY OF MY VERY LEARNED FRIEND ON
25 THE FIRST DAY HE BROUGHT THIS SUIT IS NOT GOING TO BE

1 FIXED. THIS IS MY DAY FOR MY CLIENTS TO GET WHOLE. WE
2 HAVE A RULE 41. WE HAVE CASELAW THAT GOES BACK TO THE
3 50'S THAT CREATES THE THINGS THEY HAVE TO DO.

4 THE COURT: BUT NOW Y'ALL ARE COMPLICATING IT EVEN
5 FURTHER. LET'S SAY I JUST SAY, MR. LEWIS, SIT DOWN AND
6 FORGET ABOUT YOUR MOTION TO AMEND. Y'ALL ARGUE YOUR 59(E)
7 AND ALL MY CONCERN IS ABOUT THE STANDING. I WOULD REVERSE
8 MY POSITION ON THE STANDING, GRANT THE 59(E), AND THEN IT
9 LEAVES THE 707.

10 MR. MARTIN: WELL --

11 THE COURT: WHERE DOES THAT PUT YOU?

12 MR. MARTIN: -- THAT'S WHY WE RESPECTFULLY REQUESTED
13 YOU TO DO THAT FIRST, FRANKLY. YOU KNOW, THAT'S WHY WE
14 THOUGHT IT MADE MORE SENSE FOR JAMIE TO GO FIRST JUST
15 BECAUSE OF THAT, BUT I NEED ALSO TO BRING ANOTHER POINT IN
16 PLAY. THE SEVEN PLAINTIFFS DON'T -- IF YOU RULE ABOUT
17 STANDING THAT MEANS PLAINTIFF NUMBER ONE -- LET'S SAY HER
18 NAME IS HERRON. I DON'T KNOW WHETHER SHE WAS CARMAX OR
19 NOT. SHE CAN'T SUE THE OTHER SIX. SHE DOESN'T HAVE
20 STANDING TO SUE THE OTHER SIX.

21 SO, IT'S NOT NECESSARILY THE SAME, AND JAMIE WILL GET
22 INTO THAT. SO, IT'S NOT APPLES AND APPLES.

23 THE COURT: I UNDERSTAND. ALL RIGHT. MR. HAMM?

24 MR. HAMM: JUST FOR THE RECORD, YOUR HONOR, WE ARE
25 NOT ATTEMPTING BY MY 20 CLIENTS TO BE DIFFICULT OR BE

1 INCONSISTENT. THERE ARE BUSINESS AND PRACTICAL REASONS
2 AND PROBLEMS THAT WE ARE RAISING. WE ARE, AGAIN, NOT --

3 THE COURT: I CERTAINLY WOULDN'T WANT ANYBODY TO GET
4 THE IMPRESSION THAT I THOUGHT IT WAS FRIVOLOUS.

5 MR. HAMM: NO. THERE WAS A COMMENT MADE, AND I JUST
6 FELT LIKE I HAD TO PROTECT MYSELF ON THE RECORD.

7 THE COURT: WELL, MY STRUGGLE IS TO GET THIS THING
8 UNDER CONTROL, AND I WAS EXCITED WHEN WE GOT THE MOTION TO
9 AMEND DOWN TO SEVEN. MR. MARTIN IS RAISING SIGNIFICANT
10 ISSUES. NOW, MR. LEWIS SAYS, WELL, IF YOU GRANT 59(E)
11 WE'RE BACK TO WHERE WE ARE -- MY SEVEN.

12 GO AHEAD, MR. LEWIS. I DIDN'T MEAN TO INTERRUPT YOU.

13 IN OTHER WORDS, I GOT A TIGER BY THE TAIL, AND I AM
14 TRYING TO FIND THE SOLUTION.

15 MR. LEWIS: BUT THE SOLUTION IS TO GRANT OUR MOTION
16 TO DISMISS AND YOU'RE DOWN TO SEVEN AND WE GO FORWARD, AND
17 IF MR. MARTIN WANTS TO PARTICIPATE -- LET'S SUPPOSE YOU
18 GRANT HIS MOTION TO -- JUST WHATEVER, FOR ANY -- DISMISS.
19 NONE OF THEM ARE WITH PREJUDICE. NONE OF THEM BOUND
20 ANYBODY IN THE NEXT SUIT BECAUSE IT'S DIFFERENT PLAINTIFFS
21 AND WE HAVE A PLAINTIFF FOR EVERY PERSON. SO, WHAT WE'RE
22 SAYING IS HE'S OUT OF THE SUIT THEN, AND HE DOESN'T GET TO
23 BE THERE FOR ALL OF THESE HEARINGS AND EVERYTHING WHICH HE
24 WANTS TO BE. I JUST DON'T UNDERSTAND WHAT'S GOING ON AND
25 WHY IN THE WORLD --

1 THE COURT: WELL, WHAT'S GOING ON -- AND ADDRESS THIS
2 FOR ME, PLEASE. WHAT'S GOING ON HE'S TELLING ME HE HAS A
3 NUMBER OF CLIENTS WHO AFTER A YEAR HAS SPENT A QUARTER OF
4 A MILLION DOLLARS IN DEFENSE OF THIS MATTER AND IF HE GETS
5 OUT HE IS ENTITLED TO HIS COSTS AND EXPENSE.

6 MR. LEWIS: THERE IS NO --

7 THE COURT: SIR?

8 MR. LEWIS: THERE IS NOTHING THAT ALLOWS THAT FOR HIM
9 IN THIS CASE BECAUSE IF YOU BRING -- BECAUSE HE SAYS HE
10 SHOULD GET IT BECAUSE OF BRINGING THE NEW SUIT. YOU DON'T
11 GET IT. IF I AM IN HERE AND I GET -- TAKE A NON-SUIT,
12 THEY DON'T GET THEIR MONEY. NOBODY GETS THEIR MONEY FOR A
13 NON-SUIT. IT DOESN'T HAPPEN, AND WHEN YOU BRING ANOTHER
14 SUIT AFTER YOU BROUGHT A NON-SUIT, THEN SOME PEOPLE MOVE
15 FOR IT, BUT IN THIS CASE IT'S DIFFERENT PLAINTIFFS.
16 DIFFERENT PLAINTIFFS CAN BRING THE SUIT.

17 AND THEN YOU ASKED ME TO TALK ABOUT THE STATUTE OF
18 LIMITATIONS. NOW, I DIDN'T UNDERSTAND THAT A BIT. HE IS
19 SAYING BECAUSE WE BROUGHT A SUIT LATER IN TIME WE'RE GOING
20 TO GET MORE MONEY? I DON'T THINK SO. IF THEY CHOOSE WHEN
21 WE BRING A SUIT AND IT'S A SUIT ON BEHALF OF EVERYBODY AND
22 THEY CONTINUE TO DO THE DEED AND NOT CORRECT THEIR PROBLEM
23 THAT'S WHAT -- THAT'S STILL PART OF WHATEVER SUIT IS
24 PENDING. SO, STATUTE OF LIMITATIONS MEANS NOTHING.

25 AS FAR AS INSURANCE COVERAGE, I HAVE NO IDEA. I

1 HAVEN'T SEEN THEIR POLICIES. SO, I CAN'T UNDERSTAND IF WE
2 -- WE ALL AGREE. I CAN'T BELIEVE THEY SAID THAT -- THAT
3 THE SUPREME COURT IF THEY GET IT UP THERE ON ANY ISSUE AND
4 THE SUPREME COURT RULES WE'RE BOUND BY IT. WE'RE BOUND BY
5 IT IN THE FIRST SUIT, SECOND SUIT, THIRD SUIT, OR ANYBODY
6 ELSE THAT BRINGS A SUIT ON THESE PARTICULAR GROUNDS, AND
7 IF THERE IS A SUPREME COURT RULING, THE SUPREME COURT
8 RULING WINS. THAT'S THE WAY OUR SYSTEM WORKS.

9 SO, AGAIN, WE'RE BACK TO THE POINT I THOUGHT
10 EVERYBODY WOULD -- IT WOULD WORK. FIRST WE BROUGHT -- WE
11 SAID, OKAY, WE'LL TRY THE THREE CASE. WE BROUGHT THAT
12 ONE. THEN THEY SAY THEY STILL WANT TO GO FORWARD WITH THE
13 FIRST CASE. THEN THEY ARGUE THAT THERE IS GOING TO BE TOO
14 MANY PEOPLE IN THE DEPOSITIONS. SO WE FIGURE OUT A WAY TO
15 CORRECT THEIR CONCERNS.

16 EVERY MOVE WE'VE TRIED IS TO TRY TO CORRECT THEIR
17 CONCERNS, AND ALL THEY DO IS SWITCH AND GO BACK THE OTHER
18 WAY WHEN WE FIX THEIR CONCERNS. THEY GO BACK -- BECAUSE
19 WANTING TO PUT 50 PEOPLE INSTEAD OF SEVEN IN A SUIT GOES
20 RIGHT BACK TO EVERY ARGUMENT THEY MADE FOR YOU TO DENY
21 AMENDMENT.

22 THE COURT: THANK YOU. ANYTHING IN RESPONSE,
23 MR. MARTIN?

24 MR. MARTIN: MAY IT PLEASE THE COURT. DEUS EX
25 MACHINA. WE CREATE THIS MESS 4 AND 51, 8 AND 324. THROW

1 IN ANOTHER 250. OH MY GOD, THE JUDGE IS GOING CRAZY. HE
2 DOESN'T KNOW WHAT TO DO. DEUS EX MACHINA. MAKE IT GO
3 AWAY AND SAY WE'RE THE ONES WHO CHANGED AND WE'RE THE ONES
4 WHO CAN'T MAKE UP OUR MIND.

5 THE COURT: WELL, YOU WANTED TO GO AWAY AND NOW YOU
6 WANT TO STAY.

7 MR. MARTIN: I WANTED TO GO AWAY UNDER THE SOUTH
8 CAROLINA RULES AND PRECEDENT. I WANT TO HAVE A FINAL
9 DECISION. I AM VERY OPTIMISTIC THAT YOU HAVE UNDERSTOOD
10 THE TOTAL UNMANAGEABILITY OF THIS MESS.

11 THE COURT: THAT'S WHY I SUGGESTED THEY AMEND TO GET
12 THE 7 PLAINTIFFS ON THE 7 DEFENDANTS WHICH IS WHERE WE ARE
13 WHICH IS MANAGEABLE.

14 MR. MARTIN: WHY THEY'RE WILLING TO DO THAT IS
15 BECAUSE THEY KNOW YOU'RE ABOUT TO DROP THE HAMMER ON THEM
16 AND THEY ARE SAYING, NO HAMMER, NO HAMMER; WE DON'T WANT A
17 DECISION. WHAT WE HAVE HERE IS \$250,000 OUT OF THE WINDOW
18 FOR WHAT? BECAUSE THEY CHANGED THEIR MIND AND THEY ARE
19 TRYING TO PLEASE YOU BECAUSE THEY DIDN'T DO IT RIGHT IN
20 THE BEGINNING.

21 THE COURT: THEY'RE NOT TRYING TO PLEASE ME. THEY'RE
22 TRYING TO GET THE THING MANAGEABLE.

23 MR. MARTIN: I KNOW BECAUSE THEY MADE IT
24 UNMANAGEABLE. IF THEY DID IT RIGHT FROM DAY ONE WE
25 WOULDN'T BE HERE. HE SAYS THERE'S ABSOLUTELY NO CASELAW

1 ABOUT ATTORNEYS' FEES. WELL, ABOUT SHIFT VERSUS
2 RICHARDSON CORPORATION AND MORROW VERSUS CLAYBORN?

3 THE COURT: WHAT PAGE --

4 MR. MARTIN: PAGE 8-6 OF MY BRIEF, YOUR HONOR. ANY
5 GRANT OF A VOLUNTARY DISMISSAL SHOULD INCLUDE THE PAYMENT
6 OF COST AND ATTORNEYS' FEES. SOUTH CAROLINA RULES OF
7 CIVIL PROCEDURE 41(A)(C) ALLOWS THE IMPOSITION OF
8 ATTORNEYS' FEES ON THE GRANTING OF A VOLUNTARY NON-SUIT.
9 SEE SHIPP VERSUS RICHARDSON CORPORATION. THE AWARD OF
10 ATTORNEYS' FEES MUST BE ADEQUATE TO COMPENSATE THE
11 DEFENDANTS, AND THEN -- I MEAN, THIS IS THE LAW OF THE
12 STATE. JUST LIKE WE HAVE RULES OF CIVIL PROCEDURE TO TELL
13 US WHAT TO DO IN THESE SITUATIONS AND WE HAVE PRECEDENT
14 FROM THE SUPREME COURT TO TELL US WHAT WE CAN DO, WE CAN'T
15 JUST DEUS EX MACHINA AND SAY THOSE THINGS DON'T APPLY.

16 THE COURT: WELL, LET ME ASK YOU THIS. LET'S SAY I
17 DENY HIS MOTION TO AMEND. THEREFORE, YOU'RE AREN'T
18 ENTITLED TO ATTORNEYS' FEES. YOU'RE STILL IN IT. I RULE
19 ON YOUR 59(E) THAT THEY DON'T HAVE STANDING, I MADE A
20 MISTAKE, AND THEN WE'RE BACK TO THE SEVEN AND YOU'RE OUT.

21 MR. MARTIN: PERFECTLY FINE TO ME, YOUR HONOR.

22 THE COURT: SO, YOU GIVE UP YOUR CLAIM TO \$250,000
23 FEES.

24 MR. MARTIN: WELL, I WILL NEED TO RESEARCH WHETHER I
25 HAVE AN OPPORTUNITY FOR FEES UNDER A 59(E). THAT MAY BE

1 DISCRETIONARY. I HAVEN'T RESEARCHED IT YET.

2 THE COURT: I DON'T KNOW THE ANSWER TO THAT EITHER.

3 MR. MARTIN: BUT I MAY STILL GET IT THEN, BUT THAT'S
4 NOT WHAT'S BEFORE US US NOW. WHAT'S BEFORE US NOW IS RULE
5 41 AND WHEN YOU FIND YOURSELF IN A SITUATION AND YOU'RE
6 SAYING, WHAT DO I DO? WELL, WHAT DOES THE RULE SAY? THE
7 RULE SAYS LEGAL PREJUDICE OR A PUBLIC POLICY ISSUE YOU
8 CAN'T JUST FLUSH IT IF YOU GOT PEOPLE OBJECTING.

9 THE COURT: WELL, YOU MADE YOUR POINT ON THAT. WHAT
10 IS BEFORE ME IS TO TRY TO GET THIS LITIGATION UNDER
11 CONTROL SO IT CAN BE MANAGEABLE WITHOUT HAVING --

12 MR. MARTIN: WE FIRST CAME INTO YOUR COURTROOM IN
13 APRIL LAST YEAR.

14 THE COURT: I KNOW YOU DID. I REMEMBER.

15 MR. MARTIN: IN APRIL OF LAST YEAR I SAID TO YOU THE
16 WAY THIS SHOULD BE DONE IS JUST LIKE THE FANNING VERSUS
17 FRITZ CASE AND THE NEWSOME CASE. YOU GOT ONE PLAINTIFF,
18 AND IF THERE'S TOO MANY TO BRING IN -- PLAINTIFFS --
19 AGAINST THAT ONE DEALERSHIP, SUE THAT DEALERSHIP. THAT'S
20 WHAT IT'S SUPPOSED TO BE. THEN GET YOUR CLASS ACTION.

21 I TALKED ABOUT ROUTE 23. YOU GOT TO HAVE BANKS TO
22 RIVERS. WHEN YOU HAVE BANKS TO RIVERS YOU DON'T GET
23 OVERFLOWED AND YOU DON'T DROWN. WE TALKED ABOUT THE
24 JAGUAR CASE. IF YOU GOT EIGHT BAD JAGUARS YOU CAN'T JUST
25 BRING --

1 THE COURT: I KNOW THAT YOU TALKED ABOUT ALL OF THAT,
2 AND I MADE A RULING ON IT, AND I AM GOING TO HEAR YOUR
3 59(E) ON IT.

4 MR. MARTIN: SO, BUT THE REASON WHY WE'RE HERE TODAY
5 AND THE REASON WHY WE HAVE RULE 41 IS BECAUSE MY VERY,
6 VERY CLEVER AND VERY GOOD LAWYERS ON THE OTHER SIDE KEEP
7 CHANGING TO TRY TO FIGURE OUT HOW TO GET TO WHERE THEY
8 WANT TO BE. WELL, WHY DON'T WE JUST FOLLOW THE RULES?
9 WHY DON'T WE FOLLOW THE PRECEDENT? WHY DON'T WE SAY ONE
10 PLAINTIFF, ONE DEFENDANT, AND IF YOU GOT SEVERAL
11 PLAINTIFFS THAT ARE IN THE SAME SITUATION AGAINST THAT
12 DEFENDANT, SO BE IT, BUT PROVE IT. THEN WE WOULDN'T BE
13 HERE, BUT THAT'S NOT WHERE WE ARE.

14 WE'VE BEEN IN THIS FOR A YEAR AND A HALF. MY FOLKS
15 HAVE FLUSHED A QUARTER OF A MILLION DOLLARS. GIVE IT BACK
16 TO US AND LET US DISMISS. THAT'S AN OPTION. WE WOULD
17 RATHER HAVE FINALITY. WE WANT TO GO AND DO OUR BUSINESS
18 AND KNOW THAT THINGS ARE OKAY.

19 THE COURT: THANK YOU, MR. MARTIN. ANYBODY ELSE IN
20 OPPOSITION OR IN REPLY TO MR. LEWIS? NORMALLY, I WOULDN'T
21 LET YOU SAY ANYTHING ELSE, MR. LEWIS, BUT IF YOU NEED TO I
22 WILL.

23 MR. LEWIS: I WANT TO POINT OUT ONE THING.

24 THE COURT: YES, SIR.

25 MR. LEWIS: YOU NEED TO READ 41(D) WHICH IS THE RULE

1 UPON WHICH THESE CASES HE CITES FIND THEMSELVES AND IT
2 SAYS IF A PLAINTIFF WHO HAS ONCE DISMISSED AN ACTION IN
3 ANY COURT COMMENCES AN ACTION BASED UPON OR INCLUDING THE
4 SAME CLAIM AGAINST THE SAME DEFENDANT THE COURT MAY MAKE
5 SUCH ORDER FOR THE PAYMENT OF COSTS OF THE ACTION
6 PREVIOUSLY DISMISSED AS IT MAY DEEM PROPER AND MAY STAY
7 THE PROCEEDINGS IN THE ACTION UNTIL THE PLAINTIFF HAS
8 COMPLIED WITH THE ORDER. WE DO NOT HAVE THE SAME
9 ACTION -- SAME SECOND ACTION AT ALL. WE HAVE ANOTHER
10 PLAINTIFF WHO HAS BROUGHT A SUIT AGAINST THE DEALER FOR
11 THEIR CAR.

12 SO, 41(D) JUST SIMPLY DOES NOT APPLY. THAT'S WHAT I
13 MEANT WHEN I SAID THERE IS NO RIGHT TO ATTORNEYS' FEES
14 UNDER A DISMISSAL UNLESS YOU BRING A SECOND SUIT EXACTLY
15 LIKE THE FIRST ONE.

16 MR. MARTIN: 41(A) (C) IS WHAT WE'RE GOING UNDER, YOUR
17 HONOR, AND THE SHIPP CASE WHICH IT SETS IT ALL OUT. IT
18 ALLOWS THE IMPOSITION --

19 THE COURT: WAIT A MINUTE. 41(A) WHAT?

20 MR. MARTIN: (A) (C) .

21 THE COURT: (A) (C)? HELP ME FIND IT. WHICH RULES
22 ARE YOU LOOKING AT -- FEDERAL OR STATE?

23 MR. MARTIN: STATE.

24 THE COURT: (A) --

25 MR. MARTIN: (A) (C) .

1 THE COURT: DISMISSAL -- I SEE IT.

2 MR. MARTIN: I'M SORRY. 41(A)(2)(C). I LEFT OUT
3 THE 2.

4 THE COURT: I DON'T SEE A 2(C). LET ME LOOK AGAIN.
5 I GOT A 41(A)(1) AND A 41(A)(2), NO "C" UNDER 2 -- A "B",
6 A "C," A "D" UNLESS I AM LOOKING AT IT WRONG.

7 MR. MARTIN: IT IS THE OLD LANGUAGE OF RULE 45.

8 THE COURT: WAIT A MINUTE. WHERE ARE WE GOING NOW?

9 MR. MARTIN: I AM TALKING ABOUT THE SHIPP CASE. RULE
10 45 IS NOW RULE 41. AND UNDER RULE 45 AN ACTION SHALL NOT
11 BE DISMISSED AT THE PLAINTIFF'S INSISTENCE SAVE UPON AN
12 ORDER OF THE COURT AND UPON SUCH TERMS AND CONDITIONS AS
13 THE COURT DEEMS PROPER.

14 THE COURT: WE'RE OPERATING UNDER THE NEW RULES NOW.

15 MR. MARTIN: THE NEW RULES HAS THAT SAME PHRASE.

16 THE COURT: SHOW IT TO ME. WELL, THAT'S -- YOU KNOW,
17 HERE IS WHAT I AM GOING TO DO ON THAT. IF I GRANT HIS
18 MOTION TO AMEND I WILL LET HIM BRIEF THAT ISSUE AND WE
19 WILL HOLD THAT IN ABEYANCE AS TO WHETHER OR NOT THEY ARE
20 ENTITLED TO ANY COST -- YOU'RE ENTITLED TO ANY COSTS AND
21 FEES.

22 OKAY. WHAT MR. LEWIS READ TO ME IS PRETTY CLEAR, BUT
23 I AM NOT GOING TO CATCH YOU OFF GUARD.

24 MR. MARTIN: I KNOW ABOUT 41, BUT THAT'S WITH A
25 PREVIOUSLY DISMISSED ACTION AND THAT'S NOT WHERE WE ARE.

1 IN THE SHIPP CASE IT SAYS CLEARLY THAT THE COURT CAN ORDER
2 -- CANNOT ORDER A DISMISSAL SAVE UPON AN ORDER OF THE
3 COURT AND UPON SUCH TERMS AND CONDITIONS AS THE COURT
4 DEEMS PROPER, AND THEN IN MORROW WHICH WAS THE CASE
5 DECIDED AFTER THE RULES WERE CHANGED THEY SAID THAT WOULD
6 INCLUDE THE RIGHT TO ORDER ATTORNEYS' FEES AND COSTS, AND
7 THE LAW IS ABSOLUTELY CLEAR THAT YOU CAN DO THAT IF YOU
8 SHOW THE LEGAL PREJUDICE OR --

9 THE COURT: WELL, NOW, WAIT A MINUTE. THE MORROW
10 CASE SAYS -- WELL, HE'S TALKING ABOUT THE ADAMS CASE.
11 THEY CITE THE LANGUAGE THAT MR. LEWIS JUST CITED. THAT'S
12 WHAT YOU HAVE IN YOUR BRIEF.

13 MR. MARTIN: WELL, THAT'S --

14 THE COURT: WELL -- YOU WILL NOT BE -- IF I GRANT
15 HIS MOTION, I WILL LET YOU RESERVE THAT ISSUE FOR FULL
16 HEARING WHERE EVERYBODY CAN TAKE A LOOK AT IT.

17 MR. MARTIN: OKAY.

18 THE COURT: MR. BECKER, FIRST OF ALL, I WANT TO
19 COMPLIMENT YOU ON YOUR BRIEFS. OBVIOUSLY, A LOT OF WORK
20 AND EFFORT HAS BEEN PUT INTO IT. I APPRECIATE IT. YOU
21 KNOW I SPENT ALL DAY YESTERDAY -- I WAS SUPPOSED TO BE
22 DOING SOMETHING ELSE -- READING.

23 MR. BECKER: THANK YOU, YOUR HONOR. SHALL WE PROCEED
24 WITH ARGUMENT ON THE RULE 59(E) MOTION?

25 THE COURT: WELL, LET ME ASK YOU THIS. IF I GRANT

1 YOUR 59(E) ON HERRON, DON'T WE END UP BACK WHERE WE ARE
2 WITH THE SEVEN DEFENDANTS AND THE SEVEN PLAINTIFFS?

3 MR. BECKER: IF YOU GRANT THE FULL MEASURE OF RELIEF
4 WE ASKED FOR IN THE RULE 59(E) MOTIONS I THINK YOU'LL BE
5 DISMISSING THE HERRON CASE AS TO EVERY DEFENDANT BUT THE
6 ONE THAT IS -- DOES BUSINESS IN AIKEN COUNTY AND THAT'S
7 THE FULL MEASURE OF RELIEF REQUESTED IN THE RULE.

8 THE COURT: WELL, WHAT IF I GIVE YOU PARTIAL RELIEF?

9 MR. BECKER: THAT WILL SOLVE SOME OF THE PROBLEM, BUT
10 NOT ALL OF IT, AND REMEMBER THERE IS -- THERE'S AN
11 800-POUND GORILLA SITTING IN THE BACK OF THIS COURTROOM
12 AND IT'S CALLED THE ADAMS CASE, AND EVERY ISSUE THAT IS
13 DEALING WITH TODAY PRESENTS ITSELF AGAIN IN SPADES IN THE
14 ADAMS CASE. SO, I THINK -- I THINK WE HAVE SOME
15 COMPELLING NEW ARGUMENTS.

16 THE COURT: WELL, YOU DO HAVE A COMPELLING NEW
17 ARGUMENT IN THE CLASS ACTION SETTLEMENT OF CARMAX.

18 MR. BECKER: AND THE AMCHEM CASE WE HAVE SOME NEW LAW
19 TO CITE TO YOU ON THE EFFECT OF 56-15-110(2). WE HAVE
20 SOME NEW ARGUMENTS ON THE CIVIL CONSPIRACY CLAIM. WE NEED
21 TO TALK TO YOU ABOUT THIS CONCEPT OF IMPROPER JOINDER
22 BECAUSE THAT IS NOT AN ISSUE THAT WAS ADDRESSED IN YOUR
23 ORDER. WE THINK THAT IT'S A CRITICAL ONE. IT'S A
24 THRESHOLD ISSUE JUST LIKE THESE OTHERS.

25 THE COURT: WELL, LET'S DO THIS THEN. INSTEAD OF ME

1 INTERRUPTING YOU, YOU GO AHEAD AND MAKE YOUR ARGUMENT.

2 MR. BECKER: THANK YOU. YOUR HONOR, YOU'VE HEARD
3 THAT ADAGE, THAT OLD ADAGE ABOUT THE EXCEPTION THAT
4 SWALLOWS THE RULE?

5 THE COURT: I HAVE HEARD THAT.

6 MR. BECKER: WELL, THE OVERRIDING ISSUE HERE TODAY IS
7 WHETHER THESE EXCEPTIONS THAT THE PLAINTIFF OFFER WILL
8 SWALLOW THE WELL-ESTABLISHED RULES OF CIVIL PROCEDURE, THE
9 CASELAW, THE PRECEDENT THAT WE RELY ON AND THAT GOVERNS
10 ALMOST ALL OF THE OTHER CASES THAT GET FILED IN THIS
11 COURTROOM EXCEPT THESE THREE -- HERRON, WEST-COX, ADAMS.
12 THOSE EXCEPTIONS ARE THIS -- 56-15-110(2), A 1972 STATUTE
13 THAT IS VIRTUALLY IDENTICAL -- AND I'LL SHOW THIS TO
14 YOU -- TO THE OLD SECTION 15 --

15 THE COURT: MERT, CLOSE THAT DOOR.

16 MR. BECKER: 110(2) IS VIRTUALLY IDENTICAL TO THE OLD
17 SECTION 15-5-50 IN THE OLD CIVIL PROCEDURE OF THE CODE.
18 110(2) WAS PASSED IN 1972, 15-50 WAS REPEALED IN '85 WHEN
19 THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE WERE ADOPTED.
20 THAT'S THEIR EXCEPTION ONE.

21 EXCEPTION TWO IS THEIR CIVIL CONSPIRACY CLAIM -- A
22 CLAIM THAT IS MORE OFTEN THAN NOT DISMISSED IN OUR REPORT
23 OF APPELLATE DECISIONS. UNDER THEIR INTERPRETATION OF
24 CIVIL CONSPIRACY IT IS THE GLUE THAT HOLDS EVERYTHING
25 TOGETHER -- EVERYTHING THAT ALL THE OTHER RULES WOULD TELL

1 YOU, NO, THOSE CAN'T BE PUT TOGETHER THIS WAY. SO, THE
2 ISSUE FOR YOU TODAY IS WHETHER THOSE EXCEPTIONS THAT THEY
3 THEY'VE BEEN ADVANCING ALL ALONG WILL SWALLOW RULE 23,
4 WILL SWALLOW THE CONSTITUTIONAL PRINCIPALS IN CASELAW
5 RELATED TO STANDING, WILL SWALLOW RULE 20 RELATED TO
6 JOINDER, AND WILL SWALLOW THE RULES OF PLEADING AS THEY
7 RELATE TO CIVIL CONSPIRACY.

8 LET'S DEAL FIRST WITH RULE 23. WHAT'S NEW ON THIS
9 ISSUE SINCE YOU HEARD US LAST? WELL, THERE ARE FOUR
10 THINGS. THERE IS THE CARMAX CASE. THERE IS THE AMCHEM
11 CASE -- THE CARMAX SETTLEMENT CASE -- EXCUSE ME -- THE
12 AMCHEM CASE WHICH WE'VE CITED TO YOU. WE'VE GOT SOME NEW
13 CASELAW TO SHOW YOU ON THE INTERACTION BETWEEN 110(2) OF
14 THE DEALERS ACT AND 1985 ACT 100, THE RULES ENABLING ACT,
15 THE ACT IN WHICH THE RULES OF CIVIL PROCEDURE WERE ADOPTED
16 AND WHICH WE CONTEND REPEALED 110(2) AND WE'VE GOT A NEW
17 ARGUMENT ON THE DOCTRINE OF COLLATERAL ESTOPPEL.

18 LET'S FIRST LOOK AT THE CARMAX SETTLEMENT. IN IT THE
19 PLAINTIFFS -- THEY'VE SHOWN THEIR CARDS, YOUR HONOR. WE
20 SEE THAT AT SETTLEMENT TIME THEY ABANDON ANY PRETENSE OF A
21 GROUP SUIT. THEY ABANDON ANY PRETENSE OF SUBSTANTIVE
22 RIGHTS UNDER SECTION 110(2). THEY BACKTRACK AND THEY
23 TRAVEL DOWN ROUTE 23. THEY ENTER INTO A SETTLEMENT
24 AGREEMENT DATED MARCH 27. IT'S ENTITLED CLASS ACTION
25 SETTLEMENT AGREEMENT, NOT GROUP SUIT SETTLEMENT AGREEMENT.

1 IT DEFINES CLASS MEMBERS AS PERSONS WHO DO NOT OPT OUT OF
2 THE SETTLEMENT CLASS.

3 IN FACT, SECTION 2.1 OF THAT SETTLEMENT AGREEMENT
4 SIGNED BY THE PLAINTIFFS SAYS THIS: THE PARTIES AGREE
5 THAT THE COMPLAINT IN THIS ACTION -- IN THE HERRON
6 ACTION -- SHALL BE TREATED AS AMENDED TO BE A CLASS ACTION
7 UNDER RULE 23 OF THE SOUTH CAROLINA RULES OF CIVIL
8 PROCEDURE. IN THAT SETTLEMENT AGREEMENT IT IS NOT LIMITED
9 TO FOR SETTLEMENT PURPOSES ONLY. NOW, BY THE TIME THEY
10 SUBMITTED TO YOU THE CONSENT ORDERS, THE PRELIMINARY ONE
11 AND THEN THE FINAL ONE, THEY INSERTED THAT PHRASE FOR
12 SETTLEMENT PURPOSES ONLY, BUT IN THE ORIGINAL SETTLEMENT
13 AGREEMENT SIGNED BY THOSE PARTIES THAT'S WHAT THE
14 PLAINTIFF SAID. IT'S AMENDED TO BE A COMPLAINT UNDER RULE
15 23.

16 THERE ARE NUMEROUS OTHER REFERENCES TO RULE 23 AND
17 ALL THE SETTLEMENT DOCUMENTS AND THE NOTICES TO THE CLASS,
18 AND IN YOUR OCTOBER 22 ORDER GIVING FINAL APPROVAL TO THE
19 SETTLEMENT AGREEMENT THIS COURT SAID, THIS COURT REAFFIRMS
20 ITS FINDINGS THAT THE PREREQUISITES FOR CLASS
21 CERTIFICATION CONTAINED IN RULE 23 HAVE BEEN MET. THAT'S
22 YOUR ORDER ON PAGE TWO. YOU WENT ON TO ANALYZE ALL THE
23 REQUIREMENTS -- NUMEROSITY, COMMONALITY, TYPICALITY,
24 ADEQUACY OF REPRESENTATION -- AND FOUND THAT THEY WERE MET
25 AND THE SETTLEMENT WAS FAIR.

1 I WOULD SUGGEST TO YOUR HONOR THAT IF IT LOOKS,
2 WALKS, AND TALKS LIKE A RULE 23 CLASS ACTION, THEN THAT'S
3 REALLY WHAT IT IS. THE IMPORTANT POINT HERE IS THAT
4 PLAINTIFFS HAVE REVEALED THAT WHEN IT COMES TIME TO SETTLE
5 THEY HAVE TO RELY ON RULE 23 AND ALL THE PROCEDURES IN
6 THAT RULE. NOTICE THEY DIDN'T USE THE OLD BILL OF PEACE
7 THAT YOU USED TO USE IN THE CODE PLEADING DAYS TO SETTLE A
8 GROUP SUIT WHERE THERE WERE A MULTITUDE OF PARTIES. THEY
9 USED THE MODERN VERSION OF RULE 23 FOUND IN THE SOUTH
10 CAROLINA RULES OF CIVIL PROCEDURE.

11 WHY IS THAT SO IMPORTANT? THAT BRINGS US TO AMCHEM
12 PRODUCTS, INC. VERSUS WINDSOR, 521 U.S. 591, A 1977
13 CASE -- A CASE IN WHICH SOUTH CAROLINA'S OWN RON MOTLEY
14 AND JOE RICE WERE REPRESENTING A GROUP OF ASBESTOS
15 PLAINTIFFS FROM ALL OVER THE COUNTRY. YOU MAY RECALL BACK
16 IN THOSE DAYS WHEN ASBESTOS CASES WERE IN EVERY COURTROOM
17 EVERYWHERE. THEY WERE CONSOLIDATED TOGETHER THROUGH AN
18 M.D.L. PROCEEDING THAT WAS SIMILAR IN MANY WAYS TO THE
19 MASS ACTION THAT THE PLAINTIFFS ARE TRYING TO BRING IN
20 THIS COURT HERE IN ONE SINGLE COUNTY BEFORE ONE SINGLE
21 JUDGE.

22 WELL, IN AMCHEM THE PLAINTIFFS DECIDED LET'S TAKE A
23 SHORTCUT. LET'S DO IT THE EASY WAY. LET'S GROUP
24 EVERYBODY TOGETHER AND FIX IT IN ONE FELL SWOOP. NEVER
25 INTENDING TO LITIGATE THE CASE, THE PARTIES IN AMCHEM ON A

1 SINGLE DAY FILED A COMPLAINT, AN ANSWER, A PROPOSED
2 SETTLEMENT AGREEMENT, AND A JOINT MOTION FOR CONDITIONAL
3 CLASS CERTIFICATION PURSUANT TO RULES 23(A) AND (B) OF THE
4 FEDERAL RULES OF CIVIL PROCEDURE.

5 THE TRIAL COURT SAID, OH, THIS MAKES MY LIFE EASY.
6 WE'LL APPROVE IT. WELL, THE THIRD CIRCUIT AND THEN THE
7 SUPREME COURT SAID, HOLD ON. WE'RE SORRY. YOU CAN'T DO
8 IT THAT WAY. THERE ARE RULES YOU HAVE TO FOLLOW. RULE 23
9 IS ONE, AND YOU HAVE TO FOLLOW IT FROM THE GET-GO. THE
10 SUPREME COURT HELD IF RULE 23 IS USED TO CERTIFY A
11 SETTLEMENT CLASS, THE PARTIES MUST ALSO PROVE THAT THE
12 RULE 23 REQUIREMENTS ARE SATISFIED AT THE LITIGATION OR
13 LIABILITY PHASE OF THE CASE.

14 STATED ANOTHER WAY, IF ONE WANTS TO USE RULE 23 TO
15 SETTLE A SUIT IN WHICH A NAMED PLAINTIFF PURPORTS TO
16 REPRESENT UNNAMED PLAINTIFFS, AND, MORE IMPORTANTLY, IF
17 YOU WANT THE COURT'S ORDER APPROVING THAT SETTLEMENT TO
18 BIND THE UNNAMED PLAINTIFFS -- THOSE PLAINTIFFS WHO HAVE
19 NEVER APPEARED IN THE COURTROOM WHOSE NAME HAS NEVER BEEN
20 IN THE CAPTION -- THEN YOU HAVE TO COMPLY WITH RULE 23
21 FROM THE OUTSET OF THE CASE. THE PLAINTIFFS HAVE TO PLEAD
22 AND PROVE THE REQUIREMENTS OF RULE 23 AT THE LIABILITY
23 PHASE AND THEN THE COURT HAS TO DETERMINE IN A LIABILITY
24 DETERMINATION THAT THE CLASS -- THE PUTATIVE CLASS --
25 MEETS THE REQUIREMENTS OF RULE 23.

