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.

APPELLANT'S FINAL REPLY BRIEF

Kurt M. Rozelsky (S.C. Bar # 6856)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Ave Suite 500
Post Office Box 87
Greenville, SC 29602

Dennis M. Black (*pro hac vice*)
Richmond T. Moore (S.C. Bar # 69881)
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005

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Appellant Sonic Automotive 2752 Laurens Rd., Greenville, Inc. ("Century BMW") hereby replies to the Initial Brief of Respondent Christine Watts ("Watts").

INTRODUCTION

Respondent Watts's brief is notable as much for what it does not say as for what it does. Watts does not dispute that the South Carolina Supreme Court *sua sponte* announced the South Carolina public policy that Century BMW contends is preempted by federal law *after* the close of briefing in *Herron I*, 387 S.C. 525, 693 S.E.2d 394 (2010). Nor does Watts dispute that the Supreme Court of the United States decided *AT&T Mobility LLC v Concepcion*, 131 S. Ct. 1740 (2011)—the opinion interpreting the Federal Arbitration Act ("FAA") in a manner that Century BMW contends preempts that South Carolina policy—*after* the South Carolina Supreme Court issued its opinion in *Herron I* Nevertheless, although Century BMW knew neither the preempted state-law policy nor the source of the preemption during the proceedings leading to *Herron I*, Watts claims Century BMW somehow forfeited the preemption argument by failing to raise it years earlier. To state the proposition is to refute it.

Watts's argument that the South Carolina public policy *Herron I* established somehow survives *AT&T Mobility* is equally flimsy. Watts advances an unprecedented—and clearly wrong—argument that state statutes are immune from federal preemption and relies on a California case that is inapposite and which, in any event, other courts have repeatedly rejected.

For these reasons, and the reasons stated in Century BMW's opening brief, this Court should reverse the trial court's decision and direct it to compel arbitration of this dispute on an individual basis.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT DID NOT HOLD AND CENTURY BMW DID NOT CONCEDE THAT CENTURY BMW WAS FOREVER BARRED FROM RAISING ITS PREEMPTION ARGUMENT.

Given that Watts does not dispute, first, that *Herron I* announced a new South Carolina policy for which Watts had never argued and, second, that the opinion that made clear that federal law preempted that policy was handed down after *Herron I*, Watts attributes to the South Carolina Supreme Court a bizarre holding in *Herron II*, 395 S.C. 461, 719 S.E.2d 640 (2011). She claims that the South Carolina Supreme Court held that Century BMW's purported failure in *Herron I* to challenge a policy about which Century BMW was unaware on grounds that did not yet exist somehow forever barred it from doing so. The South Carolina Supreme Court made no such holding, and Century BMW has never contended it did.

Watts can point to nowhere in (i) the *Herron II* briefing; (ii) the *Herron II* opinion; or (iii) Century BMW's subsequent briefs before the Supreme Court of the United States in which anyone said anything about what arguments would be available to Century BMW or Watts should further proceedings ensue in the trial court. The parties did not raise the issue and no court addressed it. The South Carolina Supreme Court's statements about the preemption argument not being "preserved in our courts" and being "procedurally barred," *Herron II*, 395 S.C. at 470, 719 S E.2d at 645, were, as Century BMW pointed out in its opening brief, in the context of addressing whether the issue had been preserved for purposes of the appeal before it. Likewise, there is no significance in the fact that the South Carolina Supreme Court reinstated its opinion, rather than remanding for further consideration, because its task was to reconsider *its* opinion in light

of *AT&T Mobility*, not to determine whether Century BMW could *ever* raise the issue again in the trial court.

The same is true of Century BMW's subsequent statements to the Supreme Court of the United States about the South Carolina Supreme Court having held that the issue was "forfeited." Watts can point to nothing either the Supreme Court of the United States, the South Carolina Supreme Court or Century BMW said about further proceedings in the trial court. Nor can Watts explain why, if Century BMW were supposedly telling the Supreme Court of the United States that the effect of the South Carolina court's ruling was forever to bar Century BMW from raising the issue again, it renewed its motion to compel arbitration *while its petition for certiorari was still pending before the Supreme Court of the United States*

Watts makes passing reference to the "law of the case" doctrine, Resp. Initial Br., at 5, but apparently has been unable to find a case where any court anywhere held that that doctrine barred a party from raising an argument under similar circumstances. Moreover, Watts entirely ignores *Sejman v Warner-Lambert Co* , 845 F.2d 66 (4th Cir. 1988), in which the Fourth Circuit held in virtually identical circumstances that where new controlling federal authority came down after an initial appeal that the law of the case doctrine did not bar a party from relying upon the new authority. Moreover, where, as in *Sejman* and here, the new authority supported a preemption argument, if a state procedural doctrine would have the effect of barring a party from relying upon the new authority, that state procedural doctrine would itself be preempted under the Supremacy Clause of the United States Constitution, Article VI. 845 F.2d at 69.

II. *AT&T MOBILITY* CLEARLY HOLDS THAT THE FAA PREEMPTS THE SOUTH CAROLINA POLICY ANNOUNCED IN *HERRON I.*

A. FAA Preemption Applies to Statutes as Well as Judicially Created Rules.

AT&T Mobility addressed whether "the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures" and answered that question "yes," holding that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748. *Herron* I held that the Dealers' Act embodied just such a policy. Now Watts makes the novel, and unsupportable, argument that *AT&T Mobility*'s holding does not apply to the Dealers' Act because preemption applies only to a "judicially created rule" and not a rule "provided for by statute." Resp. Initial Br. at 13. Watts apparently has found no legal authority of any kind that supports this argument as she cites no case or other authority that makes the distinction she asks this Court to make.[1] That is because courts uniformly apply preemption to state statutes just as they do to common law doctrines.

It is long "settled that state law that conflicts with federal law is 'without effect.'" *Cipollone v Liggett Grp, Inc.*, 505 U.S. 504, 516 (1992) (citation omitted). Watts cites no case, and we are aware of none, in which any court held a state statute somehow

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[1] Watts cites a number of cases for the uncontroversial proposition that courts generally will not enforce contractual provisions that conflict with state statutory provisions, Resp. Initial Br. at 11-12, but none of Watts's cases addresses a situation in which the state statute conflicted with federal law. Moreover, *Hill v PeopleSoft, USA*, 412 F.3d 540 (4th Cir. 2005) (cited in Resp. Initial Br. at 11 n.5) makes clear that the "FAA constitutes 'a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.'" 412 F.3d at 543 (quoting *Moses H. Cone Mem'l Hosp v Mercury Constr Corp*, 460 U.S. 1, 24 (1983).

insulated from federal preemption in a way that a common law doctrine would not be. Instead, courts uniformly treat state public policy identically, whether it emanates from legislatures or courts. As the United States Court of Appeals for the Tenth Circuit put the point, "[b]ecause of the supremacy of federal law, state law that conflicts with federal law is without effect, be it state common law or statutory law." *Emerson v Kansas City S Ry. Co.*, 503 F.3d 1126, 1128 (10th Cir. 2007) (citation and quotations omitted). All other courts agree. *See, e.g*, *Rivera v Philip Morris, Inc*, 395 F.3d 1142, 1146 (9th Cir. 2005) ("Under the Supremacy Clause of the United States Constitution, Congress may preempt state common law as well as state statutory law through federal legislation."); *Nat'l Bank of Commerce of El Dorado v Dow Chem Co*, 165 F.3d 602, 607 (8th Cir. 1999) (Preemption invalidates "legislative enactments . . . and also encompasses applicable common law claims recognized by state courts"); *Pub. Health Trust of Dade Cnty v Lake Aircraft, Inc.*, 992 F.2d 291, 294 (11th Cir. 1993) ("Federal law may pre-empt state common law rules in the same ways as state statutes or regulations."); *Abdullah v. Am Airlines, Inc*, 181 F.3d 363, 367 n.4 (3d Cir. 1999) (same); *Papas v Upjohn Co*, 926 F.2d 1019, 1022 (11th Cir. 1991) (preemption applies "whether the state law is rooted in a statute, regulation or common law rule." (quotations omitted)), *vacated on other grounds in light of Cippolone, supra*, 505 U.S. 1215 (1992); *Osburn v Anchor Labs.*, 825 F.2d 908, 911 (5th Cir. 1987) ("State common law as well as state statutes and regulations can be preempted by federal law."); *Vail v Pan Am Corp*, 616 A.2d 523, 525 (N.J. Super. Ct. App. Div. 1992) ("The preemption doctrine applies equally to common law and state statutory law."); *see also Sperry v Florida ex rel Fla. Bar*, 373 U.S. 379, 403 (1963) ("The authority of Congress is no less when the state power which it displaces

would otherwise have been exercised by the state judiciary rather than by the state legislature.").