1 SETTLEMENT CAN BE A FACTOR IN THAT ANALYSIS, BUT IT'S
2 ONLY A FACTOR, AND IT'S NOT THE DETERMINING FACTOR.

3 YOUR HONOR, WE'RE NOT SUGGESTING THAT THE CARMAX
4 SETTLEMENT WAS IMPROPER, BUT I AM SUGGESTING THAT IT MAY
5 HAVE BEEN THE ONLY DEFENDANT FOR WHICH SUCH A SETTLEMENT
6 WAS PROPER. WHY? BECAUSE CARMAX OPERATES VERY
7 DIFFERENTLY FROM MOST OTHER CAR DEALERS. I WAS SHOPPING
8 THERE -- MY SON IS 16. I GOT TO BUY HIM A CAR. I WAS
9 SHOPPING THERE A WEEK AGO. THEY OPERATE VERY DIFFERENTLY
10 FROM MOST OF THE CAR DEALERS. THEY ADVERTISE THE PRICE OF
11 EVERY VEHICLE THEY SELL IN THE PRINT MEDIA AND ON THE
12 INTERNET. THEY DO NOT NEGOTIATE PRICE. THE PRICE YOU GET
13 FROM THEM IS A NO-HAGGLE PRICE. THEY SIMPLY WILL NOT
14 DISCUSS A DIFFERENT PRICE, AND THEY CHARGE THE CLOSING FEE
15 ON EVERY DEAL.

16 NOW, THAT SITUATION PERFECTLY MEETS THE REQUIREMENTS
17 OF RULE 23 AT THE LITIGATION PHASE. YOU HAVE A FAIRLY
18 CLEAR-CUT PROBLEM IN THAT SITUATION WITH THE CLOSING FEE
19 STATUTE BECAUSE THE CLOSING FEE WAS NOT INCLUDED IN THE
20 ADVERTISED PRICE OF THE VEHICLE THAT WAS SOLD. IT'S
21 PRETTY CLEAR-CUT IN THAT SITUATION. SO, THAT SITUATION
22 MET THE REQUIREMENTS OF RULE 23 AT THE LIABILITY PHASE.
23 YOU HAD ONE COMMON ISSUE THAT WAS THE SAME FOR EVERY
24 SINGLE MEMBER OF THAT CLASS. YOU COULD DETERMINE IT ONE
25 TIME FOR ONE PERSON AND IT WAS THE SAME FOR EVERYBODY

1 ELSE.

2 SO, IT WAS FINE TO APPROVE A SETTLEMENT FOR CARMAX,
3 BUT THAT'S JUST NOT THE CASE WITH ALL THE OTHER
4 DEFENDANTS. FIRST OF ALL, WE CAN'T ASSUME THAT IT IS,
5 AND, SECOND, THE FACTS AS YOU PROBABLY KNOW FROM YOUR OWN
6 EXPERIENCE WILL DEMONSTRATE THAT MOST OTHER DEFENDANTS --
7 TRADITIONAL CAR DEALERS -- DON'T OPERATE THE WAY THAT
8 CARMAX DOES. THEY DON'T ADVERTISE THE PRICE OF EVERY
9 VEHICLE THEY SELL. PRICE IS ALWAYS NEGOTIATABLE. SO,
10 IT'S A RADICALLY DIFFERENT WAY OF DOING BUSINESS, AND YOU
11 CAN'T BE SURE THAT THE REQUIREMENTS OF RULE 23 ARE GOING
12 TO BE MET AT THE LIABILITY PHASE WHEN YOU'RE DEALING WITH
13 A DEFENDANT THAT DOES BUSINESS THAT WAY.

14 IN SUM, YOUR HONOR, THE HOLDING IN AMCHEM REQUIRES
15 THAT THE PLAINTIFFS HAVE TO PLEAD AND PROVE THE
16 REQUIREMENTS OF RULE 23 FROM THE OUTSET. I THINK -- I
17 THINK THE CARMAX SETTLEMENT AND THE AMCHEM CASE JUST ALONE
18 DECIDE THIS ISSUE. IN CASE YOU HAVE SOME DOUBT, LET'S
19 MOVE ON. LET'S EXAMINE THE EXCEPTION THAT THEY CLAIM
20 SWALLOWS THE RULE. LET'S REEXAMINE THAT -- THE
21 INTERACTION BETWEEN 56-15-110(2) AND RULE 23.

22 OUR ANALYSIS OF THAT BEGINS ON PAGE 16 OF OUR BRIEF,
23 AND WE'VE GOT SOMETHING NEW HERE. WE'VE GOT SOME NEW
24 CASES CITED. I BELIEVE THAT WE MORE FULLY DEMONSTRATE
25 THAT 110(2) CREATES PROCEDURAL RIGHTS AS OPPOSED TO

1 SUBSTANTIVE RIGHTS AND THAT EVEN IF 110(2) DOES CREATE
2 SUBSTANTIVE RIGHTS THE PROCEDURE FOR ASSERTING THOSE
3 RIGHTS IS RULE 23.

4 LET'S LOOK BACK AT THE PLAINTIFF'S ARGUMENTS
5 REGARDING 110(2). FIRST OF ALL, JUST TO KIND OF PUT IT IN
6 CONTEXT, AGAIN, THEY'RE ARGUING THE EXCEPTION SWALLOWS THE
7 RULE. 110(2) DOES THE FOLLOWING THINGS. IT SUBSTITUTES
8 FOR LONG-ACCEPTED PRINCIPALS OF STANDING. IT TRUMPS RULE
9 23. IT WITHSTANDS LEGISLATIVE REPEAL. IT RENDERS
10 IRRELEVANT LEADING SOUTH CAROLINA SUPREME COURT
11 PRECEDENTS. IT ALLOWS PLAINTIFFS WHO DID NOT TRANSACT
12 BUSINESS WITH THE DEFENDANT TO SUE ANYWAY, AND IT CREATES
13 THIS GROUP SUIT -- THIS UNHEARD OF ACTION -- WHICH OFFENDS
14 PRINCIPALS OF FAIRNESS AND DUE PROCESS. THAT'S A LOT TO
15 ASK OF ANY STATUTE, AND I THINK WHEN WE LOOK AT IT A
16 LITTLE BIT MORE CAREFULLY YOU'RE GOING TO SEE THAT IT'S
17 MORE THAN THE LANGUAGE IN THE INTENT OF 110(2) CAN BEAR.

18 I AM GOING TO HAND YOU OUT A FEW THINGS, YOUR HONOR,
19 THAT I'LL BE REFERRING TO AS WE MOVE ALONG. THE FIRST OF
20 THESE IS A COMPARISON OF THE CLASS ACTION -- WHAT I'M
21 CALLING THE CLASS ACTION STATUTES THAT WE'RE GOING TO BE
22 DEALING WITH AND I'VE GOT THE TEXT OF 110(2) FOR YOU THERE
23 UNDER THE TITLE 56 PART. THAT'S ON THE FIRST THING MARKED
24 "A."

25 NOW, IN YOUR ORDER -- I WANT TO GO BACK AND PARSE

1 YOUR ORDER JUST A BIT. IN YOUR ORDER DENYING THE MOTIONS
2 TO DISMISS YOU FOUND -- FIRST, YOU FOUND THREE THINGS WITH
3 RESPECT TO 110(2). YOU FOUND THAT IT CREATES A
4 SUBSTANTIVE RIGHT, BUT NOTE WHEN YOU LOOK AT IT THAT YOU
5 DID NOT EXPLAIN WHAT THAT RIGHT WAS. IN OTHER WORDS, YOU
6 DID NOT DEFINE WHAT IS THE NATURE OR THE SUBSTANCE OF THIS
7 SUBSTANTIVE RIGHT, AND I'LL GET TO THAT IN A MINUTE.

8 NUMBER TWO, YOU SAID THAT THE RULES ENABLING ACT --
9 THE 1995 ACT 100, THE ACT THAT AUTHORIZED OUR RULES OF
10 CIVIL PROCEDURE -- YOU SAID IT DID NOT REPEAL 110(2), AND
11 IT IS TRUE THAT THIS SPECIFIC SECTION OF THE CODE IN TITLE
12 56 -- THIS SPECIFIC SUBSECTION OF THIS SPECIFIC CODE
13 SECTION WAS NOT SPECIFICALLY REPEALED BY 1985 ACT 100, THE
14 RULES ENABLING ACT. HOWEVER, AS I'LL POINT OUT OTHER
15 SPECIFIC CODE SECTIONS NOTABLY 15-5-50 WHICH IS VIRTUALLY
16 IDENTICAL WERE SPECIFICALLY REPEALED.

17 FINALLY, THE THIRD THING YOU SAID WITH RESPECT TO
18 110(2) IS IT DID NOT INCLUDE A REQUIREMENT THAT A
19 COMPLAINT ASSERTING RIGHTS UNDER 110(2) MUST PLEAD AND
20 PROVE THE REQUIREMENTS OF RULE 23, AND THIS IS ALSO TRUE.
21 THAT ACT DOES NOT INCLUDE SUCH SPECIFIC LANGUAGE, BUT
22 TODAY I WANT TO ENCOURAGE YOU LET'S TAKE THE ANALYSIS JUST
23 ONE STEP FURTHER. LET'S ASSUME FOR THE PURPOSES OF
24 ARGUMENT, FIRST OF ALL, THAT 110(2) DOES CREATE A
25 SUBSTANTIVE RIGHT, BUT LET'S EXAMINE WHAT IS THE SUBSTANCE

1 OF THE SUBSTANTIVE RIGHT CREATED BY 110(2). LET'S READ
2 THAT SUBSECTION UNDER TITLE 56. WHEN SUCH ACTION IS ONE
3 OF COMMON OR GENERAL INTEREST TO MANY PERSONS OR WHEN THE
4 PARTIES ARE NUMEROUS AND IT IS IMPRACTICABLE TO BRING THEM
5 ALL BEFORE THE COURT, ONE OR MORE MAY SUE FOR THE BENEFIT
6 OF THE WHOLE INCLUDING ACTIONS FOR INJUNCTIVE RELIEF.

7 WELL, THAT'S REALLY NOTHING MORE, YOUR HONOR, THAN
8 THE RIGHT TO BRING A SUIT IN A REPRESENTATIVE CAPACITY TO
9 SUE FOR THE BENEFIT OF THE WHOLE, TO BRING CLAIMS AND
10 RECOVER DAMAGES FOR PEOPLE WHO ARE NEVER SPECIFICALLY
11 NAMED AS ONE OF THE PLAINTIFFS IN THE LAWSUIT WHOSE NAMES
12 NEVER APPEAR IN THE CAPTION OF THE CASE. THAT, YOUR
13 HONOR, IS THE SUBSTANCE OF THIS SUBSTANTIVE RIGHT TO BRING
14 CLAIMS IN A REPRESENTATIVE CAPACITY.

15 WELL, WHAT DOES THE U.S. SUPREME COURT SAY ABOUT THE
16 RIGHT TO BRING A CLAIM IN A REPRESENTATIVE CAPACITY? IN
17 U.S. PAROLE COMMISSION VERSUS GARITY 455 US 388, A 1980
18 CASE CITED IN OUR BRIEF, THE COURT HELD THE RIGHT TO
19 REPRESENT A CLASS IS A PROCEDURAL CLAIM. THEY WERE
20 TALKING ABOUT IT IMPORTANTLY IN THE CONTEXT TO STANDING.
21 THEY SAID IN THE CONTEXT OF ESTABLISHING STANDING THE
22 COURT SAID ALTHOUGH THE NAMED REPRESENTATIVE RECEIVED
23 CERTAIN BENEFITS FROM THE CLASS NATURE REPRESENTATIVE
24 NATURE OF THE ACTION, THESE BENEFITS ARE BYPRODUCTS OF THE
25 CLASS ACTION DEVICE. THE MORE -- THE RIGHT IS MORE

1 ANALOGOUS TO THE PRIVATE ATTORNEY GENERAL CONCEPT THAN TO
2 THE TYPE OF INTEREST TRADITIONALLY THOUGHT TO SATISFY THE
3 PERSONAL STATE REQUIREMENT -- THOSE REQUIREMENTS FOR
4 STANDING. AND IN DEPOSIT GUARANTY NATIONAL BANK VERSUS
5 ROPER DECIDED IN 1980 -- TO SHOW YOU HOW SMALL A WORLD
6 THIS IS ONE QUICK INCREDIBLE ASIDE -- WHEN I WAS 21 YEARS
7 OLD WORKING IN WASHINGTON, D.C. I SAW MY FATHER'S LAW
8 PARTNER ARGUE THIS VERY CASE TO THE U.S. SUPREME COURT,
9 HAD NO IDEA WHAT WAS BEING SAID AT THE TIME, BUT TODAY --
10 THE COURT: HAS ANYTHING CHANGED?

11 MR. BECKER: BUT TODAY SOME 29 YEARS LATER THIS CASE
12 IS VERY IMPORTANT TO ME. WHAT DID THE COURT SAY THERE?
13 THE RIGHT OF A LITIGANT TO EMPLOY RULE 23 IS A PROCEDURAL
14 RIGHT ONLY ANCILLARY TO THE LITIGATION OF SUBSTANTIVE
15 CLAIMS. LET'S GO BACK TO THE LAST MOTION HEARING WE HAD.
16 WE GOT A TRANSCRIPT. MR. SPEARS IS NOT HERE TODAY, BUT
17 BACK THEN WHEN HE WAS ARGUING THIS WHAT DID HE SAY ABOUT
18 THE RIGHT TO BRING A CLAIM IN A REPRESENTATIVE CAPACITY?
19 DURING ORAL ARGUMENT HE SAID ON PAGE 46 -- HE SAID,
20 110(2), IT IS IN THE ACT WHICH IS QUITE SUBSTANTIVE AND IT
21 SAYS FOR THESE SUBSTANTIVE THINGS THIS IS THE WAY YOU CAN
22 DO IT. THEN YOU INTERJECTED AND SAID, WELL, THE WAY THAT
23 YOU CAN DO IT, ISN'T THAT PROCEDURAL? AND MR. SPEARS
24 SAID, WELL, IT IS PROCEDURAL WITHIN THE BODY OF THE
25 SUBSTANTIVE RIGHT. I MEAN, IT'S DIFFERENT; HENCE, IN MY

1 VIEW IT IS THE WAY YOU WOULD DO THAT.

2 THEN ON PAGE 47 AT LINE 14 YOU SAID, WHERE DID YOU
3 FIND THE WORD GROUP SUIT? WHOSE LANGUAGE IS THAT? AND
4 MR. SPEARS SAID, I HAVE NEVER EVEN LOOKED FOR GROUP SUIT.
5 I HAVE ALWAYS REFERRED TO THIS AS ANOTHER FORM OF
6 REPRESENTATIVE CAPACITY. AND THEN ON PAGE 49 OF THAT
7 TRANSCRIPT YOU ASKED MR. MARTIN -- YOU SAID, PLEASE ANSWER
8 MY QUESTION AS TO THE NOVEL ISSUE BEING WHETHER OR NOT
9 110(2) IS PROCEDURAL OR SUBSTANTIVE, AND YOU ASKED IF HE
10 COULD SHOW YOU A CASE ON POINT. WE DIDN'T HAVE IT AT THAT
11 TIME, BUT I BELIEVE WE DO NOW, AND WHILE THERE IS NO CASE
12 SPECIFICALLY CONSTRUING 110(2) FOR ANY PURPOSE, I HAVE A
13 CASE THAT I SUGGEST TO YOU DECIDES THIS ISSUE FOR YOU AND
14 THAT I BELIEVE YOU WOULD BE COMPELLED TO FOLLOW, AND IT'S
15 ITEM NUMBER B IN THAT STACK OF MATERIALS THAT I HAVE
16 PROVIDED TO YOU.

17 THIS IS A CASE THAT WAS ADDRESSED BY OUR SUPREME
18 COURT ON TWO SEPARATE OCCASIONS -- IN 1978 AND AGAIN IN
19 1979 -- KNOWLES VERSUS STANDARD SAVINGS AND LOAN
20 ASSOCIATION AND IF YOU LOOK THIS WAS BROUGHT BACK BEFORE
21 WE HAD THE RULES OF CIVIL PROCEDURE IN SOUTH CAROLINA AND
22 IF YOU'LL LOOK DOWN THERE AT THE BOTTOM OF THIS FIRST PAGE
23 OF THE 1978 CASE -- FIRST PAGE IN THE HANDOUT -- IT POINTS
24 OUT THAT THE COMPLAINT ALLEGES A CLASS ACTION UNDER THE
25 PROVISIONS OF SECTION 15-5-50 WHICH IS OUR OLD CLASS

1 ACTION STATUTE AND THEN ON THE NEXT PAGE --

2 MR. LEWIS: EXCUSE ME. WHERE IS IT THAT YOU'RE
3 READING FROM?

4 MR. BECKER: ON THE NEXT PAGE IT POINTS OUT THAT EVEN
5 IN THOSE DAYS PLAINTIFFS WHO WERE BRINGING A CLASS ACTION
6 UNDER SECTION 15-5-50 WOULD ALLEGE ALL THE ELEMENTS OF
7 RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE. AS THIS
8 POINTS OUT IT SAYS -- IT TALKS ABOUT WHAT THE COMPLAINT
9 ALLEGES AND THIS WAS ABOUT WHETHER THE COMPLAINT WAS
10 SUFFICIENT TO STATE A CAUSE OF ACTION FOR A CLASS ACTION
11 AND IT POINTS OUT THAT IT -- THAT THEY GO THROUGH ALL THE
12 COMMON QUESTIONS OF LAW AND FACT, WHETHER THE CLAIMS ARE
13 TYPICAL, WHETHER THEY'RE NUMEROUS, AND WHETHER IT'S
14 IMPRACTICAL TO BRING THEM ALL BEFORE THE COURT, AND
15 WHETHER THEY WOULD ADEQUATELY REPRESENT THE CLASS.

16 SO, IN 1978 IN THIS CASE THE COURT SAID, YEA, OKAY,
17 THAT IS HOW YOU PLEAD A CLASS ACTION UNDER 15-5-50, AND
18 THEN IN 1979 APPARENTLY -- IT'S NOT EXACTLY CLEAR FROM
19 THESE CASES, BUT APPARENTLY THE COURT -- THE TRIAL COURT
20 HAD CERTIFIED A CLASS UNDER 15-5-50 AND THE ISSUE THEN WAS
21 WHETHER THIS -- THIS ORDER CERTIFYING A CLASS WAS AN
22 INTERLOCUTORY APPEAL OR NOT. THAT'S WHAT WAS AT ISSUE IN
23 1979, AND IF YOU LOOK AT THE LAST PAGE OF THIS ITEM B --
24 THE LAST PAGE OF THIS CASE I'VE GIVEN YOU -- HERE IS WHAT
25 THE COURT -- OUR SUPREME COURT -- HAD TO SAY ABOUT CLASS

1 CERTIFICATION RIGHTS WHICH ARE REALLY JUST THE RIGHT TO
2 BRING A CLAIM IN A REPRESENTATIVE CAPACITY. HERE IS WHAT
3 THEY HAD TO SAY ABOUT THOSE THEN. CLASS CERTIFICATION
4 ESSENTIALLY PROCEDURAL IN NATURE -- THIS IS THE SECOND
5 PARAGRAPH ON THAT PAGE -- DOES NOT INVOLVE SUBSTANTIAL OR
6 ESSENTIAL LEGAL RIGHTS WHICH REQUIRES ATTENTION PRIOR TO
7 FINAL JUDGMENT. THEN IN THE NEXT CASE THEY -- IN THE NEXT
8 SENTENCE DOWN THEY SAY, NEITHER DOES CERTIFICATION REACH
9 THE MERITS OF THE UNDERLYING CAUSE OF ACTION AS DEFINED BY
10 THIS COURT.

11 MR. ALEC BEARD POINTED OUT TO ME TODAY EARLIER, TOO,
12 YOUR HONOR, THAT IN -- IN THE BAZZLE CASE WHICH WAS ONE OF
13 THOSE SOUTH CAROLINA CASE -- SUPREME COURT CASE -- THAT
14 ULTIMATELY WENT UP TO THE U.S. SUPREME COURT ON THE ISSUE
15 OF ARBITRATION. THAT -- AND THIS IS A --

16 THE COURT: WHO WAS THE DEFENDANT IN BAZZLE? WAS
17 THAT GREENTREE?

18 MR. BECKER: THAT'S GREENTREE, YES, SIR. THAT'S THE
19 GREENTREE CASE. EXCUSE ME. HE GAVE ME AN ORDER. I CAN
20 MAKE COPIES OF THIS AND GIVE IT TO YOU LATER.

21 THE COURT: THAT'S A BARNWELL COUNTY CASE, ISN'T IT?
22 WASN'T IT OUT OF BARNWELL?

23 MR. HAMM: IT IS TWO DIFFERENT COUNTIES, YOUR HONOR.
24 IT WAS ULTIMATELY CONSOLIDATED. IT WAS A DORCHESTER CASE
25 WHICH WAS A BAZZLE CASE AND THE LACKEY CASE WHICH CAME

1 FROM BARNWELL.

2 MR. BECKER: IN AN ORDER IN THE BAZZLE LACKEY
3 GREENTREE CASES THE SUPREME COURT JUNE 12, 1998 CITED THE
4 KNOWLES CASE AND SAID CLASS CERTIFICATION ALTERS THE
5 PROCEDURES FOR THIS MODE OF TRIAL BUT DOES NOT INFRINGE ON
6 A SUBSTANTIAL RIGHT AND THEN THEY CITED THAT LANGUAGE IN
7 KNOWLES CLASS CERTIFICATION ESSENTIALLY PROCEDURAL IN
8 NATURE DOES NOT INVOLVE SUBSTANTIAL OR ESSENTIAL LEGAL
9 RIGHTS WHICH REQUIRE ATTENTION PRIOR TO FINAL JUDGMENT.

10 SO, IN A -- IN OTHER CASES OUR SUPREME COURT HAS
11 RELIED ON AND AFFIRMED THE KNOWLES DECISION. I THINK IT
12 SHOULD BE VERY CLEAR FROM THE ADMISSIONS THE PLAINTIFFS
13 MADE IN THE LAST HEARING ON THESE MOTIONS TO DISMISS FROM
14 THE CARMAX SETTLEMENT, FROM THE SUPREME COURT DECISIONS IN
15 GARITY AND ROPER, FROM THE SOUTH CAROLINA SUPREME COURT
16 DECISIONS IN KNOWLES THAT BRINGING CLAIM IN A
17 REPRESENTATIVE CAPACITY ON BEHALF OF A GROUP OF UNNAMED
18 PLAINTIFFS RELATES TO PROCEDURE AND NOT THE SUBSTANCE OF A
19 LEGAL CLAIM, NOT THE THEORY OR CAUSE OF ACTION THAT
20 ENTITLES ONE TO REMEDIES AS WE COMMONLY UNDERSTAND THEM.

21 SO, WHATEVER SUBSTANCE THERE IS IN THE RIGHTS GRANTED
22 BY 110(2), IT'S REALLY PROCEDURAL IN NATURE. AS
23 MR. SPEARS SAID, IT'S THE WAY YOU DO IT. SO, THIS BRINGS
24 US BACK TO POINTS NUMBER TWO AND THREE FROM YOUR ORDER.
25 THE 1985 ACT 100, TRUE, DID NOT REPEAL 110(2), BUT IT DID

1 REPEAL SECTION 15-5-50 WHICH I'VE PROVIDED FOR YOU AT THE
2 TOP OF HANDOUT "A" AND I'VE ALSO PROVIDED A COMPARISON
3 BETWEEN 15-5-50 AND 56-15-110(2) USING RED-LINING AND AS
4 YOU CAN SEE THAT'S THE THIRD THING DOWN ON THAT SHEET.
5 THOSE TWO PROVISIONS -- THOSE TWO CODE PROVISIONS ARE
6 VIRTUALLY IDENTICAL. SO, THE POINT IS 15-5-50 WAS
7 REPEALED -- VIRTUALLY IDENTICAL LANGUAGE BY THE RULES
8 ENABLING ACT. WE ARGUE YOU SHOULD INFER THAT IT'S BEEN
9 REPEALED. IT'S BEEN WRITTEN OUT OF OUR STATUTE.

10 BUT LET'S MOVE ON TO POINT THREE FROM YOUR ORDER.
11 YOU SAID THE 1985 ACT 100 DID NOT SAY THAT A CLAIM UNDER
12 110(2) MUST COMPLY WITH RULE 23. THAT'S TRUE AGAIN, BUT
13 HERE 1985 ACT 100 THAT REPEALED THE CLASS ACTION STATUTE,
14 IT DID NOT NEED TO BE THAT SPECIFIC TO HAVE THAT EFFECT --
15 THAT SAME EFFECT. WHAT IT SAYS -- AND I'VE QUOTED FOR YOU
16 THE LANGUAGE DOWN HERE AT THE BOTTOM ON THIS SHEET -- IT
17 SAYS, IN THE EVENT OF CONFLICT BETWEEN ANY PROVISION OF
18 THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND ANY OTHER
19 STATUTORY PROVISIONS AS TO PRACTICE AND PROCEDURE NOT
20 REPEALED BY THIS ACT THE PROVISIONS OF THE RULES SHALL
21 CONTROL.

22 WELL, I WOULD URGE YOU THAT WE HAVE JUST ESTABLISHED
23 BY THE ADMISSIONS OF PLAINTIFF'S COUNSEL, BY U.S. SUPREME
24 COURT DECISIONS, BY SOUTH CAROLINA SUPREME COURT DECISIONS
25 THAT 110(2) IS A PROCEDURAL AND NOT A SUBSTANTIVE RIGHT OR

1 EVEN IF IT COULD BE CALLED A SUBSTANTIVE RIGHT THE
2 SUBSTANCE OF THE RIGHT GRANTED BY 110(2) IS ACTUALLY ONLY
3 PROCEDURAL IN NATURE. THEREFORE, THERE IS A CONFLICT
4 BETWEEN 110(2) AND THE RULES OF CIVIL PROCEDURE.
5 THEREFORE, RULE 23 TRUMPS -- BY VIRTUE OF 1985 ACT 100,
6 RULE 23 TRUMPS 110(2).

7 WE HAVE ONE OTHER ARGUMENT FOR YOU TO CONSIDER ON
8 THIS SAME -- SCORE. NON-MUTUAL COLLATERAL ESTOPPEL. HERE
9 JUST TO BRIEFLY, BRIEFLY GO OVER THE LAW. ONCE A FINAL
10 JUDGMENT ON THE MERITS HAS BEEN REACHED IN A PRIOR CLAIM
11 THE RELITIGATION OF THOSE ISSUES ACTUALLY AND NECESSARILY
12 LITIGATED AND DETERMINED IN THE FIRST SUIT ARE PRECLUDED
13 AS TO THE PARTIES AND THEIR PRIVIES IN ANY SUBSEQUENT
14 ACTION BASED ON DIFFERENT CLAIMS. OTHER CASELAW SAYS
15 NON-MUTUAL COLLATERAL ESTOPPEL MAY BE ASSERTED UNLESS THE
16 PARTY PRECLUDED LACKED A FULL AND FAIR OPPORTUNITY TO
17 LITIGATE THE ISSUE IN THE FIRST ACTION OR OTHER
18 CIRCUMSTANCES JUSTIFIED AFFORDING HIM THE OPPORTUNITY TO
19 RELITIGATE THE ISSUE.

20 NOW, TRUE, WE'RE RELYING ON A SETTLEMENT AGREEMENT
21 HERE, AND ALTHOUGH A SETTLEMENT AGREEMENT WILL NOT USUALLY
22 PRECLUDE RELITIGATION OF AN ISSUE SUCH AN AGREEMENT MAY
23 HAVE A PRECLUSIVE EFFECT WHEN THE PARTIES INTENDED TO
24 FORECLOSE FURTHER LITIGATION OR CONSIDERATION OF THIS
25 ISSUE AND WHEN THE MATTER IS IMPORTANT AND NECESSARY TO

1 SUPPORT THE FIRST JUDGMENT. UNDER THIS IDEA FINALITY FOR
2 THE PURPOSES OF COLLATERAL ESTOPPEL IS A FLEXIBLE CONCEPT
3 AND MAY -- IT CAN MEAN LITTLE MORE THAN THE LITIGATION OF
4 A PARTICULAR ISSUE HAS REACHED SUCH A STAGE THAT THE COURT
5 SEES REALLY NO GOOD REASON FOR PERMITTING IT TO BE
6 LITIGATED AGAIN.

7 NOW, WE ACKNOWLEDGE THAT THIS DOCTRINE SIMPLY WOULD
8 NOT APPLY IF ALL THESE MANY DEFENDANTS AND PLAINTIFFS WERE
9 NOT IMPROPERLY JOINED IN THIS CASE AS THEY CURRENTLY ARE,
10 AND, MORE IMPORTANTLY, YOU KNOW, THIS CONCEPT APPLIES WITH
11 EVEN MORE POTENCY IN THE WEST-COX AND THE ADAMS CASES IF
12 AND WHEN THEY COME BEFORE YOU BECAUSE THE SITUATION THERE
13 EVEN MORE CLEARLY FITS THE CASELAW OF IT BEING A SECOND
14 ACTION, BUT IN HERRON THE ISSUE OF THE APPLICABILITY OF
15 RULE 23 WAS ACTUALLY LITIGATED, AND IT WAS DIRECTLY
16 DETERMINED IN THE CARMAX SETTLEMENT AT LEAST TO THE EXTENT
17 NECESSARY FOR THE PLAINTIFF'S POSITION ON RULE 23 TO HAVE
18 PRECLUSIVE EFFECT ON THIS ISSUE. IT WAS THE PLAINTIFFS
19 WHO THEMSELVES ASSERTED RULE 23 AND FOUND IT NECESSARY TO
20 APPLY IT IN THE CARMAX SETTLEMENT.

21 NOW, THE PLAINTIFFS HAVE ALREADY AGREED THAT RULE 23
22 APPLIES TO THEIR CAUSES OF ACTION AGAINST CARMAX AND
23 THERE'S ABSOLUTELY NO DIFFERENCE IN THEIR CLAIMS AND
24 CAUSES OF ACTION AGAINST ALL THE REMAINING DEALERS. SO,
25 COLLATERAL ESTOPPEL ALSO SHOULD PRECLUDE ANY FURTHER

1 CONSIDERATION OF WHETHER RULE 23 ACTUALLY APPLIES TO ALL
2 THE OTHER DEFENDANTS.

3 NOW, NOTE I AM NOT CONCEDING HERE THAT THE CLASS
4 ACTION REQUIREMENTS HAVE BEEN MET WITH RESPECT TO ANY
5 OTHER DEFENDANT, ONLY THAT PLAINTIFFS CAN'T NOW RELITIGATE
6 THE ISSUE OF WHETHER RULE 23 APPLIES IN THIS CASE ACROSS
7 THE BOARD TO ALL DEFENDANTS FROM THE OUTSET OF THE CASE.

8 YOUR HONOR, LET ME MOVE ON TO STANDING.

9 THE COURT: ALL RIGHT. HOLD ON ONE SECOND. ARE WE
10 AT A STOPPING POINT BEFORE WE GO TO ANOTHER SUBJECT? MY
11 COURT REPORTER NEEDS ABOUT FIVE.

12 MR. BECKER: YES, SIR.

13 THE COURT: IT'S 10 'TIL BACK ON THAT CLOCK. LET'S
14 BREAK UNTIL ABOUT 11 O'CLOCK AND WE'LL COME BACK AND WE'LL
15 COMPLETE YOUR ARGUMENT.

16 MR. BECKER: YES, SIR.

17 THE COURT: THANK YOU. WE'LL STAND AT EASE FOR JUST
18 A FEW MINUTES.

19 (WHEREUPON, A BREAK WAS TAKEN.)

20 MR. BECKER: MAY IT PLEASE THE COURT.

21 THE COURT: YES, SIR.

22 MR. BECKER: YOUR HONOR, WE'RE ON TO STANDING. A FEW
23 INITIAL OBSERVATIONS ON THIS ISSUE AND I KNOW WE'VE
24 DISCUSSED IT SOME ALREADY IN COURT TODAY, IT IS TRUE THE
25 PLAINTIFF'S RULE 41 MOTION TO DISMISS THE NO-SALE

1 DEFENDANTS AS WE CALL THEM IN HERRON, IF GRANTED, MAKES A
2 BIG DIFFERENCE ON THIS ISSUE, BUT IT DOESN'T COMPLETELY
3 CURE THE PROBLEM AND THE STANDING --

4 THE COURT: I ASSUME IF I GRANT IT, WHERE ARE WE --

5 MR. BECKER: WELL --

6 THE COURT: -- ON STANDING?

7 MR. BECKER: YOU'D STILL BE LEFT WITH A BUNCH OF
8 PLAINTIFFS AND DEFENDANTS WHO ARE IMPROPERLY JOINED IN A
9 SINGLE CASE AND WE'LL TALK ABOUT THE JOINDER ISSUE, BUT
10 RIGHT NOW THE ISSUE OF STANDING -- IT STILL PRESENTS
11 ITSELF IF TWO PLAINTIFFS WHO DIDN'T TRANSACT BUSINESS EACH
12 WHO -- TWO PLAINTIFFS EACH WHO TRANSACTED BUSINESS WITH
13 SEPARATE DEFENDANTS ARE JOINED IN A SINGLE CASE AND THEY
14 ARE ATTEMPTING TO SUE THE DEALER WITH WHOM THEY DID NOT
15 TRANSACT BUSINESS. THE STANDING -- THAT'S THE STANDING
16 ISSUE, BUT IT DOESN'T CURE THE JOINDER PROBLEM, AND WE'LL
17 TALK ABOUT THAT IN A SECOND, BUT RECALL, TOO, THE STANDING
18 PROBLEM PRESENTS ITSELF AGAIN IN SPADES IN ADAMS AND TO
19 SOME EXTENT IN WEST-COX.

20 YOU KNOW, THEY MAY ARGUE AT FIRST THE PLAINTIFFS'
21 SOLUTION TO THE STANDING PROBLEM WAS TO ATTEMPT TO AMEND
22 THE COMPLAINT IN HERRON TO BRING IN A NAMED PLAINTIFF FOR
23 EVERY DEFENDANT NAMED IN HERRON. YOU IN YOUR WISDOM
24 DENIED THAT MOTION TO AMEND. WELL, THEIR CURE, THEIR
25 BACKDOOR AROUND THAT WAS, WELL, WE'LL JUST FILE THE ADAMS

1 CASE. THAT'S A -- HOLD IT IN RESERVE. IT IS REALLY A
2 BACKDOOR ATTEMPT TO CIRCUMVENT WHAT YOU SAID IN YOUR ORDER
3 DENYING THE MOTION TO AMEND IN HERRON, BUT LOOK AT WHAT IT
4 DOES. I MEAN, THEY ARGUE, OH, WELL, THIS CURES THE
5 STANDING PROBLEM. WE'VE GOT A SEPARATE PLAINTIFF TO SUE
6 EACH DEFENDANT.

7 WELL, I HAVE TWO RESPONSES TO THIS. FIRST, IT
8 EXPONENTIALLY COMPOUNDS THE IMPROPER JOINDER PROBLEM ON
9 THE PLAINTIFFS' SIDE OF THE V. IT WAS ALREADY A HUGE MESS
10 ON THE DEFENDANTS' SIDE OF THE V, BUT NOTE IT STILL -- IT
11 REALLY DOESN'T CURE THE STANDING PROBLEM AS THEY SAY IT
12 DOES. THERE IS AN IMPORTANT DISTINCTION TO MAKE HERE. I
13 WAS GETTING TO IT JUST A SECOND AGO EARLIER. THE STANDING
14 ISSUE -- IT'S NOT ABOUT THE ABILITY OF A NAMED PLAINTIFF
15 OR PLAINTIFFS TO SUE THE DEALERSHIP WITH WHICH THEY
16 INDIVIDUALLY TRANSACTED BUSINESS. IT'S NOT ABOUT THEIR
17 ABILITY TO SUE IN A REPRESENTATIVE CAPACITY ON BEHALF OF
18 ALL OTHER UNNAMED PERSONS WHO ALSO TRANSACTED BUSINESS
19 WITH THE DEALERSHIP THAT THEY TRANSACTED BUSINESS WITH.

20 THE STANDING ISSUE IS ABOUT THE ABILITY OF A NAMED
21 PLAINTIFF TO SUE OTHER DEALERSHIPS IN A REPRESENTATIVE
22 CAPACITY OR NOT WITH WHICH IT DID NOT TRANSACT BUSINESS,
23 AND THAT'S WHAT THEY'RE STILL TRYING TO DO IN THIS
24 COMPLAINT EVEN IF IT'S SLIMMED DOWN TO JUST TWO
25 PLAINTIFFS, MUCH LESS THE SEVEN THAT THEY WANT TO GET TO

1 IN HERRON. THE PLAINTIFFS STILL CLAIM THAT EVERY
2 PLAINTIFF CAN SUE EVERY DEFENDANT EVEN IF THEY NEVER
3 BOUGHT A VEHICLE FROM THAT DEFENDANT; EVEN IF THAT
4 DEFENDANT HAS NEVER SOLD A VEHICLE TO ANY MEMBER OF THAT
5 PLAINTIFF'S FAMILY, CHURCH GROUP, SOCIAL GROUP, FACEBOOK
6 COMMUNITY, WHATEVER; EVEN IF THAT DEFENDANT HAS NEVER
7 HEARD OF OR LAID EYES ON THAT PLAINTIFF; AND ALSO EVEN IF
8 THAT DEFENDANT HAS NEVER HEARD OF, LAID EYES ON, OR
9 TRANSACTED ANY BUSINESS WITH THE DEFENDANT THAT DID
10 TRANSACT BUSINESS WITH THAT PLAINTIFF; AND MOST
11 IMPORTANTLY EVEN IF THAT PLAINTIFF HAS NEVER BEEN INJURED
12 BY THAT DEFENDANT. THE LAWS OF STANDING SIMPLY DON'T
13 PERMIT PEOPLE TO SUE OTHERS UNDER THESE CIRCUMSTANCES.

14 NOW, IN YOUR ORDER DENYING THE MOTIONS TO DISMISS YOU
15 MADE ONLY ONE RULING ON THIS ISSUE. YOU SAID THE AMENDED
16 COMPLAINT SUFFICIENTLY PLEADS FACTS SUPPORTING STANDING OF
17 THE PLAINTIFFS TO PROCEED UNDER THE THREE CAUSES OF ACTION
18 PLEAD. WELL, I HOPE I CAN DEMONSTRATE TO YOU TODAY THAT
19 REALLY AND WITH ALL DUE RESPECT THAT THAT CAN'T BE TRUE
20 BASED ON THE FACTS THAT ARE APPARENT FROM THE PLEADINGS OR
21 SIMPLY CANNOT BE DISPUTED BY THE PLAINTIFFS AND LET ME
22 DEMONSTRATE HOW.

23 BLACK LETTER LAW STANDING, THE PLAINTIFF MUST HAVE
24 SUFFERED AN INJURY IN FACT. THERE ARE REALLY THREE, BUT
25 ONLY TWO OF WHICH ARE RELEVANT HERE. FIRST, THE PLAINTIFF

1 MUST HAVE SUFFERED AN INJURY IN FACT, CONCRETE AND ACTUAL,
2 NOT CONJECTURAL OR HYPOTHETICAL. NUMBER TWO, THERE MUST
3 BE A CAUSAL CONNECTION BETWEEN THE INJURY COMPLAINED --
4 INJURY THEY ALLEGE AND THE CONDUCT THEY COMPLAIN OF. THE
5 INJURY HAS TO BE FAIRLY TRACEABLE TO THE CHALLENGED ACTION
6 OF THE DEFENDANT AND NOT THE RESULT OF SOME INDEPENDENT
7 ACTION OF SOME THIRD PARTY.

8 IN THE ENTIRE FIRST AMENDED COMPLAINT THERE'S NOT A
9 SINGLE ACTION THAT ANY OF THE EIGHT NAMED PLAINTIFFS
10 CONDUCTED BUSINESS WITH ANY OF THE NO-SALE DEFENDANTS.
11 THERE IS NO ALLEGATION THEY PAID A CLOSING FEE TO ANY
12 NO-SALE DEFENDANT, NO ALLEGATION THAT THE INJURY THEY DO
13 COMPLAIN OF -- PAYING A CLOSING FEE TO THE DEALER WITH
14 WHICH THEY DID TRANSACT BUSINESS -- WAS, IN FACT, CAUSED
15 BY ANY OF THE NO-SALE DEFENDANTS. THERE IS NO ALLEGATION
16 THAT THE NAMED PLAINTIFFS WERE THEMSELVES INJURED BY THE
17 CLOSING FEES PAID BY THE CUSTOMERS OF THE NO-SALE
18 DEFENDANTS.

19 HERE'S AN EXAMPLE. THE PLAINTIFFS ALLEGE IN THE
20 FIRST AMENDED COMPLAINT THAT THEY WERE MISLED BY THE
21 DEALERS WITH WHOM THEY DID TRANSACT BUSINESS -- THAT
22 DEALER'S SALE PERSONNEL, BY THE METHODS THE DEALERS USE TO
23 PREPARE AND PRESENT DOCUMENTS, AND BY ADVERTISEMENTS OF
24 THE DEALER WITH WHICH THEY DID TRANSACT BUSINESS, BUT
25 PLAINTIFFS -- THEY SIMPLY COULD NOT HAVE BEEN MISLED TO

1 THEIR INJURY BY DEALERS WITH WHOM THEY DID NO BUSINESS.
2 HOW, FOR EXAMPLE, COULD NATALIE ARMSTRONG, ONE OF THE
3 NAMED PLAINTIFFS IN HERRON, WHO ALLEGES THAT SHE BOUGHT A
4 CAR FROM GALEANNA CHRYSLER PLYMOUTH IN COLUMBIA AND PAID A
5 CLOSING FEE, HOW COULD SHE HAVE BEEN MISLED IN ANY WAY BY
6 BIG O DODGE IN GREENVILLE OR MCDANIELS ACURA IN
7 CHARLESTON? IT'S JUST -- THE ALLEGATION THAT SUPPORTS
8 THEIR CLAIM, THEIR THEORY OF STANDING HERE, IT DEFIES
9 COMMON SENSE AND IT'S AS DEFICIENT PRACTICALLY AS IT IS
10 LEGALLY.

11 YOUR HONOR, ANY WAY YOU SLICE, DICE, OR ANALYZE THE
12 MATRIX OF THE PROVEN OR EVEN THE HYPOTHETICAL
13 RELATIONSHIPS BETWEEN THE NAMED PARTIES IN THIS CASE, THE
14 NAMED PLAINTIFFS CANNOT ESTABLISH INJURY AND A CAUSAL
15 CONNECTION WITH ANY CONDUCT OF THE NO-SALE DEFENDANTS.
16 THERE IS A CRITICAL CASE ON THIS ISSUE, YOUR HONOR, AND I
17 THINK WE HAVE NOT EMPHASIZED IT ENOUGH. IT IS ITEM C IN
18 THE PACKAGE THAT I GAVE YOU. IT'S THE GARDENER CASE --
19 GARDENER VERSUS SOUTH CAROLINA DEPARTMENT OF REVENUE. I
20 HAVE GIVEN YOU A FULL COPY WHICH I INVITE YOU TO READ AT
21 YOUR -- WHEN YOU HAVE AN OPPORTUNITY. IT'S CRITICAL FOR
22 TWO REASONS AND I'M GOING TO JUST DISCUSS IT. I MAINLY
23 WANTED YOU TO HAVE IT. I'LL POINT YOU TO A FEW PAGES IN
24 IT IN A MOMENT. IT'S -- I BELIEVE IT'S REALLY DISPOSITIVE
25 ON THIS ISSUE OF STANDING.

1 IN THE GARDENER CASE THE PLAINTIFFS -- AND THERE ARE
2 NUMEROUS OF THEM -- BROUGHT AN ACTION FOR VIOLATIONS OF
3 THE SOUTH CAROLINA DEBT SET-OFF ACT, AND LIKE THE
4 PLAINTIFFS IN THIS CASE THEY SUED DEFENDANTS WITH WHICH
5 THEY HAD NO CONNECTION WHATSOEVER. THEY SUED -- THEY WERE
6 SUING TAX COLLECTING AUTHORITIES CLAIMING THEY HAD
7 IMPROPERLY COLLECTED TAXES FROM THEM, AND THEY SUED EACH
8 OF THOSE INDIVIDUAL PLAINTIFFS ON THE PLAINTIFFS' SIDE OF
9 THE V, SUED ALL OF THE DEFENDANTS ON THE DEFENDANTS' SIDE
10 OF THE V WHETHER OR NOT THAT DEFENDANT HAD COLLECTED ANY
11 TAXES FROM THAT PLAINTIFF OR NOT. THE POINT WAS REAL
12 SIMILAR TO THIS CASE LIKE JUST THE FACT THAT YOU ARE OUT
13 THERE AND DOING THIS ALONG WITH OTHER MUNICIPALITIES
14 AROUND THE STATE AFFECTS ME, AND, THEREFORE, I CAN SUE YOU
15 WHEN, IN FACT, A RESIDENT IN GREENVILLE HAD NEVER HAD ANY
16 ENTITY IN RICHLAND COLLECT ANY TAXES FROM THE RESIDENT OF
17 GREENVILLE.

18 WELL, THE PLAINTIFFS SUED DEFENDANT CLASS MEMBERS AS
19 I SAID THAT HAD NOT COLLECTED DEBTS FROM THEM, BUT IT
20 COLLECTED DEBTS FROM OTHER PERSONS JUST USING THE ACT LIKE
21 THEY CLAIM HERE. WELL, YOU'RE USING THE CLOSING FEE
22 STATUTE. SUPREME COURT LOOKED AT THIS -- OUR SUPREME
23 COURT, SOUTH CAROLINA SUPREME COURT -- AND SAID THAT
24 PLAINTIFFS COULD NOT SUE PERSONS WHO DID NOT COLLECT DEBTS
25 FROM THEM AND AT WHOSE HANDS THEY HAD SUFFERED NO INJURY.

1 THAT IS THE HOLDING OF THIS CASE. IN SHORT, BASED ON THE
2 BLACK LETTER LAW, BASED ON THE CITES WE'VE SHOWN YOU IN
3 GARDENER, THE NAMED PLAINTIFFS DON'T HAVE STANDING TO SUE
4 THE NO-SALE DEFENDANTS.

5 THIS CASE IS DIRECTLY ON POINT. I THINK IT COMPELS A
6 RULING FOR THE DEFENDANTS ON THIS ISSUE, AND I AM GOING TO
7 CIRCLE BACK TO IT AGAIN IN JUST A MOMENT. LET ME DEAL
8 NEXT WITH THE ISSUE OF WHETHER 56-15-110(2) CREATES
9 STANDING. I'LL DEAL WITH THIS VERY QUICKLY. I MEAN,
10 THEY'VE ARGUED THAT IT DOES CREATE STANDING, BUT IF YOU
11 LOOK AT IT CLOSELY 56-110(2) IS DEPENDENT UPON SUBSECTION
12 ONE, AND IT SAYS ANY PERSON WHO SHALL BE INJURED IN HIS
13 BUSINESS OR PROPERTY CAN BRING A CLAIM UNDER ONE AND IN A
14 REPRESENTATIVE CAPACITY UNDER SUBSECTION TWO, BUT TO HAVE
15 STANDING TO SUE UNDER SECTION ONE YOU HAVE TO BE INJURED
16 BY THE CONDUCT OF THE DEFENDANT YOU'RE SUING. OTHERWISE,
17 YOU DON'T STATE A CLAIM AND IF YOU CAN'T -- SO, YOU'RE
18 BACK THERE EVEN WITH 110(1) AND (2) HAVING TO PROVE THE
19 ELEMENTAL BLACK LETTER LAW REQUIREMENTS OF STANDING --
20 INJURY IN FACT, NOT HYPOTHETICAL OR CONJECTURAL, AND A
21 CAUSAL CONNECTION, AND AS WE'VE SAID THESE ALLEGATIONS --
22 THEY JUST DEFY COMMON SENSE, MUCH LESS MEET THE LEGAL
23 STANDARD.

24 SO, BUT, ALSO, THEY RELY HERE ON THEIR CIVIL
25 CONSPIRACY CLAIM TO CLAIM THAT WE HAVE STANDING TO SUE

1 PLAINTIFFS WITH WHOM WE DIDN'T TRANSACT ANY BUSINESS.
2 WELL, THE WHOLE FOUNDATION OF THAT IDEA IS CALLED THE
3 JURIDICAL LINKS DOCTRINE, AND IT COMES FROM A CASE DECIDED
4 BY THE NINTH CIRCUIT IN 1973. IT IS CITED IN OUR BRIEF.
5 LAMAR VERSUS H & B NOVELTY AND LOAN COMPANY, 1973, NINTH
6 CIRCUIT CASE. THE QUESTION THERE WAS WHETHER A PLAINTIFF
7 HAVING A CAUSE OF ACTION AGAINST A SINGLE DEFENDANT CAN
8 INSTITUTE A CLASS ACTION AGAINST THAT SINGLE DEFENDANT AND
9 AN UNRERELATED GROUP OF DEFENDANTS WHO HAVE ENGAGED IN
10 CONDUCT CLOSELY SIMILAR TO THAT OF THE SINGLE DEFENDANT
11 WITH WHOM THEY ACTUALLY HAD BEEN INJURED. THE NINTH
12 CIRCUIT SAID, NO, JUST LIKE OUR SUPREME COURT DID IN
13 GARDENER. IT SAID, NO, YOU CAN'T DO THAT UNDER THE FACTS
14 OF THIS CASE, BUT THEN THEY WENT ON IN DICTA -- AND AS YOU
15 KNOW, DICTA CAN SOMETIME LEAD TO ALL SORTS OF UNINTENDED
16 CONSEQUENCES -- THEY WENT ON TO SUGGEST THAT IF THE
17 PLAINTIFFS' INJURIES ARE THE RESULT OF A CONSPIRACY OR
18 CONCERTED SCHEMES BETWEEN THE DEFENDANTS OR OTHERWISE
19 JURIDICALLY RELATED IN A MANNER THAT SUGGESTS A SINGLE
20 RESOLUTION OF THE DISPUTE WOULD BE EXPEDITIOUS, THE CLAIM
21 COULD GO FORWARD.

22 SO, IN THAT LITTLE BIT OF DICTA THERE THEY SPAWNED
23 WHAT HAS SINCE BECOME IN THE CASE LAW A COTTAGE
24 INDUSTRY -- THE JURIDICAL LINKS DOCTRINE AS IT'S BEEN
25 CALLED, BUT WHAT DOES OUR COURT SAY ABOUT THIS CONCEPT

1 THAT YOU CAN USE A CIVIL CONSPIRACY CLAIM TO ESTABLISH
2 STANDING WHERE THE CONSTITUTION AND THE REST OF OUR
3 CASELAW SAYS YOU CAN'T? WELL, IN GARDENER OUR COURT SAID
4 THIS AT FOOTNOTE 14 -- AND I INVITE YOU TO TURN TO PAGE 13
5 OF THAT CASE, YOUR HONOR. FOOTNOTE 14 IS RIGHT UP THERE
6 AT THE TOP IN ALL CAPS LETTERS AND IT SAYS THIS: WHILE WE
7 DECLINE TO SPECIFICALLY ADDRESS THE REQUIREMENT OF
8 TYPICALITY WE REJECT PLAINTIFF'S REQUEST FOR US TO ADOPT
9 THE JURIDICAL LINKS DOCTRINE, AND THEN RIGHT THERE THEY
10 CITE THE LAMAR NINTH CIRCUIT CASE FROM 1973. THEY GO ON
11 TO SAY, WE NOTE THE DOCTRINE HAS RECENTLY COME UNDER CLOSE
12 SCRUTINY PRIMARILY DUE TO ITS CONFLICT WITH ARTICLE THREE
13 STANDING ISSUES. THEY CITE CASES AND AUTHORITIES. THEN
14 THEY GO ON TO SAY, THE DOCTRINE ALSO RUNS COUNTERS TO THIS
15 COURT'S PREVIOUS DECISIONS WHICH HOLD THAT A PLAINTIFF MAY
16 NOT SUE A DEFENDANT UNLESS THE PLAINTIFF HAS SUFFERED AN
17 INJURY AT THE HANDS OF THE DEFENDANT, AND THEY GO ON TO
18 CITE CASES.

19 SO, HERE YOU HAVE IN A 2003 CASE OUR STATE SUPREME
20 COURT SAYING, NOPE, CAN'T DO IT, CAN'T USE CIVIL
21 CONSPIRACY AS A WAY AROUND OUR CONSTITUTIONAL PROVISIONS
22 ON STANDING -- THE CONSTITUTIONAL REQUIREMENTS ON
23 STANDING. AGAIN, YOUR HONOR, I WOULD ARGUE THIS IS A CASE
24 ON POINT THAT COMPELS JUDGMENT ON THIS ISSUE FOR THE
25 DEFENDANTS.

1 I'D LIKE TO ALSO INVITE YOU TO THINK ABOUT ANOTHER
2 CONCEPT WE'VE RAISED IN THE BRIEF AND THAT IS THE
3 DERIVATIVE NATURE OF A CIVIL CONSPIRACY CLAIM AND IN THIS
4 CASE -- THE CIVIL CONSPIRACY IS A DERIVATIVE CLAIM WHEN
5 LIKE IN THIS CASE LIABILITY IS BASED ON ACTS WHICH ARE
6 THEMSELVES UNLAWFUL OR WHICH ARE BASED ON AN UNDERLYING
7 TORT OR CONTRACT OR STATUTORY CLAIM. OUR CASELAW IS
8 LITTERED WITH CASES WHICH IN THESE SITUATIONS SAY THAT THE
9 CIVIL CONSPIRACY CLAIM STATES NOTHING MORE THAN WHAT'S
10 ALLEGED TO SUPPORT ALL THE OTHER CLAIMS AND AFFIRMS A
11 DISMISSAL OF THE CIVIL CONSPIRACY CLAIM.

12 WELL, IN THESE SITUATIONS NUMEROUS OTHER COURTS AND
13 OTHER JURISDICTIONS HAVE EXPLICITLY HELD THAT CIVIL
14 CONSPIRACY IS A DERIVATIVE CLAIM WHEN IT'S GROUNDED IN AN
15 UNDERLYING TORT, CONTRACT, OR STATUTORY CLAIM. THEY POINT
16 OUT THAT IN THOSE SITUATIONS THE STANDING ALONE, THE
17 CONSPIRACY DOES NO HARM. THAT HARM WAS DONE BY VIOLATION
18 OF THE -- BY COMMISSION OF THE TORT, BREACH OF THE
19 CONTRACT, OR VIOLATION OF THE STATUTE. SO, IF IT HAS TO
20 BE ACTIVATED BY THE COMMISSION OF A TORT, THE CIVIL
21 CONSPIRACY CLAIM IS DERIVATIVE AND DOES NOT IN AND OF
22 ITSELF SUPPORT STANDING.

23 THE CASELAW IN SOUTH CAROLINA SUPPORTS THE VIEW THAT
24 CIVIL CONSPIRACY IS AN INDEPENDENT CAUSE OF ACTION ONLY
25 WHEN LIABILITY IS BASED ON ACTS WHICH STANDING ALONE ARE

1 LAWFUL BUT WHEN THOSE LAWFUL ACTS ARE COMBINED WITH THE
2 NEFARIOUS PURPOSE OF DAMAGING OR RUINING A TARGETED
3 BUSINESS AND AS WE SHALL DISCUSS A LITTLE BIT LATER RESULT
4 IN SOME SPECIAL DAMAGE EVEN THOUGH THE ACTS WERE LAWFUL
5 WHEN COMBINED WITH THE NEFARIOUS PURPOSE IN A CONCERTED
6 SCHEME THEY CAUSE SOME SPECIAL DAMAGE TO THE PLAINTIFF,
7 THIS IS ACTUALLY A VERY RARE TYPE OF CIVIL CONSPIRACY
8 CLAIM. WE ONLY KNOW OF ONE CASE IN SOUTH CAROLINA THAT'S
9 REALLY BROUGHT AN INDEPENDENT CLAIM FOR CIVIL CONSPIRACY,
10 AND WE'VE CITED THAT THE BRIEF, AND IT'S LAMONT V
11 PUNCHLINE OF COLUMBIA, BUT WHEN YOU THINK ABOUT HOW THIS
12 CIVIL CONSPIRACY CLAIM IS PLEAD -- AND I'LL GET, AS I SAY,
13 TO THAT A LITTLE BIT MORE THOROUGHLY IN A MINUTE -- I
14 THINK YOU SEE THE PRESENT CASE REALLY DOES NOT PRESENT AN
15 INDEPENDENT CIVIL CONSPIRACY CLAIM.

16 NOW, I'M NOT -- I DON'T THINK I'LL SPEND ANY TIME --
17 THEY'VE ALSO ARGUED THAT THEIR CLAIM FOR DECLARATORY
18 JUDGMENT CREATES STANDING. THEY'VE ALSO ARGUED THAT THE
19 PUBLIC INTEREST EXCEPTION HERE CREATES STANDING. WE'VE
20 DEALT WITH THAT IN THE BRIEF. UNLESS YOU WANT ME TO, I
21 WON'T REPEAT IT HERE. I THINK THOSE ARE EASILY DISPOSED
22 OF BECAUSE UNDER THE DECLARATORY JUDGMENT ACTION YOU
23 REALLY STILL HAVE TO DEMONSTRATE INJURY OR THE LIKELIHOOD
24 OF INJURY TO ESTABLISH STANDING UNDER -- FOR A DECLARATORY
25 JUDGMENT CLAIM JUST AS YOU WOULD FOR ANY OTHER CAUSE OF

1 ACTION AND THE PUBLIC INTEREST EXCEPTION IS EASY. THAT
2 REQUIRES PUBLIC BODIES TO BE PLAYERS IN THE LAWSUIT, AND
3 WE DON'T HAVE ANY OF THAT HERE. THERE IS NO PUBLIC ENTITY
4 INVOLVED IN ANY OF THIS. IT'S A BUNCH OF PRIVATE
5 INDIVIDUALS SUING A BUNCH OF PRIVATE BUSINESSES. THERE IS
6 SIMPLY NO PUBLIC BODY INVOLVED AS A PLAYER IN THIS SUIT
7 WHICH WOULD IMPLICATE THE PUBLIC INTEREST EXCEPTION TO THE
8 GENERAL LAWS ON STANDING.

9 LET ME DEAL WITH IMPROPER JOINDER, YOUR HONOR. AS I
10 POINTED OUT THIS, WE BELIEVE, IS A VERY IMPORTANT ISSUE.
11 IT'S ONE THAT THE ORDER YOU SIGNED DENYING THE MOTIONS TO
12 DISMISS DID NOT ADDRESS, AND IT'S AN ISSUE THAT WE BELIEVE
13 REQUIRES DISMISSAL OF THE HERRON SUIT AS IT'S CURRENTLY
14 PLEAD FOR ALL PARTIES EXCEPT THE AIKEN DEALERSHIP AND THE
15 PLAINTIFF THAT IS SUING THAT AIKEN DEALERSHIP, AND, YOU
16 KNOW, THAT POINTS OUT, YOUR HONOR, THAT THE FLIP-SIDE OF
17 THIS IMPROPER JOINDER ISSUE IS VENUE, AND WE HAVE -- WE'VE
18 RESERVED VENUE, BUT THAT'S ANOTHER 800-POUND GORILLA
19 LURKING IN THE BACK OF THE ROOM -- VENUE. WHAT -- AND I
20 AM NOT GOING TO ARGUE THOSE ISSUES HERE, BUT I JUST WANT
21 TO ENCOURAGE YOU TO BE -- AS YOU THINK THROUGH THIS
22 IMPROPER JOINDER ISSUE, THINK THROUGH VENUE. IT'S OUT
23 THERE, AND IT'S IMPORTANT, BUT LET'S LOOK AT RULE 20. I
24 DON'T THINK YOU HAVE TO GO BEYOND RULE 20 TO EVEN GET TO
25 VENUE IF YOU HANDLE RULE 20 CORRECTLY.

1 LET'S LOOK AT THAT. IT GOVERNS BOTH PLAINTIFFS --
2 THE JOINDER OF BOTH PLAINTIFFS AND DEFENDANTS AND IT'S
3 ESSENTIALLY THE SAME RULE WITH RESPECT TO EACH. THE
4 JOINDER OF PLAINTIFFS OR DEFENDANTS IN A SINGLE ACTION IS
5 PROPER ONLY WHEN THE CLAIM ARISES OUT OF THE SAME
6 TRANSACTION, OCCURRENCE, OR SERIES OF TRANSACTIONS OR
7 OCCURRENCES, AND, NUMBER TWO, A QUESTION OF LAW OR FACT
8 COMMON TO ALL PLAINTIFFS OR ALL DEFENDANTS WILL ARISE IN
9 THE ACTION. IMPORTANTLY, JOINDER IS IMPROPER UNLESS BOTH
10 CRITERIA ARE SATISFIED -- BOTH NUMBER ONE -- THAT IS,
11 ARISE OUT OF THE SAME TRANSACTION, OCCURRENCE OR SERIES OF
12 TRANSACTIONS OR OCCURRENCES, AND THERE BE A COMMON ISSUE
13 OF LAW OR FACT COMMON TO ALL OF THE PARTIES IN THE ACTION.
14 YOU GOT TO SATISFY BOTH REQUIREMENTS.

15 NOW, YOU MAY RECALL WE DISCUSSED AND MR. MARTIN
16 REFERRED TO IT BRIEFLY HERE EARLIER THE SAVAL V
17 B.L. LIMITED CASE THAT WAS DECIDED BY THE FOURTH
18 CIRCUIT -- VERY SIMILAR SITUATION HERE WHEN YOU REALLY
19 THINK ABOUT IT AND WE'VE DISCUSSED IT BEFORE, BUT OWNERS
20 OF JAGUAR AUTOMOBILES -- A WHOLE BUNCH OF DIFFERENT OWNERS
21 SUED EVERYONE IN THE CHAIN OF DISTRIBUTION CLAIMING OUR
22 CAR WAS DEFECTIVE. WELL, THE FOURTH CIRCUIT AFFIRMED THE
23 DISTRICT COURT'S REJECTION OF THAT EFFORT TO BRING A
24 SINGLE LAWSUIT BRINGING TOGETHER ALL THOSE DIFFERENT CAR
25 OWNERS PURSUANT TO RULE 20 FINDING THAT THE REQUIREMENTS

1 OF RULE 20 WEREN'T SATISFIED IN THAT CASE BECAUSE THEY
2 DIDN'T SATISFY THE TRANSACTION -- THE SAME TRANSACTION OR
3 OCCURRENCE TEST. THE COURT SAID THE CARS WERE PURCHASED
4 AT DIFFERENT TIMES, THEY WERE DRIVEN DIFFERENTLY, AND THEY
5 HAD DIFFERENT SERVICE HISTORIES. DIFFERENT CARS,
6 DIFFERENT TIMES, DIFFERENT SERVICE HISTORIES, DIFFERENT
7 MECHANICS. YOU KNOW, THIS IS NOT THE SAME TRANSACTION OR
8 OCCURRENCE, AND IN THE PRESENT CASE YOUR HONOR WE'VE GOT
9 THE SAME THING.

10 JOINDER IS IMPROPER BECAUSE THESE PLAINTIFFS ARE
11 SIMPLY UNABLE TO SATISFY EITHER OF THE TWO REQUIREMENTS
12 FOR PERMISSIVE JOINDER. THERE WAS NO COMMON TRANSACTION
13 BECAUSE EACH PLAINTIFFS' INDIVIDUAL CLAIM DOES NOT ARISE
14 OUT OF THE SAME TRANSACTION OR OCCURRENCE. IT'S
15 UNDISPUTED THAT EACH PLAINTIFF PURCHASED A SINGLE VEHICLE
16 FROM A SINGLE DIFFERENT DEALERSHIP. THAT'S THE WAY THE
17 CASE IS PLEAD. THESE ARE COMPLETELY SEPARATE AND
18 UNRELATED SALES THAT OCCURRED ON DIFFERENT DATES AT
19 DIFFERENT DEALERSHIPS IN DIFFERENT CITIES, AND NOT ONLY
20 THAT, BUT EACH SALE -- WHEN YOU LOOK AT THEM, EACH SALE
21 INVOLVED A PLETHORA OF OTHER DIFFERENCES. THERE WERE
22 DIFFERENT SALES PEOPLE, DIFFERENT SALES MANAGERS,
23 DIFFERENT VEHICLES WITH DIFFERENT ACCESSORIES, DIFFERENT
24 PRICES, DIFFERENT CLOSING FEES, DIFFERENT NEGOTIATIONS AND
25 DISCUSSIONS ABOUT PRICE, DIFFERENT DISCLOSURES OF THE

1 CLOSING FEE, DIFFERENT SALES CONTRACTS, DIFFERENT POLICIES
2 AND PROCEDURE AT EACH DEALERSHIP.

3 WHAT'S COMMON? WHAT'S THE SAME TRANSACTION OR
4 OCCURRENCE ABOUT ANY OF THAT? IT'S NOT. AND WHILE IT IS
5 TRUE, YES, THE DEALERS ACT PROVISIONS AND THE CLOSING FEE
6 STATUTE WILL BE DISCUSSED IN ALL OF THOSE CASES, THERE IS
7 NO COMMON QUESTION OF LAW DUE TO THE DIFFERENT FACTUAL
8 CIRCUMSTANCES OF EACH TRANSACTION. THE ISSUE OF WHETHER A
9 COMMON QUESTION OF LAW IS NOT -- OR FACT -- IS NOT
10 SATISFIED BY SIMPLY ASSERTING CLAIMS BASED ON THE SAME
11 LEGAL THEORY. IF THAT WERE TRUE, YOUR HONOR, THEN EVERY
12 CAR WRECK THAT HAPPENS IN AIKEN COUNTY IN A ONE-WEEK
13 PERIOD COULD BE JOINED IN THE SAME ACTION BECAUSE THEY ALL
14 ASSERT A CLAIM -- A CAUSE OF ACTION BASED ON NEGLIGENCE.
15 JUST HAVING THE SAME LEGAL THEORY DOESN'T GIVE YOU THE
16 COMMON -- DOESN'T SATISFY THE COMMON LAW OR FACT CRITERIA
17 FOR JOINDER EVEN IF YOU COULD ASSUME THAT THEY COULD
18 CLAIM, WHICH THEY CAN'T, THAT THESE TRANSACTIONS ARISE OUT
19 OF THE SAME TRANSACTION OR OCCURRENCE.

20 THIS IS NOT A SITUATION WHERE WE HAVE A MASSIVE
21 ACCIDENT, A MASSIVE PLANE CRASH, A TRAIN WRECK, OR LIKE WE
22 HAD IN THIS COUNTY A MASSIVE EXPLOSION OVER IN
23 GRANITEVILLE. IT'S NOT A SITUATION LIKE WHERE THOUSANDS
24 OF PEOPLE TOOK THE SAME MEDICINE OR THEY USED THE SAME
25 MEDICAL DEVICE. YOU MIGHT GET CLOSE TO ARGUING THAT ALL

1 THOSE DIFFERENT PLAINTIFFS COULD BE JOINED IN THE SAME
2 ACTION UNDER CIRCUMSTANCES LIKE THAT, A MASS TORT THAT
3 ARISES OUT OF A SINGLE TRANSACTION OR OCCURRENCE OR WHERE
4 THEY ALL INGEST THE SAME DRUG OR USE THE SAME MEDICAL
5 DEVICE, BUT HERE THEY DIDN'T ALL PAY THE SAME CLOSING FEE
6 TO THE SAME DEALER. THAT JUST DIDN'T HAPPEN. THERE IS NO
7 -- IN SHORT, YOUR HONOR, THE RULES FOR JOINING ALL THESE
8 PLAINTIFFS AND DEFENDANTS TOGETHER IN ONE ACTION HAVE
9 SIMPLY NOT BEEN MET.

10 LET ME MOVE ON TO DEAL WITH CIVIL CONSPIRACY. IN
11 YOUR ORDER DENYING THE MOTIONS TO DISMISS YOU SAID THIS
12 AND THIS ONLY: AT THIS STAGE OF THE PROCEEDINGS THERE ARE
13 SUFFICIENT ALLEGATIONS OF CIVIL CONSPIRACY IN THE AMENDED
14 COMPLAINT TO AVOID DISMISSAL. NOW, IT'S HARD TO DETERMINE
15 THIS, YOUR HONOR, BECAUSE THE FIRST AMENDED COMPLAINT IS
16 73 PAGES AND 411 PARAGRAPHS LONG AND THE PAUCITY OF THE
17 CIVIL CONSPIRACY PLEADINGS -- THE CIVIL CONSPIRACY
18 ALLEGATIONS -- THEY'RE CLEVERLY HIDDEN BY A PLETHORA OF
19 ALLEGATIONS ABOUT ALL THE NAMED PARTIES. THERE IS, IN
20 FACT, A LOT OF SMOKE AND MIRRORS IN THIS PLEADING, BUT
21 WITH ALL DUE RESPECT THE PLEADINGS ON CIVIL CONSPIRACY IN
22 THE FIRST AMENDED COMPLAINT IN HERRON ARE NOT SUFFICIENT
23 UNDER WELL-ESTABLISHED CASELAW IN SOUTH CAROLINA DIRECTLY
24 ON POINT.

25 LET ME DEMONSTRATE. IF YOU'LL TURN TO ITEM "D" IN

1 THE HANDOUT I GAVE YOU, YOU'LL SEE I HAVE COPIED FOR YOU
2 PAGES 70 AND 71 OF THE 73-PAGE 411-PARAGRAPH COMPLAINT,
3 AND I INVITE YOU TO LOOK DOWN THERE AT THE BOTTOM OF PAGE
4 70 BEGINNING WITH PARAGRAPH 404 AND THEN MOVING OVER TO
5 THIS NEXT PAGE AT PARAGRAPH 405. HERE'S -- THE ENTIRE
6 ALLEGATIONS RELATING TO CIVIL CONSPIRACY IN THE FIRST
7 AMENDED COMPLAINT ARE THIS. DEFENDANTS HAVE CONSPIRED
8 TOGETHER IN A COMMON SCHEME DESIGNED TO DECEIVE ALL CAR
9 BUYERS BY ALL ENGAGING IN A COMMON PRACTICE OF
10 PRESENTING/ADVERTISING CAR PRICES IN A MISLEADING MANNER
11 BY CHARGING ADMINISTRATIVE FEES. NEXT PARAGRAPH; THE
12 PLAINTIFFS HAVE SUFFERED SPECIAL DAMAGES AS A RESULT OF
13 DEFENDANTS' CONSPIRACY. NOTHING MORE. THAT'S IT -- SUM
14 TOTAL OF THE ALLEGATIONS PERTAINING TO CIVIL CONSPIRACY.

15 WELL, WHAT DO WE HAVE WITH THIS? IN REALITY THE
16 CIVIL CONSPIRACY ALLEGATIONS JUST INCORPORATE PRIOR
17 ALLEGATIONS ON THE STATUTORY CLAIMS AND THEN MERELY ALLEGE
18 A CONSPIRACY. THERE ARE NO ADDITIONAL ACTS IN FURTHERANCE
19 OF THE CONSPIRACY THAT ARE PLEAD. THERE IS NO ENUMERATION
20 OF WHAT THOSE SPECIAL DAMAGES FLOWING FROM THE CONSPIRACY
21 AS OPPOSED TO THE ALLEGED STATUTORY VIOLATIONS MIGHT BE.

22 CIVIL CONSPIRACY HAS THREE ELEMENTS. YOU GOT TO
23 PROVE A COMBINATION OF TWO OR MORE PERSONS FOR THE PURPOSE
24 OF INJURING THE PLAINTIFF WHICH CAUSES HIM SPECIAL
25 DAMAGE -- CAUSES SPECIAL DAMAGE TO THE PLAINTIFF. THE

1 GRAVAMEN OF THE TORT OF CIVIL CONSPIRACY IS THE DAMAGE
2 RESULTING TO THE PLAINTIFF FROM AN OVERT ACT DONE PURSUANT
3 TO THE COMBINATION, NOT THE AGREEMENT OR COMBINATION PER
4 SE. YOU GOT TO HAVE SOMETHING ABOVE AND BEYOND THE
5 DAMAGES THAT FLOW FROM ANY OTHER VIOLATION OF A CONTRACT,
6 COMMISSION OF A TORT, VIOLATION OF A STATUTE THAT YOU
7 MIGHT CLAIM, AND IN OUR BRIEF WE CITE FIVE OF THEM.

8 THERE ARE NUMEROUS CASES WHERE THE SOUTH CAROLINA
9 APPELLATE COURTS HAVE EXPRESSLY AFFIRMED THE DISMISSAL OF
10 A CIVIL CONSPIRACY CLAIM AS A MATTER OF LAW IN SITUATIONS
11 JUST LIKE THIS ONE WHERE THE CAUSE OF ACTION DOES NO MORE
12 THAN INCORPORATE PRIOR ALLEGATIONS AND THEN ALLEGE THE
13 EXISTENCE OF A CIVIL CONSPIRACY WHERE NO ADDITIONAL ACTS
14 IN FURTHERANCE OF THE CONSPIRACY ARE PLEAD AND WHERE THE
15 ONLY WRONGFUL ACTS PLEAD ARE THOSE FOR WHICH DAMAGES HAVE
16 ALREADY BEEN SOUGHT.