Consistent with this line of authority, the Supreme Court has on multiple occasions held that the FAA preempts state statutory provisions. Just last year in *Nitro-Lift Technologies, L.L.C. v Howard*, 133 S. Ct. 500 (2012), the Court noted that "[w]here a specific statute . . . 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, the FAA]." *Id* at 504. *See also, e g*, *Preston v Ferrer*, 552 U.S. 346 (2008) (FAA preempted provisions in California Talent Agencies Act); *Doctor's Assocs, Inc v Casarotto*, 517 U.S. 681 (1996) (FAA preempted state statute requiring special notice of arbitration clauses); *Perry v. Thomas*, 482 U.S. 483 (1987) (FAA preempted state statute that invalidated agreements to arbitrate certain wage collection claims); *Southland Corp v. Keating*, 465 U.S. 1 (1984) (FAA preempted state statute that rendered agreements to arbitrate certain franchise claims unenforceable).

South Carolina courts have previously held that the FAA preempts South Carolina statutes. *Soil Remediation Co v Nu-Way Envtl*, 323 S.C. 454, 461, 476 S.E.2d 149, 153 (1996) (holding that the "FAA preempts" South Carolina's notice requirement for arbitration agreements under S.C. Code Ann. § 15-48-10); *Tritech Elec, Inc v Frank M Hall & Co.*, 343 S.C. 396, 540 S.E.2d 864 (Ct. App. 2000) (FAA preempted statute invalidating arbitration agreements that provide for out-of-state arbitration).[2]

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[2] Watts's argument is particularly spurious given that the state policy in *AT&T Mobility* was itself statutorily based. The *Discover Bank* rule was simply a judicial interpretation of California statutes that (1) barred provisions that "exempt anyone from responsibility for his own fraud or willful injury to the person or property of another," Cal. Civ. Code Ann. § 1668, and (2) rendered contracts unenforceable if they are "unconscionable," Cal.

It would be unprecedented to hold the Dealers' Act somehow immune from federal preemption.

B. This is Not a "Private Attorneys General" Action and, Even if it Were, *AT&T Mobility* Would Still Apply.

Watts tries to dress up her lawsuit as one of public interest because she is pursuing injunctive relief, *see* Resp. Initial Br. at 14-17, but the South Carolina Supreme Court accurately described this case as "a class action suit against Century [BMW]," *Herron I*, 387 S.C. at 529, 693 S.E.2d at 396, and it seeks actual and punitive damages for the exclusive benefit of the class members. The prayer for relief in the Amended Complaint seeks "actual and compensatory damages," including "two times actual damages," "punitive damages [of] three times actual damages," and "disgorgement of all administrative fees collected." (R. p. 180, First Amended Complaint at 72.) Only after listing this desired remuneration does the Amended Complaint purport to seek "a permanent injunction" for one of its three causes of action. *Id* Watts is thus pursuing a standard damages class action and enforcing the law in the same way that any plaintiff claims to be enforcing a statutory right.

The Dealers Act is nothing like the statute in the case on which Watts relies: *Brown v Ralphs Grocery Co*, 128 Cal. Rptr. 3d 854 (Ct. App. 2011) (addressing California's Private Attorney General Act ("PAGA")), *see* Resp. Initial Br. at 14-17. PAGA empowers individuals to bring lawsuits on behalf of a state agency for civil penalties, not damages: The "purpose of the PAGA is not to recover damages or

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Civ. Code Ann. § 1670.5(a). *See Discover Bank v Sup. Ct*, 113 P.3d 1100, 1110 (Cal. 2005), (in certain circumstances when a class action waiver is found in a consumer contract "such waivers are unconscionable under California law and should not be enforced" (citing Cal. Civ. Code § 1668)).

restitution, but to create a means of 'deputizing' citizens as private attorneys general to enforce the Labor Code." *Brown*, 128 Cal. Rptr. 3d at 862. "This purpose contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration." *Id.* at 861. Consistent with this purpose, the individual pursuing a PAGA action is entitled to only a fraction of the civil penalty. "Seventy-five percent of the penalty goes to the Labor and Workforce Development Agency for Enforcement of Labor Laws and Education, and only 25 percent is recovered by the aggrieved employees." *Id* at 862 (citing PAGA § 2699(i)).