17 FURTHERMORE, RULE 9(G), YOUR HONOR, THE RULES FOR
18 PLEADING SPECIAL MATTERS, SAY THAT SPECIAL DAMAGES MUST BE
19 SPECIFICALLY ALLEGED IN ORDER TO AVOID SURPRISE TO THE
20 DEFENDANT. IN CASES WE'VE CITED TO YOU IT'S NOT ENOUGH
21 FOR A PLAINTIFF TO SIMPLY MAKE A VAGUE, UNSUBSTANTIATED
22 CLAIM THEY HAVE SUFFERED SPECIAL DAMAGES BECAUSE SUCH A
23 STATEMENT DOES NOT AVOID SURPRISE TO THE DEFENDANT AND IT
24 DOESN'T COMPLY WITH THE REQUIREMENTS OF THE RULE 9(G).

25 NOW, MOREOVER, CIVIL CONSPIRACY IS AN INTENTIONAL

1 TORT, AND, SO, THE PLAINTIFFS HAVE TO PLEAD AND PROVE THAT
2 THE DEFENDANTS CONSPIRED TO INTENTIONALLY HARM EACH NAMED
3 PLAINTIFF. WELL, THE PLAINTIFFS HAVEN'T MADE AN
4 ALLEGATION BECAUSE THEY CAN'T AND THEIR CONSPIRACY CLAIM
5 FAILS AS A MATTER OF LAW FOR THIS REASON. HOW CAN THEY
6 ALLEGE -- TO GO BACK TO THE EXAMPLE THAT I HAD BEFORE --
7 THAT BIG O DODGE IN GREENVILLE OR MCDANIEL'S ACURA IN
8 CHARLESTON INTENTIONALLY CONSPIRED TO CAUSE INJURY TO
9 NATALIE ARMSTRONG WHO BOUGHT A CAR FROM GALEANNA CHRYSLER
10 JEEP IN COLUMBIA WHERE THEY'VE NEVER HEARD -- PROBABLY
11 NEVER IMAGINED OF NATALIE ARMSTRONG EVEN IN THEIR WILDEST
12 DREAMS? SO, THEY JUST CAN'T -- THEY CAN'T MEET THE
13 SPECIAL DAMAGE PLEADING REQUIREMENTS. THEY CAN'T ALLEGE
14 THE INTENTIONAL HARM THAT'S REQUIRED TO PROVE THIS.

15 NOW, IT'S TRUE, AS THEY'VE SAID BEFORE, THEY CAN
16 PLEAD ALTERNATIVE CONTRADICTIONARY CAUSES OF ACTION. WELL,
17 THAT'S TRUE, BUT THEY STILL HAVE TO SUFFICIENTLY PLEAD
18 EACH OF THOSE ALTERNATIVE CONTRADICTIONARY CAUSES OF ACTION,
19 AND THAT'S SOMETHING THEY CLEARLY HAVEN'T DONE HERE, AND
20 THEY'VE ALSO ARGUED IN THE PAST, WELL, WE CAN WAIT UNTIL
21 SOME LATER TIME TO PLEAD OUR SPECIAL DAMAGES AFTER SOME
22 DISCOVERY WHEN WE KNOW WHAT IT IS. WELL, THAT DOESN'T GET
23 THEM PAST THE REQUIREMENTS OF RULE 9(G), AND, YOU KNOW, IF
24 THERE IS SOME EVIDENCE OUT THERE OF SOME CIVIL CONSPIRACY
25 WHICH I SUGGEST TO YOU THERE ISN'T, THEN THEY CAN ALWAYS

1 MOVE TO AMEND THEIR COMPLAINT IF THERE IS COMPELLING
2 EVIDENCE OF A CIVIL CONSPIRACY, BUT TODAY FROM WHERE WE
3 SIT RIGHT NOW AT THE OUTSET OF THIS LITIGATION THEY HAVE
4 NOT SUFFICIENTLY PLEAD CIVIL CONSPIRACY TO WITHSTAND A
5 MOTION TO DISMISS. THEY DON'T PASS MUSTER UNDER THE
6 CASELAW. THEY DON'T PASS MUSTER UNDER 9(G) AND THEY CAN'T
7 PROVE AND PLEAD IN GOOD FAITH THE INTENTIONAL ASPECTS OF A
8 CIVIL CONSPIRACY CLAIM.

9 YOUR HONOR, I'M AT THE END, BUT IN SUMMARY THIS CASE,
10 THE WAY IT'S CONSTRUCTED, THE WAY IT'S PLEAD, THE WAY IT'S
11 PUT TOGETHER, IT DEFIES ALL KNOWN PRINCIPALS AND LAW OF
12 STANDING. IT DEFIES THE RULES OF CIVIL PROCEDURE RELATING
13 TO RULE 23 ON CLASS ACTIONS, RELATING TO RULE 20 ON
14 JOINDER OF PARTIES. IT DEFIES THE RULES OF CIVIL
15 CONSPIRACY, RULE 9(G) WITH RESPECT TO SPECIAL DAMAGES. IT
16 CREATES AN UNPRECEDENTED UNFAIR MASS ACTION THAT IS
17 UNKNOWN TO AND NOT PERMITTED BY MODERN DAY RULES AND LAW
18 THAT GOVERN ALL OTHER CIVIL ACTIONS THAT ARE FILED IN THIS
19 COURT.

20 THE EXCEPTION IS SWALLOWING THE RULE. IT'S JUST
21 SWALLOWING IT. IT IS A MESS, AND THE SOLUTION, YOUR
22 HONOR, TO THIS ABOMINATION IS SIMPLE. THE COMPLAINT IN
23 HERRON WITH ALL BUT RESPECT TO THE AIKEN COUNTY DEALER
24 SUED BY THE PLAINTIFF THAT'S ASSOCIATED WITH THAT DEALER
25 SHOULD BE DISMISSED. THANK YOU.

1 THE COURT: THANK YOU. MR. LEWIS, ET AL?

2 MR. LEWIS: MAY IT PLEASE THE COURT.

3 THE COURT: YES, SIR.

4 MR. LEWIS: FIRST, LET ME JUST POINT OUT SOMETHING.
5 IF YOU LOOK AT RULE 59, YOU ARE ONLY ALLOWED TO HAVE A 59
6 MOTION FROM A JUDGMENT. THERE IS NO JUDGMENT HERE. ALL
7 THESE 59 MOTIONS ARE IMPROPER, BUT LET'S GO FORWARD WITH
8 THEM ANYWAY. AND THEN HE SAYS THAT HE WANTS THESE
9 DISMISSED FOR JOINDER AND SO FORTH. WELL, THE RULE
10 SPECIFICALLY PROVIDES YOU CAN'T DISMISS THEM. YOU SEND
11 THEM OUT TO WHEREVER YOU MIGHT THINK THEY SHOULD GO OR
12 SEPARATE THEM OUT AS A JOINDER AND SEPARATE THEM AND SAY
13 THEY'RE NOT JOINED IN A SEPARATE CASE.

14 NOW, CAN YOU IMAGINE WHAT THAT WOULD BE? YOU SEND
15 OUT THESE CASES. WITH THE FIRST RULE IN THE BOOK -- THE
16 PROCEDURE, PRACTICES, THE RULES OF CIVIL PROCEDURE -- IS
17 RULE ONE AND YOU KNOW WHAT IT SAYS? THAT YOU TRY TO DO
18 EVERYTHING EFFICIENTLY AND AS QUICKLY AND AS INEXPENSIVELY
19 AS YOU CAN. IN THIS CASE WE THOUGHT, WELL, WE HAD A CASE
20 OUT THERE -- A HOSPITAL CASE WHERE WE SUED A BUNCH OF
21 HOSPITALS ALL AROUND THE STATE AND THE CHIEF JUSTICE SENT
22 THEM TO JUDGE GOODE FOR THE PRELIMINARY MATTERS AND THEN
23 WHEN THEY WERE GETTING READY TO TRY IT THEY WOULD GO BACK
24 OUT TO THE DIFFERENT PLACES WHERE THEY CAME FROM BECAUSE
25 THAT WAS THE MOST EFFICIENT AND INEXPENSIVE AND BEST WAY

1 TO DO IT. SO, WE DID IT HERE, AND WE CAME BEFORE YOU, AND
2 WE DID THAT, AND WE HAD AN ORDER WHERE YOU SAID THAT YOU
3 WOULD BE THE ADMINISTRATIVE JUDGE FOR DISCOVERY AND WE
4 WOULD GO FORWARD WITH THIS DISCOVERY AND WE'D COME UP TO
5 WHAT TIME PERIOD OR THE PERIOD WHEN IT WAS SUPPOSED TO GO
6 OUT TO BE TRIED AND THEN YOU WOULD DECIDE IF YOU WERE
7 GOING TO KEEP THEM OR SEND THEM OUT, AND THEY -- THEY
8 DIDN'T COMPLAIN THEN. THEY COMPLAINED NOW WITH MOTIONS
9 FOR IMPROPER JOINDER, FOR MOTIONS FOR IMPROPER VENUE, AND
10 ALL THAT IS IS TO TRY TO GET AROUND WHAT WE HAVE ALREADY
11 GONE THROUGH TIME AND TIME AGAIN THAT WE NEED TO GO
12 FORWARD AND GET THESE DECIDED AND DECIDED ON THE DISCOVERY
13 ALTOGETHER.

14 NOW, WHEN WE GOT TO THAT IT BECAME APPARENT IN THE
15 FIRST MOTION THAT THEY DIDN'T WANT TO HAVE A DISCOVERY ALL
16 TOGETHER BECAUSE IT WAS TOO CONFUSING, AND I'VE TOLD YOU
17 ALL ABOUT US TRYING TO SOLVE THAT PROBLEM, AND I THINK WE
18 HAVE BY GETTING DOWN TO THE SEVEN. NOW THEY COME IN AND
19 THEY -- THEY'RE PRETTY TRICKY. I HAVE TO GIVE THEM THAT.
20 THEY SAY RULE 23 SHOULD APPLY. RULE 23 -- LET'S TAKE THE
21 CARMAX CASE. THE CARMAX CASE IS A PERFECT EXAMPLE OF
22 THEIR TRICKERY.

23 IN CARMAX WE SETTLED -- SETTLED. CARMAX WANTED A
24 CLASS ACTION SETTLEMENT. WE HAVE NEVER SAID AND WILL
25 NEVER SAY THAT OUR CAUSES OF ACTION COULDN'T ALSO BE --

1 ALSO BE A CLASS ACTION. WE HAVE NEVER AND WON'T SAY THAT
2 BECAUSE WE THINK THAT OUR CASES COULD ALSO BE A CLASS
3 ACTION UNDER RULE 23. THEY COME IN HERE AND SAY CARMAX
4 WAS A 23 AND WE'RE COLLATERALLY ESTOPPED, BUT DON'T --
5 THAT DOESN'T MEAN IT WOULD BE RULE 23 TO US. SO, WE DON'T
6 SAY NOR ANYWHERE THAT THEY'RE MUTUALLY EXCLUSIVE. THEY
7 EXIST SIDE BY SIDE.

8 NOW, LET'S GO TO THE NEXT THING THEY SAY AND THEY
9 WANT TO TALK ABOUT AMCHEM. WE AGREE 100 PERCENT IF YOU
10 HAVE A CLASS ACTION SETTLEMENT YOU HAVE TO MEET THE
11 REQUIREMENTS OF AMCHEM AND THEY AGREED WE DID IN THE
12 CARMAX CASE BECAUSE CARMAX WANTED IT THAT WAY AND THEY'RE
13 NOT MUTUALLY EXCLUSIVE AND WE SAID, OKAY, IF YOU WANT TO
14 SETTLE THAT WAY, WE WILL GO OVER AND DO THAT. WE WILL
15 SAY, YES, WE WILL AGREE THAT THE RULE 23 -- WE'LL GO THAT
16 WAY INSTEAD OF OUR WAY -- THE PARALLEL TRACKS.

17 THEY SAY THAT THE RULES WERE ADOPTED AND IT REPEALS
18 1020. WELL, IF YOU WILL LOOK VERY CAREFULLY AT CODE
19 SECTION 56-15-110, SUIT FOR DAMAGES, THEY CITE TO YOU
20 56-15-110(2) AND THEY CENTER ON (2) WHICH SAYS WHEN SUCH
21 ACTION IS ON COMMON OR GENERAL INTEREST TO MANY PERSONS OR
22 WHEN THE PARTIES ARE NUMEROUS AND IT IS IMPRACTICAL TO
23 BRING THEM ALL BEFORE THE COURT ONE OR MORE SUITS FOR THE
24 BENEFIT OF THE WHOLE INCLUDING ACTIONS FOR INJUNCTIVE
25 RELIEF. BUT YOU KNOW WHAT'S IMPORTANT? WHEN SUCH ACTION,

1 IT SAYS, AND THEY'RE REFERRING UP TO ONE WHICH GIVES YOU
2 WHAT ACTIONS YOU HAVE -- A SUBSTANTIVE RIGHT OF WHAT
3 ACTIONS YOU HAVE AND THE RIGHT TO BRING THOSE ACTIONS
4 UNDER (2), NOT THE RIGHT TO BRING THOSE ACTIONS AND HAVE
5 RULE 23 APPLY.

6 SO, YOU HAVE TO LOOK AT 56-15-110 WHEN IT SAYS YOU
7 CAN'T -- ANYBODY THAT DOES THINGS IN 56-15-110 YOU HAVE A
8 RIGHT TO BRING AND SUE UNDER THIS CHAPTER IN THE COURT OF
9 COMMON PLEAS AND RECOVER DOUBLE THE ACTUAL DAMAGES. YOU
10 HAVE THAT RIGHT, AND YOU HAVE THE RIGHT TO BRING IT ON
11 BEHALF OF THE PEOPLE OF GENERAL INTEREST TO MANY PERSONS
12 OR WHERE THE PARTIES ARE NUMEROUS AND SO FORTH.

13 SO, YOU GOT TO READ (1) AND (2) TOGETHER, AND, SO, IT
14 IS NOT A PROCEDURAL SECTION. IT IS NOT A SECTION WHERE
15 THE STATUTORY CITINGS OF THE SECTION THREE OF THE 1985
16 ACT -- AND IN THAT THEY DON'T BRING TO YOU THE BLYTHE
17 CASE. UNDER THAT SECTION THEY CLEARLY SAID WHEN YOU HAVE
18 A -- UNDER SECTION THREE OF THE 1995 ACT THE LEGISLATURE
19 PROVIDED IN THE EVENT OF CONFLICT THE RULES REPLACE
20 EXISTING PROCEDURAL STATUTES, BUT THEY HAD A TEST FOR
21 THAT. HOWEVER, REPEAL BY IMPLICATION IS DISFAVORED AND
22 REQUIRES A SHOWING OF CONFLICT BETWEEN THE TWO COMPETING
23 STATUTES INCAPABLE OF REASONABLE RECONCILIATION.
24 MOREOVER, THE REPUGNANCY MUST BE PLAIN AND IF THE TWO
25 PROVISIONS CAN BE CONSTRUED SO THAT BOTH CAN STAND A COURT

1 SHALL SO CONSTRUE THEM.

2 WE HAVE RULE 23 WHICH APPLIES TO EVERYTHING. EVERY
3 CASE THAT COMES IN HERE REGARDLESS OF THE TYPE OF ACTION
4 YOU CAN TRY TO GET A RULE 23. IN THIS CASE HERE IF YOU
5 HAVE AN ACTION WITHIN 56-15-110(1) YOU HAVE A RIGHT TO
6 BRING IT ON BEHALF OF THE PARTIES OF GENERAL -- WHO HAVE
7 GENERAL INTEREST OR ARE SO NUMEROUS IT IS IMPRACTICAL TO
8 BRING THEM ALL BEFORE THE COURT. ONE CAN SUE FOR THE
9 BENEFIT OF THEM, AND THAT IS A RIGHT TO THOSE PARTICULAR
10 CAUSES OF ACTION, AND THEY DON'T POINT THAT OUT TO YOU.
11 THEY HAVE NEVER MENTIONED THE WORD WHEN SUCH ACTION --
12 WHEN SUCH ACTION -- THE SUCH ACTION REFERS BACK TO ONE AND
13 IT ONLY APPLIES TO THOSE ACTIONS WHICH MAKES IT QUITE
14 DIFFERENT THAN THE GENERAL STATUTE THAT APPLIES TO ALL
15 CASES. SO, WHEN THEY TELL YOU THAT -- THAT THIS IS THE
16 SAME AND THEY HAVE THE LITTLE CHART THERE WHERE THEY SHOW
17 YOU HOW CLOSE IT IS IN VERBIAGE THEY DON'T MENTION TO YOU
18 THE FIRST PART OF THE STATUTE. TRICKERY.

19 THEY SAY WE'RE ESTOPPED BECAUSE OF CARMAX. ESTOPPED
20 TO DO WHAT? WE CHOSE TO SETTLE IT. CARMAX WANTED A RULE
21 23, AND THEY'RE SAYING THAT WE'RE ESTOPPED; THAT WE HAVE
22 TO SAY WE'LL SETTLE ALL THE CASES WITH RULE 23? WE WILL
23 SETTLE ALL THE CASES UNDER RULE 23, BUT IT DOESN'T MEAN WE
24 CAN'T BRING THE CASES UNDER WHATEVER RIGHTS WE HAVE AND
25 THIS CASE IT'S THE RIGHT WE JUST TALKED OF.

1 THEY'VE TALKED ABOUT RULE 59, AND I JUST TOLD YOU
2 ABOUT THAT. IT HAD TO BE A JUDGMENT. IT HAS TO BE A
3 JUDGMENT. WE DON'T EVEN HAVE THAT. SO, I DON'T THINK 59
4 APPLIES.

5 STANDING. THEY ALWAYS COME BACK TO STANDING, AND
6 THEY SAY IT'S IMPROPER -- THERE IS NO STANDING. WELL,
7 THERE ARE SEVERAL WAYS TO LOOK AT IT. THERE IS STANDING
8 IF AS TO THE SEVEN BECAUSE THEY HAD A DIRECT DEALING WITH
9 THEIR DEFENDANTS. THIS COURT TOLD US IT HAD A LITTLE
10 TREPIDATION AS TO HAVING A PLAINTIFF WHO HAD A DEALING
11 WITH ONE CAR DEALERSHIP TO BE ABLE TO SUE ALL THE CAR
12 DEALERSHIPS, AND WE SAID, WELL, THAT MAY BE. WE SHOULD
13 TRY TO CORRECT THAT. THEY BROUGHT IT UP, AND WE CORRECTED
14 IT.

15 THE COURT: SO, IF YOU HAVE ONLY SEVEN PLAINTIFFS AND
16 ON THE SEVEN PLAINTIFFS YOU WOULD STILL OPERATE?

17 (WHEREUPON, A PHONE RINGS.)

18 MR. GRIMBALL: I'M SORRY, YOUR HONOR. I FORGOT TO
19 TURN THIS --

20 THE COURT: MR. GRIMBALL, I HAVE BEEN WAITING FOR 33
21 YEARS TO PUT YOU IN JAIL.

22 MR. GRIMBALL: I PLEAD GUILTY, YOUR HONOR.

23 THE COURT: HE USED TO AGGRAVATE ME IN LAW SCHOOL.

24 MR. GRIMBALL: I PLEAD GUILTY. I HOPE IT'S A SHORT
25 TERM.

1 THE COURT: ABOUT TWO SECONDS. NO PROBLEM. NO
2 PROBLEM.

3 MR. LEWIS, IF WE GRANTED THE AMENDMENT THEY WOULD
4 STILL HAVE THE RIGHT AT SOME POINT IN TIME WHEN DISCOVERY
5 IS DONE TO IMPROPER JOINDER AND OR VENUE MOTIONS TO SEND
6 THEM TO WHATEVER COUNTIES THEY'RE SUPPOSED TO BE. ARE YOU
7 SAYING THAT?

8 MR. LEWIS: NO. I AM SAYING YOU DIDN'T RULE ON THAT.
9 I'M SAYING THEY CAN -- AS A MATTER OF FACT, YOU RESERVED
10 THAT IN TALKING ABOUT IT IN THE HEARING AND WHEN WE HAD
11 THE MOTIONS -- EXCUSE ME -- THE ORDER IN THE HOSPITAL
12 CASES IT SENT IT TO ONE JUDGE FOR DISCOVERY AND THEY
13 SPECIFICALLY SAID IT WOULD GO BACK OUT TO THE OTHER COURTS
14 FOR THE TRIALS. IN THIS CASE WE HAVEN'T EVEN COME TO THAT
15 JUNCTURE, AND I DON'T UNDERSTAND WHY WE'RE ARGUING IT
16 BECAUSE --

17 THE COURT: THEY STILL WOULD HAVE THE RIGHT TO ASSERT
18 VENUE AND OR JOINDER AFTER THE DISCOVERY.

19 MR. LEWIS: ABSOLUTELY. ABSOLUTELY.

20 THE COURT: AND IF THE AMENDMENT WERE GRANTED
21 REDUCING IT TO SEVEN, IT PRETTY MUCH TAKES CARE OF THE
22 STANDING ARGUMENT, DOES IT NOT?

23 MR. LEWIS: THAT'S WHAT I SAID.

24 THE COURT: EXCEPT FOR THE PLAINTIFF WOULDN'T HAVE
25 STANDING PERHAPS TO A DISTRIBUTORSHIP SHE DIDN'T DO

1 BUSINESS WITH. ARE YOU GOING TO CONCEDE THAT?

2 MR. LEWIS: I WILL CONCEDE THAT EXCEPT IT DEPENDS ON
3 WHETHER OR NOT THE CONSPIRACY CAUSE OF ACTION BRINGS IT IN
4 AND THEY HAVE MISSTATED CONSPIRACY CONSIDERABLY, BUT THAT
5 IS THE ONLY -- THE ONLY WAY THAT A PLAINTIFF SUING ONE CAR
6 DEALERSHIP CAN GET ANY KIND OF ABILITY TO SUE.

7 THE COURT: THROUGH THE CONSPIRACY?

8 MR. LEWIS: YES. THAT'S THE ONLY WAY.

9 THE COURT: SO, THAT REDUCES THAT THEN. GO AHEAD. I
10 DIDN'T MEAN TO INTERRUPT YOU.

11 MR. LEWIS: NO. THAT'S FINE, YOUR HONOR. THAT HELPS
12 ME. ALL RIGHT. NOW, I GUESS WE'RE AT --

13 THE COURT: SO, IT'S YOUR POSITION YOU CAN PROCEED
14 UNDER THIS PARTICULAR ACT. YOU DON'T HAVE TO DO IT UNDER
15 RULE 23 BECAUSE THERE IS A SUBSTANTIVE RIGHT EVEN THOUGH
16 THERE IS A PROCEDURAL WAY OF DOING IT. BASICALLY, THAT'S
17 WHAT YOU'RE SAYING?

18 MR. LEWIS: NOT A PROCEDURAL WAY. I HAVE A
19 SUBSTANTIVE RIGHT TO BRING A CAUSE OF ACTION ON BEHALF OF
20 A GROUP OF PEOPLE, A GROUP CAUSE OF ACTION -- MY WORDS;
21 THOSE ARE MY WORDS -- A GROUP CAUSE OF ACTION UNDER THE
22 STATUTE FOR VIOLATION OF THE STATUTE AS FOUND IN SECTION
23 56-15-110(1). IT JUST SAYS THAT WHEN I SUE FOR A
24 VIOLATION OF 56-15-110 I CAN BRING IT ON BEHALF OF A GROUP
25 OF PERSONS WHERE THE PARTIES ARE NUMEROUS AND IT IS

1 IMPRACTICAL TO BRING THEM ALL BEFORE THE COURT.

2 THEY WANT TO GET INTO WORD GAMES. IT'S NOT. IT'S A
3 SUBSTANTIVE RIGHT TO BRING THOSE CAUSES OF ACTIONS ON
4 BEHALF OF PEOPLE WHO ARE WHERE THERE ARE NUMEROUS AND
5 IMPRACTICAL TO BRING THEM ALL BEFORE THE COURT. THAT'S
6 WHAT IT SAYS.

7 THE COURT: SO, YOU'RE PLAINTIFF "A" GOING AGAINST
8 THE DEALERSHIP HERE IN AIKEN AND YOU BRING IT IN A
9 REPRESENTATIVE CAPACITY FOR THOSE PEOPLE WHO HAVE DEALT
10 WITH THAT DEALERSHIP?

11 MR. LEWIS: THAT'S RIGHT.

12 THE COURT: AND THE ONLY WAY YOU CAN GET DEALERSHIP
13 "B" INVOLVED IS IF YOU COULD PROVE THROUGH YOUR DISCOVERY
14 AND YOUR ACTION THAT THERE WAS CONSPIRACY.

15 MR. LEWIS: THAT'S CORRECT.

16 THE COURT: IF NO CONSPIRACY IS PROVED, THEN YOU HAVE
17 NOTHING AGAINST THE DEALERSHIPS THEY DIDN'T DO BUSINESS
18 WITH?

19 MR. LEWIS: THAT'S CORRECT.

20 THE COURT: GO AHEAD. AND, OF COURSE, ALONG WITH
21 CONSPIRACY YOU'D HAVE TO PROVE YOUR SPECIAL DAMAGES, ET
22 CETERA, ET CETERA, BUT JUST ASSUMING --

23 MR. LEWIS: I'D LIKE TO SAY SOMETHING ABOUT THAT.
24 YOU'VE USED SPECIAL DAMAGES. EVERYBODY USES THAT TERM.
25 WHAT DOES IT MEAN? THAT'S AN INTERESTING POINT. I HAVE

1 GONE IN AND RESEARCHED THAT AND THE ONLY THING THAT I CAN
2 FIND THAT SAYS WHAT SPECIAL DAMAGES ARE, THEY'RE THE
3 DAMAGES THAT ARE PARTICULAR TO THE PLAINTIFF. LIKE IF YOU
4 HAVE A BROKEN ARM, THAT'S A SPECIAL DAMAGE. IF YOU GOT
5 BURNED UP IN A FIRE, THAT'S A SPECIAL DAMAGE, AND THAT'S
6 WHAT I'VE ALWAYS WONDERED ABOUT THAT BECAUSE EVERYBODY
7 THROWS THAT WORD AROUND LIKE IT'S UNDERSTOOD. IT'S NOT
8 UNDERSTOOD.

9 AND I'LL TELL YOU ANOTHER THING THEY KEEP -- THEY
10 BRING UP THAT WAS WRONG. THEY SAY THAT IF YOU HAVE
11 ANOTHER CAUSE OF ACTION YOU CAN'T PLEAD THIS. ALL THE
12 CASES THEY CITE -- THE TODD CASE AND ALL OF THEM -- WERE
13 BEFORE THE RULES WE HAVE NOW. THERE IS NO QUESTION THAT
14 IN THE DEMURER -- I AM OLD ENOUGH TO HAVE MADE DEMURERS.
15 IN DEMURERS YOU COULD NOT HAVE ALTERNATE CAUSES OF ACTION
16 AND YOU CAN READ THE DISCUSSION ON THEM AND THEY SAY HOW
17 BAD THAT WAS AND HOW THAT WAS HARMFUL AND THEY CHANGED IT
18 IN THE RULES. BUT WHEN YOU GO BACK TO TODD, CONSPIRACY
19 WAS THROWN OUT BECAUSE OF THAT -- BECAUSE OF WHAT YOU
20 COULDN'T HAVE IN THE CODE PLEADING.

21 NOW, WE HAVE -- WE'RE AT THE PLEADING STAGE. WE'VE
22 PLEAD EVERYTHING. NOW, WE MAY LOSE ON SUMMARY JUDGMENT.
23 WE MAY GIVE IT UP AFTER WE HAVE DISCOVERY, OR WE MAY FIND
24 IT'S A GREAT CAUSE OF ACTION AND BUST THEM, BUT WE'RE AT
25 THE PLEADING STAGE. NOW, THEIR LITTLE NOTE -- THAT LITTLE

1 PACKET THEY GAVE YOU -- REMEMBER WHEN YOU LOOK AT THAT IF
2 YOU LOOK AT IT AGAIN THEY DON'T CITE EVERYTHING AS I TOLD
3 YOU WITH REFERENCE TO MOTOR VEHICLE CHAPTER 15. THEY
4 DON'T CITE WHAT THAT RIGHT TO BRING IT ON BEHALF OF OTHER
5 PEOPLE IS TIED TO. IT'S TIED TO THE FIRST PARAGRAPH WHERE
6 THEY HAVE THE RIGHT TO SEEK UNDER THIS CHAPTER FOR CERTAIN
7 WRONGS.

8 THEN THEY BRING TO YOU GARDENER. THAT WAS AN
9 INTERESTING ARGUMENT. HE TALKED TO YOU ABOUT GARDENER
10 SAYING THAT IT HELD THAT YOU COULDN'T DO SOMETHING -- YOU
11 COULDN'T HAVE THE PLAINTIFFS SUING DEFENDANTS THAT THEY
12 DIDN'T HAVE DIRECT CONTRACT -- CONTACT WITH AND THAT'S
13 WHAT GARDENER SAID BECAUSE -- AND HE GIVES YOU A CITE TO A
14 PARTICULAR PARAGRAPH OR FOOTNOTE IN THAT CASE. WELL, THAT
15 CASE, IF YOU'LL READ IT, IS A CASE ABOUT AND IT DEALS
16 ITSELF WITH A CLASS ACTION AND WHETHER YOU CAN HAVE A
17 CLASS OF DEFENDANTS AND WHETHER OR NOT YOU CAN HAVE A
18 CLASS OF DEFENDANTS UNDER A CLASS ACTION CASE AND DOES NOT
19 ADDRESS CONSPIRACY -- DOES NOT SAY ANYTHING ABOUT
20 CONSPIRACY.

21 WHAT IT SAYS IS IF WE WERE UNDER RULE 23 AND WE SUED
22 A DEALERSHIP ON BEHALF OF ALL THE PLAINTIFFS IN THAT
23 DEALERSHIP, THAT'S OKAY. BUT IF WE'VE SUED THAT
24 DEALERSHIP ON BEHALF OF ALL THE PEOPLE IN THAT DEALERSHIP
25 THAT WERE HURT LIKE US AND WE SUED ANOTHER DEALERSHIP FOR

1 PEOPLE THAT WERE HURT LIKE US AND ANOTHER DEALERSHIP FOR
2 PEOPLE THAT WERE HURT LIKE US AND WE HAD NO DIRECT CONTACT
3 WITH THOSE DEALERSHIPS, YOU CAN'T DO THAT AND THEY
4 REJECTED THAT PRINCIPAL. SOME STATES ALLOW IT UNDER THE
5 CLASS ACTION. SOME DON'T.

6 IT HAD NOTHING TO DO WITH CONSPIRACY. UNDER THEIR
7 IDEA OF CONSPIRACY IF WE HAVE SOMEONE GO AND THEY SIT OUT
8 THERE AND THEY SAY, OKAY, WE'RE GOING TO GO BURN DOWN THE
9 BUILDING. ALL RIGHT. I WANT YOU TO GO BURN DOWN THE
10 BUILDING. HERE'S THE GASOLINE. GO BURN DOWN THE
11 BUILDING. AND ONE GUY STAYS AWAY AND SITS OVER THERE AND
12 HE WATCHES THE BUILDING BURN AND GOES HOME. UNDER THEIR
13 THEORY ALL THE PEOPLE THAT GOT KILLED IN THE BUILDING
14 COULDN'T SUE BUT THE GUY THAT LIT THE FIRE -- COULDN'T SUE
15 THE OTHER PERSON BECAUSE HE WASN'T DIRECTLY -- HE HAD NO
16 DIRECT CONTACT WITH THE PLAINTIFF.

17 THAT'S NOT A REQUIREMENT IN CIVIL CONSPIRACY AS THEY
18 SAY IT IS. CIVIL CONSPIRACY HAS THOSE THREE SIMPLE
19 REQUIREMENTS. NOW, THAT DOCTRINE THAT THEY KEEP SAYING
20 APPLIES TO CIVIL CONSPIRACY IS CALLED -- I DON'T KNOW HOW
21 TO SAY IT -- JUDICIAL LINKS DOCTRINE AND IT IS A DOCTRINE
22 THAT ALLOWS TO SUE AND HAVE A CLASS OF DEFENDANTS IN A
23 CLASS ACTION UNDER RULE 23.

24 NOW, THEY CITED TO YOU THE CIVIL CONSPIRACY
25 ALLEGATIONS AND THEY ARE PARAGRAPH 333, 403, 404, AND 405.

1 THOSE ARE WHAT AMOUNT TO OUR CIVIL CONSPIRACY CAUSE OF
2 ACTION AND WHAT YOU HAVE TO PROVE AND PLEAD ARE THE
3 COMBINATION OF TWO OR MORE PEOPLE FOR THE PURPOSE OF
4 INJURING THE PLAINTIFF WHICH CAUSED SPECIAL DAMAGES, AND
5 WE ALLEGE THAT THEY CONSPIRED TOGETHER IN A COMMON SCHEME
6 DESIGNED TO DECEIVE CAR BUYERS AND THESE ACTIONS AMOUNTED
7 TO CONCERTED CONSUMER FRAUD, AND THEY CONSPIRED TOGETHER
8 TO HAVE A COMMON SCHEME BY CHARGING AND CREATING ILLEGAL
9 ADMINISTRATIVE FEES AND THAT THEY WERE DAMAGED BY HAVING
10 TO PAY THE FEES.

11 THAT'S WHAT WE, IN EFFECT, ALLEGE, AND THAT IS WE
12 THINK WHAT IS REQUIRED UNDER THE CIVIL CONSPIRACY CAUSE OF
13 ACTION -- THE COMBINATION OF TWO OR MORE PEOPLE. THEY ALL
14 GOT TOGETHER -- ALL THESE DEALERS -- FOR THE PURPOSE OF
15 INJURING THE PLAINTIFF WHICH THEY ALL GOT TOGETHER TO HAVE
16 ILLEGAL ADMINISTRATIVE FEES AND THESE FEES CAUSED SPECIAL
17 DAMAGES BECAUSE OUR PEOPLE PAID THEM AND THEY LOST MONEY.
18 EACH ONE LOST A DIFFERENT AMOUNT. EACH ONE LOST THEIR
19 MONEY. SPECIAL DAMAGES.

20 THEY GO ON TO TALK ABOUT DECLARATORY JUDGMENT, AND
21 THEY SAY YOU HAVE TO HAVE AN INJURY IN DECLARATORY
22 JUDGMENT -- AN INJURY. NOT TRUE. YOU HAVE TO HAVE A
23 DISAGREEMENT, A JUDICIAL CONTROVERSY. ONE OF THE THINGS
24 IN THERE IS IT SAYS THAT YOU GET TO HAVE A DECLARATORY
25 JUDGMENT TO DETERMINE A STATUTE, A WILL, A CONTRACT, AND

1 YOU DON'T HAVE TO WAIT TO BE INJURED. THAT'S WHAT THAT
2 STATUTE IS FOR.

3 IT ALSO IS VERY CLEAR IN THE STATUTE AND THE ROBINSON
4 CASE THAT YOU CAN BRING A DECLARATORY JUDGMENT AND
5 THEREAFTER SUE FOR DAMAGES. YOU CAN HAVE A DECLARATORY
6 JUDGMENT AND THEREAFTER DETERMINE DAMAGES. DECLARATORY
7 JUDGMENT IS A STATUTORY RIGHT WHERE PLAINTIFFS GET TO ASK
8 THE COURT TO DETERMINE A RIGHT UNDER A CONTRACT, STATUTE,
9 OR WHATEVER, AND THEN THEREAFTER TAKE WHAT ACTION IS
10 NECESSARY OR ALLOWED TO SUPPORT OR TO GET THAT RIGHT. SO,
11 WHEN THEY SAY THAT YOU HAVE TO HAVE AN INJURY, IT'S JUST
12 NOT TRUE.

13 AND THEN THEY SAY THE PUBLIC INTEREST HAS TO BE
14 GOVERNMENT. THERE IS NO CASE IN THE WORLD THAT SAYS THAT.
15 PUBLIC INTEREST FOR STANDING THEY SAY HAS TO BE -- PUBLIC
16 INTEREST HAS TO BE A GOVERNMENT. THERE IS NO CASE THAT
17 SAYS THAT. WHAT IT SAYS IS THAT IT HAS TO BE OF PUBLIC
18 INTEREST, AND THEY HAVE STOOD UP HERE TODAY AND TOLD YOU
19 HOW IMPORTANT IT IS TO GET THIS DETERMINED, HOW IMPORTANT
20 IT IS FOR AN INDUSTRY ALL OVER THE STATE OF SOUTH
21 CAROLINA, AN INDUSTRY THAT'S BEEN HELD HOSTAGE BY THE
22 ADMINISTRATIVE FEES, AND WE SAY WE AGREE. WE NEED TO HAVE
23 THESE DETERMINED. DECLARATORY JUDGMENT CAUSES OF ACTION
24 CAN DETERMINE IT AS FAST AS THE COURT WANTS THEM TO AND
25 THE DECLARATORY JUDGMENT WILL ALLOW STANDING. WE DON'T

1 HAVE TO WORRY ABOUT THAT IF YOU GRANT OUR MOTION TO AMEND,
2 BUT IF YOU DIDN'T, WE THINK THE DECLARATORY JUDGMENT WITH
3 REFERENCE THE STATUTE WOULD ALLOW US TO HAVE STANDING EVEN
4 FOR THOSE PEOPLE WHO DO NOT HAVE A CORRESPONDING
5 DEFENDANT.

6 I EMPHASIZE AGAIN JOINDER. IF YOU LOOK AT THE RULES,
7 YOU DON'T DISMISS FOR MISJOINDER. YOU JUST TRANSFER.

8 THE COURT: WELL, I DON'T THINK I NEED TO REACH THAT
9 ISSUE UNTIL --

10 MR. LEWIS: I AGREE.

11 THE COURT: BUT I THINK HE HAS A PRETTY GOOD ARGUMENT
12 ON IT, BUT...

13 MR. LEWIS: SIR?

14 THE COURT: I THINK HE HAS A GOOD ARGUMENT ON IT, BUT
15 I DON'T THINK WE NEED TO REACH THAT UNTIL WE GET DOWN THE
16 ROAD SOME.

17 MR. LEWIS: WELL, ONE GOOD THING ABOUT WHEN A JUDGE
18 TELLS YOU THAT THE OTHER SIDE HAS DONE REAL GOOD, THERE IS
19 NO REQUIREMENT THAT I AGREE.

20 THE COURT: THAT'S TRUE, BUT HE DID AN EXCELLENT JOB.

21 MR. LEWIS: THERE IS NO REQUIREMENT THAT I AGREE.

22 THE COURT: I WOULD THINK YOU WOULD COMMEND HIM ON
23 HIS PRESENTATION AND HIS PREPARATION.

24 MR. LEWIS: OH, HE LOOKED GOOD UP THERE.

25 THE COURT: WELL, I'LL COMMEND HIM. YOU DON'T HAVE

1 TO AGREE WITH ME.

2 MR. LEWIS: SO, FINALLY, WHAT I THINK WHERE WE'RE
3 DOWN TO IS THE RULE 23 -- AND THEY DRAFTED THAT ORDER AND
4 GAVE IT TO YOU. THE RULE 23 ORDER SHOULD STAY. WE SHOULD
5 DENY THE MOTIONS FOR RECONSIDERATION AND GO FORWARD WITH
6 DISCOVERY WITH -- OF THE SEVEN PEOPLE AFTER YOU HAVE
7 GRANTED OUR MOTION TO DISMISS AND AS QUICK AS POSSIBLE GET
8 UP TO THE COURT THOSE ISSUES THAT THEY SAY ARE NECESSARY
9 FOR THIS INDUSTRY TO BE ABLE TO GET OUT FROM UNDER THE
10 BURDEN OF A DETERMINATION OF WHETHER THEIR ADMINISTRATIVE
11 FEE PROGRAM IS IN VIOLATION OF LAW OR NOT, AND THAT'S WHAT
12 WE WANT, AND WE ASK THAT YOU GRANT OUR MOTION, DENY THEIR
13 MOTION FOR RECONSIDERATION, AND WE GO FORWARD ON THE
14 DISCOVERY AND GET THEM UP TO YOU AS FAST AS POSSIBLE AND,
15 OF COURSE, WE'LL GLAD TO ENTER INTO ANY KIND OF SCHEDULING
16 ORDER TO GET THAT DONE.

17 THE COURT: THANK YOU.

18 MR. BECKER: MAY I REPLY BRIEFLY, YOUR HONOR?

19 THE COURT: YOU CERTAINLY MAY. IF I GRANT YOUR
20 MOTION AS TO STANDING, RULE THAT THEY DON'T HAVE STANDING
21 TO SUE DEALERS WITH WHOM THEY DID NOT DO BUSINESS WITH
22 UNLESS THEY PROVE THIS CONSPIRACY THEORY, WHERE DOES THAT
23 LEAVE US?

24 MR. BECKER: WELL, THAT GOES A LONG WAY, BUT IT --

25 THE COURT: HOLD ON. AND THEN I GIVE YOU THE RIGHT

1 THAT YOU'RE NOT GIVING UP ANY RIGHT TO ARGUE PROPER VENUE,
2 IMPROPER JOINDER, THOSE TYPES OF THINGS AT THE CONCLUSION
3 OF DISCOVERY. WHERE DOES THAT LEAVE US?

4 MR. BECKER: I THINK IT LEAVES US --

5 THE COURT: AND I STAY THE ADAMS CASE AND HAVE TO
6 DEAL WITH OTHERS.

7 MR. BECKER: WELL, IT LEAVES US WITH A SMALLER CASE,
8 BUT STILL WITH A NUMBER OF IMPROPERLY JOINED DEFENDANTS
9 DEFENDING THEMSELVES IN THE WRONG COUNTY.

10 THE COURT: WELL, ISN'T THAT SIMILAR TO WHERE THE
11 SUPREME COURT HAS HANDLED THIS HOSPITAL CASE? THEY GAVE
12 IT TO THE ONE JUDGE TO GO THROUGH JUST LIKE THEY DID THE
13 OXYCOTIN CASE WITH JUDGE GOODSTEIN, JUST LIKE THEY DID THE
14 BACALL CASE WITH JUDGE KING. YOU GO IN AND HANDLE ALL THE
15 PROCEDURAL MATTERS AND HANDLE ALL THE DISCOVERY ISSUES AND
16 WHEN IT COMES DOWN TIME TO TRY THE CASE YOU BREAK THEM OUT
17 AND SEND THEM TO THE CORRECT COUNTY. HASN'T THE COURT
18 DONE THAT IN THESE OTHER CASES?

19 MR. BECKER: YES, SIR, THEY DID DO THAT, BUT THERE IS
20 ONE BIG EXCEPTION.

21 THE COURT: WHAT IS THAT?

22 MR. BECKER: WELL, ALL OF THOSE CASES THAT WERE
23 JOINED TOGETHER BY THE SUPREME COURT THROUGH USE OF ITS
24 SPECIAL POWERS STARTED OUT WHERE THEY WERE SUPPOSED TO BE
25 FILED IN THE FIRST PLACE. RICHLAND COUNTY HOSPITAL --

1 RICHLAND MEMORIAL HOSPITAL WAS SUED IN RICHLAND COUNTY,
2 AND GREENVILLE MEMORIAL HOSPITAL WAS SUED IN GREENVILLE
3 COUNTY AND THE M.U.S.C. WAS SUED IN CHARLESTON COUNTY, AND
4 THE SUPREME COURT DECIDED IN THAT SITUATION THAT THERE
5 WERE ENOUGH COMMON ISSUES OF SIGNIFICANT IMPORTANCE THAT
6 THEY SHOULD BE JOINED TOGETHER FOR PRETRIAL PURPOSES.
7 WHETHER OR NOT THE SUPREME COURT WOULD DO SO IN THIS
8 SITUATION, I DON'T KNOW. I WOULDN'T PROPOSE TO PREJUDGE
9 THAT ISSUE FOR THE SUPREME COURT.

10 THE COURT: NEITHER WOULD I.

11 MR. BECKER: BUT WHAT I DO KNOW, YOUR HONOR, IS THAT
12 -- AND I DO TAKE ISSUE HERE -- I THINK IMPROPER JOINDER
13 AND IMPROPER VENUE, THOSE ARE THRESHOLD ISSUES, AND LET ME
14 JUST GIVE YOU AN EXAMPLE. IF TWO PEOPLE WHO GOT INJURED
15 IN CAR WRECKS OUT THERE IN DOWNTOWN AIKEN COUNTY AT
16 DIFFERENT INTERSECTIONS ON DIFFERENT DAYS DRIVING
17 DIFFERENT CARS AND WERE INJURED BY DIFFERENT DEFENDANTS --
18 IF THEY CAME INTO THIS COURTROOM AND SAID WE WANT TO JOIN
19 OUR CLAIMS TOGETHER AGAINST OUR DEFENDANTS --

20 THE COURT: WELL, YOU KNOW I WOULDN'T DO THAT.

21 MR. BECKER: WELL, YOU WOULDN'T.

22 THE COURT: BUT THIS IS DIFFERENT.

23 MR. BECKER: WELL, HOW IS WHAT I WONDER. IT REALLY
24 ISN'T. THE ONLY COMMON THREAD IS THAT THEY'RE BRINGING
25 CLAIMS UNDER THE DEALERS ACT. THE ONLY COMMON THREAD THAT

1 THOSE TWO CAR-WRECK PLAINTIFFS WOULD BE OFFERING IS, WELL,
2 WE'RE BOTH BRINGING NEGLIGENCE CLAIMS. THAT'S NOT ENOUGH
3 TO BIND TWO UNRELATED PLAINTIFFS TOGETHER IN ONE SUIT TO
4 SUE TWO UNRELATED DEFENDANTS, MUCH LESS TO COMBINE SIX,
5 SEVEN, OR 250 UNRELATED PLAINTIFFS TO SUE 250 UNRELATED
6 DEFENDANTS. THE SAME CAUSE OF ACTION, THE SAME LEGAL
7 THEORY IS JUST NOT ENOUGH. THAT'S ALL THEY HAVE HERE WHEN
8 YOU REALLY LOOK AT IT.

9 VENUE -- YOU KNOW, VENUE IS ANOTHER --

10 THE COURT: I AM NOT TELLING YOU TO GIVE UP YOUR
11 RIGHT TO MOTION TO CHANGE VENUE. I AM SAYING WE'LL HOLD
12 THAT IN ABEYANCE UNTIL WE GET DOWN THE ROAD.

13 MR. BECKER: BUT ALL I'M SUGGESTING IN RESPONSE IS
14 IT'S A THRESHOLD ISSUE. IF SOMEBODY -- IF I AM IN A CAR
15 WRECK --

16 THE COURT: WELL, DO YOU WANT ME TO HEAR THE VENUE
17 MOTIONS AND SAY I WILL GRANT THEM BUT I WILL STILL --

18 MR. BECKER: I DON'T THINK YOU NEED TO GET THERE
19 BECAUSE -- BUT WE CAN IF YOUR HONOR WANTS TO.

20 THE COURT: WELL, NO, I AM TRYING TO ACCOMMODATE YOU.

21 MR. BECKER: I UNDERSTAND, BUT ALL I'M SUGGESTING IS
22 THAT YOU CAN DISMISS. THE CASES ARE OUT THERE. WE'VE
23 CITED THEM IN OUR BRIEF. YOU CAN DISMISS IF PARTIES ARE
24 IMPROPERLY JOINED. THEY, OF COURSE, ARE FREE UPON
25 DISMISSAL TO GO REFILE THE ACTION WHEREVER IT SHOULD BE

1 FILED WITH OR WITHOUT PROPERLY JOINED PARTIES, BUT THE
2 RULES PERMIT YOU TO DISMISS WHEN THERE IS IMPROPER
3 JOINDER, WHEN THERE IS IMPROPER VENUE. JUST SIMPLY
4 TRANSFERRING IT TO ANOTHER COUNTY IS NOT THE ONLY THING.

5 IN FACT, IN THIS CASE BECAUSE IT WAS FILED IN AIKEN
6 COUNTY YOU WOULD BE SPLITTING THE CASE UP IN ORDER TO
7 TRANSFER IT TO WHERE VENUE IS PROPER WHICH, YOU KNOW, THAT
8 DOESN'T USUALLY HAPPEN. I MEAN, NORMALLY WHERE PEOPLE ARE
9 IMPROPERLY JOINED YOU DISMISS THEM, AND IF SOMEONE IS
10 GOING TO BRING A CLAIM AGAINST THEM LATER, THEY GO FILE
11 THE RIGHT ACTION IN THE RIGHT PLACE.

12 SO, I THINK THE HOSPITAL PRICING LITIGATION IS AS
13 MR. LEWIS SUGGESTS A GOOD EXAMPLE OF HOW THIS MASS ACTION
14 MIGHT BE DEALT WITH IN ONE PLACE BEFORE ONE JUDGE, BUT IN
15 THAT CASE PEOPLE FOLLOWED THE RULES FROM THE GET-GO. THEY
16 DIDN'T IMPROPERLY JOIN PARTIES IN THE SAME SUIT. THEY
17 FILED IT IN THE COUNTIES WHERE VENUE WAS PROPER, AND THEN
18 THE SUPREME COURT WHO HAS THE POWER REALLY TO BEND THE
19 RULES, NOT WITH ALL --

20 THE COURT: TO DO WHAT TO THE RULE?

21 MR. BECKER: -- RESPECT TO CIRCUIT COURT JUDGES.

22 THE COURT: TO DO WHAT TO THE RULES?

23 MR. BECKER: TO INTERPRET THE RULES ANY WAY THEY WANT
24 TO CREATE NEW RULES WHEN THE NEEDS REQUIRE WHICH IS WHAT
25 THEY DID IN THE HOSPITAL PRICING LITIGATION. I MEAN,

1 OBVIOUSLY, OUR STATE DOESN'T HAVE --

2 THE COURT: I UNDERSTAND.

3 MR. BECKER: -- HAVE A MULTI-DISTRICT LITIGATION
4 REGIME AND THAT AOELS WHAT THEY DID HERE.

5 THE COURT: WELL, I THINK I'VE HEARD ENOUGH TO TRY TO
6 GET ME DOWN THE ROAD. ONCE AGAIN, NOTWITHSTANDING WHAT
7 MR. LEWIS SAYS, I WANT TO COMMEND YOU ON YOUR PRESENTATION
8 AND ARGUMENT AND PREPAREDNESS. HE WOULD, TOO, REALLY, BUT
9 HE IS JUST -- THAT'S HIS COMPETITIVE NATURE. HE WANTED
10 TO, BUT HE DOESN'T WANT TO DO IT ON THE RECORD.

11 MR. BECKER: THANK YOU. AND I'D BE HAPPY TO RESPOND
12 DIRECTLY TO ANY OTHER POINTS, BUT IF YOU DON'T NEED TO
13 HEAR THAT --

14 THE COURT: NO, I --

15 MR. BECKER: -- I'LL BE HAPPY TO SIT DOWN.

16 THE COURT: I AM NOT GOING TO RULE TODAY. LET ME
17 TELL YOU SORT OF WHERE I'M THINKING UP HERE. I'LL GIVE
18 Y'ALL TIME TO -- I DON'T THINK THEY HAVE STANDING TO SUE
19 YOU OTHER THAN IF THEY CAN PROVE CONSPIRACY. THEREFORE,
20 BASICALLY, IT LEAVES WITH THE SEVEN ON SEVEN. I CAN DO
21 THAT BY AMENDING THE LAWSUIT -- LETTING THEM AMEND IT. IF
22 I DO THAT, THEN I AM GOING TO HOLD IN ABEYANCE OR RESERVE
23 ANY ISSUES CONCERNING ATTORNEY'S FEES AND COSTS MR. MARTIN
24 OR ANY OF THE REST OF YOU MAY HAVE, OR I CAN DO IT BY
25 PARTIALLY GRANTING YOUR MOTION AND IT COMES BACK WITH THE

1 SAME THING.

2 I DON'T THINK I AM GOING TO DISTURBING MY RULING ON
3 THE SUBSTANTIVE RIGHT THAT 56-15-110(1) AND (2) GIVE.
4 THAT'S SOMETHING YOU CAN APPEAL ON IF YOU WANT TO. I AM
5 JUST THINKING OUT LOUD.

6 AS TO VENUE AND IMPROPER JOINDER, AS WE SAID FROM
7 EARLIER ON I AM GOING TO HOLD THOSE MATTERS AND RESERVE
8 THOSE AND WHEN THE DISCOVERY IS DONE AND ALL THE ISSUES
9 ARE JOINED YOU WOULD NOT BE PRECLUDED FROM ARGUING THOSE
10 IN FULL. NOW, THAT'S HOW I AM THINKING RIGHT NOW JUST TO
11 GIVE YOU A FLAVOR OF THINGS.

12 MR. BECKER: WHAT ABOUT RULE 23?

13 THE COURT: I JUST SAID I AM GOING TO STAND ON MY
14 RULE 23 RULING THAT THEY HAVE THE SUBSTANTIVE RIGHT UNDER
15 THAT STATUTE TO BRING IT IN THE MANNER IN WHICH THEY'RE
16 DOING IT. I JUST SAID YOU CAN TAKE THAT ONE UP TO
17 COLUMBIA IF YOU NEED TO. THEN, OF COURSE, INTERWOVEN INTO
18 ALL OF THAT IS THE -- FOR THOSE OF YOU WHO HAVE
19 ARBITRATION AGREEMENTS, I'VE GOT ONE BEFORE ME TODAY THAT
20 NEEDS A RULING BY THE SUPREME COURT -- SIMMONS. I GOT TO
21 LOOK AT EACH ONE OF THOSE INDIVIDUALLY. THAT COULD TAKE A
22 LONG TIME. I DON'T KNOW HOW MANY OF THE SEVEN HAVE IT.
23 JUST ONE OUT OF THE SEVEN?

24 MR. BECKER: JUST ONE AND THEY'RE HERE TODAY.

25 THE COURT: I AM READY TO HEAR THAT.

1 MR. BECKER: READY TO ARGUE THAT.

2 THE COURT: I AM GOING TO HEAR THAT TODAY. BUT
3 THAT'S ASSUMING I HOLD -- STAY THE OTHER TWO ACTIONS THAT
4 ARE CURRENTLY PENDING. THAT WOULD GIVE YOU TIME, I
5 ASSUME, TO GO UP ON THE IMPORTANT ISSUES UNLESS YOU WANT
6 TO ARGUE YOUR MOTIONS TO DISMISS ON ANYTHING ELSE THAT YOU
7 CAN JOIN THEM ALL TOGETHER. I WANT TO MAKE IT CLEAN FOR
8 YOU HOWEVER YOU WANT TO DO IT.

9 MR. BECKER: RIGHT. AND WE APPRECIATE THAT. WE'LL
10 PROBABLY NEED --

11 THE COURT: I AM NOT ASKING YOU TO DECIDED. I AM
12 JUST TELLING YOU THAT'S WHAT I AM THINKING. I GOT TO READ
13 EVERYTHING. I WANT TO STUDY. I WANT PROPOSED ORDERS, BUT
14 THAT'S SORT OF THE WAY I'M THINKING RIGHT NOW.

15 MR. BECKER: YEA.

16 THE COURT: THAT GETS IT, I THINK, MANAGEABLE. THAT
17 DOESN'T -- THE STANDING ISSUE IS THEY DON'T HAVE STANDING
18 UNLESS THEY CAN PROVE A CONSPIRACY, AND, YOU KNOW, YOU GOT
19 MOTIONS FOR SUMMARY JUDGMENT ON THAT AFTER DISCOVERY. IF
20 THEY AREN'T ABLE TO SHOW THAT THEY'RE CONNECTED IN ANY
21 WAY, THEN THEY'RE OUT ON THAT, AND THEN YOU GOT ONE ON
22 ONE. AND THEN YOU HAVE THE MOTION FOR CHANGE OF VENUE,
23 AND THOSE WHO AREN'T HERE, IF THE CORPORATE DEFENDANT
24 MEETS ALL THE REQUIREMENTS OF THE STATUTE, THEY'D GO TO
25 GREENVILLE, CHARLESTON, BIG O, OR WHATEVER YOU'RE TALKING

1 ABOUT OR WHEREVER YOU'D GO.

2 MR. MARTIN WOULD STILL HAVE HIS RIGHT TO CLAIM
3 ATTORNEY'S FEES AND COSTS. I THINK I AM TRYING TO PROTECT
4 EVERYBODY, BUT THAT'S SORT OF WHERE I FEEL LIKE IT NEEDS
5 TO GO.

6 MR. BECKER: OKAY.

7 THE COURT: THAT GIVES YOU THE RIGHT TO GO TO
8 COLUMBIA ON YOUR RULE 23 WHETHER OR NOT THAT STATUTE GIVES
9 YOU A SUBSTANTIVE RIGHT VERSUS PROCEDURAL OR NEGATES YOUR
10 ARGUMENT ON STANDING GOING TO COLUMBIA BECAUSE I PRETTY
11 MUCH AGREED WITH YOU ON THAT EXCEPT FOR THE CONSPIRACY.

12 MR. BECKER: THE ONLY THING THAT I'M THINKING THAT IT
13 MIGHT BE -- SERVE THE INTEREST OF JUDICIAL ECONOMY THEN TO
14 HAVE YOU ALSO CONSIDER A RULE ON WOULD BE VENUE, BUT
15 THAT'S SOMETHING I'LL NEED TO DISCUSS WITH ALL THE OTHER
16 DEFENSE COUNSEL AND WE CAN COME BACK TO YOU. IF WE DO ASK
17 YOU TO ADDRESS THAT, WE COULD PROBABLY DO IT JUST ON
18 BRIEFS.

19 THE COURT: WELL, WHAT IF I GRANT YOUR MOTION TO
20 CHANGE VENUE? THEN DOES THAT LEAD THE DISCOVERY AND ALL
21 THE PROCEDURAL STUFF HERE OR DOES IT SEND IT -- DO WE HAVE
22 CASES IN SEVEN DIFFERENT COUNTIES AND HAVE SEVEN DIFFERENT
23 JUDGES LOOKING AT IT? OR WOULD YOU -- WOULD Y'ALL ASK THE
24 SUPREME COURT FOR GUIDANCE ON THAT?

25 MR. BECKER: I THINK THAT'S WHAT WE'D BE DOING IS

1 WHETHER -- IN MY VIEW THE ISSUE IS WHETHER IMPROPER
2 JOINDER AND IMPROPER VENUE ARE THRESHOLD ISSUES THAT
3 REQUIRE DISMISSAL VERSUS SOME OTHER --

4 THE COURT: OKAY.

5 MR. BECKER: -- RESOLUTION.

6 THE COURT: WELL, I THINK I'VE SHARED WITH YOU MY
7 THOUGHTS RIGHT NOW. I AM NOT RULING RIGHT NOW. IF YOU
8 WANT TO LOOK AT THOSE OTHER ISSUES, WE CAN HAVE A
9 CONFERENCE CALL. WE CAN DO IT HOWEVER YOU WANT TO. IF
10 YOU WANT TO GO AHEAD AND HEAR THOSE SO YOU CAN TAKE THAT
11 TO COLUMBIA AS WELL. OBVIOUSLY, THOUGH, IF YOU COME IN
12 HERE AND TELL ME THAT THE BIG O GUYS FROM SPARTANBURG OR
13 GREENVILLE, I WILL LEAVE IT HERE, BUT WE ALSO HAVE THAT
14 INITIAL ORDER THAT EVERYBODY HAS NOT AGREED TO BUT WAS
15 SIGNED TO DO ALL OF THE DISCOVERY AND PROCEDURAL MOTIONS
16 AND DISPOSITIVE MOTIONS AND THEN ADDRESS VENUE AT THAT
17 TIME. I DON'T KNOW HOW YOU GET AROUND THAT. I AM JUST
18 TALKING OUT LOUD.

19 MR. BECKER: RIGHT.

20 THE COURT: I AM JUST THINKING OUT LOUD.

21 MR. BECKER: WE'LL NEED TO LOOK BACK AT THAT ORDER
22 AND WE'LL NEED TO EXPLORE WHAT OTHER ISSUES MIGHT BE
23 APPROPRIATE FOR RESOLUTION NOW, AND, OF COURSE, WE DON'T
24 KNOW IF THE SUPREME COURT WILL EVEN ACCEPT AN APPEAL IF WE
25 DO IT, BUT --

1 THE COURT: I DON'T EITHER.

2 MR. BECKER: AND SO --

3 THE COURT: BUT ONCE YOU FILE OF APPEAL, DOES THAT
4 DIVEST ME OF JURISDICTION? I THINK IT DOES --

5 MR. BECKER: YES.

6 THE COURT: -- UNTIL THEY SEND IT BACK TO ME.

7 MR. BECKER: RIGHT.

8 THE COURT: AND, ALSO, I THINK UNLESS YOU APPEAL IT
9 THAT IF I RULE LIKE I'M THINKING OUT LOUD I WANT THE
10 DISCOVERY TO GO AHEAD AND START ON THOSE SEVEN CASES. I
11 THINK IT'S TIME TO FISH OR CUT BAIT ON THAT, BUT IF YOU
12 APPEAL IT, THEN, YOU KNOW --

13 MR. BECKER: RIGHT.

14 THE COURT: -- IT GETS IT OUT OF MY HAIR FOR A LITTLE
15 WHILE ANYWAY.

16 MR. BECKER: THAT'S RIGHT. OKAY.

17 THE COURT: YOU UNDERSTAND.

18 MR. BECKER: I DO UNDERSTAND.

19 THE COURT: OF COURSE, ON THE OTHER TWO CASES OF THE
20 BIG CASE AND THE THREE-PARTY CASE, ADAMS AND --

21 MR. BECKER: WEST-COX.

22 THE COURT: I JUST THINK WE NEED TO GET ALL OF THIS
23 RESOLVED BEFORE WE GO INTO ALL OF THOSE UNLESS ANYBODY HAS
24 SIGNIFICANT PROBLEMS WITH THAT.

25 MR. BECKER: I THINK THEY'VE OFFERED TO STAY AND

1 WE'VE SUGGESTED THAT WOULD BE APPROPRIATE. SO, THAT'S --
2 I THINK THAT WOULD BE APPROPRIATE.

3 THE COURT: SURE.

4 MR. BECKER: ESPECIALLY IF THE HERRON --

5 THE COURT: THAT KEEPS IT SIMPLE.

6 MR. BECKER: -- GOES UP ON APPEAL.

7 THE COURT: ALL RIGHT. ANYTHING ELSE ON THAT ISSUE?
8 IF YOU DON'T MIND, I WOULD LIKE TO BE ABLE TO CALL YOU AND
9 MR. HAMM AND MR. MARTIN, MR. LEWIS, WHOEVER ELSE YOU WANT
10 ON YOUR SIDE, WITH A CONFERENCE CALL IN THE NEXT WEEK OR
11 10 DAYS AND I CAN GIVE YOU MY VERBAL WHAT I AM GOING TO
12 DO.

13 MR. BECKER: THAT WILL BE FINE.

14 MR. HAMM: THAT WILL BE FINE, YOUR HONOR.

15 THE COURT: NOW, WE -- I'M SORRY. GO AHEAD.

16 MR. VANGRACK: I WANTED TO ARGUE THE MOTION TO COMPEL
17 ARBITRATION ON BEHALF OF CENTURY BMW.

18 THE COURT: I WAS GETTING READY TO DO THAT, BUT MY
19 COURT REPORTER MIGHT NEED A LITTLE BREAK.

20 YOU OKAY?

21 THE COURT REPORTER: DEPENDS ON HOW LONG HE IS.

22 THE COURT: IT'S NOT GOING TO BE NEARLY AS LONG AS
23 THE LAST ONE. IT'S 12:30. DO YOU WANT TO GO AHEAD AND DO
24 THEM THIS MORNING?

25 MR. VANGRACK: YES. WE PREFER TO GO AHEAD AND DO IT,

1 YOUR HONOR.

2 THE COURT: EVERYBODY READY TO GO? MRS. ROSEN, MR.
3 GRIMBALL? YOU HAD SOME COUNTERCLAIMS THAT --

4 MR. GRIMBALL: I DID, BUT IF THAT CASE IS GOING TO BE
5 STAYED THAT WOULD STOP IT AT THE MOMENT, AND I ASSUME
6 THAT'S WHAT IS GOING TO HAPPEN.

7 THE COURT: IT IS. AND BEING SO CONGENIAL, I WON'T
8 HOLD YOU IN CONTEMPT FOR YOUR PHONE GOING OFF.

9 MR. GRIMBALL: IT ACTUALLY WAS FOR YOU.

10 THE COURT: YOU SHOULDN'T TELL THE JUDGE A LIE.
11 OKAY. IF EVERYBODY IS AGREEABLE, WE'LL GO AHEAD AND HEAR
12 THE MOTION TO COMPEL ARBITRATION.

13 MR. GRIMBALL: MAY I ASK WHAT CASE HE'S IN, YOUR
14 HONOR?

15 THE COURT: HERRON?

16 MR. GRIMBALL: THANK YOU.

17 THE COURT: HOLD ON A SECOND. IT IS CENTURY BMW?

18 MR. VANGRACK: THAT'S CORRECT, YOUR HONOR.

19 THE COURT: NOW, BEFORE YOU START, IDENTIFY YOURSELF
20 FOR THE RECORD.

21 MR. VANGRACK: RYAN VANGRACK. I AM HERE PRO HAC VICE
22 APPLICATION. STEVE HAMM IS OUR LOCAL COUNSEL.

23 THE COURT: WHERE DO YOU PRACTICE?

24 MR. VANGRACK: WASHINGTON, D.C.

25 THE COURT: NICE TO HAVE YOU WITH US.

1 MR. VANGRACK: THANK YOU, YOUR HONOR.

2 THE COURT: WOULD YOU SPELL YOUR LAST NAME FOR ME?

3 MR. VANGRACK: SURE. IT'S V AS IN VICTOR,
4 A-N-G-R-A-C-K. NO SPACE BETWEEN THE N AND THE G.

5 THE COURT: VANGRACK. IS THAT HOW YOU SAY IT?

6 MR. VANGRACK: YES, SIR.

7 THE COURT: ALL RIGHT. MR. VANGRACK, I HAVE READ THE
8 MEMORANDUM, THE SUPPLEMENTAL MEMORANDUM THAT HAS BEEN
9 FILED. I HAVE READ, OBVIOUSLY, SIMPSOM VERSUS MYRTLE
10 BEACH. I HAVE READ THE ARBITRATION AGREEMENT. I HAVE
11 READ PLAINTIFF'S ORIGINAL MEMORANDUM AND THEIR
12 SUPPLEMENTAL MEMORANDUM AS WELL AS THEIR ATTACHMENTS
13 INCLUDING THE AFFIDAVIT OF --

14 MR. VANGRACK: CHRISTINE WATTS, YOUR HONOR.

15 THE COURT: THE LADY'S NAME, WHATEVER HER NAME IS.
16 AND I'VE READ SOME OF THEIR ATTACHMENTS OTHER THAN THE
17 AFFIDAVIT. SO, I'LL BE GLAD TO HEAR FROM YOU.

18 MR. VANGRACK: THANK YOU, YOUR HONOR. I WANT TO
19 FIRST JUST IDENTIFY --

20 THE COURT: WELL, LET ME -- BEFORE YOU -- I HAD A
21 NOTE HERE TO ASK YOU, I'LL BE GLAD TO HEAR IT BASED ON
22 WHAT I'VE GOT. IF YOU THINK THAT YOU NEED LIMITED
23 DISCOVERY ON THE ARBITRATION ISSUE, I'LL GIVE YOU 30 DAYS
24 OR 45 DAYS TO DO THAT IF YOU WANT IT.

25 MR. VANGRACK: WELL, YOUR HONOR, NOT SO MUCH AS I

1 WOULD ADDRESS IT AS LIMITED DISCOVERY ON ARBITRATION
2 ISSUE. WE WOULD REQUEST HAVING JUST RECEIVED THIS
3 AFFIDAVIT TWO DAYS BEFORE THE HEARING THE LIMITED
4 OPPORTUNITY TO DEPOSE CHRISTINE WATTS.

5 THE COURT: IF YOU WANT THAT OPPORTUNITY, I'LL GIVE
6 IT TO YOU.

7 MR. VANGRACK: FOR THE VERY LIMITED PURPOSE OF ASKING
8 HER QUESTIONS REGARDING THE CIRCUMSTANCES SURROUNDING HER
9 ARBITRATION AGREEMENT.

10 THE COURT: WELL, DO YOU WANT TO MAKE YOUR ARGUMENT
11 SINCE WE'RE ALL HERE TODAY AND I'LL GIVE YOU THAT RIGHT TO
12 TAKE HER DEPOSITION STRICTLY LIMITED TO THE ARBITRATION
13 AGREEMENT?

14 MR. VANGRACK: AND, YOUR HONOR, I WOULD ALSO REQUEST
15 THAT IN THAT BOTH CHRISTINE WATTS AND MICHAEL WATTS, I
16 BELIEVE HER FATHER, WAS A PART OF THAT AGREEMENT. SO, WE
17 WOULD REQUEST AGAIN TO BE ABLE TO DEPOSE BOTH OF THEM ON
18 THAT VERY LIMITED ISSUE.

19 THE COURT: ANY OBJECTION TO THAT?

20 MR. LEWIS: AS LONG AS WE GET THE ABILITY TO DEPOSE
21 THE GENERAL MANAGER OF THE DEALERSHIP OR WHOEVER IS AT THE
22 DEALERSHIP.

23 THE COURT: AS TO THE ARBITRATION AGREEMENT?

24 MR. LEWIS: YES.

25 THE COURT: TIT FOR TAT?

1 MR. VANGRACK: WELL, YOUR HONOR, I DON'T KNOW I WOULD
2 IDENTIFY IT TIT FOR TAT. THERE'S ONLY BEEN AN AFFIDAVIT
3 SUBMITTED ON BEHALF OF --

4 THE COURT: NO, SIR. I AM HERE TO GIVE YOU THE
5 OPPORTUNITY TO TAKE THE DEPOSITION OF THE PERSON WHO
6 BOUGHT THE CAR AND HER DAD LIKE YOU WANT FOR THE LIMITED
7 PURPOSE OF TALKING ABOUT THE ARBITRATION AGREEMENT. I
8 CAN'T LET YOU DO THAT WITHOUT LETTING THE PLAINTIFF TAKE
9 LIKE A 30(B)(6) OF WHOEVER OF THE DEALERSHIP WHO DEALT
10 WITH THE ARBITRATION. WHAT'S GOOD FOR THE GOOSE IS GOOD
11 FOR THE GANDER. I'LL LET YOU MAKE THAT CHOICE --

12 MR. VANGRACK: FOR --

13 THE COURT: AND I'LL TELL YOU WHAT. I'LL LET YOU
14 MAKE IT AT THE END OF THE ARGUMENT. HOW ABOUT THAT?

15 MR. VANGRACK: MAKE THE CHOICE AT THE END OF THE
16 ARGUMENT?

17 THE COURT: OR NOW. WHENEVER YOU WANT TO.

18 MR. VANGRACK: WELL, I WOULD JUST, FOR THE RECORD, I
19 WOULD LET YOU KNOW THAT IT'S THE PLAINTIFF'S BURDEN TO
20 ESTABLISH UNCONSCIONABILITY. SO, WE DON'T HAVE ANY BURDEN
21 TO MAKE ANY SORT OF AFFIRMATIVE STANCE REGARDING -- ONLY
22 FOR THE RECORD, YOUR HONOR, AND, SO, THERE APPEARS TO BE
23 NO NEED BECAUSE THERE IS NO NEED TO PROFFER ANY STATEMENT
24 AT THE BEGINNING FROM --

25 THE COURT: VERY WELL.

1 MR. VANGRACK: -- FROM CENTURY BMW.

2 THE COURT: GO ALONG WITH YOUR ARGUMENT.

3 MR. VANGRACK: THANK YOU, VERY MUCH, YOUR HONOR. I
4 WANT TO FIRST CLARIFY WHAT'S NOT BEFORE THIS COURT. THERE
5 IS NO DISPUTE THAT CHRISTINE WATTS SIGNED THE ARBITRATION
6 AGREEMENT. THERE IS NO DISPUTE THAT THE FEDERAL
7 ARBITRATION AGREEMENT OR ACT -- EXCUSE ME -- APPLIES TO
8 HER AGREEMENT. THERE IS NO DISPUTE THAT HER CLAIMS FALL
9 WITHIN THE SCOPE OF THE AGREEMENT.

10 THE SOLE ISSUE HERE IS WHETHER THE PLAINTIFFS HAVE
11 DEMONSTRATED THAT THE AGREEMENT IS UNCONSCIONABLE. NOW,
12 THE U.S. SUPREME COURT HAS HELD THAT ARBITRATION IS AN
13 ATTRACTIVE METHOD OF RESOLUTION BECAUSE OF IT'S
14 SIMPLICITY, IT'S INFORMALITY, IT'S EXPEDIENCE, AND WHAT'S
15 HAPPENED WITH MS. WATT'S CLAIM IS A PERFECT EXAMPLE OF THE
16 VIRTUE OF ARBITRATION. HAD SHE PURSUED ARBITRATION
17 PURSUANT TO HER AGREEMENT BACK IN 2006, IT IS ALMOST
18 CERTAIN HER CLAIM WOULD HAVE BEEN RESOLVED BY NOW WITH
19 CENTURY BMW. INSTEAD, SHE'S LOCKED INTO THIS -- STUCK IN
20 THIS CASE WITH HUNDREDS OF DEALERSHIPS, HUNDREDS OF
21 PLAINTIFFS, HUNDREDS OF THOUSANDS OF TRANSACTIONS, DOZENS
22 OF ATTORNEYS.