PAGA's explicit authorization of individuals to act on behalf of the state and its clear purpose to protect the public (rather than compensate private citizens), stands in stark contrast to Section 56-15-110(2). First, nothing in Section 56-15-110(2), or any other provision of the Dealers Act, empowers private individuals to bring lawsuits on behalf of a state agency. To the contrary, Section 56-15-40(5) provides the Attorney General's Office with exclusive authority to investigate and regulate the Dealers Act:

> **There is hereby created the Office of Administrator**, within the Attorney General's office, and he shall appoint such personnel within his office **for the purpose of regulating this chapter**. The Administrator shall have the power to investigate, issue cease and desist orders and injunctive relief on any valid abuse connected with the sale, rental or leasing of a new or used motor vehicle; provided, however, this power shall only apply after reasonable attempts by the consumer have been made with the seller, dealer, manufacturer or lessor of the motor vehicle to alleviate the complaint.

S.C. Code Ann. § 56-15-40(5) (emphases added). It is telling that the Attorney General's power to regulate under the Dealers Act arises only after consumers have tried to resolve their complaint. *Id* By conditioning state intervention on failed private action, the statute shows a clear separation between state conduct and consumer lawsuits. Second,

unlike PAGA, the Dealers Act does not include a provision for civil penalties. Instead, Section 110(1) expressly provides for the recovery of "actual damages" sustained by an individual.[3] S.C. Code Ann. § 56-15-110(1). Finally, rather than dividing the monetary recovery between the individual and the State, the private party keeps all "money damages" recovered. S.C. Code Ann. § 56-15-110. As a result, unlike PAGA claims, the fundamental purpose of lawsuits under the Dealers Act (and certainly Watts's primary purpose in pursuing this action) is to recover monetary damages that inure to the exclusive benefit of private individuals. As noted, the *Brown* court expressly distinguished run-of-the-mill class actions like this one from the type of suit PAGA permits.

Watts's lawsuit is thus not a "private attorney general" action. Instead, it is a garden-variety class action in which plaintiff is seeking actual and punitive damages on behalf of a class. The mere fact that she seeks an injunction as well does not convert the lawsuit to a "private attorney general" action; if it did and if private attorney general actions were somehow exempt from *AT&T Mobility*, a plaintiff could circumvent *AT&T Mobility* through the simple expedient of affixing a request for injunctive relief to a damages claim. Here, Watts is not acting as a deputy of the State or a state agency in any sense; her claims arise from her business relationship with Century BMW and, as such, the arbitration agreement governs them just as it does any other consumer's claims. Even *Brown* noted that "[a] private individual right of a consumer to pursue class action remedies in court or arbitration" fell squarely within *AT&T Mobility*'s holding, and that is

[3] In addition, section 110(3) provides for the recovery of "punitive damages not to exceed three times the actual damages." S.C. Code Ann. § 56-15-110(3).

the type of case Watts brought here. 128 Cal. Rptr. 3d at 861. *Brown* contrasted suits such as this one with a case in which the plaintiff acts as "the proxy or agent of state labor law enforcement agencies . . . in a proceeding that is designed to protect the public, not benefit private parties." *Id.*

The *Brown* decision, thus, does not support Watts's position and the *Brown* decision is, in any event, wrong. Courts have repeatedly rejected *Brown* as incorrectly decided. *See Grabowski v. C.H Robinson Co* , 817 F. Supp. 2d 1159, 1181 (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, 1142 (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. 2011) (same).

Thus, the *AT&T Mobility* preemption rule squarely applies to the Dealers' Act public policy identified in *Herron I.*

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court reverse the trial court's Order and direct the trial court to enter an order compelling arbitration of Respondent's claims against Century BMW on an individual basis in accordance with the terms of the Arbitration Agreement and dismissing her claims currently pending in circuit court.

Respectfully submitted,

Kurt M. Rozelsky (S.C. Bar #6856)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Ave Suite 500
Post Office Box 87
Greenville, SC 29602
864-242-6440; 864-240-2474 (fax)
Kurt.rozelsky@smithmoorelaw.com

Dennis M. Black (*pro hac vice*)
Richmond T. Moore (S.C. Bar # 69881)
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.

August 6, 2013

Respectfully submitted,

Kurt M. Rozelsky (S.C. Bar #6856)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Ave Suite 500
Post Office Box 87
Greenville, SC 29602
864-242-6440; 864-240-2474 (fax)
Kurt.rozelsky@smithmoorelaw.com