23 SO, THIS IS A PERFECT EXAMPLE OF WHY AND HOW
24 ARBITRATION CAN BE USEFUL, WHY THE U.S. SUPREME COURT AND
25 SOUTH CAROLINA VIEWS IT --

1 THE COURT: WELL, IT IS USEFUL AS LONG AS THE
2 AGREEMENT COMPLIES WITH THE CASELAW OF THE STATE.

3 MR. VANGRACK: ABSOLUTELY, YOUR HONOR. ALL I WOULD
4 LIKE TO SAY THAT ARBITRATION CAN'T BE VIEWED AS A BAD
5 THING. IT'S NOT SUPPOSED TO BE VIEWED WITH SKEPTICISM.

6 THE COURT: I CERTAINLY DON'T VIEW IT AS A BAD THING.

7 MR. VANGRACK: ABSOLUTELY, YOUR HONOR. ALONG WITH
8 THOSE SAME LINES TO THE EXTENT THAT THERE IS ANY
9 CONFUSION, ARBITRATION CAN'T BE VIEWED AS A LESS
10 BENEFICIAL FORM OF DISPUTE RESOLUTION. IT'S SUPPOSED TO
11 BE ON EQUAL FOOTING WITH THE JUDICIAL FORUM, AND THE U.S.
12 SUPREME COURT HAS REPEATEDLY ENFORCED ARBITRATION
13 AGREEMENTS WHERE THE UNDERLYING PURPOSE OF THE STATUTE IS
14 TO PROTECT THE CONSUMERS OR TO PROMOTE SOME SORT OF SOCIAL
15 POLICY. EVEN IN CIRCUMSTANCES WHERE A PARTY COULD NOT
16 PURSUE A CLASS ACTION WHICH I'LL GET TO IN THE GREENTREE
17 VERSUS BAZZLE CASE WHICH WENT UP TO THE U.S. SUPREME COURT
18 AND ADDRESSED THE SOUTH CAROLINA CONSUMER PROTECTION
19 CODE -- EVEN THOUGH CLASS ACTIONS MIGHT NOT HAVE BEEN
20 ALLOWED IN ARBITRATION, THE U.S. SUPREME COURT HAD NO
21 PROBLEM WITH THAT GOING INTO ARBITRATION, BUT I WILL GET
22 BACK TO THAT.

23 I WANT TO QUICKLY JUST GO OVER THE CONTENTS OF THE
24 AGREEMENT. I KNOW YOU SAID YOU VIEWED IT. I HAVE A COPY
25 IN CASE --

1 THE COURT: NO, SIR. I GOT IT RIGHT HERE.

2 MR. VANGRACK: DO YOU HAVE ONE?

3 THE COURT: I DO. I REVIEWED IT. SO I HAVE TO HAVE
4 IT.

5 MR. VANGRACK: THIS IS A CONSUMER FRIENDLY AGREEMENT,
6 YOUR HONOR.

7 THE COURT: CONSUMER FRIENDLY?

8 MR. VANGRACK: CONSUMER FRIENDLY AGREEMENT. NOW, IN
9 PLAINTIFF'S OPPOSITION MEMO THEY LABEL --

10 THE COURT: I DON'T THINK -- THAT IS DISPUTED, WOULD
11 YOU AGREE?

12 MR. VANGRACK: OH, THAT IS DISPUTED. ABSOLUTELY,
13 YOUR HONOR, BUT EVEN IN THEIR OPPOSITION MEMO THEY
14 IDENTIFIED VARIOUS THEY CALL IT OPPRESSIVE TERMS OR
15 ONE-SIDED TERMS. THE ONLY TERM THAT THEY LABEL AS
16 OPPRESSIVE OR ONE-SIDED IS THE CLASS ACTION WAIVER. THERE
17 IS NO OBJECTION. THERE IS NO ALLEGATION THAT ANYTHING
18 ELSE IN THIS ARBITRATION AGREEMENT IS OPPRESSIVE OR
19 ONE-SIDED. THAT IS NOT IN DISPUTE. WHEN I CALLED IT
20 CONSUMER FRIENDLY, THEY DON'T OBJECT TO THESE TERMS
21 BECAUSE THERE ARE MANY CONSUMER FRIENDLY TERMS.

22 CONSUMER HAS THE OPTION -- IF YOU LOOK AT THE SECOND
23 PARAGRAPH, THE LAST SENTENCE -- TO CONDUCT THE HEARING AT
24 THEIR OPTION IN THE DISTRICT WHERE THEY RESIDE OR WHERE
25 THE DEALERSHIP IS. THE THIRD PARAGRAPH, FIRST SENTENCE,

1 THE PARTY HAS THE RIGHT TO REQUEST ARBITRATION -- TO WAIVE
2 THEIR REQUEST TO ARBITRATE IF THEY DECIDE TO PURSUE A
3 CLAIM IN SMALL CLAIMS COURT. PARAGRAPH SIX, FIRST
4 SENTENCE, THE DEALER AGREES TO PAY THE PORTION OF THE
5 INITIAL FILING FEE WHICH EXCEEDS THE LESSER OF THE COURT
6 FILING FEE FOR THE STATE OR FEDERAL COURT.

7 ADDITIONALLY, THIS AGREEMENT IS SUBJECT TO THE RULES
8 OF THE AMERICAN ARBITRATION ASSOCIATION, AND UNDER THOSE
9 RULES THE DEALER IS REQUIRED TO PAY ALL ARBITRATOR FEES TO
10 THE EXTENT IT EXCEEDS \$125.

11 YOUR HONOR, I HAVE A COPY OF THOSE RULES IF YOU WOULD
12 LIKE TO SEE THEM.

13 THE COURT: YOU CAN MAKE THEM A PART OF THE RECORD.
14 HOW ABOUT THAT?

15 MR. VANGRACK: THANK YOU, YOUR HONOR. SO, THE
16 DEALERSHIP IS REQUIRED TO PAY ALMOST ALL THE ARBITRATOR
17 FEES. ADDITIONALLY, THE DEALER AGREES TO PAY ANY FEES OR
18 COSTS THAT THE ARBITRATOR AWARDS THAT ARE IN ACCORDANCE
19 WITH THE APPLICABLE LAW, AND THEN, FINALLY, AND THIS IS
20 CRITICAL IN THIS MOTION TO COMPEL, THE AGREEMENT EXPRESSLY
21 DOES NOT LIMIT THE REMEDIES AVAILABLE FOR MS. WATTS. AN
22 ARBITRATOR HAS AUTHORITY TO AWARD FEES, COSTS, INJUNCTIVE
23 OR EQUITABLE RELIEF, AND CAN AWARD ANY DAMAGES ALLOWED BY
24 THE APPLICABLE LAW.

25 THAT BEING SAID, I WANT TO KIND OF TOUCH BASE ON THE

1 SIMPSON CASE WHICH YOUR HONOR KNOWS IS WHY WE, I BELIEVE,
2 POSTPONED THIS HEARING ORIGINALLY. THAT'S WHY THERE WAS A
3 SUPPLEMENTAL MEMO BECAUSE THE SIMPSON CASE IS CRITICAL.
4 THE SIMPSON CASE INTERPRETED THE ARBITRATION AGREEMENT IN
5 THE CONTEXT OF THE DEALER ACT, NO LESS. IT GAVE US A
6 GREAT ROAD MAP WHEN DECIDING AND INTERPRETING AN AGREEMENT
7 TO DETERMINE IF IT'S UNCONSCIONABLE.

8 THE COURT: AND IT'S CERTAINLY INTERESTING HOW YOU
9 AND MR. LEWIS READ THAT ROAD MAP ENTIRELY DIFFERENT.

10 MR. VANGRACK: ABSOLUTELY. AND I AM HERE TO
11 ENLIGHTEN YOU AS TO WHY OUR READING IS THE SOLE READING --

12 THE COURT: THANK YOU.

13 MR. VANGRACK: -- FOR THE SIMPSON CASE. THERE IS NO
14 DISPUTE, CERTAINLY, THAT SIMPSON LAYS OUT TWO PARTS, TWO
15 PRONGS THAT THE PARTY MUST MEET. THERE IS THE LACK OF
16 MEANINGFUL CHOICE AND WHETHER THEY'RE OPPRESSIVE ONE-SIDED
17 TERMS. IN SIMPSON THERE ARE FIVE CIRCUMSTANCES THAT HAD
18 TO BE ESTABLISHED IN ORDER TO MEET A LACK OF MEANINGFUL
19 CHOICE. IT IS A CONTRACT OF ADHESION, PRIMARY FORM OF
20 TRANSPORTATION, LACK OF BUSINESS JUDGMENT, HASTILY
21 PRESENTED, AND MOST IMPORTANTLY IT WAS INCONSPICUOUS
22 AGREEMENT.

23 HERE NONE OF THOSE FIVE CIRCUMSTANCES ARE PRESENT.
24 IT'S NOT A CONTRACT OF ADHESION. IT'S NOT CLEAR IT'S HER
25 PRIMARY FORM OF TRANSPORTATION, NOT CLEAR SHE LACKED

1 BUSINESS JUDGMENT, NOT CLEAR IT WAS HASTILY PRESENTED, AND
2 COMPARED TO THE SIMPSON CLAUSE, THIS IS NOT AN
3 INCONSPICUOUS AGREEMENT. THE SIMPSON CLAUSE, IF YOU
4 RECALL, YOUR HONOR, WAS ON THE BACK OF A BUYER'S ORDER
5 EMBEDDED IN 16 OTHER CLAUSES. THIS IS A STAND-ALONE
6 AGREEMENT THAT REQUIRES HER INDEPENDENT SIGNATURE. IT'S
7 LABELED ARBITRATION AGREEMENT. SEVERAL TIMES IT DESCRIBES
8 INCLUDING IN ALL CAPITALS THAT YOU GIVE UP YOUR RIGHT TO A
9 TRIAL BY THE COURT OR BY A JURY, AND EVEN AT THE END IN
10 BOLD IT SAYS THAT THE PARTIES ACKNOWLEDGE THEY HAVE READ
11 AND AGREED TO THE TERMS OF THE ARBITRATION AGREEMENT.

12 SO, COMPARED TO THE SIMPSON CLAUSE, I THINK IT'S EVEN
13 -- IT WOULD BE A STRETCH TO SAY THIS IS INCONSPICUOUS,
14 BUT, NOW, I KNOW THIS AFFIDAVIT -- WE TALKED ABOUT THIS,
15 YOUR HONOR. THIS WAS AN AFFIDAVIT THAT WAS JUST ENTERED
16 TWO DAYS AGO. IT WAS SIGNED EIGHT MONTHS AGO, BUT IT WAS
17 JUST PRESENTED TO US TWO DAYS AGO. SO, THE AFFIDAVIT I
18 BELIEVE MR. LEWIS CAN ATTEST TO IS TRYING TO ESTABLISH
19 SOME OF THESE LACK OF MEANINGFUL CHOICE FACTORS, AND WE'LL
20 BE ABLE TO FLUSH THOSE OUT IN LIMITED DISCOVERY AS WE
21 SAID. SO, I'LL SKIP OVER THAT.

22 THE COURT: IF YOU ALLOW YOUR GUY TO BE DEPOSED.

23 MR. VANGRACK: FAIR ENOUGH, YOUR HONOR.

24 THE COURT: GO AHEAD.

25 MR. VANGRACK: BUT SKIPPING OVER THAT ISSUE FOR THE

1 MOMENT, AND, AGAIN, IF WE DON'T GET OVER THAT HURDLE -- IF
2 THEY HAVEN'T ESTABLISHED SHE LACKED MEANINGFUL CHOICE, WE
3 DON'T EVEN GET TO THE OPPRESSIVE TERMS. THEY MUST BE
4 BOTH. SO, IF SHE DIDN'T LACK MEANINGFUL CHOICE, IT DOESN'T
5 MATTER WHAT THE TERMS ARE IN TERMS OF UNCONSCIONABILITY.

6 NOW, IN TERMS OF OPPRESSIVE TERMS, THE COURT FOUND
7 THAT THERE ARE THREE TERMS IN SIMPSON OPPRESSIVE -- NONE
8 OF WHICH ARE HERE. THERE WAS A LIMITATION ON STATUTORY
9 REMEDIES, DOUBLE TREBLE OF PUNITIVE DAMAGES WERE
10 PROHIBITED EVEN THOUGH THEY WERE REQUIRED BY THE STATUTES.
11 THE DEALERS REMEDIES WEREN'T STAYED. THEY COULD PURSUE
12 ACTIONS IN COURT WHILE THE CONSUMER WAS STUCK IN
13 ARBITRATION, AND THERE WAS A VIOLATION OF THE MAGNETS AND
14 MOSS WARRANTY ACT. ALTHOUGH, THERE WAS NO ALLEGATION OF
15 WARRANTY, THE COURT STILL FOUND THAT THE PARTIES SIMPLY
16 COULDN'T AGREE TO ARBITRATION A WARRANTY CLAIM -- A
17 WRITTEN WARRANTY CLAIM.

18 NONE OF THOSE TERMS ARE HERE, NOR HAS MS. WATTS
19 IDENTIFIED THAT ANY OF THOSE TERMS ARE HERE. THERE IS NO
20 LIMITATION ON THE REMEDIES AVAILABLE TO MS. WATTS. NO
21 REMEDIES ARE RESERVED TO THE DEALER, AND THERE ARE NO
22 WRITTEN WARRANTIES THAT ARE ALLEGED IN THEIR COMPLAINT.
23 BUT SIMPSON IS EVEN MORE CRITICAL FOR WHAT THE COURT DID
24 NOT FIND. THE SIMPSON CLAUSE HAD A CLASS ACTION WAIVER
25 AND THE COURT DID NOT FIND THAT CLAUSE UNCONSCIONABLE. IT

1 PURPORTED TO LIST ALL THE PROVISIONS THAT IT FOUND
2 UNCONSCIONABLE. IT SCRUTINIZED OVER THIS AGREEMENT.

3 AS I JUST MENTIONED THERE WAS NO ALLEGATION ABOUT
4 WRITTEN WARRANTIES, BUT THE COURT SAID THAT YOU SIMPLY
5 CANNOT AGREE TO ARBITRATE A WRITTEN WARRANTY CLAIM. BY
6 THAT SAME LOGIC IF THE COURT BELIEVED YOU CANNOT WAIVE
7 YOUR CLASS ACTION RIGHT IN THE CONTEXT OF THE DEALERS ACT,
8 IT COULD HAVE SAID SO, BUT IT DIDN'T. IT CLEARLY STATED
9 THERE WERE ONLY THREE UNCONSCIONABLE PROVISIONS -- NONE OF
10 WHICH WITH THE CLASS ACTION WAIVER. BY DOING SO THE SOUTH
11 CAROLINA SUPREME COURT ALIGNED ITSELF WITH THE U.S.
12 SUPREME COURT AND CASES ACROSS THE COUNTRY.

13 IN THE CASE OF GREENTREE VERSUS BAZZLE THE U.S.
14 SUPREME COURT IMPLICITLY UPHELD THE VALIDITY OF THE CLASS
15 ACTION WAIVER. THIS WAS IN THE CONTEXT OF A SOUTH
16 CAROLINA CONSUMER PROTECTION CODE. THE GREENTREE COURT
17 HELD THAT AN ARBITRATOR MUST DECIDE WHETHER THE
18 ARBITRATION AGREEMENT PRECLUDED CLASS ACTIONS. BY
19 ALLOWING AN ARBITRATOR TO DECIDE IF THE AGREEMENT
20 PRECLUDED CLASS ACTIONS THEY RECOGNIZED THAT IT IS
21 PERMISSIBLE TO PRECLUDE CLASS ACTIONS. OTHERWISE, THERE
22 WOULD HAVE BEEN NOTHING FOR THE ARBITRATOR TO DECIDE IN
23 THE FIRST PLACE, AND THERE ARE OTHER CASES THROUGHOUT THE
24 COUNTRY THAT HAVE SIMILARLY UPHELD A CLASS ACTION WAIVER.

25 I AM JUST GOING TO GO OVER TWO OF THEM VERY BRIEFLY

1 BECAUSE THEY'RE APPLICABLE HERE. THE FOURTH CIRCUIT COURT
2 OF APPEALS IN SNOWDEN VERSUS CHECKPOINT CASHING ALSO
3 ENFORCED A CLASS ACTION WAIVER. THAT WAS IN THE CONTEXT
4 OF THE MARYLAND CONSUMER PROTECTION CODE AND THE TRUTH IN
5 LENDING ACT. IN THAT CASE THE FOURTH CIRCUIT REJECTED
6 PLAINTIFF'S EXACT ARGUMENT HERE THAT A PLAINTIFF WITH
7 NOMINAL DAMAGES CAN'T MAINTAIN LEGAL REPRESENTATION
8 WITHOUT THE CLASS ACTION RIGHT. THE COURT THERE FOUND AS
9 HAS BEEN FOUND IN CASES ACROSS THE COUNTRY THAT IT IS
10 SUFFICIENT THAT ATTORNEYS' FEES WERE RECOVERABLE IN
11 ARBITRATION. THE COURT IN THAT CASE ALSO REJECTED THE
12 IDEA THAT A CLASS ACTION WAIVER VIOLATES THE PUBLIC POLICY
13 BEHIND A CONSUMER PROTECTION STATUTE.

14 AGAIN, IT WAS INTERPRETING THE MARYLAND CONSUMER
15 PROTECTION STATUTE. IT SAID THAT SUCH LOGIC FAILS TO PUT
16 ARBITRATION ON EQUAL FOOTING WITH THE COURT BECAUSE WHAT
17 IT FOUND SO SIGNIFICANT IS THAT THERE WERE NO REMEDIES
18 LIMITED TO THE INDIVIDUAL BRINGING THEIR CLAIM AND THERE
19 WAS NO EVIDENCE THAT PURSUING A CLAIM UNDER THE CONSUMER
20 PROTECTION ACT AS AN INDIVIDUAL WAS INCONSISTENT WITH THE
21 PURPOSE OF CONSUMER PROTECTION.

22 I BRING UP THE FOURTH CIRCUIT CASE NOT JUST BECAUSE
23 IT COUNTERS THE EXACT ARGUMENT AND PLANS WE'RE MAKING, BUT
24 ALSO TO NOTE THE IDEA THAT WERE THIS COURT TO FIND THAT
25 CLASS ACTION WAIVER IS INVALID FOR THOSE VERY REASONS YOU

1 WOULD END UP HAVING DIFFERENT RESULTS IN THE STATE OF
2 SOUTH CAROLINA BASED UPON WHETHER YOU DECIDE TO ENFORCE
3 YOUR AGREEMENT IN A FEDERAL COURT OR STATE COURT.

4 ADDITIONALLY, IN TILLMAN VERSUS COMMERCIAL CREDIT
5 LOANS THE NORTH CAROLINA COURT OF APPEALS ALSO UPHELD A
6 CLASS ACTION WAIVER AND, AGAIN, REJECTED PLAINTIFFS' EXACT
7 ARGUMENTS HERE THAT ATTORNEYS LACK THE INCENTIVE TO BRING
8 A CLAIM -- A NOMINAL CLAIM -- WITHOUT THE CLASS ACTION.
9 MECHANISM. AGAIN, THE COURT THERE FOUND THAT SINCE
10 ATTORNEYS' FEES AND COSTS WERE RECOVERABLE, ATTORNEYS HAD
11 SUFFICIENT INCENTIVES TO BRING SUCH CLAIMS.

12 NOW, I JOKE THAT MAYBE THOSE INCENTIVES AREN'T ENOUGH
13 FOR MAYBE MR. LEWIS AND HIS COLLEAGUES TO REPRESENT
14 MS. WATTS INDIVIDUALLY, BUT THESE COURTS FOUND THAT AS
15 LONG AS ATTORNEYS' FEES AND COSTS WERE RECOVERABLE AND AS
16 LONG AS THERE ARE REMEDIES THEY'RE ALLOWED TO BRING WITH
17 THEM INTO ARBITRATION, THERE IS SUFFICIENT INCENTIVE FOR
18 BOTH THE CLAIMANT TO BRING THE CASE AND FOR THE ATTORNEY
19 TO REPRESENT THEM.

20 NOW, THERE'S BEEN A LOT OF DISCUSSION AS YOUR HONOR
21 JUST HEARD PERHAPS AD NAUSEUM ABOUT WHETHER 110(2)
22 SIMPLIFIED IS SUBSTANTIVE OR PROCEDURAL. THAT DOESN'T
23 MATTER HERE. HOW YOU LABEL THAT RIGHT IS IRRELEVANT TO
24 THIS DISCUSSION. THE PLAINTIFFS HAVE PROVIDED NO CASE
25 THAT YOU CAN WAIVE A PROCEDURAL RIGHT, BUT YOU CAN'T WAIVE

1 -- EXCUSE ME -- WAIVE A SUBSTANTIVE RIGHT. IN FACT, THE
2 SIMPSON COURT IN THAT DECISION SAID PARTIES ARE ALWAYS
3 FREE TO CONTRACT AWAY THEIR RIGHTS. THE CONCERN THAT
4 COURTS HAVE IS WITH REMEDIES WHETHER A LITIGANT IS
5 PROVIDING SUFFICIENT REMEDIES TO EFFECTIVELY VINDICATE
6 THEIR CLAIMS.

7 AGAIN, AS I WILL CONTINUE TO DO, LET'S GO BACK TO THE
8 SIMPSON CASE. IN THE SIMPSON CASE THEY'RE REQUIRED TO
9 FOREGO REMEDIES THAT WERE REQUIRED BY THE STATUTE.
10 SIMPSON COURT SAID YOU CAN'T DO THAT. YOU CAN'T FOREGO
11 YOUR REMEDIES. THAT VIOLATES THE STATUTE. AND THE
12 MINORITY OF COURTS THAT HAVE INVALIDATED CLASS ACTION
13 WAIVERS SOME OF WHICH PLAINTIFFS MENTIONED, IN THOSE CASES
14 AS WELL GENERALLY THE ARBITRATION AGREEMENT AT ISSUE
15 LIMITS OR REMOVES CERTAIN REMEDIES. SOMETIMES IT'S YOUR
16 ABILITY TO RECOUP ATTORNEYS' FEES AND COSTS OTHER TIMES
17 IT'S DOUBLE DAMAGES OR TREBLE DAMAGES OR PUNITIVE DAMAGES.
18 AGAIN, IN THOSE CASES THE CONCERN IS THAT BY GOING INTO
19 ARBITRATION YOU'RE LOSING YOUR ABILITY TO VINDICATE YOUR
20 CLAIM BECAUSE YOU'RE NOT BRINGING WITH YOU ALL THE
21 REMEDIES THAT YOU'RE ENTITLED TO.

22 HERE MS. WATTS IS ENTITLED IN ARBITRATION TO ALL
23 REMEDIES THAT ARE PERMITTED UNDER THE APPLICABLE LAW. WE
24 JUST READ OVER THE AGREEMENT. IT SAYS THAT QUITE
25 SUCCINCTLY. YOU'RE ENTITLED TO UNDER THE APPLICABLE LAW

1 AN AWARDS OF ATTORNEYS' FEES, COST, INJUNCTIVE, EQUITABLE
2 RELIEF. WHATEVER IS ALLOWED UNDER THE APPLICABLE LAW, YOU
3 CAN BRING THOSE REMEDIES WITH YOU INTO ARBITRATION, AND
4 ALL OF THIS, YOUR HONOR, IS TO HIGHLIGHT THE POINT THAT
5 WAIVING A RIGHT THAT'S PROVIDED IN STATUTE DOESN'T MEAN
6 THAT A PLAINTIFF HAS WAIVED THEIR REMEDIES.

7 THE DEALERS ACT PROVIDES A PARTY WITH THE RIGHT TO,
8 QUOTE, SUE IN THE COMMON PLEAS, BUT WAIVING YOUR RIGHT TO
9 SUE IN COURT DOESN'T MEAN YOU'VE WAIVED YOUR RIGHT TO YOUR
10 REMEDIES. THE SAME LOGIC IS HERE. JUST BECAUSE YOU'VE
11 WAIVED YOUR RIGHT TO A CLASS ACTION DOESN'T MEAN YOU'VE
12 WAIVED AWAY YOUR REMEDIES.

13 I WAS TRYING TO THINK OF AN ANALOGY, AND I AM JUST
14 NOT CREATIVE ENOUGH. THE BEST I CAN THINK OF WHEN YOU'RE
15 IN COURT AND YOU HAVE A DEALERS ACT CLAIM YOU GOT A BAG OF
16 REMEDIES THAT YOU CARRY WITH YOU THAT YOU COULD POSSIBLY
17 GET -- BE IT -- I KNOW THE STATUTE MENTIONS DOUBLE DAMAGES
18 OR PUNITIVE DAMAGES, THE POSSIBILITY FOR ATTORNEYS' FEES.
19 THERE IS INJUNCTIVE RELIEF, EQUITABLE RELIEF. YOU CARRY
20 THAT BAG OF REMEDIES WITH YOU. THE CONCERN IS THAT WHEN
21 YOU WALK INTO ARBITRATION YOU'RE ABLE TO BRING THAT BAG
22 WITH YOU.

23 NOW, WHEN YOU MOVE FROM THE COURT TO ARBITRATION
24 YOU'RE WAIVING CERTAIN PROCEDURES AND RIGHTS. THERE IS NO
25 DOUBT ABOUT IT. YOU'RE WAIVING YOUR RIGHT TO GO BEFORE A

1 COURT. YOU'RE WAIVING YOUR RIGHT TO HAVE A JURY TRIAL.
2 YOU'RE WAIVING VARIOUS PROCEDURES. YOU'RE WAIVING CERTAIN
3 DISCOVERY RULES. THE WAIVER OF THE RIGHT IS WHAT'S
4 SIGNIFICANT. WHAT'S SIGNIFICANT IS THAT YOU CARRY THAT
5 BAG WITH YOU, AND CLASS ACTION FALLS UNDER THAT SAME IDEA.
6 YOU'RE WAIVING THAT RIGHT TO CLASS ACTION, BUT AS LONG AS
7 YOU'RE CARRYING THAT BAG OF REMEDIES WITH YOU, YOU'RE
8 FINE.

9 IN FACT, THE SUPREME COURT HAS SAID THAT JUST BECAUSE
10 YOU WAIVE YOUR PROCEDURES AND RIGHTS -- CERTAIN PROCEDURES
11 AND RIGHTS WHEN YOU GO INTO ARBITRATION, THAT IS EXACTLY
12 WHY ARBITRATION IS A GOOD THING AS WE STARTED OUT FOR
13 BECAUSE IT'S SIMPLER, EASIER, MORE INFORMAL. IT EXPEDITES
14 THE PROCESS. SO, IT'S COMPLETELY ACCEPTABLE. IN FACT,
15 IT'S CONSISTENT WITH THE CONCEPT OF ARBITRATION TO WAIVE
16 AWAY CERTAIN RIGHTS AND PROCEDURES. THAT'S COMPLETELY
17 ACCEPTABLE AS LONG AS YOU GET TO CARRY THAT SAME BAG WITH
18 YOU.

19 NOW, PLAINTIFFS ARGUE THAT THROUGH THE ARBITRATION
20 AGREEMENT -- ACTUALLY, MORE SPECIFICALLY THROUGH THE CLASS
21 ACTION WAIVER -- THEY CAN'T VINDICATE OR THEY CAN'T
22 RECEIVE INJUNCTIVE RELIEF. WE JUST TALKED ABOUT REMEDIES.
23 THEY SAID YOU DON'T GET THAT REMEDY. WELL, THAT'S NOT
24 TRUE. ON THE FACE OF THE AGREEMENT IT SAYS QUITE CLEARLY
25 PARAGRAPH SIX THE ARBITRATOR THAT'S SIGNING THE CLAIMS

1 WILL HAVE THE AUTHORITY TO AWARD FEES, COSTS, INJUNCTIVE
2 OR EQUITABLE RELIEF.

3 ON THE FACE OF THE AGREEMENT MS. WATTS WHEN SHE WALKS
4 INTO ARBITRATION IS ENTITLED TO INJUNCTIVE RELIEF, AND
5 THAT INJUNCTIVE AND EQUITABLE RELIEF IS ENTITLED TO THE
6 SAME RESPECT AS IT WOULD IF SHE'S SUCCESSFUL IN RECEIVING
7 INJUNCTIVE OR EQUITABLE RELIEF. IT'S ENTITLED TO THE SAME
8 RESPECT IF SHE RECEIVED INJUNCTIVE OR EQUITABLE RELIEF IN
9 COURT.

10 PLAINTIFFS HAVE NOT SHOWN WHY ARBITRATION SOMEHOW IS
11 UNABLE TO FULFILL THAT REMEDY OF HERS. YOU CAN'T -- AS WE
12 STARTED OFF AGAIN, YOUR HONOR, YOU CAN'T HOLD ARBITRATION
13 WITH GENERALIZED SUSPICION. THAT'S WHAT THE FEDERAL
14 ARBITRATION ACT IS ALL ABOUT. YOU'RE SUPPOSED TO BE ON
15 EQUAL FOOTING. THE AGREEMENT SAYS SHE'S ENTITLED TO
16 INJUNCTIVE -- NOT ENTITLED, BUT THE ARBITRATOR CAN AWARD
17 INJUNCTIVE RELIEF AND SHE'S ABLE TO BRING THAT BAG WITH
18 HER INTO ARBITRATION.

19 NOW, YOUR HONOR, TO THE EXTENT THERE IS ANY
20 QUESTION -- AGAIN, AS I SAY IT'S CLEAR CUT. IT'S ON THE
21 AGREEMENT, BUT IF THERE IS A QUESTION AS TO WHETHER OR NOT
22 SHE'S ENTITLED TO INJUNCTIVE RELIEF, THAT'S A QUESTION FOR
23 THE ARBITRATOR TO DECIDE. IN GREENTREE VERSUS BAZZLE THE
24 CASE SAID THAT ONLY THRESHOLD GATEWAY ISSUES SHOULD BE
25 DECIDED FROM THE COURT. IT IS VERY LIMITED.

1 THE REASON WE'RE HERE IS BECAUSE ONE OF THOSE
2 THRESHOLD ISSUES IS THE VALIDITY OF THE AN AGREEMENT, BUT
3 IN CAROLINA CARE PLAN VERSUS UNITED HEALTHCARE SERVICES
4 SOUTH CAROLINA COURT HELD THAT QUESTIONS OF THE
5 LIMITATIONS OR AVAILABILITY OF REMEDIES SHOULD BE DECIDED
6 BY THE ARBITRATOR. IN THAT CASE I BELIEVE THERE WAS A
7 QUESTION OF WHETHER PUNITIVE DAMAGES WERE FORBIDDEN BY THE
8 AGREEMENT. THEY SAID THAT'S A QUESTION -- TO THE EXTENT
9 THAT IT'S AN ISSUE, THAT'S A QUESTION FOR THE ARBITRATOR.
10 AGAIN, I DON'T THINK THERE IS A QUESTION. THE AGREEMENT
11 ITSELF ON ITS FACE TELLS YOU THAT SHE'S ENTITLED -- EXCUSE
12 ME; I KEEP SAYING THAT -- THAT SHE HAS THE ABILITY TO
13 RECEIVE INJUNCTIVE OR EQUITABLE RELIEF AS ALLOWED BY THE
14 APPLICABLE LAW.

15 YOUR HONOR, THE U.S. SUPREME COURT HAS REJECTED THIS
16 EXACT ARGUMENT. IN 50 U.S. 20 GILMER VERSUS
17 INTERSTATE/JOHNSON LANE CORPORATION. IN THE GILMER CASE
18 PLAINTIFFS ARGUE THAT AN ARBITRATION AGREEMENT WAS INVALID
19 BECAUSE THE ARBITRATOR COULD NOT PROVIDE BROAD EQUITABLE
20 RELIEF AND CLASS ACTIONS WEREN'T ALLOWED. THE COURT
21 DISAGREED. THE COURT FOUND THAT AN ARBITRATOR IS FULLY
22 CAPABLE OF PROVIDING EQUITABLE RELIEF; THAT THE
23 ARBITRATION RULES ALLOWED THE ARBITRATOR TO PROVIDE
24 EQUITABLE RELIEF; AND THAT THE INDIVIDUAL ABILITY TO
25 RECEIVE A REMEDY OR THE REMEDIES WAS SUFFICIENT TO

1 VINDICATE THE PERSON'S CLAIMS.

2 THAT LANGUAGE IS IMPORTANT BECAUSE WHEN WE TALK ABOUT
3 CLASS ACTION WAIVERS AND WHETHER IT'S PERMISSIBLE OR NOT
4 AND WHETHER IT'S JUST SOMEHOW WAIVING SOMETHING, BUT THE
5 LANGUAGE IN THAT CASE SAID SO LONG AS A LITIGANT -- A
6 LITIGANT EFFECTIVELY MAY VINDICATE HIS OR HER STATUTORY
7 CAUSE OF ACTION IN ARBITRATION, THE STATUTE SERVES ITS
8 FUNCTION. THE COURT -- THIS IS THE U.S. SUPREME COURT --
9 WAS CONCERNED ABOUT WHETHER THE LITIGANT CAN EFFECTIVELY
10 VINDICATE HIS OR HER CAUSE OF ACTION. I KNOW I AM
11 BELABORING THIS POINT, YOUR HONOR, AND I APOLOGIZE, BUT
12 THE CONCERN IS NOT WHETHER SHE CAN VINDICATE THE CAUSES OF
13 ACTIONS OF OTHER UNNAMED PARTIES. THE FOCUS IS ON THE
14 LITIGANT, AND AS LONG AS THE INDIVIDUAL CAN BRING THEIR
15 CLAIM IN ARBITRATION AND HAS THAT BAG OF REMEDIES, THEN
16 THERE IS ABSOLUTELY NO PROBLEM WITH A CLASS ACTION WAIVER.

17 THE LAST ISSUE I WANT TO TOUCH UP ON IS THE ARGUMENT
18 THAT THEY MAKE IN THEIR OPPOSITION THAT ARBITRATION IS TOO
19 EXPENSIVE. THEIR WORDS WERE ECONOMICALLY IMPRACTICAL AS
20 SPENDING TOO MUCH TIME AND MONEY. I WOULD FIRST NOTE THAT
21 IN GREENTREE VERSUS RANDOLPH THE U.S. SUPREME COURT SAID
22 THAT THE BURDEN IS ON THE PLAINTIFFS -- ON THE OPPOSING
23 PARTY TO SHOW THAT ARBITRATION WOULD BE PROHIBITIVELY
24 EXPENSIVE. AGAIN, YOU CAN'T RELY ON GENERALIZED
25 SUSPICION. YOU MUST SHOW ON THE RECORD THAT PLAINTIFF

1 WILL BEAR CERTAIN COSTS THAT WILL MAKE IT PROHIBITIVE TO
2 BRING A CLAIM.

3 PLAINTIFFS HAVE NOT DONE SO. THEY CAN'T DO SO
4 BECAUSE, AGAIN, WE LOOK AT THE AGREEMENT. THE DEALER IS
5 REQUIRED TO PAY ALMOST ALL OF THE COSTS. SHE'S ELIGIBLE
6 OR THE POTENTIAL THAT SHE CAN RECOVER ATTORNEYS' FEES IN
7 ARBITRATION ALLOWED UNDER THE APPLICABLE LAW, AND AS I'LL
8 AGAIN BELABOR THE POINT, YOUR HONOR, ANY REMEDY AVAILABLE
9 UNDER COURT WOULD STILL BE AVAILABLE UNDER ARBITRATION.

10 LAST, YOUR HONOR, TO THE EXTENT THAT THERE IS ANY
11 DISAGREEMENT BETWEEN OUR INTERPRETATION BETWEEN MYSELF AND
12 MR. LEWIS AND BETWEEN OUR BRIEFS AND BETWEEN THE VARIOUS
13 CASES THAT WE'VE ALL THROWN AT YOU, I WOULD ASK THE COURT
14 TO FOCUS ON THOSE CASES THAT ARE DIRECTLY APPLICABLE AND
15 BINDING, AND THAT'S THE U.S. SUPREME COURT'S CASE IN
16 BAZZLE VERSUS GREENTREE AND THE SOUTH CAROLINA SUPREME
17 COURT CASE IN SIMPSON.

18 IN BAZZLE AS I'VE ALREADY SAID THE COURT IMPLICITLY
19 UPHELD A CLASS ACTION WAIVER IN A CONSUMER PROTECTION
20 STATUTE. THE ARBITRATOR COULD DECIDE IF CLASS
21 PRECLUSION -- IF THE AGREEMENT PRECLUDED CLASS ACTIONS.
22 SO, THE U.S. SUPREME COURT HAD NO PROBLEM WITH AN
23 ARBITRATION AGREEMENT PRECLUDING CLASS ACTIONS, AND,
24 AGAIN, IN THE SIMPSON CASE THE COURT HAD BEFORE IT IN THE
25 CONTEXT OF A DEALERS ACT A CLASS ACTION WAIVER AND IT DID

1 NOT FIND IT UNCONSCIONABLE.

2 AND, SO, BECAUSE THERE ARE NONE OF THE OPPRESSIVE
3 TERMS THAT THE COURT FOUND IN SIMPSON OR IN THIS
4 ARBITRATION AGREEMENT AND ALL REMEDIES THAT CHRISTINE
5 WATTS IS ENTITLED TO SHE'S ALLOWED TO BRING WITH HER INTO
6 ARBITRATION, WE WOULD REQUEST THAT THE COURT ENFORCE THIS
7 ARBITRATION AGREEMENT, DISMISS MS. WATTS' CLAIMS CURRENTLY
8 PENDING BEFORE THE COURT.

9 THE COURT: THANK YOU, MR. VANGRACK.

10 MR. VANGRACK: THANK YOU, YOUR HONOR.

11 THE COURT: MR. LEWIS, ET AL?

12 MR. LEWIS: IN THE SIMPSON CASE, YOUR HONOR, THE
13 COURT SAID SECOND UNCONDITIONALLY PERMITTING THE WEAKER
14 PARTY TO WAIVE THE STATUTORY REMEDIES PURSUANT TO AN
15 ADHESION CONTRACT RUNS CONTRARY TO THE UNDERLYING STATUTE
16 OF PUNISHING ACTS THAT ADVERSELY AFFECT THE PUBLIC
17 INTEREST. IN THIS CASE WE GO BACK TO OUR STATUTORY RIGHTS
18 UNDER THE FACT THAT WE HAVE THE RIGHT TO BRING AN ACTION
19 ON BEHALF OF OTHER PEOPLE IN ORDER TO MAKE SURE THAT THE
20 ACTS PROVISIONS -- THAT IS, 56-15-43(C) AND THE OTHERS
21 ONES THAT ARE FOUND IN 56-15-110(1), WE HAVE THE RIGHT TO
22 ENFORCE THOSE AS A REMEDY FOR THEIR ACTIONS -- A REMEDY
23 FOR THEIR ACTIONS.

24 BUT HE IS RIGHT. THERE ARE TWO TESTS. ABSENCE OF
25 MEANINGFUL CHOICE AND I THINK THE THING THAT WE DID TO TRY

1 TO COMPARE SIMPSON WHICH IS THE CONTROLLING CASE TO THIS
2 CASE IS WE WENT DOWN AND WE LOOKED AT THE FACTS OF SIMPSON
3 VERSUS THE FACTS OF THIS CASE. SAME AS SIMPSON, SAME
4 FACTS, STANDARD FORM CONTRACT. I DON'T KNOW WHERE HE GOT
5 HIS INFORMATION, BUT THE STATUTE -- I MEAN, THE AFFIDAVIT,
6 THE VEHICLE WAS FOR PRIMARY SOURCE OF TRANSPORTATION. SHE
7 DIDN'T UNDERSTAND THE IMPLICATIONS OF THE ARBITRATION
8 AGREEMENT, DID NOT HAVE A LAWYER PRESENT, HASTILY
9 PRESENTED THE AGREEMENT TO HER FOR SIGNATURE. WE'VE
10 ALREADY SAID IT TAKES AWAY THE STATUTORY RIGHTS UNDER THE
11 DEALER ACT; THAT IF YOU READ IT YOU HAVE -- TO READ IT YOU
12 HAVE TO GET IT RIGHT UP TO YOUR NOSE TO READ IT. IT IS
13 VERY SMALL FONT; DRAFTED BY A SUPERIOR PARTY THAT TAKES
14 TAKES AWAY RIGHTS OTHERWISE AVAILABLE BY LAW AND SHE'S NOT
15 A SOPHISTICATED BUSINESS PERSON SO THAT THE ARRANGEMENT
16 WAS NOT AT ARM'S LENGTH.

17 THOSE ARE ALL THE SAME AS SIMPSON.

18 THE COURT: MR. VANGRACK, WOULD THEY HAVE SOLD HER
19 THE CAR IF SHE HAD SAID, HEY, I AM NOT GOING TO SIGN THIS
20 AGREEMENT?

21 MR. VANGRACK: YOUR HONOR, AS FAR AS WE UNDERSTAND,
22 SHE NEVER ASKED WHETHER OR NOT --

23 THE COURT: I DIDN'T ASK YOU THAT.

24 MR. VANGRACK: MY UNDERSTANDING IS THAT IT IS
25 POSSIBLE. IT IS POSSIBLE TO PURCHASE A CAR --

1 THE COURT: THAT THIS YOUNG LADY --

2 MR. VANGRACK: -- WITHOUT HAVING TO SIGN THE
3 AGREEMENT.

4 THE COURT: DID THIS YOUNG LADY -- I ASSUME IT WAS A
5 YOUNG LADY. YOU SAID HER DADDY WAS WITH HER. COULD SHE
6 HAVE BOUGHT THE CAR IF SHE SAID, I AM NOT GOING TO SIGN
7 THIS ARBITRATION AGREEMENT? I AM WILLING TO PAY THE
8 PURCHASE PRICE, BUT I AM NOT GOING TO SIGN THE ARBITRATION
9 AGREEMENT.

10 MR. VANGRACK: MY UNDERSTANDING IS THAT IF A PARTY
11 REFUSES TO SIGN AN ARBITRATION AGREEMENT IT IS STILL
12 POSSIBLE TO PURCHASE THE VEHICLE.

13 MR. LEWIS: POSSIBLE.

14 MR. VANGRACK: WELL, I JUST DON'T KNOW THE
15 CIRCUMSTANCES UNDER WHICH THAT WOULD HAPPEN. I AM SAYING
16 THAT IT IS POSSIBLE TO STILL PURCHASE THE VEHICLE WITHOUT
17 HAVING TO SIGN THE ARBITRATION AGREEMENT. WE DON'T KNOW
18 IF SHE OBJECTED. WE DON'T KNOW WHAT HAPPENED.

19 THE COURT: YOU'VE ANSWERED MY QUESTION. DO YOU KNOW
20 OF ANY CARS YOUR DEALERSHIP HAS SOLD THAT THEY DIDN'T
21 REQUIRE THE ARBITRATION AGREEMENT TO BE SIGNED?

22 MR. VANGRACK: I DON'T KNOW OFFHAND. I HAVE NOT
23 SPOKE TO MY CLIENT IN THAT REGARD.

24 MR. MARTIN: YOUR HONOR, IF I MAY --

25 THE COURT: WAIT A MINUTE. DO YOU REPRESENT THIS

1 CLIENT?

2 MR. MARTIN: I DON'T.

3 THE COURT: WELL, THEN IT'S NOT YOUR DOG. I DON'T
4 WANT ANY ANSWERS BY MR. MARTIN'S CARS.

5 MR. VANGRACK: YOUR HONOR, IF WE COULD CALL A WITNESS
6 WHO HAS PURCHASED A VEHICLE WITHOUT SIGNING AN ARBITRATION
7 AGREEMENT.

8 THE COURT: CAREFUL NOW.

9 MR. VANGRACK: WE'RE HAPPY TO DEPOSE HIM OR ALLOW CAM
10 TO DEPOSE HIM.

11 MR. LEWIS: EVERYTHING IS POSSIBLE. THEN WE WENT
12 THROUGH AND WE SAID WHAT WAS -- WHAT WAS DIFFERENT ABOUT
13 OUR SIMPSON. IT WAS ON A SEPARATE DOCUMENT WHICH WAS
14 POINTED OUT. IT DOES NOT LIMIT PUNITIVE DAMAGES. IT HAD
15 A LIMITATION ON ABILITY TO GO TO COURT, AND MS. WATTS IS
16 NOT BRINGING A BREACH OF WARRANTY CLAIM.

17 THOSE ARE THE ONLY REAL DIFFERENCES THAT ONE CAN
18 POINT TO, AND THEN WE SAID WHAT DO WE HAVE IN OUR
19 AGREEMENT THAT MAKES IT WORSE THAN SIMPSON? AND WE HAD
20 THE ONE WHERE THE DOCUMENT WAS STUCK IN WITH OTHER PAPERS
21 AND SHE WAS REQUIRED TO SIGN. THE CONTRACT SHE SAYS THAT
22 WAS GIVEN TO HER ON A TAKE-IT-OR-LEAVE-IT BASIS. THE
23 CONTRACT WAS NOT EXPLAINED, AND SHE'S A 24-YEAR-OLD GIRL
24 WHO WAS BUYING A CAR FROM A MULTI-MILLION DOLLAR
25 CORPORATION.

1 SO, YOU HAVE TO SAY, OKAY, I THINK WE MET THE ABSENCE
2 OF MEANINGFUL CHOICE, AND THEN YOU TURN TO THE NEXT TEST
3 AND THAT IS WAS IT A OPPRESSIVE AND ONE-SIDED, AND THEY
4 WON'T ENFORCE IT IF IT'S VIOLATIVE OF PUBLIC POLICY OR
5 STATUTORY LAW. IT'S INTERESTING IN THIS CONTRACT, IF I
6 MIGHT JUST REGRESS A SECOND, OR IN THE ARBITRATION
7 AGREEMENT IT SAYS THAT THEY ARE REQUIRED TO FOLLOW LOCAL,
8 STATE, OR FEDERAL LAW, AND IN THAT REGARD THAT'S WHAT
9 WE'RE TRYING TO ESTABLISH HERE IS THE LAW WITH THE
10 ARBITRATOR IS REQUIRED TO FOLLOW BECAUSE THERE IS NO LAW
11 RIGHT NOW FOR HIM TO FOLLOW.

12 BUT IN ANY EVENT, OPPRESSIVE AND ONE-SIDED TERMS. I
13 POINTED OUT THERE IS A TEST IN SIMPSON. IT IS A LONG
14 TEST. IT SAYS, THIS ARBITRATION CLAUSE VIOLATES STATUTORY
15 LAW BECAUSE IT PREVENTS SIMPSON FROM RECEIVING THE
16 MANDATORY STATUTORY REMEDIES TO WHICH SHE MAY ENTITLE IN
17 HER DEALERS ACT CLAIM. WELL, IN THIS CASE THE REMEDIES
18 ARE UNDER -- WE'VE TALKED AND TALKED ABOUT THEM, AND THEY
19 SAY THEY ELIMINATE THEM. I DON'T THINK THAT THEY SAY WHEN
20 THEY SAY YOU CAN'T HAVE CLASS ACTIONS THAT YOU'LL SAY,
21 OKAY, SINCE IT'S NOW A STATUTORY RIGHT, YOU CAN HAVE
22 THOSE. IF THAT WERE TRUTH, IT WOULD CHANGE THE ENTIRE
23 AGREEMENT, AND OUR ARGUMENT MIGHT BE SOMEWHAT DIFFERENT,
24 BUT RIGHT NOW THEY'RE TAKING THE POSITION THAT WHEN THEY
25 SAY CLASS ACTION WE HAVE ELIMINATED THE RIGHT OF MS. WATTS

1 UNDER THE STATUTORY REMEDIES THAT SHE HAS AVAILABLE.

2 OF COURSE, THEY SAY THAT SHE CAN GET INJUNCTION
3 RELIEF. WELL, DOES THAT MEAN INJUNCTIVE RELIEF JUST AS TO
4 HER OR CAN SHE HAVE INJUNCTIVE RELIEF AS TO EVERYBODY AND
5 SAY YOU CAN'T DO IT TO ANYBODY? I THINK THEY'VE SAID SHE
6 CAN'T DO IT JUST INJUNCTIVE RELIEF THAT'S JUST FOR HER.
7 THIS ARBITRATOR CAN'T BIND THEM SO THAT YOU CAN'T GET
8 EVERYBODY.

9 WHEN YOU LOOK AT THE SIMPSON CASE, IT JUST CRIES OUT
10 THAT THIS IS THE SAME, AND YOU LOOK AT THE LAW ON THE
11 DEALERS ACT, AND IT SAYS IT WAS CREATED BECAUSE CONSUMER
12 REMEDIES AT COMMON LAW WERE DEEMED INADEQUATE. NOW
13 THEY'RE TAKING AWAY SOME OF THOSE REMEDIES, AND,
14 THEREFORE, BY TAKING THEM AWAY -- THE DEALERS ACT -- IT
15 WOULD BE AGAINST PUBLIC POLICY BY TAKING THE REMEDIES.

16 THE PURPOSE OF THE DEALERS ACT IS TO PUNISH ACTS THAT
17 ADVERSELY AFFECT THE PUBLIC INTEREST. THAT'S WHAT OUR
18 COURTS HAVE SAID. THE ONLY WAY TO DO THAT IS THROUGH THE
19 STATUTORY RIGHTS GIVEN IN SOUTH CAROLINA 56-15-110 WHICH
20 THEY SAY THEY NOW HAVE TAKEN AWAY FROM MS. WATTS, AND I
21 KIND OF AMAZED. WHY DO THEY SAY IT'S STILL ECONOMICALLY
22 VIABLE FOR ONE LITTLE LADY TO BRING AN ACTION FOR HER
23 ADMINISTRATIVE FEE OF \$400 AND TO HAVE AN INJUNCTION FOR
24 HER NOT TO -- THAT THEY CAN'T CHARGE HER \$400 IN THE
25 FUTURE? THAT MAKES NO SENSE, BUT THAT'S WHAT THEY SAY WE

1 CAN GET AND THAT'S ADEQUATE. WE CAN GET OUR \$400 AND WE
2 CAN HAVE AN INJUNCTION THAT SHE CAN'T BE CHARGED \$400
3 ANYMORE.

4 THE SOUTH CAROLINA SUPREME COURT SAID IN BAZZLE
5 PRECLUSION OF WHAT CLASS WIDE OR CONSOLIDATED ARBITRATION
6 IN AN ADHESION CONTRACT WHICH THIS IS EVEN IF EXPLICIT
7 UNDERMINES PRINCIPALS FAVORING EXPEDITIOUS AND EQUITABLE
8 CASE DISPOSITION ABSENT DEMONSTRATION OF PREJUDICE TO THE
9 DRAFTER OF THE ADHESION CONTRACT. SO, THE SUPREME COURT
10 IN BAZZLE SAYS THAT THIS TYPE OF LIMITATION EVEN IF IT
11 WERE PROCEDURAL AND UNDER THE RULES WOULDN'T BE LOOKED ON
12 AND WOULDN'T BE FAVORED, AND NOW WE LOOK AT IT AS PART OF
13 A STATUTORY SCHEME, AND THEY WANT TO JERK OUT OF THE
14 STATUTORY SCHEME WHICH WAS DESIGNED TO MAKE THE CAR
15 DEALERS ACT HAVE TEETH SO THE CAR DEALERS WOULDN'T PREY
16 UPON THE PUBLIC, AND THEY SAY THAT GIVING THAT UP IS
17 SOMETHING THAT'S OKAY, AND, AGAIN, I SAY THAT IS NOT
18 OKAY -- THAT BY THE CAR DEALERS HAVING TO FACE A LINCOLN
19 WHO HAS THE ABILITY AND REMEDIES AS PROVIDED IN 15-56 --
20 56-15-110 IS A FAR GREATER DETERRENT AND IS FOR THE
21 PURPOSE OF THE ACT IN MAKING SURE THAT THEY ARE PUNISHED
22 FOR ACTS THAT ADVERSELY AFFECT THE PUBLIC INTEREST.

23 NO OTHER WAY TO DO IT, AND, AGAIN, I SAY UNDER THEIR
24 INTERPRETATION IT'S GOING TO BE -- THIS ACTS' PURPOSE IS
25 GOING TO BE PUT FORTH AND OKAYED BY AN ACTION TO GET \$400

1 BACK AND AN INJUNCTION NOT TO CHARGE 400 IN THE FUTURE.
2 WE'VE CITED IN OUR BRIEF OTHER CASES THAT SAY THE
3 JURISDICTION -- OTHER JURISDICTIONS THAT AGREE WITH OUR
4 ARGUMENTS. THERE ARE JURISDICTIONS THAT DON'T AGREE WITH
5 OUR ARGUMENTS. SURPRISE, SURPRISE.

6 SO, THOSE I THINK DON'T HELP YOU. I THINK WHAT HELPS
7 YOU AND THE CASE THAT CENTERS ON IT IS THE SIMPSON CASE
8 AND THAT TO ENFORCE THIS AGREEMENT AND ALLOW THEM TO HAVE
9 THIS AGREEMENT WITHOUT THE ABILITY TO HAVE THE REMEDIES
10 AND THE PROVISIONS OF 56-15-110 IS CONTRARY TO THE STRONG
11 PUBLIC POLICY REASONS BEHIND THE ENACTMENT OF THE DEALERS
12 ACT AND SHOULD, THEREFORE, BE FOUND TO BE UNENFORCEABLE
13 JUST LIKE IN SIMPSON.

14 THE COURT: THANK YOU. MR. VANGRACK, ANYTHING IN
15 RESPONSE BRIEFLY?

16 MR. VANGRACK: VERY BRIEFLY IN RESPONSE, YOUR HONOR.
17 FIRST, YOU CAN CALL A CIRCLE A SQUARE. THAT DOESN'T MAKE
18 IT SO. HE KEEPS LABELING THIS CLASS ACTION RIGHT A
19 REMEDY. IT'S NOT A REMEDY. IT IS A RIGHT. IT IS THE WAY
20 WE'RE ABLE TO -- IT IS A WAY YOU CAN BRING A CLAIM, BUT
21 IT'S NOT A REMEDY. WHEN WE TALK ABOUT REMEDIES, WE'RE
22 TALKING ABOUT DAMAGES. WE'RE TALKING ABOUT RECOUPING FEES
23 OR COSTS, INJUNCTIVE OR EQUITABLE RELIEF. THERE IS
24 NOTHING THAT SAYS A CLASS ACTION RIGHT IS A REMEDY. IT IS
25 A MEANS, BUT IT'S NOT A REMEDY.

1 ON THAT SAME VEIN, THEY USE THE LANGUAGE FROM SIMPSON
2 THAT SAYS THAT IT'S MANDATORY STATUTORY REMEDIES. WELL,
3 THEY GO ONE THROUGH THREE WITH THOSE THREE WORDS. FIRST
4 OF ALL, THIS WASN'T MANDATORY. THIS CLASS ACTION RIGHT IS
5 NOT MANDATORY. IN SIMPSON, THE SIMPSON COURT FOUND THAT
6 THE REMEDIES IN THAT CASE -- THE DOUBLE AND TREBLE DAMAGES
7 WERE REQUIRED BY THE STATUTE. THIS CLASS ACTION RIGHT
8 ISN'T REQUIRED. IT DOESN'T SAY YOU SHALL BRING A GROUP
9 SUIT. IT SAYS YOU MAY BRING A GROUP SUIT. IT IS A WAY.
10 YOU CAN BRING IT INDIVIDUALLY OR YOU HAVE A RIGHT TO BRING
11 IT AS A GROUP, BUT IT'S NOT MANDATORY, AND AS I SAID
12 BEFORE THE OTHER THING -- MANDATORY STATUTORY REMEDIES.
13 THIS IS NOT A REMEDY.

14 YOU KNOW, THE OTHER TWO POINTS, YOUR HONOR, TO THE
15 EXTENT THAT YOU TALK ABOUT IT NOT BEING ECONOMICALLY
16 FEASIBLE, SHE'S ENTITLED TO THE STATUTE TO DOUBLE DAMAGES,
17 TO PUNITIVE DAMAGES, TO ATTORNEYS' FEES AND COSTS. SO,
18 THE FACT THAT THIS IS \$400 AND THIS IS FOR \$300, WHATEVER
19 IS THE CASE, MISREPRESENTS WHAT'S ACTUALLY AT ISSUE, NOT
20 TO MENTION THAT THE DEALER HAS TO PAY FOR THE ARBITRATION
21 FEES.

22 AND, LAST, YOUR HONOR, THEY MENTION A FOOTNOTE IN
23 BAZZLE, BUT THAT'S THE SOUTH CAROLINA SUPREME COURT IN
24 BAZZLE. THAT CASE WAS VACATED. THE QUOTE THAT HE BRINGS
25 YOU -- THE FOOTNOTE IN BAZZLE -- THAT'S THE SOUTH CAROLINA

1 SUPREME COURT'S CASE. THAT WAS VACATED BY THE U.S.
2 SUPREME COURT IN THE BAZZLE DECISION THAT I MENTIONED FOR
3 YOU -- THE BAZZLE DECISION WHERE THE SUPREME COURT SAID
4 THE ARBITRATOR COULD DECIDE WHETHER OR NOT AN AGREEMENT
5 PRECLUDED CLASS ACTIONS.

6 AND I JUST WANT TO HIGHLIGHT AS A LAST POINT WHAT
7 MR. LEWIS DOES NOT SAY. HE DOESN'T ADDRESS THE FACT THAT
8 THE SIMPSON COURT DID NOT FIND A CLASS ACTION WAIVER
9 UNENFORCEABLE, AND HE'S NOT MENTIONED THIS U.S. SUPREME
10 COURT CASE OF BAZZLE VERSUS GREENTREE -- THE TWO CASES
11 THAT I ASK, YOUR HONOR, IF YOU'RE GOING TO FOCUS ON TWO
12 CASES THOSE ARE THE TWO THAT ARE BINDING UPON THIS COURT
13 AND DIRECTLY APPLICABLE.

14 THE COURT: THANK YOU. IS THERE ANY OTHER MATTER WE
15 NEED TO DISCUSS? HEARING NONE, WE'LL BE ADJOURNED. ALL
16 RIGHT.

17 (WHEREUPON, END OF TRANSCRIPT OF RECORD.)
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF AIKEN)

I, LISA H. HICKLIN, OFFICIAL COURT REPORTER FOR THE
SECOND 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 AIKEN
COUNTY, SOUTH CAROLINA, ON THE 30TH DAY OF NOVEMBER, 2007.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

MARCH 8, 2008

LISA H. HICKLIN, COURT REPORTER

1 STATE OF SOUTH CAROLINA
CIRCUIT COURT
2 COUNTY OF GREENVILLE 2012-CP-23-07156

3

4

CHRISTINE WATTS, et al,
5 Plaintiff,

6 -vs- TRANSCRIPT OF RECORD

7 CENTURY BMW, et al,
Defendant

8

9

Heard on Thursday, November 28, 2012

10

Barnwell, South Carolina

11

12 BEFORE

13 THE HONORABLE DOYET A. EARLY, III

14

15

APPEARANCES

16 Counsel on Behalf of the Plaintiff.

Brady R Thomas, Esq

17 Terry E Richardson, Jr , Esq

18 Counsel on Behalf of the Defendant

Richard C Moore, Esq

19 Kurt M Rozelsky, Esq.

Dennis M Black, Esq

20

21

22

Cheri L Young, RPR

23 Circuit Court Reporter

P O Box 5232

24 Aiken, SC 29804-5232

25

1 ON THURSDAY, NOVEMBER 28, 2012 AT 1 56 P M .

2 THE COURT Who's going to argue for BMW

3 MR. MOORE. I am, Your Honor

4 THE COURT Mr Moore

5 MR. MOORE. Do you mind if I argue from here?

6 THE COURT Wherever suits

7 THE CLERK Do you want a podium?

8 MR. MOORE No, this is fine

9 Your Honor, Rich Moore for Century BMW.

10 Your Honor, we filed a motion requesting two forms of

11 relief First we moved for judgment on the pleadings

12 based on the failure to join an indispensable party,

13 Michael Watts

14 Michael Watts was the purchaser of the vehicle at

15 issue. He has a legal interest in the case and he's been

16 dismissed with prejudice.

17 The second form of relief we're requesting in the

18 alternative is to compel arbitration. This is based on a

19 United States Supreme Court opinion, AT&T Mobility, which

20 was issued since the first time we moved for arbitration

21 in this Court.

22 So, turning first to the motion regarding the

23 indispensable party The key facts are straight forward.

24 Michael Watts purchased the vehicle for his daughter,

25 Christine Watts, as a graduation gift for her He,

1 Michael Watts, negotiated a price He obtained financing
2 from his credit union And he -- we recently submitted an
3 assignment in which he stated he was the purchaser of the
4 vehicle, admitting that he has a legal interest in the
5 case

6 Now, Michael Watts was originally a Plaintiff in the
7 case as to another Defendant, Toyota of Greenville, but he
8 was dismissed from the case at his request with prejudice.
9 So he's no longer a party to the case.

10 And under Rule 19 we believe he is a classic example
11 of an indispensable party There are two parties to the
12 purchasing agreement, Christine Watts and Michael Watts
13 And Rule 19 boils down essentially to a test of whether
14 all the parties are necessary to fully adjudicate the
15 dispute

16 And when you have a case where there are co-parties to
17 a contract, two plaintiffs suing under the same contract,
18 in the case we've cited that's a perfect example of where
19 their rights are indivisible, they're joint. And you have
20 to have both of them present to fully adjudicate the
21 controversy because if, for example, she were to win, that
22 wouldn't be -- that wouldn't benefit him He's not --

23 THE COURT Hasn't he been dismissed with prejudice?
24 So he couldn't do anything in the future. So, I mean,
25 he's out of it How can he come back after having been

2 claim any additional benefits from the lawsuit?

3 MR. MOORE. He can seek to file a separate lawsuit,

4 Your Honor. He's been dismissed with this case with

5 prejudice, but he still has a claim that he could try to

6 attempt to bring. And if Christine Watts were to lose,

7 for example, he still has a potential claim out there

8 As Defendants, our position is we are entitled to have

9 the case decided once and for all as part of this single

10 action. In fact, Your Honor, the Plaintiff -- he is more

11 of a Plaintiff than she is. I mean, to make it more -- as

12 simple as I can possibly make it --

13 THE COURT. Well, he may have had more involvement in

14 purchase than she did.

15 MR. MOORE. Right. Well, he admits he purchased the

16 car. That's what he said. I am the purchaser of the car,

17 is what he said.

18 And so we have a case where the Plaintiffs are suing

19 on the basis that the administrative fee was unlawful in

20 the sale of the vehicle. Even though it was disclosed in

21 the paperwork, they're saying it's unlawful

22 And the actual purchaser, the person who has admitted

23 he's the purchaser, is not a Plaintiff. So under the case

24 law, we believe --

25 THE COURT. Well, to me that's going to probably give

1 them problems if and when they try the case. But I don't

2 know if it, by dismissing him with prejudice would be

3 grounds enough to dismiss the lawsuit

4 I mean, I think y'all can have a good time The

5 remaining Plaintiff is what her losses are, but I don't

6 know if that's enough when he's been dismissed with

7 prejudice for me to dismiss the case under the rule that

8 you're relying on

9 But, I'm not cutting you off Go ahead

10 MR MOORE Well, Your Honor, respectfully we believe

11 that is the -- that's the remedy that's provided for under

12 the rule And there's no --

13 THE COURT Well --

14 MR. MOORE -- there's no -- you know, he decided to

15 be dismissed with prejudice. That was his choice

16 And we're entitled to have the actual Plaintiffs who

17 were involved in the case And so we believe that would

18 be the appropriate remedy and we have offered to have

19 another Plaintiff substituted in as a representative of

20 the Plaintiff And the Plaintiffs declined that offer.

21 So it's a situation where the -- under the rule we

22 believe it's a pretty straight forward application of Rule

23 19 in the indispensable party.

24 Now Plaintiff's only real rebuttal is not to say that

25 he's not an indispensable party under Rule 19, but to say

1 that he has assigned his claims to his daughter

2 And the test for whether a claim is assignable under

3 South Carolina law is whether or not it would survive the
4 Plaintiff's death. And there's an exception to the
5 survival statute for claims for fraud and deceit.

6 And the South Carolina Supreme Court in the Ferguson
7 case specifically addressed claims under the Dealers Act,
8 as here where the Plaintiffs are alleging fraud and
9 deceit, and held that they did not survive the Plaintiff's
10 death. Therefore they're not assignable, therefore the
11 assignment is void. And so, the -- I think that's pretty
12 clear under the Ferguson case.

13 So, the only argument Plaintiffs brought forward, it's
14 not valid and we believe that for that reason it should be
15 dismissed.

16 Now we've been handed this morning a disclaimer of
17 interest in which Mr. Watts purports to disclaim and waive
18 any interest he has in the lawsuit. But this doesn't
19 change the analysis under Rule 19 and under the cases
20 we've cited because their claims are joint claims. They
21 are joined at the hip. They're indivisible. They're like
22 Siamese twins. When one of them -- they both have to be
23 there or they both perish. They rise and fall together.
24 So whether or not he disclaims his claim or not, he's not
25 a party to the lawsuit and the case can be resolved.

7

1 Your Honor, our second part of our motion is a motion
2 to compel arbitration. And, again, as you know, the

3 procedural history is complicated in this matter, but I --

4 THE COURT. And I'm well aware of the procedural
5 history. I have --

6 MR. MOORE Okay

7 THE COURT. -- gone back over it two or three times in
8 the last two or three days and in the last hour And I'm
9 familiar with Herron One, Herron Two, AT&T Mobility and
10 where all we are at.

11 And, you know, it seems to me the question you got to
12 ask or answer me is the very end of Herron Two the Court
13 says, that because the matter of preemption, this is the
14 last paragraph, was not raised to and ruled upon any of
15 the South Carolina proceedings -- and ruled upon in any of
16 the South Carolina proceedings, we find the issue of
17 preemption is procedurally barred as a matter of state law
18 and, further, consideration in light of AT&T Mobility is
19 unwarranted

20 So what is my Supreme Court telling me? Is it telling
21 me that y'all had a bite at this apple and you didn't
22 argue it and it's waived, and as a matter of state law it
23 is barred? So how does that allow me now to consider your
24 renewal, as you say in your memo or the motion to compel
25 arbitration, when the State's Supreme Court says it's

1 barred as a matter of state law and further consideration
2 is unwarranted

3 So where does that put me as the lower court now that

4 it's back before me? It wasn't remanded as the Plaintiff
5 has said in their briefs for me to reconsider the
6 preemption question. It simply says it's barred as a
7 matter of state law. How do you get around that?
8 MR. MOORE: Right. Your Honor, we're not asking you
9 to do anything, obviously, contrary to what the South
10 Carolina Supreme Court has held.
11 We believe that that statement that you've just read
12 taken in context means that we waived the argument for
13 purposes of that appeal and the appellate procedural
14 rules. It's a long standing rule under appellate
15 procedure, not in dispute here; if you don't raise an
16 issue in the trial court, you can't raise it in the
17 appellate court.
18 THE COURT: Absolutely. Issue of preservation.
19 MR. MOORE: And now we disagree as to whether we
20 raised it, but that's not the issue here.
21 THE COURT: I see your footnote says you may have
22 raised it.
23 MR. MOORE: Right. But we can assume arguendo, for
24 purposes of this motion we're not disputing that.
25 THE COURT: Okay.

1 MR. MOORE: What we're saying is when the case was
2 remanded from the United States Supreme Court, the South
3 Carolina Supreme Court held we hadn't preserved it in the

4 trial court, we're not going to reach it

5 THE COURT We're not going to raise it

6 MR. MOORE: We're not going to raise it You have to

7 raise it in the trial court before you can raise it in the

8 appellate court

9 Well, that's what we're doing. We're raising it in

10 the trial court. We have a directly controlling United

11 States Supreme Court case, we believe, that requires

12 arbitration. I don't often have these cases where you

13 have direct authority which clearly --

14 THE COURT Well, you know, obviously you're referring

15 to AT&T Mobility

16 MR. MOORE: Yes, yes, Your Honor And we have not

17 received a ruling on the merits of that It went to the

18 Supreme Court. The Supreme Court ruled and vacated the

19 South Carolina Supreme Court's opinion. South Carolina

20 Supreme Court didn't consider it on the merits, didn't

21 dispute that AT&T controlled. They said we waived it for

22 purposes of that appeal So, what we --

23 THE COURT So, do you get a second bite at the

24 apple?

25 MR. MOORE It's a first bite at the apple We never

10

1 had a bite at the apple

2 THE COURT Well, you had a bite at the apple being

3 the arbitration apple. You bit into it one time and lost,

4 supposedly Now can you come back and bite on the other

5 side of the apple on the preemption issue when you didn't
6 do it to start off with?

7 MR. MOORE. Right. When you say the preemption issue,
8 Your Honor, it's a little more narrow than that. We did
9 raise preemption as to what, in response to what Plaintiff
10 argued. But the issue of whether there's a state law rule
11 that says you cannot have an arbitration, a waiver of
12 class action in arbitration because that violates South
13 Carolina public policy

14 THE COURT. That's what our Supreme Court held in
15 Herron One

16 MR. MOORE. Yes, Your Honor.

17 THE COURT. And that's what AT&T Mobility said it's
18 okay to do that. That's -- preemption takes care of that

19 MR. MOORE. Right.

20 THE COURT. So now you're coming back and saying,
21 well, based on AT&T Mobility it's preempted. Now we can
22 use that argument to compel arbitration

23 MR. MOORE. That's right, because that argument wasn't
24 available to us the first time we moved because AA, the
25 United States Supreme Court hadn't issued that rule of law

11

1 and, B, the South Carolina Supreme Court hadn't issued the
2 rule in South Carolina that it's against public policy
3 So we're not -- it's not a situation whereas, as the South
4 Carolina Supreme Court says you're holding your ace card

5 up your sleeve

6 THE COURT That's what they said

7 MR MOORE But we didn't have the ace card That was
8 dealt to us after it was up on appeal And we would have
9 had no reason to play it because the argument or the rule
10 that was preempted was announced after the case was on
11 appeal.

12 So waiver, Your Honor, is a doctrine of fairness,
13 equity It's a case when you have a known argument and
14 you don't -- if you choose not to make it, doesn't apply
15 here when the case hadn't been decided yet. And we didn't
16 have it in -- it wasn't available And so this is the
17 first opportunity in which we had to raise it
18 Plaintiffs hadn't argued it below It was at the
19 Supreme Court sui sponte said, we're announcing a new rule
20 under South Carolina law and that is that waivers of class
21 action are against South Carolina public policy.

22 So we believe that it's unfair and unjust to, for the
23 South Carolina Supreme Court to say you should have raised
24 it at the trial court And we come to the trial court and
25 they're saying, well, you know, you didn't raise it here

12

1 So we're --

2 THE COURT. Well, I'm just simply reading the last
3 paragraph of the appeal -- or the opinion

4 MR MOORE So, Your Honor, we're not trying -- we're
5 not trying -- we're simply seeking a ruling on our motion

6 on the merits And that we haven't been able to get yet
7 and we couldn't have, we couldn't have sought that
8 earlier

9 And turning to whether AT&T is on point -- did you
10 have any further questions, Your Honor?

11 THE COURT No I'll ask them Go ahead.

12 MR. MOORE On the question of whether AT&T is on
13 point, I don't think it could be any more squarely on
14 point. It's a case where the United States Supreme Court
15 held that state -- to the extent a state wants to bar
16 waivers of class action as against public policy, in this
17 case it was in California state court, that's preempted
18 because it collides with the Federal Arbitration Act And
19 it has to yield to the Federal Arbitration Act and --
20 under preemption of the supremacy clause.

21 And the Plaintiffs only offered a couple of reasons
22 why AT&T wouldn't apply. One is to say that there's a
23 statute at issue, i e , the Dealers Act, whereas in AT&T
24 Mobility it had to do with the common law rule of
25 unconscionability.

13

1 THE COURT And they've also cited a California case
2 dealing with the Private Attorney Generals Act being
3 distinguishable from AT&T Mobility.

4 MR. MOORE. That's right, Your Honor.

5 So as to the first point about whether it's statute

6 versus common law, just this week, Monday, the United
7 States Supreme Court struck down an Oklahoma State
8 decision that it held that an arbitration agreement was
9 contrary to an Oklahoma statute. There's an Oklahoma
10 statute that prohibited non-competition agreements under
11 Oklahoma statutory law and the Oklahoma State Court had
12 held that arbitration agreement was therefore invalid
13 because it conflicted with that.

14 And just this Monday, the United States Supreme Court
15 issued an opinion that said under the Federal Arbitration
16 Act that's preempted.

17 So whether it's statutory law or common law doesn't
18 matter. Any state law, policy or ruling that conflicts
19 with the Federal Arbitration Act is preempted.

20 As to the question of whether the intermediate court
21 in California, there's one case out there that found that
22 under the California statute wasn't preempted by AT&T
23 Mobility.

24 And first of all, Your Honor, that statute is
25 different than the Dealers Act. The Dealers Act -- the

14

1 South Carolina Supreme Court has referred to the Dealers
2 Act as a class action. That's what they refer to it as.
3 And they're seeking damages. Plaintiffs are seeking
4 restitution, damages, private rights where they say they
5 have been overpaid -- or paid a fee they shouldn't have
6 paid. And they're seeking private remedies on behalf of

7 their claims

8 The case out in California was, they called it a

9 private attorney general action, was where the Plaintiffs

10 were truly seeking on behalf of the public fines against

11 the defendant. So it's a different statute, first of all

12 Second of all, it doesn't really matter under AT&T

13 Mobility. AT&T Mobility says that no matter what type of

14 state policy is at issue, for example, South Carolina, the

15 South Carolina Supreme Court found that because the claims

16 were small and they needed to be aggregated that it was in

17 the South Carolina public interest to have class actions

18 and that the arbitration would prohibit the plaintiff from

19 pursuing that collective right That was the policy at

20 issue

21 The Supreme Court said that's preempted because it,

22 the policy that the Federal Arbitration Act and Congress

23 enacted overrides that And so the same is true with

24 whether you call it a Private Attorney General action.

25 It's the same thing There's still a representative

15

1 action on behalf of a group seeking to enforce a statute

2 and if the state -- it's not an issue whether that's a

3 good or a bad policy under state law to encourage that.

4 It still conflicts with the arbitration agreement in this

5 case in which the parties agreed to decide it on a

6 bilateral basis on an individual basis. So I think AT&T

7 Mobility, it's a distinction without a difference

8 And the third reason, Your Honor, is that that

9 decision is sort of a lone voice in the wilderness. There

10 are multiple cases after it in which the courts have held

11 that that was incorrectly decided

12 So, we believe that AT&T Mobility is squarely on point

13 and that it prohibits the State from superimposing its

14 conditions on the arbitration that the parties didn't

15 agree to

16 So for those reasons, Your Honor, we would again

17 request that the case be dismissed, failure to join

18 indispensable party And if it's not dismissed that it

19 be, that you compel arbitration.

20 THE COURT Thank you Mr Thomas?

21 MR THOMAS Your Honor, well, let's start with the

22 Rule 19 issue First of all, we do not believe that

23 Michael Watts is a necessary party under Rule 19

24 THE COURT. Well, he's the one who bought the car

25 MR. THOMAS. He was a co-purchaser actually

16

1 THE COURT. I mean, he went in there and he's the one

2 who dealt with them about the administrative fees and

3 closing costs This was sort of a present to her

4 MR THOMAS He helped them negotiate and he helped

5 obtain credit And she was the one that's paid for the

6 car and made all the payments including, which would

7 necessarily mean she's the one that paid the

8 administrative fee.

9 But you had -- as Rule 19, it creates a test under
10 Rule 19-A which is on page 15 of our brief. And one of
11 the grounds is if complete relief cannot be afforded
12 amongst those already parties.

13 Well as Your Honor pointed out, Michael Watts was a
14 party to this case. He had a civil conspiracy claim
15 against Century BMW. And by definition when he dismissed
16 his claims with prejudice, he dismissed all his claims as
17 to Century BMW with prejudice

18 In addition to that, Your Honor, he does not claim an
19 interest in this lawsuit. Mr. Watts, in fact, has
20 executed a disclaimer of his interest.

21 THE COURT. Well, does that disclaimer mean that if
22 your client loses up there that it would preclude him from
23 filing the same type of action and making them go through
24 the same --

25 MR. THOMAS. That's exactly right, Your Honor.

17

1 And the test under Rule 19 is looking for prejudice
2 And there's no prejudice here to Century BMW because it
3 says, will leave any other persons already parties subject
4 to a substantial risk of incurring double or inconsistent
5 obligations

6 There's no substantial risk here. We've got Mr. Watts
7 disclaiming his interest. We have Mr. Watts being in the

8 case, filing claims against them, involved in the
9 administrative fees Had he wanted to bring his claim
10 against them at that time he could have Those claims
11 have been dismissed There is no substantial risk of
12 incurring double or inconsistent obligations
13 In addition to that, Your Honor, even if he's found to
14 be an indispensable party under Rule 19-A, necessary
15 party, Rule 19-B sets forth the factors for the Court to
16 determine before they dismiss the claim
17 Because as in the notes for Rule 19-B say, it's only
18 the rare case where you've got somebody that's truly
19 indispensable that should be dismissed
20 Rule 19-B says one of the factors is, looks to the
21 extent to which by protective provisions in the judgment
22 or by shaping of relief or other measures that prejudice
23 can be lessened or avoided
24 Here we don't believe there is any prejudice to
25 Century BMW; however, if Century BMW wants, you know,

18

1 we're perfectly willing to abide by, if the Court wants to
2 order us, to go back to Mr Watts and sign something
3 different than his disclaimer of an interest, or the Court
4 wants us to sign a release of his claim only that doesn't
5 impact Christine Watts' claims, we'd be more than willing
6 to get him to do that
7 There simply is no substantial risk of Century BMW
8 incurring multiple liability.

9 And, frankly, this is a hyper-technical reading of
10 Rule 19 which is contrary to Rule One which says we
11 interpret all these rules to do justice.
12 Next, I'd like to talk about the South Carolina
13 Supreme Court. As Your Honor noted, in Herron Two, our
14 Court stated that appellant's preemption argument was not
15 preserved in our courts as a matter of state law
16 And the use of the word courts there is significant
17 because they're not saying like they've said in some other
18 case, an example, a 2012 case, recent case, Flemming
19 versus State, the South Carolina Supreme Court said there,
20 no issues are preserved for appellate review The Circuit
21 Court had subject matter jurisdiction to revoke probation
22 and no issues were preserved for appellate review
23 Similarly in State versus Sheppard, 2011, our Court
24 used the language. This argument however was not raised
25 to the trial judge and therefore this issue is not

19

1 preserved for appellate review. This Court has
2 consistently held that a challenge to sentencing must be
3 raised at trial or this issue will not be preserved for
4 our appellate review.

5 That's not what the Court did in Herron. In Herron,
6 the Court said, we cannot treat appellant's preemption
7 argument as preserved in our courts as a matter of state
8 law We find the issue of preemption is procedurally

9 barred as a matter of state law

10 And, Your Honor, that's fair And the reason that's
11 fair is, in this Court's order that denied the original
12 motion to compel arbitration close to five years ago, this
13 Court properly found the Plaintiff and Defendant agreed
14 that Simpson versus MSA is the controlling authority for
15 this motion. The Simpson Court held that a car dealer's
16 intent, an informed contract, to prevent a consumer from
17 prosecuting statutory rights in arbitration was
18 unconscionable and unenforceable.

19 And as the Herron Court -- our Supreme Court in Herron
20 noted --

21 THE COURT Herron One or Herron Two?

22 MR. THOMAS In Herron Two. All right Our Court
23 came back to that exact provision from your order and
24 said Tellingly the Court's order cites Simpson as the
25 controlling authority and then notes, contrary to what

20

1 Mr Moore is arguing he said this preemption was not in
2 that argument.

3 Well, the South Carolina State Supreme Court said It
4 is clear, preemption was neither a novel or an unknown
5 argument to appellant, because they raised sole preemption
6 on other grounds And they chose not to raise it with
7 respect to our argument that the Dealers Act claim
8 violated the statutory policy that allowed us to bring a
9 group suit for both damages and injunctive relief, both of

10 which we're seeking here.

11 And they agreed, Simpson controlled. They failed to
12 raise preemption. The South Carolina Supreme Court said
13 that they can't do it. You know, they say, quite
14 naturally -- this Court and all other courts quite
15 naturally resolve matters solely on the basis of state law
16 just as the parties have wanted.

17 After Herron Two comes out and says that the issue's
18 procedurally barred as a matter of state law, Century BMW
19 files a brief in the United States Supreme Court, multiple
20 briefs that say, the South Carolina Supreme Court's
21 determination of petitioner has forfeited preemption
22 argument. The forfeiture rule is inequitable because it
23 would deprive Century BMW of a reasonable opportunity to
24 assert its federal rights. There's no valid justification
25 for the forfeiture determination because it deprives us of

21

1 the opportunity to assert our federal rights.
2 Your Honor, they've admitted to the Supreme Court that
3 they've forfeited their rights to bring it as the South
4 Carolina Supreme Court found by not raising it five years
5 ago. And it would be unfair for us to allow a Defendant
6 or any party for that matter to hold back arguments when
7 an issue is raised. Here the issue was: Does the
8 arbitration clause violate the statutory policy of the
9 Dealers Act.

10 It's inequitable to allow them to say, okay, we're
11 going to argue one argument to them, take it up on appeal,
12 five years later we're going to raise argument number
13 two And then maybe appeal again and then bring it back,
14 effectively stopping us from ever determining any of our
15 cases

16 The Fourth Circuit looked at the Herron opinion in
17 dicta but said. Upon the South Carolina Supreme Court's
18 reconsideration of Herron, after remand, the Court held
19 that the dealership had forfeited the argument that class
20 action arbitration under -- bar under the public policy of
21 South Carolina was preempted by federal arbitration.

22 So in conclusion, the plain language of Herron Two
23 says it's procedurally barred as a matter of state law in
24 all of our courts

25 Two, the Fourth Circuit agrees with that

22

1 determination

2 Three, Century BMW in their briefs to the Supreme
3 Court agreed.

4 And, respectfully, Your Honor, we suggest that this
5 Court should follow the South Carolina Supreme Court and
6 hold that the issue is procedurally barred in our courts
7 as a matter of state law

8 THE COURT Well, how do -- you know, Mr. Moore didn't
9 touch on this in his argument but he's argued it in his
10 brief, but assuming all that you say is correct there's a

11 supremacy cause that says a judicially-created procedural
12 doctrine cannot defeat the intent of Congress. When
13 Congress preempts state law, it gives concrete discretion
14 to the constitutional authority granted by the Supremacy
15 Clause of Article One.

16 We all know what the Supremacy Clause means. How do
17 you get around that?

18 MR. THOMAS: Well, we get around the Supremacy Clause
19 in two different ways. One, the -- AT&T is
20 distinguishable from the situation here. And that is that
21 in AT&T, there was a California judicially-created law.
22 There was a judicial rule that said that you can't have a
23 class action in arbitration but a judicially-created law.
24 Here we've got a different situation completely
25 because we've got a South Carolina State Legislation

23

1 determination that there's a substantive right, as our
2 Supreme Court has looked at it, says. Our Legislature
3 recognized this and expressly provided plaintiffs with the
4 right to bring class action lawsuits for violations of the
5 Dealers Act.

6 Stated succinctly that the Legislature has made it
7 clear that public policy of this state is to provide
8 consumers --

9 THE COURT: Slow down, slow down.

10 MR. THOMAS: -- with a non-waivable right.

11 And that right was actually challenged by Century
12 BMW After Herron Two they went to the United States
13 Supreme Court They made all the same arguments we're
14 making here today
15 And they said, oh, we got preemption We got the FAA
16 and it can trump the State statutory rights under the
17 Dealers Act
18 And we, in our briefs to United States Supreme Court,
19 even asked, quote, is it the Supreme Court's opinion that
20 the FAA can preempt a consumer's substantive right
21 conferred by a South Carolina State statute?
22 The issue was up for cert and the United States
23 Supreme Court denied it, sent it back down, which left the
24 Herron One as the controlling opinion in this case
25 As noted by Herron Two, it says We reinstate our

24

1 original opinion and decline to revisit This is simply
2 the law of the case And that -- the law of the case is
3 this That we've got a statute in the Dealers Act that,
4 it creates a non-waivable right and that provision is --
5 the Dealers Act goes on to say that any contract
6 requirement of the statute shall be deemed against public
7 policy and will be void and unenforceable if it violates
8 the Dealers Act.
9 Now Justice Thomas in his concurring opinion in the
10 AT&T case expressly found that the holding in AT&T should
11 be limited to -- except in situations where you've got a

12 clause that will defeat the -- defeats the contract from
13 the very beginning.

14 And as we know, contracts in South Carolina that are
15 against public policy are, as Justice Thomas noted, void
16 ab initio And, therefore if you got a clause that's in
17 violation of the state's substantive right, that portion
18 of the contract is for -- is a defect in the formation of
19 the contract because under our state statute -- as we all
20 know, our state statutory law is built in and a part of
21 every contract.

22 And quite simply, a party can't, as our South Carolina
23 Supreme Court has held, they cannot waive their rights
24 under the Dealers Act to seek group injunctive -- and
25 damages because it's a non-waivable right

25

1 THE COURT. So what should BMW have done back in 2006,
2 I think, when they filed their motion for arbitration?

3 MR. THOMAS: Well, from an issue of preservation
4 standpoint, they could have argued but they chose not to,
5 in theory they could have argued Plaintiff's arguments
6 that this is, that the Dealers Act creates a substantive
7 right and, Judge, and which -- they connect -- as against
8 public policy as Your Honor found. I find the terms of
9 the arbitration agreement are oppressive and violative of
10 public policy and statutory law.

11 What they could have done is they could have come in

12 here and argued to this Court that, Your Honor, even if
13 the Plaintiff is right and even if you're right that the
14 terms of the arbitration agreement are oppressive and
15 violate the Dealers Act against public policy, federal
16 preemption controls and therefore this holding doesn't
17 matter But they --

18 THE COURT. That's not what we did, though We all
19 came in at that point in time and both sides, as the
20 Supreme Court says in their order, we, everybody agreed
21 that Simpson versus Myrtle Beach, MSA of Myrtle Beach, was
22 what I had to look at And, that's all we did.

23 MR THOMAS. That's right, Your Honor

24 THE COURT So, are you telling me that when they
25 didn't argue the preemption at that time, or raised the

26

1 preemption at that time that they have forever either
2 forfeited or waived their right now to come back and say,
3 hey, federal law preempts us and we can't rely on state
4 law

5 We didn't know that at that time because AT&T Mobility
6 hadn't been decided So we shouldn't be penalized because
7 the law has changed in the interim How is that fair for
8 me not to let them now argue it when the law has changed
9 under AT&T?

10 MR THOMAS As our Supreme Court found, it's clear
11 preemption was neither a novel or unknown argument This
12 wasn't a new issue, federal preemption, something they

13 argued before And our Supreme Court looked at these
14 exact arguments, looked at the record and said, hey, they
15 should have raised it years ago and they didn't and we
16 find that the issue is procedurally barred as a matter of
17 state law and we decline to reverse it, even in light of
18 their arguments of federal preemption.

19 THE COURT And thus the decision in Herron Two, the
20 burden that I started these arguments with That's, you
21 know --

22 MR. THOMAS. That's correct, Your Honor

23 THE COURT -- that's the law of the case A matter
24 of state law. Barred. Procedurally barred Mr Moore?

25 MR. MOORE Well, Your Honor, on the waiver issue, as

27

1 you pointed out, the issue the first time was under
2 Simpson, whether the agreement was oppressive and one
3 sided

4 THE COURT And I said it was and the Supreme Court
5 said I was wrong but then they took it a step further and
6 said, no, but this clause and they're dealing with the
7 class actions makes it against public policy

8 MR. MOORE. Right. So they switched horses after --

9 THE COURT. They switched horses.

10 MR. MOORE Yeah. The Supreme Court came up with a
11 new rule. I mean, the issue of whether it was
12 unconscionable under Simpson, that they'd held that it

13 wasn't And that's what the issue was below
14 And so -- but they announced a new rule which was
15 against public, South Carolina public policy
16 THE COURT Dealing with the class action part
17 MR MOORE. Right
18 THE COURT And then I guess concomitantly or at the
19 same time or almost parallel in the US Supreme Court was
20 AT&T Mobility.
21 MR MOORE Right.
22 THE COURT: And AT&T Mobility addressed the class
23 action part.
24 MR. MOORE Exactly
25 THE COURT: And said that is not against public policy

28

1 and sent it back to the South Carolina Supreme Court
2 Y'all need to address this because you'd ruled earlier
3 that it was against public policy
4 MR. MOORE Right
5 THE COURT Or consider that ruling in light of our
6 ruling
7 It got back to the US -- strike that. It got back to
8 the South Carolina Supreme Court and they said BMW, no,
9 no, no, no, y'all hadn't talked about that at all You're
10 barred from doing it You've waived it The issue wasn't
11 preserved We understand what AT&T Mobility says, but you
12 didn't raise it You should have You've waived it
13 You've forfeited it

14 And it says now that's the law of the case You're
15 procedurally barred as a matter of state law
16 I'm sympathetic with your situation I don't like,
17 you know, being affirmed of something -- getting affirmed
18 on some other reason that I didn't say But how do I deal
19 with what they're telling me now?
20 MR MOORE: Well, they say in that opinion, Herron
21 Two, that appellate courts don't, like well-behaved
22 children, they don't speak unless spoken to.
23 THE COURT. I understand all of that
24 MR MOORE. Yeah So they weren't speaking on that
25 issue

29

1 THE COURT They spoke pretty -- not harshly. They
2 said, y'all tried to come -- I want to say this
3 correctly Tried to raise that preemption issue on the
4 appeal and, doggone it, you should have done it earlier
5 and now you're barred from doing it, notwithstanding the
6 AT&T Mobility
7 MR MOORE And --
8 THE COURT: That's what it sounds like they're saying
9 to me.
10 MR. MOORE. Well --
11 THE COURT Instructing me to, listen, you've seen
12 enough of it, you've waived it You've forfeited it.
13 MR. MOORE: I believe taken in context when the issue

14 was whether we had raised it below, that was the issue was

15 whether we had raised it below and --

16 THE COURT: You know, you got in your footnote in your
17 brief that you may have mentioned it somewhere

18 MR MOORE: Right

19 THE COURT: But we did not -- nobody argued that
20 federal statute preempted the class action part when we
21 argued it initially. Everybody agrees with that

22 MR MOORE: Well, we cited FAA. We cited the FAA. We
23 did cite cases that discussed preemption. And our
24 position is, as we've taken to the South Carolina Supreme
25 Court and we took to the United States Supreme Court is

30

1 that we did do enough to preserve the issue but we're not
2 retreading that ground

3 THE COURT: All right. Because you've been ruled
4 against on that

5 MR MOORE: Right. And, but what the South Carolina
6 Supreme Court -- so if they're right that we waived it and
7 we didn't, you know, we did not raise it in the trial
8 court, well, we're doing exactly then what they're saying
9 we should do, raise the issue in the trial court to get a
10 ruling

11 THE COURT: Well, I agree with that. I agree. You're
12 doing what you're supposed to do

13 But the fact that you didn't do it back on December 29
14 of '06, does that now preclude me from considering in

15 light of the language in Herron Two? How can I consider
16 it?

17 MR. MOORE: Because I don't -- because I don't believe
18 that that language is controlling of the issue of whether
19 we can raise it again in the trial court.

20 I know what it says but if taken in context at what
21 the issue before the Court was, which is what was briefed,
22 what we had briefed, what the other side had briefed,
23 which was, did we preserve it, did we preserve it.

24 And therefore, that's what they were to decide And
25 when they said we had waived it, they had no reason to go

31

1 back and tell Your Honor whether you should consider it
2 again That's a law-of-the-case issue which as you've
3 pointed out does not apply here. There's no law of the
4 case.

5 THE COURT: They saw it applies. You say it
6 doesn't --

7 MR. MOORE: Well, it doesn't --

8 THE COURT: -- in the briefs

9 MR. MOORE: Right. Because of the Fourth Circuit case
10 is pretty squarely on --

11 THE COURT: Well, it's obvious AT&T Mobility sort of
12 changed the landscape

13 MR. MOORE: It did. It did. And nobody was arguing
14 below that the waiver was -- class action waiver itself

15 was void or based on public policy I mean, we won on the
16 issue of whether the arbitration agreement was valid under
17 state law and whether it was oppressive under Simpson or
18 not. The Supreme Court said it wasn't but --

19 THE COURT. But they took it another step

20 MR. MOORE Right. They came up with a new rule and
21 so our point is this new rule that, that was preempted
22 We didn't know to argue it was preempted until the South
23 Carolina Supreme Court said that's what the rule was

24 THE COURT Sort of brought it to light

25 MR. MOORE And then we didn't know to cite AT&T

32

1 Mobility because it had not yet been announced So we
2 were not able to do that, you know, predict new rules from
3 the Supreme Court that hadn't been announced
4 So we don't think it's fair And we don't think that
5 the waiver doctrine, which really is when a party knows
6 about something and sits on its hands, at all applies
7 here

8 In addition, Your Honor, as you've pointed out, the
9 Supremacy Clause would trump any sort of procedural rule
10 like that. I mean, we're talking about the Federal
11 Arbitration Act which the Supreme Court has repeatedly and
12 strongly stated is, whether you agree with it or not
13 that's the law And that Congress when it enacted it made
14 clear that those types agreements are supposed to be
15 enforced

16 And if you read the Oklahoma case from earlier this
17 week, it's pretty strongly worded in saying that, you
18 know, this is what Congress enacted and, you know, it has
19 to be enforced

20 And so we believe that that's exactly what's going on
21 here.

22 THE COURT. Well, I tend to agree with you on all of
23 that but I'm still -- you know, I get my instructions from
24 Columbia and when they tell me that something is
25 procedurally barred as a matter of law, that gives me

33

1 concerns Can I go back and now reconsider the new
2 argument under AT&T Mobility?

3 Mr Thomas, let's assume that we're here for the first
4 time and Mr Moore has filed a motion to compel
5 arbitration. And he's got a ruling now from the South
6 Carolina Supreme Court that says it's not unconscionable
7 but yet the State dealing with a class action, that is
8 against public policy. And then you got the US Supreme
9 Court says no, no, no, no, that's not right Federal law
10 preempts all of that.

11 How are you going to defeat arbitration assuming we're
12 just here for first time? Could you defeat it?

13 MR. THOMAS. Yes, Your Honor --

14 THE COURT. How?

15 MR. THOMAS. -- because AT&T doesn't address a State

16 statutorily-mandated substantive right like we have here
17 AT&T addresses simply a court opinion about a regular Rule
18 23 type class action And here we have a Dealers Act
19 THE COURT Which is different than a class action
20 It's sort of a representative We've been through all of
21 that
22 MR THOMAS. That's right.
23 THE COURT It's representative
24 MR THOMAS That's right That's exactly right, Your
25 Honor That's exactly what --

34

1 THE COURT But didn't our Supreme Court call it a
2 class action?
3 MR THOMAS Our Supreme Court did use the word class
4 action
5 THE COURT Yeah
6 MR. THOMAS And said that that right, that right to
7 bring that group action is statutorily mandated and
8 necessary to protect consumers Like in this case We
9 got 6,000 people
10 If Ms Watts is forced to arbitrate by herself, she
11 can't protect the public She can't protect consumers
12 Can't get injunctive relief It would stop this from
13 happening as a whole
14 And this issue was raised to the United States Supreme
15 Court They had an opportunity to look at this and say,
16 you know what, Supremacy Clause trumps AT&T, beats this

17 opinion and they declined to do so.

18 And the reason is is because you've got a state
19 statutory law that is a part of every contract And as
20 Justice Thomas said, if you've got a problem with the
21 contract, the contract's, you know, void ab initio, from
22 the beginning

23 And a contract clause in a contract that is against
24 public policy would be. Then that defect, it is an
25 argument that would prevent you from ever even getting to

35

1 an AT&T analysis And --

2 THE COURT Well, we certainly have created a can of
3 worms, haven't we?

4 MR. THOMAS Yes, Your Honor. I want to raise two
5 more things

6 One, I failed to mention that Oklahoma case from last
7 week doesn't have anything to do with the state's
8 substantive right to bring a class action. The issue in
9 that case was whether the Oklahoma courts could look at a,
10 an employment agreement that limited the employee's
11 ability to work other places or whether that issue should
12 be determined in the arbitration first.

13 It's not on point. Doesn't have anything to do with
14 this.

15 And second, you know, I think this Court -- Mr. Moore
16 says the issue of whether this statute was against public

17 policy wasn't an argument before but, you know, Your
18 Honor, I mean, I wrote the briefs. It's in my brief when
19 I say the arbitration agreement forced to take away
20 statutory rights that are designed to protect consumers
21 and Your Honor found that the terms of the arbitration
22 agreement were oppressive and violative of public policy
23 I mean, we were talking about the Dealers Act And we
24 could have raised federal preemption It was a known
25 argument. Our Supreme Court says it was a known argument

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1 and they didn't do so
2 And we respectfully suggest the Court should follow --
3 THE COURT: Well, they didn't do so because what
4 happened afterwards, what our Supreme Court ruled that I
5 was wrong about being unconscionable but yet still denied
6 arbitration because the class action portion of it or the
7 alleged class action portion of it was violative of public
8 policy
9 And then once that came up, then BMW started
10 screaming, well, federal law would preempt that part of
11 it And sure enough, they come out with AT&T Mobility and
12 there you are.
13 MR. THOMAS: And to that point, Your Honor, the
14 Federal Arbitration Act's not a new statute It's
15 something that's existed for a long time People have
16 been arguing preemption based on it for a long time The
17 Defendant's argued it here prior

18 And, Your Honor, the original holding in this case
19 under Simpson was you had adhesion contract,
20 unconscionable because it was against public policy.
21 THE COURT Your position is not withstanding the fact
22 that AT&T Mobility was not decided or not the law at that
23 time, the Federal Arbitration Act since 19, what, 20?
24 MR THOMAS. A long time ago
25 THE COURT. Long time ago

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1 MR. THOMAS Yes, sir
2 THE COURT Was in existence so they had the right to
3 look at that and include that in their motion for
4 arbitration, to compel arbitration
5 They didn't do it They've waived it Our South
6 Carolina Supreme Court says they've waived it Our state
7 law precludes them from now going into it. That's your
8 position?
9 MR THOMAS. That's right, Your Honor
10 THE COURT Mr Moore says, and rest his soul, Walter
11 Beddingfield, it just ain't right And he's got several
12 grounds for it's not just right
13 So it's an interesting argument on both sides.
14 All right. For the record, anything else you all want
15 to put to protect yourselves? I know this may go a lot
16 further than where we are sitting here today.
17 MR. MOORE Could I just --

18 THE COURT Absolutely.

19 MR MOORE Your Honor, just briefly The Oklahoma
20 case didn't address class actions because that's what AT&T
21 Mobility addressed So that's already been decided
22 And we did cite the Federal Arbitration Act in our
23 briefs, but we responded to their arguments they were
24 making Now that was --

25 THE COURT. You're talking which brief now?

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1 MR MOORE. In the trial court And we cited -- it's
2 not like we didn't cite the Federal Arbitration Act, but
3 we only made the preemption arguments that were responsive
4 to what they argued And that wasn't clear until the case
5 was on appeal

6 THE COURT Well, now, was it clear or was it not
7 clear? I mean, you had - the Federal Arbitration Act's
8 been in existence for a long time. It's a federal law
9 What would have precluded BMW back in 2006 saying,
10 Judge -- you know, I try railroad cases all the time and
11 y'all, litigants argue preemption on railroad law and we
12 deal with that day in and day out Why was that argument
13 was not available to you in 2006?

14 MR MOORE Because we were responding to the
15 arguments they were making

16 THE COURT But again, it was your motion It was
17 your motion to compel arbitration

18 MR. MOORE Right And they made the argument under

19 Simpson that it was oppressive and one sided. We said it
20 wasn't and we won. And so --
21 THE COURT I understand that But you made, not you,
22 but whoever was representing them at that time, made the
23 motion to compel arbitration.
24 What precluded BMW at that time to say, Judge Early,
25 federal law says this has to go to arbitration. The

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1 state's law is preempted Just like in a railroad case.
2 I mean, there's all kind of evidentiary issues that are
3 preempted by federal law
4 MR MOORE. Right. So we did -- when responding to
5 their arguments, we did raise the issue of preemption, but
6 when it's not responding to their arguments we wouldn't
7 have any reason to say a state law rule that finds that a
8 contract was oppress -- not oppressive, was not one sided,
9 but that under the state policy of South Carolina
10 prohibits class actions
11 Why would we have ever said that's preemptive when the
12 Plaintiffs weren't arguing that? And that's not something
13 that the South Carolina Supreme Court announced until the
14 case was up on appeal. And when it did so, in Herron Two,
15 it specifically noted Plaintiffs argued that the
16 agreement is oppressive and one sided.
17 We don't think that it is, but here's a different
18 reason why we're saying that it's -- so preemption, you

19 know, the word preemption covers a lot, but the specific
20 argument they're saying that we waived, the reason we
21 didn't make it is because we didn't, we weren't responding
22 to anything that the Plaintiffs argued

23 THE COURT Yeah, but it was your motion

24 MR MOORE Right

25 THE COURT And you moved to compel arbitration What

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1 would have precluded you from -- as a grounds for
2 compelling arbitration was that any state law was
3 preempted by federal law?

4 MR MOORE Well, we did I mean, we can't respond to
5 every conceivable argument that the Plaintiffs could
6 make For example, they argued that the font wasn't
7 right

8 THE COURT I know They argued all kind of stuff

9 MR. MOORE. And we said, well, that's preemptive So
10 if they, you know, if they would have argued -- we're
11 responding to their arguments, Your Honor, so, and we
12 believe that --

13 THE COURT. Well, it was your motion

14 MR MOORE I know. But, in -- Your Honor, when we
15 did the Federal Arbitration Act to compel arbitration, and
16 what the argument at issue here and what the South
17 Carolina Supreme Court says has been waived is the
18 specific argument that a state law rule invalidating class
19 action waivers is, violates South Carolina public policy.

20 That's preemptive And that wasn't what was argued.
21 That wasn't the rule in South Carolina And on top of
22 that, Your Honor, there was no United States Supreme Court
23 case on point as it is now
24 And so the South Carolina -- I mean, the United States
25 Supreme Court by the way said, specifically went into

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1 group actions and explained in detail why that those were
2 violating the Federal Arbitration Act. So the case wasn't
3 in place.
4 I mean, going back to our original point, Your Honor,
5 they didn't argue it, it hadn't been announced as a South
6 Carolina rule And the law, you know, the Supreme Court
7 law, not available then. Therefore, a waiver argument
8 doesn't apply here because we're not -- it's -- we haven't
9 waived a known right. It wasn't known
10 THE COURT Well, that's a good argument except for
11 the last sentence in this case that --
12 MR. MOORE I just want --
13 THE COURT -- gives me problems
14 MR. MOORE. I want to -- really quickly back on the
15 point about Mr. Watts and his disclaimer of interest.
16 Your Honor, if you add three or four zeroes to the
17 case instead of \$300, it's \$3,000,000, let's say for
18 example, at issue And Mr. Watts comes in and says, I've
19 disclaimed my interest and my portion of that

20 And you still have to decide what portion of that
21 money is Mrs. Watts' She's not entitled to recover, she
22 can't recover his portion And if he's disclaiming his
23 interest, how is Your Honor going to know what portion is
24 his, what portion is hers?
25 Really what he's doing by waiving his right is saying,

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1 I'm assigning my rights to her which we know he can't do,
2 they don't even now say that he can. So by saying I'm
3 disclaiming my rights, in effect, he has to be assigning
4 them because Your Honor's not going to know -- Your
5 Honor's not going to be able to divide that fee You
6 can't give it all to her because it's not all hers
7 They're co-purchasers They are equal -- they have joint
8 rights to that.

9 So, that's why this, the reasoning that we've cited
10 still applies, whether they're saying it's a disclaimer of
11 interest or whether it's an assignment of interest

12 And the reason he can't assign it is because it's a
13 personal right, I think is the basis for South Carolina
14 rule; fraud, deceit or deemed to be rights to the person
15 and therefore can't be -- if they don't survive, they
16 can't be assigned

17 So just to clarify The disclaimer of interest
18 doesn't change the analysis on whether their rights are
19 indivisible

20 THE COURT: Anything else in response? Mr. Thomas?

21 Mr Richardson? Anybody? Mr. Black?

22 MR. THOMAS. Your Honor, just real briefly One, we
23 repeatedly argued that the Dealers Act, the arbitration
24 clause that attempts to take away the statutory right to
25 bring a group action was violative of public policy,

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1 violative of the Dealers Act And it's in our
2 supplemental memorandum in opposition to their motion to
3 compel It's in our original memorandum, motion to
4 compel

5 Mr. Lewis argued it to this Court. Respectfully
6 Mr. Black and Mr. Moore were not here, but that's what we
7 argued. So they could have raised FAA as our Supreme
8 Court's noted

9 And then last, if Mr Watts has dismissed his claims
10 with prejudice there's simply not a substantial risk of
11 them incurring multiple liability that's required under
12 Rule 19

13 THE COURT All right Well, thank you It's very,
14 very, very, continues to be a very, very interesting case
15 from all angles

16 And, gentlemen, I'll take it under advisement. I want
17 to compliment the lawyers on the thorough briefs and
18 submissions made. It makes it much easier to get a handle
19 on it by looking at all of it

20 And I compliment the younger lawyers on your

21 arguments. You did an excellent job and your firms should
22 be proud of both of you
23 So, I'll take it under advisement I'll get an
24 opinion out, or an order out or instructions to draft an
25 order within a short period of time. Thank you.

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1 MR. RICHARDSON: Thank you very much
2 MR. MOORE: Thank you.
3 THE COURT: In another light, I got two -- we had two
4 little short orders about preserving all of the things
5 that were filed in Aiken for this case
6 MR. THOMAS: Yes, Your Honor.
7 THE COURT: I think our clerk has already made copies
8 and sent them to the clerk up there, but --
9 MR. THOMAS: Okay
10 THE COURT: -- I'll sign that order anyway It just
11 simply says everything that's been filed here to date
12 heretofore is part of the record here for appellate
13 purposes
14 MR. ROZELSKY: Just in case something didn't go up by
15 accident.
16 THE COURT: Aren't you going back to Greenville?
17 MR. ROZELSKY: Yes, sir.
18 (Off-the-record discussion)
19 THE COURT: Anita's already sent everything So
20 there's one paragraph in there, one sentence that says the
21 clerk in Aiken will retain all the documents but she's

22 already sent everything to everybody Just look at it
23 You can take that out I think it's good to go
24 MR. THOMAS Your Honor, I'll get with the other
25 Defendants who were trying to do some orders in their

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1 case, and I'll let them know as well

2 END OF CASE 2 52 P.M.

3 * * * *

4 CERTIFICATE OF REPORTER

5 STATE OF SOUTH CAROLINA)

6 COUNTY OF AIKEN)

7

I, Cheri L. Young, Registered Professional Reporter

8

and Official Court Reporter for the State of South

9

Carolina, Second Circuit-At Large, do hereby certify that

10

the foregoing is a true, accurate and complete transcript

11

of record of the proceedings had and evidence introduced

12

in the hearing of the captioned case, relative to appeal,

13

in the Court of Common Pleas for Barnwell County, on the

14

28th day of November, 2012.

15

I do further certify that I am neither of kin,

16

counsel, nor interest to any party hereto. I have

17

hereunder set my hand this 5th day of April, 2013.

18

19

20

21

Cheri L. Young, RPR
Official Court Reporter

22

23

24

25

- - - -

DATE: 6.25.05

VIN: 4U5BT33554L550769

In this Arbitration Agreement ("Agreement"), "you" and "your" refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and includes the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

The Parties waive the right to request arbitration for a Claim filed and maintained individually (as opposed to a class action) in your state's small claims court, if any. However, if such a Claim originally brought in small claims court is transferred or removed to a higher state or federal trial court, the Parties reserve their right to request arbitration under this Agreement.

The Parties agree that once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this Agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. Until a Party entitled to do so requests arbitration under this Agreement, any party to this Agreement may proceed with all other rights and remedies they may have. Neither you nor we waive our right to request arbitration under this Agreement, even after all Parties have elected to litigate a Claim in court, in the event new Claims are asserted after the initial filing of such litigation in court.

The arbitrator shall be an attorney or retired judge. The arbitrator shall apply and be bound by governing local, state or federal law when making an award, and shall award only those damages or other relief allowed by such governing law. Issues regarding whether a matter is arbitrable shall be made by the arbitrator. The arbitrator shall prepare a written decision stating reasoned findings of fact and conclusions of law. A party may seek entry of a judgment on the award in any court of competent jurisdiction.

If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside. If we initiate a Claim for arbitration we will pay the entire initial filing fee. We also agree to pay up to \$1500 of the arbitrator's fees, unless applicable law or the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of \$1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decides we must pay in accordance with applicable law for this Agreement to be enforceable. The arbitrator deciding the Claim(s) shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law. Unless otherwise ordered by the arbitrator in accordance with applicable law or provided otherwise by applicable law, the Parties shall be responsible for the payment of their own attorney's(*) fees.

This Agreement evidences a transaction involving interstate commerce. The Parties acknowledge and agree that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) ("FAA") shall govern any arbitration under this Agreement. The arbitrator's decision shall be final and binding, except for any right of appeal provided by the FAA or the rules of the AAA.

If any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable. In the event this Agreement is found void you and we waive our respective rights to a trial by jury, if such waiver is permitted by applicable law.

This Agreement shall survive the repayment of all amounts owed by you with respect to the Vehicle. This Agreement is incorporated into and made a part of all Contract(s) as defined in this Agreement. If there is a separate arbitration agreement in any other Contract, then to the extent this Agreement is inconsistent with any such arbitration agreement this Agreement shall supersede such other arbitration agreement with respect to Claims between you and us, unless otherwise provided by law.

- EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT.
- IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY.
- IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US, INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
- THE INFORMATION YOU AND WE MAY OBTAIN IN DISCOVERY FROM EACH OTHER IN ARBITRATION IS GENERALLY MORE LIMITED THAN IN A LAWSUIT.
- OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.
- YOUR AND OUR RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE VERY LIMITED.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT

Customer: [Signature]

Customer: [Signature]

Dealer: [Signature]

Its: _____

**IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

v.

**SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a
CENTURY BMW**

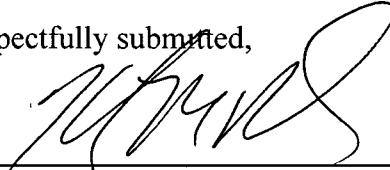
Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant certifies that the Record on Appeal contains material proposed to be included by the parties and not any other material.

July 17, 2013

Respectfully submitted,



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